January 13, 2010

BY ELECTRONIC FILING

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

Re: Ex Parte Communication in MB Docket Nos. 07-29, 07-198

Dear Ms. Dortch:

In this letter, the Coalition for Competitive Access to Content ("CA2C") briefly responds to a recent *ex parte* letter filed by Cablevision Systems Corporation ("Cablevision").[1] Cablevision suggests, as it has repeatedly throughout this proceeding, that the Commission lacks jurisdiction to close the so-called "terrestrial loophole" by which cable operators and their affiliated programmers have denied competitors "must have" sports programming for more than a decade. We have attached to this letter a set of talking points demonstrating the Commission's jurisdiction to close the terrestrial loophole in general. Here, we wish to make three additional points in specific response to Cablevision.[2]

First, Cablevision's letter once again ignores the D.C. Circuit's binding legal holdings in *National Cable & Telecomm. Ass'n v. FCC*[3] with respect to the relationship between the general prohibitions of Section 628(b) and the more specific provisions of Section 628(c). Cablevision argues that the Commission may not issue rules under Section 628(b) that sweep more broadly than those found in Section 628(c)(2).[4] But in rejecting that very argument made by the cable industry in *NCTA*, the D.C. Circuit held precisely otherwise. Specifically, the court found that, "[b]y its terms, section 628(c) describes only *the '[m]inimum contents of regulations,'*

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1 *See* Letter from Henk Brands to Marlene H. Dortch, MB Docket Nos. 07-29 and 07-198 (Jan. 8, 2010) ("Cablevision *ex parte*").

2 We also note that Cablevision filed a second *ex parte* on January 8, directly contradicting its conclusion that the Commission lacks jurisdiction to close the terrestrial loophole, and conceding that a Section 628(b) complaint would lie for conduct involving terrestrially delivered programming. *See* Letter from Howard Symons to Marlene H. Dortch, at 3, MB Docket Nos. 07-29 and 07-198 (Jan. 8, 2010).

3 567 F.3d 659 (D.C. Cir. 2009) ("*NCTA*").

4 Cablevision *ex parte* at 3.

and . . . Congress's enumeration of specific, required regulations in subsection (c) actually suggests that Congress intended subsection (b)'s generic language to cover a broader field."[5] The court also noted the breadth of Section 628(b) and confirmed that "'statutes written in broad, sweeping language should be given broad, sweeping application.'"[6] Cablevision may believe that the *NCTA* court "stretched Section 628's text well beyond the breaking point,"[7] but its cramped reading of Section 628(b),which would read the "minimum contents of regulation" languge out of the statute entirely, is of no consequence in the face of authoritative judicial precedent directly to the contrary.[8]

Second, Cablevision also ignores the holding in the *NCTA* decision when it argues that the withholding of terrestrial programming has no "effect" on the provision of satellite cable programming to consumers.[9] Indeed, the *NCTA* court explicitly found that conduct not involving satellite cable programming (in that case, exclusive arrangements to serve MDUs) could be an "unfair practice" within the ambit of the statute if it hindered the provision of satellite programming to consumers – even if it also hindered the provision of other kinds of programming.[10]

Here, the Commission has repeatedly recognized the "must have" nature of RSN programming, and has already found that "there is substantial evidence that a large number of consumers will refuse to purchase DBS service if the provider cannot offer an RSN."[11] Because

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[5] *NCTA*, 567 F.3d at 664-65 (emphasis added) (citations omitted).

[6] *Id.* at 664 (citation omitted).

[7] Cablevision *ex parte* at 3 n.1.

[8] Cablevision also argues, without support, that the Commission cannot use its rulemaking authority under Section 628(c)(2) to specify prohibited conduct under Section 628(b), because Section 628(c)(2) required that the Commission adopt regulations "within 180 days after the date of enactment of this section." *Id.* at 3, n.1. While that provision required the Commission to adopt initial regulations within 180 days, it is not a bar to adoption of additional, expanded regulations under that authority. *See, e.g., Building Owners and Managers Association v. FCC,* 254 F.3d 89 (D.C. Cir. 2001) (affirming adoption of new regulation expanding Commission's prohibition on restrictions on the placement of Over the Air Reception Devices two years after enactment under statutory provision that required Commission to adopt rules "within 180 days after the date of enactment of this Act").

[9] Cablevision *ex parte* at 2-3.

[10] *NCTA*, 567 F.3d at 666 (noting that nobody had urged the Commission to "modify its rule so as to ban exclusivity deals only to the extent they affect satellite cable or satellite broadcast programming alone").

