

November 13, 2009

**VIA ECFS AND ELECTRONIC EMAIL**

Marlene H. Dortch  
Secretary  
Federal Communications Commission  
445 12 Street, S.W.  
Washington, D.C. 20554

**Re: Ex Parte Presentation  
MB Docket Nos. 07-29, 07-198**

Dear Secretary Dortch:

The intensity of video distribution competition in a growing number of areas around the country highlights the need to tailor application of cable regulations based upon local market competitive circumstances. The program access rules' exclusivity ban was enacted in 1992 to jump-start competition nationally. Recognizing that the ban exacted a significant cost by dampening incentives to invest in programming, Congress specified that the exclusivity prohibition should apply only to programming delivered via satellite and only so long as it is necessary to preserve competition. To that end, rather than expand the scope of the program access rules, the Commission should relax the exclusivity ban in those local markets where competition among video distributors has taken firm root so that consumers and competitors may benefit from the content innovation that accompanies freedom from the rule.

Cablevision Systems Corporation ("Cablevision") sells cable television service in the New York Metropolitan area ("NYMA"), the most overbuilt and competitive video marketplace in the nation. Consumers have a choice of up to five multichannel video programming distributors, including AT&T or Verizon, the largest and second largest communications companies in the country. The intense competition among these providers has brought consumers more service and increased value across the spectrum of products – video, voice and broadband. In this environment, Cablevision survives – and thrives – through innovation, including the kind of content innovation that only occurs in the *absence* of the program sharing requirements of the program access rules.

While the exclusivity ban may have been justifiable in a circumstance when the inability of a new potential rival to obtain marquee programming would have prevented it from entering the market with a competitive offering, there is no warrant for such a rule in markets where

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competition is firmly entrenched. In markets such as NYMA where four or five MVPDs are effectively competing to provide hundreds of channels of video programming (the vast majority of which are not cable-owned), the array of competitive choices available to consumers cannot and will not hinge upon whether any particular provider has or lacks access to one or two programming services. To the contrary, such content differentiation will intensify competition, as rival distributors vie to attract business through new investment and innovation in service, quality, price *and the quality of new content*. Currently such innovations are discouraged, as the forced sharing required by the exclusivity ban forces cable operators to bear all the risks and costs associated with program investments that fail, while sharing the benefits of successful content investments with their direct competitors who took no risk at all.

Today's program access rule is monolithic, least-common-denominator regulation: it treats each local market as if competition depended upon government intervention and forfeits in mature markets the benefits to investment and innovation that would flourish absent the government constraint on exclusivity. To remedy this situation, the FCC should amend the program access rules so that forced sharing of content is not required in areas where market analysis shows durable competition exists, and where the application of the sharing rule is not – in the words of the statute – “*necessary* to preserve and protect competition and diversity in the distribution of video programming.” The Commission and the courts previously have recognized that sharing requirements impede innovation, and that they should be sparingly applied only in markets where such costs are substantially outweighed by the benefits of such a rule.<sup>1/</sup> Applying a sharing rule based on a simple assessment of national conditions is too blunt, undermining consumer welfare by unnecessarily restricting a common marketplace tool – exclusivity – widely recognized as a key driver of investment and innovation.

Cablevision has long understood that to compete against much bigger and well-funded providers it must invest and innovate. Cablevision launched the nation's first hyper-local regional news service in 1986; it was the first regular provider of sports coverage in High Definition (MSG HD) more than 10 years ago, long before most Americans had HDTVs; it was the first to introduce the “triple play” to the market—a revolutionary marketing offer that transformed the business. Cablevision has always innovated to succeed. But a company facing vigorous competition has no incentive to invest in untested and expensive services if it has to share those services with competitors. For instance, Cablevision's recent venture, MSG Varsity, is a multi-platform, hyper-local suite of television and interactive services dedicated to covering high school sports and activities across Cablevision's service area. Already the venture employs hundreds of people and has engaged scores of local schools in training, videography, editing, and production of local content. This venture is a costly and risky undertaking intended to create more value exclusively for Cablevision's customers. *But for* the fact that the program sharing rules do not apply to terrestrially delivered programming like MSG Varsity, this kind of investment and innovation simply would not take place.

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<sup>1/</sup> See *infra* at n. 28.

Rather than expand program access, the facts and the law strongly counsel in favor of adoption by the Commission of a mechanism that would allow cable operators to seek removal of the exclusivity ban in specific local markets where a granular analysis of market conditions shows durable competition from both DBS and either AT&T or Verizon.

**I. The Commission Should Establish a Mechanism for Removal of the Program Access Exclusivity Ban in Markets Where Competition has Taken Firm Root**

Competition in today's video market is intense, dynamic, but geographically variable. In some markets, there are several wireline video competitors, satellite providers, and SMATV and other operators all offering head-to-head video services in direct competition. In other markets video competition is less developed. A static, monolithic national snapshot of competition in the video marketplace fails to account for the substantial local market variances in competitive investment in video delivery infrastructure. Removing the exclusivity ban in any local market with robust competition would promote consumer welfare by encouraging innovation and investment in programming and allowing for product differentiation among distributors, providing consumers with more choice and more competition.

Consumers are best served by having MVPDs compete through product differentiation strategies than by compelling rivals to offer identical versions of the same product.<sup>2/</sup> Verizon itself has stated that exclusive arrangements "promote innovation and consumer choice, are not implemented for anti-competitive purposes," and that such agreements "play an important role in marketing, competition and differentiating one provider from other providers."<sup>3/</sup> By prolonging the exclusivity ban in local markets where competition from DBS and the telcos has taken firm root, the Commission's "one size fits all" regulatory policy undermines consumer welfare by depriving such markets of the long-recognized and well-established investment and innovation benefits associated with allowing content providers the freedom to choose their distributors.

Cablevision always has viewed itself as a provider of information and entertainment services to subscribers, rather than as simply the owner of a transmission conduit. It wins and retains subscribers by distributing – but also by investing in and developing – programming content that viewers want to see. In the early 1970s, Cablevision's chairman, Charles F. Dolan, recognized the opportunity to use cable's increased channel capacity to develop new, non-

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<sup>2/</sup> See *Unbundled Access to Network Elements, Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, WC Docket 04-313, Comments of Verizon, at 86 (filed Oct. 4, 2004) ("Verizon UNE Comments") ("[I]ntermodal forms of competition offer consumers much greater benefits than forms of competition that merely duplicate the incumbent's offerings").

