

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

In the Matter of	)	
	)	
Revision of the Commission's Program	)	MB Docket No. 12-68
Access Rules	)	

**COMMENTS OF CENTURYLINK, INC. AND FRONTIER COMMUNICATIONS**

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**INTRODUCTION AND SUMMARY**

CenturyLink is a relatively new entrant to the video distribution market, including with its Prism TV service—a high-quality IP-based multichannel video programming distribution service that is now available in eight geographic markets (soon to be nine). Similarly, in July 2010 following its acquisition of certain Verizon operations, Frontier Communications (Frontier) began offering and today continues to provide FiOS video service in Oregon, Washington, and Indiana markets. For new entrants such as CenturyLink and Frontier to maintain and expand competitive service, access to highly valued programming on reasonable terms and conditions is essential. CenturyLink and Frontier file these comments to urge that the Commission adopt the rebuttable presumptions proposed in the Further Notice of Proposed Rulemaking (“*Notice*”) in the above-captioned proceeding concerning the Commission’s program access rules.<sup>1</sup>

Like other parties striving to improve the state of competition in the multichannel video distribution marketplace and expand access to broadband, CenturyLink opposed the sunset of the presumptive ban on exclusive contracts for cable-affiliated, satellite-delivered programming.

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<sup>1</sup> *Revision of the Commission’s Program Access Rules*, Report and Order in MB Docket Nos. 12-68, 07-18, 05-192, Further Notice of Proposed Rulemaking in MB Docket No. 12-68, Order on Reconsideration in MB Docket No. 07-29, 27 FCC Rcd. 12,605 (2012); Notice of Proposed Rulemaking, 77 Fed. Reg. 66052 (Oct. 31, 2012); Order, 12-1871 (Nov. 19, 2012).

That presumptive ban helped to prevent anticompetitive conduct by cable-affiliated programmers, which have skewed incentives to distribute popular programming solely to their affiliated cable systems. Risk to competition is especially great in the case of exclusive contracts for cable-affiliated regional and national sports networks (“RSNs” and “NSNs,” respectively); these networks carry must-see programming without which it is difficult for new entrants to compete. Without evidentiary presumptions of the sort proposed in the *Notice*, unaffiliated multichannel video programming distributors (“MVPDs”) would face unnecessary costs and delays in attempting to challenge anticompetitive exclusive contracts for RSNs and NSNs under Section 628 of the Communications Act.

In particular, CenturyLink and Frontier encourage the Commission to adopt the following presumptions:

- Exclusive contracts for cable-affiliated RSNs are unfair acts. Given the “must-have” nature of RSN programming, a cable-affiliated RSN does not need an exclusive contract to secure distribution. Because exclusive contracts for RSNs lack any procompetitive benefit, it is reasonable to presume that such exclusive contracts are unfair acts.
- Complainants challenging exclusive contracts for RSNs are entitled to a standstill order during the pendency of the program access complaint. Again due to the must-have nature of RSN programming, “it is sensible and timesaving to assume [that the complainant is entitled to a standstill] until the adversary disproves it.”
- Where the Commission already has found an exclusive contract to violate Section 628 of the Act, it should presume that another exclusive contract involving the same network would also violate Section 628. Requiring a complainant to re-litigate the same question already decided by the Commission would be irrational and a poor use of agency resources.

In all cases, cable-affiliated programmers would be free to seek to rebut any evidentiary presumption to which they are subject, should they so choose. But, by establishing these rebuttable presumptions, the Commission will ameliorate, at least to some extent, the risk posed

to competition in the MVPD marketplace by the sunset of the presumptive ban on exclusive contracts.

**I. THE COMMISSION SHOULD ESTABLISH A REBUTTABLE PRESUMPTION THAT AN EXCLUSIVE CONTRACT FOR A CABLE-AFFILIATED REGIONAL SPORTS NETWORK (“RSN”) IS AN “UNFAIR ACT.”**

Vertical integration of RSNs is particularly threatening to competition in the MVPD marketplace because, as the Commission has observed, “RSNs typically offer non-replicable content and are considered ‘must have’ programming by MVPDs.”<sup>2</sup> In line with this finding, the Commission already has established a rebuttable presumption that an exclusive contract involving a cable-affiliated RSN has the purpose or effect of significantly hindering or preventing the complainant from providing programming.<sup>3</sup> Particularly with the number of cable-affiliated RSNs having ballooned from 18 in 2007 to 56 today, the Commission should also establish a rebuttable presumption that an exclusive contract for a cable-affiliated RSN is an “unfair act.”