[11] *Adelphia Communications Corp., Time Warner Cable Inc., and Comcast Corp.*, 21 FCC Rcd. 8203, ¶ 151 (2006)("*Adelphia Order").* The Commission reiterated that conclusion and used

an MVPD cannot provide consumers with *any* of its programming if they refuse to purchase service that does not include RSN programming, the clear "effect" of RSN withholding is to "significantly hinder or prevent" the MVPD from "providing satellite cable programming to subscribers or consumers." 47 U.S.C. § 548(b). As the D.C. Circuit recognized, that is all the statute requires.

Third, Cablevision repeatedly accuses CA2C of employing "legal jujitsu."[12] This is a curious accusation from a company in Cablevision's position. Cablevision, a "cable operator," wholly owns and controls a programmer engaging in anticompetitive withholding of RSN programming. (Indeed, Cablevision also owns professional sports teams that are the subject of such withholding.) For purposes of withholding, Cablevision *is* the programmer – and everybody knows this is why withholding has occurred in the first place. If Cablevision thinks that the statute's restrictions on unfair practices, which explicitly apply to the conduct of "cable operators," cannot apply where the cable operator owns, controls, or manages a programmer, it is the one engaging in jujitsu.[13]

It is worth noting that Cablevision soon plans a spin-off of its RSN business, under which the RSNs currently wholly owned by Cablevision would be owned directly by Cablevision's shareholders. After this spin-off, although Cablevision will no longer have an ownership interest in the RSN business, the Dolan family will continue to control both companies and there will be a substantial overlap in senior management and the boards of directors.[14] If the Commission were to limit its enforcement against unfair practices to entities owned, controlled, or managed by a cable operator, Cablevision's RSNs would already have an evasion strategy in place.

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it as a basis to extend the prohibition on exclusive arrangements with respect to satellite-delivered programming in all markets across the country. *See Implementation of the Cable Television Consumer Protection and Competition Act of 1992*, 22 FCC Rcd. 17791, ¶¶ 39-49 and Appendix C (2007).

12 *See* Cablevision *ex parte* at 4-5.

13 Analogously, in *Adelphia*, the Commission applied program access conditions to "Covered RSNs," which the Commission defined as any RSN that the acquiring cable operators at the time managed or controlled, or in which they acquired an attributable interest in the future. *See Adelphia Order,* App. B, n. 1.

14 *See* Information Statement of Madison Square Garden, Inc., at 7 (submitted Jan. 11, 2010) (MSG will be owned by Cablevision shareholders; controlled by Charles F. Dolan, members of his family, and certain related family entities; James L. Dolan will serve as both Executive Chairman of MSG and as President/CEO of Cablevision; Hank J. Ratner will serve as the President/CEO of MSG and as Vice Chairman of Cablevision; and MSG and Cablevision will have eight common directors) (available at http://www.sec.gov/Archives/edgar/data/1469372/000095012310001448/y78599a6exv99w1.htm).

To prevent such evasion, the Commission should presume that a cable operator holding an attributable interest in a programming vendor manages or controls that vendor, such that, absent rebuttal, conduct of the vendor is deemed to be conduct of the cable operator itself – fully remediable under the program access rules. This approach, not dissimilar to the Commission's approach in the *Adelphia Order*,[15] would ensure that any rule promulgated in this proceeding would effectively reach anticompetitive activities of "cable operators" – entities indisputably covered by Section 628(b)[16] that are, after all, the root of the problem Congress sought to remedy.

Pursuant to the Commission's rules, I am filing one copy of this letter electronically in each of the dockets listed above.

Respectfully submitted by:

/s/

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Attachment

cc: Austin Schlick,William Lake, Sherrese Smith, Jamila Bess Johnson, Joshua Cinelli, Rick Kaplan, Rosemary Harold, and Millie Kerr.

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15 *Adelphia Order*, ¶ 161 and App. B (placing "conditions, on a going-forward basis, that forbid the Applicants from acquiring an attributable interest in, an option to purchase an attributable interest in, or one that would permit management or control of an RSN during the period of the conditions set forth in Appendix B if the RSN is not obligated to abide by the conditions"). In addition, while in *Adelphia* the source of the Commission's authority was its jurisdiction under Section 310(d) over "a person" (in that case, a cable operator) acquiring control over a corporation holding radio licenses, here, analogously, the source of the Commission's authority is its explicit jurisdiction under Section 628(b) over a "cable operator" – in this case to regulate its anticompetitive and unfair acts or practices.

