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May 28, 2009

EX PARTE

Chairman Michael J. Copps
Commissioner Jonathan S. Adelstein
Commissioner Robert M. McDowell
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: Program Access Proceeding, MB Docket Nos. 07-29, 07-198

Dear Chairman Copps, Commissioner Adelstein, and Commissioner McDowell:

As we recently explained in a letter to Chairman Copps, the Commission can and should take action now to prevent cable incumbents from denying competitive video providers access to the cable-affiliated regional sports networks or other regional sports programming – including the HD format of regional sports – that they need in order to provide their customers a meaningful and fully competitive choice.¹ Earlier this week, the D.C. Circuit issued a decision that confirms the Commission’s authority to address this critical issue.² This decision, which arose in the context of the Commission’s ban on exclusive access agreements for multiple dwelling unit properties (MDUs), confirms that the Commission has a solid statutory basis to address other unfair or anticompetitive practices of cable incumbents that likewise deny consumers a meaningful competitive choice for video services, including their refusal to provide access to “must have” regional sports programming.

1. As an initial matter, the cable incumbents’ documented history of abusing their control of regional sports networks and other regional sports programming (collectively “RSNs”) to deny consumers a meaningful competitive choice is a real and ongoing problem that must be addressed.

¹ See Letter from Susanne A. Guyer to Chairman Michael J. Copps, WC Docket No.07-244, MB Docket Nos. 07-29 & 07-198 (April 22, 2009).

² *National Cable & Telecommunications Association v. FCC*, No. 08-1016 (D.C. Cir. May 26, 2009) (“NCTA”).

The Commission has repeatedly recognized the significance of regional sports programming in the video marketplace. Indeed, while the cable incumbents may claim that regional sports constitutes “niche” programming of limited competitive significance, the Commission has correctly found that this unique programming is “must have” for many consumers. Regional sports programming is a critical component for any competitive video offering. And unlike many other types of programming, a provider denied access to regional sports programming has no way of duplicating or providing an effective alternative for regional sports programming which, by its very nature, is unique. A competitive provider cannot simply build its own professional sports league or convince potential subscribers to switch their allegiance to teams in other cities or to other sports. For this reason, the Commission has quite correctly concluded that “access to this non-substitutable programming is necessary for competition in the video distribution market to remain viable.”³

Numerous episodes document the significance of regional sports programming for a provider seeking to offer a competitive video service and support the Commission’s conclusion that lack of access to regional sports has a “serious adverse impact on competition.” *Id.* ¶ 115.

For example, the satellite providers have long been denied access to regional sports as a result of incumbents’ withholding of sports programming in Philadelphia and San Diego, and the competitive impact has been significant. The Commission’s analysis of the empirical data concluded that “such withholding has had a material adverse impact on competition in the video distribution market,” with the percentage of television households that subscribe to DBS service in Philadelphia “40 percent below what would otherwise be expected.” *Id.* ¶ 39. Similarly, “[i]n San Diego, the analysis concluded that lack of access . . . results in a 33 percent reduction in the households subscribing to DBS service.” *Id.*

The cable incumbents have also used this anticompetitive approach to handicap other new competitors when they have the opportunity to do so. For example, AT&T has hit the same roadblock in San Diego that the satellite providers encountered, and has been completely denied access to the RSN that carries Padres games.⁴ And Cox has sought to exploit this advantage, heavily advertising its exclusive access to this programming and

³ Report and Order and Notice of Proposed Rulemaking, *Implementation of the Cable Television Consumer Protection and Competition Act of 1992*, 22 FCC Rcd 17791, ¶ 39 (2007)(“2007 Program Access Order”).

⁴ See Memorandum Opinion and Order, *AT&T Services Inc. v. CoxCom, Inc.*, CSR-80660-P (March 9, 2009)(“AT&T Order”).

agreeing to license the programming only to other cable incumbents against which it does not compete directly.⁵

Verizon has encountered similar problems. For example, Cablevision refused to provide access to its regional sports channels in the New York City area – MSG and MSG Plus – and agreed to do so only after we filed a program access complaint. Even then, Cablevision would only agree to provide access to the standard definition format of its RSNs, and flatly refused access to the HD format of that same programming (even though it provides the programming to other non-overlapping cable incumbents).⁶ Later, as Verizon prepared to enter additional markets in upstate or western New York, Cablevision again refused to even discuss providing access to the HD feeds of the RSNs in those areas. And more recently, as Verizon and Cablevision negotiated a renewal contract for the Cablevision RSNs, Cablevision again flatly refused to provide access to these RSNs in HD format.