**A. Exclusive Contracts for Cable-Affiliated RSNs Do Not Have Any Procompetitive Benefits.**

Exclusive contracts for cable-affiliated RSNs do not provide any of the benefits typically cited to justify exclusive contracts by cable-affiliated programmers: promotion of investment, diversity, or innovation in programming.<sup>4</sup> Because they lack any procompetitive benefits, these exclusive contracts are unfair acts.

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<sup>2</sup> See *Review of the Commission’s Program Access Rules and Examination of Programming Tying Arrangements*, First Report and Order, 25 FCC Rcd. 746, 782, ¶ 52 (footnotes omitted) (2010) (“*2010 Program Access Order*”), *aff’d in relevant part sub nom. Cablevision Sys. Corp. v. FCC*, 649 F.3d 695 (D.C. Cir. 2011) (“*Cablevision II*”).

<sup>3</sup> See *Notice*, 27 FCC Rcd. at 12,655, ¶ 75; *2010 Program Access Order*, 25 FCC Rcd. at 782–83, ¶ 52.

<sup>4</sup> See, e.g., *Notice*, 27 FCC Rcd. at 12,629–30, ¶ 35.

RSNs carry popular programming—such as the games of the Boston Celtics (NBA), Philadelphia Phillies (MLB), and Washington Capitals (NHL), among many others—that will attract investment and distribution regardless of whether the network offers an exclusive contract to a single MVPD partner. The popular sporting events carried by RSNs are not new programming innovations that need to be offered via exclusive contracts with an MVPD to incentivize distribution. And as Commissioner Pai observes in his separate statement to the *Notice*, “[t]he Commission has long recognized that many RSNs carry programming that consumers consider ‘must-have.’”<sup>5</sup> It therefore is difficult, if not impossible, to conceive of a situation in which diversity or innovation in programming will fail to materialize unless a cable-affiliated RSN is allowed to restrict distribution of its programming to its commonly owned cable systems.

Likewise, the well-known and highly demanded sporting events featured on RSNs are not dependent on MVPDs for marketing; the networks, leagues, and teams have demonstrated that they are more than capable of promoting themselves. Nor can a competing MVPD hope to replicate or substitute such popular sports programming, which typically is licensed on an exclusive basis to the RSN owner. As the Commission has found, RSNs are “very likely to be both non-replicable and highly valued by consumers.”<sup>6</sup> RSNs thus are the opposite of the new, obscure, or easily replicable programming for which the Commission has suggested that cable-affiliated exclusive contracts might benefit consumers.<sup>7</sup> As the Commission has explained, “when programming is non-replicable and valuable to consumers, *such as regional sports*

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<sup>5</sup> See *Notice*, 27 FCC Rcd. at 12,750.

<sup>6</sup> 2010 *Program Access Order*, 25 FCC Rcd. at 782, ¶ 52.

<sup>7</sup> See *Notice* at 12,629–30, ¶ 35.

*programming*, no amount of investment can duplicate the unique attributes of such programming.”<sup>8</sup>

Because there are no conceivable procompetitive benefits for exclusive contracts with cable-affiliated RSNs, the Commission would be justified in adopting an *irrebuttable* presumption that exclusive contracts for cable-affiliated RSNs are “unfair acts.” Certainly the evidence therefore supports a *rebuttable* presumption, which would allow a cable-affiliated RSN to present case-specific evidence if it believed its circumstances were unique.

**B. The Commission Has the Authority to Adopt an Evidentiary Presumption That Exclusive Contracts for RSNs Are “Unfair Acts.”**

The U.S. Court of Appeals for the D.C. Circuit defers to an agency’s decision to adopt an evidentiary presumption so long as “there is a sound and rational connection between the proved and inferred facts” and “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.”<sup>9</sup> Applying this standard in *Cablevision II*, the D.C. Circuit upheld the Commission’s decision to adopt a rebuttable presumption that an unfair act involving a terrestrially-delivered, cable-affiliated RSN has the purpose or effect of significantly hindering or preventing an MVPD from providing programming. Today’s proposal—a rebuttable presumption that exclusive contracts for all cable-affiliated RSNs are “unfair acts”—also falls squarely within the Commission’s jurisdiction.

