

**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

**REPLY COMMENTS OF DIRECTV, LLC**

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## SUMMARY

This proceeding continues the trend in which all parties other than large, vertically integrated cable operators and their affiliated programmers recognize the need for effective safeguards to prevent anticompetitive use of programming assets. In this case, the evidentiary presumptions proposed by the Commission are justified by the evidence of record, appropriate to streamline program access proceedings, and especially necessary in the absence of the cable exclusivity ban that was allowed to sunset last year. Although cable interests raise several objections to such presumptions, none withstand scrutiny.

For example, contrary to cable's lament, presumptions would not effectively reinstate the exclusivity ban. The complainant still has the ultimate burden of persuasion on all issues involved in a given case. By limiting such presumptions to cable-affiliated sports-related programming, which has been shown numerous times to be the type of high-value and non-replicable content that can be used anticompetitively, the Commission has crafted the type of rational and efficient approach that the courts have approved in light of the evidence and the Commission's predictive judgment. Cable's continuing attempts to raise First Amendment concerns fare no better, as they have been repeatedly rejected by both the Commission and the courts. Indeed, nothing about the proposed presumptions would force cable operators or cable-affiliated programmers to engage in specific speech or to associate themselves with specific viewpoints. In the absence of such compulsion, First Amendment concerns are minimal, and easily outweighed by the procompetitive effects of the Commission's program access regime.

As DIRECTV and other commenters have demonstrated in this proceeding, the proposed presumptions are grounded in sound and rational connections between the proven facts related to the nature and importance of sports-related programming and the proposed inference as to the unfairness of withholding such content from competitors and the effect of such withholding. Cable largely ignores this evidence, preferring instead to raise misleading or inapposite objections. For example, contrary to cable's assertions, the fact that the D.C. Circuit found no basis for an "unfair act" presumption with respect to all cable-affiliated programming does not preclude the Commission from adopting such a presumption for the much more limited and well-documented case of sports-related programming. Similarly, even assuming that exclusive arrangements could be procompetitive when applied to local news or niche programming, the proposed presumptions would have no effect on such arrangements as they related solely to sports-related programming. Moreover, cable operators would have unfettered access to evidence relevant to any presumption in favor of a standstill, and need only prevail on one of the four relevant factors in order to overcome such a presumption.

Accordingly, DIRECTV urges the Commission to adopt the proposed presumptions and put in place much-needed enhancements to its post-sunset program access regime.

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DIRECTV, LLC (“DIRECTV”) submits these reply comments in favor of the adoption of three rebuttable presumptions proposed in the Commission’s Further Notice of Proposed Rulemaking in the above referenced proceeding.<sup>1</sup> In its initial comments, DIRECTV urged the Commission to adopt the following rebuttable presumptions:

- An exclusive carriage arrangement involving a cable-affiliated regional sports network (“RSN”) is an “unfair act” under Section 628(b) of the Communications Act.
- An exclusive carriage arrangement involving a cable-affiliated national sports network (“NSN”) is both an “unfair act” and has the purpose or effect of “significantly hindering or preventing” the complainant from providing satellite cable programming under Section 628(b).
- A complainant challenging an exclusive contract involving a cable-affiliated RSN or NSN is entitled to a standstill of an existing programming contract for that programming during the pendency of the complaint proceeding.

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<sup>1</sup> See *Revision of the Commission’s Program Access Rules*, 27 FCC Rcd. 12605 (2012) (“FNPRM”).

In this reply, DIRECTV addresses the cable industry's objections to presumptions generally, as well as its more specific objections to each individual presumption.

## **I. CABLE'S GENERAL OBJECTIONS TO PRESUMPTIONS LACK MERIT**

The cable industry offers two general objections to the use of presumptions in program access proceedings. First, cable argues that such presumptions would effectively reinstate the *per se* exclusivity ban that was allowed to sunset last year. Second, cable asserts that such presumptions would violate the First Amendment rights of cable-affiliated programmers. Both objections lack merit.

### **A. Adopting Presumptions Would Not Reinstate a *Per Se* Ban**

Cable operators claim that adoption of the *FNPRM's* proposed presumptions would essentially "reinstat[e] an effective *per se* ban on exclusive sports contracts"<sup>2</sup> and "reconstruct a *per se* prohibition."<sup>3</sup> Comcast even laments the Commission's proposals as "layer[ing] on new program access rules that have never before been thought necessary"<sup>4</sup>—a curious complaint about presumptions "thought necessary" only because the broader ban on exclusive contracts has been allowed to expire.

Of course, it is not true that the adoption of evidentiary presumptions is tantamount to a *per se* ban, any more than it is true that the findings that led to lifting of the ban also argue against adoption of such presumptions. All parties recognize that presumptions are appropriate when "there is a sound and rational connection between the proved and inferred facts, and when

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<sup>2</sup> Comments of Comcast Corporation and NBCUniversal Media LLC at 6 ("Comcast Comments"). Unless otherwise noted, all comments cited herein were filed in MB Docket No. 12-68 on December 14, 2012.

