

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

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

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**COMMENTS OF AT&T INC.**

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## COMMENTS OF AT&T INC.

AT&T Inc. respectfully submits these comments on behalf of itself and its operating company affiliates (collectively, “AT&T”) pursuant to the Commission’s Further Notice of Proposed Rulemaking in the above-captioned proceeding.<sup>1</sup>

### I. Introduction and Summary

During the past twenty years – especially over the last several – AT&T and others have made substantial investments in new platforms for the delivery of multichannel video programming services with the reasonable expectation that most video programmers would seek the widest possible retail audience for their content and would thus make their content available both to incumbent cable operators and to new video distribution competitors. For those situations, however, in which video programmers had countervailing incentives – most notably, where a video programmer was affiliated with a vertically integrated cable operator – section 628 of the Communications Act served to encourage investment in competitive facilities by protecting new entrants from anticompetitive behavior by incumbent cable operators.<sup>2</sup>

Because access to video programming is so crucial for competition in video distribution services, perhaps the most important tool employed by Congress and the Commission under section 628 to preserve, protect, and promote competition and diversity for those services was a ban on exclusive contracts between vertically integrated cable operators and affiliated programming networks (“exclusivity ban”).<sup>3</sup> Yet in the *Exclusivity Ban Sunset Order*,<sup>4</sup> the

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<sup>1</sup> *Revision of the Commission’s Program Access Rules, et al.*, Further Notice of Proposed Rulemaking in MB Docket No. 12-68, 27 FCC Rcd 12605 (2012) (“*October 2012 Further Notice*”).

<sup>2</sup> 47 C.F.R. § 548.

<sup>3</sup> *See, e.g.*, 47 U.S.C. § 548(c)(2)(D); *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*, Report and Order, 22 FCC Rcd 17791 (2007) (“*2007 Extension Order*”), *aff’d sub nom. Cablevision Sys. Corp. v. FCC*, 597 F.3d 1306 (D.C. Cir. 2010) (“*Cablevision I*”); *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*

Commission discarded that vital tool. To justify doing so, the Commission posited that a case-by-case complaint process would now suffice to safeguard video distribution competition.<sup>5</sup>

AT&T continues to believe – as did the Commission for many years -- that a complaint process will be a poor substitute for the exclusivity ban.<sup>6</sup> This is especially true given that even a relatively accelerated complaint process may span multiple seasons of various televised sports. It is therefore all the more imperative that the Commission maximize the utility of the complaint process in preserving, protecting, and promoting competition and diversity in the video distribution market.

To that end, the Commission should adopt most, if not all, of the proposals in the *October 2012 Further Notice*. Those proposals primarily concern rebuttable evidentiary presumptions in complaint proceedings initiated by a multichannel video programming distributor (“MVPD”) alleging that an exclusive contract between a cable operator and an affiliated programming network violates section 628(b) of the Act.<sup>7</sup> Because experience, empirical evidence, and common sense indicate that anticompetitive harms inherently arise from exclusive contracts

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*Communications Act: Sunset of Exclusive Contract Prohibition*, Report and Order, 17 FCC Rcd 12124 (2002)(“2002 Extension Order”).

<sup>4</sup> *Revision of the Commission’s Program Access Rules, et al.: Sunset of Exclusive Contract Prohibition*, Report and Order in MB Docket Nos. 12-68, 07-18, 05-192, 27 FCC Rcd 12605 (2012) (“*Exclusivity Ban Sunset Order*”).

<sup>5</sup> See, e.g., *Exclusivity Ban Sunset Order*, 27 FCC Rcd at 12608, 12625, ¶¶ 2, 30.

<sup>6</sup> See, e.g., *2007 Extension Order*, 22 FCC Rcd at 17834-35, ¶ 62 n.320; *2002 Extension Order*, 17 FCC Rcd at 12153-54, ¶ 65 n.206 (both characterizing a case-by-case process for assessing the lawfulness of exclusive contracts as an inadequate substitute for the “particularized protection” afforded by the exclusivity ban).

<sup>7</sup> The proposed rebuttable presumptions include: (i) that an exclusive contract involving a cable-affiliated regional sports network (“RSN”) is an “unfair act” under section 628(b); (ii) that an MVPD complainant challenging an exclusive contract involving a cable-affiliated RSN or a cable-affiliated national sports network is entitled to a standstill of an existing programming contract during the pendency of the complaint; (iii) that an exclusive contract involving a cable-affiliated national sports network is an “unfair act” under section 628(b); (iv) that an exclusive contract involving a cable-affiliated national sports network will “significantly hinder” the MVPD complainant’s ability to provide video programming under section 628(b); and (v) that once an MVPD complainant succeeds in demonstrating the unlawfulness under section 628(b) of an exclusive contract involving a cable-affiliated network, any other exclusive contract involving the same network violates section 628(b). *Exclusivity Ban Sunset Order*, 27 FCC Rcd at 12654-58, ¶¶ 74-81.

between vertically integrated affiliates involving the kinds of programming addressed by the proposed presumptions, the initial burden of producing evidence in complaint proceedings should be on cable operator and programmer defendants attempting to show pro-competitive benefits of the exclusive contracts. Enacting this approach is particularly important in light of the paucity of record evidence that the kinds of exclusive contracts at issue provide any benefits at all to competition or consumers.

Indeed, the Commission’s own observations in the *Exclusivity Ban Sunset Order* about the nature of the video distribution market today – which should have caused the Commission to retain the exclusivity ban -- lead almost ineluctably to the conclusion that the Commission must adopt its presumption proposals discussed below. Specifically, the Commission in the *Exclusivity Ban Sunset Order* repeatedly cites “prevailing concerns” about the ongoing repression of video distribution competition due to enduring cable-operator power and concentration in “many markets”.<sup>8</sup> For example, the *Exclusivity Ban Sunset Order* points out that cable operators continue to control 57.4% of MVPD subscribers nationwide and much higher market shares in many major metropolitan areas.<sup>9</sup> In addition, the *Exclusivity Ban Sunset Order* explains that “clustering” by cable operators has increased, which can heighten cable operators’ incentive to enter into exclusive contracts for affiliated regional programming.<sup>10</sup> Furthermore, the *Exclusivity Ban Sunset Order* cites evidence that cable prices continue to rise in

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<sup>8</sup> See, e.g., *Exclusivity Ban Sunset Order* at ¶¶ 2, 11, 17, 30.

<sup>9</sup> See, e.g., *Exclusivity Ban Sunset Order*, 27 FCC Rcd at 12608, 12613-14, 12616, 12625, 1649-50, ¶¶ 2, 11, 17-18, 30, 67, and nn.67, 269 (highlighting areas such as New York, Philadelphia, Boston, Chicago, and Washington, D.C.).

