

October 4, 2012

VIA ELECTRONIC FILING

The Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Re: *Revision of the Commission's Program Access Rules*, MB Docket No. 12-68;
News Corporation and the DIRECTV Group, Inc., Transferors, and Liberty Media Corporation, Transferee, for Authority to Transfer Control, MB Docket N. 07-18;
Applications for Consent to the Assignment and/or Transfer of Control of Licenses, Adelphia Communications Corporation (and Subsidiaries, Debtors-in-Possession), Assignors, to Time Warner Cable Inc. (subsidiaries), Assignees, et al., MB Docket No. 05-192

Dear Madam Secretary:

This letter is being filed in the above-referenced dockets to respond to recent proposals to apply unprecedented and unjustifiable regulation to national programming networks that are not vertically integrated but carry some undefined level of sports or popular programming.¹ These proposals are beyond the scope of the current proceeding, as well as FCC authority, and raise profound First Amendment concerns.

As the D.C. Circuit has explained, the Commission's Section 628 regulations "focus on vertically integrated cable companies due to their special characteristics and their unique ability to impact competition."² Precedent does not support any expansion of Commission authority to apply program access regulations to programming vendors that are not vertically integrated with cable operators.³ This established regulatory focus is consistent with the settled understanding of

¹ See, e.g., American Cable Association Ex Parte Submission, MB Docket Nos. 12-68, 07-18 & 05-192, at 3-4 (submitted Oct. 1, 2012) ("ACA Ex Parte") (expressly identifying Time Warner Inc. owned TBS and TNT networks with respect to new regulatory proposal). Although the focus of the ACA proposal was a new "rebuttable presumption," a presumption against a particular class of programmers necessarily implies that the underlying regulation also extends to that class.

² *Cablevision Sys. Corp. et al. v. FCC*, 649 F.3d 695, 713 (D.C. Cir. 2011) ("*Cablevision II*") (citing *Time Warner Entertainment v. FCC*, 93 F.3d 957, 978 (D.C. Cir. 1996) and quoting *Turner Broad. Sys v. FCC*, 512 U.S. 622, 660-61 (1994) (internal quotations omitted)).

³ See Reply Comments of Time Warner Inc., MB Docket Nos. 12-68, 07-18 & 05-192, at 4-7 (submitted July 23, 2012). Both *Cablevision II* and the underlying Commission order focus on "cable-affiliated" entities. See *Cablevision II*, 649 F.3d at 700-704, 706, 708, 710, 712-714, 716, 717 & 719 & *Review of the Commission's Program Access Rules and Examination of Program Tying Arrangements*, First Report and Order, 25 FCC Rcd 746 n. 191 (2010), affirmed in part and vacated in part, *Cablevision II*, 649 F.3d 695 (D.C. Cir. 2011). ACA admits that several of its apparent examples, including TNT and TBS, are not vertically integrated. See ACA Ex Parte at 3 n.9. The speculative allegation that ownership of a network may "change over time" is irrelevant to whether the current rules should apply to networks that are not vertically integrated.

the statute and congressional intent, as well as the policy concerns underlying Section 628.⁴ Moreover, the fact that the nonbroadcast programming networks targeted for these new regulatory burdens obtain high Nielsen ratings underscore that they already are universally carried by multichannel video programming distributors, which undermines any allegation that regulation is necessary to ensure access to these networks.

Further, any regulation based on the content of a programming network, including its subject matter or current popularity, cannot withstand constitutional scrutiny. The Supreme Court has long established that an agency should not adopt regulations or policies that will raise serious constitutional questions.⁵ Even if the incorrect assertion that “national . . . cable programming networks have the exact same economic attributes”⁶ as vertically integrated regional sports networks is, *arguendo*, accurate, this claim does not constitute the compelling justification or provide the necessary evidentiary or legal grounds for the Commission to create an unprecedented and sweeping burden on particular programming networks based, directly or indirectly, on the content of that network.

Consistent with this precedent, the NPRM in the instant proceeding requested comment only as to issues relating to cable-affiliated programming vendors. It focused largely on whether to extend or to sunset the prohibition on exclusive contracts involving cable-affiliated programming vendors.⁷ The Commission should not transform the scope of the current proceeding, or any future NPRM, by considering any regulatory proposal with respect to programming networks that are not “cable-affiliated.”

