

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 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., Transferors, 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, et al.)	MB Docket No. 05-192
)	
Implementation of the Cable Television Consumer Protection and Competition Act of 1992)	MB Docket No. 07-29
)	
Development of Competition and Diversity in Video Programming Distribution: Section 628(c)(5) of the Communications Act: Sunset of Exclusive Contract Prohibition)	
)	

**COMMENTS OF
THE UNITED STATES TELECOM ASSOCIATION**

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EXECUTIVE SUMMARY

Given the sudden and dramatic change in its program access framework as a result of its recent order, it is imperative that the Federal Communications Commission (Commission) implement reasonable protections to preserve and protect competition in the multichannel video programming distributor (MVPD) marketplace. These same measures are equally important to ensuring that the necessary foundations are in place for the Commission to realize its national broadband deployment policy goals.

Since their implementation in 1992, the Commission's program access rules have been a resounding success story. The rules provided a reasonable and balanced framework through which the Commission has steadily advanced towards its associated policy goals of greater MVPD competition and increased broadband deployment. After the Commission abruptly sunset the exclusivity prohibition in October, vertically integrated cable providers will now be able to withhold certain must have programming – including regional sports networks (RSNs) – that are essential to the success of any competitive video platform. The Commission's decision is likely to make it more difficult to build and operate broadband networks, especially in rural communities where revenues from offering competitive video services are essential to making a business case for broadband deployment.

In light of these changes, it is imperative that the Commission adopt the reasonable and narrowly tailored proposals outlined in its Notice. Indeed, by implementing the proposals contained in its Notice, the Commission will ensure that it continues to fulfill its statutory obligation to “preserve and protect” competition and diversity in the distribution of video programming.”

In particular, the Commission should adopt these proposals in light of the substantial growth in the number of non-replicable and popular RSNs controlled by vertically integrated cable providers. The number of vertically integrated RSNs has more than tripled from 18 in 2007 to 57 today, and more than half of all RSNs are vertically integrated with a cable operator. The Commission has consistently identified RSN programming as “must-have” programming due to the fact that it is “non-replicable and highly valued by consumers.” Competitive MVPDs lacking access to such content face a substantial competitive disadvantage in markets where they compete – or hope to compete – against entrenched cable incumbents.

In addition to the compelling policy arguments supporting reasonable modifications to the Commission's program access rules, there are strong legal arguments supporting such changes. On two separate occasions, the Court of Appeals for the D.C. Circuit has addressed Commission actions related to RSN programming. In both decisions, the court upheld the reasonable Commission actions targeted at RSNs, acknowledging the unique nature of such content, as well as the Commission's narrowly tailored measures. Given that sports programming is popular and non-replicable, and therefore uniquely important to competition in the video and broadband marketplace, it is imperative that the Commission adopt the reasonable and narrow proposals contained in its Notice.

With respect to cable-affiliated RSN programming, the Commission should establish a rebuttable presumption that withholding such programming is an “unfair act.” Given that sports

programming is popular and non-replicable, and therefore uniquely important to competition in the video marketplace, it would be entirely reasonable for the Commission to establish a rebuttable presumption that its withholding by a cable-affiliated programmer constitutes an unfair act. Moreover, the Commission has sufficient legal authority to establish such a presumption consistent with each of the five factors identified in the D.C. Circuit's decision in *Cablevision II*.

First, the withholding of RSN programming is detrimental to the development of competition in local and national MVPD markets. Given the Commission's repeated acknowledgement of the must-have and non-replicable nature of RSN programming, it can use its predictive judgment to conclude that such withholding constitutes an unfair act in any designated market area where such withholding occurs. This is especially the case given that such withholding involves "non-replicable and popular RSN programming." Because of the non-replicable nature of the content on cable-affiliated RSNs, no MVPD competitor has the ability to formulate a viable competitive response that would allow it to compete for the many subscribers that highly value these networks.

Second, the Commission can safely conclude that there is an adverse effect from the withholding of cable-affiliated RSNs on alternative video providers in their ability to compete with incumbent cable operators. Given their popular and non-replicable nature, competitive MVPDs must have access to cable-affiliated RSN programming in order to effectively compete. In every instance where the Commission has addressed an RSN-related program access complaint, it has concluded that the withholding of that content significantly hindered the ability of MVPDs to compete with cable incumbents.

Third, the Commission has previously found that attraction of investment in new programming weighs against an exclusive arrangement when "the network is established and does not currently need to offer exclusivity in order to obtain carriage and attract capital investments." There is no programming more lucrative or desirable than RSNs, and exclusive arrangements are unnecessary in order to obtain carriage or attract capital investment for such programming.

Fourth, there is no basis for the Commission to conclude that diversity of programming would receive any positive effects from the withholding of cable-affiliated RSN programming in the MVPD market. In fact, just the opposite is true. As the Commission noted in previous program access complaints, RSN programming is non-replicable and "no amount of investment can duplicate the unique attributes of such programming." As such the potential for diversity in such programming is non-existent, given its non-replicable nature.

Finally, the duration of withholding of any RSN will always weigh against the cable-affiliated owner of such content. The lack of access to such content for even one year could feasibly result in the loss of consumer access to several seasons-worth of sports programming.

In addition to establishing a rebuttable presumption that such withholding constitutes an unfair act, the Commission should also adopt a standstill agreement during the pendency of an RSN related program access complaint. Under the Commission's current rules, an MVPD

seeking renewal of an existing programming contract may obtain a temporary standstill of the price, terms, and other conditions of such a contract through the program access complaint process. Absent the automatic granting of a standstill agreement, the Commission should adopt a rebuttable presumption that the complainant is likely to prevail on each of the four merits outlined in its rules. Implementation of a standstill mechanism for RSN programming is particularly critical, due to the unique nature of the programming. Given the tremendous consumer interest in sports programming, and its time-sensitive nature, the loss of RSN networks has a significant impact on consumers and competitive MVPDs alike.

In addition, given the unique and non-replicable nature of sports programming, the Commission should establish rebuttable evidentiary presumptions for complaints involving access to cable-affiliated national cable networks that air the same amount of sports programming as RSNs. Just as the sports programming content on RSNs is highly valuable and non-replicable, national sports programming networks generally contain marquee sports programming of tremendous interest to consumers. With the exception of their singular difference in geographic scope, national sports programming networks are identical to RSNs. Based upon their tremendous popularity and their shared characteristics with RSNs, national sports programming should be treated no differently by the Commission than RSNs.

The Commission should establish a rebuttable presumption that, once a complainant succeeds in demonstrating that an exclusive contract involving a cable-affiliated network – regardless of whether it is terrestrially delivered or satellite-delivered – is anti-competitive, any other exclusive contract involving the same network will be afforded the same treatment. The Commission is permitted to exercise its predictive judgment in such instances, and such an approach would economize the Commission’s limited resources, by foreclosing the need for Commission staff to undertake repetitive examinations of program access complaints. Such an approach would be particularly beneficial to smaller MVPDs and to the Commission’s broadband policy goals.

