

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

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

**REPLY COMMENTS OF  
NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION**

In its initial comments, the National Cable & Telecommunications Association (“NCTA”) explained why, as a matter of law and as a matter of sound public policy, the Commission should not adopt *any* of the rebuttable presumptions on which the Further Notice seeks comment. In none of the cases is the presumed fact “so probable” that it is “sensible and timesaving” to assume its truth until disproven by the defendant cable program network – the legal standard for presumptions in agency rulemaking. Enabling and encouraging a multichannel video programming distributor (“MVPD”) to trigger a program access complaint proceeding without first providing evidence that an exclusive contract between a cable-owned program network and a cable operator unfairly and significantly hinders its ability to compete imposes unwarranted costs and burdens on cable-owned program networks and on the Commission.

In today’s competitive MVPD marketplace, rules that uniquely restrict or discourage exclusive contracts between cable-affiliated program networks and cable operators are not only unnecessary to protect competition but also, in fact, can unfairly distort or discourage competition in the video marketplace. As the Commission reaffirmed in allowing the *per se* prohibition on such contracts to sunset, exclusivity can be an efficient, procompetitive means of competition for MVPDs and program networks. But that competition is skewed when some

competitors are advantaged by allowing them to enter into such contracts more readily and with fewer regulatory costs and burdens than others.

Moreover, rules that discourage cable operators from using exclusivity as a means of competing for customers by differentiating their services from other MVPDs in the marketplace also discourage those MVPDs from themselves competing with unique, innovative and attractive price and service offerings of their own – all to the detriment of consumers. The way to promote and preserve competition today is to scale back on the scope and burdens of the program access rules, not to adopt new presumptions that encourage and facilitate complaints.

Predictably, those very MVPDs that have for two decades enjoyed the protectionism of the program access rules now urge the Commission to adopt *all* the proposed rebuttable presumptions. They argue that exclusive contracts between cable-owned RSNs or other networks and cable operators *never* benefit consumers or promote competition, so that it is reasonable and lawful to presume that they unfairly hinder competition. But their arguments fail even to address the extent to which exclusivity can be and often is a legitimate and procompetitive means of product differentiation.

There is no basis for concluding that cable operators' competitors are incapable of responding effectively to, and remaining fully viable in the face of, an exclusive regional sports network ("RSN") contract – much less that such an outcome is so probable as to warrant a presumption that all RSN contracts between a cable-affiliated RSN and a cable operator are unfair and hinder competition. It is even less likely that exclusive contracts with cable-affiliated *national* sports networks would be unfair or have such an effect.

If it is unwarranted to presume that exclusive contracts with cable-affiliated RSNs (or national sports networks) are unfair, it would be especially unreasonable to presume at the outset

of a complaint proceeding that the complainant is entitled to the extraordinary relief of a standstill order, based on the notion that the complainant is likely to prevail on the merits. Finally, given the multitude of unique characteristics of local cable communities, it would make no sense to presume that, just because an exclusive contract between a cable-affiliated RSN and a cable operator has been deemed to be unfair and significantly hinder MVPD competition in one market, all exclusive contracts involving the same network are also unfair and significantly hinder competitors.

**I. THERE IS NO BASIS FOR PRESUMING THAT EXCLUSIVE CONTRACTS INVOLVING CABLE-AFFILIATED RSNs ARE “UNFAIR.”**

The parties supporting a rebuttable presumption that exclusive RSN contracts are “unfair” argue that it is reasonable and lawful to presume unfairness because, in their view, such contracts virtually never benefit consumers or promote competition. CenturyLink and Frontier Communications, for example, go so far as to assert that, “[b]ecause 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.’”<sup>1</sup> Others simply argue that if particular programming is “popular and non-replicable,” it must be “unfair” to withhold that programming from a competitor.<sup>2</sup>

The parties reach these categorical conclusions by ignoring one of the important potential procompetitive benefits of exclusivity. Focusing solely on the procompetitive ways that exclusive contracts between a supplier and a distributor can benefit the supplier – *i.e.*, the programmer – they claim that exclusive RSN contracts “do not provide any of the benefits

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<sup>1</sup> Comments of CenturyLink, Inc. and Frontier Communications at 5 (emphasis in original).