Respectfully submitted,



Susan A. Mort

cc: Elizabeth Andrion
Lyle Elder
Erin McGrath
David Grimaldi

⁴ See, e.g., 47 U.S.C. § 548(b); *Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992: Development of Competition and Diversity in Video Programming Distribution and Carriage*, First Report and Order, 8 FCC Rcd 3359, 3366 (¶ 121) (1993), *recon.*, 10 FCC Rcd 1902 (1994), *further recon.*, 10 FCC Rcd 3105 (1994); H.R. Rep. No. 102-628 at 41 (1992).

⁵ See, e.g., *Rust v. Sullivan*, 500 U.S. 173, 190-91 (1991); *Public Citizen v. U.S. Dep't of Justice*, 491 U.S. 440, 466 (1989); *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988); *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 348 (1936) (Brandeis, J., concurring). See also *U.S. West, Inc. v. FCC*, 182 F.3d 1224, 1231 (10th Cir. 1999) (“[D]eference to an agency interpretation is inappropriate not only when it is conclusively unconstitutional, but also when it raises serious constitutional questions”).

⁶ See *ACA Ex Parte* at 3-4.

⁷ See *Revision of the Commission's Program Access Rules, et al.*, Notice of Proposed Rulemaking, MB Docket Nos. 12-68, 07-18 & 05-192, 27 FCC Rcd 3413, 3417-3465 (¶¶ 6-95) (2012).

Alex Hoehn-Saric
Matthew Berry
William Lake
Michelle Carey
Susan Aaron

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of)	
)	
Revision of the Commission's Program Access Rules)	MB Docket No. 12-68
)	
News Corporation and the DIRECTV Group, Inc., Transferees, and Liberty Media Corporation, Transferee, for Authority to Transfer Control)	MB Docket No. 07-18
)	
Applications for Consent to the Assignment and/or Transfer of Control of Licenses, Adelphia Communications Corporation (and Subsidiaries, Debtors-in-Possession), Assignors, to Time Warner Cable Inc. (subsidiaries), Assignees, <i>et al.</i>)	MB Docket No. 05-192
)	
)	

REPLY COMMENTS OF TIME WARNER INC.

Time Warner Inc. ("Time Warner") is a content-focused company which, through its divisions, is involved primarily in the operation of multichannel television networks, the production and distribution of filmed entertainment (including motion pictures, television programming, and video games), and the production and distribution of magazines.¹ As an industry leader in both the creation and packaging of high quality multichannel video content, Time Warner has a strong interest in matters affecting the multichannel video marketplace and thus submits these reply comments in response to comments filed in the above-captioned proceeding.

¹ Time Warner's motion picture and television production studio assets include Warner Bros. Pictures and Warner Bros. Television. The company's programming networks include Home Box Office and Cinemax, as well as CNN, TNT, TBS, Cartoon Network, and other Turner Broadcasting System, Inc. cable networks. All of Time Warner's businesses, including the Time Inc. publishing business, are actively engaged in the development of digital products and services for multiple platforms. Time Warner is not itself a multichannel video programming distributor, nor is it affiliated with any multichannel video programming distributor.

I. COMMENTS URGING UNPRECEDENTED EXPANSION OF THE PROGRAM ACCESS RULES ARE OUTSIDE THE SCOPE OF THE INSTANT PROCEEDING AND LACK LEGAL, FACTUAL, AND POLICY SUPPORT.

Although the NPRM in this proceeding fundamentally focuses on whether to extend or sunset the prohibition on exclusive contracts applicable to cable operators and programmers vertically integrated with cable operators,² a few comments instead raise matters outside the scope of the NPRM. These comments advocate for an unprecedented expansion of the program access regime to: (1) restrict programming practices that are lawful, reduce costs, expand consumer access to programming, and in no way hinder multichannel video programming distributors (“MVPDs”) from providing satellite cable programming; and (2) encompass programmers that are unaffiliated with cable operators. The Commission should summarily reject these proposals as they are beyond the scope of the current proceeding, and for the reasons additionally detailed below maintain a tailored focus in program access matters.

