

EXHIBIT II

Federal Communications Commission, Memorandum Opinion and Order, *EchoStar Communications Corp. v. Comcast Corp.*, FCC File No. CSR-5244-P, 14 FCC Rcd. 2089 (rel. January 26, 1999), available on Westlaw (1999 WL 27028) and Lexis (1999 FCC LEXIS 307).

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1999 WL 27028 (F.C.C.), 14 F.C.C.R. 2089, 14 FCC Rcd. 2089,
15 Communications Reg. (P&F) 803

Federal Communications Commission (F.C.C.)

Memorandum Opinion and Order

IN THE MATTER OF ECHOSTAR COMMUNICATIONS CORPORATION COMPLAINANT,
v.

COMCAST CORPORATION, COMCAST-SPECTACOR, L.P., PHILADELPHIA SPORTS MEDIA, L.P.,
DEFENDANTS.
File No. CSR 5244-P

DA 99-235

Adopted: January 22, 1999

Released: January 26, 1999

By the Chief, Cable Services Bureau:

I. INTRODUCTION

1. EchoStar Communications Corporation ("EchoStar") filed a program access complaint ("Complaint") against Comcast Corporation ("Comcast"), Comcast-Spectacor, L.P., and Philadelphia Sports Media, L.P. (collectively referred to as "Defendants") alleging violations of Sections 628(b) and (c) of the Communications Act of 1934, as amended ("Communications Act"), [FN1] and Sections 76.1001, 76.1002(a) and 76.1002(b) of the Commission's rules, [FN2] by engaging in discrimination and unfair practices and exercising undue influence over the distribution of satellite cable programming.

II. BACKGROUND

2. Congress enacted the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act") [FN3] to promote competition, with the view that regulation would be transitional until the video programming distribution market becomes competitive. [FN4] In enacting the program access provisions, codified in Section 628 of the Communications Act, [FN5] Congress sought to minimize the incentive and ability of vertically integrated programming suppliers to favor affiliated cable operators over nonaffiliated cable operators or other multichannel video programming distributors ("MVPDs") in the sale of satellite cable and satellite broadcast programming. [FN6]

3. Section 628(b) of the Communications Act states that:

[i]t shall be unlawful for a cable operator, a satellite cable programming vendor in which a cable operator has an attributable interest, or a satellite broadcast programming vendor to engage 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. [FN7]

In Section 628(c), Congress instructed the Commission to promulgate regulations

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that:

(A) establish effective safeguards to prevent a cable operator which has an attributable interest in a satellite cable programming vendor or a satellite broadcast programming vendor from unduly or improperly influencing the decision of such vendor to sell, or the prices, terms, and conditions of sale of, satellite cable programming or satellite broadcast programming to any unaffiliated multichannel video programming distributor; [and] [FN8]

(B) prohibit discrimination by a satellite cable programming vendor in which a cable operator has an attributable interest or by a satellite broadcast programming vendor in the prices, terms, and conditions of sale or delivery of satellite cable programming or satellite broadcast programming among or between cable systems, cable operators, or other MVPDs or their agents or buying groups.... [FN9]

4. In Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992: Development of Competition and Diversity in Video Programming Distribution and Carriage, MM Docket No. 92-265, First Report and Order ("Program Access Report and Order"), [FN10] the Commission concluded that non-price discrimination is included within the prohibition against discrimination set forth in Section 628(c)(2)(B). While the Commission did not attempt to identify all types of non-price discrimination that could occur, the Commission stated that "one form of non-price discrimination could occur through a vendor's 'unreasonable refusal to sell', or refusing to initiate discussions with a particular distributor when the vendor has sold its programming to that distributor's competitor." The Commission cautioned, however that "'unreasonable' refusals to sell" should be distinguished from "certain legitimate reasons that could prevent a contract between a vendor and a particular distributor." [FN11] Such legitimate reasons would include:

(i) the possibility of [the] parties reaching an impasse on particular terms, (ii) the distributor's history of defaulting on other programming contracts, or (iii) the vendor's preference not to sell a program package in a particular area for reasons unrelated to an existing exclusive arrangement or a specific distributor. [FN12]

5. "Satellite cable programming" is "video programming which is transmitted via satellite and which is primarily intended for the direct receipt by cable operators for their retransmission to cable subscribers." [FN13] "Satellite broadcast programming" is broadcast programming when such programming is retransmitted by satellite and the entity retransmitting such programming is not the broadcaster or an entity performing such retransmission on behalf of and with the specific consent of the broadcaster. [FN14]

III. THE FACTS

6. Complainant, EchoStar, is a direct broadcast satellite ("DBS") provider that offers multichannel video programming distributor ("MVPD") service to approximately 950,000 subscribers across the continental United States. [FN15] EchoStar operates three DBS satellites to offer up to 200 channels of digital programming. [FN16] As an MVPD, EchoStar competes directly with cable operators in each and every cable franchise area, including the Philadelphia metropolitan area. [FN17]

7. Defendant Comcast is a multiple system operator ("MSO") based in Philadelphia that owns and operates several cable systems and cable programming services. [FN18] Comcast is one of the nation's largest cable operators, and an

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incumbent cable operator in the Philadelphia market. [FN19] In July 1996, Comcast acquired a 66% interest in the Philadelphia Flyers L.P., to form a new partnership named Comcast-Spectacor, L.P. [FN20] Comcast-Spectacor owns the following assets: 1) the Philadelphia Flyers National Hockey League ("NHL") team; 2) the Philadelphia 76ers National Basketball Association ("NBA") team; and 3) the CoreStates Spectrum and Corestates Center sports arenas. [FN21] Also in 1996, Comcast-Spectacor entered into a partnership with the Philadelphia Phillies Major League Baseball ("MLB") team to form Philadelphia Sports Media, L.P. [FN22]

8. The facts underlying EchoStar's complaint are undisputed. SportsChannel Philadelphia ("SportsChannel") and PRISM were commonly owned cable networks that served the Philadelphia market. [FN23] SportsChannel was a satellite delivered basic tier network that offered numerous Philadelphia professional major league sport contests, including Philadelphia Flyers hockey games, Philadelphia 76ers basketball games, and Philadelphia Phillies baseball games. [FN24] PRISM was a network that produced and distributed movies and other entertainment programming, including Philadelphia professional major league sport contests. [FN25] Unlike SportsChannel, PRISM was delivered through terrestrial technology, and its programming was available only as a premium priced subscription service. [FN26] Both SportsChannel and PRISM terminated operations on September 30, 1997. [FN27] Because SportsChannel distributed its programming through satellite technology, it was considered "satellite cable programming" subject to the program access rules. [FN28] EchoStar never carried SportsChannel or PRISM programming.

9. On October 1, 1997, Comcast SportsNet ("SportsNet") debuted as a new channel on Comcast's, and other cable operators', basic service tier ("BST") in the Philadelphia market. Defendants distribute SportsNet only through terrestrial microwave and fiber technology. [FN29] In addition to the professional sporting events previously offered through SportsChannel and PRISM, SportsNet's programming includes various professional and collegiate sporting events that had not been carried on either channel. [FN30] SportsNet offers locally produced programming, such as sports-related talk-shows and sports news shows. [FN31] These shows are all original and have never appeared before on any programming service, including SportsChannel and PRISM. [FN32]

10. Defendants have indicated that they license SportsNet programming to a wide variety of MVPDs in the Greater Philadelphia market, including local cable operators, wireless cable systems, also known as multichannel multipoint distribution systems ("MMDS"), satellite master antenna television ("SMATV") providers, and potential open video systems ("OVS"). [FN33] In letters dated December 9, 1997, and December 31, 1997, EchoStar attempted to negotiate with Defendants for the carriage rights of SportsNet's programming. [FN34] EchoStar requested that Defendants send a copy of SportsNet's affiliation agreement and applicable rate card. EchoStar's efforts were unsuccessful. In a letter to EchoStar dated January 7, 1998, the general counsel of Comcast-Spectacor, L.P. stated that SportsNet's programming would not be available to "any satellite delivered service in the Philadelphia market." [FN35] After providing Defendants with the requisite notice of its intent to file a program access complaint, EchoStar filed the instant action alleging that Defendants' refusal to sell SportsNet programming to EchoStar violates the program access provisions of the Communications Act. [FN36]

IV. THE PLEADINGS

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11. EchoStar alleges that Defendants' refusal to offer its regional sports programming to EchoStar and other DBS providers constitutes an impermissible refusal to sell prohibited by Section 628(c)(2)(B). [FN37] EchoStar maintains that if the regional sports programming were transmitted by satellite, Defendants' refusal to sell would be an impermissible form of non-price discrimination. [FN38] EchoStar argues that Defendants distribute SportsNet's programming through terrestrial means in order to evade application of the program access rules. [FN39] EchoStar contends that the Commission has authority under Sections 4(i) and 303(r) to ensure that its regulations are not evaded. [FN40]