<sup>2</sup> *See, e.g.*, Comments of United States Telecom Association (“USTelecom”) at ii.

typically cited to justify exclusive contracts by cable-affiliated programmers: promotion of investment, diversity, or innovation in programming.”<sup>3</sup>

But even if this claim were true for most RSNs (and there is no evidence that it is), those are not the only potential procompetitive benefits of exclusive contracts. As the Commission has recognized, in addition to promoting competition and more and better choices for consumers in the programming marketplace, exclusivity can also enhance competition and choice in the MVPD marketplace: “We recognize the benefits of exclusive contracts and vertical integration . . . such as encouraging innovation and investment in programming *and allowing for ‘product differentiation’ among distributors.*”<sup>4</sup>

As economist Mark Israel explained in a paper submitted by NCTA in this docket:

[T]hrough the usual competitive process, new or improved content distributed by one MVPD – including via exclusive programming networks – puts competitive pressure on other MVPDs to offer more value to consumers, perhaps by lowering their prices, developing or improving their own affiliated network offerings, or otherwise improving the set of services they offer (*e.g.*, voice or data offerings, online content, DVR technologies, *etc.*). This dynamic response whereby one company responds to the quality improvements of another is the essence of competition and redounds to the ultimate benefit of consumers.<sup>5</sup>

This is why, in a vibrantly competitive MVPD marketplace, the mere fact that an exclusive contract may “significantly hinder” some competitors does not render the contract anticompetitive or unfair. In such a marketplace, competitors are constantly seeking to differentiate their product in a manner that will disadvantage their competitors – and those competitors try to counter with uniquely attractive price or service offerings of their own.

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<sup>3</sup> Comments of CenturyLink and Frontier Communications at 3. *See also, e.g.*, Comments of Dish Network at 3; Comments of DIRECTV at 4.

<sup>4</sup> *In re Implementation of the Cable Television Consumer Protection and Competition Act of 1992*, 22 FCC Rcd 17791, 17835 (2007) (emphasis added).

<sup>5</sup> Declaration of Dr. Mark Israel, “An Economic Assessment of the Prohibition on Exclusive Contracts for Satellite-Delivered, Cable-Affiliated Networks” ¶ 22 (submitted as attachment to Ex Parte Letter from Rick Chessen to Marlene Dortch, filed Sept. 7, 2012).

Even if it were possible that, in a particular marketplace, the particular sports events carried by an RSN were deemed so essential by such a large segment of the population that cable operators' competitors in that community could not develop service offerings and enhancements of their own to remain viable competitors, the commenting parties offer no basis for concluding that this is usually, much less almost always, the case. In these circumstances, it makes most sense to require MVPDs to provide evidence that they cannot respond effectively and competitively before a programmer is required to demonstrate the contrary. A presumption of unfairness is utterly unwarranted.

**II. THERE IS NO BASIS FOR ADOPTING PRESUMPTIONS REGARDING EXCLUSIVE CONTRACTS INVOLVING CABLE-OWNED NATIONAL SPORTS NETWORKS.**

The telephone and DBS companies contend that national sports networks (“NSNs”) generally have the same supposedly essential “must-have” qualities as RSNs, and that, therefore, exclusive contracts involving cable-affiliated NSNs should, like RSNs, be presumed to be unfair and significantly hinder the viability of competing MVPDs. For example, according to DIRECTV, “The characteristics that make RSNs critical to viewers (and thus ideal tools for anticompetitive acts) are related not [to] the fact that they are ‘regional’ but rather to the fact that they carry ‘sports’ – *i.e.*, programming that is non-replicable and for which there is no close substitute.”<sup>6</sup>

