MINTZ LEVIN

DATE STAMP
AND RETURN

701 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
202-434-7300
202-434-7400 fax
www.mintz.com

June 22, 2011

VIA HAND DELIVERY

RECEIVED - FCC

JUN 22 2011

Federal Communications Commission
Bureau / Office

William T. Lake
Chief, Media Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: Notice of Ex Parte Presentation
MB Docket No. 07-198

Verizon v. Madison Square Garden, L.P. and Cablevision Systems Corp.
File No. CSR 8185-P

AT&T v. Madison Square Garden, L.P. and Cablevision Systems Corp.
File No. CSR 8196-P

Dear Mr. Lake:

The D.C. Circuit's decision in *Cablevision v. Federal Communications Commission* vacated "that portion of the Commission's order treating certain acts of terrestrially delivered programming withholding as categorically unfair."[1/] In light of this decision, the Commission must now resume its notice and comment proceeding to impart meaning to the unfairness prong of its new rules governing access to terrestrial programming before the Media Bureau can address the above-captioned complaints. Any other course would be contrary to law and the court's mandate.

I. The Commission Must Effectuate the Court's Remand Via a Notice and Comment Proceeding Before the Bureau May Proceed to Adjudicate the Pending Complaints

Under the express terms of section 628(b), the Commission can take action against withholding of terrestrial programming only if such an act constitutes an "unfair" act or practice. The D.C. Circuit's decision, however, vacated the Commission's rule condemning the withholding of terrestrial programming as categorically unfair. While Verizon and AT&T seize

1/ *Cablevision v. Federal Communications Commission*, No. 10-1062, slip op. at 47-48 (June 10, 2011) ("*Cablevision v. FCC*").

on the court's reference to "case-by-case" assessments of unfairness to assert that the Commission can proceed immediately to decision in the pending complaint proceedings,[2/] this assertion ignores basic principles of administrative law, the Commission's own rules, the language of section 628 and the Commission's precedent, and fundamental fairness – all of which require the Commission to complete its remand proceedings *before* deciding the pending complaints.

First, when a court "vacates" an agency's order or rule, conditions are "returned to the status quo ante, before the . . . rule took effect."[3/] Before the *2010 Program Access Order* took effect,[4/] the Commission already had in effect a rule prohibiting "unfair" conduct.[5/] At that time, the Commission had reached a definitive interpretation of that rule, under which the withholding of terrestrially-delivered programming was not "unfair."[6/] The effect of the D.C. Circuit's decision invalidating the *2010 Program Access Order*'s condemnation of terrestrial withholding as categorically "unfair" is to restore the pre-2010 interpretation under which such conduct was deemed not unfair. Any adjudicative decision deeming the withholding of terrestrial programming "unfair" would change that interpretation. Such a change must be preceded by notice and comment. As the D.C. Circuit has put it:

2/ *See* Letter from Michael E. Glover, Senior Vice President and Deputy General Counsel, Verizon, to William T. Lake, Chief, Media Bureau (filed June 15, 2011) ("Verizon June 15 Letter") at 5-6; Letter from Aaron Panner, Counsel to AT&T, to Marlene H. Dortch, Secretary, FCC (File No. CSR-8196-P) (filed June 20, 2011) ("AT&T June 20 Letter") at 4.

3/ *Independent U.S. Tanker Owners Committee v. Dole*, 809 F.2d 847, 855 (D.C. Cir. 1987). *See also Georgetown Univ. Hosp. v. Bowen, 821 F.2d 750, 757* (D.C. Cir. 1987) ("the effect of invalidating a rule is to reinstate the rules previously in force") (internal quotation marks and brackets omitted), *aff'd*, 488 U.S. 204 (1988)).

4/ *See generally, Review of the Commission's Program Access Rules and Examination of Program Tying Arrangements, First Report and Order*, 25 FCC Rcd 746 (2010) ("*2010 Program Access Order*").

5/ 47 C.F.R. § 76.1001 (2009).

