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November 13, 2009

Via ECFS

Marlene H. Dortch
Secretary
Federal Communications Commission
445 Twelfth Street, SW
Washington, D.C. 20554

Re: MB Docket 07-269, *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming,*

Dear Secretary Dortch:

Cablevision Systems Corporation ("Cablevision"), through its counsel, hereby files the attached pleadings in the above-captioned proceeding. The pleadings respond to and refute the Global Marketing Research Services Survey of Paid Television Subscribers in NY and Buffalo Designated Market Areas ("Survey"), which the Verizon companies (collectively, "Verizon") filed with its reply comments in this proceeding on August 28, 2009. Verizon also filed the same Survey in an ongoing program access dispute proceeding, CSR 8185-P, V*erizon Telephone Companies and Verizon Services Corp., v. Madison Square Garden, L.P. and Cablevision Systems Corp*. The attached Cablevision pleadings being submitted herewith were originally prepared as part of the record in that program access dispute.

Cablevision's pleadings present a detailed critique of the Survey's numerous flaws and inaccuracies, and include a declaration from a survey expert detailing the Survey's biases and mistakes. As shown in these pleadings, the key Survey questions were significantly biased to achieve the outcome sought by Verizon. Further, Verizon's reply comments misreported the results of the Survey in a manner that dramatically overstated the importance of high-definition (HD) regional sports networks relative to other programming services and compared to other key factors that drive purchasing decisions such as price and customer service. Moreover, the Survey failed to address the key question raised by the circumstance giving rise to the complaint filed by Verizon: *i.e.*, whether it is critical to a provider's competitive viability to be able to offer RSN games in HD when it already offers those same games in SD.

Cablevision files these pleadings to assist the Commission in connection with its review of Verizon's Survey. Please contact the undersigned with any questions concerning this filing.

*/s/ Christopher J. Harvie*_____
Christopher J. Harvie
Counsel to Cablevision/Madison Square Garden

Enclosures

DATE STAMP

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FILED/ACCEPTED
AUG 31 2009
Federal Communications Commission
Office of the Secretary

In the Matter of	)	
Verizon Telephone Companies and Verizon Services Corp.,	)	
Complainants,	)	
v.	)	File No. CSR-8185-P
Madison Square Garden, L.P. and Cablevision Systems Corp.	)	
Defendants	)	

MOTION TO STRIKE IN PART VERIZON'S REPLY

Madison Square Garden, L.P. ("MSG") and Cablevision Systems Corp. ("Cablevision") (collectively, "Defendants") hereby move to strike certain portions of the Reply of Verizon to Program Access Complaint ("Verizon Reply").[1/] The Verizon Reply flouts the Commission's pleading rules by seeking to insert a new consumer survey (the "Reply Survey") that Verizon designed and apparently began to implement *prior* to receiving Defendants' Answer. Verizon could have and should have included the Reply Survey with its Complaint if it wanted the Commission to consider it. Instead, Verizon's Complaint relied entirely on seven Internet message board postings in a vain attempt to demonstrate competitive harm. The Reply Survey does not respond to any unique or unexpected arguments raised by Defendants in their Answer,

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1/ The rules permit additional pleadings, such as this one, upon a showing of "extraordinary circumstances." 47 C.F.R. § 76.7(d). Extraordinary circumstances exist here because Verizon has impermissibly submitted new evidence prohibited by the Commission's rules. The public interest is clearly served by the Commission's consideration of this Motion, as Defendants are the only parties situated to oppose Verizon's violation of the Commission's rules.

nor can Verizon credibly claim that the need for the Reply Survey only became apparent after reading Defendants' Answer. The Commission's rules and the basic requirements of due process are designed to prohibit just this type of sandbagging, and they require that the Reply Survey be stricken.

The Reply Survey's obvious flaws and lack of probative value, and Verizon's inaccurate and misleading portrayal of its results, confirm why the Commission and other adjudicatory bodies typically prohibit a party from presenting new matter in a phase of a proceeding where there is no opportunity for the other side to respond. The unreliability of the Reply Survey is clear from the outset, where it reports that *none* of the respondents were cable or satellite television subscribers and *none* are responsible for purchasing such services. This evident misreporting of results illustrates the slapdash nature of the submission. Beyond this fundamental defect, the Reply Survey's questions are misleading and biased toward obtaining the pre-ordained result that Verizon sought.

With respect to the alleged importance of MSG HD and MSG+ HD, Verizon mischaracterizes the results of the single applicable question as reflecting the attitude of all cable subscribers rather than just the minority of respondents who indicated that they subscribe to these services. Further, the wording of this question essentially asks for respondents' attitude toward losing *all* access to the Knicks, Rangers, Devils, and Islanders games carried on MSG and MSG+, ignoring the fact that Verizon customers have access to those games via Verizon's carriage of the satellite-delivered MSG and MSG+ standard definition (SD) services. While Verizon could have easily crafted a question relevant to the actual circumstance present here, *i.e.*, where subscribers have access to local professional games in SD but not high definition (HD), it opted instead to use a misleading question and to misrepresent the results.

Finally, the results that the Reply Survey purports to report do not add any support to Verizon's claims. Most of the questions ask about the relative importance to subscribers of sports in general, of regional sports networks ("RSNs") in general, and of HD RSNs in general, but these questions are irrelevant to the issues in this case since Verizon itself has access to all of the SD RSNs and to YES HD and SportsNet New York HD. In any event, even ignoring the Reply Survey's flaws, the responses demonstrate that the absence of HD RSNs is *not* regarded as a problem for the vast majority of New York City and Buffalo viewers. In fact, the Reply Survey indicates that the availability of HD RSNs is actually *less* of a concern than cost and customer service and no more important than access to movie channels.

Verizon's strategy of holding back the survey until its Reply and its misleading characterizations of the results of the survey constitute a knowing and willful violation of the Commission's rules. Defendants therefore respectfully move that the Commission strike the results of the Reply Survey, the accompanying Declaration of Chris Stella ("Stella Declaration") discussing that survey, and all references to and discussion of the Reply Survey and the declaration in the Verizon Reply itself.

I. VERIZON IMPROPERLY SUBMITTED NEW MATTER IN ITS REPLY, WHICH MUST BE STRICKEN

The Commission's rules expressly require that in program access cases alleging unfair competition claims, as Verizon does here, the complaint must contain "evidence demonstrating that the behavior complained of has harmed complainant."[2/] Replies, by contrast, "shall be responsive to matters contained in the answer *and shall not contain new matters*."[3/] Thus, to the

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2/ 47 C.F.R. § 76.1003(b)(7); *see also* 47 C.F.R. § 76.7(a)(4) (complaint must "state fully and precisely all pertinent facts and considerations relied on to demonstrate the need for the relief requested and to support a determination that a grant of such relief would serve the public interest").

3/ 47 C.F.R. § 76.1003(f) (emphasis added).

extent that Verizon believed that the results of a survey purporting to show the importance of HD sports programming in general and MSG HD and MSG+ HD in particular would help it to show harm from being denied access to those services – which is precisely how Verizon attempts to use the Reply Survey in its Reply – it was obligated to produce it with its Complaint.

Instead, however, the purported specific evidence of harm included in the Verizon Complaint consisted of nothing more than seven Internet message board postings. *After* it filed its Complaint – but even *before* it received Defendants' Answer – Verizon commissioned, designed, and began conducting a survey – albeit, as shown below, a fatally flawed one – that purports to (but does not) illustrate the significance to consumers of HD programming in general and MSG HD and MSG+ HD in particular. Verizon's conduct amounts to a knowing and willful violation of the Commission's rules for which striking the Reply Survey, the Declaration, and arguments made in reliance on those newly-introduced materials is an appropriate sanction.