This argument is, to put it mildly, counter-intuitive. RSNs typically provide almost *all* the games of local sports teams and may be especially highly valued and deemed essential by the fans of those teams in local communities. While everybody’s favorite teams may appear *occasionally* on NSNs, with a few exceptions, there is a difference between a network that

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<sup>6</sup> Comments of DIRECTV, LLC at 8. *See also* Comments of Dish Network at 4-5; Comments of DIRECTV at 7-13; Comments of AT&T at 20-21; Comments of CenturyLink and Frontier Communications at 10; Comments of Independent Telephone & Telecommunications Alliance at 11-12; Comments of USTelecom at 21-23.

carries all but a small handful of a local team's games and a network that carries a few of those games, along with other games and events that may be of general interest to sports fans.

CenturyLink and Frontier Communications note correctly that “[a]ny definition of NSN would likely include the Golf Channel, Mun2, NBC Sports and Universal Sports, all of which are affiliated with cable operators.”<sup>7</sup> But their assertion that “[e]xclusive contracts with vertically integrated cable operators for just a few of these networks would *critically impair* competition”<sup>8</sup> is implausible – especially since many cable systems choose not to carry all of these and other NSNs with no adverse impact on their viability.<sup>9</sup>

In any event, the Commission's decision to adopt a presumption that exclusive contracts with RSNs significantly hinder competing MVPDs was based on specific evidence and studies of the effects of such contracts in a small number of communities. That evidence, in the Commission's view, showed that in some (but not all) of those markets, the exclusive contracts had a significant impact on the subscribership of competing MVPDs.<sup>10</sup> There is no similar evidence to support the blanket conclusion that most exclusive contracts involving NSNs have such an impact. And in the absence of such evidence, there is no basis for any presumption that such contracts significantly hinder competitors, much less that they are unfair.

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<sup>7</sup> Comments of CenturyLink and Frontier Communications at 10.

<sup>8</sup> *Id.* (emphasis added).

<sup>9</sup> Indeed, some NSNs have submitted complaints under the Commission's “program carriage” rules precisely because MVPDs have chosen *not* to carry them. *See, e.g., Tennis Channel, Inc. v. Comcast Cable Communications, LLC*, 27 FCC Rcd 8508 (2012); NFL Enterprises LLC, Program Carriage Complaint, File No. CSR-7876-P (filed May 6, 2008).

<sup>10</sup> *See, e.g., Program Access Rules & Examination of Programming Tying Arrangements*, First Report and Order, 25 FCC Rcd 746, 782-83 (2010); *Revision of the Commission's Program Access Rules*, Report and Order, ¶ 55 (Oct. 5, 2012).

### **III. THERE IS NO BASIS FOR PRESUMING THAT A COMPLAINANT CHALLENGING AN EXCLUSIVE CONTRACT INVOLVING A CABLE-AFFILIATED RSN IS ENTITLED TO A STANDSTILL.**

As NCTA and others pointed out in their initial comments, the barrier to establishing a presumption in favor of a standstill order during the pendency of a program access complaint proceeding should be even higher than for an evidentiary presumption regarding whether an exclusive contract is unfair or significantly hinders MVPD competitors.<sup>11</sup> A standstill order is an extraordinary remedy – one that restrains a party’s conduct before a complaint has been adjudicated and before a violation has been found to have occurred. Moreover, in the case of program access complaints, the conduct being restrained directly involves speech protected by the First Amendment. Furthermore, it requires determinations not only that the complainant is likely to prevail on the merits – *i.e.*, that it is likely to show that the exclusive contract is unfair and significantly hinders competition – but also that any harm incurred during the pendency of the proceeding will be irreparable and will outweigh any adverse effects that a standstill might have on other parties and on the public interest.