A. Discounts Offered by Programming Vendors to MVPDs for Carriage of Multiple Programming Networks Are Lawful, Beneficial, and in No Way Hinder MVPDs from Program Distribution.

Mediacom Communications Corporation (“Mediacom”) asserts that all programming vendors should be barred from offering discounts to MVPDs that choose to carry multiple networks from that vendor.³ Specifically, Mediacom argues that discounts for carriage of multiple programming networks constitute a practice that significantly hinders or prevents MVPDs from providing satellite cable programming pursuant to Section 628(b).⁴ These

² *Revision of the Commission’s Program Access Rules, et al.*, Notice of Proposed Rulemaking, MB Docket Nos. 12-68, 07-18 & 05-192, 27 FCC Rcd 3413, 3417-3465 (¶¶ 6-95) (2012) (“NPRM”). *See also infra* note 24.

³ *See* Comments of Mediacom Communications Corporation, MB Docket Nos. 12-68, 07-18 & 05-192 (submitted June 22, 2012) (“Mediacom Comments”).

⁴ *See id.* at 4-9.

assertions have been squarely addressed and rebutted in other Commission dockets, including in comments by Time Warner Inc., and nothing in the instant record supports their adoption.⁵

These earlier submissions explain why the ability of programming vendors to offer discounts for carriage of multiple programming networks as part of private negotiations with MVPDs is a lawful and competitive practice, and one which in no way hinders MVPDs from programming distribution.⁶ Indeed, the Commission has previously found that this practice may lead to reduced costs and expanded consumer access to programming.⁷ These filings, which we incorporate by reference here, summarize findings of Congress and the courts that affirm these benefits.⁸ They demonstrate that nothing in Section 628⁹ or its legislative history allows the Commission to impinge on the ability of programming vendors to offer package discounts, as these are entirely unrelated to congressional concerns regarding the vertical integration of cable operators and programming vendors that motivated passage of Section 628.¹⁰ They also detail

⁵ See Comments of Time Warner Inc., *Review of the Commission's Program Access Rules and Examination of Programming Tying Arrangements*, MB Docket No. 07-198, at 6-12 & 19-22 (submitted Jan. 4, 2008) ("Time Warner 2008 Comments") (explaining, *inter alia*, that package discounts may increase programming available to the public, is a matter outside Commission authority, is protected by First Amendment considerations, and is fundamentally distinct from "tying" in the antitrust context).

⁶ See, e.g., *id.*; Comments of The Walt Disney Company, *Review of the Commission's Program Access Rules and Examination of Programming Tying Arrangements*, MB Docket No. 07-198, at 9-42 & 72-83 (submitted Jan. 4, 2008). See also Joint Letter from CBS Corporation, Fox Entertainment Group, NBCUniversal, Time Warner Inc., The Walt Disney Company Inc. & Viacom Inc., *Revision of the Commission's Program Carriage Rules*, Notice of Proposed Rulemaking, MB Docket No. 11-131, at 2 (submitted Jan. 11, 2012).

⁷ Time Warner 2008 Comments at 19 (citing *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Tenth Annual Report, 19 FCC Rcd 1606, 1705-06 (¶ 173) (2004)).

⁸ See Time Warner 2008 Comments at 19-21.

⁹ Section 628(b) by its terms only applies to unfair or deceptive practices by "a cable operator, a satellite cable programming vendor in which a cable operator has an attributable interest, or a satellite broadcast programming vendor." See 47 U.S.C. § 548(b).