<sup>10</sup> See, e.g., *Exclusivity Ban Sunset Order*, 27 FCC Rcd at 12616-17, 12649-50, ¶ 19 (relying on, among other things, evidence that MVPDs attempting to compete in areas with cable-operator clusters generally have substantially smaller market shares than MVPDs competing in non-clustered areas).

excess of inflation.<sup>11</sup> Finally, and perhaps most importantly, the *Exclusivity Ban Sunset Order* (i) reiterates the recurring (and, frankly, obvious) conclusion in other Commission orders that regional sports networks (“RSNs”) are almost always non-replicable and highly valued by consumers,<sup>12</sup> and (ii) emphasizes that recent real-world examples of RSN withholding continue to demonstrate a strong potential for cable operator exploitation of those unique RSN attributes.<sup>13</sup>

Given these alarming observations in the *Exclusivity Ban Sunset Order* itself, it is readily apparent that a complaint process (even one faster than normal) lacking the proposed rebuttable presumptions would fall far short of providing the mechanism necessary to impose any meaningful restraint on the ability and incentive of cable operators and affiliated programmers to execute exclusive contracts that substantially damage competition. At a minimum, cable operators and their affiliated programmers must bear the initial burden of producing probative evidence that a challenged exclusive contract between them will have predominant pro-competitive effects. This will not only help deter anti-competitive conduct from occurring in the first place, but will also make any necessary complaint proceedings less burdensome and more effective.<sup>14</sup>

In brief, the Commission should take the following specific actions. First, the Commission should adopt a rebuttable presumption that an exclusive contract between a cable

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<sup>11</sup> See, e.g., *Exclusivity Ban Sunset Order*, 27 FCC Rcd at 12617-18, ¶ 67. These price hikes are occurring despite the small dip in the national market share of cable operators.

<sup>12</sup> See, e.g., *Exclusivity Ban Sunset Order*, 27 FCC Rcd at 12625, 12642-43, ¶¶ 30, 55.

<sup>13</sup> See, e.g., *Exclusivity Ban Sunset Order*, 27 FCC Rcd at 12619, ¶ 20, citing *Verizon Tel. Cos. et al.*, Order, 26 FCC Rcd 13145 (MB 2011) (“*Verizon v. MSG/Cablevision (Bureau Order)*”), affirmed, *Verizon Tel. Cos. et al.*, Memorandum Opinion and Order, 26 FCC Rcd 15849 (2011) (“*Verizon v. MSG/Cablevision (Commission Order)*”); and *AT&T Servs. Inc., et al.*, Order, 26 FCC Rcd 13206 (MB 2011) (“*AT&T v. MSG/Cablevision (Bureau Order)*”), affirmed, *AT&T Servs. Inc., et al.*, Memorandum Opinion and Order, 26 FCC Rcd 15871 (2011) (“*AT&T v. MSG/Cablevision (Commission Order)*”).

<sup>14</sup> See, e.g., *Exclusivity Ban Sunset Order*, 27 FCC Rcd at 12636-37, ¶ 46 (explaining that rebuttable presumptions eliminate the need for litigants and Commission staff to undertake repetitive examinations of certain recurring precedent and facts).

operator and an affiliated RSN is an “unfair act” under section 628(b). RSN programming is non-replicable and almost always extremely popular; so any possible pro-competitive benefits of such an exclusive contract will rarely (if ever) outweigh its anticompetitive harms.

Second, the Commission should adopt a rebuttable presumption that an MVPD complainant challenging an exclusive contract between a cable operator and an affiliated RSN is entitled to a standstill of an existing programming contract during the pendency of the complaint. If the Commission adopts an “unfair act” presumption, then it follows that the Commission should also adopt a standstill presumption, because the combination of the “unfair act” and “significant hindrance” presumptions would incorporate rebuttable presumptions that virtually all of the factors warranting a standstill exist. Even if the Commission does not adopt an “unfair act” presumption, the Commission should still adopt a standstill presumption, because the “significant hindrance” presumption, when considered along with Commission precedent, facts about the video market, and evidence supplied by AT&T’s subject matter expert, satisfies all of the standstill prerequisites (on a rebuttably presumptive basis).

Third, the Commission should adopt the same rebuttable presumptions for complaint proceedings involving cable-affiliated national sports networks as for complaint proceedings involving cable-affiliated RSNs. The programming of national sports networks resembles that of RSNs in its non-replicability and extreme popularity. Thus, an exclusive contract between a cable operator and an affiliated national sports network – like an exclusive contract between a cable operator and an affiliated RSN – is highly likely to be predominantly anti-competitive and a significant hindrance to competing MVPDs.

Fourth, the Commission should adopt a rebuttable presumption that, once one MVPD complainant succeeds in demonstrating that an exclusive contract involving a cable-affiliated

network violates section 628(b), any other exclusive contract involving the same network and similar core market factors violates section 628(b). To trigger this rebuttable presumption, an MVPD in a subsequent complaint proceeding must allege the following “core market factors”:

in the geographic market at issue in the subsequent complaint proceeding, (i) the market share of the subsequent MVPD complainant is roughly equivalent to or less than the market share of the original MVPD complainant; (ii) the market share of the cable operator defendant is roughly equivalent to or greater than the market share shown in the original complaint proceeding; and (iii) the ratings of the affiliated network are roughly comparable to or higher than the ratings shown in the original complaint proceeding.

Finally, the Commission should clarify that a standstill petition filed twenty (20) days before the expiration of an existing programming contract is timely, and a shorter period may be permitted for good cause. In a related vein, the Commission should commit to resolving any timely-filed standstill petition before the existing programming contract expires.

## **II. Overarching Principles**

Section 628(b) of the Act prohibits a cable operator or its affiliated video programmer from “engag[ing] in unfair methods of competition or unfair or deceptive acts or practices, the purpose or effect of which is to hinder significantly or to prevent any multichannel video programming distributor from providing satellite cable programming or satellite broadcast programming to subscribers or consumers.”<sup>15</sup> As interpreted by the Commission and reviewing courts, section 628(b) applies to both terrestrially delivered and satellite delivered programming.<sup>16</sup> And an MVPD seeking to prove that an exclusive contract between a cable

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<sup>15</sup> 47 U.S.C. § 528(b).

