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VIA ELECTRONIC FILING

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

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

Dear Ms. Dortch:

This letter is in response to the *ex parte* letter of Cablevision Systems Corporation (“Cablevision”) filed on January 8, 2010.¹ As explained below, Cablevision’s *ex parte* letter does not undermine the conclusion that the withholding of terrestrially delivered regional sports programming runs afoul of Section 628(b).²

1. *First*, Cablevision’s argument that a “vendor of terrestrial programming” that is affiliated with a cable operator “is not captured” by the statutory prohibition of Section 628(b) because it is not “a cable operator, a satellite cable programming vendor in which a cable operator has an attributable interest, or a satellite broadcast programming vendor” is misplaced. Section 628(b) bars any “cable operator” from engaging in “unfair methods of competition” and “unfair . . . acts or practices” that have the “purpose or effect of . . . hinder[ing] significantly or . . . prevent[ing] an[other] [MVPD] from providing satellite cable programming or satellite

¹ Letter from Henk Brands to Marlene H. Dortch, FCC, MB Docket Nos. 07-29, 07-198 (Jan. 8, 2010) (“Cablevision Jan. 8 Ex Parte”).

² *See, e.g.*, Letter from Michael E. Glover, Verizon, to Chairman Michael J. Copps, *et al.*, FCC, MB Docket Nos. 07-29, 07-198, at 3-6 (May 28, 2009).

broadcast programming to subscribers or consumers.”³ Just as a cable operator cannot violate this prohibition directly, neither can it do so indirectly by acting through an affiliate. Indeed, the statute and the Commission’s rules generally apply to cable operator’s “affiliates,”⁴ which Section 602(2) defines to mean “another person who owns or controls, is owned or controlled by, or is under common ownership or control with, such person.”⁵ Likewise, the Commission’s rules specifically confirm that the rules adopted pursuant to Section 628 apply in the context of affiliates, and further define the attribution standard for this purpose.⁶ And as the Commission and the D.C. Circuit have confirmed, Section 628(b) extends beyond conduct involving any types of programming, and therefore obviously extends beyond particular types of programming. *See NCTA v. FCC*, 567 F.3d 659, 665 (D.C. Cir. 2009) (“Congress had a particular manifestation of a problem in mind, but in no way expressed an unambiguous intent to limit the Commission’s power solely to that version of the problem.”). Accordingly, the terms of the statute apply to any type of cable-affiliated programming regardless of how it is delivered.⁵

2. *Second*, to the extent Cablevision suggests that an affiliated cable programming vendor that supplies the standard-definition format of particular regional sports programming via satellite while supplying another format (*i.e.*, the high-definition (“HD”) feed) of that same programming terrestrially is exempt from the prohibition of Section 628(b) as a “vendor of terrestrial programming,” its argument is even weaker because such a programming vendor is a “satellite cable programming vendor” covered by the express terms of the statute. In that context, the affiliated vendor would also fall within the statutory definition of a “satellite cable programming vendor.” This is because the vendor undeniably is “engaged in the production, creation, or wholesale distribution for sale of satellite cable programming, even if it decides to

³ 47 U.S.C. § 548(b).

⁴ 47 U.S.C. § 522(5) (“the term ‘cable operator’ means any person or group of persons (A) who provides cable service over a cable system and directly or through one or more affiliates owns a significant interest in such cable system, or (B) who otherwise controls or is responsible for, through any arrangement, the management and operation of such a cable system.”).

⁵ *Id.* § 522(2).

⁶ 47 C.F.R. § 76.1000(b).

⁵ This is especially appropriate where the practice of withholding terrestrially delivered regional sports programming – whether directly by the entity that delivers cable service to consumers or by an affiliate – is designed solely to benefit the cable operator itself and such a practice would not make sense absent the direction or influence of the cable operator. Indeed, the natural incentive for any supplier of programming, but for its affiliation with a cable operator that might benefit from withholding, would be to achieve the widest possible distribution of its programming. That a cable operator might involve an affiliate when engaging in acts that, by their plain terms, violate Section 628(b) does not insulate those acts.⁵ The Commission surely would not allow a cable operator to evade the Commission’s rules prohibiting MDU exclusive access agreements by, for example, creating a new affiliate or subsidiary to handle all negotiations with MDUs. So too, it would make no sense to allow a cable operator to circumvent the statute’s prohibition as it relates to regional sports by simply relying on an affiliate or subsidiary to engage in the proscribed acts.’

distribute some formats of that programming terrestrially.⁶ Accordingly, Section 628(b)'s prohibition directly applies.⁷ That the cable programming vendor has chosen to deliver some feeds of programming via satellite and other feeds of such programming terrestrially does not, on its own, remove it from the coverage of Section 628(b), and Cablevision's argument to the contrary slices the bologna too thin. The contrary conclusion urged by Cablevision would allow entities to end-run the statute's substantive prohibition simply by diverting programming to terrestrial delivery, a result that cannot be squared with Congress' intent to broadly prohibit unfair acts or practices that thwart video competition and consumer choice in Section 628(b) or with precedent.⁸

In sum, Section 628(b) reaches any conduct by an affiliate of a "cable operator" that runs afoul of the statutory prohibition. Furthermore, a cable programming vendor also falls within the definition of a "satellite cable programming vendor," and is therefore covered by Section 628(b), whenever it delivers programming via satellite, even if it delivers other feeds of that same programming terrestrially.

Sincerely yours,

A handwritten signature in black ink, appearing to be "Richard" followed by a stylized flourish.

⁶ See 47 U.S.C. § 548(i)(2) ("The term 'satellite cable programming vendor' means a person engaged in the production, creation, or wholesale distribution for sale of satellite cable programming, but does not include a satellite broadcast programming vendor.").

⁷ 47 U.S.C. § 548(b).

⁸ See, e.g., *DirecTV Inc. v. Comcast Corp.*, 15 FCC Rcd 22802, 22807 (¶ 13) (2000) ("We acknowledge that there may be some circumstances where moving programming from satellite to terrestrial delivery could be cognizable under 628(b) as an unfair method of competition or deceptive practice if it precluded competitive MVPDs from providing satellite cable programming.").