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July 17, 2008

## Ex Parte

Ms. Marlene H. Dortch, Secretary  
Federal Communications Commission  
445 12th Street, S.W.  
Washington, D.C.

**Re: In the Matter of Review of the Commission's Program Access Rules and Examination of Programming Tying Arrangements, MB Docket No. 07-29 and MB Docket No. 07-198**

Dear Ms. Dortch:

As the Commission continues its consideration of various issues concerning competitive video providers' access to programming, it should address the growing practice of vertically-integrated programmers withholding from sale to competitive providers the "HD feed" of programming that they are otherwise required to provide access to under the Cable Act. Some cable incumbents attempt to circumvent the Commission's rules and deny competitors the HD format of covered programming by routing that particular format (but not a lower quality version of the same programming) over fiber and arguing that, as a result, the "HD feed" is not covered by the rules. This transparent effort to evade the rules ignores that it is the *programming* – and not the various technical *formats* in which that programming may be delivered or viewed – to which the Commission's rules provide access. The cable incumbents' attempt to evade the rules in this way is a transparent effort to handicap competitive providers and denies consumers the ability to take full advantage of the HD capabilities of their televisions.

The cable incumbents who have engaged in these anticompetitive and unfair practices are seizing on the growing importance of HD technology to consumers. As the Commission is aware, consumer demand for a robust selection of HD programming is skyrocketing. More than one-third of American households already have an HD television ("HDTV") set, and HDTV sales are growing at an astonishing 50% per year.<sup>1</sup> By 2011, according to estimates by the

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<sup>1</sup> K.C. Neel, *Consumers Get "High" Anxiety: No Clear Picture On High-Definition Do's and Don'ts*, Multichannel News, Nov. 26, 2007; see also Press Release, *30 Percent of U.S. Households Own an HDTV, CEA Research Finds* (June 26, 2007) (available at [http://www.ce.org/Press/CurrentNews/press\\_release\\_detail.asp?id=11309](http://www.ce.org/Press/CurrentNews/press_release_detail.asp?id=11309)).

Consumer Electronics Association, the number of HDTVs sold in the United States will reach 170 million, which is roughly one set for every two Americans. *See id.* Therefore, denying access to regional sports programming that is subject to the program access rules in HD format is an attempt to handicap competitive entrants in view of this market trend.

Verizon previously informed the Commission of Cablevision's effort to circumvent the program access rules by denying Verizon access to the "HD feed" for the MSG regional sports network in New York City.<sup>2</sup> Verizon reached a deal for the standard definition version of this channel only after filing a program access complaint with the Commission, but Cablevision even then refused to provide the HD feed for that same programming – purportedly because this version of the programming was delivered terrestrially. *Id.* After withholding this highly desirable and unique regional sports programming, Cablevision trumpeted in its advertisements the fact that it was the only source for this programming in HD. *Id.*

Now, Cablevision is at it again, and is again refusing to sell (or even talk about selling) the HD feed for its MSG-Buffalo channel. Even though Cablevision apparently concedes that its sports network in Buffalo is satellite-delivered and subject to the Commission's rules, it again refuses to provide access to the HD format of this sports programming, presumably based on the terrestrial delivery of that particular format. Remarkably, Cablevision is refusing to provide the programming to Verizon in HD format, even though Cablevision itself is not a cable operator in that area and should have every reason to want to maximize distribution of its programming there. Moreover, Cablevision does provide the programming in HD format to one or more video providers who do operate in that area at the same time that it has refused to provide the HD format to Verizon.<sup>3</sup>

The Commission can and should recognize that unfair and anticompetitive practices such as these violate the program access rules. Nothing in those rules permits vertically integrated cable incumbents to pick and choose certain (lower quality) formats of programming covered by the rules to make available to competitive providers, and deny other (higher quality) formats. Allowing such practices would allow incumbents to effectively nullify the program access rules.