<sup>16</sup> See, e.g., *Review of the Commission’s Program Access Rules and Examination of Programming Tying Arrangements*, First Report and Order, 25 FCC Rcd 746 (2010) (“2010 Program Access Order”), *affirmed in part*

operator and an affiliated programmer violates section 628(b) must show two things: (i) that the exclusive contract constitutes an “unfair method[] of competition or unfair or deceptive act[] or practice[]”,<sup>17</sup> and (ii) that the exclusive contract has the “purpose or effect of ... hinder[ing] significantly or ... prevent[ing]” any MVPD from providing service.<sup>18</sup>

The Commission has already adopted a rebuttable evidentiary presumption that an exclusive contract between a cable operator and an affiliated RSN satisfies the “significant hindrance” prong of the two-pronged test under section 628(b).<sup>19</sup> The question addressed here is whether the Commission should adopt certain additional rebuttable presumptions in complaint proceedings alleging that an exclusive contract between a cable operator and a programming affiliate violates section 628(b).

AT&T recognizes that, under the Administrative Procedure Act (“APA”), court opinions, and Commission precedent, any evidentiary presumption adopted by the Commission can shift only the burden of production and not the burden of proof.<sup>20</sup> AT&T also recognizes that, pursuant to court and Commission precedent, an evidentiary presumption is only permissible “if 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.”<sup>21</sup>

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*and vacated in part sub nom. Cablevision Sys. Corp. v. FCC*, 649 F.3d 695 (D.C. Cir. 2011) (“*Cablevision II*”). Consequently, AT&T’s positions in these Comments apply to complaint proceedings concerning any of the exclusive contracts discussed, regardless of whether the programming is terrestrially delivered or satellite delivered.

<sup>17</sup> 47 U.S.C. § 528(b). In these Comments, the shorthand “unfair act” will often be used to describe this first factor of section 628(b).

<sup>18</sup> 47 U.S.C. § 528(b). In these Comments, the shorthand “significant hindrance” will often be used to describe this second factor of section 628(b).

<sup>19</sup> See, e.g., *Exclusivity Ban Sunset Order*, 27 FCC Rcd at 12642-43, ¶ 55.

<sup>20</sup> See, e.g., *Exclusivity Ban Sunset Order*, 27 FCC Rcd at 12643, 12656, nn.227, 309.

<sup>21</sup> *Exclusivity Ban Sunset Order*, 27 FCC Rcd at 12656, ¶ 77 (quoting *Cablevision II*, 649 F.3d at 716).

Accordingly, AT&T does not argue in these Comments that the Commission should adopt presumptions that are conclusive (as opposed to rebuttable) or that shift the burden of proof.<sup>22</sup> Instead, AT&T's Comments are designed solely to demonstrate that the required grounds for the proposed evidentiary presumptions exist whenever an MVPD alleges in a complaint proceeding that an exclusive contract between a cable operator and particular kinds of programming affiliates violates section 628(b). To rebut such presumptions, cable operators and affiliated programmers should be required to produce evidence that is – in Commission parlance – “substantial, sufficient, persuasive, or exculpatory, and not amounting to merely general allegations and inconclusive evidence.”<sup>23</sup>

One final overarching point: in evaluating whether to adopt the proposed rebuttable presumptions, the Commission should keep in mind that its decision will have a profound impact not only on competition in the video distribution market, but also on competition in the broadband market. As the Commission has often recognized, today's marketplace increasingly requires communication providers to compete via bundles of voice, video, and broadband. Thus, a provider's ability to offer video service and to deploy broadband networks are closely linked. “This secondary effect heightens the urgency of Commission action” to adopt the proposed rebuttable presumptions to help foster competition in both the video distribution market *and* the broadband market.<sup>24</sup>

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<sup>22</sup> This dispositively distinguishes all of the presumptions discussed in these Comments from the *conclusive* presumption vacated in *Cablevision II*. See, e.g., *Exclusivity Ban Sunset Order*, 27 FCC Rcd at 12655, ¶ 76.

<sup>23</sup> *AT&T v. MSG/Cablevision (Commission Order)*, 26 FCC Rcd at 15884-85, ¶ 19 (footnotes and quotation marks omitted).

<sup>24</sup> *2010 Program Access Order*, 25 FCC Rcd at 771-772, ¶ 36. See, e.g., *id.*, 25 FCC Rcd at 765, ¶ 29; *AT&T v. MSG/Cablevision (Bureau Order)*, 26 FCC Rcd at 13238, ¶ 39 (and orders cited therein), *aff'd*, *AT&T v. MSG/Cablevision (Commission Order)*.

### **III. Rebuttable Presumptions to be Adopted**

Given the rigorous analysis in which the Commission engaged to justify jettisoning the exclusivity ban, it seems clear that the Commission believed its decision to do so was a close call. The Commission should then view adoption of the proposed rebuttable presumptions as the easy decision that it plainly is. As the Commission itself acknowledged (and as described above), many of the market factors supporting the exclusivity ban still exist in varying degrees; and even the combination of all of the proposed rebuttable presumptions discussed in these Comments would amount to a dramatically less restrictive imposition on cable operator conduct than was the exclusivity ban. Moreover, most of the rebuttable presumptions discussed in these Comments concern circumstances that the Commission has repeatedly identified as the most problematic: exclusive contracts between cable operators and affiliated RSNs. Thus, nothing close to heavy lifting is required to support the rebuttable presumptions.

#### **A. The Commission Should Adopt a Rebuttable Presumption that an Exclusive Contract Involving a Cable-affiliated RSN is an “Unfair Act”.**

The Commission has held that determining whether an exclusive contract between a cable operator and a programming affiliate is an “unfair act” requires balancing the anticompetitive harms of the exclusive contract against its pro-competitive benefits (if any),<sup>25</sup> especially when viewed through the lens of the five public interest factors of section 628(c)(4) of the Act.<sup>26</sup> When the exclusive contract at issue involves an RSN, such balancing will usually demonstrate that the contract is an “unfair act”, i.e., the harms outweigh the benefits. Thus, for the following reasons, the Commission should adopt an “unfair act” presumption.

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<sup>25</sup> See, e.g., *Exclusivity Ban Sunset Order*, 27 FCC Rcd at 12640-41, ¶ 53.

<sup>26</sup> 47 U.S.C. § 548(c)(4). See, e.g., *AT&T v. MSG/Cablevision (Bureau Order)*, 26 FCC Rcd at 13229-38, *aff'd*, *AT&T v. MSG/Cablevision (Commission Order)*. The five factors are the effect of an exclusive contract between a cable operator and an affiliated programmer on (i) the development of competition in local and national MVPD markets; (ii) competition from MVPD technologies other than cable; (iii) the attraction of capital investment in the production and distribution of new satellite cable programming; (iv) diversity of programming in the MVPD market; and (v) the duration of exclusion. 47 U.S.C. § 548(c)(4).