12. EchoStar argues that Defendants' claim of cost savings is not a valid basis to move to terrestrial delivery of SportsNet. [FN41] EchoStar alleges that Defendants' primary reason to switch to terrestrial facilities was to avoid application of the Commission's rules and thus secure the additional monopoly rents available from exclusive carriage of SportsNet. [FN42] EchoStar maintains that Defendants have no cost justification to support its allegedly discriminatory conduct toward EchoStar, contending that it and other DBS providers offered to share in SportsNet's satellite distribution costs. [FN43] EchoStar notes it has a well-established and recognized record of creditworthiness and financial stability. [FN44] EchoStar believes that Defendants' decision to make its programming available to other MVPDs highlights Defendants' discriminatory treatment of EchoStar as compared to the other MVPDs. [FN45] EchoStar notes that even if the sports programming is considered a new service containing programming previously unavailable by satellite in the Philadelphia area, if the use of terrestrial transmission was intended to evade the Commission's prohibition on refusing to sell satellite cable programming, it does not matter whether the programming was switched from satellite transmission or was transmitted by terrestrial means from the outset. [FN46]

13. EchoStar alleges that Defendants have unduly influenced the decision of Comcast-Spectacor and Philadelphia Sports Media, L.P. to deny EchoStar the opportunity to carry the regional sports programming in violation of Section 628(c)(2)(A). [FN47] EchoStar further states that Defendants' unwillingness to negotiate to carry SportsNet, while offering it to certain MVPDs (including Comcast), constitutes an unfair practice under Section 628(b). [FN48] EchoStar maintains that the sports programming offered by Defendants is important to its success and ability to compete in the Philadelphia MVPD market, and the unavailability of SportsNet precludes EchoStar from competing effectively with Comcast. [FN49] EchoStar believes that the statutory prohibition contained in Section 628(b) is broader than the specific prohibitions on discrimination in Section 628(c), arguing that the only requirement for triggering the prohibition in Section 628(b) is that the unfair conduct in question prevents an MVPD "from providing satellite cable programming or satellite broadcast programming to subscribers or consumers." [FN50] EchoStar argues that if Defendant's refusal to sell its sports programming to EchoStar hinders EchoStar's provision of satellite programming to consumers, the status of the sports programming as "satellite cable programming" is irrelevant as long as EchoStar can show it has been harmed in its ability to provide satellite cable programming. [FN51]

14. EchoStar maintains its construction of Section 628(b) is consistent with the plain language of the statute. [FN52] EchoStar also maintains that the Commission has read Section 628(b) as a "catch-all" provision intended to cover anti-competitive practices not directly covered by other regulations and statutory provisions, such as the use of terrestrial transmission to avoid

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Section 628(c) obligations. [FN53] EchoStar argues that a violation of Section 628(b) has occurred because Defendants' refusal to allow EchoStar to carry regional sports programming in Philadelphia hinders EchoStar's ability to sell other programming which qualifies as "satellite cable programming." [FN54] EchoStar contends that regional sports programming is important to the success of an MVPD. [FN55] EchoStar claims the harm caused by Defendant's actions is demonstrated by the fact that there is a huge disparity between its and Comcast's subscriber count in the Philadelphia even though EchoStar offers less expensive services. [FN56] EchoStar maintains that because the effect of not having access to SportsNet is enough to find a violation of Section 628(b), the Commission does not need to find that Defendants' purpose for not selling its programming to EchoStar was to inhibit EchoStar as an MVPD competitor. [FN57]

15. In their Answer, Defendants asserts that their conduct does not violate Sections 628(b) or 628(c) of the Communications Act. Defendants maintain that the SportsNet is not satellite cable programming. [FN58] Defendants argue that the Commission is granted only limited authority to adjudicate disputes regarding access to satellite cable programming, which is defined as "video programming which is transmitted via satellite." [FN59] Defendants cite Congress' deliberate, consistent, and repeated use of the phrase "satellite cable programming" as evidence that Congress intended to limit application of the program access rules to satellite programming. [FN60] Defendants argue that the legislative history reveals that Congress considered and rejected the idea that the program access rules apply to terrestrially delivered programming. [FN61] Defendants reason that if the Commission were to extend the application of the statute to terrestrial programming, despite the clear language of the statute, it would violate well established principles of statutory construction. [FN62] Defendants state that because SportsNet falls outside of the scope of the statute, the Commission does not have authority to grant the requested relief. [FN63]

16. Defendants also challenge EchoStar's claim that SportsNet is terrestrially delivered in order to evade the program access rules. [FN64] According to Defendants, SportsNet constitutes a new and original programming service entirely unrelated to SportsChannel. [FN65] In support of its claim, Defendants detail how SportsNet is different in ownership, management, name, and content from SportsChannel. [FN66] Defendants allege that SportsNet will telecast significant amounts of programming never before seen on SportsChannel or PRISM, including various collegiate games, sports news shows, and a host of original and locally-produced shows. [FN67] Defendants maintain that the only programming overlap between SportsNet and SportsChannel consists of Flyers, Phillies and 76ers games. [FN68] Defendants argue that SportsNet has always been terrestrially delivered, and has never been moved from satellite delivery. [FN69]

17. Defendants also dispute EchoStar's suggestion that its motivation for creating SportsNet was to deny competitors access to sports programming. [FN70] Defendants explain that adoption of terrestrial distribution for SportsNet was a rational and legitimate business decision based on a determination that terrestrial distribution is significantly less expensive than satellite distribution. [FN71] In this regard, Defendants note that they had access to the pre-existing terrestrial infrastructure of PRISM to deliver SportsNet and that SportsNet was being offered to essentially the same base of terrestrial operators that formerly distributed PRISM. [FN72] Because a microwave and fiber-optic distribution system was already in place, Defendants argue that it was

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both logistically simple and economical to adopt terrestrial distribution for SportsNet. Defendants also claim that satellite distribution substantially increases the costs of policing against signal theft. [FN73] Defendants believe that because SportsNet is a regional service, there is no reason to incur the higher costs associated with satellite distribution. [FN74] Defendants maintain that their decision to refuse EchoStar's offer to pay to have SportsNet uplinked to a satellite cannot be characterized as an evasion of the program access rules. Defendant's argue that EchoStar's offer to pay for the uplink to satellite does not transform terrestrially delivered programming into satellite cable programming. Defendants note that other competing MVPDs in the Greater Philadelphia market will have access to SportsNet including MMDS, OVS providers, SMATV, as well as all local cable systems. [FN75]

18. Defendants assert that EchoStar has failed to state a claim under Section 628(b) and that there is no legal support for EchoStar's theory. Defendants argue that, under EchoStar's view of Section 628(b), anything that Defendants do to compete in the marketplace will constitute a program access violation because such an action could help Comcast gain or retain subscribers at the expense of EchoStar. [FN76] Defendants further argue that the decision not to offer SportsNet to EchoStar is not an unfair practice because this decision is specifically permitted under law. [FN77] Defendants contend that because the program access provisions of the 1992 Cable Act and the Commission's rules exclude terrestrially delivered programming, Defendants may decide whether or not to offer SportsNet to any MVPD. [FN78] Finally, Defendants argue that EchoStar fails to state a claim under Section 628(b) because it does not make a showing of harm as required by Section 76.1000(c)(1)(xii) of the Commission rules. [FN79] Defendants contend that EchoStar presents no evidence to support its claim that the absence of SportsNet has directly lead to a low subscriber count.

V. DISCUSSION

19. At the outset of our discussion, we note that EchoStar's complaint presents essentially the same facts and legal issues recently resolved by the Cable Services Bureau in DIRECTV, Inc. v. Comcast Corporation, et al. [FN80] In resolving EchoStar's complaint, we rely substantially on the analysis set forth therein. As in DIRECTV, there appear to be three interrelated matters of dispute in this proceeding:

(1) Is the programming in question "satellite cable programming" so that Defendants' conduct is actionable under Section 628(c) of the program access rules?

(2) Does the Commission have the authority to take action against evasions of the program access rules and, if so, is Defendants' conduct actionable as an evasion?

(3) Does Defendants' conduct involve unfair or anti-competitive action to deprive EchoStar of "satellite cable programming" under Section 628(b)?

20. Section 628 is generally understood to be a mechanism for ensuring that MVPDs that are competing with traditional cable television systems are not deprived, through exclusive contracts, discriminatory pricing, or otherwise, of access to vertically integrated "satellite cable programming." Section 628(c)(2)(A) prohibits a cable operator from unduly or improperly influencing the decision of a "satellite cable programming vendor" to sell, or the prices terms and conditions of sale, of satellite cable programming to unaffiliated

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MVPDs. [FN81] Section 628(c)(2)(B) prohibits a "satellite cable programming vendor" in which a cable operator has an attributable interest from engaging in discrimination in the prices, terms or conditions of the sale or delivery of satellite cable programming to competing MVPDs. [FN82] As in DIRECTV, the success of EchoStar's Section 628(c) claim hinges upon whether SportsNet can be said to be a satellite cable programming vendor.