6/ *See, e.g., DirecTV, Inc. v. Comcast Corp.*, 13 FCC Rcd 21822, ¶ 32 (CSB 1998) ("[W]e decline to find that, standing alone, Comcast's decision to deliver Comcast SportsNet terrestrially and to deny that programming to DirecTV is 'unfair.'"), *aff'd, DirecTV, Inc. v. Comcast Corp.*, 15 FCC Rcd 22082, ¶ 14 (2000) (noting that Bureau concluded "that, standing alone, [Comcast's] decision to deliver Comcast SportsNet terrestrially and to deny that programming to [Complainants] is 'unfair'" and stating that "[c]omplainants have submitted nothing to cause us to question the Bureau's reasoning on this issue"). *See also Dakota Telecom Inc. v. CBS Broadcasting, Inc. d/b/a Midwest SportsChannel and Bresnan Commc'ns*, 14 FCC Rcd 10500, ¶¶ 21-22 (1999) (exclusive agreements between programmers and cable operators not restricted by Section 628(c) cannot be proscribed as "unfair"); *RCN Telecom Services of New York, Inc., et. al. v. Cablevision Systems, Inc. et al.*, 16 FCC Rcd 12048, ¶ 15 (2001) (rejecting argument that refusal to sell terrestrial programming constitutes a prohibited "unfair act").

> 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. . . . Under the APA, agencies are obliged to engage in notice and comment before formulating regulations, which applies as well to "repeals" or "amendments." See 5 U.S.C. § 551(5). To allow an agency to make a fundamental change in its interpretation of a substantive regulation without notice and comment would undermine those APA requirements. [7/]

Even if the pre-2010 state of affairs had been different, notice and comment would still be required: the rule that the Commission promulgated in 2010 (47 C.F.R. § 76.1001(b)) itself was an interpretation of the pre-existing rule (renumbered as 47 C.F.R. § 76.1001(a)).[8/] Thus, changing the 2010 interpretation likewise requires notice and comment.

Second, in the *2010 Program Access Order*, the Commission itself decided that a rulemaking is the appropriate vehicle for defining conduct that is "unfair" under section 628(b). There are sound public policy reasons for proceeding in this fashion, since this issue would affect not just the parties to a particular dispute but also thousands of participants throughout the industry. A rulemaking is the most appropriate means for ensuring that potentially affected parties have an opportunity to provide input and ensure full consideration of the issues raised by the court in connection with developing a new "unfairness" definition, such as the potential pro-competitive effects of exclusivity and selective distribution of terrestrially-delivered programming and the merits of "adopting a public interest exception mirroring the one for satellite programming."[9/] In the absence of a defined standard for "unfairness," moreover, cable operators and subject programmers will face the prospect of not knowing whether they could be compelled to make terrestrial programming available to competing MVPDs. Such uncertainty could well chill investment in new programming ventures.

Further, the statute itself envisions that the Commission define "unfair" practices by way of rulemaking: Section 628(c)(1) authorizes the Commission "to specify particular conduct that is prohibited by subsection (b)" by "prescrib[ing] regulations."[10/] Thus, the Commission predicated its 2010 terrestrial program access rules on the "*rulemaking authority* expressly

---

7/ *Paralyzed Veterans of Am. v. D.C. Arena L.P.*, 117 F.3d 579, 586 (D.C. Cir. 1997).

8/ *See* 47 C.F.R. § 76.1001(b) ("The phrase 'unfair . . .' *as used in paragraph (a) of this section* includes, but is not limited to the following . . .") (emphasis added).

9/ *Cablevision v. FCC*, slip op. at 42-47.

10/ *Accord 2010 Program Access Order*, Statement of Commissioner Baker ("Regulation must, however, be accomplished with statutory authority, and rules of general applicability must be adopted via rulemaking. . . . I am pleased that we are addressing this issue in a rulemaking proceeding rather than through the narrow lens of a specific adjudication . . . .").

granted to the Commission through Sections 628(b) and 628(c)(1)."[11/] The D.C. Circuit sustained the Commission's interpretation in part in reliance on the Commission's authority granted in section 628(c)(1).[12/] If the Commission were to identify unfair conduct other than by way of rulemaking, it would contravene the language and structure of the statute, effect an unexplained shift from its prior approach,[13/] and abandon whatever judicial deference it might derive from section 628(c)(1).