<sup>3</sup> Comments of the Madison Square Garden Company on the Further Notice of Proposed Rulemaking at 1 ("MSG Comments").

<sup>4</sup> Comcast Comments at 5.

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>5</sup> Thus, the relevant question when considering a presumption is whether this connection has been substantiated such that the burden of going forward with the evidence should be shifted in the interest of efficiency. Yet cable operators seem to forget that, even with presumptions, in each case the *complainant* still bears the ultimate burden of proof.<sup>6</sup>

Nor, for that matter, is it true that the proposed presumptions would stack the deck against the cable industry. Comcast puts this complaint the most colorfully, arguing that, “[i]f Section 628(b) litigation were a game, [presumptions] would be like requiring the defendant to start a checkers game by arranging pieces to allow the complainant to triple jump and get a king in the complainant’s first move.”<sup>7</sup> But program access litigation is not a game, and the Commission’s role in crafting rules is not to give the “players” an equal chance of winning regardless of the merits of their respective cases. Rather, it is to craft rules that reach the correct outcome as often as possible, while minimizing harm to the public and costs for all parties. If the Commission finds, as DIRECTV believes it must, “a sound and rational connection between the proved and inferred facts,” then it is entirely appropriate to presume the existence of these facts, even if this makes the “game” more difficult for defendants.

## **B. First Amendment Concerns are No Bar to Presumptions**

Cable’s second general objection to the use of presumptions relates to alleged First Amendment concerns. Such presumptions are said to be “content-based” (because they relate to

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<sup>5</sup> See *Cablevision Sys. Corp. v. FCC*, 649 F.3d 695, 716 (D.C. Cir. 2011) (citation omitted) (“*Cablevision IP*”).

<sup>6</sup> See Comcast Comments at 8 (erroneously asserting that adoption of an unfair act presumption would effectively shift the burden of proof to defendants).

<sup>7</sup> *Id.* at 13 n.37.

sports programming), not to serve an important government interest, and to lack the requisite “fit” because they unfairly single out cable operators.<sup>8</sup>

These, of course, are the exact arguments that cable has made in prior proceedings, which both the Commission and the courts have rejected. Most recently, although the Commission found that it lacked the *factual* basis to maintain a broad, *per se* ban on exclusive cable carriage arrangements,<sup>9</sup> it rejected these very arguments in the context of a case-by-case regime with presumptions for RSNs,<sup>10</sup> just as the D.C. Circuit had done the year before with respect to presumptions used for terrestrially delivered programming.<sup>11</sup> Thus:

- Presumptions applicable only to sports programming are not “content-based.” As the Commission has found, a decision to adopt a rebuttable presumption for RSN programming “is based not on content but on the existing precedent and record evidence before us regarding the importance of RSNs for competition.”<sup>12</sup>
- Presumptions serve an important government interest, especially “[g]iven the clear evidence in the record that cable operators remain dominant in some regional markets

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<sup>8</sup> See, e.g., Comments of Time Warner Cable Inc. at 6-7 (“TWC Comments”); Comcast Comments at 10-11.

<sup>9</sup> *FNPRM*, ¶¶ 17-18 (finding that the record is “mixed” with respect to cable’s market share (and thus its incentive to withhold through exclusive contracts), and that, because there are “region-specific” circumstances in which withholding might be profitable, case-by-case approach under Section 628(b) of the Communications Act is better than generalized ban).

<sup>10</sup> *FNPRM*, ¶¶ 66 *et seq.*

<sup>11</sup> *Cablevision II*, 649 F.3d at 712-18.

<sup>12</sup> *FMPRM*, ¶ 68; see also *Cablevision II*, 649 F.3d at 718 (noting that the “clear and undisputed evidence shows that the Commission established presumptions for RSN programming due to that programming’s economic characteristics, not to its communicative impact”).

and in some cases may enter into exclusive contracts for satellite-delivered, cable-affiliated programming that is necessary for competition and has no good substitutes.”<sup>13</sup>

- Presumptions are sufficiently tailored to the government interest, because “any incidental restriction on speech which may result from [the use of presumptions] is ‘no greater than is essential to the furtherance’ of Congress’ interest in promoting competition in the video distribution market.”<sup>14</sup>

Such unequivocal, on-point, and repeated findings ought to put to rest cable’s contention that adopting the proposed presumptions would be inconsistent with cable-affiliated programmers’ First Amendment rights.

Nonetheless, below we discuss two additional points relevant to cable’s First Amendment claims.