The prohibition on submitting new evidence on reply in a program access case is consistent with the Commission's treatment of replies in other adjudications.[4/] The Commission's prohibition on the inclusion of new facts in a reply brief is consistent with the Federal Courts' prohibition of just this type of sandbagging. For example, the D.C. Circuit has consistently refused to consider arguments and evidence presented for the first time in a reply

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4/ *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*, 8 FCC Rcd. 3359, ¶ 79 (1993) (in a program carriage proceeding, "[t]he complainant will not be permitted to submit new evidence or allegations in its reply"); *Application of Palm Bay Public Radio*, 6 FCC Rcd 1772, ¶ 4, n.5 (1991) ("A reply pleading, to the extent that it contains wholly new and previously unmentioned allegations of fact, will be dismissed. To allow the reply to serve the purposes of the original petition would be either to effectively render meaningless provisions of the rules for a fair opportunity by another party to respond to allegations, or to compel the addition of supplementary pleadings not ordinarily contemplated by the rules."). *See also Himmelman v. MCI Communications Corp.*, 17 FCC Rcd 5504, ¶ 19 and n.56 (2002) (granting motion to strike assertions made in reply brief where the relevant information was in the hands of the complainant at the time of filing, and therefore "should have been raised in earlier filings" rather than on reply).

brief because it both interferes with the parties' interests in due process and results in an incomplete decisional record. The D.C. Circuit has specifically noted that "[c]onsidering an argument advanced for the first time in a reply brief, then, is not only unfair to an appellee, but also entails the risk of an improvident or ill-advised opinion on the legal issues tendered."[5/]

Verizon cannot suggest that submission of its survey at the reply stage, rather than with its original Complaint, was made necessary by any facts or arguments raised in Defendants' Answer. It strains credulity to suppose that Verizon did not anticipate that Defendants would contest the Complaint's assertion that Verizon's competitive viability is harmed by lack of access to MSG HD and MSG+ HD; in fact, Defendants did just that in their response to Verizon's 10-day letter. Further, as the Stella Declaration and the Reply Survey make perfectly clear, *Verizon had already commissioned the study before Defendants filed their Answer*, and GMRS Inc. was very likely already conducting its Reply Survey before Defendants served their Answer on Verizon.

The Stella Declaration and the Reply Survey disclose that GMRS Inc. began conducting a telephone survey of 851 people on July 28, 2009, which was the date that Defendants' Answer was due.[6/] Counsel for Defendants filed the Answer with the Commission at approximately 6:00 p.m. on July 28, and sent an E-mail courtesy copy of the Answer to Verizon's counsel at 7:27

5/ *McBride v. Merrell Dow and Pharms., Inc.*, 800 F.2d 1208, 1211 (D.C. Cir. 1986). As one judge explained the similar prohibition on refusal to consider issues on appeal not properly raised at trial: "The reason for the rules is not that litigation is a game, like golf, with arbitrary rules to test the skill of the players. Rather, litigation is a 'winnowing process,' and the procedures for preserving or waiving issues are part of the machinery by which courts narrow what remains to be decided. If lawyers could pursue on appeal issues not properly raised below, there would be little incentive to get it right the first time and no end of retrials." *Poliquin v. Garden Way, Inc.*, 989 F.2d 527, 531 (1st Cir. 1993).

6/ *See* Stella Declaration at ¶ 4; Reply Survey "Topline Report" at 1.

p.m. that same day.[7] It simply cannot be that Verizon received Defendants' Answer at 7:27 p.m. on July 28, 2009, read and digested the arguments therein, decided to hire an outside market research firm to conduct a study, had that firm design a 35-question survey instrument, and instructed that firm to start making calls that very same evening.[8] This situation is therefore unlike that addressed in *Herring Broadcasting, Inc. d/b/a WealthTV v. Time Warner Cable Inc.*, 23 FCC Rcd 14787, 14794 n.38 (2008), in which the Commission found that certain additional materials provided in a reply brief were admissible in response to arguments raised in an answer. Here, the Reply Survey cannot be found to "respond" to anything in the Defendants' Answer because the Reply Survey was already a *fait accompli* by the time Verizon received Defendants' Answer. Rather, Verizon's obvious planning for the survey before filing of the Answer here evidences deliberate gamesmanship.

Even without this telling evidence that Verizon strategically planned to slip the Reply Study into the record in its Reply, the Commission would be obligated to reject any suggestion by Verizon that Defendants' Answer contained new or surprising material that made the need for a survey unknown until the Reply stage. Verizon has been complaining to the Commission for years about the Defendants' unwillingness to license the terrestrially-delivered MSG HD and MSG+ HD,[9] and Defendants have consistently rebutted Verizon's argument that it is harmed by its lack of access to MSG HD and MSG+ HD. Defendants have explained to the Commission numerous times that market realities belie any argument that access to terrestrially-delivered content such as MSG HD and MSG+ HD is necessary for Verizon to be an effective

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7/ *See* E-mail from Christopher Harvie, counsel for Defendants, to Evan T. Leo, counsel for Verizon, dated July 28, 2009, at 7:27 p.m., attached hereto as Exhibit 1.

8/ *See* declaration of survey expert Hal Poret ("Poret Decl."), attached hereto as Exhibit 2, at ¶ 3.

9/ *See, e.g.*, Comments of Verizon, MB Docket No. 07-29, at 13-14 (filed April 2, 2007) (complaining of Cablevision's unwillingness to provide it with the terrestrially-delivered MSG HD and MSG+ HD); Comments of Verizon, MB Docket No. 07-198, at 6-8 (filed January 4, 2008) (same).

multichannel video programming distributor ("MVPD") competitor.[10/] If Verizon believed that a market survey would bolster its showing of competitive harm, it had no reason or excuse to wait for Defendants' Answer before producing such a survey.

Verizon could have and should have produced its market survey with its Complaint. Its conduct makes clear that its intention was to hold back production of the survey until after Defendants' Answer, in order to deprive Defendants of the opportunity to fully examine and respond to it. The Commission's rules do not countenance such knowing and willful gamesmanship. Accordingly, the Commission should strike from the record the Reply Survey, the Stella Declaration, and all portions of the Verizon Reply which discuss the Reply Survey or the declaration.

II. THE REPLY SURVEY SHOULD BE DISREGARDED BECAUSE IT IS RIDDLED WITH ERROR AND BIAS AND VERIZON'S CONCLUSIONS REGARDING ITS RESULTS ARE DRASTICALLY INACCURATE

Even if the Commission were to overlook Verizon's calculated decision to hold back submission of the Reply Survey until its reply pleading, the Reply Survey should still be disregarded. Not only has Verizon attempted to foist upon the Commission a survey that is fatally flawed and highly unreliable, but it also has blatantly mischaracterized the conclusions of the Reply Survey to the Commission. For the reasons detailed below – and in the attached declaration of survey expert Hal Poret – the Verizon Reply Survey is so laden with defects that the Commission cannot accept it as probative of any issue relevant to the instant proceeding.

