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Ex Parte

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

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

Dear Ms. Dortch:

On October 20, 2009, Will Johnson and I met with Rick Kaplan, Legal Advisor to Commissioner Clyburn, to urge the Commission to take action now to prevent incumbent cable operators from denying competitive providers access to cable-affiliated regional sports programming (including the high-definition (HD) format of such programming) that they need in order to provide their customers a meaningful and fully competitive choice.

As the Commission has repeatedly found, 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. Consumers who demand sports programming will not even consider subscribing to a video service that does not offer such programming. For these consumers, a service lacking their local teams' games is not a meaningful choice at all.

As explained in more detail in Verizon's May 28, 2009 ex parte filing in this proceeding,[1] we also reiterated that the Commission has a strong legal basis for addressing this barrier to more effective competition, as confirmed by D.C. Circuit's decision in *National Cable & Telecommunications Association v. FCC*, No. 08-1016 (D.C. Cir. May 26, 2009) ("*NCTA*"). The cable incumbents typically defend their refusal to provide access by arguing that this programming is not satellite delivered and not subject to the protections of Section 628. As the Commission already

[1] *See* Letter from Michael E. Glover, Verizon Senior Vice President and Deputy General Counsel, to Chairman Michael J. Copps, et al., MB Docket Nos. 07-29, 07-198 (May 29, 2009).

recognized when prohibiting the enforcement of MDU exclusive access agreements and as the D.C. Circuit has now confirmed in *NCTA*, 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). Given that the bulk of any provider's overall service is made up of satellite-delivered programming, cable incumbents' refusal to provide access to must-have regional sports programming, regardless of how it is delivered, likewise violates that prohibition.

Finally, we urged the Commission to act to address the incumbents' anticompetitive practice of withholding regional sports in the context of its Notice of Proposed Rulemaking in the above-referenced proceeding. That proceeding squarely teed up this issue and provides a complete and full record supporting the need for targeted Commission action to address the narrow but important issue of denial of access to regional sports. Additionally, we suggested that the FCC could address these issues in the context of AT&T's program access complaint against Cox, an application for review of which is currently pending before the full Commission.

Sincerely,