***Cable is not unfairly singled out.*** Time Warner Cable Inc. (“TWC”), alone in the cable industry, once again argues that the proposed presumptions would violate the First Amendment because they only apply to cable. Once again, this concern is misplaced. To begin with, while TWC complains about the “Commission’s myopic focus on *cable* exclusivity,”<sup>15</sup> that focus was

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<sup>13</sup> *Id.*, ¶ 69; *see also Cablevision II*, 649 F.3d at 712 (stating that “[t]he Commission has no obligation to establish that vertically integrated cable companies retain a stranglehold on competition nationally or that all withholding of terrestrially delivered programming negatively affects competition,” and that the Commission “need show only that vertically integrated cable operators remain dominant in *some* video distribution markets, that the withholding of highly desirable terrestrially delivered cable programming, like RSNs, inhibits competition in those markets, and that providing other MVPDs access to such programming will ‘promot[e] . . . fair competition in the video marketplace’”).

<sup>14</sup> *FNPRM*, ¶ 69; *see also Cablevision II*, 649 F.3d at 718 (explaining that, “[b]y imposing liability only when complainants demonstrate that a company’s unfair act has the ‘purpose or effect’ of ‘hinder[ing] significantly or . . . prevent[ing] the provision of satellite programming, . . . the Commission’s terrestrial programming rules specifically target activities where the governmental interest is greatest” and that “[g]iven record evidence demonstrating the significant impact of RSN programming withholding, the Commission’s presumptions represent a narrowly tailored effort to further the important governmental interest of increasing competition in video programming”).

<sup>15</sup> TWC Comments at 7.

the mandate of Congress, not the Commission. Section 628 of the Communications Act prohibits unfair acts involving *cable operators* and *cable-affiliated* programmers.<sup>16</sup> This choice was deliberate, and it continues to be valid today due to cable's ongoing dominance in the market. Indeed, as DIRECTV noted in its initial comments, there has never been any evidence that exclusive arrangements between non-cable MVPDs and affiliated programmers have any effect at all on competition.<sup>17</sup> As the *Cablevision II* court found:

Were the Commission to persist in regulating only the conduct of cable operators in the face of evidence that exclusive dealing arrangements involving other MVPDs have similar negative impacts on competition, then our analysis would necessarily change. But nothing in the present record suggests such unjustified discrimination. . . . We therefore decline to strike down the Commission's order as "fatally underinclusive simply because an alternative regulation, which would restrict more speech or the speech of *more* people, could be more effective."<sup>18</sup>

Moreover, because DIRECTV is already subject to conditions that include a prohibition on exclusive arrangements with affiliated programmers, the only major MVPD not covered by this limitation is DISH Network, which has no significant affiliated programming. TWC thus has no basis to claim that cable-specific presumptions represent "bias."

In addition to market dominance, there is another rational basis for treating cable operators differently than other MVPDs (including MVPDs larger than some cable operators). Cable operators have non-overlapping franchise areas and thus do not compete against one another. Thus, a programmer affiliated with TWC could grant exclusive rights to other cable operators without compromising TWC's exclusivity in its franchise areas. In this way, a cable-only exclusive strategy would allow the programmer to achieve distribution to cable's aggregate 58.5 percent share of MVPD subscribers nationwide (and much higher percentages in many key

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<sup>16</sup> 47 U.S.C. § 548(b).

<sup>17</sup> Comments of DIRECTV, LLC at 3-4 ("DIRECTV Comments").

<sup>18</sup> *Cablevision II*, 649 F.3d at 713 (citation omitted).

DMAs). By contrast, a programmer affiliated with DIRECTV or DISH Network could not grant an exclusive to any other MVPD without violating an exclusive arrangement with its affiliated distributor. Accordingly, although DBS operators have a combined MVPD market share of 33.9 percent, an affiliated programmer that wanted to grant an exclusive could not achieve that scale of distribution. At most, it could reach the approximately 19.9 percent of MVPD subscribers served by DIRECTV, or approximately one-third the number of subscribers reached through a cable-only exclusive. Under these circumstances, cable operators are justifiably treated differently because of their unique competitive position.

***Cable Has Minimal First Amendment Interests At Stake In Any Event.*** In its reply comments in the sunset proceeding, DIRECTV explained why cable’s First Amendment claims fall for a reason entirely different than that set forth in *Cablevision II*—namely, that cable speech is not meaningfully compelled in the first place.<sup>19</sup> The cable industry never addressed this argument, and the Commission rejected cable’s First Amendment arguments without needing to reach the issues raised by DIRECTV. The Commission, though, has since made this argument the centerpiece of its response to similar First Amendment claims raised in the net neutrality litigation.<sup>20</sup> Just as net neutrality rules “regulate[] conduct, not speech,” so too do program access rules affect what cable operators “must do . . . not what they may or may not say.”<sup>21</sup> Because program access rules—whether formulated as a *per se* ban on exclusive arrangements or evidentiary presumptions—permit cable-affiliated programmers to say whatever they would like,

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<sup>19</sup> Reply Comments of DIRECTV, LLC, MB Docket Nos. 12-68, 07-18, and 05-192, at 21-26 (filed July 23, 2012).