10/ *See, e.g.*, Reply Comments of Cablevision Systems Corp., MB Docket No. 07-29, at 14 (filed Apr. 16, 2007) (responding to Verizon's complaints about access to the terrestrially-delivered MSG HD and MSG+ HD); Comments of Cablevision Systems Corp., MB Docket No. 07-198, at 16-17 (filed Jan. 4, 2008) (explaining that access to terrestrially-delivered programming is not necessary to provide a viable video service); Reply Comments of Cablevision Systems Corp., MB Docket No. 07-198, at 10-18 (filed Feb, 12, 2008) (responding in detail to Verizon's complaints about access to the terrestrially-delivered MSG HD and MSG+ HD).

First, the Reply Survey is unreliable on its face. The Reply Survey contains fundamental errors and omissions that preclude reliance on it to substantiate any of Verizon's claims. For example, while the summary of the Reply Survey states that it was "conducted . . . among paid TV subscribers,"[11/] the survey results indicate that no survey respondent subscribes to cable or satellite TV service[12/] and that none of the respondents are responsible for making decisions about which cable provider is used by the household.[13/] This evident misreporting of results reveals a sloppiness that raises questions about the reliability the entire survey.

Second, Verizon drastically misstates the results of the sole question related to MSG HD and MSG+ HD. Only Question 12 inquires specifically about subscriber attitudes toward MSG HD and MSG+ HD, and the conclusions that Verizon draws from the responses to that question are wildly inaccurate and blatantly misleading. Verizon twice asserts (and the Reply Survey author once claims) that the Reply Survey shows that "more than half of New York City and Buffalo subscribers are 'not likely at all' to switch to a provider that does not carry MSG and MSG+ in HD."[14/] In fact, however, Question 12 *was limited to MSG or MSG Plus subscribers* – not all subscribers – meaning that Verizon has significantly exaggerated the number of respondents unlikely to switch. Taking into account *all* of the applicable responses, the percentage of all subscribers "not likely at all" to switch is 21% in the NYMA and 25% in Buffalo.[15/] That is far less than "more than half" in either market: even on the Reply Survey's

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11/ Reply Survey at 1.

12/ *Id.*, Response to Question 1.

13/ *Id.*, Response to Question S3.

14/ Reply at 2, 25; Reply Survey at 2.

15/ The NYMA figure is obtained by multiplying 56%, the percentage of NYMA respondents subscribing to MSG or MSG+ who reported in Question 12 that they are "not likely at all" to switch, by 38%, the percentage of all NYMA respondents that have access to MSG according to Question 7. A similar calculation yields the 25% result for Buffalo. Even these lower figures likely overstate the actual

own terms,[16/] Verizon has overstated the results of the responses to Question 12 by approximately 100% in Buffalo, and 167% in the NYMA. Such a patently incorrect assertion regarding a key factual element of Verizon's pleading repeated three different times in its Reply filing compels rejection of the Reply Survey.

Errors of similar magnitude arise if one looks at the segment of respondents deemed "not likely" (*i.e.*, "not likely at all" + "not very likely") to switch absent a provider's offering of MSG HD and MSG+ HD. While Verizon claims that 71% of NYMA subscribers and 76% of Buffalo subscribers can be characterized as "not likely" to switch, those numbers decline to 27% and 31% when the percentages in Question 12 are multiplied by the percentages in Question 7 (as they must be).[17/] In other words, Verizon overstated the "unlikely to switch category" by 163% in the NYMA and 145% in Buffalo. The Reply Survey also gives no indication that Verizon backed out from the "not likely" tabulation those MSG/MSG+ subscribers that are "not likely" to switch for some reason *other than* the absence of MSG HD or MSG+ HD, such as customer service, value, or any number of other reasons. Further, the very use of the phrase "not likely" implies that some portion of respondents who report that they are "not likely" to switch might in fact switch anyway, regardless of the presence or absence of MSG HD and MSG+ HD.

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percentage of subscribers who are unlikely to switch because of the serious flaws in Question 7 that make its results unreliable. As the Poret Declaration notes, Question 7 asked if respondents have "access" to MSG, not if respondents "subscribe" to MSG. As evidenced by the answers to Question 4, "access" was clearly interpreted by many respondents as meaning that they have the "potential" to get a channel, not that they actually receive a channel. Therefore, the answers to Question 7 cannot indicate whether a respondent receives MSG or merely has the ability to receive it. *See* Poret Decl. nn.2, 4.

16/ Defendants are in no way suggesting that the responses to Question 7 accurately reflect actual MVPD subscriber penetration levels for MSG and MSG+ in NYMA or Buffalo. In fact, Defendants believe those numbers inaccurately depict subscriber penetration numbers for all the RSNs included in that question, further underscoring the flawed design of the Verizon survey.

17/ See note 15, *supra*.

Third, the structure and wording of Question 12 is highly skewed in favor of the outcome sought by Verizon. The wording of Question 12 – the only question that actually relates to MSG and MSG+ – is highly misleading.[18/] As a matter of simple grammar, this question actually does two things: (1) it asks whether a respondent would be willing to switch to a provider that did not carry MSG or MSG+ *at all*, and then (2) it states in a declarative explanatory clause that MSG and MSG+ are "the regional sports channels that cover the Knicks, Devils, Rangers, and Islanders in HD." It does not ask whether that respondent would be willing to switch to a provider that carried MSG and MSG+ but not MSG HD and MSG+ HD; nor does the question establish as a predicate that, if a switch was made, the respondent would still be able to watch the games carried on the SD networks. Thus, the phrasing of Question 12 creates a significant likelihood that many respondents may have been answering how they would feel about not having MSG and MSG+ at all. A more neutral approach that would not bias respondents toward the outcome sought by Verizon would be to ask if the respondent would "consider switching to a provider that has MSG/MSG+ and Knicks, Devils, Rangers, and Islanders games, but does not carry those games in HD."[19/]

An additional flaw in Question 12 is that its results can only be meaningfully understood if there is a benchmark against which to compare them.[20/] The Reply Survey does not investigate what portion of subscribers are "likely" or "unlikely" to consider switching providers under any condition, separate and apart from whether they would specifically consider "switching to a provider that did not have MSG/MSG+ in HD." Based on the responses to Question 13, close to half of subscribers are "very satisfied" and more than 85% are at least "somewhat satisfied" with

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18/ *See* Poret Decl. at ¶ 17.

19/ *See id.*

20/ *See* Poret Decl. at ¶ 11.

their current providers and may have been "unlikely" to switch irrespective of whether the alternative provider carried MSG HD and MSG+ HD. In the absence of any control measuring the general inclination of respondents to switch providers, as well as their inclination to switch in a circumstance where they lose something insignificant, there is no way to evaluate the significance of a certain percentage of people saying they don't want to switch due to the unavailability of MSG HD or MSG+ HD.[21/]

Fourth, the Reply Survey is plagued by serious inconsistencies that render it unreliable. For example, the Reply Survey indicates that 67% of NYMA and 57% of Buffalo respondents have an HD television set.[22/] If, as the Reply Survey claims, only 62% of NYMA and 53% of Buffalo subscribers have access to regional sports programming, then it is reasonable to presume – based upon the data provided by Verizon – that at most only 42% of NYMA and 30% of Buffalo respondents have access to HD regional sports channels. And yet the Reply Survey summary claims that "[f]ewer than one in five indicated they would even *consider* switching to a provider that didn't offer HD regional sports programming."[23/] Thus, Verizon's position is that the number of people that would not consider switching to a provider that lacked HD regional sports programming is approximately twice as large as the number of people that the Reply Survey reports as having access to HD regional sports programming.[24/] There is no

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21/ *See id.*

22/ Reply Survey at Question 3.

23/ Reply Survey Summary at 1 (emphasis in original).

