

**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
)	

COMMENTS OF DISH NETWORK L.L.C.

I. INTRODUCTION AND SUMMARY

DISH Network L.L.C. (“DISH”) submits these comments in the above-captioned proceeding¹ to support the implementation of certain safeguards for MVPDs negotiating for programming in light of the Commission’s recent decision to sunset the ban on exclusive deals for satellite-delivered, cable affiliated programming.² Since implemented in 1992, the Commission’s program access rules have been instrumental in spurring competition in the pay-TV market and ensuring a vibrant landscape for video programming. The Commission’s decision to allow this ban to expire increases the incentive and ability of cable operators to

¹ See Revision of the Commission’s Program Access Rules, *Report and Order, Further Notice of Proposed Rulemaking, Order on Reconsideration*, MB Docket Nos. 12-68, 07-18, 05-192, and 07-29, FCC 12-123 (rel. Oct. 5, 2012) (“*Report and Order*” or “*Further Notice*”).

² *Id.* ¶ 1.

withhold key programming from competitors, thereby harming consumers and competition in the video market.³

To ensure continued competition in the MVPD marketplace, the Commission should reinstate the ban on exclusive arrangements. However, in the absence of such action, DISH supports various Commission proposals, with some modifications, aimed at protecting MVPDs negotiating for satellite-delivered, cable-affiliated programming.

First, the Commission should establish a rebuttable presumption that an exclusive contract involving certain categories of popular cable-affiliated programming (as described below) is an “unfair act” that has the anticompetitive effects prohibited by Section 628(b).

Second, the Commission should mandate that any complainant challenging an exclusive contract for cable-affiliated programming is entitled to an *automatic* standstill of the existing programming contract during the pendency of the complaint, regardless of the type of programming at issue.

Finally, the Commission should establish a rebuttable presumption that, once a complainant succeeds in demonstrating that an exclusive contract involving a cable-affiliated network violates Section 628, any future exclusive contract involving the same network is also a violation of the statutory provision.

³ See Letter from Edward J. Markey, Congressman, to Julius Genachowski, Chairman, FCC (Oct. 2, 2012) (“The largest vertically integrated cable companies remain powerful players in the marketplace, and recent mergers have deepened their programming resources. . . . The program access rules are as necessary today as they were when Chairman Michael Powell and Chairman Kevin Martin extended them in 2002 and 2007, respectively.”).

II. THE COMMISSION SHOULD ADOPT AND EXPAND UPON THE REBUTTABLE PRESUMPTIONS PROPOSED IN THE *FURTHER NOTICE*

A. The Commission Should Adopt a Rebuttable Presumption that Withholding Either a Regional or National Sports Programming Network Is an “Unfair Act”

The *Report and Order* established a rebuttable presumption that an exclusive contract for “a satellite-delivered, cable-affiliated [regional sports network (“RSN”)] has the ‘purpose or effect’ of ‘significantly hindering or preventing’ the complainant from providing satellite cable programming or satellite broadcast programming.”⁴ This presumption mirrors one already established for terrestrially delivered RSNs.⁵ But, the *Report and Order* declined to establish a rebuttable presumption that an exclusive contract for such programming is also an “unfair act.” DISH believes, in response to the Commission’s question,⁶ that consumers and competition will benefit if the Commission establishes a rebuttable presumption that an exclusive contract for a cable-affiliated RSN (regardless of whether it is terrestrially-delivered or satellite-delivered) is an “unfair act” under Section 628(b). The record contains no credible evidence of pro-competitive benefits of exclusive contracts for a cable-affiliated RSN, and the anticompetitive harms of an exclusive contract for a cable-affiliated RSN are well-established.⁷

⁴ *Report and Order* ¶ 55.