<sup>20</sup> *Verizon v. FCC*, Brief for Appellee/Respondents, No. 11-1355, at 70 (D.C. Cir., filed Sept. 10, 2012) (“FCC Net Neutrality Brief”).

<sup>21</sup> *Id.* (citing *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 547 U.S. 47, 60 (2006) (“*Rumsfeld*”).

“that should be the end of the matter”<sup>22</sup> without the need to engage in *Cablevision II*’s “intermediate scrutiny” analysis.

In seeking to cloak itself in the First Amendment, the cable industry has asserted that it is “not unlike the newspaper industry.”<sup>23</sup> But the speech at issue here is not the *Washington Post*’s editorial page, and the Commission is no censor. What cable wants is not to “speak” in the usual sense of the word. Rather, it wants to the right to *act* by refusing to sell say, basketball games to competitors like DIRECTV who would like to buy them. Cable interests want to protect their economic right to limit speech they have already engaged in by denying certain content only to commercial rivals.

Cable argues that restrictions on exclusive arrangements compel cable-affiliated programmers to speak against their will.<sup>24</sup> Certainly, courts have determined that cable programmers and distributors are First Amendment speakers when they choose to distribute programming. First Amendment interests are implicated if the government tells a programmer what to “say” or seeks to force a distributor to carry a particular programmer instead of another.<sup>25</sup> Courts have also recognized that the First Amendment protects not only the right of speakers (even corporate speakers) to speak, but also their right not to speak.<sup>26</sup>

Not every allegation of compelled speech, however, rises to the level of a constitutional violation. In compelled-speech cases such as this one, courts balance the level of government

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<sup>22</sup> *Id.*

<sup>23</sup> *See, e.g.*, Comments of Time Warner Cable, MB Docket Nos. 12-68, 07-18, and 05-192, at 15 (filed June 22, 2012).

<sup>24</sup> *Id.*

<sup>25</sup> *Time Warner Entm’t Co. v. FCC*, 93 F.3d 957, 966 (D.C. Cir. 1996) (citing *Turner Broadcasting Sys., Inc. v. FCC*, 512 U.S. 622, 636 (1994) (“*Turner I*”)).

<sup>26</sup> *Pacific Gas & Elec. Co. v. Pub. Utilities Comm’n of California*, 475 U.S. 1, 16 (1986) (“For corporations as for individuals, the choice to speak includes within it the choice of what not to say.”).

coercion affecting speech with the level of government interest required to justify such coercion.<sup>27</sup> Courts will find that an alleged compulsion rises to constitutional significance where the government seeks to force a person or corporation to say something it does not want to say or to identify with a viewpoint with which it does not wish to be identified. As the Supreme Court put it, “[i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.”<sup>28</sup> In such cases, the Court will find a violation where there is either actual compulsion (being required to deliver an unwanted message) or, at the very least, a party might be associated with viewpoints other than its own.<sup>29</sup>

Where these two factors are absent, or where the compelled speech is merely “factual” and not “ideological,” however, courts are far less likely to find an alleged compulsion to be of constitutional significance.<sup>30</sup> In such cases, as in *Rumsfeld*, courts often say that the regulation in question is of *action*, not *speech*.<sup>31</sup>

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<sup>27</sup> *Wooley v. Maynard*, 430 U.S. 705, 715 (1977) (finding that differences between various alleged violations of negative First Amendment rights are matters of degree) (“*Wooley*”).

<sup>28</sup> *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 642 (1943) (“*Barnette*”).

<sup>29</sup> *See, e.g., Wooley*, 430 U.S. at 715 (holding that state could not require Jehova’s Witnesses to purchase license plates with motto “Live Free or Die,” despite asserted interest in fostering “appreciation of history, state pride, and individualism”); *Barnette*, 319 U.S. at 642 (holding that school board could not compel students, under threat of expulsion, to salute the United States Flag or recite the Pledge of Allegiance).

<sup>30</sup> *See, e.g., Rumsfeld*, 547 U.S. at 60, 62 (reasoning that requiring law schools to give equal space to military recruiters “neither limits what law schools may say nor requires them to say anything,” that “recruiting assistance . . . is a far cry from the compelled speech in *Barnette* and *Wooley*,” that the requirement “does not dictate the content of the speech at all, which is only ‘compelled’ if, and to the extent, the school provides such speech for other recruiters” and that “[t]here is nothing in this case approaching a Government-mandated pledge or motto that the school must endorse” ).

<sup>31</sup> *Id.* at 60.