Cablevision has made no secret of its reasons for refusing to sell RSNs in HD to Verizon. In fact, Cablevision trumpets to consumers and analysts that it is the only source within its territory for receiving all nine local teams in New York City in HD. One Cablevision executive described its RSNs as the “most valued and popular sports programming” in New York.⁷ And when asked by an analyst how Cablevision would fend off competition from Verizon, Cablevision’s chief operating officer immediately pointed to the competitive importance of the HD formats of regional sports, stating: “We have our sports channels in high definition. So four of the nine professional sports teams in New York. If you want to see them in HD, you have to get them from us.”⁸

By denying competing video providers access to regional sports, the cable incumbents deny many consumers a meaningful choice in video services. Without access to the games of local sports teams (many of whom compete in facilities funded by taxpayer dollars and obtain other public benefits, such as exemption from antitrust laws), many viewers simply will not consider a competing provider’s video services. As the Commission has previously concluded, when a competitor’s offering lacks regional sports, “a large number of consumers will refuse to purchase the MVPD’s service and

⁵ See AT&T’s Application for Review, CSR-8066-P, at 2-3 (April 3, 2009).

⁶ See Verizon Ex Parte, MB Docket Nos. 07-29 & 07-198 (July 17, 2008).

⁷ R. Ortega and J. Furse, *Cable War Strands Mets Fans*, New York Daily News (Aug. 2, 2004) (quoting Mike McCarthy, President, MSG Network).

⁸ Statement of Tom Rutledge, COO, Cablevision Systems Corp., Thomson StreetEvents, CVC- Cablevision Systems Corp. at UBS Global Media and Communications Conference, at 9 (Dec. 8, 2008).

will elect to purchase service from the cable operator that offers the RSN.” 2007
Program Access Order ¶ 39.

Similarly, the carriage of regional sports in HD is increasingly essential to consumers. As the Commission is aware, consumer demand for a robust selection of HD programming is skyrocketing. More than 45 percent of American households have an HD television set, up from less than 20 percent in 2006.⁹ Nielsen data show higher levels of sports viewing and engagement in HD homes, with ratings for sports events 20 percent higher in HD homes compared to U.S. households as a whole.¹⁰

Indeed, the attached sampling of online postings from consumers commenting on Cablevision’s refusal to provide its regional sports networks in HD demonstrates the impact on consumers:

- “The only reason they do not offer it is because of competition. They really can’t/don’t compete with other cable companies so they get their money from MSG HD from them. AT&T and Fios compete directly with Cablevision so that’s why they will not offer it unless they are forced to. . . How do you have the regular MSG and not offer the HD channel?”
– Fios Fan
- “With hockey season underway and Basketball season about to start, are there any updates as to if/when FiOS will get MSG HD? Watching MSG in SD is like watching it on YouTube” – Spaceboy 88
- “Ok, October 28 I am back with Time Warner. I will have MSG HD, and MSG+ HD.” – billy2

The anticompetitive purposes and effects of cable incumbents’ practices could not be more clear, and Commission action is necessary now to promote video competition and consumer choice.

2. As the D.C. Circuit’s *NCTA* decision from earlier this week confirms, the Commission’s legal authority to ensure that competitors have access to this “must have” sports programming is solid. The cable incumbents typically defend their refusal to provide access by arguing that this programming – or even just the “HD feed” of the

⁹ See, e.g., Simon Flannery et al., Morgan Stanley, *Broadband Outlook: Recent Sell-Off an Opportunity in Recurring Revenue Models* at 11, Exhibit 25 (Oct. 17, 2008); Walter Mossberg, *Family Snapshots in the Splendor of HD*, Wall St. J. Online (Nov. 26, 2008), <http://online.wsj.com/article/SB122766053302758377.html>.

¹⁰ Nielsen Special Report, *2008 a Banner Year in Sports* at 3-4 (2008).

programming – is not satellite delivered and not subject to the protections of Section 628. As the Commission already recognized when prohibiting the enforcement of MDU exclusive access agreements and as the D.C. Circuit has now confirmed, however, Section 628(b) prohibits *any* “unfair methods of competition or unfair or deceptive acts or practices, the purpose or effect of which is to hinder significantly or prevent any [video provider] from providing satellite cable programming . . . to subscribers or consumers.” 47 U.S.C. § 548(b). Refusing to provide access to regional sports programming, regardless of how it is delivered, violates that prohibition.

The reason for this is straightforward and follows from “Section 628’s actual words.” *NCTA* at 12. As discussed above, many subscribers consider regional sports programming essential and would not switch to a competitive video provider that does not carry such programming. Therefore, there is no plausible argument that regional sports are a form of niche programming of no competitive significance. Quite the contrary, when the incumbent withholds “must have” regional sports programming, it is denying competitors a necessary component to compete for such customers, and denying those consumers a meaningful competitive choice. Necessarily, this “significantly hinders or prevents” the competitor’s ability to provide *any* of its programming – including other programming that is delivered by satellite – to these “subscribers or consumers.” 47 U.S.C. § 548(b). As the D.C. Circuit noted in *NCTA*, there is no dispute that “most programming” making up competitive video services is satellite-delivered. *Id.* at 11.

