Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Revision of the Commission's Program Access Rules	)	MB Docket No. 12-68
	)	
News Corporation and The DIRECTV Group, Inc., Transferors, and Liberty Media Corporation, Transferee, for Authority to Transfer Control	)	MB Docket No. 07-18
	)	
Applications for Consent to the Assignment and/or Transfer of Control of Licenses, Adelphia Communications Corporation (and subsidiaries, debtors-in-possession), Assignors, to Time Warner Cable Inc. (subsidiaries), Assignees, et al.	)	MB Docket No. 05-192

COMMENTS OF FREE PRESS

Matthew F. Wood
Policy Director
Andrew Jay Schwartzman
Special Counsel
Free Press
Connecticut Ave, NW
Suite 1110
Washington, DC 20036
202-265-1490

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Free Press respectfully submits these brief comments urging that the Commission retain the existing prohibition on exclusive contracts involving satellite-delivered, cable-affiliated programming and that the Commission improve its enforcement of such rules.

INTRODUCTION

The Commission frames the ultimate question in this proceeding as "whether ***current*** conditions in the video distribution marketplace support retaining, sunsetting or relaxing the exclusive contract prohibition."[1]. Actually, the question is more properly stated as "whether ***current and future*** conditions in the video distribution marketplace will support retaining, sunsetting or relaxing the exclusive contract prohibition." If, in the absence of the rules, the marketplace would not remain as competitive as it is now, much less become more competitive in the future, the Commission cannot make the requisite finding under Section 628(c)(5) that relaxing or repealing the exclusive contract provision is unnecessary "to preserve and protect competition and diversity." The focus on future conditions is especially significant, because the Commission – and only the Commission – is charged with using its expertise to make predictive judgments about the future.

The elephant in the room during this proceeding is the *dictum* of the U.S. Court of Appeals for the D.C. Circuit contemplating that the lifespan of the exclusive contract ban is near its end:

> We ***anticipate*** that cable's dominance in the MVPD market will have diminished still more by the time the Commission next reviews the prohibition, and ***expect*** that at that time the Commission will weigh heavily Congress's intention that the exclusive contract prohibition will eventually sunset. Petitioners are correct in pointing out that the MVPD market has changed drastically since 1992. ***We expect that if the market continues to evolve at such a rapid pace***, the Commission will soon be able to conclude that the exclusivity prohibition is no longer necessary to preserve and protect competition and diversity in the

[1] *Notice of Proposed Rulemaking*, p. 4 at ¶4 (emphasis added).

distribution of video programming.[2]

However, with due deference to the judiciary's power to review agency judgments, Free Press respectfully reminds the Commission that what matters is not what the court "anticipates" or "expects," but what the Commission determines based on its knowledge of the affected industries. It is the decisions of the Commission that a reviewing court examines; and it is the factual judgments of the Commission, not the court, on which the court's decision will be based.

ANALYSIS

There are two parts to the central question. First, the Commission should examine the relationship of any current competition it may find in the market to the exclusive contract provision. If, as is clearly the case, increases in competition would not have happened without the provisions of Section 628, this determination adds weight to the conclusion that the Commission cannot "preserve and protect competition and diversity" without maintaining the rule. Second, the Commission must use its special expertise to examine whether competition will continue to increase if the exclusive contract regulations are repealed. If, as seems quite likely, the market will ***not*** "continue[] to evolve at such a rapid pace" absent the exclusive contract provision, the Commission must leave that rule in place.

The record in this proceeding will show that elimination of exclusive cable operator contracts for satellite-delivered, cable-affiliated programming has been essential to developing competition in the marketplace. Neither DirecTV nor EchoStar would have even launched their satellites two decades ago without enactment of Section 628 that made this programing available to Direct Broadcast Satellite ("DBS") entrants. Nor would Verizon and AT&T have deployed their video platforms without access to such programming.

[2] *Cablevision Sys. Corp. v. FCC*, 597 F.3d 1306, 1314 (D.C. Cir. 2010) (emphasis added).

More importantly for the purposes of this proceeding is the need for the Commission to assess whether the market will, indeed, "continue to evolve at such a rapid pace" absent the exclusive contract provision. While there are no guarantees, the Commission alone is tasked with using its special expertise and powers to make its best judgment of what is likely to happen.