<sup>3/</sup> *Rural Cellular Association Petition for Rulemaking Regarding Exclusivity Arrangements Between Commercial Wireless Carriers and Handset Manufacturers*, RM-11497, Comments of Verizon Wireless, Inc., at 3 (Feb. 2, 2009) ("Verizon Wireless Exclusivity Comments").

broadcast programming content for cable, and created the first premium movie service, HBO, and, shortly thereafter, one of the first regional sports programming service, SportsChannel. In 1986, Cablevision launched News 12, the world's first 24-hour regional news channel. The investment and development of each of these services -- as well as others that predated enactment of the program access rules, such as AMC and Bravo -- unquestionably was bolstered by the absence of any obligation to share the fruits of those investments with its competitors.

But developing a cable programming service is expensive, resource-intensive, and replete with risk. For every program content investment that succeeds, there are others that fail to pan out. Since 2005, two substantial program service initiatives developed and launched by Cablevision, Metro Channels and VOOM, were shut down. As Verizon itself has stated: "If parties who have not shared the risks are able to come in as equal partners on the successes, and avoid payment for the losers, the incentive to invest plainly declines."<sup>4/</sup>

In vigorously competitive video markets, the predicate for the imposition of forced program sharing arrangements does not exist and the Commission should refrain from intervening in those markets and regulating access to programming. In enacting the 1992 Cable Act, Congress made clear its preference for policies that "rely on the marketplace, to the maximum extent feasible, to achieve. . . the availability to the public of a diversity of views and information through cable television and other video distribution media."<sup>5/</sup> More specifically, the Commission is obligated by Section 628 itself to apply the program access rules only to the extent "necessary to preserve and protect competition and diversity in the distribution of video programming."<sup>6/</sup>

The bulk of subscribers served by Cablevision reside in the NYMA, which ranks among the most competitive video markets in the country. NYMA residents today have a choice of as many as five different MVPDs.<sup>7/</sup> Among those competitors, Verizon is clearly the most formidable, the second largest communications services company in the country (only AT&T is larger), with an enterprise value exceeding \$140 billion and over 223,000 employees.<sup>8/</sup> Verizon

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<sup>4/</sup> Verizon Wireless Exclusivity Comments at 20-21 (citing *United States Telecomm. Ass'n v. FCC*, 290 F.3d 415, 424 (D.C. Cir. 2002)).

<sup>5/</sup> See Cable Television Consumer Protection and Competition Act of 1992, Pub. L. 102-385, § 2(b)(1)-(2).

<sup>6/</sup> 47 U.S.C. § 548(c)(5).

<sup>7/</sup> Many NYMA residents have the option to choose MVPD service from either Cablevision (or Time Warner), Verizon (or AT&T in southern Connecticut), RCN, DirecTV, and Dish Network.

<sup>8/</sup> Yahoo Finance, Verizon Communications Inc. (VZ), Key Statistics, at <http://finance.yahoo.com/q/ks?s=VZ> (Last visited November 4, 2009). Nationally, Verizon is now one of the top 10 MVPDs in the country with over 2.5 million subscribers, and is now larger than Bright House Networks, thereby becoming the eighth largest MVPD in the country. Todd Spangler, *FiOS TV Cracks*

enjoys a network footprint, market reach, and financial resources of unmatched size and strength – and it has been providing communications services to the vast majority of households in the NYMA for decades.

Verizon is now the eighth largest video programming distributor in the country.<sup>9/</sup> In the NYMA, the number of Verizon FiOS TV subscribers more than doubled in 2008.<sup>10/</sup> The launch of FiOS TV in New York City last year was widely credited with driving a dramatic rise in total video subscribers for Verizon,<sup>11/</sup> and the company expects to offer service to a total of 800,000 households in the city by the end of 2009.<sup>12/</sup> Even before launching FiOS TV in New York City, Verizon officials maintained that FiOS TV had been having “great success in the suburban areas around the city,”<sup>13/</sup> and it marked the one year anniversary of its cable offering there by proclaiming that “It’s been a great first year for FiOS TV in New York City.”<sup>14/</sup>

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2.5 Million Subs, MULTICHANNEL NEWS, July 27, 2009. See also *id.* (quoting Verizon CFO: “We had another great quarter of FiOS performance . . . We are taking market share from cable”); *Verizon’s FiOS TV: Can You Hear Us Now*, MEDIAWEEK.COM, April 28, 2009. Verizon added close to 300,000 FiOS TV subscribers in the first quarter of 2009 – its “best quarter ever in terms of video subscriber growth” – and has added 1 million subscribers over the past year, nearly doubling its amount of total subscribers. Mike Farrell, *Cable Stages a Comeback*, MULTICHANNEL NEWS (May 4, 2009); Todd Spangler, *Telco Posts Record FiOS Internet Additions, As Landlines Keep Dropping*, MULTICHANNEL NEWS (Apr. 26, 2009). Verizon’s First Quarter 2009 financial report shows FiOS TV subscriber revenues increased nearly 84% from the previous year. Verizon Communications Inc., Quarterly Report (Form 10-Q), at 25 (May 11, 2009); available at [http://investor.verizon.com/sec/sec.aspx?Report=\\*&Year=2009&Company=7762](http://investor.verizon.com/sec/sec.aspx?Report=*&Year=2009&Company=7762).

<sup>9/</sup> Todd Spangler, *FiOS TV Cracks 2.5 Million Subs*, MULTICHANNEL NEWS, July 27, 2009.

<sup>10/</sup> According to its Copyright Office filings, the number of subscribers served by Verizon in New York and New Jersey more than doubled last year, increasing from approximately 170,000 to more than 400,000. See Verizon New York Inc. and Verizon New Jersey Inc. Statements of Account for Secondary Transmissions by Cable Systems, SA3 Long Form, Accounting Periods ending Dec. 31, 2007, and Dec. 31, 2008 (on file with the U.S. Copyright Office).