Although *Cablevision II* rejected an *irrebuttable* presumption that *all* exclusive contracts for cable-affiliated terrestrial programming are “unfair acts,”<sup>10</sup> the court implied that a *rebuttable*

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<sup>8</sup> See *2010 Program Access Order*, 25 FCC Rcd. at 750, ¶ 9 (emphasis added).

<sup>9</sup> *Cablevision II*, 649 F.3d at 716 (citation omitted).

<sup>10</sup> See *id.* at 720–22.

presumption like the current proposal would be permissible. The court explained 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 . . .*, then it must grapple with whether its definition of unfairness would apply to conduct that appears procompetitive.”<sup>11</sup> A rebuttable presumption avoids this issue entirely by requiring the Commission to assess fairness on a case-by-case basis whenever a defendant in a complaint proceeding presents evidence that its exclusive contract with its affiliated RSN is not unfair.

Moreover, *Cablevision II* specifically suggested that even an irrebuttable presumption might be permissible if it were to apply only to RSNs. The D.C. Circuit explained that it was troubled by the universality of the irrebuttable presumption because local news networks might be obligated to share their programming despite the fact that, “[u]nlike RSN programming, local news and local community or educational programming is readily replicable by competitive MVPDs.”<sup>12</sup> A presumption confined specifically to RSNs—which, as the court acknowledged, are not replicable by competing MVPDs—avoids any such problem.<sup>13</sup>

## **II. THE COMMISSION SHOULD ESTABLISH A REBUTTABLE PRESUMPTION THAT A COMPLAINANT CHALLENGING AN EXCLUSIVE CONTRACT FOR A CABLE-AFFILIATED RSN IS ENTITLED TO A STANDSTILL.**

Under the Commission’s rules, a complainant seeking a standstill generally bears the burden of demonstrating that: (1) it is likely to prevail on the merits, (2) it will suffer irreparable harm absent a standstill, (3) a standstill would not substantially harm other interested parties, and

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<sup>11</sup> *Id.* at 723 (emphasis added).

<sup>12</sup> *Id.* at 722 (emphasis added) (citation and internal quotation marks omitted).

<sup>13</sup> It also bears noting that the D.C. Circuit did not even categorically reject an across-the-board irrebuttable presumption that all exclusive contracts for cable-affiliated terrestrial programming are “unfair acts.” Rather, it held simply that the Commission did not sufficiently “grapple with whether its definition of unfairness would apply to conduct that appears procompetitive.” *Id.* at 723.

(4) the public interest favors a standstill.<sup>14</sup> Nearly all complaints challenging exclusive contracts for cable-affiliated RSNs will satisfy these four criteria. Accordingly, because “it is sensible and timesaving to assume [that the complainant is entitled to a standstill] until the adversary disproves it,”<sup>15</sup> the Commission should adopt a rebuttable presumption that such complainants are entitled to a standstill.

**A. The Vast Majority of Complaints Challenging Exclusive Contracts for Cable-Affiliated RSNs Will Satisfy the Four Criteria for a Standstill.**

*1. Likelihood of Success on the Merits*

A complainant alleging a violation of Section 628(b) must prove that the relevant exclusive contract (1) is an “unfair act” and (2) has the “purpose or effect” of significantly hindering or preventing the complainant from providing programming.<sup>16</sup> As explained above, exclusive contracts for cable-affiliated RSNs are nearly always “unfair acts.” And the Commission has already established a rebuttable presumption that an exclusive contract involving a cable-affiliated RSN has the purpose or effect of significantly hindering or preventing the complainant from providing programming.<sup>17</sup> Because both of the elements of Section 628(b) are highly likely to be established for exclusive contracts for cable-affiliated RSNs, it is reasonable to assume that a complainant challenging such a contract is likely to prevail on the merits.<sup>18</sup>

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<sup>14</sup> See 47 C.F.R. § 76.1003(l); *Notice*, 27 FCC Rcd. at 12,656, ¶ 78.