The Commission can and should examine four factors:

1. Is DBS likely to continue to increase its market share;
2. Will Verizon and AT&T continue to increase their market shares;
3. Will online video distributors be able to enter the market and obtain significant market share; and
4. Will cable continue to lose video customers?

The Commission ultimately must make these determinations, but Free Press respectfully submits that the record will show DBS and telco shares in the video market have neared their peak and will ***not*** "continue to evolve at such a rapid pace," thus preserving cable's continued "dominance" of the traditional multichannel video program distributor ("MVPD") marketplace. Perhaps the most significant opportunity for increased video competition is the possibility of online video distributor ("OVD") competition. However, the future for OVD competition depends to a considerable degree on whether the Commission determines that OVD providers that wish to do so can qualify as MVPDs under the Communications Act. Whatever the prospect of increased market shares for competitors to cable, however, available evidence suggests that cable's loss of video market share is slowing, and that its video subscription numbers quite likely will begin to increase again over the next two years.

DBS

DBS faces a very difficult competitive environment for growth. For one thing, it already reaches essentially 100% of its potential footprint. Every home in the country that can receive satellite reception is already able to do so, and those homes that cannot "see" the satellite because of their location, especially residences in multiple dwelling units, will likely never be able to receive a satellite signal.[3] The second major restraint capping DBS's growth is its inability to offer a bundled broadband connection.[4] This constitutes an increasingly important and unbridgeable obstacle for future DBS penetration. Finally, some 70% of DBS subscribers utilize DSL for their Internet services. As DSL becomes increasingly less adequate for broadband connectivity, DBS faces the prospect of losing its customer base.[5] For these reasons, analysts project that DBS will experience "continued deceleration to a level modestly below the [pay TV] industry growth rate, with small subscriber losses by the end of 2013."[6]

Indeed, SNL Kagan predicts that DBS subscriber growth will be 0.9 percent in 2012, and steadily decline to zero percent growth in 2019 and beyond.[7] This is of course occurring as the number of multichannel households slowly increases, meaning DBS penetration *has already peaked* and will slowly decline over the next decade. Any increase in telco video penetration will be modest (see discussion below), off-setting this DBS trend somewhat, but will not significantly change cable's penetration by much over the next decade.[8]

TELCOS

With respect to the growth of telco market shares in the video market, it is clear that they will ***not*** "continue to evolve at such a rapid pace" and instead will only grow very modestly over the next decade, largely replacing some of the penetration lost by DBS. Thus, overall, it appears that traditional cable providers will continue to control the majority of multichannel subscribers

[3] Sanford C. Bernstein & Co., "U.S. Telecommunications and U.S. Cable & Satellite: Nature Versus Nurture," at 76 (May 2012) ("*Bernstein Report*").
[4] *Id.*
[5] *Id.*
[6] *Id.*
[7] *SNL Kagan Multichannel Industry Benchmarks* (last accessed June 22, 2012).
[8] SNL Kagan's prediction data shows Cable's share of multichannel households will go from 56% in 2012 to 49% in 2022. *Id*.

for the foreseeable future.

According to one industry analyst, "[t]he pullback in video footprint expansion among AT&T and Verizon is expected to limit the availability of video services to 57% of the industry's total telco homes passed, the rate revised downward from the previously forecast level of 62% of passings."[9] Verizon in particular "has only a few hundred thousand additional passings left until it reaches the low-end of its plans for 17-18 million FiOS homes passed"[10] and the company can expect to see a "year over year decline in 2012 net new homes passed versus 2011. After that, incremental homes passed would fall to zero, or close to it."[11] Verizon has no current plans to expand FiOS beyond its current markets, and its buildout is rapidly reaching completion. Furthermore, Verizon's ability to increase or even maintain market shares within its current footprint is entirely dependent on continuation of the existing prohibition on exclusive contracting between cable operators and cable-affiliated programming. The largest portion of Verizon's FiOS footprint is located in areas served by Cablevision and Comcast, making FiOS especially dependent on protection from such exclusive contracts.