<sup>11/</sup> *NYC FiOS TV Launch Credited for Verizon’s Record Q4*, NYCONVERGENCE.COM (Jan. 28, 2009) at <http://www.nyconvergence.com/2009/01/nyc-fios-tv-launch-credits-for-verizons-record-q4.html> (“The launch of FiOS TV in the five boroughs last year has helped Verizon sign on a record number of subscribers for FiOS in the fourth quarter of 2008. Verizon ended the year with 1.9 million customers, which is 1 million more than the company had in the end of ‘07.”).

<sup>12/</sup> Press Release, Verizon, Verizon FiOS TV Celebrates First Year of Operation in New York City (July 28, 2009).

<sup>13/</sup> *Verizon’s FiOS TV Opens for Business*, CRAIN’S NEW YORK BUSINESS (July 28, 2008).

<sup>14/</sup> Press Release, Verizon FiOS TV Celebrates First Year of Operation in New York City (July 28, 2009).

Likewise, Verizon officials have characterized the response to FiOS TV from New Jersey consumers “as nothing short of astounding.”<sup>15/</sup> Verizon’s competitive strength is reflected by its recent rate hike for FiOS TV in the New York area, with a company official commenting that it “was feeling good enough about its brand position that it could charge a premium price even as it tried to steal customers from cable.”<sup>16/</sup>

AT&T is also a formidable competitor in the Connecticut portions of the NYMA served by Cablevision. AT&T has garnered over 1.3 million customers in the short period of time it has been providing video service, making it the tenth largest MVPD in the country.<sup>17/</sup> AT&T provides video service to “more than half of Connecticut” with the capability to serve “more than 370,000 households.”<sup>18/</sup> One Connecticut newspaper states that AT&T continues to have “‘aggressive’ expansion plans” that portend “a full-scale war over Internet, phone and television service is on the horizon” in the state.<sup>19/</sup> In April 2009, AT&T reported that as of the first quarter 2009, “about 60% of the customers signing up for AT&T’s U-verse services are switching from cable competitors.”<sup>20/</sup>

In a highly competitive marketplace such as NYMA, each provider is driven to respond to market forces by investing in risky and innovative offerings in order to differentiate itself from other providers, thereby enhancing consumer welfare. Verizon runs ads claiming it “has more HD than . . . Cablevision,” that Verizon is “delivering the ultimate high-definition home-entertainment experience,” and that “FiOS TV is the best place to watch sports.”<sup>21/</sup> Verizon

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<sup>15/</sup> Press Release, Verizon, Verizon Ends Year by Expanding FiOS TV and Internet to Seven More New Jersey Cities and Towns (Dec. 16, 2008).

<sup>16/</sup> Saul Hansell, *Verizon Raises FiOS Prices, but Hardly Mentions It*, NY TIMES.COM (June 22, 2009) at <http://bits.blogs.nytimes.com/2009/06/22/verizon-raises-fios-prices-but-hardly-mentions-it/>.

<sup>17/</sup> Press Release, AT&T, U-verse TV Starts 2009 with Record Quarter (Apr. 23, 2009); Todd Spangler, *AT&T: 100,000-Plus Subs Through DirecTV In Q2*, MULTICHANNEL NEWS, July 23, 2009.

<sup>18/</sup> *Now on Demand: Competition, AT&T is Poised to Fight a Full-Scale War with Cable Companies But Will the Prices Come Down?*, HARTFORD COURANT (May 24, 2009).

<sup>19/</sup> *Id.*; see also *AT&T Calls for Help, Hiring 100 People, 50 of them to Sell U-Verse TV Service Door to Door*, HARTFORD COURANT (Aug. 12, 2009) (reporting on AT&T’s hiring efforts for “door-to-door salespeople to sell its U-verse television service” and noting that “U-verse is also offered as a package, with voice, Internet and wireless services, and competes with cable television services offered by companies such as Comcast.”).

<sup>20/</sup> Todd Spangler, *AT&T: 60% Of U-verse Customers From Cable Competitors*, MULTICHANNEL NEWS (April 22, 2009).

<sup>21/</sup> Press Release, Verizon, Verizon FiOS TV Delivers 100 High-Definition Channels to New Yorkers - on the Network Built for HD, July 28, 2008 (“FiOS TV in New York Metro Area Now Offers More HD Channels Than . . . Cablevision.”); Press Release, Verizon, Verizon to Distribute the YES Network

recently announced the launch of its own exclusive regional channels, FiOS 1 Long Island and FiOS 1 New Jersey, that will feature news, sports, weather and local information, and entertainment programming that “won’t be found on cable TV.”<sup>22/</sup> Verizon intends for sports programming to “play a major role” on these new channels.<sup>23/</sup> As one industry publication recently noted, Verizon clearly is “looking for every ounce of differentiation between FiOS TV and cable.”<sup>24/</sup> AT&T currently offers at least 110 HD channels<sup>25/</sup> and touts that these HD offerings rival or beat incumbent cable companies’ offerings.<sup>26/</sup> AT&T’s marketing and advertising campaigns have emphasized U-Verse’s HD services and other differentiating features such as a “whole house” DVR offering, and special tie-ins with AT&T’s exclusive iPhone and iPod service arrangements.

Not only are Cablevision, Verizon and AT&T undertaking vigorous efforts to differentiate themselves, but DirecTV (which continues to offer NFL Sunday Ticket and other programming on an exclusive basis) and Dish Network (which has exclusive distribution rights to numerous foreign language programming services) are doing so as well.<sup>27/</sup> The competitive

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Nationally in High Definition to FiOS ‘Extreme HD’ Subscribers, Under Multiyear Agreement (Apr. 16, 2009).

<sup>22/</sup> Press Release, Verizon, Verizon Launches FiOS1 One Channels on Long Island and in Northern New Jersey (June 22, 2009).

<sup>23/</sup> See *id.*

<sup>24/</sup> Todd Spangler, *Verizon Weaves Web into FiOS TV*, MULTICHANNEL NEWS (July 15, 2009). See also Henry E. Powderly II, *In War for LI, Verizon Hitting Cablevision From All Angles*, LONG ISLAND BUSINESS NEWS, July 16, 2009 (“Verizon has launched some of its biggest weapons in its war with Cablevision for television and Internet dominance no Long Island.”). Verizon recently has been running “Optimum Hardly” advertisements in local newspapers, on billboards, on movable vehicles and on television in the local New York market which promote Verizon’s HD offerings.