Restrictions on cable exclusivity, even evidentiary presumptions, fall within the latter line of cases. By definition, a cable-affiliated programmer “speaks” the minute it is carried on a cable system. Its speech when carried by a non-cable rival is *exactly the same*. There is thus no chance whatsoever that a programmer might be associated with a message not its own, or be compelled to say something it does not wish to say. No one, in other words, is telling the cable programmer that it can or cannot speak; and no one is telling it to “say what it otherwise would not say.”<sup>32</sup> The only “compulsion”—if one can call it that—is that it might be required to distribute its message to more listeners than it would like, and to do so via its commercial rivals. This is far afield indeed from the concerns animating the compelled speech cases. Indeed, as the Court found in *Rumsfeld*, there is really no compelled speech here at all, only compelled action.

Viewed in this light, even the intermediate scrutiny test adopted in *Time Warner I* and followed in *Cablevision II* is likely too strict, just as the Commission argues in the net neutrality context.<sup>33</sup> In those cases, the D.C. Circuit followed the analysis originally adopted by the Supreme Court in *Turner I* in resolving the cable industry’s claim that the must-carry rules compelled speech by requiring cable operators to broadcast messages with which they disagree.<sup>34</sup> The *Turner I* Court found the compulsion acceptable both because it was content neutral and because, “[g]iven cable’s long history of serving as a conduit for broadcast signals, there appears little risk that cable viewers would assume that the broadcast stations carried on a cable system convey ideas or messages endorsed by the cable operator.”<sup>35</sup> Here, by contrast,

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<sup>32</sup> *Id.*

<sup>33</sup> FCC Net Neutrality Brief at 72.

<sup>34</sup> *Turner I*, 512 U.S. at 653 (noting that “appellants contend that the provisions (1) compel speech by cable operators, (2) favor broadcast programmers over cable programmers, and (3) single out certain members of the press for disfavored treatment”).

<sup>35</sup> *Id.* at 655.

there is no risk that a cable-affiliated programmer will be compelled to say something it does not want to say or be associated with a message not its own. In such circumstances, the alleged compulsion simply does not rise to the level even of that found permissible in *Turner I*.

## **II. AN “UNFAIR ACT” PRESUMPTION FOR WITHHOLDING OF CABLE-AFFILIATED RSN AND NSN PROGRAMMING IS SUPPORTED BY EVIDENCE AND NOT PRECLUDED BY PRIOR RULINGS**

The Communications Act prohibits “unfair practices” by cable operators and cable-affiliated programmers, if the “purpose or effect” of such unfair practices “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>36</sup> For both satellite-delivered and terrestrially-delivered cable-affiliated RSNs, the Commission has adopted a presumption that withholding such programming has the prescribed purpose or effect.<sup>37</sup> DIRECTV and other competitive MPVDs have urged the Commission to adopt a parallel presumption that such acts are also “unfair” with respect to cable-affiliated RSN programming, as well as the related category of cable-affiliated NSN programming.<sup>38</sup> The cable industry objects to such a presumption, arguing both that there is no evidence to support it, and that prior rulings preclude it. Both claims are wrong.

The cable industry insists that no evidence supports an “unfairness” presumption.<sup>39</sup> Yet, as DIRECTV pointed out in its initial comments, in all the Commission cases analyzing

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<sup>36</sup> 47 U.S.C. § 548(b).

<sup>37</sup> See *FNPRM*, ¶ 55; *Review of the Commission’s Program Access Rules and Examination of Programming Tying Arrangements*, 25 FCC Rcd. 746, ¶ 52 (2010) (“*2010 Program Access Order*”).

<sup>38</sup> See, e.g., DIRECTV Comments at 3-12; Comments of the American Cable Association at 28-38 (“*ACA Comments*”); Comments of AT&T Inc. at 14-21 (“*AT&T Comments*”); Comments of DISH Network L.L.C. at 3-4.

<sup>39</sup> See, e.g., MSG Comments at 2-3 (arguing that the “proposed rebuttable presumption lacks an empirical basis, with no tangible evidence to support a conclusion that the pro-competitive benefits of

withholding, it has never found evidence that cable-affiliated RSN withholding has ever been used for legitimate, procompetitive purposes.<sup>40</sup> As Verizon noted, while there is a “theoretical possibility” that the “potential procompetitive benefits from withholding even non-replicable RSN programming . . . may outweigh any anticompetitive harms,” there is “no evidence that such conditions have ever been met and no reason to expect that they ever will be met.”<sup>41</sup>

DIRECTV also pointed out that, in circumstances where programming exclusivity could be expected to lead to procompetitive outcomes (such as arrangements between MVPDs and unaffiliated programmers), it almost never happens. Rather, it almost always happens where it can lead to anticompetitive outcomes (such as when loopholes in the law permitted withholding of cable-affiliated RSN programming).