24/ In fact, the disparity is probably greater than twice as much because the Reply Survey appears to overstate the number of households with HD televisions. Verizon's own Complaint claims that 45% of homes nationally have HD sets. Complaint at ¶ 27. According to Nielsen, national HD penetration grew from 23.3% of homes in November 2008 to 33% in February 2009. *See* nielsen wire, "In U.S., Hi-Def TV Household Penetration Tops 23%" (Dec. 11, 2008), *available at* http://blog.nielsen.com/nielsenwire/media_entertainment/in-us-hi-def-tv-penetration-tops-23/; The Nielsen Company, HD TV: The Picture is Getting Clearer (May 2009), *available at* http://blog.nielsen.com/nielsenwire/wp-content/uploads/2009/05/hdtv_052109.pdf. Nielsen reported that

reasonable basis on which the Reply Survey can be interpreted to support such a finding, and Verizon's proffer of such a claim impugns the credibility of all of its conclusions regarding the Reply Survey.[25/]

In a similar vein, the Reply Survey results indicate that, at most, 21% of NYMA respondents consider themselves to be fans of teams with games shown on MSG and MSG+.[26/] Given that there are likely some respondents that are fans of multiple teams shown on MSG and MSG+, the percentage of respondents that are fans of teams with games shown on MSG and MSG+ is likely lower than 21%. In addition, the Reply Survey indicates that an even smaller subset of these respondents have an HD television set. Thus, the number of NYMA respondents with HD sets that are fans of teams featured on MSG and MSG+ is most likely well below 21%. But regardless of these results as the Reply Survey reports them, Verizon claims that the percentage of respondents who would be unlikely to switch to a provider that does not carry MSG HD or MSG+ HD is 71%, or 50 percentage points higher than the maximum possible percentage of fans of teams featured on those networks who the Reply Survey reports could possibly watch the games in HD. Again, the conclusion asserted by Verizon simply cannot be reconciled with the Reply Survey results.

HD penetration in the NYMA was around 30% in November 2008. If NYMA penetration grew at the same rate as national penetration, NYMA penetration would be around 42% in February. It seems unlikely that penetration would have increased to 67% by August 2009.

25/ Likewise, Verizon claims that the survey shows that "the ability to watch regional sports programming in HD is also very important." Reply Survey Summary at 2; Verizon Reply at 24-25. But the number of subscribers reported by Verizon (54% and 49% in the NYMA and Buffalo respectively) that always or usually watch HD RSNs cannot be reconciled with other survey data. For example, it is difficult to see how 54% of NYMA and 49% of Buffalo respondents could claim that watching HD RSNs is "very important" when the data suggests that only 42% of NYMA and 30% of Buffalo respondents actually do so.

26/ Reply Survey, Response to Question 5 (providing figures on the number of respondents that are fans of the Knicks, Rangers, Islanders, Devils, Red Bulls or Liberty).

Fifth, most of the survey is irrelevant. The bulk of the Reply Survey provides no information regarding the importance of MSG HD and MSG+ HD as compared to the other sports programming in general or of other HD or SD RSNs such as YES or SportsNet New York. Indeed, as noted above, there is only one question that specifically addresses MSG HD and MSG+ HD, and that question is fatally biased and its results presented misleadingly. Verizon claims that the results show that subscribers prefer video providers that offer "sports channels in HD,"[27/] but this finding – even if accurate – offers no basis for concluding that the absence of MSG HD and MSG+ HD disadvantages Verizon in any significant respect. The question is not limited to regional sports networks, and does not provide respondents with any guidance as to what constitutes a "sports channel in HD." Respondents could easily have responded based on their affinity for ESPN, NFL Network, Versus, any of the major broadcast networks, or a host of other sport programming channels that are not regional sports networks. Even the questions that ask about RSNs as opposed to all sports channels in general include references to SportsNet New York and YES, which almost certainly skews the results of these questions regardless of respondents' views on MSG HD and MSG+ HD.

Question 5 further distorts the results of the Reply Survey by asking respondents about whether they were fans of – and followed games played by – the New York Jets, the New York Giants, and the Buffalo Bills, teams whose games are not featured on any of the RSNs in New York, thereby making it reasonable for respondents to assume that the survey generally encompassed any channel that carries NFL, Major League Baseball, NBA and NHL programming. To the extent that respondents believed they would be losing some or all of these channels, that would certainly bias them against switching.

27/ Verizon Reply at 2, 25; Reply Survey at Question 11.

Indeed, all of the "likely to switch" questions related to HD sports programming (Questions 11, 12, and 27) are flawed because each is extremely leading, asking respondents whether they would switch providers when the only piece of information they are being offered about the new service provider is that it is missing certain channels.[28/] Respondents are biased toward responding negatively, because most people would not be inclined to switch when the only piece of concrete information they are provided is that such action will result in them losing (or not getting) something.[29/] Thus, Question 11 likely exaggerates the unwillingness of respondents to switch. In any event, the results of Question 11 – like the responses to the 25 of the other 26 questions propounded that do not specifically address subscriber attitudes toward MSG HD and MSG+ HD – offer no insight into whether any respondents stating that they are not likely to switch to a provider that does not have "sports channels in HD" gave that answer because of MSG HD and MSG+ HD.

Sixth, the Reply Survey omits critical data. There appear to be material omissions in the purported survey data presented in the Verizon Reply. For example, the summary states that 62% of NYMA and 53% of Buffalo subscribers have access to regional sports programming in their home.[30/] Oddly, in the very next paragraph, the survey attempts to suggest that 72% of NYMA and 71% of Buffalo subscribers believe that the ability to watch an RSN is "important," even though both of these numbers are higher than the number of respondents that the survey reports have an RSN in their home. But these data are reported nowhere in the Reply Survey.

28/ *See* Poret Decl. at ¶¶ 17-18, 21.

29/ *See* Poret Decl. at ¶ 10. Even Question 27, which asks whether respondents would forego "more channels" if it meant losing "HD sports channels," suffers from this bias. In a marketplace where most consumers (particularly those with HD programming) have access to at least 200 channels, it is hardly surprising that subscribers would be inclined against giving up HD services they already have in exchange for an unspecified number of unknown channels transmitted in an undefined format.

30/ Survey Summary at 1.

Finally, if anything, the Reply Survey demonstrates that the absence of HD regional sports channels is not regarded as a problem for NYMA and Buffalo viewers. Question 16 indicates that only 5% of NYMA and 4% of Buffalo subscribers expressed dissatisfaction with the availability of HD RSNs, the lowest level of dissatisfaction measured in any of the Reply Survey "satisfaction" questions. The responses to Question 2 indicate that 14% of NYMA respondents and 21% of Buffalo respondents subscribe to a provider that does not offer MSG HD and MSG+ HD (*e.g.*, Verizon or Dish). Further, MSG HD and MSG+ HD also are not available to the one-third of NYMA respondents and 42% of Buffalo respondents stated that they lack an HD television set. Assuming that one-third figure stays constant with respect to the 38% of NYMA respondents that identified themselves as MSG subscribers in Question 7, then, based upon the figures provided by Verizon, 75% of NYMA respondents do not have access to MSG HD. If MSG HD and MSG+ HD really were indispensable, "must have" offerings, one would expect the responses to Question 16 to reveal levels of dissatisfaction significantly higher than 5% in NYMA and 4% in Buffalo.