<sup>25/</sup> Todd Spangler, *U-verse TV Hits 110 HD Channels*, MULTICHANNEL NEWS (July 20, 2009).

<sup>26/</sup> Todd Spangler, *U-verse Hits 100-Plus HDs Channels In All TV Markets, AT&T Claims That Tops Local Cable Providers In Those DMAs*, MULTICHANNEL NEWS (March 2, 2009) (reporting that AT&T claims that its 100-plus HD offerings “tops the HD channel lineups offered by the local cable providers in every U-verse TV market” and noting that “only a few cable operators have hit the [triple-digit HD] mark”); Press Release, AT&T, AT&T U-verse TV Lineup Expands to 100 or More High Definition Channels in Every U-verse TV Market (Mar. 2, 2009) (quoting AT&T Executive Vice President of Content and Programming Dan York as saying, “[Y]ou can’t beat the U-verse TV HD experience.”); Press Release, AT&T, AT&T U-verse TV Adds ShortsHD and New International Channels (July 20, 2009) (“U-verse TV customers enjoy access to an extensive HD channel lineup . . . exceeding the HD channel lineups offered by the local cable providers in every U-verse TV market.”); Press Release, AT&T, AT&T U-verse TV Lineup Expands to Include Six New HD Channels from MTV Networks (May 15, 2009) (quoting AT&T Executive Vice President Dan York as saying, “These HD additions help us . . . to continue to deliver more HD channels than the local cable providers.”).

<sup>27/</sup> DirecTV, NFL Sunday Ticket, at <https://www.directv.com:443/DTVAPP/content/sports/nfl> (last visited Sept. 24, 2009) (“If you’re a football fan, you need NFL SUNDAY TICKET - available only on DIRECTV.”); Friday Night Lights,

forces unleashed in a highly competitive market such as the NYMA clearly help to expand the quantity, quality, and diversity of services available to consumers.

The courts and the Commission have emphasized that mandatory sharing arrangements are appropriate only where a “granular analysis” of local market conditions demonstrates that competition will be impaired absent the provision of unbundled network elements to competitors.<sup>28/</sup> The Commission recently noted that the need for the program access exclusivity ban diminishes as “competition in the MVPD market continues to develop and cable market share continues to decline.”<sup>29/</sup> The incumbent telephone companies were arguing for elimination of asset-sharing mandates in some local markets at a time when their voice competitors held no more than 15 percent of the residential telephony market nationally.<sup>30/</sup> By contrast, non-cable MVPDs today serve more than twice that proportion of multichannel households.<sup>31/</sup> If anything, the much higher level of national market share held by cable’s competitors provides greater justification for affording cable operators market-by-market relief from asset-sharing obligations.

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<http://www.directv.com/DTVAPP/global/article.jsp?assetId=P5770265> (last visited Sept. 24, 2009) (“All 26 episodes of the fourth and fifth seasons of the critically acclaimed and award-winning drama series will air first exclusively on The 101 Network, only on DIRECTV”); Press Release, Dish Network, DISH Network Launches DishMEXICO Programming Package (Nov. 19, 2008) (announcing a new programming package “designed specifically for Mexicans” that includes programming “available exclusively on DISH Network”); Press Release, Dish Network, DISH Network Becomes Exclusive U.S. Provider of TeleAmazonas (Oct. 1, 2008) (announcing the launch of “a 24-hour Ecuadorian TV network” and saying that Dish Network is “the only pay-TV provider to offer the channel in the U.S.”).

<sup>28/</sup> See, e.g., *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 18 FCC Rcd. 16978, ¶ 118 (2003) (“*Triennial Review Order*”) (citing *United States Telecom Ass’n v. FCC*, 290 F.3d 415, 422 (D.C. Cir. 2002) (“*USTA I*”)) (subsequent history omitted); *Unbundled Access to Network Elements*, 20 FCC Rcd. 2533, ¶ 8 (2005) (“*Triennial Review Remand Order*”) (noting *USTA I* rejected national sharing obligations because they were “insufficiently ‘granular’” and “did not account for differences in particular markets and particular customer classes”), *aff’d Covad Commc’ns Co. v. FCC*, 450 F.3d. 528, 544 (D.C. Cir. 2006) (noting that that “*USTA I* and *USTA II* require a nuanced application of a ‘granular’ impairment standard, which incorporates competitive variations within and across markets”).

<sup>29/</sup> *2007 Extension Order & NPRM* ¶ 60.

<sup>30/</sup> Press Release, Federal Communications Commission, Federal Communications Commission Releases Data on Local Telephone Competition, at 1 (Dec. 22, 2004) (noting that CLECs served 15% of residential and small business users). See also *Petitions of the Verizon Telephone Companies for Forbearance Pursuant to 47 U.S.C. § 160(c) in Boston, New York, Philadelphia, Pittsburgh, Providence and Virginia Beach Metropolitan Statistical Areas*, WC Docket No. 06-172 (filed Sept. 6, 2006); News Release, Federal Communications Commission, Federal Communications Commission Releases Data on Local Telephone Competition, at 1 (Jan. 31, 2007) (noting that as of June 30, 2006, CLECs served 17% of all end-user lines and 12.4% of all residential lines).

<sup>31/</sup> Press Release, Federal Communications Commission, FCC Adopts 13th Annual Report to Congress on Video Competition and Notice of Inquiry for the 14th Annual Report, at 3 (Nov. 27, 2007) (noting that competing MVPDs serve approximately 32% of all MVPD subscribers).