21. EchoStar's complaint makes little effort to demonstrate that SportsNet is in fact "satellite cable programming." Rather, it argues that, if the programming were satellite delivered, it would be subject to the program access provisions of the Communications Act. The first step in our analysis is to determine what Congress intended the term "satellite cable programming" to mean. The Supreme Court, in its Chevron decision [FN83] speaks to the proper statutory interpretation analysis in situations such as this. That decision states:

[f]irst, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. ... if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute. [FN84]

We believe that the correct reading of Section 628(c) is that the provisions in question apply to satellite cable programming, not programming that was "previously" satellite-delivered, or the "equivalent" of satellite cable programming, or programming that would qualify as satellite cable programming, but for its terrestrial delivery. The statute defines "satellite cable programming" as that which is transmitted via satellite. [FN85] This reading is consistent with the legislative history of Section 628 which indicates that the version of the program access provision that the Senate adopted would have extended to terrestrially-delivered programming services but the House bill, that was eventually adopted, did not. [FN86] This indicates a specific intention to limit the scope of the provision to satellite services. [FN87] Given the new content of the service in question it is also not clear that this is a service which can be considered "previously" distributed by satellite. Because we find that SportsNet is not satellite cable programming, we deny EchoStar's Section 628(c)(2)(B) refusal to sell claim and its Section 628(c)(2)(A) undue influence claim.

22. The next question presented has to do with the scope of the Commission's authority to act against evasions of Section 628 and whether the conduct of Defendants could in fact be considered an evasion. Assuming for the sake of argument that the Commission has the authority to act against evasions in some circumstances (an issue the Commission has considered elsewhere), [FN88] we are not persuaded here that the totality of the circumstances demonstrates an intent to evade our rules.

23. Here, for instance, we find evidence that the service in question is not simply a service that has moved from satellite to terrestrial distribution but is in fact a new service. [FN89] The majority of the programming content on SportsNet is not duplicative of content on SportsChannel Philadelphia. A significant amount of the sports content on the channel consists of sports events that were on PRISM, a terrestrially delivered service, operating in the Philadelphia market for over two decades, that in its last season distributed some 124 games of the Philadelphia Flyers, Philadelphia 76ers and the Philadelphia Phillies. [FN90] In contrast, in its last year of operation,

SportsChannel Philadelphia distributed 67 such games. In this regard, we believe that it bears repeating that EchoStar never purchased programming from SportsChannel or PRISM. SportsNet is a brand new service in ownership, name, management, and content. [FN91] It is described as featuring more locally-produced sports coverage -- including events, news, opinion, and programming -- than any other regional sports network in the United States. [FN92] As a further departure from its predecessors, Defendants have returned 22 games of the Philadelphia 76ers back to broadcast television. [FN93]

24. In addition, according to Defendants, the terrestrial distribution of this service is dramatically less expensive than satellite distribution. [FN94] An affidavit filed by Defendants, indicates that it costs approximately \$600,000 per year to deliver the SportsNet service terrestrially. The cost of delivering the service would be approximately \$2,280,000 per year using a full band satellite transponder, \$1,400,000 using a second tier satellite transponder, or between \$720,000 and \$900,000 using shared digital capacity. [FN95] In addition, a one time cost of \$250,000 for an up-link facility would be required plus \$24,000 a year to uplink and a cost of \$190,000 for encoding the signal prior to uplinking it and decoding at the headend of the individual recipients. Although not cited as an extra cost by Defendants, EchoStar itself notes if it received the service it would split the cost of uplinking SportsNet to a satellite if that was the only thing standing in the way of Comcast's making the sports programming available to DBS. [FN96] The terrestrial infrastructure used by PRISM, according to Defendants, had available capacity and the base of operators receiving the Service is substantially that same as that which received PRISM, so use of that network became a logistically simple and economical choice. [FN97] None of these facts are disputed by EchoStar.

25. Given all these facts, including the differences between the old and the new service, the incorporation of the old PRISM terrestrially delivered content and distribution process, and the unchallenged cost advantages of terrestrial distribution, we cannot conclude that evasive conduct is involved. Because we conclude that evasive conduct is not present, we do not address EchoStar's argument that the Commission can act to prevent such conduct under Sections 4(i) and 303(r) of the Communications Act.

26. We also find unpersuasive EchoStar's assertion that Defendants' failure to pursue EchoStar's offer to share the cost of uplinking SportsNet for satellite delivery constitutes evidence that the primary purpose for terrestrially delivering SportsNet was evading the program access requirements, rather than selecting the most cost effective delivery method. As discussed above, Defendants have presented evidence that they enjoy significant cost savings by employing terrestrial distribution methods. EchoStar's subsequent offer to share the costs of uplinking SportsNet's signal for purposes of satellite distribution by EchoStar and, perhaps, other DBS providers, does not alter the logic of defendants' initial business decision to utilize terrestrial delivery methods. Having employed terrestrial distribution for legitimate business means and not for purposes of evading the program access rules, Defendants' introduced SportsNet, a new programming service. As a new, terrestrially delivered service, SportsNet is not subject to the program access rules and not required to provide access to all interested MVPDs. Accordingly, EchoStar's subsequent offer to share uplinking costs after Defendants have legitimately chosen terrestrial delivery methods is not relevant to our determination. [FN98]

27. The final argument that EchoStar makes is that Defendants' conduct violates Section 628(b) of the Communications Act. This provision reads as

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follows:

It shall be unlawful for a cable operator, a satellite cable programming vendor in which a cable operator has an attributable interest, or a satellite broadcast programming vendor to engage 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.

EchoStar asserts that Section 628(b) has broad applicability and does not specifically require that the unfair practices in question hinder the distribution of the programming at issue. Because its own service is satellite delivered, EchoStar asserts that Defendants' unfair denial of SportsNet violates Section 628(b) because it hinders the provision of EchoStar's satellite delivered service.

8. We are not persuaded that the facts alleged are sufficient to constitute a Section 628(b) violation. In order to find a violation of Section 628(b), the Commission must make two independent determinations. First, the Commission must determine that the defendant has engaged in unfair methods of competition or unfair or deceptive acts or practices. Second, the Commission must determine that the unfair acts or practices, if found, had the purpose or effect of hindering significantly or preventing a MVPD from providing satellite cable programming to subscribers or consumers. Here, we do not believe that the record supports a conclusion that Defendants have engaged in unfair or deceptive acts creating, packaging and distributing SportsNet. [FN99] In enacting Section 628(b), Congress determined that while cable operators generally must make available to competing MVPDs vertically-integrated programming that is satellite-delivered, they do not have a similar obligation with respect to programming that is terrestrially-delivered. EchoStar's argument would have us find that it is somehow unfair for a cable operator to move a programming service from satellite delivery to terrestrial delivery if it means that a competing MVPD may no longer be afforded access to the service. We find no evidence in Section 628 that Congress intended such a result. Congress did not prohibit cable operators from delivering any particular type of service terrestrially, did not prohibit cable operators from moving any particular service from satellite to terrestrial delivery, and did not provide that program access obligations remain with a programming service that has been so moved. Thus, given our prior finding that Defendants' actions do not amount to an attempt to evade our rules, we decline to find that, standing alone, Defendants' decision to deliver SportsNet terrestrially and to deny that programming to EchoStar is "unfair" under Section 628(b).

9. Section 628(b) remains, as the Commission has stated previously, "a clear and unambiguous exercise of Commission jurisdiction to adopt additional rules or to take additional action to accomplish statutory objectives should additional types of conduct emerge as barriers to competition and obstacles to the broader distribution of satellite cable and broadcast programming." [FN100] It cannot, however, be converted into a tool that, on a per se basis, precludes cable operators from exercising competitive choices that Congress deemed legitimate.

10. Following the release of our DIRECTV order, EchoStar filed a Motion to Compel Production of Documents ("Motion"). Defendants filed an Opposition and Request to Strike to which EchoStar filed a Reply. While stating numerous times in its Motion that the record in this proceeding contains sufficient evidence to establish violations of Section 628, [FN101] EchoStar states that it must seek

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discovery in light of the Bureau's DIRECTV decision. In support of its Motion, EchoStar states that the Bureau in DIRECTV found that "the record in that case did not contain enough evidence to establish that Comcast's conduct was 'unfair' for purposes of the Section 628(b) prohibition." [FN102] EchoStar mischaracterizes the Bureau's decision in DIRECTV. In that case, the Bureau stated "[w]e are not persuaded that the facts alleged are sufficient to constitute a Section 628(b) violation. ... Here, we do not believe that the record supports a conclusion that Comcast has engaged in unfair or deceptive acts in creating, packaging and distributing Comcast SportsNet." [FN103] Contrary to EchoStar's assertion, the Bureau's decision in DIRECTV did not deny DIRECTV's claim based on insufficient evidence. Rather, the Bureau, assuming the facts alleged by DIRECTV to be true, determined that DIRECTV failed to establish a violation of Section 628(b).

31. EchoStar also argues in its Motion that "the facts underlying the EchoStar and DIRECTV complaints are different in at least one significant respect ... Comcast [publicly admitted that it] decided to withhold its sports programming from certain competitors to counter those competitors' own exclusive programming. EchoStar, however, does not enjoy any such exclusive rights, unlike DIRECTV." [FN104] These facts do not serve to alter our conclusions herein or persuade us that discovery is warranted. As stated above:

EchoStar's argument would have us find that it is somehow unfair for a cable operator to move a programming service from satellite delivery to terrestrial delivery if it means that a competing MVPD may no longer be afforded access to the service. ... [G]iven ... that Defendants' actions do not amount to an attempt to evade our rules, we decline to find that, standing alone, Defendants' decision to deliver SportsNet terrestrially and to deny that programming to EchoStar is "unfair" under Section 628(b). [FN105] Our decision herein, as in DIRECTV, is unrelated to the complainant's possession, or lack thereof, of an exclusive source of sports programming. EchoStar has not persuaded us that discovery is necessary or that the record compiled herein is insufficient. Accordingly, EchoStar's Motion is denied.