The FCC should adopt procedures specific to new MVPD entrants seeking access to vertically integrated programming under a new contract. In instances where a new MVPD is unable to reach an agreement with vertically integrated programmer for a certain network (or networks), the Commission should establish a shot clock for resolving any associated program access complaint. In addition, the Commission should establish a mechanism whereby a new MVPD may request interim carriage of the programming subject to retroactive application of established prices, terms and conditions during the pendency of any complaint.

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EXECUTIVE SUMMARYI

**I. THE FCC’S DECISION TO LIFT THE EXCLUSIVITY PROHIBITION
COULD IMPEDE VIDEO AND BROADBAND COMPETITION. 2**

**II. THE FCC SHOULD IMPLEMENT REASONABLE PROTECTIONS TO
PRESERVE AND PROTECT COMPETITION IN THE MVPD
MARKETPLACE. 4**

**A. Sports Programming Remains ‘Must Have’ Programming in the
MVPD Marketplace. 5**

**1. The FCC Should Establish a Rebuttable Presumption that an
Exclusive Contract for a Cable-Affiliated RSN is an “Unfair
Act” 9**

**2. The FCC Should Retain the Standstill Mechanism During the
Pendency of a Complaint Involving a Cable-Affiliated RSN. 18**

**3. The FCC Should Establish a Rebuttable Presumptions for
Exclusive Contracts Involving Cable-Affiliated National Sports
Networks. 21**

**B. At a Minimum, the FCC Should Establish a Rebuttable Presumption
for Previously Challenged Exclusive Contracts. 23**

**C. The FCC Should Adopt a Shot-Clock and Interim Carriage for New
Entrants Seeking Programming Contracts. 25**

III. CONCLUSION 27

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**COMMENTS OF
THE UNITED STATES TELECOM ASSOCIATION**

The United States Telecom Association (USTelecom)¹ is pleased to submit its comments in response to the Federal Communications Commission’s (Commission) above referenced

¹ USTelecom is the premier trade association representing service providers and suppliers for the telecommunications industry. USTelecom members provide a full array of services, including broadband, voice, data and video over wireline and wireless networks.

Further Notice of Proposed Rulemaking (Notice).² In its Notice, the Commission seeks comment on certain aspects of its rules regarding access to cable-affiliated programming for non-affiliated multichannel video programming distributors (MVPDs). Changes to the current program access rules have taken on added importance since the Commission's recent decision to decline to extend its exclusive contract prohibition.³ Given the ongoing importance of access to vertically integrated programming content by competitive MVPD services in the deployment of bundled voice and broadband services, USTelecom supports the Commission's narrowly tailored and reasonable modifications to its program access rules contained in the Notice.

I. THE FCC'S DECISION TO LIFT THE EXCLUSIVITY PROHIBITION COULD IMPEDE VIDEO AND BROADBAND COMPETITION.

USTelecom is appreciative of the Commission's willingness to explore possible refinements to its current program access rules. Given the sudden and dramatic change in the Commission's program access framework as a result of its recent order, it is imperative that the Commission implement reasonable protections to preserve and protect competition in the MVPD marketplace. These same measures are equally important to ensuring that the necessary foundations are in place for the Commission to realize its national broadband deployment policy goals.⁴

Since their implementation in 1992, the Commission's program access rules have been a resounding success story. Over the last two decades, the rules provided a reasonable and

² See, Order and Further Notice of Proposed Rulemaking, *In the Matter of Revision of the Commission's Program Access Rules*, FCC 12-123, 77 Fed. Reg. 66052 (October 31, 2012) (Notice).

³ See e.g., Notice, ¶¶ 7 - 73.

⁴ See e.g., *Connecting America: The National Broadband Plan*, p. 59 (released March 16, 2010) (National Broadband Plan); Report and Order and Further Notice of Proposed Rulemaking, *Connect America Fund*, 26 FCC Rcd 17663, FCC 11-161, ¶ 9 (rel. Nov. 18, 2011) (Universal Service Reform Order).

balanced framework through which the Commission has steadily advanced towards its associated policy goals of greater MVPD competition and increased broadband deployment. In October of this year, however, the Commission abruptly sunset the exclusivity prohibition that was the cornerstone of its rules.

Absent the prohibition, vertically integrated cable providers will now be able to withhold certain must have programming – including regional sports networks (RSNs) – that are essential to the success of any competitive video platform. The Commission’s decision is likely to make it more difficult to build and operate broadband networks, especially in rural communities where revenues from offering competitive video services are essential to making a business case for broadband deployment.

Despite the Commission’s well-documented acknowledgement of the connection between video and broadband deployment,⁵ its recent program access order makes only fleeting reference to broadband.⁶ For new wireline MVPD entrants, however, the importance of reasonable access to vertically integrated cable programming remains essential to realizing the Commission’s broadband deployment goals. Such access is even more crucial to rural MVPD

⁵ See e.g., Report and Order and Further Notice of Proposed Rulemaking, *Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended by the Cable Television Consumer Protection and Competition Act of 1992*, 22 FCC Rcd. 5101, ¶51 (2006) (concluding that “broadband deployment and video entry are ‘inextricably linked’”) (*Franchise Reform Order*); *Franchise Reform Order*, ¶62 (stating that, “[t]he record here indicates that a provider’s ability to offer video service and to deploy broadband networks are linked intrinsically, and the federal goals of enhanced cable competition and rapid broadband deployment are interrelated.”); Report and Order, Notice of Proposed Rulemaking, *Exclusive Service Contracts for Provision of Video Services in Multiple Dwelling Units and Other Real Estate Developments*, 22 FCC Rcd 20235, ¶20 (2007) (*MDU Order*) (stating that “broadband deployment and entry into the MVPD business are ‘inextricably linked.’”); First Report and Order, *Review of the Commission’s Program Access Rules and Examination of Programming Tying Arrangements*, 25 FCC Rcd. 746, ¶36 (2010) (concluding that “a wireline firm’s decision to deploy broadband is linked to its ability to offer video.”) (*Terrestrial Loophole Order*).

⁶ In its order lifting the prohibition on exclusivity, the Commission dedicates a single paragraph to the discussion of the relationship between video and broadband deployment. See, *Notice*, ¶ 42.

providers, given the Obama Administration's emphasis on rural broadband deployment and adoption.⁷

The Commission's decision to sunset the exclusivity prohibition, thereby impeding access to video programming undermines a key aspect of the Commission's recent Universal Service Reform Order. Specifically, in its order, the Commission emphasized the importance of video revenues in its analysis. The Commission emphasized that its evaluation of appropriate support levels necessarily includes all revenue sources available to the carrier and that its actions did "not alter a provider's ability to collect regulated and unregulated end-user revenues."⁸ The Commission went on to note that by taking into account these other revenue streams it believed that "rate-of-return carriers on the whole will have a stronger and more certain foundation."⁹

II. THE FCC SHOULD IMPLEMENT REASONABLE PROTECTIONS TO PRESERVE AND PROTECT COMPETITION IN THE MVPD MARKETPLACE.

Several of the proposals outlined by the Commission in its Notice are narrowly tailored to address specific harms that could arise under its new program access complaint framework. Given that the Commission's current framework has lifted the exclusivity prohibition and shifted to a complaint driven process, it is imperative that competition within the MVPD marketplace is still able to develop and thrive. Indeed, by implementing the proposals contained in its Notice,

⁷ See e.g., Executive Order, *Accelerating Broadband Infrastructure Deployment* (Jun. 14, 2012) (available at <http://www.whitehouse.gov/the-press-office/2012/06/14/executive-order-accelerating-broadband-infrastructure-deployment>) (visited December 4, 2012).