The Commission has stated that exclusive contracts between cable operators and programmers may theoretically have the following pro-competitive benefits: (i) increased product differentiation, by both cable operators and their MVPD competitors, and (ii) increased investment in and promotion of new programming, by both cable operators and their MVPD competitors.<sup>27</sup> The Commission has also stated, however, that those potential pro-competitive benefits of exclusive contracts are generally outweighed by the contracts' anticompetitive harms, unless the programming at issue is replicable, new, fledgling, untested, and/or lowly rated.<sup>28</sup>

Applying those balancing principles to exclusive contracts involving cable-affiliated RSNs, the Commission has repeatedly held that the anticompetitive harms typically outweigh the pro-competitive benefits.<sup>29</sup> That is because the programming of cable-affiliated RSNs usually is not replicable, new, fledgling, untested, or lowly rated. In fact, the Commission has held that just the opposite is generally true: the programming of cable-affiliated RSNs is "very likely to be both non-replicable and highly valued by consumers."<sup>30</sup>

Indeed, in two recent complaint proceedings, the Commission held that an exclusive contract between a cable operator and an affiliated RSN was an "unfair act" because its anticompetitive harms outweighed its pro-competitive benefits. Specifically, the substantial diminution in the competing MVPDs' ability to provide extremely popular programming, combined with the corresponding decline in the competing MVPDs' ability to satisfy consumer demand for broadband access, significantly harmed competition and outweighed any potentially

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<sup>27</sup> See, e.g., *Exclusivity Ban Sunset Order*, 27 FCC Rcd at 12608, 12629, 12631, ¶¶ 2, 35, 37.

<sup>28</sup> See, e.g., *AT&T v. MSG/Cablevision (Bureau Order)*, 26 FCC Rcd at 13229-39, *affirmed*, *AT&T v. MSG/Cablevision (Commission Order)*, 26 FCC Rcd at 15891.

<sup>29</sup> See, e.g., *AT&T v. MSG/Cablevision (Bureau Order)*, 26 FCC Rcd at 13229-39, *affirmed*, *AT&T v. MSG/Cablevision (Commission Order)*, 26 FCC Rcd at 15891.

<sup>30</sup> *2010 Program Access Order*, 25 FCC Rcd at 782, ¶ 52. See, e.g., *AT&T v. MSG/Cablevision (Bureau Order)*, 26 FCC Rcd at 13229-39, *affirmed*, *AT&T v. MSG/Cablevision (Commission Order)*, 26 FCC Rcd at 15891.

positive product differentiation and investment effects.<sup>31</sup> At bottom, because cable-affiliated RSNs are consistently non-replicable and exceptionally valued, no amount of programming differentiation or investment can counterbalance the severe harm to competition inflicted by exclusive contracts.

These decisions were undoubtedly correct. As shown in the attached Declaration of AT&T's subject matter expert, RSNs are (i) almost always highly valued by existing and prospective customers and (ii) non-replicable. Thus, no amount of programming differentiation or investment by competing MVPDs could diminish the anti-competitive harms from lack of access to an RSN.<sup>32</sup>

Beyond that, marketplace evidence belies the notion that material pro-competitive benefits arise from exclusive contracts between cable operators and affiliated RSNs. First, if exclusivity between cable operators and affiliated programmers really were necessary to promote programming differentiation and investment, minimal increases in programming would have occurred during the twenty years that the exclusivity ban was in effect. Yet as the Commission has reported, the number of satellite-delivered, national programming networks, including sports networks, exploded during that time (almost eight-fold, from 106 to approximately 800),<sup>33</sup> even in the virtual absence of exclusive contracts between programmers and entities other than cable operators.<sup>34</sup> The number of RSNs rose substantially, too.<sup>35</sup>

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<sup>31</sup> See, e.g., *Verizon v. MSG/Cablevision (Bureau Order)*, affirmed, *Verizon v. MSG/Cablevision (Commission Order)*; *AT&T v. MSG/Cablevision (Bureau Order)*, affirmed, *AT&T v. MSG/Cablevision (Commission Order)*.

<sup>32</sup> See Declaration of J. Christopher Lauricella ("Lauricella Declaration")(attached as Exhibit A) at ¶ 2.

<sup>33</sup> See, e.g., *Revisions of the Commission's Program Access Rules et al.*, Notice of Proposed Rulemaking, 27 FCC Rcd 3413, 3476-81, at Appendix B (2012)("March 2012 Notice"); *Exclusivity Ban Sunset Order*, 27 FCC Rcd at 12691-97, Appendix F, Tables 2-4.

<sup>34</sup> See, e.g., *Exclusivity Ban Sunset Order*, 27 FCC Rcd at 12630-31, ¶ 36.

<sup>35</sup> *Exclusivity Ban Sunset Order*, 27 FCC Rcd at 12698, Appendix G, Table 1.

Second, if exclusivity between cable operators and affiliated programmers really were necessary to promote programming differentiation and investment, cable operators surely would have filed more than just ten “Petitions for Exclusivity” during the past twenty years, would have prosecuted to Commission decision more than merely five such Petitions, and would have prevailed on more than only two.<sup>36</sup>

Finally, without the ban on exclusive contracts, cable operators can be expected to step up their efforts to stifle emerging competition from wireline MVPD competitors, particularly given that wireline MVPDs are making modest inroads in the video distribution market.<sup>37</sup> As the Commission has consistently recognized, “wireline entrants such as AT&T pose a greater competitive threat than DBS to cable operators”, and “DBS operators do not constrain the price of cable service to the extent that wireline MVPDs do”.<sup>38</sup> It is therefore imperative that the Commission establish efficient and effective complaint processes to address any anticompetitive conduct.

Given the foregoing precedent, facts, and evidence, it is clear that, in any complaint proceeding challenging the lawfulness under section 628(b) of an exclusive contract between a

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<sup>36</sup> See, e.g., Comments of AT&T Inc. at 5, MB Docket Nos. 12-68, 07-18, 05-192 (filed June 25, 2012). See generally *Exclusivity Ban Sunset Order*, 27 FCC Rcd at 12648, ¶ 65.