16 Cablevision *ex parte* at 1.

TERRESTRIALLY-DELIVERED PROGRAMMING IS NOT BEYOND THE REACH OF SECTION 628

The Statute Does Not Foreclose Commission Action to Close the So-Called Terrestrial Loophole.

- Section 628(b) sets forth the substantive standard – it makes unlawful ***any*** "unfair methods of competition or unfair acts or practices the purpose or effect of which is to hinder significantly or prevent any MVPD from providing satellite cable programming to subscribers."

- Nothing on the face of section 628(b) limits its scope to the specific practices identified in section 628(c), or the "unfair methods of competition" within its ambit to conduct involving satellite delivered programming.

    - As the Commission correctly found in the ***MDU Order***, conduct that may not directly relate to programming may form the basis for a violation.

    - In *NCTA v. FCC*, the DC Circuit held that sections 628(b) is written in "broad and sweeping terms" and covers all "practices having an anticompetitive effect on [MVPD] service;" and by its "plain terms," section 628(b) "prohibit[s] cable company practices with the purpose or effect of preventing competing MVPDs" from offering a competitive video service. *National Cable & Telecomm. Ass'n v. FCC*, 567 F.3d 659, 664 (D.C. Cir. 2009) (*NCTA v. FCC*).

- That 628(b) sweeps more broadly than 628(c) is confirmed by the structure of section 628.

    - Section 628(b) applies to all cable operators; 628(c) applies only to vertically integrated operators; thus 628(b) is broader.

    - Section 628(c) does not require a showing of competitive harm, and thus identifies practices that are *per se* violations of section 628.

    - Section 628(c)(2) specifies only the **minimum contents** of such regulations, and thus -- as the Commission recognized in the MDU Order -- does not express the limits of the Commission's jurisdiction under section 628, but rather is the starting point, the base case, for those regulations

    - Thus, while Section 628(c)(2) *requires* the Commission to address the problem of exclusive contracts and discrimination for video programming in the context of satellite delivered programming, it does not foreclose it from addressing it in the terrestrial context and cannot be read to be a constraint on the Commission's authority. Doing so reads out of the statute the term "minimum content of regulations."

- The language of section 628 simply reflects Congress's understanding of the nature of the delivery mechanism used at the time of its enactment. Since "there was no reason to consider" terrestrial delivery in 1992, "its omission would mean nothing at all." *Union Dominion Industries, Inc. v. United States*, 532 U.S. 822, 836 (2001).

  - As the Supreme Court has recognized, it is not a reasonable cannon of interpretation that the draftsmen of acts delegating agency powers . . . can or do include specific consideration of every evil sought to be corrected." *Mourning v. Family Publications Service, Inc.*, 411 U.S. 356, 372 (1973).

  - The absence of such foresight "is precisely one of the reasons why regulatory agencies . . . are created." *Id.* at 372-73.

  - Where legislation addresses the power of administrative agencies, "a congressional decision to prohibit certain activities does *not* imply an intent to disable the relevant administrative body from taking similar action with respect to activities that pose a similar danger." *Texas Rural Legal Aid, Inc. v. Legal Services Corp.*, 940 F.2d 685, 694 (D.C. Cir. 1991) (emphasis in original).

  - "A congressional prohibition of particular conduct may actually *support* the view that [an] administrative entity can exercise its authority to eliminate a similar danger" pursuant to its more general statutory authority. *Id.* (emphasis in original).

  - "In the absence of affirmative and significant evidence that Congress intended the omission to be read as a mandate . . . we find Congress not to have precluded or required any particular [agency] solution." *Cheney R.R. v. ICC*, 902 F.2d 66, 69 (1990).

Nothing in the Legislative History Supports Claims that Congress Intended to Exclude Terrestrially-Delivered Programming from the Program Access Rules.

- The legislative history and purpose of an Act do not suggest that Congress intended to foreclose the Commission from addressing program exclusivity in the terrestrial context.

  - In proposing section 628, Rep. Tauzin never indicated any intent to limit the Commission's authority, or to constrain it to the listed categories of service. He explained the problem it was intended to address was that cable companies that control programming "now have refused to sell that program[ing] to anybody else who would compete with cable." 138 Cong. Rec. 19,149 (1992). *Id.* at 19,152 (Rep. Harris) (noting that "cable companies which also own programming cannot refuse to sell their programming to other distribution systems in order to choke off any competition.").

- Although the Senate version did not contain the term "satellite cable programming," neither side of the debate found this difference to be substantive. Indeed, Rep. Tauzin described the Senate bill as similar.