Third, the complaints are pending before the Media Bureau. The Bureau lacks authority to decide Verizon's and AT&T's claims until the full Commission adopts a new "unfairness" rule. Section 0.283 of the Commission's rules precludes Bureau action on "[m]atters that present novel questions of law, fact, or policy that cannot be resolved under exiting precedents and guidelines."[14/] Now that the court has vacated the Commission's earlier rule on the "unfairness" element of the law, the meaning of that term presents the paradigm of a "novel" issue that must be decided by the full Commission before the Bureau can rule on the complaints. The Media Bureau itself has recognized previously that it lacks authority to decide whether withholding of terrestrial programming is "unfair" absent a valid and applicable regulatory framework established by the full Commission.[15/]

11/ *2010 Program Access Order* ¶ 21 (emphasis added); *see also id.* ¶ 5 ("Under Sections 628(b) and 628(c)(1), . . . Congress granted the Commission broad authority to address this 'loophole' by adopting additional regulations beyond those listed in Section 628(c)(2) to address unfair acts of cable operators."); *id.* ¶ 47 ("Section 628(c)(1) gives the Commission authority to adopt regulations defining 'particular conduct' that is within the scope of the 'unfair methods of competition or unfair or deceptive acts or practices" prohibited by Section 628(b).'"); *id.* ¶ 3 n.10 ("Section 628(c)(1) authorizes the Commission to prescribe regulations to specify the particular conduct prohibited by Section 628(b).").

12/ *See Cablevision v. FCC*, slip op. at 15 (endorsing "the Commission's reliance on subsections (b) and (c)(1) to regulate conduct that subsection (c)(2) leaves unrestricted").

13/ *Cf. Exclusive Service Contracts for Provision of Video Services in Multiple Dwelling Units and Other Real Estate Developments*, 22 FCC Rcd 20235 ¶ 42 (2007) (justifying authority to adopt rules proscribing exclusive contracts in MDUs as "unfair" by noting that "Section 628(c)(1), in turn, directs the Commission, 'in order to promote the public interest, convenience, and necessity by increasing competition and diversity in the multichannel video programming market and the continuing development of communications technologies,' to promulgate rules specifying the conduct prohibited by Section 628(b).").

14/ 47 C.F.R. § 0.283(c).

15/ *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 (2009), ¶13 ("Our prior decisions have refused to find the withholding of terrestrially-delivered programming a violation of Section 628(b) in such cases"); *id.* ¶16 ("Under existing precedent, there is no basis for us to grant the relief requested by AT&T in its Complaint.").

Fourth, an attempt by the Commission or the Bureau to enforce the categorical condemnation of withholding invalidated by the D.C. Circuit would inevitably risk condemnation as being in contravention of the D.C. Circuit's mandate. The court "vacate[d] that portion of the Commission's order treating certain acts of terrestrially delivered programming withholding as categorically unfair and remand[ed] to the Commission for further proceedings consistent with this opinion."[16] The court instructed the Commission to take another stab at "defin[ing] the . . . statutory term 'unfair.'"[17] In short, the court plainly envisioned that, on remand, there will be rulemaking proceedings. Although the court did not rule out the assessment of "unfairness" on "a case-by-case basis," the court plainly envisioned that such assessment would occur *after* the Commission had completed its remand proceeding. Thus, any case-by-case adjudication that precedes completion of a remand rulemaking and condemns the withholding of terrestrial programming as unfair will inevitably draw charges that the Bureau in effect applied the rule that the court vacated, thereby risking swift judicial condemnation.[18]

That is particularly true because it is plainly not the case that the withholding of RSN programming would be "unfair" under potential definitions of that term suggested to the Commission in the rulemaking that preceded the *2010 Program Access Order*. Cablevision offered a proposed "unfairness" standard that would require complainants to demonstrate that the conduct complained of was undertaken other than in pursuit of legitimate business or competitive purposes.[19] This standard drew on the Federal Trade Commission's Unfairness Policy Statement, which uses a three-part test for unfairness: a practice (1) must present an imminent, substantial, non-speculative threat of injury to consumers (as opposed to competitors); (2) must not be outweighed by any countervailing benefits to consumers or competition that the practice produces; and (3) must impose an injury that consumers could not reasonably avoid by "survey[ing] the available alternatives, choos[ing] those that are most desirable, and avoid[ing] those that are inadequate or unsatisfactory."[20] Under this and other reasonable constructions of

---

16/ *Cablevision v. FCC*, slip op. at 47-48.

17/ *Id.* at 47

18/ *See City of Cleveland v. FPC*, 561 F.2d 344, 346 (D.C. Cir. 1977) ("The decision of a federal appellate court established the law binding further action in the litigation by another body subject to its authority. The latter is without power to do anything which is contrary to either the letter or spirit of the mandate construed in the light of the opinion of the court deciding the case, and the higher tribunal is amply armed to rectify any deviation through the process of mandamus.") (footnotes omitted); *Office of Consumers' Counsel v. FERC*, 826 F.2d 1136, 1140 (D.C. Cir. 1987) ("A federal appellate court has the authority, through the process of mandamus, to correct any misconception of its mandate by a lower court or administrative agency subject to its authority. . . . A party always has recourse to the court to seek enforcement of its mandate.").