In fact, however, the Reply Survey indicates that the levels of dissatisfaction regarding the availability of RSNs in general (Question 14) are virtually identical to the levels of dissatisfaction regarding the availability of HD RSNs (Question 16). Thus, the Reply Survey suggests that any dissatisfaction in the marketplace regarding the availability of HD sports channels arises from the lack of access to the games, rather than the availability of those games on an HD RSN.[31/] Indeed, the Reply Survey indicates that cost, customer service, and premium

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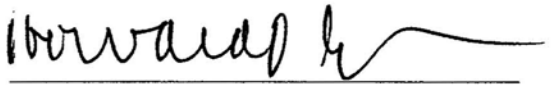
[31/] *See* Poret Decl. at ¶ 19. The only other plausible explanation for the similarity between the results of questions fourteen and sixteen is that respondents to the survey were not paying attention to the difference between HD and SD and were simply answering questions about sports channels in general without focusing on HD – which further undermines the usefulness of the survey. *See id.*

movie channel availability are more significant concerns for subscribers than the availability of HD RSNs.[32]

III. CONCLUSION

The Reply Survey is invalid, highly prejudicial, and misleading, and provides nothing of value for the Commission to consider in this case. On its face, the Reply Survey itself states that it reveals no information about the attitudes of cable and satellite television subscribers, and Verizon's assertions of what conclusions can be drawn are flatly incorrect. The Reply Survey – and all references to it in the Reply – should be rejected by the Commission.

Respectfully submitted,



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August 31, 2009

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[32] *See* Reply Survey, Responses to Question 21 (80% of NYMA sports fans said the availability of movies channels important in considering whether to switch providers); Question 24 (94% of NYMA sports fans said affordability or cost was important); and Question 25 (96% of NYMA sports fans said customer service was important). By contrast, 77% of NYMA sports fans said the availability of RSNs in HD was important. *See id.*, Response to Question 22.

VERIFICATION

I, Adam Levine, Senior Vice President of Legal and Business Affairs – MSG Media, do hereby verify that I have read the foregoing and, to the best of my knowledge, information, and belief formed after reasonable inquiry, it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and is not intended for any improper purpose.

8/31/09

Adam Levine Date

CERTIFICATE OF SERVICE

I, Ernest C. Cooper, do hereby certify that on this 31st day of August, 2009, a true and correct copy of the foregoing Answer was served on counsel for Verizon via FedEx:

Edward Shakin
William H. Johnson
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Ernest C. Cooper

Exhibit 1

E-mail from Christopher Harvie, counsel for Defendants, to Evan T. Leo, counsel for Verizon, dated July 28, 2009, at 7:27 p.m.

From: Harvie, Christopher
Sent: Tuesday, July 28, 2009 7:27 PM
To: 'Leo, Evan T.'
Subject: RE: Answer and Reply Filing Dates in Verizon Telephone Companies v. Madison Square Garden, L.P.

Evan -- per our agreement, attached is a courtesy e-copy of Cablevision/MSG's Answer to Verizon's program access complaint in CSR 8185-P.

You will be receiving tomorrow via delivery a hard-copy of the Answer with exhibits.

Let me know if you have any questions.

Chris Harvie

IRS CIRCULAR 230 NOTICE

In compliance with IRS requirements, we inform you that any U.S. tax advice contained in this communication is not intended or written to be used, and cannot be used, for the purpose of avoiding tax penalties or in connection with marketing or promotional materials.

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The information contained in this electronic message and any attachments to this message are intended for the exclusive use of the addressee(s) and may contain confidential or privileged information. If you are not the intended recipient, or the person responsible for delivering the e-mail to the intended recipient, be advised you have received this message in error and that any use, dissemination, forwarding, printing, or copying is strictly prohibited. Please notify Mintz, Levin, Cohn, Ferris, Glovsky and Popeo immediately at either (617) 542-6000 or at DirectorofIT@Mintz.com, and destroy all copies of this message and any attachments. You will be reimbursed for reasonable costs incurred in notifying us.

Exhibit 2

Declaration of Hal Poret

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
Verizon Telephone Companies and Verizon Services Corp.,	)	
Complainants,	)	
v.	)	File No. CSR-8185-P
Madison Square Garden, L.P. and Cablevision Systems Corp.	)	
Defendants	)	

DECLARATION OF HAL PORET

1. My name is Hal Poret. My position is Vice President of ORC Guideline, a global market research firm that provides customized research and analysis to clients in many industries. In my position at ORC Guideline, I have designed and executed more than 250 surveys for use in proceedings of various types, including cases in U.S. District Court and before the Trademark Trial and Appeal Board.

2. I have personally reviewed the Reply of Verizon to Answer to Program Access Complaint filed in this proceeding on August 13, 2009 (the "Verizon Reply"), and specifically those portions relating to and consisting of a survey conducted by GMRS Inc. (the "Reply Survey").

3. As a threshold matter, I would note that a survey of the type that GMRS Inc. conducted in this case would take a minimum of several days to design and refine to the point of implementation. A survey such as this one could not be designed and implemented in a matter of mere hours.

4. I have identified several major flaws at multiple stages of the Reply Survey, which I describe below.

Flaws in the Survey Universe

5. The proper relevant universe of respondents for a survey purporting to show the effect of the absence of HD programming is owners of HD televisions who take HD service from some provider. The Reply Survey did not focus its inquiry on HD households. According to Question 3, 32% of survey subjects in the New York Metropolitan Area ("NYMA") and 42% in

Buffalo do not own an HD television set, which means that they cannot subscribe to any HD service from any provider. It is improper survey design to question people who do not even have HD service about issues involving HD.

6. The survey also improperly includes in the relevant universe respondents who do not subscribe to any HD services of any type from any provider. The survey at Question 4 does not address the question of whether a respondent actually takes HD service; it only asks whether the respondent has "access" to HD channels. Many respondents obviously interpreted the question to be asking whether their provider offered HD channels and not whether they actually take HD service because the percent who said "yes" (84%/71%) is far too high to be the percent that actually takes HD service.

7. Similarly, the survey never asked whether the respondent received MSG in HD at the time of the survey. Questions 7-9 ask about "access" to the listed sports channels, and the HD question (Question 9) is not correlated to any particular sports channel in Question 7.[1] So there is no way to interpret the meaning of questions about a respondent's likelihood of switching when we do not even know if the respondent has MSG to begin with.

8. Because of these flaws, the survey result presented by Verizon is a hodgepodge of answers from an undetermined, but certainly large, number of irrelevant respondents who do not have HD service, an undetermined number of respondents who have HD service but don't have or watch MSG HD, and an undetermined number of respondents who do have and watch MSG HD. Since the underlying survey data is not included with the Reply Survey and the data for each respondent cannot be reviewed, there is no way to correct for these flaws and meaningfully interpret the results.

Flaws in the Questions

9. The "likely to switch" questions are extremely leading, and the survey does not control for this leading wording. The survey essentially asks whether the respondent would want to switch service providers when the only piece of information the respondent is offered about the new service provider is that it is missing certain channels. It is unlikely that a respondent would report being likely to switch when all that she is told is that she would be losing something or not getting something.

10. This is an extremely leading method that encourages a respondent to say that she would not switch. Under this methodology, I would expect most subjects to report that they would not be likely to switch, no matter what particular channel or feature they were told they would be losing.