¹⁰ Mediacom's unsupported claim that the Commission may use its ancillary jurisdiction to regulate these practices with respect to programming vendors that are not vertically integrated with cable operators, see Mediacom Comments at 21, is likewise contrary to the Communications Act and congressional intent. Courts have determined that ancillary authority only may be used to meet obligations specified in other sections of the Act. See, e.g., *Am. Library Ass'n v. FCC*, 406 F.3d 689, 703 (D.C. Cir. 2005). As Congress concluded that Section 628 was necessary to provide FCC authority with respect to unfair or deceptive practices by programming vendors vertically integrated with cable operators, claims that the FCC has unspecified or latent authority to regulate legitimate business practices or other types of programming vendors cannot survive scrutiny.

the significant First Amendment issues that caution against any new rule or policy adversely affecting the negotiating discretion of a programming vendor to offer discounted packages of programming networks.¹¹

The significant growth in both MVPD competition and the availability of programming to consumers in recent years further underscores the benefits of these practices.¹² Indeed, in noting the rise of satellite and other video distribution platforms, Mediacom's own comments in this docket acknowledge that the video marketplace has become more competitive in the past twenty years.¹³ This demonstrable growth in the availability of programming and MVPD competition is consistent with the past filings discussed above, as well as court and Commission precedent, which recognize that package discounts provide cost-saving benefits and lead to expanded delivery of program networks.¹⁴ In light of these positive benefits to consumers and competition, and because Mediacom's proposal falls outside the scope of both Section 628 and the instant NPRM, the Commission should reject calls for this type of unnecessary and harmful intervention in the private marketplace.

B. Proposals to Extend Program Access Requirements to Non-Vertically Integrated Programmers Are Without Legal Support and Justification.

A few commenters, to varying degrees, suggest that the Commission should consider extending aspects of the existing program access rules to programming vendors that are not vertically integrated with cable operators: (1) Mediacom advocates for broader application of

¹¹ See Time Warner 2008 Comments at 8-12.

¹² See, e.g., National Cable & Telecommunications Association, "A World of Choice" & "History of Cable Television" (last viewed July 11, 2012) (available at <http://www.ncta.com/statistic/statistic/Consumer-Choice-Explodes.aspx> & <http://www.ncta.com/About/About/HistoryofCableTelevision.aspx>); Comments of National Cable & Telecommunications Association, *Annual Assessment of the Status of Competition in the Market for Delivery of Video Programming*, Further Notice of Inquiry, 25 FCC Rcd 14091 (2011), at 7-13, 26 (submitted June 8, 2011) (noting vibrant competition, including "virtually unlimited array of programming content").

¹³ See, e.g., Mediacom Comments at v, 21-22.

¹⁴ See *supra* notes 6 & 7.

the prohibition on price discrimination in Section 628(c)(2)(B)(ii);¹⁵ (2) Cox Communications encourages further examination of volume pricing practices;¹⁶ and (3) DIRECTV implies that limitations on exclusive contracts involving unaffiliated “marquee networks” may be appropriate.¹⁷ Each of these proposals is without legal support and merit and should not be considered as part of this proceeding.

As the D.C. Circuit noted last year, the Commission’s Section 628 regulations “focus on vertically integrated cable companies due to their special characteristics and their unique ability to impact competition.”¹⁸ This regulatory focus is consistent with the settled understanding of the statute and congressional intent as well as the policy concerns that motivated passage of Section 628.¹⁹ Although, as Mediacom notes, *Cablevision II* indicated that the Commission has some latitude with respect to how it chooses to regulate entities expressly identified within the statutory language as subject to Section 628(b),²⁰ the court did not hold that the Commission could expand its authority to regulate other entities not named within the statutory language, such as programming vendors that are not vertically integrated with cable operators.²¹ In light of

¹⁵ See Mediacom Comments at 9-20.

¹⁶ Comments of Cox Communications, Inc., MB Docket Nos. 12-68, 07-18 & 05-192, at 6 n.14 (submitted June 22, 2012) (“Cox Comment”).

¹⁷ Comments of DIRECTV, LLC, MB Docket Nos. 12-68, 07-18 & 05-192, at 42-43 (submitted June 22, 2012) (“DIRECTV Comment”).

¹⁸ *Cablevision Sys. Corp. et al. v. FCC*, 649 F.3d 695, 713 (D.C. Cir. 2011) (“*Cablevision II*”) (citing *Time Warner Entertainment v. FCC*, 93 F.3d 957, 978 (D.C. Cir. 1996) and quoting *Turner Broad. Sys v. FCC*, 512 U.S. 622, 660–61 (1994) (internal quotations omitted)).