While the cable incumbents traditionally have sought to minimize the significance of Section 628(b) and limit the scope of the statutory protections to the specifics set out in Section 628(c), both the Commission and the D.C. Circuit have now rejected that interpretation. As an initial, textual matter, the statute indicates that the specific rules required by Section 628(c) are the “minimum contents of regulation” required of the Commission, thus providing a floor but not a ceiling for the authority conferred by Section 628(b). *See* 47 U.S.C. § 548(c). The Commission recognized as much in the context of its MDU Order, when it concluded that the “broad, plain language” of Section 628(b) reaches practices and conduct beyond access to satellite-delivered programming.¹¹ Instead, the “clear and complete terms of” Section 628(b) prohibit “any practices that unfairly deny MVPDs the ability to provide such programming to consumers.” *Id.*

In *NCTA*, the D.C. Circuit unanimously upheld this interpretation of “section 628(b)’s broad and sweeping terms.” *Id.* at 8. In doing so, the Court rejected the cable incumbents’ narrow reading of Section 628 as addressing a competitor’s access to

¹¹ Report and Order and Further Notice of Proposed Rulemaking, *Exclusive Service Contracts for Provision of Video Services in Multiple Dwelling Units and Other Real Estate Developments*, 22 FCC Rcd 20235, ¶ 44 (2007) (“*MDU Order*”).

satellite-delivered programming, and noted instead that “the words Congress chose focus not on practices that prevent MVPDs from *obtaining* satellite cable or satellite broadcast programming, but on practices that prevent them from ‘providing’ that programming ‘to subscribers or consumers.’” *Id.* The Court concluded the specific focus on a competitor’s access to satellite programming in Section 628(c) did not limit the broader scope of Section 628(b), noting: “Congress had a particular manifestation of a problem in mind, but in no way expressed an unambiguous intent to limit the Commission’s power solely to that version of the problem. . . . [Cable incumbents] offer no evidence from the legislative record to show that Congress chose its language so as to limit the Commission solely to that particular abuse of market power.” *Id.* at 9-10.

The withholding of cable-affiliated regional sports programming or the HD feed of that programming – necessary components to provide consumers with a fully competitive choice – is the type of practice that is squarely prohibited by the plain language of Section 628(b).

3. Finally, the Commission has before it at least two vehicles to address this issue, and should act promptly to prevent further harm to consumers and video competition.

First, over eighteen months ago the Commission released a Notice of Proposed Rulemaking (NPRM) in which it recognized the harm to competition from incumbents’ withholding of regional sports programming, and squarely teed up this issue of whether the Commission can and should prohibit these anticompetitive practices. *2007 Program Access Order* ¶¶ 115-17. Among other things, the Commission sought comment on its authority to extend its rules to incumbents’ terrestrially-delivered programming pursuant to various provisions of the Communications Act, including specifically Section 628(b). *Id.* ¶ 116. Likewise, the Commission sought comment on “whether the program access rules should apply to all feeds of the same programming, including both standard and HD, regardless of whether one feed is delivered terrestrially” and “whether shifting the HD feed . . . to terrestrial delivery is an unfair method of competition or an unfair or deceptive act in violation of Section 628(b).” *Id.* ¶ 117. In response to the NPRM, Verizon and numerous other parties demonstrated the need for Commission action. This record provides a firm basis for the Commission to act now to prohibit these anticompetitive practices that deny many consumers a meaningful choice in video providers.

Second, AT&T filed a program access complaint concerning Cox’s denial of access to Padres programming in San Diego, arguing that Cox’s practices violated Section 628(b) of the Cable Act.¹² Because the staff generally lacks authority to decide

¹² Amended Program Access Complaint, AT&T Services, Inc. v. Cox Enterprises, Inc., CSR-8066-P (Oct. 6, 2008).

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issues of first impression, the Media Bureau recently issued an order denying that complaint without prejudice based on “existing precedent,” but noting that the full Commission could address these issues. AT&T Order ¶ 16. AT&T has applied for full Commission review of that Bureau-level decision,¹³ and the Commission could determine in that context that the withholding of regional sports programming violates the Cable Act.

In sum, cable incumbents’ refusal to provide access to regional sports programming (or of the HD feed of that programming) is a real and ongoing problem that denies consumers a meaningful choice and that harms video competition in violation of Section 628(b). The Commission has before it a fully-ripe record demonstrating the need for Commission action, and now is the time for the Commission to remove this significant impediment to video competition and meaningful consumer choice.