⁸ *Universal Service Reform Order*, ¶ 291.

⁹ While video is not expressly mentioned there, it is in the context of setting forth the information that a provider would need to submit to obtain a waiver from provisions in the order. See, *Universal Service Reform Order* ¶¶ 539-542. It also emphasized that it intended to "take into account not only revenues derived from network facilities that are supported by universal service but also revenues derived from unregulated and unsupported services as well." *Id.*, ¶540. Specifically, among other information, the waiver petition would need to include details of any video plans, percentage of subscribers taking video services and audited financials that includes information on costs and revenues from video services. *Id.*, ¶ 542.

the Commission will ensure that it continues to fulfill its statutory obligation to “preserve and protect competition and diversity in the distribution of video programming.”¹⁰

A. Sports Programming Remains ‘Must Have’ Programming in the MVPD Marketplace.

If the market has changed at all since 2007, it has been in a direction that increases an incumbent cable operator’s incentive to withhold programming from competitors. The withholding of vertically integrated RSNs is the vehicle with which cable incumbents can exact the most competitive harm to wireline MVPD entrants. In particular, vertically integrated cable providers are now in a position to leverage programming exclusives to combat broadband competition from competing providers of bundled services. The substantial growth in the number of non-replicable and popular regional sports networks (RSNs) controlled by vertically integrated cable providers should be of particular concern to the Commission. The Commission has consistently identified RSN programming as “must-have” programming due to the fact that it is “non-replicable and highly valued by consumers.”¹¹

Competitive MVPDs lacking access to such content face a substantial competitive disadvantage in markets where they compete – or hope to compete – against entrenched cable incumbents. While access to national, marquee sporting events is essential for competitive MVPDs, access to local sports franchises on vertically integrated RSNs is even more critical for competitive entry into local markets. It should come as no surprise to the Commission then, that the number of vertically integrated RSNs has more than tripled from 18 in 2007 to 57 today.¹²

¹⁰ 47 U.S.C. § 548(c)(5).

¹¹ *Terrestrial Loophole Order* ¶ 52.

¹² See Notice of Proposed Rulemaking, FCC, *In the Matter of Revision of the Commission’s Program Access Rules*, FCC 12-30, 77 Fed. Reg. 24302, Appendix C, Table 1, p. 70 (April 23, 2012) (*Program Access Rulemaking*).

As the Commission acknowledged in its Notice of Proposed Rulemaking earlier this year, more than half of all RSNs today are vertically integrated with a cable operator.¹³

RSNs have repeatedly been cited by the Commission as a major concern in the MVPD marketplace. In previous instances, the Commission has concluded that the withholding of RSN content has a substantial impact on the ability of MVPDs to compete and can decrease an MVPD's market share "significantly," thereby having a "material adverse impact" in the MVPD marketplace.¹⁴ The Commission has previously pointed to the withholding of cable-affiliated RSNs in Philadelphia and San Diego, where competitive MVPD subscription rates were 40% and 33% below, respectively, of what would otherwise be expected.¹⁵ The Commission's recent orders regarding Cablevision's withholding of RSNs from its competitors acknowledged a long catalogue of anti-competitive behavior by Cablevision with respect to its withholding.¹⁶

¹³ *Program Access Rulemaking*.

¹⁴ Report and Order and Notice of Proposed Rulemaking, Implementation of the Cable Television Consumer Protection and Competition Act of 1992, 22 FCC Rcd. 17791, ¶ 39 (2007) (*2007 Extension Order*).

¹⁵ Memorandum Opinion and Order, *Applications for Consent to the Assignment and/or Transfer of Control of Licenses, Adelphia Communications Corporation, Assignors to Time Warner Cable, Inc., Assignees, et al.*, 21 FCC Rcd 8203, 8271, FCC 06-105, ¶ 149 (released July 21, 2006). *See also*, Order, *In the Matter of AT&T Services, Inc. and Southern New England Telephone Company d/b/a AT&T Connecticut, Complainants v. Madison Square Garden, L.P. and Cablevision Systems Corp., Defendants*, DA 11-1595, 26 FCC Rcd. 13206, n. 8 (released September 22, 2011) (*AT&T Cablevision Order*); *see also*, Order, *Verizon Telephone Companies and Verizon Services Corp., Complainants, v. Madison Square Garden, L.P. and Cablevision Systems Corp., Defendants*, DA 11-1594, 26 FCC Rcd. 13145, n.8 (released September 22, 2011) (*Verizon Cablevision Order*).

¹⁶ The Commission addressed separate complaints filed against Cablevision by AT&T and Verizon in the summer of 2009. AT&T's complaint addressed withholding of RSNs by Cablevision in the state of Connecticut, while Verizon's complaint addressed withholding of RSNs by Cablevision in the New York City and Buffalo, New York markets. Although both companies were offered access to Cablevision's RSN standard definition signals, both Verizon and AT&T were repeatedly denied access to the RSN HD programming for the New York Knicks, the New York Rangers, the New York Islanders, the New Jersey Devils, and televised local and national college football and basketball games. Verizon was also denied access to programming for the Buffalo Sabres in the Buffalo market. *See, Verizon Cablevision Order*, ¶¶6-7; *see also, AT&T Cablevision Order*, ¶¶6-7.

In each instance, the Commission found “two significant anticompetitive harms resulting from [Cablevision’s] withholding” of RSNs from both AT&T and Verizon.¹⁷ First, the Commission concluded that Cablevision’s withholding of RSNs from both AT&T and Verizon “significantly hinders” their ability to compete in various designated market areas (DMAs), which “in turn harms consumers by limiting video competition in those markets.”¹⁸ Second, the Commission also concluded that, “an act that impedes the ability of an MVPD to provide video service can also impede the ability of an MVPD to provide broadband services.”¹⁹

In discussing how the withholding of RSNs negatively impacted MVPD competition, the Commission explained that, “when programming is non-replicable and valuable to consumers, such as regional sports programming, no amount of investment can duplicate the unique attributes of such programming, and denial of access to such programming can significantly hinder an MVPD from competing in the marketplace.” The Commission further stated that “given the non-replicable nature of the content on [Cablevision’s RSNs],” companies like AT&T and Verizon had “no ability to formulate a viable competitive response” that would allow either of them “to compete for the many subscribers that highly value these networks.”²⁰

The Commission also found that the negative impact on competition stemming from complaints involving wireline MVPDs was “particularly acute” due to its recognition that wireline entrants “pose a greater competitive threat than DBS to cable operators,” since DBS operators do not “constrain the price of cable service to the extent that wireline MVPDs do.”²¹ It