In considering the merits of market-by-market relief from asset-sharing obligations imposed on the telephone companies, the Commission has held that “it could be appropriate to conclude, based on sufficient facilities-based competition, particularly from cable companies, that the state of local competition might justify forbearance from unbundling obligations.”<sup>32/</sup> Such a conclusion is equally true with respect to asset-sharing obligations applicable to cable operators.<sup>33/</sup> Indeed, Verizon itself has argued vigorously that asset-sharing arrangements should not be applied in competitive local markets.<sup>34/</sup>

Removing the exclusivity ban in local markets with durable competition would promote consumer welfare by encouraging innovation and investment in programming and allowing for product differentiation among distributors, thereby providing consumers with more choice and more competition.<sup>35/</sup> Cable operators have repeatedly demonstrated their willingness to invest in new services, new programming and new infrastructure where regulatory constraints burdening investment are absent or removed. The foundation of today’s cable programming marketplace was established prior to the enactment of the program access requirements, driven by cable operator investment in such programming staples as MTV, BET, CNN, TNT, Discovery, Nickelodeon, Showtime and others. As noted above, Cablevision or its founder Charles Dolan were involved in the launch of several key programming networks, including HBO, SportsChannel, AMC, Bravo and News 12. All of this innovation was driven by cable operator investment and took place without the constraints of the program access rules. Unsurprisingly, most of the innovation and investment in premium new content occurring today takes place where the program sharing requirement does not apply, as evidenced by Cablevision’s recent investment in the MSG Varsity terrestrial service, Verizon’s investment in FiOS 1 (also

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<sup>32/</sup> *Petition of ACS of Anchorage, Inc., Pursuant to Section 10 of the Communications Act of 1934, as Amended, for Forbearance from Sections 251(c)(3) and 252(d)(1) in the Anchorage Study Area*, 22 FCC Rcd. 1958, ¶ 5 (2007).

<sup>33/</sup> *Cf. Unbundled Access to Network Elements, Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 20 FCC Rcd 2533, ¶ 2 (2004) (noting benefits of using “unbundling authority in a more targeted manner”).

<sup>34/</sup> *See Verizon UNE Comments at 7-8* (“[T]he Commission must make a finding of impairment with respect to particular geographic markets and market segments before it imposes a UNE obligation in each such market.”).

<sup>35/</sup> *See Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Development of Competition and Diversity in Video Programming Distribution: Section 628(c)(5) of the Communications Act: Sunset of Exclusive Contract Prohibition*, MB Docket No. 07-198, Comments of Cablevision Systems Corporation, at 8 (filed Jan. 4, 2008). *See also Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Development of Competition and Diversity in Video Programming Distribution: Section 628(c)(5) of the Communications Act: Sunset of Exclusive Contract Prohibition*, MB Docket No. 07-29, Comments of Cablevision Systems Corporation, at 8-9 & n.25 (filed Apr. 2, 2007); *2007 Extension Order & NPRM* ¶ 63.

terrestrial), DirecTV's Sunday Ticket package and other exclusive offerings such as March Madness.

The Commission itself has recognized the positive effects of exclusivity in terms of promoting programming investment and output.<sup>36/</sup> Removal of the exclusivity prohibition in competitive local markets will spur additional investment by both cable operators and competing MVPDs to support new and existing programming networks, thereby fueling a virtuous cycle of output production as both content creators and distributors respond to the exclusivity strategies of their rivals by producing and distributing distinct content offerings that enable them to maintain a unique presence in the marketplace. The end result will be to enhance consumer welfare by providing consumers with more choices at better prices.

## **II. The D.C. Circuit's Decision in *NCTA v. FCC* Does Not Support Extending the Program Access Rules to Terrestrial Programming**

Notwithstanding the clear evidence of intensifying video competition, Verizon has continued to argue for an unwarranted expansion of the program access rules to cover terrestrially delivered cable programming, such as Madison Square Garden's MSG HD and MSG+ HD.<sup>37/</sup> Verizon's latest ex partes in this docket seek to convince the Commission that the D.C. Circuit decision upholding the FCC's ban on exclusive contracts in multiple dwelling units ("MDUs")<sup>38/</sup> provides a basis for extending the Cable Act's program access provisions – which currently apply only to satellite-delivered programming – to terrestrial programming services such as MSG HD and MSG+ HD.

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<sup>36/</sup> See *New England Cable News*, 9 FCC Rcd 3231, ¶ 34 (1994) (exclusivity may "attract investment, carriage and support of [a programming] service"); *id.* ¶ 40 ("exclusivity may promote diversity in the programming market when used to provide incentives for cable operators to promote and carry a new and untested programming service"). See also *2007 Extension Order & NPRM* ¶ 63; (Noting "the benefits of exclusive contracts and vertical integration . . . , such as encouraging innovation and investment in programming and allowing for 'product differentiation' among distributors"); *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, ¶ 63 (1993) ("*Program Access First Report and Order*") ("As a general matter, the public interest in exclusivity in the sale of entertainment programming is widely recognized.").

<sup>37/</sup> See Letters from Leora L. Hochstein, Verizon, to Marlene H. Dortch, Secretary, Federal Communications Commission, MB Dockets No. 07-29 and 07-198 (filed September 23, 2009, October 14 and October 21, 2009); Letter from Michael Glover, Senior Vice President and Deputy General Counsel, Verizon, to Chairman Michael J. Copps, Commissioner Jonathan S. Adelstein and Commissioner Robert M. McDowell, Federal Communications Commission, MB Dockets No. 07-29 and 07-198 (filed May 28, 2009) ("Verizon May 28 Ex Parte").

<sup>38/</sup> *Nat'l Cable & Telecomms. Ass'n v. FCC*, 567 F.3d 659 (D.C. Cir. 2009) ("*NCTA v. FCC*").

As detailed below, calls for the expansion of the sharing requirement in the program access rules should be rejected. Not only does the D.C. Circuit's MDU decision offer no solace to Verizon, the same court's even more recent decision in *Comcast Corp. v. FCC* makes clear that forced sharing can no longer be justified, let alone expanded beyond the limits expressly set by Congress. The court there found that cable operators face "ever increasing competition" from DBS operators and phone companies that "have entered the market and grown in market share since the Congress passed the 1992 Act" and that there has been a dramatic increase both in the number of cable networks and in the programming available to subscribers.<sup>39/</sup> With competition in distribution and programming now firmly entrenched – perhaps nowhere more so than in the NYMA --, there is no justification for broadening the scope of outdated forced sharing requirements to encompass terrestrial programming.