As to AT&T, it is a matter of public record that the first major tranche of U-Verse deployment is nearing completion, and that AT&T does not intend to resume its build out of U-Verse for some time. Far from "continu[ing] to evolve at such a rapid pace," U-Verse's growth is likewise slowing down. U-Verse, which is technologically inferior to FiOS and cable, has "essentially" completed its entire current planned build of 30 million homes, and "[n]ew passings

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[9] Mari Rondeli, "Telco video paradox points to higher subs penetrations, limits on footprint expansion," *SNL Kagan*, (June 20, 2012).
[10] *Bernstein Report* at 78.
[11] *Id.*

can be expected to subsequently fall to close to zero."[12]

Therefore, having essentially reached peak deployment, any growth in FiOS and U-Verse has to come from poaching subscribers from DBS and cable. In other words, cable is becoming less and less likely to lose subscribers simply because a new option is available. Both DBS and telco video are nearing a saturation point in terms of availability, and their continued ability to compete against dominant cable operators will depend on their continued access to cable-affiliated programming, such as "must-have" sports programming on cable operators' Regional Sports Networks ("RSNs") and other valuable cable-affiliated content.[13]

OVD

In its decision to approve with conditions Comcast's acquisition of NBCU, the Commission concluded that "[o]nline viewing is indisputably becoming an important service demanded by consumers"[14] and concluded that "OVDs pose a potential competitive threat to Comcast's MVPD service."[15] It found that "most consumers ***today*** do not see OVD service as a substitute for the MVPD service,"[16] but might do so "in the near future."[17] The Commission also found "no merit in Applicants' argument that OVDs cannot replace Comcast's MVPD service...because the Internet lacks the capacity to deliver popular sports and other heavily watched programming."[18] The Commission noted that "the Applicants' internal documents and

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[12] *Id.* at 82.
[13] *See, e.g.*, Marguerite Reardon, "FCC closes cable programming loophole," CNET (Jan. 20, 2010), *available at* http://news.cnet.com/8301-30686_3-10438235-266.html.
[14] *Comcast Corporation, General Electric Company and NBC Universal, Inc.*, 26 FCC Rcd 4238, 4267 (2011) ("*Comcast-NBCU Order*").
[15] *Id.* at 4273.
[16] *Id.* at 4270 (emphasis in the original).
[17] *Id.*
[18] *Id.* at 4272.

public statements demonstrate that they consider OVDs to be at least a potential competitive threat" to the traditional cable TV business.[19]

The ultimate extent of OVDs' competition against cable is unknown. The Commission is currently considering whether such services can be considered MVPDs and thus can be entitled to protection under Section 628.[20] If the Commission answers that question in the affirmative, OVDs will be similarly situated to DBS and telco competitors at their birth. Like those services, then, OVDs will not be able to obtain significant market share in mainstream video offerings, especially linear programming, without access to "must have" cable-affiliated programming and RSNs.

CABLE

Unlike the other MVPD platforms, cable's future is more certain, and its continued dominance likely. Analysts "expect [cable video] subscriber losses to continue through 2012, before turning from negative to positive as satellite, FiOS, and U-Verse gains abate."[21] They "project that cable subscriber losses slow from 1.8 million in 2011 to 500 thousand in 2012, and then...project a subscriber ***gain*** of 400 thousand in 2013,"[22] with "growth rates...flat or positive through 2015 as the telcos complete the build-outs of their fiber networks."[23]

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[19] *Id.*
[20] *Public Notice, Media Bureau Seeks Comment on Interpretation of the Terms "Multichannel Video Programming Distributor" and "Channel" as Raised in Pending Program Access Complaint Proceeding*, 27 FCC Rcd 3079 (2012).
[21] *Bernstein Report* at 83.
[22] *Id.* (emphasis added).
[23] *Id.*

CONCLUSION

Contrary to the D.C. Circuit's speculation that the video marketplace will "continue to evolve at...a rapid pace[,]" the Commission can conclude on the basis of the evidence above and other evidence to be submitted in this docket that, if anything, cable's competitive posture will likely improve in coming years. Under that likely circumstance, maintaining the current prohibition on exclusive contracts will be necessary to "preserve and protect competition and diversity."

Respectfully Submitted,

______/s/_____________

Matthew F. Wood
Policy Director
Andrew Jay Schwartzman
Special Counsel
Free Press
Connecticut Ave, NW
Suite 1110
Washington, DC 20036
202-265-1490

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