¹⁷ See, *Verizon Cablevision Order*, ¶38; see also, *AT&T Cablevision Order*, ¶39.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ *AT&T Cablevision Order*, ¶ 29.

should come as no surprise then, that within days of the Commission allowing the exclusivity prohibition to expire, reports surfaced that Time Warner Cable was withholding its RSN – which is the sole provider of Los Angeles Lakers games – from AT&T Uverse, Cox and others.²² At a monthly rate of \$3.95 per subscriber, the Time Warner RSN was reported to be one of the highest-priced RSNs in the country.²³ The blackout impacted more than 4 million consumers residing not only in Los Angeles and neighboring Fresno and San Diego counties, but consumers residing in Nevada and Hawaii as well.²⁴

In addition to the compelling policy arguments supporting reasonable modifications to the Commission’s program access rules, there are strong legal arguments supporting such changes. On two separate occasions, the Court of Appeals for the D.C. Circuit has addressed Commission actions related to RSN programming. On both occasions, the court has upheld the Commission’s efforts in this area. In both decisions, the court upheld the reasonable Commission actions targeted at RSNs, acknowledging the unique nature of such content, as well as the Commission’s narrowly tailored measures. Given that sports programming is popular and non-replicable, and therefore uniquely important to competition in the video and broadband marketplace, it is imperative that the Commission adopt the reasonable and narrow proposals contained in its Notice.

²² Tony Pierce, *Time Warner's Lakers blackout area extends from San Diego to Fresno to Hawaii*, October 10, 2012, 89.3 KPCC Southern California Public Radio website (available at: <http://www.scpr.org/blogs/news/2012/10/10/10427/time-warner-laker-blackout-area-extends-san-diego/>) (visited December 14, 2012) (*Pierce Article*).

²³ Jon Weisman, *Millions of Laker fans face blackout*, *Variety*, October 25, 2012 (available at: <http://www.variety.com/article/VR1118061250>) (visited December 14, 2012).

²⁴ *Pierce Article*.

1. The FCC Should Establish a Rebuttable Presumption that an Exclusive Contract for a Cable-Affiliated RSN is an “Unfair Act”.

With respect to cable-affiliated RSN programming, the Commission should establish a rebuttable presumption that withholding such programming is an “unfair act.” Consistent with the D.C. Circuit’s decisions in *Cablevision I*²⁵ and *Cablevision II*,²⁶ the Commission has sufficient legal authority to establish such a presumption.

When the Court in *Cablevision I* upheld the Commission’s extension of the program access rules, it noted that cable operators remained vertically integrated with “almost half of all regional sports networks.”²⁷ Since the court’s affirmation in *Cablevision I*, there has been a substantial *increase* in cable-affiliated RSN programming. As the Commission noted in its initial rulemaking in this proceeding, the percentage of cable-affiliated RSNs has increased from 46 percent in 2007, to approximately 52.3 percent, today.²⁸ As discussed above, given the unique nature of RSN programming, it is crucial for competitive MVPDs to gain access to such programming. Time and again, the Commission has identified RSN programming as “must-have” programming due to the fact that it is “non-replicable and highly valued by consumers.”²⁹

Indeed, even the dissent in *Cablevision I* acknowledged that the unique characteristics of “regional video programming networks, particularly regional sports networks,” could justify the “targeted restraint” of a “prospective ban” on exclusive deals for such programming.³⁰ A similar rationale should apply here: given that sports programming is popular and non-replicable,

²⁵ *Cablevision Systems Corp. v. FCC*, 597 F.3d 1306 (D.C. Cir. 2010) (*Cablevision I*).

²⁶ *Cablevision Systems Corp. v. FCC*, 649 F.3d 695 (D.C. Cir. 2011) (*Cablevision II*).

²⁷ *Cablevision I*, 597 F.3d 1309.

²⁸ *Notice*, ¶ 28.

²⁹ *Terrestrial Loophole Order*, ¶ 52.

³⁰ *Cablevision I*, 597 F.3d 1326, n. 6.

and therefore uniquely important to competition in the video marketplace, it would be entirely reasonable for the Commission to establish a rebuttable presumption that its withholding by a cable-affiliated programmer constitutes an unfair act.

The D.C. Circuit's unanimous decision in *Cablevision II* underscores this point. The D.C. Circuit upheld the Commission's decision to apply additional protections targeted at cable-affiliated RSNs as a "narrowly tailored effort to further the important governmental interest of increasing competition in video programming" in light of the "record evidence demonstrating the significant impact of RSN programming withholding."³¹ The court went on to note that while competition in the MVPD had generally increased, "nothing prevents the Commission from addressing any remaining barriers to effective competition with appropriately tailored remedies."³²

While the Court of Appeals vacated the Commission's categorical rule that *all* exclusive contracts involving terrestrially delivered, cable-affiliated programming are "unfair," the court did not rule out establishment of a *narrower* standard directed solely at RSN programming. Nor did the court preclude the establishment of a rebuttable presumption. Rather, it only concluded that "if the Commission believes that conduct involving the withholding of terrestrial programming should be treated as categorically unfair, as opposed to assessing fairness on a case-by-case basis or perhaps adopting a public interest exception mirroring the one for satellite programming, then it must grapple with whether its definition of unfairness would apply to

³¹ *Cablevision II*, 649 F.3d 718.

³² *Id.*, 649 F.3d 712.

conduct that appears procompetitive and, if so, whether that result would comport with section 628.”³³

In this regard, the Commission to date has elected to address on a case-by-case basis whether challenged conduct, including an exclusive contract is “unfair”, as demonstrated by the *Verizon v. MSG/Cablevision* and *AT&T v. MSG/Cablevision* cases.³⁴ The court’s decision makes clear that the Commission can supplement its current case-by-case approach with the adoption of a rebuttable presumption that the withholding of such content is an unfair act.³⁵

a. Adoption of a Rebuttable Presumption Satisfies the D.C. Circuit’s Criteria Established in *Cablevision II*

The Commission asks in its Notice whether adoption of a rebuttable presumption that withholding of RSN programming constitutes an unfair act satisfies the D.C. Circuit’s criteria in its *Cablevision II* decision.³⁶ In its decision, the D.C. Circuit explained that an evidentiary presumption is only permissible:

(i) “if there is a sound and rational connection between the proved and inferred facts;” and

(ii) “when proof of one fact renders the existence of another fact so probable that it is sensible and timesaving to assume the truth of [the inferred] fact ... until the adversary disproves it.”³⁷

³³ *Cablevision II*, 649 F.3d 723.

³⁴ Notice, ¶76; *see also*, *Verizon Cablevision Order*, ¶20; *AT&T Cablevision Order*, ¶21.