VI. ORDERING CLAUSES

32. Accordingly, IT IS ORDERED, that the complaint filed in CSR 5244-P by EchoStar Communications Corporation IS DENIED.

33. IT IS FURTHER ORDERED, that EchoStar Communications Corporation's Motion to Compel Production of Documents IS DENIED.

34. This action is taken pursuant to authority delegated by Section 0.321 of the Commission's rules, 47 C.F.R. s 0.321.

FEDERAL COMMUNICATIONS COMMISSION

Deborah A. Lathen
Chief
Cable Services Bureau

FN1. 47 U.S.C. s 548(b), (c).

FN2. 47 C.F.R. ss 76.1001, 76.1002(a), (b).

FN3. Pub. L. No. 102-385, 106 Stat. 1460 (1992) (codified as amended in

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scattered sections of 47 U.S.C.).

FN4. 1992 Cable Act s 2(b)(2), 106 Stat. 1463. See also Communications Act s 601(6), 47 U.S.C. s 521(6) ("The purposes of this title are to ... promote competition in cable communications and minimize unnecessary regulation that would impose an undue economic burden on cable systems.")

FN5. 47 U.S.C. s 548.

FN6. 1992 Cable Act s 2(a)(5), 106 Stat. 1460-61.

FN7. 47 U.S.C. s 548(b).

FN8. Communications Act s 628(c)(2)(A), 47 U.S.C. s 548(c)(2)(A).

FN9. Communications Act s 628(c)(2)(B), 47 U.S.C. s 548(c)(2)(B). Congress provided limited exceptions to this prohibition. A satellite programming vendor is not prohibited from:

(i) imposing reasonable requirements for creditworthiness, offering of service, and financial stability and standards regarding character and technical quality; (ii) establishing different prices, terms, and conditions to take into account actual and reasonable differences in the cost of creation, sale, delivery, or transmission of satellite cable programming or satellite broadcast programming; (iii) establishing different prices, terms, and conditions which take into account economies of scale, cost savings, or other direct and legitimate economic benefits reasonably attributable to the number of subscribers served by the distributor; or (iv) entering into an exclusive contract that is permitted under subparagraph (D) [of this section].
Id.

FN10. 8 FCC Rcd 3359 (1993).

FN11. Id.

FN12. Id. (footnote omitted).

FN13. 47 U.S.C. s 601(d)(1).

FN14. 47 U.S.C. s 548(i)(3).

FN15. Complaint at 2, Exhibit 2.

FN16. Id. at 2.

FN17. Id. at 3.

FN18. Comcast has ownership interests in a number of cable television programming services, including QVC, El, Outdoor Life and Speedvision. Answer at Exhibit 2.

FN19. Complaint at 4; Answer at 32.

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- FN20. Complaint at 3; Answer at 32.
- FN21. Complaint at 3; Answer at 32.
- FN22. Complaint at 3; Answer at 32.
- FN23. Answer at 4-5.
- FN24. Id.
- FN25. Id.
- FN26. Id.
- FN27. Id.
- FN28. 47 U.S.C. ss 548(a), 605(d)(1).
- FN29. Answer at Exhibit 3.
- FN30. Id. at 16-17.
- FN31. Id. at Exhibit 4.
- FN32. Id.
- FN33. Answer at 6.
- FN34. Complaint at 5, Exhibit 2.
- FN35. Complaint at Exhibit 4 (letter from Philip Weinberg, General Counsel, Comcast-Spectacor to Michael Schwimmer, Vice President -- Programming, EchoStar (Jan. 7, 1998)).
- FN36. 47 U.S.C. ss548(b), (c); see 47 C.F.R. s 76.1003(a).
- FN37. 47 U.S.C. s 548(c)(2)(B).
- FN38. Complaint at 7.
- FN39. Id. at 8.
- FN40. Id. at 8-9, citing Communications Act ss 4(i) and 303 (r), 47 U.S.C. s 154(i) and 47 U.S.C. s 303(r). Section 4(i) states "The Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions." Section 303(r) states that one of the general powers of the Commission is to "[m]ake such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this Act...."
- FN41. Id. at 8, n.15. EchoStar stated that it would share in the costs of

uplinking SportsNet programming to satellite.

FN42. Complaint at 9.

FN43. Complaint at 12.

FN44. Id.

FN45. Reply at 13.

FN46. Id.

FN47. 47 U.S.C. s 548(c)(2)(A), 47 C.F.R. s 76.1002(a). Complaint at 13.

FN48. 47 U.S.C. s 548(b), 47 C.F.R. s 76.1001.

FN49. Complaint at 16.

FN50. Reply at 3 citing 47 C.F.R. s 76.1001.

FN51. Reply at 3.

FN52. Id. at 4.

FN53. Id. at 5.

FN54. Complaint at 16.

FN55. Reply at 7.

FN56. EchoStar asserts its subscribers in the Philadelphia area are a small percentage of the number of Comcast subscribership the same area, although its entry level package costs \$19.99 a month while comparable programming offered by Comcast costs \$35.39 a month. Complaint at 16.

FN57. Reply at 9.

FN58. Answer at 15.

FN59. Id. at 16.

FN60. Id. Defendants note the phrase "satellite cable programming" was used 18 times in Section 628.

FN61. Id. Defendants maintain that the program access provisions that the Senate adopted provisions adopted extended to terrestrially delivered programming services, but the House bill, which was ultimately enacted, applied only to satellite delivered programming services.

FN62. Answer at 18 (citing Chevron U.S.A. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842-43 (1984); Estate of Colwart v. Nicklose Drilling Co., 505 U.S. 469, 476 (1992); Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.,

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447 U.S. 102, 108 (1980)).

FN63. Id. at 19.

FN64. Id.

FN65. Id. at 20.

FN66. Answer at 21.

FN67. Id.

FN68. Id.

FN69. Id. at 21-22.

FN70. Answer at 22.

FN71. Id. at 23. According to Defendants, terrestrial distribution of SportsNet costs approximately \$600,000 per year, whereas satellite distribution costs approximately \$1,400,000 to \$2,280,000 per year, depending upon the type of satellite transponder employed.

FN72. Id. at 24.

FN73. Answer at 24.

FN74. Id.

FN75. Id. at 26.

FN76. Id. at 27.

FN77. Answer at 28.

FN78. Id. at 28.

FN79. Id. at 29.

FN80. DIRECTV, Inc. v. Comcast Corporation, et al., DA 98-2151 (rel. October 27, 1998), app. for rev. pending.

FN81. Communications Act s 628(c)(2)(A), 47 U.S.C. s 548 (c)(2)(A).

FN82. Communications Act s 628(c)(2)(B), 47 U.S.C. s 548 (c)(2)(B).

FN83. Chevron, U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. 837, 842-43 (1984). See also Estate of Colwart v. Niclose Drilling Co., 505 U.S. 469, 476 (1992); Consumer Product Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102, 108 (1980).

FN84. Id.

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FN85. 47 U.S.C. s 605(d)(1) (emphasis added).

FN86. See H.R. Conf. Rep. No. 862, 102d Cong., 2d Sess. at 91-3 (1993).

FN87. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 442-43 (1987) ("Few principles of statutory construction are more compelling than the proposition that Congress does not intend sub silentio to enact statutory language that it has earlier discarded in favor of other language."); *Tanner v. United States*, 483 U.S. 107, 125 (1987) ("the legislative history demonstrates with uncommon clarity that Congress specifically understood, considered and rejected" other language.)

FN88. See Report and Order, FCC 98-189 at P 71 (released Aug. 7, 1998). In the Report and Order, the Commission stated:

The record developed in this proceeding fails to establish that the conduct complained of, i.e., moving the transmission of programming from satellite to terrestrial delivery to avoid the program access rules, is significant and causing demonstrative competitive harm at this time. The Commission has received only two complaints against the same vertically-integrated programmer related to moving the transmission of programming from satellite to terrestrial delivery to avoid the program access rules. Where the record fails to indicate a significant competitive problem, we are reluctant to promulgate general rules prohibiting activity particularly where reasonable issues are raised regarding the scope of the statutory language. In circumstances where anti-competitive harm has not been demonstrated, we perceive no reason to impose detailed rules on the movement of programming from satellite delivery to terrestrial delivery that would unnecessarily inject the Commission into the day-to-day business decisions of vertically-integrated programmers. While the record does not indicate a significant anti-competitive impact necessitating Commission action at this time, we believe that the issue of terrestrial distribution of programming could eventually have substantial impact on the ability of alternative MVPDs to compete in the video marketplace. We note that Congress is considering legislation which, if enacted, would introduce important changes to the program access provisions, including clarification of the Commission's jurisdiction over terrestrially-delivered programming. The Commission will continue to monitor this issue and its impact on competition in the video marketplace.

Id.

FN89. Answer at 14.