Sincerely,



Michael E. Glover

cc: Marlene Dortch
Rick Chessen
Rudy Brioché
Rosemary Harold
Robert Ratcliffe
Angela Giancarlo

¹³ AT&T Application for Review, CSR-8066-P (April 3, 2009).

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Author	All Replies
 Spaceboy88 @e-ot.net	Any new updates on MSG HD? With hockey season underway and Basketball season about to start, are there any updates as to if/when FIOS will get MSG HD? Watching MSG in SD is like watching a game on YouTube! <small>to forum • permalnk • 2008-10-10 11:17 PM • (locked)</small>
 PoloDude Premium VIP Join: 2006-03-29 East Northport, NY	<small>to forum • permalnk • 2008-10-10 11:17 PM • (locked)</small>

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<p>EMBARQ Official Site Bundle Your Phone, TV, Internet See How Much Embarq Saves You. www.EMBARQ.com</p>	<p> Mike Scott Join: 2008-07-08 Long Beach, CA</p>	<p>to forum - permalink - 2009-10-23 10:03:29 - (locked)</p>
<p>how-to block ads</p>	<p> matcarl Join: 2007-03-09 Franklin Square, NY</p>	<p>Wow, Comcast got rights to air it in northern NJ www.multichannel.com/article/CA6606210.html</p>
	<p> waiting4fios Join: 2005-04-08 Hewitt, NJ Verizon FIOS</p>	<p>to forum - permalink - 2009-10-23 11:54:38 - (locked)</p>
	<p></p>	<p>to forum - permalink - 2009-10-23 11:54:38 - (locked)</p>

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 Missmycat @verizon.net	<p>to forum · permalink · 2008-11-16 22:27:05 · (locked)</p>
Mcas97 Join: 2007-04-10 Oakland Gardens, NY	<p>reply to Missmycat Re: Any new updates on MSG HD?</p> <p>You know what I hate. I dont live in an area that is competition with cablevision. My service would be time warner cable if I did not have fios, and they had msg-hd, so I feel my area should have msg-hd. This would only benefit cablevision by allowing more customers to access the channel, and getting paid their share.</p> <p>to forum · permalink · 2008-11-16 22:43:43 · (locked)</p>
robjevin Join: 2002-10-30 Millington, NJ	<p>to forum · permalink · 2008-11-17 00:00:01 · (locked)</p>
 Fios Fan @verizon.net	<p>Those should be fined and put Dolan in jail. The only reason they do not offer it is because of competition. They really can't/don't compete with other cable companies so they get their money for MSG HD from them. AT&T and Fios compete directly with Cablevision so that's why they will not offer it unless they are forced to. This is where the FCC should make them offer it. How do you have the regular MSG and not offer the HD channel? Verizon should cut off all of their cables from their poles and make them drill their own! And for those who some how think the dish or cable company has a better picture than FIOS, let me know I have a great eye doctor that can get you the right glasses!! It ain't even a question and Verizon is a lot cheaper and gives you more.</p> <p>to forum · permalink · 2008-11-19 22:17:05 · (locked)</p>
 hobgoblin	

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 <p>holgoblin Sort of Regular Premium Join: 2001-11-25 Orchard Park, NY clubs: X</p>	<p>to forum - permalink - 2008-11-19 11:09:20 - (locked)</p>
 <p>Earleyp Join: 2008-07-03 West Sayville, NY</p>	<p>to forum - permalink - 2008-11-19 11:09:20 - (locked)</p>
<p>UofMiamiGrad Premium Join: 2001-02-03 Great Neck, NY</p>	<p>said by Earleyp</p> <p>I wonder if the ATT TV thing has MSG HD even though it's out of area. Also what about NHL thing, isn't that in HD and MSG HD is shown on it.</p> <p>From what I have heard, U-Verse doesn't have MSG-HD feed as well. Cablevision is not giving the HD feed to AT&T, Verizon & Dish Network.</p> <p>to forum - permalink - 2008-11-20 09:29:19 - (locked)</p>
<p>robjlevin Join: 2002-10-30 Millington, NJ</p>	<p>to forum - permalink - 2008-11-20 09:29:19 - (locked)</p>

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 billy2 @aol.com	to forum - permalink - 2009-02-24 05:27:52 (locked)
 billy2 @aol.com	to forum - permalink - 2009-02-24 05:27:52 (locked)
 matcarl Join: 2007-03-09 Franklin Square, NY	to forum - permalink - 2009-02-24 05:24:56 (locked)
 rick4769 @rr.com	to forum - permalink - 2009-02-24 05:24:49 (locked)
 frankpf3 verizon.net Join: 2007-08-09 Huntington Station, NY	reply to tracekyle88 I actually saw on TV the other night cablevision commercial throwing in the face of Sat and Verizon the fact that they have all NY sports teams in HD. to forum - permalink - 2009-02-24 05:23:03 (locked)

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