¹⁹ See, e.g., 47 U.S.C. § 548(b); *Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992: Development of Competition and Diversity in Video Programming Distribution and Carriage*, First Report and Order, 8 FCC Rcd 3359, 3366 (¶ 121) (1993), *recon.*, 10 FCC Rcd 1902 (1994), *further recon.*, 10 FCC Rcd 3105 (1994); H.R. Rep. No. 102-628 at 41 (1992).

²⁰ See Mediacom Comments at 20. Mediacom argues that the D.C. Circuit’s decision allowing the FCC to close the so-called “terrestrial loophole” suggests broad authority to regulate all programming vendors. *Id.* This argument overlooks the fundamental fact that the reason why certain terrestrial and satellite-based RSNs are subject to the FCC’s program access rules is because they are vertically integrated with cable operators.

²¹ Indeed, the *Cablevision II* decision repeatedly refers to “cable-affiliated” entities. See *Cablevision II*, 649 F.3d at 700-704, 706, 708, 710, 712-714, 716, 717 & 719 (using “cable-affiliated” 18 times throughout opinion). The underlying Commission ruling similarly targets cable-affiliated programming and cable-affiliated programming vendors, not other vendors. See, e.g., *Review of the Commission’s Program Access Rules and Examination of*

this and other precedent, Cox correctly notes that “program access rules relate only to vertically integrated programmers,” and other programmers “are not subject to the rules.”²²

In light of such statutory, judicial, and regulatory precedent, the instant NPRM understandably sought comment only with respect to matters relating to cable-affiliated programming vendors. As noted above, the NPRM largely addresses whether to extend or to sunset the prohibition on exclusive contracts involving cable-affiliated programming vendors.²³ With respect to a few paragraphs on volume-discount and uniform-price matters, the NPRM exclusively addresses “cable-affiliated programming.”²⁴ Accordingly, the Commission must adhere to the scope of the current proceeding and reject any proposals with respect to programming networks that are not “cable-affiliated.”

This is particularly the case with respect to DIRECTV’s comments regarding “marquee networks,” that fail to explain why regulation based on the current popularity or status of a network is appropriate, or how such a provision could withstand constitutional scrutiny. The hypothetical suggestion that some programming networks may have incentives to become vertically integrated in the future²⁵ is, at best, speculative. Further, the assertion that “national sport networks share many of the same qualities as regional ones, and other ‘marquee’ programming can have a similar competitive effect”²⁶ does not offer the necessary evidentiary or legal support for any intrusion into private negotiations, particularly in the absence of any vertical integration. Regulation of a new category of “marquee” programming would likely

Program Tying Arrangements, First Report and Order, 25 FCC Rcd 746 n. 191 (2010) (“*2010 Program Access Order*”) (using the term “cable-affiliated” nearly 200 times throughout the ruling and expressly stating that the “rules established by this *Order* do not address exclusive contracts between a cable operator and a non-cable-affiliated programmer”). *affirmed in part and vacated in part*, *Cablevision II*, 649 F.3d 695 (D.C. Cir. 2011).

²² Cox Comment at 6 n.14.

²³ See *supra* note 2.

²⁴ See, e.g., NPRM at ¶¶ 98-102.

²⁵ See DIRECTV Comment at 22-23.

²⁶ See *id.* at 42.

involve, in the words of DIRECTV, “difficult” determinations,²⁷ including First Amendment considerations. These factors, along with the statutory limitations discussed above, weigh strongly against any restrictions on “marquee” programming.

II. CONCLUSION

The Commission should not consider any suggestion that may restrain or otherwise impact the ability of programming vendors to offer discounts for carriage of multiple networks, or extend existing program access obligations to non-vertically integrated programmers. The vibrant and competitive multichannel video marketplace underscores that there is no need for additional government intervention in private contractual negotiations. Accordingly, Time Warner encourages the Commission to maintain the focus of the instant NPRM and otherwise act consistently with the foregoing.

Respectfully submitted,

TIME WARNER INC.

By: /s/ Susan A. Mort
Susan A. Mort
Time Warner Inc.
800 Connecticut Ave., N.W.
Suite 800
Washington, DC 20006

July 23, 2012

²⁷ *Id.* at 37 (noting that FCC rejected differentiating among types of programming in 2007).