First, notwithstanding the cable incumbents' efforts to evade or circumscribe the program access rules, "programming" means "programming." And it is programming – and not the various technical *formats* in which that programming may be delivered or viewed – to which the Commission's rules provide access. Whether or not a customer tunes into the standard definition or HD "feed" of Cablevision's MSG network to watch a Buffalo Sabres game, the score will be the same. Nothing in Section 628 or the Commission's rules indicates that any particular

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<sup>2</sup> Comments of Verizon, MB Docket No., 07-198, at 8 (Jan. 4, 2008)

<sup>3</sup> *See, e.g.*, DirecTV Web Site, available at [http://www.directv.com/DTVAPP/global/contentPageNR.jsp?assetId=3420007&\\_DARGS=/DTVAPP/layout/component/topNavSections.jsp.21\\_A&\\_DAV=-1&\\_dynSessConf=5153639675144590846](http://www.directv.com/DTVAPP/global/contentPageNR.jsp?assetId=3420007&_DARGS=/DTVAPP/layout/component/topNavSections.jsp.21_A&_DAV=-1&_dynSessConf=5153639675144590846) (last visited July 16, 2008),

technical format should be considered separate “programming,” much less that a vertically integrated programmer has discretion to unilaterally withhold higher quality formats of programming that is subject to the rules from a competitive provider by drawing such distinctions. And when a channel is subject to the program access rules – as the satellite-delivered Cablevision sports networks in New York City and Buffalo undeniably are – then the rules on their face entitle competitive providers to access without discrimination “in the prices, terms, and conditions of sale or delivery.” *See* 47 U.S.C. § 548(c)(2). The cable incumbent’s decision about how it will route the various formats of the programming does not change this simple fact.

Second, aside from the violation itself, the incumbents’ effort to evade the program access rules through these types of subterfuges is an “unfair method[] of competition or unfair or deceptive act[] or practice[]” in violation of Section 628(b) of the Cable Act. *See* 47 U.S.C. § 548(b). Cable incumbents’ efforts to evade their statutory obligations by placing the HD format of covered programming onto alternative feeds is precisely the type of unfair or deceptive practice that falls within the scope of this provision.

Finally, the Commission also possesses sufficient ancillary authority to address the incumbents’ practices because doing so is necessary to effectuate and give full effect to Section 628 and to further Congress’s underlying goals in Section 628. Both the Commission and the courts have long recognized that the Commission may exercise ancillary jurisdiction as a basis for adopting measures that are directly ancillary to the Commission’s express responsibilities and are necessary to effectuate and further the purposes of those express statutory responsibilities.<sup>4</sup> If cable incumbents were allowed to withhold the HD formats of covered programming – Section 628 would fail to accomplish its purposes. This is particularly true, given that current technology makes it easy to shift particular formats of covered programming from satellite- to terrestrial-delivery. This fact – as well as a documented history of abuse by vertically integrated programmers – reveals that the protections of the program access rules are necessary in the context of these “HD feeds” of covered programming in order to ensure that competitive providers receive the access to programming that Congress intended.

The Commission should promptly condemn the anticompetitive and unfair practices of cable incumbents who deny access to the HD feed of programming otherwise covered by the

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<sup>4</sup> The Commission has invoked several statutory provisions to support the exercise of limited ancillary jurisdiction in appropriate cases. Section 4(i) of the Communications Act permits the Commission to “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.” 47 U.S.C. § 154(i). Section 303(r) directs the Commission to “make 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 chapter....” 47 U.S.C. § 303(r). In particular contexts, the Commission has also pointed to Sections 1 and 2(a) of the Communications Act to support the exercise of ancillary jurisdiction to regulate aspects of cable services. *See* 47 U.S.C. §§ 151, 152(a).

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program access rules, and should clarify that competitive providers are entitled to such programming in all available formats.

Sincerely,

A handwritten signature in black ink, appearing to read "Jon H. ...". The signature is fluid and cursive, with a long horizontal stroke at the end.

cc: Chairman Kevin J. Martin  
Commissioner Michael J. Copps  
Commissioner Jonathan S. Adelstein  
Commissioner Deborah Taylor Tate  
Commissioner Robert M. McDowell  
Daniel Gonzalez  
Amy Bender  
Rick Chessen  
Christina Chou Pauzé  
Rudy Brioché  
Amy Blankenship  
Monica Desai, Chief of the Media Bureau