19/ *See* Letter from Howard J. Symons to Marlene H. Dortch, Secretary, Federal Communications Commission, MB Docket Nos. 07-29 and 07-198 (Jan. 8, 2010), at 3 (attached hereto).

20/ *Id.*

"unfair" – which recognize the limited circumstances in which imposing duties to deal benefit competition and consumers and take into account factors expressly raised by the D.C. Circuit in its opinion – the withholding of the RSN programming at issue in the two pending complaint proceedings would not be "unfair."

II. The D.C. Circuit Decision Has Additional Repercussions That Warrant Further Briefing and Record Development

At a minimum, the court's decision requires the Bureau to conduct supplemental record development and briefing by the parties on the "unfairness" issue. The Commission's *per se* condemnation of the withholding at issue as "unfair" – while challenged as unlawful in Defendants' briefs in the pending complaint proceeding – obviated factual development and legal argument about whether the conduct complained of could be classified as "unfair" in violation of section 628(b). Nor did it give the parties occasion or opportunity to gather evidence, conduct discovery, and present legal argument with respect to the "unfair" issue.

All parties in the pending complaint proceedings must therefore be given the opportunity to develop facts and argument concerning whether Defendants conduct can be deemed to violate section 628(b) in light of the court's guidance regarding the type of factors that should be considered in any assessment of "unfairness." For example, the D.C. Circuit expressly noted that, in assessing what constitutes "unfair practices" relating to terrestrial programming, there could be distinctions between satellite and terrestrial programming that warrant treating the latter differently from the former.[21/] The court also noted that there could be instances in which a programmer's decision to license one distributor but not another yields pro-competitive effects that outweigh any adverse competitive impact associated with the withholding.[22/] The record in the pending complaint proceedings can only be assessed against – and indeed may well have to be supplemented to reflect – a lawful definition of "unfair" that comports with the court's directive. Failure to provide such an opportunity would amount to resolution of the pending complaint proceedings without taking account of the court's vacatur of the "unfairness" decision, an outcome that would be contrary to law.

Three other aspects of the court's decision likewise warrant further consideration and briefing in the pending complaint proceedings.[23/]

21/ *Cablevision v. FCC*, slip op. at 42-44.

22/ *Id.* at 43-47.

23/ The Verizon and AT&T letters raise a host of other matters that are more appropriately addressed following the adoption of a rule defining "unfair" in a manner consistent with the court's directive. Defendants thoroughly disagree with all aspects of those letters, including their characterization of the evidence in CSR 8185-P and CSR 8196-P and the impact of the D.C. Circuit's decision on these proceedings, and reserve the right to respond thereto.

First, the court's discussion regarding the application of the significant hindrance standard to specific factual circumstances of terrestrial withholding obviously will affect the Bureau's assessment of the evidence in the instant proceeding. The parties should have the opportunity to address the guidance on the significant hindrance standard provided by the court, as well as the impact of that guidance on the analysis of the record in the complaint proceedings. Unsurprisingly, Verizon's letter highlights the court's reference to "commercial attractiveness,"[24/] but omits entirely any discussion of the gloss on that concept set forth in the opinion. The opinion, in fact, strongly indicated that an MVPD's lack of commercial attractiveness would satisfy the significant hindrance requirement only in a circumstance in which that MVPD is deprived of all games of a local professional team (thereby rendering its expansion in the market at issue "uneconomical")[25/] and where the withholding of a terrestrial service makes "it completely impossible for competitors to enter or survive in a market."[26/]

The former circumstance is inapposite in both cases, since both Verizon and AT&T have access to all professional games shown on the networks at issue due to their of the standard definition MSG and MSG+ networks. They have both demonstrated, by their conduct and statements, that they in no way consider entry or expansion into the New York area marketplace "uneconomical." Likewise, the latter circumstance is inapplicable, because both AT&T and Verizon not only have shown that they can "enter" and "survive" in the New York are market, but the record demonstrates – and their own statements confirm – that they are thriving in that market.