DIRECTV also cited the record evidence submitted by Professor Kevin Murphy earlier in this proceeding.<sup>42</sup> Professor Murphy demonstrated that, while procompetitive exclusive vertical arrangements do not limit end-users’ access to the product, MVPD exclusives nearly always reduce end-user access to the product and the very nature of MVPD services makes it unlikely that these sorts of efficiencies would arise through exclusive dealing. Moreover, vertically integrated MVPDs can obtain any arguable efficiencies *without* exclusivity because vertical

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an RSN exclusivity will nearly always be outweighed by any possible anticompetitive effects”); *id.* at 6 (arguing that “there is simply no evidence to support the notion that each individual case of RSN exclusivity that may arise is so likely to be unfair that unfairness must be presumed”); TWC Comments at 10 (arguing that, “[h]ere, there is no record evidence indicating that an exclusive arrangement between a cable operator and an affiliated RSN is inherently ‘unfair,’ or that the mere existence of such an arrangement creates a sufficient ‘probab[ility]’ that the cable operator or the RSN has engaged in an ‘unfair act.’”).

<sup>40</sup> See DIRECTV Comments at 3-4 (citing cases).

<sup>41</sup> Comments of Verizon and Verizon Wireless at 6; *see also id.* (“As an initial matter, in light of the popularity of, and extensive consumer demand for, hometown local sports programming, exclusivity is plainly not necessary to ensure investment in, and the creation of, this programming.”)

<sup>42</sup> Kevin M. Murphy, “Report of Professor Kevin M. Murphy” (June 22, 2012) (“Murphy Report”) (attached as Exhibit A to Comments of DIRECTV, LLC, MB Docket Nos. 12-68, 07-18, and 05-192 (June 22, 2012)).

integration is itself a substitute for exclusivity as a way to align the incentives of supplier and distributor.<sup>43</sup> Thus, “[t]aken together, these factors imply that there likely is little benefit from MVPD exclusives and non-trivial costs in lack of access to customers.”<sup>44</sup> From this evidence, Professor Murphy concludes that cable-affiliated programmers will find it in their interest to withhold content precisely in those cases where withholding has the worst price impacts for consumers and is thus most detrimental to competition.<sup>45</sup> This analysis and evidence supports the conclusion the Commission has reached consistently in multiple proceedings.<sup>46</sup>

Not one of the cable commenters addresses this evidence or Professor Murphy’s analysis. Instead, they respond with what can only be called bromides, such as the assertion that the proposed presumptions would harm local news and niche networks.<sup>47</sup> Yet a presumption with respect to cable-affiliated *RSN or NSN* exclusivity has nothing to do with such networks. RSNs

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<sup>43</sup> *Id.* at 10-17.

<sup>44</sup> *Id.* at 18. The evidence that non-cable affiliated programmers rarely use exclusive distribution arrangements provides empirical support for Professor Murphy’s analysis.

<sup>45</sup> *See id.* at 28 (“Vertically integrated programmers will find it in their interest to withhold precisely when withholding has the worst price impacts for consumers, *i.e.*, in those cases where the prices of the vertically integrated MVPD would fall the most and its competitor’s prices would increase the least if the rival MVPD had access to the programming. The competitive conditions where extending the cable exclusivity prohibition likely will benefit consumers the most through price competition are those where the vertically integrated firm has the greatest incentive to refuse to license.”).

<sup>46</sup> *See Comcast Corp., General Electric Co. and NBC Universal, Inc.*, 26 FCC Rcd. 4238, ¶¶ 29, 39 (2011); *Verizon Tel. Cos. and Verizon Svcs. Corp. v. Madison Square Garden, L.P. and Cablevision Sys. Corp.*, 26 FCC Rcd. 13145, ¶ 41 (MB 2011) (“*Verizon HD Access Order*”), *aff’d*, 26 FCC Rcd. 15849 (2011); *AT&T Svcs. Inc. and Southern New England Tel. Co. d/b/a AT&T Connecticut v. Madison Square Garden, L.P. and Cablevision Sys. Corp.*, 26 FCC Rcd. 13206, ¶ 42 (MB 2011) (“*AT&T HD Access Order*”), *aff’d*, 26 FCC Rcd. 15871 (2011); *2010 Program Access Order*, ¶ 25.

<sup>47</sup> Comments of Cablevision Systems Corporation at 3 (“Cablevision Comments”) (arguing that “the stifling of exclusivity engendered by this proposal would have a particularly adverse effect on new and niche programming services and local and regional news networks that depend upon exclusivity to attract investors and expand their market reach”); *id.* at 10 (arguing that “[i]nhibiting cable operators’ willingness to enter into exclusive arrangements would have a particularly harmful effect on regional news networks and new and niche programming services”).

and NSNs are neither local news nor niche networks, so a cable-affiliated sports-specific presumption would not affect any arrangements involving such networks.<sup>48</sup>