<sup>15</sup> *Cablevision II*, 649 F.3d at 716 (citation omitted).

<sup>16</sup> 47 U.S.C. § 548(b); *Notice*, 27 FCC Rcd. at 12,655, ¶ 75.

<sup>17</sup> See *Notice*, 27 FCC Rcd. at 12,655, ¶ 75; *2010 Program Access Order*, 25 FCC Rcd. at 782–83, ¶ 52.

<sup>18</sup> Of course, a defendant who believes its unique exclusive contract with its affiliated RSN does not violate Section 628(b) remains free to rebut this presumption.

## 2. *Irreparable Harm*

A competing MVPD complainant will almost always suffer irreparable harm absent a stay because—as the Commission observed when establishing a rebuttable presumption that such exclusive contracts for cable-affiliated RSNs have the purpose or effect of significantly hindering competitors—“RSNs . . . are considered ‘must have’ programming.”<sup>19</sup> Viewers will not passively wait during the significant portion of a sports season (or longer) while missing their local team’s games before switching to the vertically integrated cable operator with the exclusive contract. Moreover, even if the complainant ultimately prevails, customers face significant switching costs when changing MVPDs and thus will be unlikely to switch back to the complainant MVPD—even if the complainant offers somewhat better service or prices.<sup>20</sup>

## 3. *Other Parties*

Preliminarily enjoining an exclusive contract for a cable-affiliated RSN is highly unlikely to harm any third parties, given that the standstill does not affect the rights of anyone other than the cable-affiliated programmer and its commonly owned cable systems.

## 4. *Public Interest*

A standstill would allow the public to enjoy wider dissemination of the RSN’s programming during the proceedings. Moreover, the complainant’s likelihood of success on the merits—for the reasons discussed above—demonstrates that such contracts nearly always harm

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<sup>19</sup> *2010 Program Access Order*, 25 FCC Rcd. at 782, ¶ 52.

<sup>20</sup> *Cf.*, e.g., Andrew Stewart Wise & Kiran Duwadi, *Competition Between Cable Television and Direct Broadcast Satellite: The Importance of Switching Costs and Regional Sports Networks*, 1 J. Competition L. & Econ. 679, 684–85, 697, 702 (2005) (“One possible way of looking at the multichannel video market, supported by the results in this paper, is in the context of the theory of switching costs. . . . [C]onsumers are reluctant to change due to real or perceived switching costs . . . .” *Id.* at 702.); Nicholas Economides, *Broadband Openness Rules Are Fully Justified by Economic Research* 5 (N.Y.U. Law & Econ. Research Paper Series, Working Paper No. 10-31, 2010), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1627694](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1627694) (“[C]ustomers face significant costs in changing last mile broadband access networks.”).

consumers and thus go against the public's interests. And in the aggregate, withholding of RSNs by vertically integrated MVPDs would diminish competition in the video marketplace. The Commission time and again has recognized the importance of promoting such competition.<sup>21</sup>

It also bears noting that the Commission's authority to grant a standstill is not strictly limited to situations in which all four of the criteria adopted in the *2010 Program Access Order* are satisfied,<sup>22</sup> though those four factors are generally relevant considerations.<sup>23</sup> Therefore, even if the Commission cannot be certain at this point that every complainant will suffer irreparable harm, complainants are so likely to succeed on the merits when challenging an exclusive contract for a cable-affiliated RSN that a standstill would nonetheless be appropriate in the vast majority of such cases—thus justifying an appropriate rebuttable presumption.

**B. D.C. Circuit Precedent Permits the Commission to Adopt Such an Evidentiary Presumption.**

For the reasons stated above, the high probability a complainant will satisfy the four criteria for a standstill makes a presumption in favor of such a standstill “sound and rational” and “sensible,” satisfying the D.C. Circuit's test for permissibility of an agency's adoption of an evidentiary presumption.<sup>24</sup>

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<sup>21</sup> See, e.g., *2010 Program Access Order*, 25 FCC Rcd. at 782–83, ¶ 52; *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.*, Memorandum Opinion and Order, 21 FCC Rcd. 8203, 8267–73, ¶¶ 140–54 (2006) (“*Adelphia Order*”).