<sup>37</sup> See, e.g., *AT&T v. MSG/Cablevision (Bureau Order)*, 26 FCC Rcd at 13229-39, affirmed, *AT&T v. MSG/Cablevision (Commission Order)*, 26 FCC Rcd at 15891; *Verizon v. MSG/Cablevision (Bureau Order)*, affirmed, *Verizon v. MSG/Cablevision (Commission Order)*; *AT&T Services, Inc. et al.*, Amended Program Access Complaint, File No. CSR 8066-P (filed Oct. 3, 2008); *AT&T Services, Inc. et al. v. Rainbow Media Holdings, LLC*, File No. CSR-7429-P (filed June 18, 2007) (demonstrating in all four proceedings that cable operators vigorously resist selling RSN programming to wireline MVPDs). See also *Exclusivity Ban Sunset Order*, 27 FCC Rcd at 12688-90, Appendix E (showing that wireline video providers have a nationwide market share of approximately 8.5%).

<sup>38</sup> *AT&T v. MSG/Cablevision (Bureau Order)*, 26 FCC Rcd at 13232, ¶ 29, affirmed, *AT&T v. MSG/Cablevision (Commission Order)*, 26 FCC Rcd at 15891. See *2010 Program Access Order*, 25 FCC Rcd at 765, ¶ 29; *In the Matter of 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*, Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd 5105, 5126 at ¶ 50 (2007), *aff'd sub nom. Alliance for Cmty. Media v. FCC*, 529 F.3d 763 (6th Cir. 2008), *cert denied*, 557 U.S. 904 (2009) (stating that competition from wireline service providers, like AT&T, has a much greater impact on the price of cable service than does competition from DBS).

cable operator and an affiliated RSN, the correlation between the proven fact that such an exclusive contract exists and the inferred fact that the exclusive contract is an “unfair act” (i.e., its anticompetitive harms outweigh its pro-competitive benefits) would be powerful and direct. As a result, the Commission should adopt the proposed rebuttable presumption that an exclusive contract between a cable operator and an affiliated RSN is an “unfair act” under section 628(b).

**B. The Commission Should Adopt a Rebuttable Presumption that a Complainant Challenging an Exclusive Contract Involving a Cable-Affiliated RSN is Entitled to a Standstill of an Existing Programming Contract During the Pendency of the Complaint.**

To minimize consumer disruption and confusion and to avoid irreparable harm to competitors, the Commission must facilitate the use of standstills during the pendency of program access complaint proceedings. Indeed, given the stakes involved, the Commission could justify using standstills in program access complaint proceedings involving exclusive contracts between cable operators and any kind of affiliated programmer. Thus, the Commission should undoubtedly take the lesser step of rebuttably presuming the propriety of using a standstill during the pendency of a program access proceeding involving an exclusive contract between a cable operator and an affiliated RSN, where the incentive and ability for abuse is clearest and has been repeatedly demonstrated.<sup>39</sup>

To obtain a standstill of an existing programming contract during the pendency of a complaint challenging an exclusive contract between a cable operator and an affiliated RSN, an MVPD complainant would have to show that (i) the MVPD is likely to prevail on the merits of its complaint; (ii) the MVPD will suffer irreparable harm absent a standstill; (iii) grant of a standstill will not substantially harm other interested parties; and (iv) the public interest favors

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<sup>39</sup> As explained later, a standstill presumption should apply also to proceedings involving a cable-affiliated national sports network. See Section III(C), *infra*.

grant of a standstill.<sup>40</sup> As explained below, the Commission should adopt the proposed rebuttable presumption that a complainant MVPD satisfies that four-part test -- and thus is entitled to a standstill of an existing RSN contract -- whenever the MVPD is challenging the lawfulness under section 628(b) of an exclusive contract between a cable operator and an affiliated RSN.

**1. A standstill presumption would be essentially required upon adoption of an “unfair act” presumption.**

Because, as shown, the Commission should establish a rebuttable presumption that exclusive contracts between a cable operator and an affiliated RSN are “unfair acts”, it necessarily follows that the Commission should likewise rebuttably presume that an MVPD complainant challenging such an exclusive contract is entitled to a standstill of an existing RSN contract during the pendency of the complaint. Indeed, the “unfair act” presumption, when combined with the pre-existing “significant hindrance” presumption, would require the Commission to presume (on a rebuttable basis) satisfaction of the first, second, and fourth factors of the four-factor test described above, and the third factor will usually be clearly met, as well.<sup>41</sup>

Regarding the first prong of the standstill test – likelihood of success on the merits – the addition of the “unfair act” presumption to the “significant hindrance” presumption would effectively result in a rebuttable presumption that the complainant MVPD had shown both of the two elements necessary to prove a violation of section 628(b). Thus, the complainant MVPD would presumptively demonstrate a likelihood of success on the merits.

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<sup>40</sup> See, e.g., *Exclusivity Ban Sunset Order*, 27 FCC Rcd at 12656, ¶ 78.

<sup>41</sup> It is important to keep in mind that, as previously described, the “unfair act” and “significant hindrance” presumptions derive from multiple Commission orders concluding that (i) RSN programming is non-replicable and extremely popular, and (ii) lack of access to RSN programming substantially diminishes a competitor’s ability to provide video distribution service. See Sections I, II, III(A), *supra*.

Regarding the second prong of the standstill test – irreparable harm to the complainant MVPD in the absence of a standstill – both the “unfair act” presumption and the “significant hindrance presumption” incorporate rebuttable conclusions that the complainant MVPD will suffer damage from the challenged exclusive contract. In particular, the anticompetitive harms presumed to exist via the “unfair act” presumption include injury to the MVPD’s ability to provide desirable programming and to deliver broadband services. Similarly, the deleterious effects presumed to exist via the “significant hindrance” presumption include (as the label suggests) injury to the MVPD’s ability to provide programming sufficient to retain, obtain, and regain customers. And all of these kinds of competitive harms covered by the “unfair act” and “significant hindrance” presumptions fall squarely within the scope of those deemed by courts to be “irreparable”.<sup>42</sup>

In fact, those competitive injuries are particularly grievous in the context of access to RSN programming. In that context, time is uniquely and self-evidently of-the-essence, because sports league play is seasonal, and because, unlike many other kinds of programming, virtually all of the value of sports programming resides in live viewing. Thus, as well documented in Commission orders, without access to RSN programming during the pendency of even a relatively accelerated complaint process, a plaintiff MVPD would likely lose multiple sports seasons, along with the many existing and prospective customers for whom watching those sports live is an important factor in choosing a video distributor.<sup>43</sup>

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<sup>42</sup> See, e.g., *WPIX, Inc. v. ivi, Inc.*, 691 F.3d 275 (2<sup>nd</sup> Cir. 2012); *Celsis In Vitro, Inc. v. CellzDirect, Inc.*, 664 F.3d 922 (Fed. Cir. 2012); *Southwest Stainless, LP v. Sappington*, 582 F.3d 1176 (10<sup>th</sup> Cir. 2009); *Dominion Video Satellite, Inc. v. EchoStar Satellite Corp.*, 269 F.3d 1149 (10<sup>th</sup> Cir. 2001); *Multi-Channel TV Cable Co. v. Charlottesville Quality Cable Operating Co.*, 22 F.3d 546 (4<sup>th</sup> Cir. 1994). See generally 11A Fed. Pract. & Proc., Wright & Miller, §2948.1 (2<sup>nd</sup> ed.)(updated Sept. 2012).