FN90. Id. at 2.

FN91. Id. at 3.

FN92. Id.

FN93. Id. at 3, 16.

FN94. Id. at 23.

FN95. Id. at 23-24, n.5.

FN96. Complaint at 12.

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FN97. Answer at 24.

FN98. We note that EchoStar presents no evidence that its uplinking offer, although publicly articulated, was ever formally presented to SportsNet.

FN99. Because we do not find Comcast's actions to be unfair or deceptive, we need not address whether such actions had the purpose or effect of hindering significantly or preventing a MVPD from providing satellite cable programming to subscribers or consumers.

FN100. Program Access Report and Order, 8 FCC Rcd at 3374.

FN101. Motion at 1-2, 3, 4, 5, 6.

FN102. Motion at 2, citing DIRECTV, DA 98-2151 at P 32.

FN103. DIRECTV, DA 98-2151 at P32.

FN104. Motion at 3.

FN105. See supra P 28; see also DIRECTV, DA 98-2151 at P 31.
1999 WL 27028 (F.C.C.), 14 F.C.C.R. 2089, 14 FCC Rcd. 2089, 15 Communications
Reg. (P&F) 803
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Federal Communications Commission, Memorandum Opinion and Order, *EchoStar Communications Corp. v. Speedvision Network, LLC*, FCC File No. CSR-5364-P, 14 FCC Rcd. 9327 (rel. June 14, 1999), available on Westlaw (1999 WL 381800) and Lexis (1999 FCC LEXIS 2698).

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Federal Communications Commission (F.C.C.)

Memorandum Opinion and Order

IN THE MATTER OF: ECHOSTAR COMMUNICATIONS CORPORATION
v.

SPEEDVISION NETWORK, L.L.C., OUTDOOR LIFE NETWORK, L.L.C.

Program Access Complaint
CSR-5364-P

DA 99-1148

Adopted: June 10, 1999

Released: June 14, 1999

By the Chief, Cable Services Bureau:

I. INTRODUCTION

1. EchoStar Communications Corporation ("EchoStar") has filed a program access complaint against Speedvision Network, L.L.C. and Outdoor Life Network, L.L.C. (collectively referred to as "the Networks") alleging that the Networks are in violation of Section 628(c)(2)(B) of the Communications Act of 1934, as amended ("Communications Act"), [FN1] and Section 76.1002(b) of the Commission's rules [FN2] because the Networks have unreasonably refused to offer programming to EchoStar on fair and nondiscriminatory rates, terms and conditions. EchoStar also alleges that the Networks are in violation of Section 628(b) of the Communications Act [FN3] and Section 76.1001 of the Commission's rules [FN4] because the Networks have engaged in unfair practices by unreasonably refusing to sell their programming to EchoStar. [FN5]

2. The Networks filed an answer arguing that Echostar failed to state any cognizable claim for violation of the Commission's program access rules and, accordingly, its complaint should be dismissed with prejudice. EchoStar filed a reply pleading. [FN6] Because of the pendency of a breach of contract suit between the parties in federal district court, the Networks filed a "Motion to Dismiss or, in the Alternative, to Hold Proceeding in Abeyance Pending Resolution in Federal District Court." [FN7] EchoStar filed an opposition to the motion. [FN8] For the reasons discussed below, EchoStar's program access complaint is denied.

II. BACKGROUND

3. Congress enacted the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act") to promote competition, with the view that regulation would be transitional until the video programming distribution market becomes competitive. [FN9] By enacting the program access provisions, which are codified in Section 628 of the Communications Act, [FN10] Congress sought to minimize the incentive and ability of vertically integrated programming

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suppliers to favor affiliated cable operators over nonaffiliated cable operators or other multichannel video programming distributors ("MVPDS") in the sale of satellite cable and satellite broadcast programming. [FN11]

4. In Section 628(b) of the Communications Act, Congress states that:

It shall be unlawful for a cable operator, a satellite cable programming vendor in which a cable operator has an attributable interest, or a satellite broadcast programming vendor to engage 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. [FN12]

In Section 628(c)(2), Congress instructed the Commission to promulgate regulations that:

(A) establish effective safeguards to prevent a cable operator which has an attributable interest in a satellite cable programming vendor or a satellite broadcast programming vendor from unduly or improperly influencing the decision of such vendor to sell, or the prices, terms, and conditions of sale of, satellite cable programming or satellite broadcast programming to any unaffiliated multichannel video programming distributor; [and] [FN13]

(B) prohibit discrimination by a satellite cable programming vendor in which a cable operator has an attributable interest or by a satellite broadcast programming vendor in the prices, terms and conditions of sale or delivery of satellite cable programming or satellite broadcast programming among or between cable systems, cable operators, or other MVPDS or their agents or buying groups.... [FN14]

5. In Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992: Development of Competition and Diversity in Video Programming Distribution and Carriage, Report and Order, MM Docket No. 92-265 (Program Access Order), [FN15] the Commission concluded that non-price discrimination is included within the prohibition against discrimination set forth in Section 628(c)(2)(B). While the Commission did not attempt to identify all types of non-price discrimination that could occur, the Commission stated that "one form of non-price discrimination could occur through a vendor's 'unreasonable refusal to sell,' or refusing to initiate discussions with a particular distributor when the vendor has sold its programming to that distributor's competitor." The Commission cautioned, however that "'unreasonable' refusals to sell" should be distinguished from "certain legitimate reasons that could prevent a contract between a vendor and a particular distributor." [FN16] Such legitimate reasons would include:

(i) the possibility of parties reaching an impasse on particular terms, (ii) the distributor's history of defaulting on other programming contracts, or (iii) the vendor's preference not to sell a program package in a particular area for reasons unrelated to an existing exclusive arrangement or a specific distributor. [FN17]

6. The term "satellite cable programming" is video programming which is transmitted via satellite and which is primarily intended for the direct receipt by cable operators for their retransmission to cable subscribers. [FN18] The term "satellite broadcast programming" is broadcast programming when such programming is retransmitted by satellite and the entity retransmitting such programming is not the broadcaster or an entity performing such retransmission on behalf of and with the specific consent of the broadcaster. [FN19]

III. THE FACTS

7. EchoStar is a direct broadcast satellite ("DBS") provider that offers multichannel video programming distributor ("MVPD") service throughout the United States. [FN20] EchoStar operates four satellites that allow it to offer hundreds of channels of digital television programming to its subscribers. [FN21] As an MVPD, EchoStar competes against cable operators and other MVPDs in each and every cable franchise area, as well as against other DBS providers. [FN22]

8. The Networks are satellite cable programming vendors. [FN23] Speedvision is a network that provides comprehensive coverage of the automotive, motorcycle, aviation and marine industries. [FN24]

Outdoor Life is a network that features outdoor recreational activities, including cycling, fly fishing, sailing, skiing, snowboarding and windsurfing. [FN25] Speedvision is owned by TMJV, Inc. (affiliated with Cox Communications, Inc.), Comcast Programming Ventures, Inc., Fostoria Communications, Inc. (affiliated with MediaOne, Inc.), Daniels Properties, L.L.P., Fox/Liberty SV, L.L.C. (affiliated with AT&T, formerly Tele-Communications, Inc.), and Roger Werner. [FN26] Outdoor Life is owned by TMJV, Inc., Comcast Programming Ventures, Inc., Fostoria Communications, Inc., Fox/Liberty OL, L.L.C., and Roger Werner. [FN27] Fox/Liberty Networks, which has a one-third ownership interest in the Speedvision and Outdoor Life Networks, is 50 percent owned by AT&T, one of the largest cable multiple system operators ("MSOs") in the United States. [FN28] The Commission has determined previously that the ownership interests in the Networks constitute an "attributable interest," as defined in Section 76.1000(b) of the Commission's rules, thereby making the Networks vertically integrated satellite cable programming vendors subject to the Commission's program access rules. [FN29]

9. On November 18, 1998, the Networks and EchoStar entered into an agreement for the carriage of the Networks' programming. [FN30] While the agreement prohibited the carriage of the Networks on an a la carte basis, it permitted EchoStar to carry the programming in one of three ways: 1) on EchoStar's expanded basic package; 2) on a specialty tier of programming later known as EchoStar's "Action Plus" package; or, 3) on a sports tier. [FN31] On December 2, 1998, EchoStar launched its "Action Plus" package which included both Speedvision and Outdoor Life in its programming line-up. [FN32]

10. On December 7, 1998, following the discovery of an alleged breach of the agreement regarding the packaging of the Networks' programming, the Networks deauthorized EchoStar's reception of Speedvision and Outdoor Life. [FN33] According to EchoStar, approximately 23,000 "Action Plus" package subscribers were left without service. [FN34] The Networks alleged that EchoStar had not properly packaged its programming because in addition to the Networks, only one other programming service was included in the package when EchoStar was to have included at least two other programming services other than Outdoor Life and Speedvision. [FN35] The Networks also alleged that EchoStar violated the a la carte prohibition of the agreement. [FN36] Also, on December 7, 1998, the Networks filed a complaint against EchoStar in the United States District Court for the District of Connecticut alleging, inter alia, breach of contract, fraudulent inducement and trademark infringement. [FN37]