³⁵ In fact, the court’s language in *Cablevision II* suggests that the Commission could just as easily replace its current case-by-case approach with the adoption of a public interest exception mirroring the one for satellite programming. *Cablevision II*, 649 F.3d 723; *see also*, 47 U.S.C. § 628(c)(2)(D); 47 U.S.C. § 628(c)(4). Such an approach would just as easily assuage any legal concerns, since it replaces one possible approach proposed by the court (i.e., the case-by-case approach), with another (i.e., adopting a public interest exception mirroring the one for satellite programming). While USTelecom has previously advocated for use of the public interest exception with respect to cable-affiliated content, the Commission would be justified in replacing its current case-by-case approach with the rebuttable presumption, given the unique nature of RSN programming.

³⁶ Notice, ¶¶ 75 – 77.

³⁷ *Cablevision II*, 649 F.3d 716.

The Commission has substantial record evidence demonstrating the “sound and rational connection” that the withholding of cable-affiliated RSN programming constitutes an unfair act. To begin with, the court in *Cablevision II* acknowledged the “substantial deference we owe the [Commission’s] predictive judgments.”³⁸ In this regard, in both the AT&T/Cablevision complaint and Verizon/Cablevision complaint, the Commission concluded that the anticompetitive harms of Cablevision’s withholding of its RSN programming outweighed any procompetitive benefits in the MVPD market.

In reaching its conclusions, the Commission examined each of the five factors set forth in Section 628(c)(4).³⁹ In each instance, the Commission concluded that the withholding of cable-affiliated RSN programming outweighed any procompetitive benefits in the video programming market.⁴⁰ Importantly, the Commission’s analysis of the five factors did not focus on any characteristics unique to the particular programming or markets at issue, but instead focused more broadly on the non-replicable and popular nature of the RSN programming itself.

b. The Withholding of RSN Programming Harms Local and National MVPD Competition

With respect to the first criteria, the withholding of RSN programming is detrimental to the development of competition in local and national MVPD markets. In its most recent decision

³⁸ *Id.*, 649 F.3d 716.

³⁹ In determining whether Cablevision’s withholding of its affiliated RSN programming was an unfair act, the Commission utilized the criteria set forth in 47 U.S.C. 628(c)(4), which requires an analysis of the exclusive contact with respect to its: (i) effect on the development of competition in local and national MVPD Markets; (ii) effect on the of withholding on alternative video providers to incumbent cable operators; (iii) effect on the attraction of investment in new programming; (iv) effect on the diversity of programming in the MVPD market; and (v) duration of withholding. *See*, 47 U.S.C. 628(c)(4); *see also*, *AT&T Cablevision Order*, ¶¶ 28 – 38; *Verizon Cablevision Order*, ¶¶ 24 – 37.

⁴⁰ *AT&T Cablevision Order*, ¶ 28; *Verizon Cablevision Order*, ¶ 27.

regarding RSN-related complaints, the Commission concluded that the withholding of RSN content “harms consumers by limiting video competition in those markets.” Moreover, it concluded that the impact of such withholding on competition was “particularly acute,” in light of the Commission’s recognition that wireline entrants “pose a greater competitive threat than DBS to cable operators and data indicating that DBS operators do not constrain the price of cable service to the extent that wireline MVPDs do.”⁴¹

Given the Commission’s repeated acknowledgement of the must-have and non-replicable nature of RSN programming, it can use its predictive judgment to conclude that such withholding constitutes an unfair act in *any* designated market area where such withholding occurs. Indeed, the Commission acknowledged in its most recent complaint orders involving Cablevision that a “key distinction” related to the withholding was that it involved “non-replicable and popular RSN programming.”⁴² Because of the non-replicable nature of the content on cable-affiliated RSNs, no MVPD competitor has the ability to formulate a viable competitive response that would allow it to compete for the many subscribers that highly value these networks.⁴³ Simply stated, there is no feasible scenario whereby a competitive MVPD could establish new teams or leagues in order to compete with a cable-affiliated RSN at issue.

c. The Withholding of RSN Programming Adversely Affects the Ability of MVPDs to Compete with Cable Incumbents

With respect to the second criteria, the Commission can safely conclude that there is an adverse effect from the withholding of cable-affiliated RSNs on alternative video providers in their ability to compete with incumbent cable operators. Given their popular and non-replicable

⁴¹ *Verizon Cablevision Order*, ¶ 28.

⁴² *Id.*, ¶ 29.

⁴³ *Id.*

nature, competitive MVPDs must have access to cable-affiliated RSN programming in order to effectively compete. While the Commission's recent order focused on the percentage of networks that are vertically integrated with cable operators, such an approach is misplaced in the context of RSN programming. As it noted in its 2010 Terrestrial Loophole Order, the "salient point for purposes of Section 628(b) is not the total number of programming networks available or the percentage of these networks that are vertically integrated with cable operators, *but rather the popularity of the particular programming that is withheld and how the inability of competitive MVPDs to access that programming in a particular local market may impact their ability to provide a commercially attractive MVPD service.*"⁴⁴

RSNs clearly fit well into this Commission construct, since it has been repeatedly shown that they are the most popular form of programming content, and are essential to the offering of commercially attractive MVPD services. The Commission has pointed to the withholding of cable-affiliated RSNs in Philadelphia and San Diego, where competitive MVPD subscription rates were 40% and 33% below, respectively, of what would otherwise be expected.⁴⁵ In every instance where the Commission has addressed an RSN-related program access complaint, it has concluded that the withholding of that content significantly hindered the ability of MVPDs to compete with cable incumbents.

On multiple occasions, the Commission has emphasized the importance of introducing greater video competition to cable incumbents, particularly with respect to wireline competitors. Specifically, the Commission has concluded that the withholding of programming content "may

⁴⁴ *Terrestrial Loophole Order*, ¶34 (emphasis added).

⁴⁵ Memorandum Opinion and Order, *Applications for Consent to the Assignment and/or Transfer of Control of Licenses, Adelphia Communications Corporation, Assignors to Time Warner Cable, Inc., Assignees, et al.*, 21 FCC Rcd 8203, 8271, FCC 06-105, ¶ 149 (released July 21, 2006). See also, *AT&T Cablevision Order*, n. 8; *Verizon Cablevision Order*, n. 8.

significantly hinder the ability of competitive MVPDs to provide broadband services, particularly in rural areas.”⁴⁶ As the Commission concluded in 2010, allowing such unfair acts related to the withholding of cable-affiliated programming to continue “would undermine the goal of promoting the deployment of advanced services that Congress established as a priority for the Commission.”⁴⁷ Then, as now, this secondary effect “heightens the urgency for Commission action.”⁴⁸

d. The Withholding of RSN Programming is Unnecessary for Attracting Investment in New Programming

With respect to the third criteria, the Commission has previously found that attraction of investment in new programming weighs against an exclusive arrangement when “the network is established and does not currently need to offer exclusivity in order to obtain carriage and attract capital investments.”⁴⁹ There is no programming more lucrative or desirable than RSNs, and exclusive arrangements are unnecessary in order to obtain carriage or attract capital investment.

In fact, the withholding of a cable-affiliated RSN by an incumbent cable operator would substantially *decrease* the attraction of investment in new programming. A cable-affiliate’s decision to deny a competitive MVPD access to RSN programming would significantly hinder that MVPD’s ability to effectively compete in, or even enter new markets. Because RSN

⁴⁶ *Terrestrial Loophole Order*, ¶31.