**Background.** Less than two years ago the Commission again declined invitations from Verizon, AT&T, and others to expand the program access rules to cover terrestrially delivered programming.<sup>40/</sup> That ruling was fully consistent with numerous previous determinations by the Commission that the constraints of the program access rules are limited to satellite-delivered programming.<sup>41/</sup> While the instant proceeding once again considers the scope of the program access rules, the Commission itself reiterated in the *Notice* that "the plain language of Section

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<sup>39/</sup> *Comcast Corporation v. Federal Communications Commission*, Case No. 08-1114, 2009 Westlaw 2622763, \*6 (D.C. Cir. Aug. 28, 2009) ("*Comcast Corp. v. FCC*").

<sup>40/</sup> *See, e.g., Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Development of Competition and Diversity in Video Programming Distribution: Section 628(c)(5) of the Communications Act: Sunset of Exclusive Contract Prohibition*, MB Docket No. 07-29, 22 FCC Rcd. 17791, ¶ 78 (2007) ("*2007 Extension Order & NPRM*").

<sup>41/</sup> *DirectTV, Inc. v. Comcast Corp.*, 13 FCC Rcd. 21822, ¶ 25 (1998) ("*DirectTV Order*"); *EchoStar Communications Corp. v. Comcast Corporation*, 14 FCC Rcd. 2089, ¶ 21 (1999) ("*EchoStar Order*"); *RCN Telecom Services of New York, Inc. v. Cablevision Systems, Inc. et al.*, 14 FCC Rcd 17093, ¶ 25 (1999) ("*RCN Order*"), *aff'd* 16 FCC Rcd. 12048, ¶¶ 14-17 (2001); *DirectTV, Inc. and EchoStar Communications Corp. v. Comcast Corp.*, 15 FCC Rcd. 22802, ¶ 12 (2000) (holding that a terrestrially-delivered service is "outside of the direct coverage of Section 628(c)"); *Implementation of the Cable Television Consumer Protection and Competition Act of 1992; Development of Competition and Diversity in Video Programming Distribution: Section 628(c)(5) of the Communications Act; Sunset of Exclusive Contract Prohibition*, 17 FCC Rcd. 12124, ¶ 73 (2002); *Everest Midwest Licensee v. Kansas City Cable Partners and Metro Sports*, 18 FCC Rcd. 26679, ¶ 7, n. 34 (2004) ("*Everest Midwest 2004 Order*") ("By its express terms, Section 628 of the Communications Act does not apply to terrestrially-delivered services."); *2007 Extension Order & NPRM* ¶ 78 ("We continue to believe that the plain language of the definitions of 'satellite cable programming' and 'satellite broadcast programming' as well as the legislative history of the 1992 Cable Act place terrestrially delivered programming beyond the scope of Section 628(c)(2)(D)."); *AT&T Services Inc. and Pacific Bell Telephone Company d/b/a SBC California d/b/a AT&T California v. CoxCom, Inc.*, 24 FCC Rcd. 2859, ¶ 13 (2009).

628(b)” expressly limits both the program access rules’ unfair practices provision, like the exclusivity ban, to satellite-delivered programming.<sup>42/</sup>

As the Commission has explained, “the legislative history of Section 628 . . . indicates that the version of the program access provision that the Senate adopted would have extended to terrestrially delivered programming services but the House bill, that was eventually adopted, did not. This indicates a specific intention to limit the scope of the provision to satellite services.”<sup>43/</sup> Because Congress deliberately rejected applying the program access provisions to non-satellite delivered programming, lack of access to a terrestrial service cannot be deemed a violation of Section 628(b).<sup>44/</sup> Further, a specific Congressional directive to limit application of a statute -- such as limitation of program access requirements of Section 628 to “satellite cable programming” -- cannot be superseded by more general rulemaking authority set forth elsewhere in the statute.<sup>45/</sup>

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<sup>42/</sup> 2007 Extension Order & NPRM ¶ 116.

<sup>43/</sup> *EchoStar 1999 Order* ¶ 21. The Supreme Court has noted that “[f]ew principles of statutory construction are more compelling than the proposition that Congress does not intend *sub silentio* to enact statutory language that it has earlier discarded in favor of other language.” *INS v. Cardoza-Fonseca*, 480 U.S. 421, 442-43 (1987) (finding enactment of House bill rather than Senate bill demonstrates that Congress rejected Senate’s stricter language). See *Gulf Oil Corp. v. Copp Paving Co.*, 419 U.S. 186, 200 (1974) (finding deletion of language in Conference Committee “strongly militates against a judgment that Congress intended a result that it expressly declined to enact”). See also *Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Development of Competition and Diversity in Video Programming Distribution: Section 628(c)(5) of the Communications Act Sunset of Exclusive Contract Prohibition*, 17 FCC Rcd. 12124, ¶ 73 (2002) (citing H.R. Conf. Rep. 102-862, 102nd Cong., 2nd Sess. 91 (1992)); *RCN Order* ¶ 25 (“In enacting Section 628, Congress determined that while cable operators generally must make available to competing MVPDs vertically-integrated programming that is satellite-delivered, they do not have a similar obligation with respect to programming that is terrestrially-delivered.”).

<sup>44/</sup> *Dakota Telecom Inc. v. CBS Broadcasting, Inc. d/b/a Midwest SportsChannel and Bresnan Communications*, 14 FCC Rcd. 10500, ¶ 21 (1999) (“[A] practice permitted under the Communications Act and the Commission’s rules cannot, without more, form the basis of a claim of unfair competition” under Section 628(b).”); *EchoStar 1999 Order* ¶ 29 (Section 628(b) “cannot be converted into a tool that, on a per se basis, precludes cable operators from exercising competitive choices that Congress deemed legitimate”).

<sup>45/</sup> *Asiana Airlines v. FAA*, 134 F.3d 393 (D.C. Cir. 1998) (an agency “cannot rely on its general authority to make rules necessary to carry out its functions when a specific statutory directive defines [its] relevant functions . . . in a particular area.”); *Natural Res. Def. Council, Inc. v. Reilly*, 976 F.2d 36, 41 (D.C. Cir. 1992) (“[W]e have not allowed the general grant of [agency] rulemaking power . . . to trump the specific provisions of the Act.”).