⁵ See Review of the Commission’s Program Access Rules and Examination of Programming Tying Arrangements, *First Report and Order*, 25 FCC Rcd. 746, 782-84 ¶ 52 (2010) (“*Terrestrial Loophole Order*”), *aff’d in part and vacated in part sub nom. Cablevision Sys. Corp. et al. v. FCC*, 649 F.3d 695, 716-718 (D.C. Cir. 2011) (“*Cablevision II*”).

⁶ See *Report and Order* ¶ 77.

⁷ See *Terrestrial Loophole Order* ¶ 52. See also *Report and Order* ¶ 48, n.191, citing 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, 8271 ¶ 149 (concluding that Comcast’s withholding of the terrestrially delivered Comcast SportsNet Philadelphia RSN from DBS operators caused the percentage of television households subscribing to DBS in Philadelphia to be 40 percent lower than what it otherwise would have been; concluding that Cox’s withholding of the terrestrially delivered Cox-4 RSN from DBS operators in San Diego caused the percentage of television households subscribing to DBS in that city to be 33 percent lower than what it otherwise would have been).

The Commission should also, pursuant to its proposal in the *Further Notice*, establish rebuttable presumptions with respect to the “unfair act” element and the “significant hindrance” element of a Section 628(b) claim for challenging an exclusive contract involving a cable-affiliated “national sports network” (“NSN”), regardless of whether it is terrestrially delivered or satellite-delivered.⁸ This is of particular concern now that Comcast has obtained control over several NSNs.⁹ The Commission has repeatedly recognized that sports programming in general is highly valued by consumers, in part because it is impossible to replicate.¹⁰ For example, a study produced by Verizon revealed that 54 percent of viewers surveyed “indicated that the availability of regional sports channels in HD was an important factor in any decision whether to switch providers.”¹¹ To the extent that a national sports network carries highly popular, non-replicable content (such as a particular sports league whose games cannot be viewed on any other channel), the harm to competition resulting from withholding an NSN could be the same as withholding an RSN.¹² Rather than forcing competitors and Commission staff to undertake the repetitive, costly, and time-consuming review of historical evidence and precedent concerning

⁸ *Report and Order* ¶ 80.

⁹ *Id.* at Appendix F, Table 4 (Golf Channel, Universal Sports, and NBC Sports Network). Comcast also has a significant interest in, but not control of, the NHL Network. *Id.*

¹⁰ See *Terrestrial Loophole Order* ¶ 52. See also Implementation of the Cable Television Consumer Protection and Competition Act of 1992 – Development of Competition and Diversity in Video Programming Distribution: Section 628(c)(5) of the Communications Act: Sunset of Exclusive Contract Prohibition, Review of the Commission’s Program Access Rules and Examination of Programming Tying Arrangements, *Report and Order, Notice of Proposed Rulemaking*, 22 FCC Rcd. 17791, 17816 ¶ 38 (2007), *aff’d sub nom. Cablevision Sys. Corp. et al. v. FCC*, 597 F.3d 1306 (D.C. Cir. 2010) (“The record reflects that numerous national programming networks, RSNs, premium programming networks, and VOD networks are cable-affiliated programming networks that are demanded by MVPD subscribers and for which there are no adequate substitutes.”).

¹¹ Letter from William H. Johnson, Verizon, to Marlene H. Dortch, Secretary, FCC, MB Docket Nos. 12-68, 07-18, and 05-192, at 2 (Sept. 25, 2012).

¹² See DIRECTV Comments at 37-38, 42; Letter from William M. Wiltshire, counsel for DIRECTV, to Marlene H. Dortch, Secretary, FCC, MB Docket Nos. 12-68, 07-18, and 05-192, at 1-3 (Oct. 3, 2012); Letter from Barbara Esbin, counsel for American Cable Association, to Marlene H. Dortch, Secretary, FCC, MB Docket Nos. 12-68, 07-18, and 05-192, at 2-6 (Oct. 1, 2012).

withholding highly popular sports programming, the Commission should allow complainants to invoke a rebuttable presumption that withholding such programming meets both the “unfair act” element and the “significant hindrance” element of a Section 628(b) claim.