Second, the court also observed that a showing of vibrant competition in the New York City market would constitute "powerful evidence that their terrestrial programming withholding has no significant impact on the delivery of satellite programming."[27/] The record in the complaint proceedings likewise demonstrates that both Verizon and AT&T are strong and durable competitors in video markets in which they compete against Cablevision, and that those geographic markets are among the most vigorously competitive local markets in the entire country. At a minimum, the Bureau should permit further briefing on this issue as well.

Finally, the court's decision definitively holds that the RSN presumption adopted by the Commission in the *2010 Program Access Order* does nothing more than "shift only the burden of production," and leaves the burden of persuasion with the complainants.[28/] The court's ruling is fully consistent with the Administrative Procedure Act, which provides that, "[e]xcept as

---

24/ Verizon Letter at 2.

25/ *Cablevision v. FCC*, slip op. at 20.

26/ *Id.* at 20-21.

27/ *Id.* at 30.

28/ *See id.* at 34.

otherwise provided by statute, the proponent of a rule or order has the burden of proof."[29/] A presumption may operate to assign the burden of production with respect to a given fact.[30/] But once evidence is introduced to rebut or overcome the presumption, it falls from the case and is no longer a factor in consideration of the case.[31/] Defendants have more than satisfied the burden of production in the two complaint proceedings, providing voluminous evidence demonstrating lack of significant hindrance into the record of each proceeding. Having produced considerable evidence showing lack of significant hindrance in each complaint proceeding, Verizon and AT&T cannot obtain relief unless they satisfy their burden of proof and demonstrate, by a preponderance of evidence, that the allegedly unfair acts significantly hinder or prevent them from providing satellite cable programming.

* * *

For the reasons set forth above, Defendants respectfully submit that neither the Commission nor the Bureau may proceed to decision in CSR-8185-P and CSR-8196-P until the Commission defines the fundamental term "unfair" through a notice and comment rulemaking. In addition, the court of appeals' decision requires the Bureau to conduct additional proceedings as well. For these reasons, Verizon and AT&T are wrong in arguing that the Bureau can proceed to decision immediately.

Sincerely,

Howard J. Symons
COUNSEL FOR CABLEVISION SYSTEMS CORPORATION
AND MADISON SQUARE GARDEN, L.P.

[29/] 5 U.S.C. § 556(d). *See also Director, Office of Workers' Compensation Programs, Dep't of Labor v. Greenwich Collieries*, 512 U.S. 267, 281 (1994).

[30/] *See, e.g., AC Aukerman Co. v. RL Chaides Const. Co.*, 960 F. 2d 1020, 1028 (Fed. Cir. 1992) ("A presumption has the effect of shifting the burden of going forward with evidence, not the burden of persuasion."); *Pennzoil Co. v. FERC*, 789 F. 2d 1128, 1136-37 (5th Cir. 1986) ("[T]he *only* effect of a presumption is to shift the burden of producing evidence with regard to the presumed fact."); *Evening Star Newspaper Co. v. Kemp*, 533 F. 2d 1224, 1230 (D.C. Cir. 1976) ("A presumption does not acquire the attribute of evidence, indeed '[i]ts only office is to control the result where there is an entire lack of competent evidence.'") (quoting *Del Vecchio v. Bowers*, 296 U.S. 280, 286 (1939)).

[31/] *See, e.g., Del Vecchio*, 296 U.S. at 286 (once evidence is adduced to overcome the presumption, it falls from the case and cannot be considered); *Pennzoil Co.*, 789 F. 2d at 1136-37 ("If the party against whom the presumption operates produces evidence challenging the presumed fact, the presumption simply disappears from the case.").

cc: Marlene Dortch, Secretary
Austin Schlick
Steven Broeckaert
David Konczal
Mary Beth Murphy
Nancy Murphy
Diana Sokolow

MINTZ LEVIN

Howard J. Symons | (202) 434-7305 | hjsymons@mintz.com

701 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
202-434-7300
202-434-7400 fax
www.mintz.com

January 8, 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 permitting MVPDs to file complaints for access to terrestrial programming pursuant to section 628(b). That section expressly requires that a complainant demonstrate, among other things, that a "cable operator . . . [or] satellite cable programming vendor" has engaged in "unfair or deceptive acts or practices" or "unfair methods of competition." While section 628(c)(2) "specif[ies] particular conduct that is prohibited by subsection (b)," the plain language of subsection (c)(2) makes clear that the enumerated prohibitions apply only to the provision of *satellite* cable programming. As demonstrated below, it would be arbitrary for the Commission to hold that conduct prohibited by subsection (c)(2) is automatically unfair when it involves terrestrially-delivered programming.[1/]