11. At a minimum, the Reply Survey should have included control questions to see what percentage of respondents would be likely to switch when asked about a feature or channel that is obviously insignificant. In the absence of such a control, there is no way to evaluate the significance of a certain percentage of people saying they do not want to switch. Because there

[1] The term "access" was clearly ambiguous to respondents. The result of Question 7 is far lower than the known percentage of subscribers that actually have access to MSG.

are many other reasons for which a subscriber would not choose to leave a current provider, such as cost, customer service, and overall convenience, the results are not fully accurate without a control measuring the general inclination of respondents to switch providers and their inclination to switch in situations where a relatively unimportant benefit is withheld or lost. In my opinion, the results that GMRS reports for this part of the survey are mostly, if not entirely, explained by the uncontrolled leading wording of these questions rather than by any actual underlying consumer preference.

Flaws Regarding the Importance of Regional Sports Channels

12. The questions concerning "Regional Sports Channels" ("RSC"), other than Question 12, ask about all regional sports channels collectively. Therefore, these questions say nothing about the significance of any specific channel and nothing about the importance of MSG. There is no way to know whether a single respondent who said they are not likely to switch to a provider that does not have regional sports channels gave that answer because they care about MSG at all. The inclusion of the YES network along with all other RSC results likely skews the numbers by itself. Respondents who understandably interpreted the question to suggest that they would lose some or all of these non-RSC channels would almost certainly be biased against switching.

13. Tellingly, the responses from the Reply Survey reveal that numerous respondents are fans of teams that are on RSCs other than MSG, such as the Yankees and the Mets. Even accepting the validity of questions regarding RSCs in general, a substantial portion of respondents' reluctance to lose RSCs in HD would have to be attributed to losing the channels that carry the games of those teams, *i.e.*, YES and SNY. By asking about the Giants, Jets and Bills, moreover, the study erroneously implies that NFL games are part of regional sports programming and would therefore be unavailable if a respondent switched to a new provider.

14. The survey also had no control for causation and bias, *i.e.*, no control for whether it was really the absence of regional sports channels that caused a respondent to report that she is not likely to switch, as opposed to other reasons such as a predisposition to stick with what she has. The study did not control for whether a particular respondent is open to switching at all, much less likely to switch. For instance, even someone who does not care about sports channels at all could easily say they are not likely to switch to a new provider simply because the person has no reason or desire to switch. The survey needed a control group that measured respondents' openness or likelihood of switching even in the absence of any issues involving regional sports channels.

15. As I discussed above, it is impossible to know what a respondent's answer about whether they would be likely to switch means when we do not know what they have to begin with. We have no idea whether any particular respondent has MSG HD or not. If they do not, their aversion to switching cannot be attributed to the absence of MSG. Similarly, if a respondent does not even currently have an HD television or take HD service, her report of an aversion to switching cannot be attributed to loss of an HD channel. For respondents that currently subscribe to Verizon FiOS, the question is meaningless. But we have no way of knowing who those respondents are because GMRS did not ask the right questions and did not provide the data from the questions it did ask.

16. Another uncontrolled bias in the Reply Survey is a possible fear of using a new, untested, upstart provider. The Reply Survey uses the phraseology of switching to a "new provider," which may imply that respondents are being asked about switching to a literally "new" company, *i.e.*, an untested company that does not have an established track record or reputation. Respondents could easily be expressing a reluctance to change from a well-known provider to something new that might prove unreliable.

17. Question 12 is the only question that focuses on MSG, and it contains at least two fatal errors. First, GMRS claims that this question was asked of "MSG or MSG+ Subscribers Only," but that can't be the case since the survey does not ask whether a respondent is an MSG subscriber, but rather whether they have "access" to MSG.[2] The survey therefore failed to find out which respondents are MSG subscribers and watch MSG, which prevents any meaningful analysis. Second, this question is misleadingly worded, and it is likely that many if not most respondents interpreted this question as asking whether they would switch to a provider that did not carry MSG or MSG+ *at all*, rather than in HD, as the "in HD" language is buried at the end of the question after an extended explanatory clause.[3] To ascertain more accurate results, the question should have been worded so as to make clear that the respondent would still have access to MSG and MSG+ even if they lacked access to MSG HD and MSG+ HD, such as: "[would you] consider switching to a provider that has MSG/MSG+ and Knicks, Devils, Rangers, and Islanders games, but does not carry those games in HD?".

18. Additionally, the conclusions that Verizon draws from the responses to Question 12 are inaccurate and blatantly misleading. Verizon twice asserts that the Reply Survey shows that "more than half of New York City and Buffalo subscribers are 'not likely at all' to switch to a provider that does not carry MSG and MSG+ in HD." In fact, however, Question 12 *was limited to MSG or MSG Plus subscribers* – not all subscribers – meaning that Verizon has significantly exaggerated the number of respondents unlikely to switch. If one were to attempt to use the survey data to measure what percentage of all subscribers are "not likely at all" to switch, the figure would be 21% in the NYMA and 25% in Buffalo. The New York City figure is obtained by multiplying 56%, the percentage of New York City respondents subscribing to MSG or MSG+ who reported in Question 12 that they are "not likely at all" to switch, by 38%, the percentage of all NYMA respondents that have access to MSG according to Question 7. A similar calculation yields the 25% result for Buffalo.[4] That is far less than "more than half" in

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[2] Question 7 asked if respondents have "access" to MSG, not if respondents "subscribe" to MSG. As evidenced by the answers to Question 4, "access" was clearly interpreted by many respondents as meaning that they have the "potential" to get a channel, not that they actually receive a channel. Therefore, the answers to Question 7 cannot indicate whether a respondent receives MSG or merely has the ability to receive it,

[3] The likelihood that respondents heard this question as asking whether they would switch to a provider that did not offer MSG *at all* is also increased by the fact that the only previous mention of MSG asked about MSG in general, not MSG HD. After being asked in Question 7 whether they had access to "MSG", it is easy to see how they would have heard Question 12 as asking if they'd be likely to switch to a provider that did not offer MSG.

[4] Even these calculations may be overly-inflated due to the severe flaws in Question 7 that make its results unreliable. As mentioned above, Question 7 did not find out if respondents were

either market: even on the Reply Survey's own terms, Verizon has overstated the results of the responses to Question 12 by approximately 100% in Buffalo, and 167% in New York City.

19. Questions 14 and 16 asked respondents about their satisfaction with the availability of regional sports channels and then of the availability of regional sports channels in HD. Since the survey data was not provided, it is impossible to fully interpret the results presented. However, the fact that the results are nearly identical strongly suggests one of two things: either (1) the respondents were not paying attention to the difference between HD and SD and were really just answering questions about sports channels in general, without focusing on HD, which means that the entire survey is invalid, or (2) it means that there is no additional dissatisfaction with sports HD availability beyond general sports availability.

20. Because the survey indicates that the levels of dissatisfaction relating to the general availability of regional sports channels (Question 14) are so precisely similar to the levels of dissatisfaction reported for the availability of regional sports channels in HD (Question 16), the survey effectively indicates that any dissatisfaction in the marketplace regarding the accessibility of regional sports channels arises from the lack of access to the games, rather than the availability of those games on an HD RSC.

21. Question 27 suffers from many of the same flaws as discussed above. Offering respondents some unnamed extra channels to compensate for the loss of all HD regional sports channels does nothing to cure the flaws because it provides no real basis for a cost/benefit analysis.

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actually MSG subscribers, rendering any attempt to apply the result of Question 12 to "MSG subscribers" or to project Question 12 to "all" subscribers impossible.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge, information and belief.