Cable also suggests that the *Cablevision II* court effectively ruled against the proposed presumption.<sup>49</sup> This is simply not the case. In *Cablevision II*, the D.C. Circuit held that the Commission had not sufficiently justified a presumption that *all* withholding of terrestrially-delivered, cable-affiliated programming is “unfair” in every case. It pointed out—with reference to local news programming—that not all such withholding is “unfair,” and thus a categorical presumption is not justified.<sup>50</sup> In that same decision, however, the *Cablevision II* court upheld a “significant hindrance” presumption limited to RSN programming. It did so because, “relying on its expertise and wealth of experience, the Commission advanced compelling reasons to believe that withholding RSN programming is, given its desirability and non-replicability, uniquely likely to significantly impact the MVPD market.”<sup>51</sup> Just as those facts were a permissible basis for the Commission to presume that unfair RSN withholding “significantly hinders” competition, they permit the Commission to reach a similar conclusion with respect to the “unfairness” of cable-affiliated RSN/NSN withholding in the first place.<sup>52</sup>

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<sup>48</sup> MSG complains that a presumption with respect to out-of-market carriage of RSNs would “reduce the aggregate amount of sports programming available to multichannel subscribers.” MSG Comments at 15. Here again, a presumption would only apply to such programming if it involved a sufficient amount of the type of content the Commission has found able to move the market, as embodied in the definition of “RSN” adopted to date.

<sup>49</sup> Cablevision Comments at 2 (*citing Cablevision II*, 649 F. 3d at 721-22).

<sup>50</sup> *Cablevision II*, 649 F.3d at 723.

<sup>51</sup> *Id.* at 716-17.

<sup>52</sup> Indeed, the case for such a presumption is even stronger with respect to “unfairness” than with respect to “significant hindrance.” In adopting the presumption for “significant hindrance,” the Commission noted that “withholding of a cable-affiliated RSN does not always have a significant competitive impact.” *FNPRM*, ¶ 49. Yet the “competitive impact” of withholding is less relevant to the “unfairness” of the act than it is to the “significant hindrance” caused thereby. If the Commission can presume significant hindrance where there is not “always” a “significant competitive impact,” surely it can presume unfairness in the same circumstances.

### III. A PRESUMPTION IN FAVOR OF A STANDSTILL IS SUPPORTED BY SUBSTANTIAL EVIDENCE

Under existing rules, a complainant may seek a standstill of an existing programming contract during the pendency of a complaint if it can meet the four standard *Petroleum Jobbers* factors.<sup>53</sup> DIRECTV and others argued that, in a complaint proceeding where the presumptions discussed above with respect to cable-affiliated RSN or NSN programming will apply, one can logically presume that each of these elements will likely be satisfied.

Cable interests, however, reserve perhaps their strongest attacks for this proposed presumption. They cite “the extraordinary nature” of a standstill, and argue that the Commission cannot presume that “any element of the four-factor test, let alone the entire test, has been satisfied.”<sup>54</sup> They argue that the presumption would make the standstill “effectively automatic,”<sup>55</sup> “providing an MVPD with a virtual guarantee of continued carriage regardless of how unreasonable its negotiating demands,”<sup>56</sup> and “put[ting] defendants in the impossible position of presenting evidence during the opening stages of litigation showing, for instance, that the complainant would not suffer irreparable harm absent a standstill.”<sup>57</sup>

Notwithstanding this overblown rhetoric, cable’s contentions have no merit. To begin with, nothing about an evidentiary presumption is “automatic” or “guaranteed.” An evidentiary presumption with respect to a standstill merely shifts the burden of going forward. The complainant would still bear the ultimate burden of persuasion on all four required showings.

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<sup>53</sup> See 47 C.F.R. § 76.1003(l) (permitting complainant to obtain standstill where: (1) it is likely to prevail on the merits of its complaint; (2) it will suffer irreparable harm absent a stay; (3) grant of a stay will not substantially harm other interested parties; and (4) the public interest favors grant of a stay).

<sup>54</sup> See, e.g., Comcast Comments at 11.

<sup>55</sup> TWC Comments at 14.

<sup>56</sup> MSG Comments at 10.

<sup>57</sup> TWC Comments at 13 (emphasis omitted).

Moreover, the same evidence that would enable a defendant to overcome the underlying presumption with respect to the “unfair act” and “significant hindrance” prongs of the Section 628(b) analysis would also be relevant with respect to this presumption. Indeed, a defendant need only produce evidence on one of the four factors in order to prevail, and defendants are clearly in the best position to marshal facts relevant to any harmful effect of a standstill on themselves and other third parties. Nor does it seem a particular burden to ask defendants seeking to withhold cable-affiliated sports programming to explain why doing so is in the public interest.

More importantly, just as with the substantive presumptions, with the standstill presumption “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>58</sup> Indeed, as DIRECTV pointed out in its initial comments, this is so with respect to all four *Petroleum Jobbers* factors.