11. On December 9, 1998, in a letter sent to the Networks, EchoStar offered to add another programming service to the "Action Plus" package. [FN38] In a letter dated December 11, 1998, the Networks rejected EchoStar's offer by stating its

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position that the agreement was breached and therefore void, and that it was too late to remedy EchoStar's noncompliance by adding another programming service to the package. [FN39] After providing the Networks with the requisite ten days notice of its intent to file a program access complaint, EchoStar filed the instant complaint on January 14, 1999. [FN40]

IV. ARGUMENTS OF THE PARTIES

12. EchoStar alleges that the Networks have unreasonably refused to offer their programming to EchoStar on fair and nondiscriminatory rates, terms and conditions in violation of Section 628(c)(2)(B) of the Communications Act [FN41] and Section 76.1002(b) of the Commission's rules. [FN42] EchoStar argues that the Networks' unilateral termination of their programming and their continuing refusal to provide it to EchoStar constitutes an unreasonable refusal to deal which is recognized by the Commission as a form of non-price discrimination. [FN43] According to EchoStar, the Networks' allegations of contractual breach do not excuse cable-affiliated programming vendors, such as the Networks, from the obligation to provide their programming to a MVPD, such as EchoStar, in a fair and non-discriminatory manner. [FN44] EchoStar contends that the Networks have the option of pursuing their legal claims for alleged breach of contract in court while still allowing EchoStar to carry the Networks' programming. [FN45]

13. Although EchoStar denies the alleged breach of contract, EchoStar states that, in a spirit of compromise, it has offered to carry the Networks' programming in a manner that is indisputably consistent with the Networks' interpretation of the contract. In that regard, EchoStar states that it has offered to include one more programming service -- the WingSpan aviation channel -- in the "Action Plus" package. [FN46] However, the Networks have rejected EchoStar's offer and EchoStar claims that the Networks' refusal to provide its programming even on the terms that the Networks maintain is required by the contract evidences lack of good faith on the part of the Networks. [FN47] Furthermore, EchoStar contends that as a matter of industry practice in the programming distribution area, a programmer does not terminate its relationship with an allegedly breaching distributor before giving the distributor an opportunity to conform its conduct to the programming vendor's reading of the programming agreement. [FN48]

14. EchoStar also alleges that the Networks have engaged in unfair practices in violation of Section 628(b) of the Communications Act and Section 76.1001 of the Commission's rules [FN49] because they have terminated distribution of their programming to EchoStar and since that termination consistently have refused to allow EchoStar access to their programming. [FN50] EchoStar notes that Section 628(b) of the Communications Act was intended to be a repository of "Commission jurisdiction to adopt additional rules or to take additional actions to accomplish statutory objectives should additional types of conduct emerge as barriers to competition and obstacles to the broader distribution of satellite cable and broadcast video programming." [FN51] Thus, with regard to the distribution of the Networks' programming, EchoStar alleges that the Networks' unfair conduct has prevented EchoStar from serving consumers which EchoStar argues is the core constituency intended to be protected by the program access laws. [FN52] EchoStar argues that because of the Networks' conduct, EchoStar's subscribers were deprived of the Networks' programming five days after they purchased it and started to receive it, and as a result EchoStar was inundated with complaints that it was powerless to resolve. [FN53]

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15. EchoStar further argues that the Networks' unfair conduct has prevented it from launching the specialty tier that it planned to build around the Networks' programming. [FN54] EchoStar argues that the Networks' programming is important for the purpose of attracting large categories of consumers with special interests. For instance, EchoStar notes that the NASCAR races covered by Speedvision are among the nation's most watched and fastest growing sports events on television. [FN55] In addition, EchoStar asserts that Outdoor Life Network is a leader in outdoor adventure programming. [FN56] Therefore, without the Networks' programming, EchoStar argues that it is at a competitive disadvantage with competing MVPDs that carry the Networks' programming in "digital cable" and other tiers outside their expanded basic package. [FN57]

16. Finally, EchoStar requests damages for the harm it alleges to have suffered because of the Networks' alleged unfair and discriminatory conduct in this matter. [FN58] EchoStar states that it has suffered damages in the form of refunds and credits that it had to pay the 23,000 customers that subscribed to the "Action Plus" package at the time of its termination. [FN59] EchoStar also claims loss of profits for the program package from these customers, as well as for additional subscribers that EchoStar states that it would have secured with this programming. [FN60] In addition, EchoStar also claims loss of profit from disgruntled subscribers who EchoStar believes may have abandoned its programming altogether because of the termination of the Networks' programming. [FN61] EchoStar also requests damages for marketing costs, both out-of-pocket and overhead that were incurred to promote the Networks' programming; overhead expenses incurred for handling the consequences of the Networks' conduct, such as the cost of processing phone calls from affected customers; and, the loss of goodwill. [FN62]

17. The Networks respond by asserting that their decision to deauthorize EchoStar's carriage of the Networks' programming does not constitute an unreasonable refusal to deal in a nondiscriminatory manner or constitute an unfair practice under the Commission's program access rules. [FN63] The Networks argue that their decision was lawful and an appropriate business response to what they allege to be EchoStar's breach of the clear and express terms of the parties' contract. [FN64] Moreover, the Networks contend that the action they took was necessary to protect their reputation and the good will that they have earned with viewers, advertisers, program suppliers and other distributors. [FN65] The Networks also note that they have pursued carriage on EchoStar for over three years and that throughout that period they made at least 14 formal offers of carriage to EchoStar until the parties finally signed a mutually acceptable agreement on November 18, 1998. [FN66]

18. Specifically, the Networks argue that their actions in this matter do not constitute an unreasonable refusal to deal because the deauthorization of EchoStar's receipt of their signals occurred after EchoStar breached a crucial packaging condition of their agreement. [FN67] The Networks note that in adopting the program access rules, the Commission recognized that there are certain situations in which a vertically integrated programming vendor would be justified in refusing to deal with a distributor, such as when parties reach an "impasse on particular terms." [FN68] In this case, the Networks argue that where a programming distributor, such as EchoStar, breaches the express, material terms of a distribution agreement and federal court litigation ensues, an impasse has clearly occurred and the Networks' refusal to deal with such a distributor is reasonable. [FN69]

19. The Networks argue further that their signal deauthorization is reasonable

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after the breach of such an important condition under general principles of contract and antitrust law. [FN70] The Networks assert that under contract law, a contracting party's failure to abide by a condition or material term of that contract is grounds for non-performance by the other party to the contract. [FN71] In addition, the Networks contend that breach of contract has been found to constitute a reasonable ground upon which vertically integrated programming vendors may refuse to distribute programming to DBS providers. [FN72] Specifically, the Networks refer to the PrimeStar Consent Decree, approved by the United States District Court for the Southern District of New York, as an example where breach of contract was considered a reasonable basis upon which PrimeStar Partners, L.P. could refuse to distribute programming to DBS or MMDS providers. [FN73] The Networks also assert that under antitrust law, a party may refuse to deal with another entity where a valid business justification exists. [FN74]

20. The Networks also contend that their decision to deauthorize EchoStar's receipt of their programming after a contractual breach does not constitute an unfair practice under the Communications Act and the Commission's rules. [FN75] The Networks argue that their refusal to provide programming after EchoStar's alleged breach was reasonable and if the Commission agrees, it cannot find that the Networks acted unfairly in violation of the prohibition on unfair acts or practices. [FN76] The Networks assert that Section 628(b) of the Act was not intended as a mechanism to declare unfair that which is permitted under the Act's specific provisions. [FN77] The Networks argue that the Commission has ruled that actions that are legal under one section of the program access rules should not be considered illegal under the broad unfair practices language of Section 628(b). [FN78] In that regard, the Networks contend that EchoStar has not alleged any facts or circumstances in their unfair practices allegation that are not encompassed by their unreasonable refusal to deal or non-price discrimination allegation. [FN79] Accordingly, the Networks argue that if the Commission finds that the Networks' refusal to provide programming to EchoStar was not unreasonable, then consequently the Commission cannot find that the Networks acted unfairly in this matter. [FN80]

V. DISCUSSION

21. For the reasons discussed below, we deny EchoStar's program access complaint against the Networks. The Commission recognizes that Section 628(c)'s prohibition against discrimination also encompasses forms of non-price discrimination. [FN81] In that regard, the Commission has stated:

[W]e believe that one form of non-price discrimination could occur through a vendor's "unreasonable refusal to sell," including refusing to sell programming to a class of distributors, or refusing to initiate discussions with a particular distributor when the vendor has sold its programming to that distributor's competitor. We believe that the Commission should distinguish "unreasonable" refusals to sell from certain legitimate reasons that could prevent a contract between a vendor and a particular distributor, including (i) the possibility of parties reaching an impasse on particular terms, (ii) the distributor's history of defaulting on other contracts, or (iii) the vendor's preference not to sell a program package in a particular area for reasons unrelated to an existing exclusive arrangement or a specific distributor. [FN82]

22. We note at the outset that this is not the usual "refusal to deal" or "refusal to sell" case. This is not a matter where programming vendors, such as

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the Networks, refused to sell their programming to a distributor, such as EchoStar, or refused to initiate discussions about the sale of programming when the vendors have sold their programming to that distributor's competitor. Instead, in the instant case, after three years of negotiations between the parties and 14 formal offer of carriage made from the Networks to EchoStar, the parties entered into a mutually acceptable agreement on November 18, 1998. [FN83] Thus, despite the length of negotiations, the Networks did deal with EchoStar and ultimately sold both Speedvision and Outdoor Life programming to EchoStar on terms agreed to by both parties. If not for the alleged breach of contract on the part of EchoStar, the Networks would still be providing their programming to EchoStar.