B. The Commission Should Adopt a Rebuttable Presumption that Withholding Any Top 20 Cable-Affiliated Network is an Unfair Act and Has an Anticompetitive Effect

The Commission should also establish a rebuttable presumption that an exclusive contract for a cable-affiliated network in the list of Top 20 national cable networks (as ranked by average prime time ratings) is an “unfair act” and has the anticompetitive effects prohibited by Section 628(b). RSNs are by no means the only class of highly popular cable networks, which the *Report and Order* appears to acknowledge in discussing the Top 20 cable networks.¹³ Yet the *Report and Order* gives RSNs special protections under its rules without explaining why other similarly popular programming is not provided similar safeguards.¹⁴ This focus appears to be the result not of any reasoned distinction, but rather of historical accident, and it is not justified in the record.

Prior to the Commission’s 2010 decision to close the “terrestrial loophole,” many RSNs that were delivered to headends by fiber were withheld from competing distributors without fear of triggering the prohibition on exclusive dealings and discrimination. This means that the Commission has had the opportunity to empirically observe the consequences of withholding and has expressed justifiable concerns about cable operators’ withholding of that content.¹⁵ But the

¹³ See *Report and Order* ¶ 29.

¹⁴ *Id.* ¶ 30 (“We recognize that some satellite-delivered, cable-affiliated programming, such as certain RSNs, remains necessary for competition and has no good substitutes.”).

¹⁵ See *Verizon Telephone Companies, Order*, 26 FCC Rcd. 13145, 13145 ¶ 1 (2011) (holding that Madison Square Garden, L.P. and Cablevision Systems Corporation’s withholding of high definition versions of MSG and MSG+ Verizon in the New York and Buffalo DMAs constituted an “unfair act” which had the “effect” of “significantly hindering” Verizon from providing a competing video service to

withholding of other, similarly situated content is no less significant. Some of this content is equally or even more important to consumers, and the empirical evidence of foreclosure's negative effects is lacking only because it could not legally be withheld before the expiration of the ban on exclusive contracts. The Commission should thus provide presumptions of unfairness and anticompetitive effect for all Top 20 cable-affiliated networks.

III. THE COMMISSION SHOULD ADOPT A REBUTTABLE PRESUMPTION IN FAVOR OF A STANDSTILL TO PROTECT CONSUMERS DURING THE PENDENCY OF A PROGRAM ACCESS COMPLAINT

The proposed rebuttable presumption in favor of a standstill during the pendency of a program access complaint involving a cable-affiliated RSN is necessary, but not sufficient, to protect consumers and competition in the MVPD market. The Commission should go beyond the limited protections proposed in the *Further Notice*¹⁶ and impose an automatic standstill during the pendency of all program access complaints involving not only cable-affiliated RSNs, but any cable-affiliated programming carried by the complaining MVPD. This approach will prevent needless disruption of customers' services and mitigate near-term harm to competing MVPDs. Among other things, an automatic standstill limits the ability of vertically integrated programmers to use temporary foreclosure strategies (*i.e.*, withholding programming to extract concessions from an MVPD during renewal negotiations), encourages settlement, and increases

subscribers), *aff'd*, Verizon Telephone Companies, *Memorandum Opinion and Order*, 26 FCC Rcd. 15849, 15849 ¶ 1 (2011); AT&T Services, Inc., *Order*, 26 FCC Rcd. 13206, 13206 ¶ 1 (2011) (holding that Madison Square Garden, L.P. and Cablevision Systems Corporation's withholding of high definition versions of MSG and MSG+ AT&T in Connecticut constituted an "unfair act" which had the "effect" of "significantly hindering" AT&T from providing a competing video service to subscribers), *aff'd*, AT&T Services, Inc., *Memorandum Opinion and Order*, 26 FCC Rcd. 15871, 15871 ¶ 1 (2011), *appeal pending sub nom.* Cablevision Sys. Corp. et al. v. FCC, No. 11-4780 (2nd Cir.).