<sup>43</sup> See, e.g., *AT&T v. MSG/Cablevision (Bureau Order)*, affirmed, *AT&T v. MSG/Cablevision (Commission Order)* (and orders cited therein).

Regarding the fourth prong of the standstill test – the public interest favors a standstill – both the “unfair act” presumption and the “significant hindrance” presumption incorporate rebuttable conclusions that consumers will suffer harm from the challenged exclusive contract. Specifically, both presumptions foresee fewer competitive alternatives, less attractive competitive offerings, and confusion and inconvenience arising from loss of valued programming. The public interest surely favors avoidance of such consumer ills while a complaint is pending.

Finally, regarding the third prong of the standstill test – grant of a standstill will not substantially harm other interested parties – neither the “unfair act” presumption nor the “significant hindrance” presumption has much material to say. Nevertheless, as AT&T’s subject matter expert attests, and as common sense dictates, it is difficult to imagine any interested parties of consequence other than those participating in the complaint proceeding itself (except the MVPD complainant’s consumers already addressed by the fourth prong, described above).<sup>44</sup> And it is equally difficult to conjure any significant or predominant harm that the cable operator or its RSN affiliate will experience from continuing to sell the programming at issue during the pendency of the complaint, especially given the Commission’s “true-up” process.<sup>45</sup>

In sum, if the Commission were to adopt a rebuttable presumption that an exclusive contract between a cable operator and an RSN affiliate is an “unfair act” under section 628(b), then an MVPD complainant challenging such a contract would presumptively satisfy all four-prongs of the standstill test. Accordingly, the Commission should adopt a rebuttable

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<sup>44</sup> See Lauricella Declaration at ¶ 6.

<sup>45</sup> See, e.g., *2010 Program Access Order*, 25 FCC Rcd at 794-97, ¶¶ 71-75. See also Lauricella Declaration at ¶ 6. The Commission has asked whether an “unfair act” presumption and the “significant hindrance” presumption rationally relate to any standstill factor other than likelihood of success on the merits. *Exclusivity Ban Sunset Order*, 27 FCC Rcd at 12656-57, ¶ 79. As explained in the text, those presumptions do rationally relate to other standstill factors, including the irreparable injury factor and the public interest factor (as well as the likelihood of success factor).

presumption that a complainant MVPD challenging an exclusive contract between a cable operator and an RSN affiliate is entitled to a standstill of an existing programming contract during the pendency of a complaint.

**2. A standstill presumption makes sense even without an “unfair act” presumption.**

The Commission has inquired whether the Commission could rebuttably presume an MVPD complainant’s entitlement to a standstill even without also adopting an “unfair act” presumption.<sup>46</sup> The answer is yes. For the following reasons, the existing “significant hindrance” presumption, when combined with Commission precedent, facts about the video market, and evidence supplied by AT&T’s subject matter expert, plainly provides ample grounds for satisfying all four prongs of the standstill test.

Regarding likelihood of success on the merits, the “significant hindrance” presumption covers one of the two components of a section 628(b) claim; and although significant hindrance of a competitor does not fully equate to an “unfair act” (the other component of a section 628(b) claim), the Commission has held that such hindrance can be one substantial anticompetitive harm to be weighed against any alleged pro-competitive effects.<sup>47</sup> Indeed, as described previously, RSNs are non-replicable and usually very popular; so pro-competitive benefits arising from an exclusive RSN contract are likely to be non-existent or, in any event, outweighed by the anti-competitive harms.<sup>48</sup> Finally, as also described previously, the history and present status of the video programming and distribution markets refute any suggestion that exclusive contracts

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<sup>46</sup> *Exclusivity Ban Sunset Order*, 27 FCC Rcd at 12656-57, ¶ 79.

<sup>47</sup> *See, e.g., AT&T v. MSG/Cablevision (Bureau Order)*, 26 FCC Rcd at 13229-39, *aff’d*, *AT&T v. MSG/Cablevision (Commission Order)*, 26 FCC Rcd at 15891. The Commission has held that, in determining whether the challenged RSN contract is unfair, the Commission will weigh the competitive harm against any pro-competitive effects. *See, e.g., Exclusivity Ban Sunset Order*, 27 FCC Rcd at 12640-41, ¶ 53.

<sup>48</sup> *See, e.g., AT&T v. MSG/Cablevision (Bureau Order)*, 26 FCC Rcd at 13229-39, *aff’d*, *AT&T v. MSG/Cablevision (Commission Order)*, 26 FCC Rcd at 15891; Lauricella Declaration at ¶¶ 2, 6.

involving cable operators and affiliated RSNs would likely have pro-competitive benefits that would outweigh their anticompetitive harms.

Regarding irreparable harm to the complainant MVPD absent a standstill -- here, too, the “significant hindrance” presumption is virtually dispositive, standing alone. In brief, that presumption assumes that an exclusive contract between a cable operator and an affiliated RSN will materially diminish the complainant’s ability to provide commercially attractive video programming and broadband services to consumers. In addition, as previously described, it is self evident that, because RSN programming consists largely of live events and seasonal sports, the loss of RSN programming even for a relatively short period can be crippling.

Accordingly, in most, if not all, areas in which AT&T distributes a cable-affiliated RSN, AT&T would suffer at least the following irreparable harms if AT&T’s access to the RSN programming were discontinued during the pendency of a complaint: (i) AT&T would lose a material number of existing and prospective customers; (ii) AT&T would lose a material amount of consumer good will; (iii) AT&T would have to expend material cost and effort to regain lost customers, if and when AT&T ultimately prevailed on its complaint; and (iv) AT&T would have to expend material cost and effort to try to convince existing and prospective customers to overlook the potential loss of RSN programming in the future, even if AT&T were to ultimately prevail on its complaint.<sup>49</sup>

Regarding promoting the public interest, a standstill of an existing RSN contract during the pendency of a complaint would (i) minimize MVPD customer inconvenience and confusion; (ii) limit the ability of cable operators and their affiliated RSNs to use temporary foreclosure strategies (i.e., withholding programming to extract concessions from MVPDs during renewal negotiations); (iii) encourage settlement; and (iv) increase the usefulness of the program access

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<sup>49</sup> Lauricella Declaration at ¶¶ 3-5, 7.

complaint process.<sup>50</sup> Regarding potential harm to other interested parties, a standstill would not cause any such substantial or predominant harm, for the same reasons already described.