- Nothing in the Conference Report explains the difference between the language of the two bills or suggested that adoption of the language referring to "satellite delivered programming" was substantive and/or intended to limit the Commission's authority only to programming delivered by satellite.

- Indeed, the legislative history confirms that Congress intended in section 628 to equip the Commission with the tools necessary to break the ***"stranglehold"*** that cable operators' had over video programming, which they were (and still are) using to throttle competition. 138 Cong. Rec. H6540 (July 23, 1992) (Rep. Eckart) (emphasis added) (noting that cable operators know that "if they maintain their stranglehold on this programming, they can shut down competition – *even the deep pockets of the telephone companies*.").

- The premise of the Act supports broad authority to address abuses of vertical integration by cable incumbents.

  - 1992 Cable Act, Pub. L. no. 102-385, 106 Stat. 1460, § 2(a)(5) (finding that vertically integrated programmers "have the incentive and ability to favor their affiliated cable operators over nonaffiliated cable operators and programming distributors using other technologies."

  - *Id.* at § 2(b)(5) (expressing the "policy of the Congress" to "ensure that cable television operators do not have undue market power vis-à-vis . . . consumers.")

  - H.R. Conf. Rep. 102-862 at 93 (1992) (directing the Commission to "address and resolve the problems of unreasonable cable industry practices, including restricting the availability of programming and charging discriminatory prices to non-cable technologies," and to "encourage arrangements which promote the development of new technologies providing facilities-based competition to cable.")

Commission Precedent Likewise Does Not Foreclose Extension of the Program Access Rules to Terrestrially-Delivered Programming.

Commission precedent does not compel the conclusion that conduct not proscribed as *per se* unlawful under section 628(c) necessarily is lawful under section 628(b).

- The *MDU Order*, affirmed by the DC Circuit, rejects such a narrow interpretation of section 628(b). There, the FCC held the prohibition on "unfair . . . practice[s]" reaches conduct that "can be used to impede the entry of competitors into the market and foreclose competition." *Exclusive Service Contracts for Provision of Video Service in Multiple Dwelling Units and Other Real Estate Developments*, Report and Order, 22 FCC

Rcd 20235, ¶ 43 (2007) (*MDU Order*), *aff'd, NCTA v. FCC*. As the FCC's most recent precedent, the *MDU Order* is controlling.

- Setting aside the issue whether Pre-*MDU Order* is controlling in light of the *MDU Order*, that precedent does not foreclose action to close the terrestrial loophole under section 628(b).

    - Many of those orders concern the scope of section 628(c) -- and thus the conduct proscribed as per se unlawful -- not section 628(b).

        - *DirecTV v. Comcast*, 13 FCC Rcd 21822, ¶ 25 (interpreting "section 628(c)" as limited to satellite)
        - *Echostar v. Comcast*, 14 FCC Rcd 2089, ¶ 21 (same)
        - *2002 Extension Order*, 17 FCC Rcd 12124, ¶ 73 (noting that the Commission has concluded that "the language of section 628(c) expressly applies to satellite cable programming" and that "terrestrially delivered programming is outside the direct coverage of section 628(c)")
        - *2007 Extension Order*, 22 FCC Rcd 17791 at ¶ 78 (declining to extend section 628(c) to terrestrial programming.

    - Precedent involving section 628(b) simply held -- on the facts of those cases -- that, standing alone, a decision to move programming to terrestrial delivery and a refusal to provide it to competitors was not a *per se* unfair practice under section 628(b).

        - *RCN v. Cablevision*, 14 FCC Rcd 17093, para. 25 ("Standing alone," Defendant's decision to deliver programming terrestrially and deny it to Complainants was not unfair under section 628(b)).
        - *DirecTV v. Comcast*, 15 FCC Rcd 22802, para. 13 (acknowledging that there may be circumstances where moving programming to terrestrial delivery could be cognizable under section 628(c), but finding that the facts alleged are not sufficient to constitute such a violation).
        - *RCN v. Cablevision*, 16 FCC Rcd 12048, para. 15 (same).

- In any event, most of this precedent addressed the terrestrial delivery issue in the context of specific program access complaints rather than a rulemaking in which the Commission fully considered the scope of its authority under section 628(b). In the *2002 Extension Order* and *2007 Extension Order*, the Commission confined its analysis to section 628(c)(2)(D), the exclusivity prohibition in the "minimum contents of regulations," and did not focus on the scope of section 628(b) and its interplay with section 628(b).