¹⁶ See *Report and Order* ¶ 79.

the usefulness of the program access complaint process.¹⁷ The Commission found in the *Comcast/NBCU Merger Order* that its “public interest mandate” required standstill provisions for certain key content “for which subscribers would switch to a different MVPD in order to regain access.”¹⁸ And it is entirely appropriate to impose an automatic standstill pending resolution of a program access complaint for *all* cable-affiliated programming networks, because doing so “eliminates the need for the Commission to draw lines among various cable networks” and will prevent cable companies from being able to avoid standstill provisions by shifting key programming from one network to another.¹⁹

While the *Report and Order* does impose a six-month deadline for Commission staff to review complaints, this protection does not go nearly far enough to protect existing carriage arrangements that may be impacted by the expiration of the exclusivity ban. First, the six-month deadline is likely only effective in an aspirational sense, akin to the 180-day shot clock for handling mergers and acquisitions. Equally important, the six-month timeline does little to limit the well-recognized harm of temporary foreclosure, and the inability of the harm to be undone, even if a distributor is vindicated six months down the road. Therefore, to limit disruption to consumers and create more equal bargaining power for parties seeking to retain access to cable-affiliated content, the Commission should require an *automatic* standstill in the event that an MVPD files a program access complaint alleging that a cable-affiliated programmer is refusing to renew a carriage agreement on the grounds of an exclusive contract.

¹⁷ See Letter from Kevin G. Rupy, Coalition for Competitive Access to Content, to Marlene H. Dortch, Secretary, FCC, MB Docket Nos. 12-68, 07-18, and 05-192, at 4-5 (Sept. 26, 2012).

¹⁸ Applications for Consent to the Assignment and/or Transfer of Control of Licenses, General Electric Company and NBC Universal, Inc., Assignors to Comcast Corporation, Assignees, *Memorandum Opinion and Order*, 26 FCC Rcd. 4238, 4260 ¶ 52 (2011).

¹⁹ *Id.* ¶ 53.

III. THE COMMISSION SHOULD ESTABLISH A REBUTTABLE PRESUMPTION FOR PREVIOUSLY CHALLENGED EXCLUSIVE CONTRACTS

Consistent with its proposal, the Commission should establish a rebuttable presumption that, once any complainant succeeds in demonstrating that an exclusive contract involving a cable-affiliated network (regardless of whether it is terrestrially or satellite-delivered) has violated Section 628(b), any future exclusive contract involving the same network also violates Section 628(b).²⁰ This approach would economize the Commission's limited resources by foreclosing the need for Commission staff to undertake repetitive examinations of program access complaints. This approach is also justified because it is a reasonable exercise of the Commission's predicative judgment – the evidence necessary to satisfy the burden in one case would likely suffice in a second case involving the same network.²¹ It would also lower costs for MVPDs (and ultimately consumers) seeking access to programming by cutting out the costly complaint process in cases where cable-affiliated programming has proven to be unfairly withheld from competitors.

IV. CONCLUSION

The Commission's recent decision to sunset the ban on exclusive deals for satellite-delivered, cable-affiliated programming will increase the incentive and ability of cable operators to withhold key programming from their competitors. To ameliorate the harms to competition and consumers that result from the loss of the exclusivity prohibition, the Commission should, at a minimum, adopt the safeguards described above.

²⁰ See *Report and Order* ¶ 81.

²¹ See Letter from William Wiltshire, Counsel for DIRECTV, to Marlene H. Dortch, Secretary, FCC, MB Docket Nos. 12-68, 07-18, and 05-192, at 2, n.5 (Sept. 21, 2012) *citing* *Cablevision II*, 649 F.3d at 716 (“courts defer to an agency’s predicative judgment underlying an evidentiary presumption when ‘there is a sound and rational connection between the proved and inferred facts, and 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’ (citation omitted).”).

Respectfully submitted,

/s/

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