<sup>22</sup> See *2010 Program Access Order*, 25 FCC Rcd. at 804 (adding paragraph (I), regarding petitions for temporary standstills, to section 76.1003 of the Commission's rules).

<sup>23</sup> See 47 U.S.C. § 154(i); *Game Show Network, LLC v. Cablevision Sys. Corp.*, 26 FCC Rcd. 16,471, 16,474, ¶ 10 (2011) (“In evaluating a request for preliminary injunctive relief, the Commission and the courts *generally* consider the following four factors . . . .”) (emphasis added).

<sup>24</sup> *Cablevision II*, 649 F.3d at 716.

**III. THE COMMISSION SHOULD ESTABLISH REBUTTABLE PRESUMPTIONS THAT AN EXCLUSIVE CONTRACT FOR A CABLE-AFFILIATED NATIONAL SPORTS NETWORK (“NSN”) IS BOTH AN “UNFAIR ACT” AND A “SIGNIFICANT HINDRANCE.”**

Exclusive contracts for cable-affiliated NSNs also pose a significant threat to competitive choice for consumers. Some one hundred satellite-delivered national networks are now vertically integrated.<sup>25</sup> Any definition of NSN would likely include the Golf Channel, Mun2, NBC Sports, and Universal Sports, all of which are affiliated with cable operators. Although some cable-affiliated NSNs are controlled by Comcast and thus bound by the *Comcast/NBCU Order*, those conditions will expire in January 2018.<sup>26</sup> Moreover, there are other cable-affiliated NSNs that are not subject to the *Comcast/NBCU Order*, as indicated at Appendix F to the *Notice*. Exclusive contracts with vertically integrated cable operators for just a few of these networks would critically impair competition.

As with RSNs, exclusive contracts for cable-affiliated national sports networks do not have any procompetitive benefits. National sports programming that is already widely popular is long past the point of depending on MVPDs to obtain optimal levels of investment. Such national sports events are impossible for competing MVPDs to replicate themselves. Accordingly, the Commission should adopt a rebuttable presumption that exclusive contracts for cable-affiliated NSNs are “unfair acts” for purposes of Section 628(b) and have the cause or effect of significantly hindering competing MVPDs, for purposes of Section 628(c). Such presumptions would present no First Amendment difficulties because they are rebuttable: a

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<sup>25</sup> See *Notice*, 27 FCC Rcd. at 12,691–97, Appendix F, Table 4.

<sup>26</sup> See *Applications of Comcast Corporation, General Electric Company and NBC Universal, Inc. for Consent to Assign Licenses and Transfer Control of Licensees*, Memorandum Opinion and Order, 26 FCC Rcd. 4238 (2011).

cable-affiliated NSN could have an exclusive contract if it demonstrated that its particular contract was either not unfair or not a significant hindrance to competition.

**IV. THE COMMISSION SHOULD ESTABLISH A REBUTTABLE PRESUMPTION AGAINST EXCLUSIVE CONTRACTS PREVIOUSLY FOUND TO BE IMPERMISSIBLE.**

Where an exclusive contract for a cable-affiliated network has previously been held to violate Section 628, the Commission should presume that another exclusive contract with the same network would also violate Section 628. Such a presumption is both sensible and timesaving as required by *Cablevision II*: surely one of the strongest predictors of the unfairness of and significant hindrance on competition caused by a network's exclusive contract is whether that network's previous exclusive contracts were unfair and significantly hindered competition. This rebuttable presumption would spare complainants from presenting repetitive evidence and building up the same facts from scratch. And, of course, if a cable-affiliated network's circumstances have changed such that an exclusive contract might now be permissible, the network is free to demonstrate that and thus rebut the presumption.

## CONCLUSION

For the foregoing reasons, CenturyLink and Frontier urge the Commission to establish rebuttable presumptions with respect to three specific categories of exclusive contracts with cable-affiliated networks: RSNs, NSNs, and networks whose exclusive contracts were previously determined to violate Section 628. These presumptions will deter cable-affiliated programmers from stifling competition and choice for consumers in the MVPD marketplace, thus serving longstanding Commission goals.

Respectfully submitted,

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