23. Nonetheless, EchoStar argues that the Networks' unilateral termination of their programming and their continuing refusal to provide that programming, even after an alleged breach of contract, constitutes an unreasonable refusal to deal which is recognized by the Commission as a form of non-price discrimination. The record reveals that the Networks' breach of contract action was filed more than a month before EchoStar's program access complaint. While the Commission's jurisdiction to resolve program access disputes is not subject to question, the resolution of EchoStar's program access complaint is inextricably intertwined with the reasonableness of the Networks' actions resulting from EchoStar's alleged breach of contract. The Commission cannot resolve EchoStar's program access complaint without making factual determinations related to the actions of the parties under the programming contract. Where, as here, a court of competent jurisdiction first has been presented with the same set of operative facts that constitute a program access case which involves a material breach and is not evidently interposed for purposes of evading or delaying the Commission's exercise of jurisdiction, we will not substitute our judgment on these issues for that of the court. The federal court has jurisdiction to examine the parties' contractual dispute and determine whether EchoStar breached a material term of the November 18, 1998 agreement. While we understand EchoStar's concern that during the time when this dispute is pending in federal court some of EchoStar's subscribers will be denied access to the Networks' programming, we do not believe that our program access rules were designed to force a programming vendor to continue to provide its programming to a distributor during the pendency of a non-frivolous breach of contract action on an underlying programming contract. [FN84] Our decision is without prejudice to EchoStar filing a program access complaint after the contractual dispute between the parties is resolved by the federal district court.

24. With regard to EchoStar's allegation that the Networks engaged in unfair practices, we agree with the Networks that EchoStar has not alleged any facts or circumstances in connection with that allegation that are not encompassed by their unreasonable refusal to sell or non-price discrimination allegation. In view of our decision on EchoStar's non-price discrimination claim, we find it unnecessary to address this allegation.

VI. ORDERING CLAUSES

25. Accordingly, IT IS ORDERED that the program access complaint filed by EchoStar against Speedvision Network, L.L.C. and Outdoor Life Network, L.L.C. IS DENIED WITHOUT PREJUDICE.

26. IT IS FURTHER ORDERED that the Motion to Dismiss or, in the Alternative, to Hold Proceeding in Abeyance Pending Resolution in Federal District Court

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filed by Speedvision Network, L.L.C. and Outdoor Life Network, L.L.C. IS DISMISSED AS MOOT.

27. This action is taken by the Chief, Cable Services Bureau, pursuant to authority delegated by Section 0.321 of the Commission's rules. [FN85]

FEDERAL COMMUNICATIONS COMMISSION

Deborah A. Lathen
Chief
Cable Services Bureau

FN1. 47 U.S.C. s 548(c)(2)(B).

FN2. 47 C.F.R. s 76.1002(b).

FN3. 47 U.S.C. s 548(b).

FN4. 47 C.F.R. s 76.1001.

FN5. Pursuant to 47 C.F.R. s 76.1003(h), which provides for the confidentiality of proprietary information falling within an exemption to disclosure contained in the Freedom of Information Act, 5 U.S.C. s 552(b) ("FOIA"), the parties requested that portions of the record regarding this program access complaint be treated as confidential because they contain proprietary information. This Memorandum Opinion and Order observes the requested confidentiality. The parties also submitted redacted copies of their pleadings for inclusion in the Commission's public file.

FN6. Both parties requested and were granted extensions of time in which to file their responsive pleadings. The Networks were granted a two week extension of time in which to file an answer to EchoStar's complaint. EchoStar v. Speedvision et al., Memorandum Opinion and Order, DA 99-262 (released February 1, 1999). Likewise, EchoStar was granted a two week extension of time in which to file its reply pleading in this matter. EchoStar v. Speedvision et al., Memorandum Opinion and Order, DA 99-508 (released March 16, 1999). EchoStar also later filed a supplemental reply.

FN7. See Outdoor Life Network, L.L.C. and Speedvision Network, L.L.C. v. EchoStar Satellite Corporation and EchoStar Communications Corporation, No. 3:98CV2378 (AHN).

FN8. The Networks also submitted a "Reply Memorandum" in support of their Motion to Dismiss or Hold in Abeyance.

FN9. 1992 Cable Act s 2(b)(2), 106 Stat. 1463. See Communications Act s 601(6), 47 U.S.C. s 521(6) ("The purposes of this title are to -- ... (6) promote competition in cable communications and minimize unnecessary regulation that would impose an undue economic burden on cable systems.").

FN10. 47 U.S.C. s 548.

FN11. 1992 Cable Act ss 2(a)(2), 2(b)(5), 106 Stat. 1460, 1463.

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FN12. 47 U.S.C. s 548(b).

FN13. 47 U.S.C. s 548(c)(2)(A).

FN14. 47 U.S.C. s 548(c)(2)(B). Congress provided limited exceptions to this prohibition. A satellite programming vendor or satellite broadcast programming vendor is not prohibited from:

(i) imposing reasonable requirements for creditworthiness, offering of service, and financial stability and standards regarding character and technical quality; (ii) establishing different prices, terms, and conditions to take into account actual and reasonable differences in the cost of creation, sale, delivery, or transmission of satellite cable programming or satellite broadcast programming; (iii) establishing different prices, terms, and conditions which take into account economies of scale, cost savings, or other direct and legitimate economic benefits reasonable attributable to the number of subscribers served by the distributor; or (iv) entering into an exclusive contract that is permitted under subparagraph (D) [of this section].
Id.

FN15. 8 FCC Rcd 3359 (1993).

FN16. Id. at 3412.

FN17. Id. (footnote omitted).

FN18. 47 U.S.C. s 605(d)(1); 47 C.F.R. s76.1000(h).

FN19. 47 U.S.C. s 548(i)(3); 47 C.F.R. s 76.1000(f).

FN20. Complaint at 2.

FN21. Id.

FN22. Id. On April 27, 1999, the Networks filed a "Motion for Leave to Supplement Defendants' Answer and Motion to Dismiss." As an exhibit to their motion, the Networks attach EchoStar's responses to the Networks' first set of interrogatories in the parties' federal district court case. Referring to the interrogatories, the Networks argue that EchoStar asserted in the federal district court action that it was not a party to the agreement at issue and did not distribute programming services at any time in this matter. The Networks argue that EchoStar is not a MVPD and therefore does not have standing to file a program access complaint. On May 7, 1999, EchoStar filed an "Opposition to Motion for Leave to Supplement Defendants' Answer and Motion to Dismiss" and "Motion to Supplement Complaint." EchoStar argues that while it was not the signatory to the agreement at issue with the Networks, the signatory was EchoStar Satellite Corporation ("ESC") which is wholly-owned by EchoStar. ESC is a wholly-owned subsidiary of EchoStar DBS Corporation, which is in turn, a wholly-owned subsidiary of EchoStar. In its "Motion to Supplement Complaint," EchoStar requests that ESC be added as a joint complainant to its program access complaint. In response, on May 17, 1999, the Networks filed "Defendants' Reply in Support of Motion for Leave to Supplement and Response to Complainant's Motion to Supplement" to which EchoStar filed a reply on May 24, 1999. In light

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of our action in this proceeding, we do not address this issue.

FN23. Complaint at 2, 7; Networks Answer at 6. The term "satellite cable programming vendor" means a person engaged in the production, creation, or wholesale distribution for sale of satellite cable programming, but does not include a satellite broadcast vendor. 47 U.S.C. s 548(i)(2); 47 C.F.R. s 76.1000(i).

FN24. Complaint at 2, Exhibit 1; Networks Answer at 6.

FN25. Complaint at 3, Exhibit 2; Networks Answer at 6.

FN26. Networks Answer at 6; see also Complaint at 3. On February 18, 1999, the Commission approved the transfer of Commission licenses and authorizations from Tele-Communications, Inc. ("TCI") to AT&T in connection with the companies' planned merger. On March 9, 1999, AT&T and TCI consummated the merger.

FN27. Id.

FN28. Id.

FN29. See Outdoor Life Networks and Speedvision Network (Petition for Exclusivity pursuant to 47 C.F.R. s 76.1002(c)(4) and (5), 13 FCC Rcd 12226, 12227-8 (1998)).

FN30. Complaint at 8.

FN31. Id. at 9-10. Both parties have requested confidentiality with regard to the precise terms of the November 18, 1998 agreement attached as Exhibit 10 to the Complaint. As such, we will only refer to the agreement in its most general terms.

FN32. Id. at 10. EchoStar states that in addition to Speedvision and the Outdoor Life Network, the "Action Plus" package programming line-up also included Outdoor Channel, a cable network unaffiliated with Speedvision, and Angel One which is another unaffiliated channel available to all EchoStar subscribers and included in all other Echostar packages.

