

January 13, 2010

FILED ELECTRONICALLY

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

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

Dear Ms. Dortch:

It has been reported that the Commission is considering an order in the above-captioned dockets that would establish a prohibition or a presumption against withholding terrestrially-delivered regional sports programming. Such a content-based restriction would be subject to strict scrutiny under the First Amendment.

Restrictions based on the content of speech are presumptively invalid.^{1/} Under the strict scrutiny test applicable to such restrictions, the Commission would be required to demonstrate that the burden on speech serves a compelling governmental interest and is narrowly tailored to achieve that end.^{2/} As Cablevision has explained in its filings in this proceeding, there is no evidence to suggest that withholding terrestrially-delivered sports programming is an “unfair or deceptive” act or practice or that new MVPD entrants require access to such programming in order to provide satellite cable programming to subscribers or consumers.^{3/} To the contrary, the

^{1/} See, e.g., *Ysursa v. Pocatello Educ. Ass’n*, 129 S. Ct. 1093, 1098 (2009) (“Restrictions on speech based on its content are ‘presumptively invalid’ and subject to strict scrutiny.”); *Davenport v. Washington Educ. Ass’n*, 127 S. Ct. 2372, 2381 (2007) (same).

^{2/} *Simon & Schuster, Inc. v. Members of the New York State Crime Victims Bd.*, 502 U.S. 105, 118 (1991) (to survive strict scrutiny, “the State must show that its regulation is necessary to serve a compelling state interest, and is narrowly drawn to achieve that end”) (internal quotation marks omitted).

^{3/} See, e.g., Letter from Howard J. Symons, Counsel to Cablevision Systems Corp., to Marlene H. Dortch, MB Docket Nos. 07-29 & 07-198 (Nov. 13, 2009); Letter from Howard J. Symons, to Marlene H. Dortch, MB Docket Nos. 07-29 & 07-198 (Jan. 8, 2010).

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

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D.C. Circuit noted less than a year ago the undeniable “evidence of ever-increasing competition among video providers: Satellite and fiber optic video providers have entered the market and grown in market share since the Congress passed the 1992 Act, and particularly in recent years.”^{4/} A rule that disfavored sports programming would therefore fail the strict scrutiny test applicable to such a content-based restriction.

Even if such a prohibition or a presumption against withholding terrestrially-delivered regional sports programming were determined to be content-neutral, it could not survive intermediate scrutiny under the First Amendment.^{5/} As Cablevision explained in its initial comments in this proceeding,^{6/} the First Amendment implications of program access requirements increase the burden on the Commission to show that any such requirement is truly specific to addressing a real and measurable harm, based on specific evidence.^{7/} No such showing could be made for an extension of the rules to terrestrially-delivered sports programming.^{8/}

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

Sincerely,



Howard J. Symons

cc: Sherrese Smith
Joshua Cinelli
Jamila Bess Johnson

^{4/} *Comcast Corp. v. Federal Communications Commission*, 579 F.3d 1, 8 (D.C. Cir. 2009).

^{5/} *See, e.g., Turner Broadcasting v. FCC*, 512 U.S. 622, 659-662 (1994) (discussing application of strict scrutiny versus intermediate scrutiny).

^{6/} *See* Comments of Cablevision Systems Corp., MB Docket Nos. 07-29, 07-198, at 5-6 (filed January 4, 2008).

^{7/} *See Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027, 1041 (D.C. Cir. 2002) (“[F]irst amendment ‘intermediate scrutiny’ . . . is more demanding than the arbitrary and capricious standard of the APA.”); *Time Warner Entm’t Co. v. FCC*, 240 F.3d 1126, 1137 (D.C. Cir. 2001) (“*Time Warner II*”) (“[T]o pass even the arbitrary and capricious standard, the agency must at least reveal a rational connection between the facts found and the choice made. Here the FCC must also meet First Amendment intermediate scrutiny.”) (internal quotation marks and internal citations omitted).

^{8/} *See Comcast, supra* note 4, 579 F.3d at 8 (“Considering the marketplace as it is today and the many significant changes that have occurred since 1992, the FCC has not identified a sufficient basis for imposing upon cable operators . . . ‘special obligations,’ *Turner I*, 512 U.S. at 641 . . . ”)

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Joshua Cinelli
Rick Kaplan
Rosemary Harold
Millie Kerr
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