

January 13, 2010

FILED ELECTRONICALLY

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

Re: Notice of Ex Parte Presentation
MB Docket Nos. 07-29 and 07-198

Dear Ms. Dortch:

Cablevision Systems Corporation (“Cablevision”), by its counsel, hereby responds to several issues that have arisen in the above-captioned dockets.

First, Verizon has suggested that pending program access complaints involving terrestrially-delivered programming are “ripe for decision” and should be resolved “no later than the time at which an order issues in this proceeding.”^{1/} Verizon’s suggestion that pending complaints are “ripe for decision” under a new standard that has yet to be established by the Commission is extraordinary and meritless. It would contravene basic norms of procedural fairness for the Commission to announce new rules for adjudicating complaints involving access to terrestrial withholding and concurrently resolve pending complaints pursuant to those new rules without affording the parties an opportunity to present their positions in light of those new rules.

Verizon suggests that the Commission can simply proceed to decision in the pending complaints because a rule subject terrestrial programming does nothing more than “resolve an open issue consistent with the Commission’s precedent.”^{2/} If the Commission’s existing rules already permitted it to reach terrestrial withholding under section 628(b), then there would have been no need to initiate the instant proceeding. Indeed, the central question posed by the Commission in this proceeding is whether “it would be appropriate to *extend* our program access

^{1/} See e.g., Letter from Leora Hochstein, Verizon, to Marlene H. Dortch, Secretary, Federal Communications Commission, MB Docket Nos. 07-29 & 07-198 (January 6, 2010) (“Verizon January 6 *Ex Parte*”).

^{2/} Letter from William H. Johnson, Verizon, to Marlene H. Dortch, Secretary, Federal Communications Commission, MB Docket Nos. 07-29 & 07-198 (January 13, 2010) (“Verizon January 13 *Ex Parte*”).

rules to all terrestrially delivered cable-affiliated programming.”^{3/} The Commission’s framing of the issue in that proceeding implicitly acknowledges that its current rules do not apply to terrestrial programming.^{4/} Further, the Media Bureau last year expressly acknowledged in the AT&T/CoxCom dispute that “under existing precedent, there is no basis for” granting relief under section 628(b) for withholding of terrestrial programming.^{5/} Hence, any suggestion by Verizon that subjecting terrestrial programming to the constraints of section 628 does nothing more than resolve “unsettled” law or clarify “uncertainty” are wholly without foundation.

Second, the Commission is reportedly considering the establishment of a presumption of harm arising from an MVPD’s lack of access to a terrestrially-delivered regional sports network (“RSN”). While Cablevision has demonstrated in the record of this proceeding that MVPDs can be viable competitors even if they lack access to a terrestrially-delivered RSN, it writes here to emphasize a fundamental point: to the extent that lack of access to so-called “must have” RSN programming can be presumed to significantly hinder an MVPD’s ability to compete, such a presumption cannot apply where that MVPD is providing the local professional games shown on that RSN to its subscribers.

For example, in the program access complaints brought against MSG HD by AT&T and Verizon, it is undisputed that each complaining MVPD carries the standard definition (SD), satellite-delivered MSG and MSG+ services. Thus, lack of access to MSG HD and MSG+ HD has not prevented Verizon or AT&T from providing *any* local professional games to its subscribers.

The Commission’s previous conclusions regarding the impact of withholding “must have” sports programming were predicated upon a complete deprivation of local professional sports programming. AT&T and Verizon subscribers, however, have been able to watch every local professional game carried on MSG and MSG+, thereby belying claims that their subscribers are deprived of crucial sports programming and distinguishing its circumstance from RSN access issues in Philadelphia and San Diego.

The Commission has never held or even remotely suggested that subscribers are deprived of “must have” sports programming where, as here, they have access to all local professional

^{3/} *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*, 22 FCC Rcd 17791, ¶ 116 (2007) (emphasis added).

^{4/} *Alaska Prof. Hunters Ass’n, Inc. v. FAA*, 177 F.3d 1030, 1035 (D.C. Cir. 1999) (“Once an agency gives its regulation an interpretation, it can only change that interpretation as it would formally modify the regulation itself: through the process of notice and comment rulemaking.”)

^{5/} *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 (“AT&T/CoxCom Order”).

games exhibited in a market.^{6/} Further, it would be irrational for the Commission to presumptively equate this situation to one in which an MVPD lacks access to all games shown on an RSN.^{7/} A fortiori, there is no justification in the record or in the statute for an absolute prohibition on exclusive agreements for the provision of HD RSNs where the same content is available on SD channels.^{8/}

Finally, the Commission also is reportedly considering establishing a presumption that withholding non-replicable terrestrial programming significantly hinders an MVPD's competitive viability. As a threshold matter, the Commission has neither solicited nor articulated any guidelines with respect to how to determine whether or not a particular programming service is or is not replicable.

Even if the Commission could articulate a reasonable – and constitutional – standard for determining whether a service or category of programming is non-replicable, there is no evidentiary basis for automatically presuming that withholding non-replicable programming significantly hinders a competing MVPD. A “niche” programming service such as a foreign language channel, for example, is almost by definition non-replicable. In the New York area, there are several different foreign language channels, but in many instances there is only one channel for a particular language. While such a service may be non-replicable, it is by no means reasonable to presume that its absence from a distributor's line-up “significantly hinders” the distributor's competitive viability. To the extent that the Commission opts to distinguish between the competitive “significan[ce]” of certain types of non-replicable programming, it must articulate and justify the basis for those distinctions. There is nothing in the record to date that provides it with a basis for doing so.

^{6/} The Commission has never ruled that an HD service is “must have” programming in circumstances where that same service is available to an MVPD in SD, and Cablevision's submissions in the instant dockets and the two pending program access proceedings demonstrate that such a conclusion is untenable. To the extent that the Commission seeks to rely on Verizon's Global Marketing Research Services Survey included in its January 6, 2010 *ex parte*, Cablevision has shown, in a separate submission from the undersigned also transmitted to the Commission today, that the Verizon survey is inaccurate, unreliable and not probative of the significance of access to MSG HD in a circumstance in which Verizon carries MSG SD. Further, Verizon's survey was submitted in the reply phase of that proceeding, thereby depriving defendants of the full opportunity to prepare and submit its own affirmative evidentiary submission such as a survey or statistical study with its answer.

^{7/} *National Mining Ass'n v. Babbitt*, 172 F.3d 906, 910 (D.C. Cir. 1999) (presumption in agency regulation is arbitrary unless “the circumstances giving rise to the presumption make it more likely than not that the presumed fact exists”).

^{8/} See Verizon January 6 *Ex Parte* (“Congress should adopt an across-the-board ruling prohibiting cable operators and their affiliates from withholding access to this unique form of programming, without the need for further proceedings”).

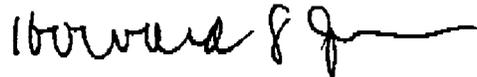
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Pursuant to section 1.1206(b) of the Commission's rules, an electronic copy of this letter is being filed electronically with the Office of the Secretary and served electronically on the Commission participants in the meetings.

Should there be any questions regarding this matter, please contact the undersigned.

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

cc: Sherrese Smith
Joshua Cinelli
Jamila Bess Johnson
Joshua Cinelli
Rick Kaplan
Rosemary Harold
Millie Kerr
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Robert Ratcliffe
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