⁴⁷ *Terrestrial Loophole Order*, ¶36. *See also* Telecommunications Act of 1996, Pub. L. No. 104-104, § 706, 110 Stat. 56, 153 (codified at 47 U.S.C. § 157 note). Congress has repeatedly directed the Commission to promote the deployment of broadband throughout the nation. *See* American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 123 Stat. 115 (2009) (authorizing the Commission to create the National Broadband Plan that “shall seek to ensure that all people of the United States have access to broadband capability”); Telecommunications Act of 1996, Pub. L. No. 104-104, § 706, 110 Stat. 56, 153 (codified at 47 U.S.C. § 157 nt. (2008)) (directing the Commission to “encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans”).

⁴⁸ *Terrestrial Loophole Order*, ¶ 36.

⁴⁹ *AT&T Cablevision Order*, ¶ 32 *Verizon Cablevision Order*, ¶ 31.

programming is non-replicable, it would therefore be impossible for the MVPD entrant to attract investment in such programming. Moreover, by lacking access to RSN programming, it would be equally difficult for that new MVPD entrant to attract investment in any new programming network given its weakened competitive position.

e. The Withholding of RSN Does not Promote Programming Diversity

Regarding the fourth criteria, there is no basis for the Commission to conclude that diversity of programming would receive any positive effects from the withholding of cable-affiliated RSN programming in the MVPD market. In fact, just the opposite is true. As the Commission noted in previous program access complaints, RSN programming is non-replicable and “no amount of investment can duplicate the unique attributes of such programming.”⁵⁰ As such the potential for diversity in such programming is non-existent, given its non-replicable nature.

While such withholding strategies may be appropriate for new and untested programming services – such as regional news networks – the same cannot be said for RSN programming. Such programming is among the most popular type of programming available to consumers and, given that its programming content involves specific sports leagues and teams, it is impossible to introduce a competitive alternative. Indeed, as Time Warner Cable’s Chief Executive Officer, Glenn A. Britt recently acknowledged in a conference call with investors, “most of the sports rights are tied out for many, many years to come.”⁵¹

⁵⁰ *AT&T Cablevision Order*, ¶ 36; *Verizon Cablevision Order*, ¶ 35.

⁵¹ 2012 Q2 Earnings Transcript (available at: <http://seekingalpha.com/article/531451-time-warner-cable-management-discusses-q1-2012-results-earnings-call-transcript?part=single>) (visited December 14, 2012).

f. The Duration of Withholding RSN Programming Will Always Weigh Against the Cable-Affiliated Owner of Such Content

The duration of withholding of any RSN will always weigh against the cable-affiliated owner of such content. The lack of access to such content for even one year could feasibly result in the loss of consumer access to several seasons-worth of sports programming. For example, the recently launched Time Warner Cable SportsNet in Los Angeles is the exclusive home to the Los Angeles Lakers (NBA), LA Galaxy (MLS) and Los Angeles Sparks (WNBA), as well as collegiate football and basketball leagues in the Mountain West Conference.⁵² As a result, the loss of access to this content for even a single year, would impact five distinct seasons of professional and collegiate sports.

Establishment of a rebuttable presumption by the Commission that the withholding of a cable-affiliated RSN constitutes an unfair act also satisfies the *Cablevision II* court's second criteria that "proof of one fact renders the existence of another fact so probable that it is sensible and timesaving to assume the truth of [the inferred] fact . . . until the adversary disproves it." Rather than force competitors and Commission staff to undertake repetitive and time-consuming examinations of historical evidence and precedents concerning withholding of such programming, the Commission should allow complainants to invoke a rebuttable presumption that the withholding of such a cable-affiliated regional programming network is an unfair act.⁵³

⁵² Maury Brown, Forbes, *Time Warner Cable Launches Two Regional Sports Networks, Lakers Reap \$4 Billion*, October 1, 2012 (available at: <http://www.forbes.com/sites/maurybrown/2012/10/01/time-warner-cable-launches-two-regional-sports-networks-lakers-reap-4-billion/>) (visited December 14, 2012).

⁵³ Because of the continued importance of high definition (HD) programming in the marketplace and its distinctive characteristics, the Commission should continue to analyze the HD version of a network separately from the standard definition (SD) version with similar content for purposes of its statutory analysis. Thus, the fact that a defendant offers the SD version of a network to subscribers will not alone be sufficient to refute the complainant's showing that lack of access to the HD version has the purpose or effect set forth in Section 628(b).

It is both “sensible and timesaving” for the Commission to adopt such a rebuttable presumption, given the significant evidence that such withholding is an unfair act.

2. The FCC Should Retain the Standstill Mechanism During the Pendency of a Complaint Involving a Cable-Affiliated RSN.

During the pendency of an RSN related program access complaint, USTelecom urges the Commission to adopt a standstill agreement as a matter of course. Under the Commission’s current rules, an MVPD seeking renewal of an existing programming contract may obtain a temporary standstill of the price, terms, and other conditions of such a contract through the program access complaint process.⁵⁴ Absent the automatic granting of a standstill agreement, the Commission should adopt a rebuttable presumption that the complainant is likely to prevail on each of the four merits outlined in its rules.⁵⁵

As the Commission noted in its Terrestrial Loophole Order, it has “statutory authority to impose a temporary standstill of an existing contract in appropriate cases pending resolution of a program access complaint.”⁵⁶ Specifically, it is authorized to “make such rules and regulations . . . as may be necessary in the execution of its functions,” and to “[m]ake such rules and regulations . . . not inconsistent with law, as may be necessary to carry out the provisions of this Act.”⁵⁷ In addition to implementing such a framework in four previous merger orders,⁵⁸ the Commission’s authority to do so has been affirmed by the Supreme Court.⁵⁹

⁵⁴ 47 C.F.R. § 76.1003(1). A standstill will granted upon a showing that the complainant is likely to prevail on the merits of its complaint, the complainant will suffer irreparable harm, that grant of a stay will not substantially harm other interested parties, and the public interest favors grant of a stay.

⁵⁵ 47 C.F.R. § 76.1003(1).

⁵⁶ *Terrestrial Loophole Order*, ¶ 72.

⁵⁷ *Id.*

⁵⁸ See e.g., Memorandum Opinion and Order, *News Corp. and DIRECTV Group, Inc. and Liberty Media Corp. for Authority to Transfer Control*, 23 FCC Rcd 3265, 3346, Appendix B, §

After the filing of a complaint, immediate implementation of a standstill mechanism for RSN programming is particularly critical, due to the unique nature of the programming. Given the tremendous consumer interest in sports programming, and its time-sensitive nature, the loss of RSN networks has a significant impact on consumers and competitive MVPDs alike. In its order regarding the AT&T Cablevision dispute, the Commission acknowledged survey findings showing that 39 percent of respondents in the New York DMA watched a regional sports channel “at least several times per week.”⁶⁰ In addition, when asked how important it is to watch a game of a team they closely follow, 58 percent of respondents in the New York DMA stated that it was “very important” or “somewhat important.”⁶¹ These findings underscore the point that missing even a few weeks of a single season is tremendously disruptive to consumers and can significantly impede MVPD competition.