Date: 8/31/09

Signed: Hal Poret e.c.
Hal Poret

DATE STAMP
AND RETURN

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
Verizon Telephone Companies and Verizon Services Corp.,	)	
Complainants,	)	
v.	)	File No. CSR-8185-P
Madison Square Garden, L.P. and Cablevision Systems Corp.	)	
Defendants	)	

FILED/ACCEPTED
SEP 24 2009
Federal Communications Commission
Office of the Secretary

REPLY TO VERIZON'S RESPONSE
TO DEFENDANTS' MOTION TO STRIKE

Madison Square Garden, L.P. ("MSG") and Cablevision Systems Corp. ("Cablevision") (collectively, "Defendants") hereby submit this reply to Verizon's Response ("Response" or "Verizon Response") to Defendants Motion to Strike certain portions of the Reply of Verizon to Defendants' Answer to Verizon's Program Access Complaint ("Motion" or "Motion to Strike"). In their Motion, Defendants objected to the inclusion of a defect-laden survey that Verizon submitted with its August 13, 2009 Reply pleading ("Reply Survey"). Defendants' demonstrated that Verizon's strategy of holding back its survey until its Reply and its misleading characterizations of the results of the Reply Survey knowingly and willfully violated the Commission's rules. As set forth below, the Verizon Response fails to counter the key points of Defendants' Motion to Strike.

First, contrary to Verizon's assertion, the Reply Survey was not responsive to material contained in the Answer because it was designed and commissioned *before* the Answer was even

filed. As such, the inclusion of the Reply Survey in Verizon's Reply pleading violated the Commission's rules[1/] and therefore must be stricken. Verizon offers no reason whatsoever why its Reply Survey could not have been included with the Complaint, and its obvious attempt to sandbag Cablevision was neither necessary nor permissible under the Commission's rules.

Verizon disingenuously claims that it was somehow "surprising" that Defendants would question its contention that "regional sports is must-have programming."[2/] As Defendants note in their Motion, however, during the more than two years in which Verizon has been pressing the Commission with respect to access to MSG HD and MSG+ HD, Cablevision has repeatedly contested the assertion that those services – or any regional sports services – constitute "must have" programming.[3/] Verizon's claim of surprise rings particularly hollow in light of Cablevision's statement in its response to Verizon's 10-day letter *in this case* that Verizon's lack of access to the HD RSNs does not harm Verizon because it is not being deprived of any local professional games.[4/] Likewise, Verizon also knew before filing its Complaint that Defendants would vigorously dispute the assertion that MSG HD and MSG+ HD are critical to Verizon's competitive viability,[5/] notwithstanding the feigned "surpris[e]" proffered in the Reply.

1/ 47 C.F.R. § 76.1003(f) (replies "shall be responsive to matters contained in the answer").

2/ Response at 10.

3/ Motion to Strike at 6-7 and n.9. Contrary to Verizon's suggestion, Response at 10, MSG's arguments in an antitrust case against the NHL completely unrelated to program access issues in no way contradict the position that RSNs are not "must have" programming indispensable to the competitive viability of MVPDs.

4/ *See* Letter from Howard J. Symons, Counsel for Cablevision to Stan Tugentman, Senior Vice President and Deputy Counsel, Verizon, at 2 (June 29, 2009) (included as Exhibit 3 to Verizon Complaint) ("Leaving aside the issues of how and whether to categorize any programming as 'must have,' Verizon customers have in fact enjoyed access to MSG's sports programming as part of the satellite-delivered programming services that are the subject of the affiliation agreement between MSG and Verizon. All live professional sports events included in MSG HD and MSG+HD were also included in the MSG satellite-delivered programming services that are available to all your subscribers.").

5/ *See id.* ("Verizon's ability to provide satellite cable programming is in no way hindered by lack of access to MSG HD and MSG+ HD. Even without any legal right to terrestrial programming, Verizon

Equally specious is Verizon's claim that its Reply Survey was necessary to address Defendants' allegedly "self-contradictory" position that MSG HD and MSG+ HD are not critical to Verizon's competitive viability but that such services also represent a useful product differentiator for Cablevision.[6/] There is nothing "contradictory" or novel about Defendants' posture. As it has throughout this proceeding, Verizon steadfastly refuses to acknowledge the distinction between a competitive differentiator that makes a service or product incrementally more attractive to a subset of potential customers and an "act or practice" that entirely forecloses entry into the relevant marketplace.[7/] Defendants' selective distribution of MSG HD and MSG+ HD is a procompetitive tool that differentiates their services from those of rivals whose product offerings are most similar to Cablevision's. Such selective distribution fosters incentives to innovate and increases variety and consumer choice. Moreover, as evidenced by Verizon's trumpeting of the success of FiOS TV in NYMA, Defendants' selective distribution strategy does not, and cannot, foreclose Verizon from providing a compelling video offering of its own.[8/] The Answer's explanation of this distinction in no way triggered the need for the Reply Survey. Moreover, the Reply Survey itself offers nothing probative on that issue since only 1 out of the 35 questions purports to directly address the impact of the deprivation of the programming at

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has invested billions of dollars to upgrade its network infrastructure so that it could provide video service in competition with cable operators. Verizon offers hundreds of channels of satellite cable programming to each household within its video network footprint. It has garnered over 2 million customers in the short period of time it has been providing video service, putting it among the 10 largest MVPDs in the country. During the recently-completed 2008-09 NBA and NHL seasons, Verizon subscribers enjoyed access to every single professional hockey and professional basketball game shown on MSG's satellite-delivered services. Under these circumstances, your claim of competitive harm strains credulity.").

6/ Verizon Response at 5. *See id.* at 10.

7/ Verizon's willful refusal to acknowledge this obvious distinction is all the more surprising since it has clearly embraced it in connection with defending its own exclusive arrangements. *See* Answer at 19-20 and 35-36.

8/ *See* Answer at 37-38 and 43-45.

issue – and that question, as discussed in the Motion to Strike and further below, is flawed and its results unreliable.

Second, Verizon's Reply Survey – and the reporting of it in Verizon's Reply – was misleading and unreliable and therefore entitled to no weight.[9/] Verizon effectively acknowledges – but only after being called out in the Motion to Strike – that the results of the only Reply Survey query directly related to MSG and MSG+ (Question 12) were misreported and dramatically overstated.[10/] Throughout the Reply as well as in the Reply Survey's description of its findings, Verizon misleadingly suggested that the universe of respondents to Question 12 were all MVPD subscribers Reply Surveyed,[11/] when in fact that question was directed only to respondents that identified themselves as MSG and MSG+ subscribers.

Remarkably, Verizon attempts to rehabilitate its misleading report of the responses to Question 12 by asserting that Reply Survey respondents who indicated that they do *not* subscribe to MSG and MSG+ should nonetheless be presumed to assign the same level of importance to those programming services as respondent who do actually receive those services.[12/] In effect, Verizon's claim is that its unwarranted inferences concerning the preferences of Reply Survey respondents speak louder than the actual purchasing and subscription decisions of those subscribers. Such a claim is facially untenable, albeit illustrative of the fallacies animating Verizon's defense of its discredited Reply Survey.

Verizon cavalierly dismisses as some mere "quibble" the Reply Survey's acknowledged failure to measure the importance of MSG HD and MSG+ HD in a circumstance in which all

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9/ Motion to Strike at 7-16.

10/ *See* Verizon Response at 13.

11/ *See* Verizon Reply at 2, 25. *See also* Motion to Strike at 8-9.