**Verizon Misreads the D.C. Circuit’s MDU Decision.** Verizon misconstrues *NCTA v. FCC* when it suggests that the D.C. Circuit’s *NCTA v. FCC* decision “confirms” FCC authority to proscribe withholding of terrestrially delivered sports programming.<sup>46/</sup>

*First*, nothing in the D.C. Circuit’s opinion offers any basis for allowing the Commission to override the express and specific limitation on the scope of its authority in Section 638 established by Congress.<sup>47/</sup> The specific Congressional designation of the category of programmers covered by the program access provisions – vertically integrated, satellite cable programmers – precludes construing section 628 to apply to other non-designated entities, such as terrestrial programmers.<sup>48/</sup> As the D.C. Circuit itself noted in *NCTA*, an agency has no authority to construe a statute in a manner that would “render nugatory restrictions that Congress has imposed.”<sup>49/</sup>

Under Verizon’s distorted reading of the statute and the D.C. Circuit decision, however, the general prohibitions in Section 628(b) would negate Congress’ specific decision to exclude both terrestrial programming and non-cable owned programming from the ambit of program access. Such a result would contravene the court’s admonition that any action taken by the Commission under the unfair practices provision must comport with “Section 628’s actual words,”<sup>50/</sup> which do not authorize regulation of terrestrial programming.

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<sup>46/</sup> Verizon May 28 Ex Parte at 4.

<sup>47/</sup> *Hi-Craft Clothing Co. v. NLRB*, 660 F.2d 910, 916 n.3 (3rd Cir. 1981) (Congressional intention to exclude certain class of persons from coverage under statute precluded agency from using regulatory authority to subject to statute a member of the excluded category); *Amer. Petroleum Inst. v. EPA*, 52 F.3d 1113, 1119 (D.C. Cir. 1995) (agency “cannot rely on its general authority to make rules necessary to carry out its functions when a specific statutory directive defines [its] relevant functions . . . in a particular area”). See also *Teva Pharm. Indus. v. Crawford*, 410 F.3d 51, 55 (D.C. Cir. 2005); *Natural Res. Def. Council, Inc. v. Reilly*, 976 F.2d 36, 41 (D.C. Cir. 1992) (“[W]e have not allowed the general grant of rulemaking power . . . to trump the specific provisions of the Act.”); *Albany Eng’g Corp. v. FERC*, 548 F.3d 1071, 1075 (D.C. Cir. 2008) (“Congress’s express provision for three types could hardly leave room for a FERC mandate of reimbursement of, say, the operational costs in dispute here. The maxim *expressio unius est exclusio alterius* has its limits, but we need not plumb them here.”).

<sup>48/</sup> *West Virginia Univ. Hosps., Inc. v. Casey*, 499 U.S. 83, 101 (1991) (courts may not construe statutes in a manner that enlarges their application when language plainly conveys a Congressional intention to limit their scope); *Louisiana Pub. Serv. Comm’n v. FCC*, 476 U.S. 355, 374-75 (1986) (The Commission “may not confer power upon itself . . . to expand its power in the face of a congressional limitation on its jurisdiction.”); *Assoc. of Amer. R.Rs. and Wisconsin Cent. Ltd. v. Surface Transp. Bd.*, 162 F.3d 101, 104-05 (D.C. Cir. 1998) (rejecting agency’s effort to extend to “displaced” workers rights that statutory language showed were intended by Congress to be limited to terminated workers).

<sup>49/</sup> *NCTA v. FCC* at 666.

<sup>50/</sup> *Id.*

*Second*, the circumstances giving rise to the *MDU Exclusivity Order* and affirmed by the D.C. Circuit as an appropriate exercise of the Commission's authority under Section 628(b) differ markedly from the facts here. The D.C. Circuit affirmed the *MDU Exclusivity Order* because it held that Congress, in enacting Section 628(b), "focus[ed] not on practices that prevent MVPDs from *obtaining* satellite cable or satellite broadcast programming," but on anti-competitive practices "that prevent them from 'providing' that programming 'to subscribers or consumers.'"<sup>51/</sup> The court found that the MDU exclusivity ban ran afoul of Section 628(b) because it completely foreclosed a competing MVPD from providing any and all satellite cable programming to that building.<sup>52/</sup> Here, by contrast, Verizon is not prohibited from providing *any* satellite programming when the only programming being withheld from it is terrestrially-delivered. It is indisputable that Verizon still provides hundreds of satellite programming channels to all of its subscribers in the New York DMA, notwithstanding its lack of access to some terrestrial programming.

Extending Section 628(b) to terrestrial programming would be "taking unreasonably overbroad action to achieve an objective Congress never intended to authorize."<sup>53/</sup> Congress expressly disclaimed any intention to regulate terrestrial access to terrestrial programming. Congress did not intend – and the D.C. Circuit did not construe – Section 628(b) to preclude a cable operator from taking lawful actions that make its service more attractive or valuable, even if that would thereby "hinder" Verizon's ability to provide satellite cable programming.

The practice found by the court to be cognizable under Section 628(b) – exclusivity in cable MDUs – entirely foreclosed competing MVPDs from providing any service to any type of customers in MDUs. By contrast, Verizon asserts that Section 628(b) authorizes government regulation of a lawful competitive practice – terrestrial exclusivity – that does not foreclose Verizon from providing any satellite cable programming but simply, at most, may make Verizon's service comparably less attractive to some subset of subscribers.<sup>54/</sup> This constitutes precisely the sort of overbroad application of Section 628(b) rejected by the court in *NCTA v. FCC*.

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<sup>51/</sup> *Id.* at 664 (emphasis in original).

<sup>52/</sup> *Id.* ("[E]xclusivity agreements have both the proscribed 'purpose' and the proscribed 'effect' -- cable operators execute them precisely so that they can be the sole company serving a building, and as petitioners themselves put it, 'if you can't serve a building then you can't deliver satellite cable programming and satellite broadcasting programming.'").

<sup>53/</sup> *Id.* at 666.

<sup>54/</sup> In other words, as a result of an MDU exclusivity agreement, a consumer living in that MDU who *actually wants* to subscribe to the video service of a competing MDU is prohibited from doing so. That is not the case with terrestrial programming access. No consumer that *wants* to subscribe to Verizon FiOS is prevented from doing so as a result of Verizon's lack of access to terrestrial programming.