FN33. Id. at 11; Networks Answer at 11.

FN34. Complaint at 11. The Networks state that they lack knowledge or information sufficient to form a belief as to the number of EchoStar subscribers that subscribed to the "Action Plus" package and therefore deny those allegations. Networks Answer at 10.

FN35. Complaint at 14-15, Exhibit 11 (Letter from Burt A. Braverman to Michael S. Schwimmer, December 7, 1998); Networks Answer at 11.

FN36. Id. The Networks allege that EchoStar offered "any or all" of the services comprising the "Action Plus" package, in violation of the a la carte prohibition of the agreement. Complaint, Exhibit 11 (Letter from Burt A. Braverman to Michael S. Schwimmer at p. 2, December 7, 1998).

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FN37. Complaint at 12; Networks Answer at 11-12. See Outdoor Life Network, L.L.C. and Speedvision Network, L.L.C. v. EchoStar Satellite Corporation and EchoStar Communications Corporation, No. 3:98CV2378(AHN).

FN38. Complaint at 14, Exhibit 13 (Letter from Michael S. Schwimmer to E. Roger Williams, December 9, 1998).

FN39. Id. at 14, Exhibit 14 (Letter from Burt A. Braverman to David K. Moskowitz, December 11, 1998).

FN40. See 47 C.F.R. s 76.1003(a).

FN41. 47 U.S.C. s548(c)(2)(B).

FN42. Complaint at 17; 47 C.F.R. s 76.1002(b).

FN43. Complaint at 17; see also Program Access Order, 8 FCC Rcd at 3364.

FN44. Complaint at 19.

FN45. Id.

FN46. Id.

FN47. Id. at 20-21; EchoStar Reply 2-5.

FN48. Complaint at 20.

FN49. 47 U.S.C. s 548(b); 47 C.F.R. s 76.1001.

FN50. Complaint at 21-22; EchoStar Reply at 31-33.

FN51. Complaint at 22, citing Program Access Order at 3374.

FN52. Complaint at 22.

FN53. Id. at 23.

FN54. Id. at 22-23.

FN55. Id. at 23. EchoStar cites several articles attesting to the popularity of NASCAR races: Steve Goldberg, Time, (June 15, 1998); Bob McClellan, The Florida Times-Union, (June 5, 1998); and, Hilary Kraus, The Spokesman-Review, (July 26, 1998).

FN56. Id.

FN57. Id.

FN58. EchoStar notes that the Commission recently affirmed its authority to impose damages in program access cases for violations of Section 628 where it is necessary to remedy the harm stemming from a programmer's anti-competitive

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conduct. Implementation of the Cable Television Consumer Protection and Competition Act of 1992: Petition for Rulemaking of Ameritech New Media, Inc., 13 FCC Rcd 15822, 15829 (1998).

FN59. Complaint at 26.

FN60. Id.

FN61. Id.

FN62. Id. EchoStar states that it is still in the process of calculating and assessing some categories of claimed damages. However, in accordance with 47 C.F.R. s 76.1003(c)(5), EchoStar has provided the Commission with computations and documentation with respect to certain damage categories that EchoStar states were easy to ascertain. EchoStar requests that its claim for damages to the Commission be without prejudice to its ability to claim these damages in court and/or to request any other additional damages in the future before this Commission or in court. Id. at 26-27.

FN63. Networks Answer at 19.

FN64. Id.

FN65. Id.

FN66. Id. at 2, 20.

FN67. Id. at 49.

FN68. Id.; see Program Access Order, 8 FCC Rcd at 3412.

FN69. Id.

FN70. Id. at 50.

FN71. Id., citing *Rokalor, Inc. v. Connecticut Eating Enterprises, Inc., Inc.*, 18 Conn. App. 384, 391-92, 558 A.2d 265 (1989); *Aleysayi Beverage Corp. v. Canada Dry Corp.*, 947 F.Supp. 658, 667 (S.D.N.Y. 1996); *Jafari v. Wally Findlay Galleries*, 741 F.Supp. 64, 68 (S.D.N.Y. 1990); *Crown Life Ins. Co. v. American National Bank and Trust Co.*, 830 F.Supp. 1097 (N.D.Ill 1993); and, *U.S. v. Bedwell*, 506 F.Supp. 1324, 1327 (E.D.Pa. 1981).

FN72. Networks Answer at 51.

FN73. Id.; see *New York v. Primestar Partners, L.P.*, 1993 U.S. Dist. LEXIS 21122, *18 (S.D.N.Y. 1993) (finding that the Primestar partners could refuse to deal with DBS or MMDS providers where such "prospective provider is in breach of any contract" with the Primestar programming entity) (emphasis added). The Primestar Consent Decree settled an antitrust case between the Primestar Partners and 40 states' attorneys general. The Networks note that some of their owners are Primestar Partners and were bound by the consent decree until it expired. The Networks argue that while the Commission expressed concern over

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that portion of the Consent Decree that permitted certain exclusive distribution agreements, the Consent Decree is still persuasive authority concerning what constitutes a reasonable refusal to deal under antitrust law. *Id.*, n. 35. EchoStar argues that the Commission has never recognized allegations of contractual breach as justification for refusal to deal. EchoStar Reply at 12. Moreover, EchoStar contends that the consent decree at issue permitted Primestar to refuse to deal in circumstances where a programming vendor would be prohibited from doing so under the program access laws. *Id.*, n. 22. In addition, EchoStar argues that a negotiated consent agreement has no more precedential value than any agreement in settlement of litigation. *Id.*; see *Beatrice Foods Co. v. Federal Trade Commission*, 540 F.2d 303, 312 (7th Cir. 1976).

FN74. Networks Answer at 51; see, e.g., *Byars v. Bluff City News Co.*, 609 F.2d 843, 863 (6th Cir. 1979) ("A finding of antitrust liability in a case of a refusal to deal should not be made without examining business reasons which might justify the refusal to deal."). The Networks also cite several cases where the courts have found valid business justifications to exist in refusal to deal cases. See, e.g., *Arthur S. Langenderfer v. S.E. Johnson Co.*, 917 F.2d 1414, 1427 (6th Cir. 1990) (claim for refusal to deal is inextricably bound with commercial disputes and contract disputes); *Homefinders of America, Inc. v. Providence Journal Co.*, 621 F.2d 441, 443 (1st Cir. 1980) (not unreasonable for a newspaper to refuse misleading advertising that offends its readers).

FN75. Networks Answer at 58.

FN76. *Id.*

FN77. *Id.*

FN78. *Id.* at 58-59 citing *American Cable Co. and Jay Copeland v. TeleCable of Columbus, Inc.*, 11 FCC Rcd 10090 (1996).

FN79. *Id.* at 59.

FN80. *Id.* The Networks also note that while EchoStar primarily alleges that the Networks engaged in an unreasonable refusal to deal, allegations raised in the complaint could also be construed as an attempt to assert a price discrimination complaint. Networks Answer at 59, referring to Complaint at 6, 18 and P 11, P 33 and Exhibit 5. The Networks argue that EchoStar has not demonstrated that the Networks are offering more favorable packaging terms to cable operators or other MVPDs. The Networks argue that the Commission should not permit EchoStar to turn this proceeding into a price discrimination matter forcing the Networks to expose all of the price, terms and conditions contained in agreements with distributors similarly situated to EchoStar. The Networks assert that EchoStar has not alleged facts or circumstances in its complaint to warrant such an intrusion into the Networks' proprietary operations. We agree with the Networks that EchoStar has not alleged sufficient facts or circumstances to make a price discrimination complaint.

FN81. 47 U.S.C. s 548(c).

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FN82. Program Access Order, 8 FCC Rcd at 3412.

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FN83. Complaint at 7-9 and Reply 14-15; Networks Answer 2, 9 and 20. Both EchoStar and the Networks argue extensively with regard to the fairness of the negotiations between the parties, whether the Networks provided Echostar with non-discriminatory rates and terms compared to other distributors, and on whose terms the parties ultimately reached agreement on November 18, 1998. For our purposes in this matter, our interest is limited to the fact that the parties actually reached an agreement regarding carriage of the Networks' programming by EchoStar.

FN84. The Bureau recently requested that both EchoStar and the Networks provide a report as to the status of the breach of contract suit and related litigation that is pending in federal court between the parties. The Networks report that under the "Case Management Plan" agreed to by the parties, which has been submitted to the Court for approval, discovery must be completed by September 8, 1999; dispositive motions, if any, must be filed by October 8, 1999; and the parties are required to have the matter ready for trial no later than December 7, 1999. April 14, 1999 Letter from Burt A. Braverman, Esq. In its response, EchoStar does not dispute this schedule, but argues that the case will not go to trial for many months after the trial readiness date due to what EchoStar refers to as a substantial backlog in the Court's docket. April 19, 1999 Letter from Pantelis Michalopoulos, Esq. The Networks respond by arguing that apart from being unsubstantiated, EchoStar's assertion regarding the actual trial date did not comport with the information that the Networks received regarding the calendar of the Senior Judge assigned to the case. April 20, 1999 Letter from Burt A. Braverman, Esq.

FN85. 47 C.F.R. s 0.321.
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