12/ Verizon Response at 13. *See also id.* at 2 ("[T]here is no basis for Cablevision's assumption that all non-MSG/MSG+ subscribers consider the availability of such programming immaterial.").

games shown on those channels are also available on SD services it carries.[13/] But far from a quibble, the flaw in Verizon's key question (Question 12) goes to the heart of the Reply Survey. That question misleads respondents into assuming a complete loss of all local professional games carried on MSG HD and MSG+ HD – even though those games remain available to Verizon subscribers on MSG and MSG+. Verizon cannot satisfy its burden to show competitive harm in the proceeding based on answers to such a fundamentally flawed question, yet that is precisely what Verizon seeks to do.

Question 12 consists of (i) a question in the primary clause: "[H]ow likely would you be to consider switching to a provider that did not have MSG or MSG Plus?"; and (ii) a statement tacked on as a secondary clause: "the regional sports channels that covers the Knicks, Devils Rangers and Islanders in HD." The question gives no indication at all that the Knicks, Devils, Rangers and Islanders games would still be available to these subscribers on MSG and MSG+; to the contrary, it asks the respondent how they would respond to *a loss* of MSG and MSG+. As noted in the Motion, it would have been easy and appropriate to phrase an unbiased question neutrally addressing Reply Survey respondents' reaction to a circumstance in which games were available on an SD RSN, but not an HD RSN.[14/] Instead, Verizon opted for a convoluted question that likely led most respondents to offer their views regarding the impact of a total loss of local professional games – a factual circumstance not present here.[15/] Further, Verizon's Response exacerbates its credibility problems by invoking responses to Reply Survey questions that were not limited to MSG HD and MSG+ HD.[16/]

13/ *See* Verizon Response at 14.

14/ Motion to Strike at 10.

15/ Motion to Strike, Exhibit 1, Declaration of Hal Poret, ¶ 12 ("Poret Declaration").

16/ Verizon Response at 14. Verizon's suggestion that the unwarranted conclusions it seeks to assert for Question 12 are bolstered by the results from Questions 11 and 27 is flawed because each of the latter

Third, the Verizon Response offers no convincing justification for the unreliable Reply Survey results exposed in the Motion to Strike. For example, Defendants noted that the Reply Survey itself found that the number of people that would not consider switching to a provider that lacked HD regional sports programming is approximately twice as large as the number of people that the Reply Survey reports as having access to HD regional sports programming.[17/] Instead of addressing the issue of why so many people would respond to a question in its Reply Survey by asserting that they would not consider doing something that they are presently doing, Verizon offers nothing more than the simple assertion that such a finding is "quite possible."[18/]

Verizon's effort to dismiss another significant incongruity noted in the Motion – the discrepancy between the Reply Survey's findings on switching propensity and the number of

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two questions (and, indeed, the entire Reply Survey structure) likewise only probed whether respondents preferred to preserve access to HD channels or switch to a new provider that did not offer those services and provided no concrete benefit to offset the lost channels. Apart from the fact that respondents obviously will be biased against losing something tangible, particularly when the only other alternative offers no offsetting benefit, these questions also offer no insight into the degree to which consumers value HD sports channels if they already receive the same games on an SD channel. *See* Motion to Strike, Poret Declaration ¶ 11.

17/ Motion to Strike at 11-12. Verizon wrongly claims that this anomaly exposed by Defendants is based upon "improperly adjusted" numbers. Verizon Response at 14-15. In fact, Defendants' analysis is based squarely on the data presented by Verizon. Question 3 of Verizon's Reply Survey indicates that 67% of NYMA and 57% of Buffalo respondents have an HD television set (a prerequisite for receiving HD programming), while page 2 states that only 62% of NYMA and 53% of Buffalo subscribers have access to regional sports programming. On the basis of these responses, the most reasonable conclusion is that 42% of NYMA respondents (67% x 62%) and 30% of Buffalo respondents (57% x 53%) actually have access to HD RSNs. Against the backdrop of its own Reply Survey results indicating that nearly 3 in 5 subscribers presently are content to go without HD regional sports programming, Verizon's assertion that fewer than 1 in 5 of respondents would even consider switching to a provider without HD regional sports programming lacks credibility. Verizon's claim that Defendants numbers should have taken account of the fact that sports fans are more likely to own an HD television set – even if true – is irrelevant, because the Reply Survey question regarding switching propensity that Defendants were responding to was not limited to sports fans.

18/ Verizon Response at 15. In fact, it is quite likely that such anomalous results were caused by the many design flaws and biases noted here and in the Motion to Strike. *See supra* at n. 8. *See also* Motion to Strike at 10-12; Poret Declaration ¶¶ 5-21. Further, the Verizon Response offers no explanation for the absence of any control mechanism measuring the general inclination of respondents to switch, thereby negating the usefulness of responses to the specific questions on switching proffered in the Reply Survey. *See* Motion to Strike at 10-11; Poret Declaration ¶ 11.

respondents that identified themselves as fans of teams carried on MSG and MSG+ – is likewise unavailing.[19/] The Reply Survey reported that, at most, only 2 in 10 respondents consider themselves to be fans of either the Knicks, Rangers, Islanders, Devils, Red Bulls, or Liberty – the teams shown on MSG and MSG+. But the Reply Survey also purports to find that 7 in 10 respondents would not consider switching to a provider that does not carry in HD games played by those teams – which is roughly 250% higher than the number of respondents that consider themselves to be fans of any of those teams. Verizon sees "no facial inconsistency" between those numbers, even though they support two markedly different and incompatible conclusions regarding the breadth and depth of the importance to respondents of the games carried on MSG and MSG+.

Fourth, the Verizon response glides over the fact that the absence of HD RSNs is *not* regarded as a problem for the vast majority of New York City and Buffalo viewers. Indeed, the Reply Survey indicates that the availability of HD RSNs is much *less* of a concern than cost and customer service and no more important than access to movie channels. Verizon's only response to the Reply Survey's failure to find widespread dissatisfaction regarding the availability of HD RSN is to point out that a slightly higher number of respondents expressed satisfaction with the availability of RSNs in general than with the availability of HD RSNs.[20/] But this difference is meaningless, and appears to be a solely a function of the fact that there were more "don't know/refused" responses to the question regarding availability of HD RSNs than to the question about availability of RSNs in general. Indeed, the ratio of satisfied to dissatisfied respondents is virtually identical in both questions.[21/] Thus, as Defendants noted in

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19/ Verizon Response at 15, n.5.

20/ Verizon Response at 17.

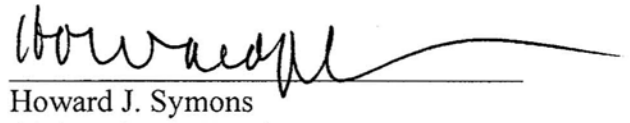
21/ *See* Reply Survey at Questions 14, 16.

the Motion, the Reply Survey suggests that any dissatisfaction in the marketplace regarding the availability of HD sports channels arises from the lack of access to the games entirely, rather than the availability of those games on an HD RSN.[22/] Indeed, the Reply Survey indicates that cost, customer service, and premium movie channel availability are more significant concerns for subscribers than the availability of HD RSNs.[23/]

CONCLUSION

The Reply Survey is invalid, highly prejudicial, and misleading, and provides nothing of value for the Commission to consider in this case. Accordingly, the Reply Survey – and all references to it in the Reply – should be stricken and rejected by the Commission.

Respectfully submitted,



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September 24, 2009

22/ *See* Poret Declaration ¶ 19.

23/ *See* Motion to Strike at 15-16 and n.32.

CERTIFICATE OF SERVICE

I, Ernest C. Cooper, do hereby certify that on this 24th day of September, 2009, a true and correct copy of the foregoing Reply to Verizon's Response to Defendant's Motion to Strike was served on counsel for Verizon via FedEx:

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