*Third*, Verizon itself has illustrated elsewhere precisely why the rationale underlying the D.C. Circuit's affirmation of the MDU exclusivity ban is completely inapposite to application to terrestrial program access. In justifying its own exclusivity practices to the Commission, Verizon has highlighted the distinction between exclusive arrangements designed to make a provider's offering relatively more attractive versus exclusive arrangements that completely preclude a provider from serving particular potential customers (as the FCC found to be the case with MDU exclusivity):

Exclusive marketing arrangements for specific handsets do not preclude the provision of communications services by those authorized to provide them, as do agreements that restrict tenants in apartment buildings to one service provider.<sup>55/</sup>

If the word "handset" is changed to "programming," that sentence aptly describes the distinction between exclusive distribution of terrestrial programming (which does not foreclose any competitive MVPD from providing any satellite programming services) and MDU exclusivity (which forecloses all competitive MVPDs from providing any service). Here, however, the entire foundation of Verizon's Section 628(b) claim rests completely upon its untenable conflation of these two markedly different circumstances.

*Fourth*, the Media Bureau's recent decision in *AT&T/CoxCom* was issued well after the Commission's decision in the MDU exclusivity order and the agency's adoption of the construction of Section 628(b) that was upheld by the D.C. Circuit in *NCTA v. FCC*. Yet, notwithstanding the urging of AT&T,<sup>56/</sup> the Media Bureau declined to construe the rationale underlying the MDU exclusivity order as authorizing any departure from the Commission's previous decisions regarding access to terrestrial programming.

*Lastly*, even if Section 628(b) and the D.C. Circuit's decision could be construed to address an MVPD's access to terrestrial programming, Verizon would still be precluded from obtaining access to MSG HD and MSG+ HD pursuant to Section 628(b). Verizon cannot show that its lack of access to MSG HD and MSG+ HD "prevent[s] or hinder[s] significantly" its ability to compete.<sup>57/</sup> Even without guaranteed access to terrestrial programming, Verizon has emerged as a potent and formidable competitor in the NYMA.

Because Verizon carries the standard definition (SD), satellite-delivered MSG and MSG+ services, lack of access to MSG HD and MSG+ HD has not prevented Verizon from providing *any* local professional games to its subscribers. Thus, Verizon's invocation of prior Commission statements regarding the withholding of sports programming in Philadelphia and San Diego is

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<sup>55/</sup> Verizon Wireless Exclusivity Comments at 8.

<sup>56/</sup> See *AT&T/CoxCom Order* ¶ 11.

<sup>57/</sup> 47 U.S.C. § 548(b)

therefore inapposite here<sup>58/</sup> because, unlike those situations, no competing MVPD in the NYMA is prevented from providing any local games to its subscribers. Indeed, any suggestion that Verizon is not able to offer a viable sports programming package is belied by Verizon itself, which boasts to the public that “FiOS TV is the best place to watch sports.”<sup>59/</sup>

Verizon complains that Cablevision advertises the fact that some terrestrially delivered HD RSNs are not available on competing MVPD platforms,<sup>60/</sup> but there is nothing unlawful in informing the public that a programming service that Congress expressly excluded from the ambit of program access is available only from Cablevision. Indeed, Verizon itself continues to tout its HD program offerings as a competitive differentiator to Cablevision and other operators, belying the notion that Verizon’s ability to offer customers a compelling video service is crippled by the absence of MSG HD and MSG+ HD.<sup>61/</sup>

## CONCLUSION

In local video markets where competition from DBS and the telcos is firmly entrenched, the Commission should promote investment and innovation by removing the constraints of the program access rules’ exclusivity ban. There is no justification for prohibiting full use of the common marketplace tool of exclusivity in local markets where consumers are being offered a choice of at least four different MVPDs. Rather than considering extension of program access exclusivity prohibitions to terrestrial programming, the Commission would better benefit consumers by lifting the exclusivity restriction in markets like the NYMA where robust competition already exists.

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<sup>58/</sup> Verizon May 28 Ex Parte at 2. *See also* Verizon September 23 Ex Parte at 1.

<sup>59/</sup> Press Release, Verizon, Verizon to Distribute YES Network Nationally in High Definition to FiOS ‘Extreme HD’ Subscribers, Under Multiyear Agreement (Apr. 13, 2009) (quoting Terry Denson, vice president, FiOS TV content and programming).

<sup>60/</sup> Verizon May 28 Ex Parte at 3.

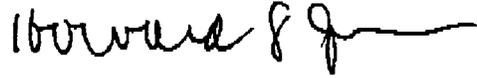
<sup>61/</sup> *See, e.g.*, Verizon Internet Advertisement, *Discover Verizon FiOS Triple Freedom - Better*, at <http://www22.verizon.com/Residential/Specific+Bundles/Vz+FiOS+Trpl+Freedom+Better/124225> (“Only Verizon can deliver the best HD experience, because FiOS is the 100% fiber-optic network built for HD.”); *Verizon’s Terry Denson on DVR, HD, targeted ads*, FIERCE IPTV, Mar. 10, 2009, <http://www.fierceiptv.com/story/verizons-terry-denson-dvr-hd-targeted-ads/2009-03-10> (“The HD channel war will continue. For the next three years, it will still be a hotly contested area. As long as it necessitates a service change, it’s something that puts the customer in play as a shopper.”). *See also* Press Release, Verizon, Disney-ABC Television Group and Verizon FiOS TV Expand ABC’s Video-On-Demand Offering, Verizon Launches New Fast-Forward-Disabled Content From ABC in FiOS TV’s Industry-Leading VOD Library (Oct. 28, 2008) (“FiOS TV is the only service to consider for customers who want the best HD experience”).

Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C.

November 13, 2009

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Sincerely,

A handwritten signature in black ink, appearing to read "Howard J. Symons", with a long horizontal flourish extending to the right.

Howard J. Symons  
*Counsel to Cablevision*

cc (via email):

Steven Broeckaert  
Angela Giancarlo  
Brad Gillen  
Bruce Gottlieb  
Rosemary Harold  
Rick Kaplan  
Christine Kurth  
William Lake  
Edward Lazarus  
Charles Mathias  
Robert Ratcliffe  
Jennifer Schneider  
Carol Simpson  
Sherrese Smith