Finally, it is well-established that the four prongs of the standstill test are subject to a “sliding scale.” Hence, for example, if a complainant makes a strong showing of irreparable harm, then its burden to show likelihood of success on the merits is reduced accordingly (and vice-versa).<sup>51</sup> Thus, if the Commission were to choose not to adopt a rebuttable presumption regarding an “unfair act”, any resulting diminution in the presumed likelihood of success on the merits (which diminution should be *de minimus*, anyway) would typically be counterbalanced by the strong showing of irreparable harm that derives inherently from the “significant hindrance” presumption and the deleterious anticompetitive injuries caused by almost any exclusive RSN contract.

In addition to adopting a rebuttable standstill presumption, the Commission should take two additional, related steps. First, the Commission has “encourage[d] complainants to file the petition [for a standstill] and complaint sufficiently in advance of the expiration of the existing contract to provide the Commission with sufficient time to act prior to expiration.”<sup>52</sup> The Commission should adopt a rule clarifying that twenty (20) days is “sufficiently in advance of the expiration of the existing contract”, and that even fewer days in advance may be permissible for good cause. Otherwise, a complainant might feel compelled to file a standstill petition and complaint before settlement prospects are truly dim, solely to preserve the possibility of obtaining a standstill prior to expiration of the existing contract. Obviously, that could waste the time and resources of both the parties and the Commission. Moreover, the Commission would

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<sup>50</sup> Lauricella Declaration at ¶¶ 3-5, 7. See, e.g., *2010 Program Access Order*, 25 FCC Rcd at 794-97, ¶¶ 71-75.

<sup>51</sup> See, e.g., *Cardinal Health, Inc. v. Holder*, 846 F.Supp.2d 203 (D.D.C. 2012); *Holiday CVS, L.L.C. v. Holder*, 839 F.Supp.2d 145 (D.D.C. 2012). See generally 11A Fed. Pract. & Proc., Wright & Miller, §2948.3 (2d ed.) (updated Sept. 2012).

<sup>52</sup> *2010 Program Access Order*, 25 FCC Rcd at 795, ¶ 73.

typically have up to ten (10) days after the filing of the answer (which rule 76.1003(1)(2) says must be filed ten (10) days after the petition) to issue a ruling. Second, the Commission should commit to ruling on any timely-filed standstill petition before the existing contract expires.

**C. The Commission Should Adopt the Same Rebuttable Presumptions for Complaint Proceedings Involving Cable-Affiliated National Sports Networks as for Complaint Proceedings Involving Cable-Affiliated RSNs.**

The Commission has asked how to define a “national sports network”.<sup>53</sup> In AT&T’s view, the Commission should define “national sports network” in the same manner as the Commission defined RSN in the *Exclusivity Ban Sunset Order*, except for deletion of references to limited geographic regions.<sup>54</sup> In that way, the sports leagues included would be confined to those that the Commission has already determined are the most popular and thus the most important to video distribution competition; and the quantity of sports programming required would match what the Commission has already concluded is a reasonable threshold of competitive significance.

The Commission has also asked whether the “unfair act”, “significant hindrance”, and “standstill” rebuttable presumptions should apply in complaint proceedings involving allegations that an exclusive contract between a cable operator and an affiliated “national sports network” violates section 628(b).<sup>55</sup> Assuming the Commission defines “national sports network” as just described, the answer is yes again, for the following reasons.

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<sup>53</sup> *Exclusivity Ban Sunset Order*, 27 FCC Rcd at 12657, ¶ 80.

<sup>54</sup> Thus, “national sport network” would be defined as “any non-broadcast video programming service that (1) provides live or same-day distribution ... of sporting events of a sports team that is a member of Major League Baseball, the National Basketball Association, the National Football League, the National Hockey League, NASCAR, NCAA Division I Football, [and] NCAA Division I Basketball, ... and (2) in any year, carries a minimum of either 100 hours of programming that meets the criteria of subheading 1, or 10% of the regular season games of at least one sports team that meets the criteria of subheading 1”. *Exclusivity Ban Sunset Order*, 27 FCC Rcd at 12643-44, ¶ 56 (quoting *2010 Program Access Order*, 25 FCC Rcd at 783-84, ¶ 53).

<sup>55</sup> *Exclusivity Ban Sunset Order*, 27 FCC Rcd at 12657, ¶ 80.

First, the non-replicability of sports programming in the covered leagues does not turn on whether it is distributed nationally or regionally. A live contest between two particular teams in the covered leagues is inherently unique.

Second, although in some instances sports programming featuring a region's home team may be more popular in that region than sports programming featuring other teams, all sorts of indicia -- such as ratings, ad revenue, and content pricing -- indicate that national sports programming is highly valued by consumers across the country.<sup>56</sup> Indeed, the content of sports programming to be distributed nationally is surely chosen particularly because of its broad appeal, and thus often features marquee match-ups bound to have large viewerships.

Given this evidence that national sports networks have attributes of non-replicability and popularity akin to those of RSNs, the Commission may again apply its predictive judgment to conclude that exclusive contracts between cable operators and national sports networks (as defined above) are likely to be "unfair acts" that cause "significant hindrance" to competing MVPDs.<sup>57</sup> Accordingly, the Commission should adopt the same "unfair act", "significant hindrance", and "standstill" presumptions to exclusive contracts involving cable-affiliated national sports networks as it should to exclusive contracts involving cable-affiliated RSNs.<sup>58</sup>

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<sup>56</sup> See, e.g., *March 2012 Notice*, 27 FCC Rcd at 3441, ¶ 53 (stating that "certain national cable programming networks produce programming that is more widely viewed and commands higher advertising revenue than certain broadcast or RSN programming")(quotation marks and footnote omitted); *Exclusivity Sunset Order*, 27 FCC Rcd at Appendix F, Table 3 (indicating that ESPN, TNT, and TBS -- all of which show substantial amounts of programming included within the proposed definition of "national sports network" -- are among the top ten cable networks ranked by average prime time ratings); Lauricella Declaration at ¶ 8.

<sup>57</sup> See, e.g., *Cablevision II*, 649 F.3d at 716-17.