Previous experience has shown that program access related cases can take months, and even years, to resolve. For example, both AT&T and Verizon filed their initial program access

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IV(A)(3) (2008); Memorandum Opinion and Order, *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, Adelphia Communications Corporation, (and Subsidiaries, Debtors-In-Possession), Assignors and Transferors, to Comcast Corporation (Subsidiaries), Assignees and Transferees*, 21 FCC Rcd 8203, 8337, Appendix B, § 2(c) (2006); Memorandum Opinion and Order, *General Motors Corporation and Hughes Electronics Corporation, Transferors, and The News Corporation Limited, Transferee*, 19 FCC Rcd 473, 554, ¶ 177 (2004); Memorandum Opinion and Order, *Applications of Comcast Corporation, General Electric Company and NBC Universal, Inc.*, 26 FCC Rcd. 4238, ¶ 52 – 53 (2011) (*Comcast Order*).

⁵⁹ See e.g., *United States v. Southwestern Cable Co.*, 392 U.S. 157, 181 (1968).

⁶⁰ *AT&T Cablevision Order*, n. 239.

⁶¹ *Id.*

complaints against Cablevision during the summer of 2009.⁶² Even preceding the filing of their complaints, Cablevision spent years continually refusing to provide both MVPD entrants with access to the HD feed of the RSN.⁶³ Even after AT&T and Verizon filed their respective complaints in 2009, the complaint process was not resolved by the Commission until September 2011. With each passing sports season, cable incumbents are rewarded by dragging out the process, since it severely undermines competition and consumer choice. Moreover, the burdens and expense of the process are likely to deter many competitive providers from even bothering to pursue the complaint process, while the lack of any penalty for such behavior fails to provide the necessary disincentive to cable operators and their affiliated programmers. It is therefore imperative that the Commission institute a meaningful standstill process.

In instances where a standstill is exercised, any subsequent Commission decision on the complaint should make the terms of the new agreement between the parties, if any, retroactive to the expiration date of the previous agreement. As a result of this approach, consumers will be ensured continued access to local sports programming, and the owner of the cable affiliated RSN will be fully compensated for carriage. As the Commission noted in its Terrestrial Loophole Order, such an approach will limit the ability of vertically integrated programmers to use temporary foreclosure strategies (*i.e.*, withholding programming to extract concessions from an MVPD during renewal negotiations) while also encouraging settlement between the parties.⁶⁴ A

⁶² AT&T filed its complaint against Cablevision on August 13, 2009. *AT&T Cablevision Order*, ¶ 8. Verizon filed its complaint against Cablevision on July 7, 2009. *Verizon Cablevision Order*, ¶ 8. Both complaints were resolved by the Commission more than 2 years later on September 22, 2011.

⁶³ Verizon was denied access to the HD feed of the RSN as early as 2006. *Verizon Cablevision Order*, ¶ 7. AT&T was denied access to the HD feed of the RSN as early as 2007. *AT&T Cablevision Order*, ¶ 7.

⁶⁴ *Terrestrial Loophole Order*, ¶ 71.

standstill mechanism will ultimately increase the usefulness of the program access complaint process.

3. The FCC Should Establish a Rebuttable Presumptions for Exclusive Contracts Involving Cable-Affiliated National Sports Networks.

Given the unique and non-replicable nature of sports programming, the Commission must establish rebuttable evidentiary presumptions for complainants bringing cases under Section 628(b) not only for cases involving access to satellite or terrestrially-delivered RSNs, but also for complaints involving access to cable-affiliated national cable networks that air the same amount of sports programming as RSNs. Just as the sports programming content on RSNs is highly valuable and non-replicable, national sports programming networks generally contain marquee sports programming of tremendous interest to consumers.

There is no reason to believe that nonreplicable programming distributed on a regional basis would somehow lose this quality when distributed on a national basis. National cable networks air sports content from the same professional and college sports leagues as RSNs, and as such, both such networks air non-replicable content. It is therefore appropriate for national sports programming networks to be treated identically to RSNs due to their inherent similarities. Whether distributed on a national or regional basis, sporting events that include the most popular sports leagues remain non-replicable and highly desired by consumers.

National cable programming networks that carry significant amounts of sports content include well-known sports networks like ESPN and NBC Sports (formally Versus). Networks like TNT and TBS – while not exclusively dedicated to sports programming – often feature the most competitive matchups of the week from the leagues, and matchups involving popular teams. The most popular sports leagues, such as Major League Baseball (MLB), the National Basketball Association (NBA), the National Hockey League, and the National Collegiate

Athletic Association (NCAA), often distribute their playoff, tournament and bowl games on cable networks, which are often the most desired games to view of the season.

TBS, for example, was the exclusive provider of several 2012 MLB playoff series.⁶⁵ During the 2012 NCAA March Madness Tournament, TBS broadcast 16 games, including games in the second round, third round and the Sweet 16; while TNT aired 12 games, including second round and third round games.⁶⁶ In addition to Monday Night Football and exclusive rights to select NCAA football and basketball games, ESPN is reportedly close to securing media rights for the entire college football playoff system, meaning the network would own college football's postseason over 12 years, beginning with the 2014 season.⁶⁷ In total, the deal would include 12 national championship games and 24 semifinal games within the new college football four-team playoff, as well as the rights to three "access" bowls.

Sporting events carried on national cable programming networks are often times more desirable than games on RSNs, and even other non-sports related programming. For example, during the week of the 2012 Presidential election, the number one rated programming on cable was Monday Night Football.⁶⁸ Of the top 25 programs during the same reporting period, twenty

⁶⁵ See, Adam Wells, October 3, 2012, *MLB Playoff Schedule 2012: Start Times, Dates, Live Stream and TV Info*, Bleacher Report website (available at: <http://bleacherreport.com/articles/1356805-mlb-playoff-schedule-2012-start-times-dates-live-stream-and-tv-info>) (visited December 14, 2012).

⁶⁶ Richard Deitsch, Sports Illustrated, March 13, 2012, *Ultimate viewer's guide for the 2012 NCAA tournament*, (available at: http://sportsillustrated.cnn.com/2012/writers/richard_deitsch/03/12/NCAA.Viewers.Guide/index.html) (visited December 14, 2012).

⁶⁷ John Ourand, Michael Smith, Sporting News, November 9, 2012, ESPN closing in on \$500 million BCS media rights deal (available at: <http://aol.sportingnews.com/ncaa-football/story/2012-11-09/bcs-media-rights-deal-espn-500-million-per-season-tv-rights-contract-bowls>) (visited December 14, 2012).