- ***Likelihood of success on the merits.*** Where these presumptions are applicable, there is every reason to expect the complainant to prevail on the merits. The very existence of the presumptions evidences the Commission’s judgment that an exclusive arrangement involving a cable-affiliated RSN or NSN and a cable operator will likely constitute an unfair act that will significantly hinder MVPD competition, and thus violate Section 628(b).
- ***Irreparable harm.*** In such cases, it is logical to conclude that such actions cause irreparable harm. The Commission has ample empirical evidence of the competitive

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<sup>58</sup> See *Cablevision II*, 649 F.3d at 716.

harm suffered by MVPDs that have been denied cable-affiliated sports programming in the past, especially in terms of subscriber losses.<sup>59</sup> Subscribers who switch in order to retain access to valuable sports programming may not return, given the recognized effects of inertia on such decisions.<sup>60</sup> Moreover, the specter of past service disruptions could lead consumers to avoid non-cable MVPDs, causing damage that is not repaired even if access to content is ultimately restored.

- ***No harm to third parties.*** Grant of a standstill would not impose substantial harm on any third party. In particular, because the defendant programmer has already sold its programming to the complainant in the past and will be paid for carriage during pendency of the complaint, there is no harm imposed by an interim carriage requirement. This is especially true in light of the Commission's adoption of a six-month deadline (calculated from the date the complaint is filed) for the Media Bureau to act on a complaint alleging a denial of programming,<sup>61</sup> which will substantially limit the duration (and therefore the impact) of any standstill.
- ***Public interest.*** Disrupting service to consumers does not serve the public interest.<sup>62</sup> A standstill would allow interim carriage for a brief period while the merits of

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<sup>59</sup> See, e.g., *Implementation of the Cable Television Consumer Protection and Competition Act of 1992 – Development of Competition and Diversity in Video Programming Distribution: Sunset of Exclusive Contract Prohibition*, 22 FCC Rcd. 17791, ¶¶ 39-42 and Appendix B (2007), *aff'd sub nom. Cablevision Sys. Corp. v. FCC*, 597 F.3d 1306 (D.C. Cir. 2010); *Verizon HD Access Order*, ¶¶ 46-48; *AT&T HD Access Order*, ¶¶ 47-49.

<sup>60</sup> See *General Motors Corp., Hughes Elec. Corp., and The News Corp. Ltd.*, 19 FCC Rcd. 473, ¶ 79 (2004).

<sup>61</sup> See *FNPRM*, ¶ 63.

<sup>62</sup> See, e.g., *Amendment of the Commission's Rules Related to Retransmission Consent*, 26 FCC Rcd. 2718, ¶ 17 (2011) (initiating proceeding to adopt rules designed to protect consumers against the disruptive effects of the loss of video programming).

complainant's claim are being sorted out, and thereby avoid unnecessary disruption if the complaint is ultimately successful.

Cable operators argue that the program access rules already provide remedies for violations,<sup>63</sup> or even that DBS operators and telcos are now large enough to overcome exclusivity without any remedies at all.<sup>64</sup> Yet the very considerations that led the Commission to adopt a cable-affiliated RSN presumption in the first place—the repeated findings that cable-affiliated RSN programming is “non-replicable and, in many cases, critically important to consumers”<sup>65</sup>—speak to the inadequacy of existing (or no) remedies. The notion of “alternative competitive responses” posited by NCTA<sup>66</sup> is particularly inapposite for satellite carriers such as DIRECTV, who lack increasingly critical broadband facilities.

The best approach, DIRECTV believes, is AT&T's proposal, which would allow complainants to apply for a standstill up to twenty days prior to the expiration of a contract, and requiring the Commission to rule prior to such expiration.<sup>67</sup> Such an approach ensures continuity of service where appropriate, while still giving defendants the opportunity to present evidence that the requested standstill would not be appropriate in a particular case.

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<sup>63</sup> See TWC Comments at 14 (“A presumption in favor of standstills is particularly unwarranted given the availability of several other possible remedies for alleged program access violations, such as the awarding of damages and the establishment of reasonable terms and conditions for the sale of the programming service at issue.”).

<sup>64</sup> National Cable and Telecommunications Association Comments at 10 (“NCTA Comments”).

<sup>65</sup> See *FNPRM*, ¶ 55; *2010 Program Access Order*, ¶ 52.

<sup>66</sup> NCTA Comments at 10.

<sup>67</sup> AT&T Comments at 19-20. The American Cable Association (“ACA”) proposes a TRO-like procedure to accomplish a similar objective. See ACA Comments at 49-52. DIRECTV believes that ACA's approach would be more complicated and difficult to implement, and thus supports AT&T's proposal instead.

## CONCLUSION

Sunset of the cable exclusivity prohibition threatens to weaken the program access regime, which has been a bulwark against anticompetitive conduct for twenty years. Adopting the presumptions discussed above will help shore up that regime in a way that is fully justified and legally sustainable based on the evidence and economic analysis available to the Commission. For the foregoing reasons, the Commission should adopt these presumptions as expeditiously as possible.

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