<sup>58</sup> AT&T recognizes that, today, the most popular cable networks featuring significant national sports programming are not affiliated with a cable operator. It is also true, however, that the market for content ownership is highly fluid; and as discussed above, armed with their new ability to execute exclusive contracts, cable operators have every incentive and ability to acquire and lock up the most popular programming, including national sports programming. Thus, to fulfill its statutory duty to preserve and protect competition and diversity in the distribution of video programming, the Commission must address the potential for future problems, and not focus just on existing problems.

**D. The Commission Should Adopt a Rebuttable Presumption That, Once One MVPD Complainant Succeeds in Demonstrating that an Exclusive Contract Involving a Cable-Affiliated Network Violates Section 628(b), any other Exclusive Contract Involving the Same Network and Similar Core Market Factors Violates Section 628(b).**

Under certain circumstances (identified below), a Commission finding that an exclusive contract between a cable operator and an affiliated network violates section 628(b) will constitute powerful evidence -- powerful enough to warrant a rebuttable presumption -- that any other exclusive contract involving the same affiliated parties also violates section 628(b). Such circumstances will exist when an MVPD in a subsequent complaint proceeding alleges in good faith that, *in the geographic market at issue in the subsequent complaint proceeding*, (i) the market share of the subsequent MVPD complainant is roughly comparable to or less than the market share of the original MVPD complainant; (ii) the market share of the cable operator defendant is roughly equivalent to or greater than the market share shown in the original complaint proceeding; and (iii) the ratings of the affiliated network are roughly comparable to or higher than the ratings shown in the original complaint proceeding.

Those three factors possess compelling probative value pertaining to the competition analysis required by section 628(b). Indeed, the Commission has often relied on those factors as core indicia in evaluating claims under section 628(b).<sup>59</sup>

Moreover, utilizing those three factors will tailor application of the proposed presumption to fit only those situations where the prior finding of unlawfulness renders a subsequent finding of unlawfulness so probable that it is sensible and efficient to assume unlawfulness until the defendant produces material contrary evidence. For example, the Commission has expressed concern that application of an unqualified presumption regarding previously challenged contracts might fail to account for competitive distinctions between (i) different MVPD complainants, (ii)

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<sup>59</sup> See, e.g., *Verizon v. MSG/Cablevision (Bureau Order)*, affirmed, *Verizon v. MSG/Cablevision (Commission Order)*; *AT&T v. MSG/Cablevision (Bureau Order)*, affirmed, *AT&T v. MSG/Cablevision (Commission Order)*.

cable operators providing service in different geographic areas, and (iii) a network's popularity at one point in time and at a future time.<sup>60</sup> Requiring a subsequent MVPD complainant to plead the three market factors described above will vitiate all of those concerns.<sup>61</sup> Furthermore, given the objectiveness and public availability of the information that comprise those three factors, alleging them in good faith as a prerequisite for applying a rebuttable presumption will not undermine the presumption's efficiencies.<sup>62</sup>

#### **IV. Conclusion**

For the foregoing reasons, the Commission should adopt all of the rebuttable evidentiary presumptions discussed above.

Respectfully submitted,

/s/ Alex Starr

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December 14, 2012

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<sup>60</sup> *Exclusivity Ban Sunset Order*, 27 FCC Rcd at 12657-58, ¶ 81; *March 2012 Notice*, 27 FCC Rcd at 3442-43, ¶¶ 55-56 (2012).

<sup>61</sup> Note that pleading the three market factors described above would be required only for application of the rebuttable presumption, and not for stating an actionable claim.

<sup>62</sup> None of the proposed rebuttable presumptions discussed in these Comments is more restrictive, less narrowly tailored, or designed to achieve a less important government objective than the "significant hindrance" rebuttable presumption that has already passed muster under the First Amendment. *See, e.g., Cablevision II*, 649 F.3d at 710-14, 717-18. Thus, the proposed rebuttable presumptions present no First Amendment concerns.

# **EXHIBIT A**

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

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

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Declaration of J. Christopher Lauricella

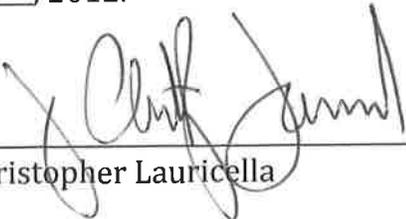
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1. My name is J. Christopher Lauricella. I am currently employed by AT&T Services, Inc., and my current title is Assistant Vice President – Content. I have been in this position since March 2005, and my primary responsibility is the acquisition of entertainment and sports programming for AT&T's three screen deployment, including for AT&T U-verse TV service. From June 1996 through March 2005 I worked for DirecTv where my duties involved acquiring and marketing sports programming. I have been in this industry since 1990.
2. In my experience, regional sports networks ("RSNs") are almost always non-replicable and highly valued by consumers, and are extremely highly valued by AT&T's existing and prospective customers. No amount of programming differentiation or investment by a competing multichannel video programming distributor ("MVPD") could diminish the anti-competitive harms from lack of access to an RSN.
3. In most, if not all, regions in which it provides video distribution services, AT&T would lose a material amount of existing customers and goodwill in the event AT&T and a network owning the RSN have a dispute that results in a complaint proceeding during which it lost access to such programming. Moreover, AT&T would inevitably lose prospective customers to others who have the RSN programming if it is not available on AT&T U-verse while a complaint was pending,

4. Likewise, in most, if not all, regions in which it provides video distribution services, existing and prospective customers of AT&T would experience significant confusion, disruption, and/or inconvenience if AT&T lost RSN programming while a complaint was pending.
5. It would be significantly costly and difficult for AT&T to regain lost customers if and when AT&T ultimately prevailed in its complaint, as it would be significantly costly and difficult for AT&T to convince existing and prospective customers to overlook the potential discontinuation of RSN programming in the future, even if AT&T ultimately prevailed in its complaint.
6. A standstill would have no material impact on any person or entity other than the parties to the complaint proceeding and AT&T's existing and prospective customers, and it would cause far less harm, if any, to the cable operator and/or programmer than the absence of a standstill would have on AT&T, especially given the Commission's true-up process.
7. Likewise, a standstill would minimize customer confusion and inconvenience; limit the ability of cable operators and their affiliated RSNs to use temporary foreclosure strategies; encourage settlement; and increase the usefulness of the program access complaint process.
8. The relevant content of national sports networks, like that of RSNs, is almost always non-replicable, except in those limited situations when a sporting event is available on both a national sports network and another local network. Further, national sports networks, like RSNs, are extremely popular, as shown by, among other things, ratings, ad revenue, and content pricing.

Pursuant to 28 U.S.C. § 1746 and 47 C.F.R § 1.16, I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on December 14, 2012.

  
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J. Christopher Lauricella