⁶⁸ Sara Bibel, *Cable Top 25: Monday Night Football Tops Cable Viewership for the Week Ending November 11, 2012*, November 13, 2012, TV by the Numbers website (available at: <http://tvbythenumbers.zap2it.com/2012/11/13/cable-top-25-monday-night-football-tops-cable->

were related to the election and 3 were nationally distributed sports programming.⁶⁹ In addition to the number one ranked Monday Night Football, Thursday Night Football was ranked twentieth, followed by the NASCAR Sprint Cup ranked twenty-fifth.⁷⁰

With the exception of their singular difference in geographic scope, national sports programming networks are identical to RSNs. Based upon their tremendous popularity and their shared characteristics with RSNs, national sports programming should be treated no differently by the Commission than RSNs. The Commission acknowledged this reality in its Comcast-NBCU Order when it stated that ““certain national cable programming networks produce programming that is more widely viewed and commands higher advertising revenue than certain broadcast or RSN programming.””⁷¹

B. At a Minimum, the FCC Should Establish a Rebuttable Presumption for Previously Challenged Exclusive Contracts.

The Commission should establish a rebuttable presumption that, once a complainant succeeds in demonstrating that an exclusive contract involving a cable-affiliated network – regardless of whether it is terrestrially delivered or satellite-delivered – is anti-competitive, any other exclusive contract involving the same network will be afforded the same treatment. The Commission is permitted to exercise its predictive judgment in such instances, and such an approach would economize the Commission’s limited resources, by foreclosing the need for Commission staff to undertake repetitive examinations of program access complaints.

(footnote cont’d.)
[viewership-for-the-week-ending-november-11-2012/157114/](#) (visited December 14, 2012) (*TV by the Numbers website*).

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Comcast Order*, ¶ 46.

As a threshold matter, any successful complaint under the Section 628(b) framework by an aggrieved MVPD would factually demonstrate that the withholding of the programming at issue was both “unfair,” and that lack of access significantly hindered the MVPD’s ability to provide satellite cable programming. In the event the Commission reaches such a conclusion in one complaint proceeding, it is free to use its predictive judgment that the factors relating to such ‘must-have’ programming in one (or several) markets, will have the same effect on different MVPDs in other markets.

Such an approach would be particularly beneficial to smaller MVPDs and to the Commission’s broadband policy goals. USTelecom has previously noted the significant time, costs and associated delays inherent in the current complaint process,⁷² as evidenced by recent proceedings at the Commission.⁷³ In addition, it has been well established that smaller MVPDs lack the financial resources to initiate – much less, prosecute – a program access complaint.⁷⁴ Given the intrinsic link between video and broadband deployment acknowledged by the Commission on numerous occasions,⁷⁵ the costly delays associated with any program access

⁷² See e.g., Letter from Glenn Reynolds, Vice President, Law and Policy, USTelecom, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 07-198, p. 9 (Jan. 12, 2010) (noting that any Commission complaint process must be efficient and timely).

⁷³ See, n. 63, *supra*. The complaints addressed in these orders were filed by Verizon and AT&T in June, 2009 and August, 2009, respectively. They were ultimately resolved by the Commission in September, 2011.

⁷⁴ See e.g., Comments of the Organization for the Promotion and Advancement of Small Telecommunications Companies (OPASTCO) and the National Telecommunications Cooperative Association (NTCA), MB Docket No. 12-68 pp. 7 – 8 (June 22, 2012) (noting that smaller MVPDs “lack the resources” to engage in “expensive, drawn out” program access complaint proceedings.”); Comments of the Independent Telephone & Telecommunications Alliance, MB Docket No. 12-68, p. 9 (June 22, 2012) (noting that the Commission’s program access complaint process is “an unrealistic means for smaller and new entrant MVPDs to seek relief.”).

⁷⁵ See e.g., *Franchise Reform Order*, ¶51 (2006) (concluding that “broadband deployment and video entry are ‘inextricably linked’”); *Id.*, ¶62 (stating that, “[t]he record here indicates that a provider’s ability to offer video service and to deploy broadband networks are linked

complaint would have a cascading effect on broadband deployment. The denial of access to must-have programming would not only eliminate the ability of smaller MVPDs to compete in the video marketplace, but would severely diminish wireline competition for voice and broadband service.

C. The FCC Should Adopt a Shot-Clock and Interim Carriage for New Entrants Seeking Programming Contracts.

The FCC should adopt procedures specific to new MVPD entrants seeking access to vertically integrated programming under a new contract. In instances where a new MVPD is unable to reach an agreement with vertically integrated programmer for a certain network (or networks), the Commission should establish a shot clock for resolving any associated program access complaint. In addition, the Commission should establish a mechanism whereby a new MVPD may request interim carriage of the programming subject to retroactive application of established prices, terms and conditions during the pendency of any complaint.

First, any complaint process should be subject to a strict ‘shot-clock’ (not to exceed 60 days) in order to ensure expeditious resolution of an underlying complaint. The Commission has established a shot-clock in numerous other instances, and its importance in the program access complaint process is paramount. Particularly for new wireline MVPD entrants, the ability to offer viable video packages to consumers is essential.

When a competitive MVPD is launching a brand new video service, the importance of a competitive video package is essential to ensuring competition. Launching a video service

(footnote cont’d.)

intrinsicly, and the federal goals of enhanced cable competition and rapid broadband deployment are interrelated.”); *MDU Order*, ¶20 (2007) (stating that “broadband deployment and entry into the MVPD business are ‘inextricably linked.’”); *Terrestrial Loophole Order*, ¶36 (concluding that “a wireline firm’s decision to deploy broadband is linked to its ability to offer video.”).

without must-have programming – particularly RSN related programming – can severely limit the ability of a new entrant to compete with the incumbent cable operator. Moreover, if a new video service is launched without must-have programming, lengthy disputes can severely limit the marketability of the service on a going forward basis.

As a result, wireline entrants attempting to offer bundled services (*i.e.*, voice, video and broadband offerings), will encounter difficulty retaining subscribers and attracting new ones. The hindrance on competition will ultimately be borne by consumers, in the form of higher prices for such bundled offerings. As one small, rural provider noted in the underlying proceeding, “if any of the large, vertically integrated companies against which we compete directly could deny us access to programming that customers expect and demand, our ability to compete would be severely undercut. Simply put, if large, vertically integrated MVPDs are allowed to withhold programming, the results would not only eliminate smaller MVPDs with which they might compete, but would effectively eliminate competition for voice and broadband service.”⁷⁶

Second, the Commission should establish a mechanism whereby once a new MVPD files a complaint, that MVPD complainant should be granted temporary access to the subject programming. Much in the same way that standstills are beneficial during the Commission’s deliberation on existing program access contract complaints, such an approach is equally appropriate – if not more so –for new MVPD entrants.

⁷⁶ See, Letter from H. Keith Oliver, Home Telecom, to Marlene Dortch, Secretary, Federal Communications Commission, MB Docket No. 12-68, dated September 20, 2012.

III. CONCLUSION

Changes to the current program access rules have taken on added importance since the Commission's recent decision to decline to extend its exclusive contract prohibition. Given the ongoing importance of access to vertically integrated programming content by competitive MVPD services in the deployment of bundled voice and broadband services, USTelecom supports the Commission's narrowly tailored and reasonable modifications to its program access rules contained in the Notice.

Respectfully submitted,

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