Thus, even if it were reasonable to adopt rebuttable presumptions that exclusive RSN contracts were unfair *and* significantly hindered competitors, it would be unwarranted to presume that a standstill order should be granted. As Time Warner Cable explains:

Under the proposed presumption, a complainant could obtain a standstill – even on the basis of an unsupported or totally frivolous complaint – so long as the defendant is unable to come forward with evidence in a highly compressed time frame rebutting each of the four elements described above. . . . This risk of error has grave First Amendment implications, as it would involve compelling the speech of cable-affiliated RSNs without any specific justification.<sup>12</sup>

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<sup>11</sup> See NCTA Comments at 9-10; Comments of Time Warner Cable at 12-14; Comments of Comcast Corporation and NBCUniversal Media at 11-13; Comments of Cablevision Systems Corporation at 7-8; Comments of Madison Square Garden Company at 8-12.

<sup>12</sup> Comments of Time Warner Cable Inc. at 13-14. Some parties are wholly unconcerned with any such risk of error. See Comments of USTelecom at 18 (arguing that the Commission should adopt an “automatic” standstill agreement in RSN-related complaint proceedings “as a matter of course”); Comments of Dish Network at 6

#### **IV. THERE IS NO BASIS FOR A REBUTTABLE PRESUMPTION FOR PREVIOUSLY CHALLENGED EXCLUSIVE CONTRACTS.**

So many factors are relevant to whether or not a particular RSN's exclusive contract in a particular market significantly hinders a particular MVPD *and* is unfair that there is no basis for presuming that, if an exclusive contract is determined to be unlawful, *every* exclusive contract involving that same RSN is also unlawful. While some – but not all – of the commenting telephone and DBS companies briefly argue for the adoption of such a broad presumption,<sup>13</sup> none provide any reasoned explanation for why it should apply without regard to the unique characteristics of each marketplace and each MVPD.

AT&T at least recognizes *some* of the variables that preclude such a broad across-the-board presumption. Thus, it would apply the presumption only “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.”<sup>14</sup>

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(urging the Commission to “go beyond the limited protections proposed in the *Further Notice* 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”).

<sup>13</sup> See, e.g., Comments of Dish Network at 8; Comments of CenturyLink and Frontier Communications at 11; Comments of USTelecom at 23-25; Comments of Independent Telephone & Telecommunications Alliance at 14. DIRECTV's comments do not address this presumption.

<sup>14</sup> Comments of AT&T Inc. at 22 (emphasis in original).

But even this narrowing of the presumption ignores several key variables that are critical to case-by-case determinations of the effects and the unfairness of an exclusive RSN contract. In particular, the effect of exclusivity on the viability of an MVPD will vary not only depending on the ratings of the network and the market share of the MVPD but also on whether an MVPD is able to counter the effects of the exclusive contract with unique, attractive services of its own. The effect of an exclusive contract on marketplace competition and consumer welfare is likely to be quite different depending upon whether the MVPD competitors in the marketplace consist of small, independent MVPDs or large DBS or telephone companies with national market shares that are larger than all but the largest cable operators.

In order to trigger the burdens and procedures of a program access complaint, an MVPD should be required, as a threshold matter, to provide evidence that the exclusive contract at issue will, in fact, not only significantly hinder its efforts to compete in the marketplace but also that it lacks the capability of responding effectively to such a contract and that competition in the marketplace will, as a result, be significantly impaired. Such evidence, if it exists, would be in the possession or knowledge of the complainant. There is no basis for presuming that, simply because another contract involving the same RSN in a different community or with a different MVPD was determined to be unfair and significantly hindered that MVPD from competing, all exclusive contracts involving that RSN will have the same effects.

**CONCLUSION**

For the foregoing reasons, and for the reasons set forth in our initial comments, the Commission should not adopt any of the presumptions discussed in the Further Notice.

Respectfully submitted,

**/s/ Rick Chessen**

Rick Chessen  
Michael S. Schooler  
Stephanie L. Poday  
National Cable & Telecommunications  
Association  
25 Massachusetts Avenue, N.W. – Suite 100  
Washington, D.C. 20001-1431  
(202) 222-2445

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