First, there is a difference between satellite- and terrestrially-delivered programming in terms of the need for a sharing requirement. Congress prohibited exclusive contracts and the other conduct enumerated in subsection (c)(2) with respect to satellite cable programming because it believed that giving cable's then-fledgling competitors access to such programming was necessary to "create some competition" by enabling these entities "to get off the ground."[2/] "Satellite video programming" was a proxy for the cable-owned national programming networks that Congress believed were key to fostering competitive distribution.[3/] The FCC likewise

1/ *EchoStar Communications Corp. v. Comcast Corp.*, 14 FCC Rcd. 2089, 2099 ¶ 21 (1999) (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").

2/ 138 CONG. REC. H6533 (daily ed. July 23, 1992) (remarks of Rep. Tauzin).

3/ *See id.* H6536 (remarks of Rep. Synar) (the program access provisions are a positive step toward ensuring access for competitors to cable programming services such as HBO, TNT, and CNN); 138

understood this to be Congress's intent.[4] The ban on exclusive contracts for satellite-delivered programming and the other prohibitions in subsection (c)(2) reflected Congress's conclusion that the sum of all cable-affiliated satellite services constituted an essential input for any entrant's service. Congress was concerned that the withholding of that input would bar entry. By contrast, the average MVPD carries only a small handful of terrestrial services. Thus, the sum of all terrestrial services does not constitute an essential input and a blanket ban on withholding such services was therefore not required to promote entry.

Second, there is a difference in terms of investment incentives. Any compelled sharing requirement makes it less likely that incumbents will invest because such a requirement denies incumbents the upside of successful investments. Satellite-delivered services typically are nationally marketed and created by national content producers. Even when cable operators own a stake in such firms, these content producers generally create new services with a view to generating earnings through the sale of programming. Thus, even if such national programming must be shared, some new programming likely will still come into existence. By contrast, terrestrially-delivered services commonly are regional services created by cable operators in large part to establish customer loyalty or promote the sale of cable service. Such services are far less likely to be created if a cable operator is forced to share the fruits of its investment with competitors.

Finally, there is a difference in terms of downstream market power. Congress's determination that withholding satellite-delivered programming was "unfair" was predicated on its finding that cable operators had a monopoly on the retail end.[5] As the D.C. Circuit recently determined, however, and as we have shown throughout this proceeding, monopoly no longer exists.[6] It makes no sense to impose a sharing duty absent downstream market power: the absence of downstream market power demonstrates that a sharing duty is unnecessary to foster competition.[7] For that reason, the prohibitions on conduct relating to satellite programming

---

CONG. REC. S737 (daily ed. Jan. 31, 1992) (remarks of Sen. Gore) ("program services like ESPN, CNN, USA, and others, must be made available").

4/ *See Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992*, 8 FCC Rcd. 3359, 3366 ¶ 21 n.6 (1993) (referring to House and Senate reports citing "popular cable programming services" and "nationally delivered cable networks").

5/ 138 CONG. REC. H6533-34 (daily ed. July 23, 1992) (remarks of Rep. Tauzin); *id.* H6533 (remarks of Rep. Williams); *id.* H6536 (remarks of Rep. Synar); *id.* H6539 (remarks of Rep. Shays).

6/ *Comcast Corp. v. FCC*, 579 F.3d 1, 8 (D.C. Cir. 2009) (finding 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).

contained in section 628(c)(2) do not imply that Congress would have deemed analogous conduct involving terrestrial programming "unfair" today.

For these reasons, it would be arbitrary for the Commission to hold that conduct of the kind prohibited by subsection (c)(2) is *per se* unfair when it involves terrestrially-delivered programming. Rather, the complainant in each proceeding should be required to demonstrate that the conduct complained of was undertaken other than in pursuit of legitimate business or competitive purposes.

In evaluating showings in individual complaint proceedings, the Commission should draw guidance from the Federal Trade Commission's Unfairness Policy Statement, in which the FTC interpreted its authority to police "unfair" practices under the Federal Trade Commission Act. The FTC uses a three-part test for unfairness: a practice (1) must present an imminent, substantial, non-speculative threat of injury *to consumers* (as opposed to competitors); (2) must not be outweighed by any countervailing benefits to consumers or competition that the practice produces; and (3) must impose an injury that consumers could not reasonably avoid by "survey[ing] the available alternatives, choos[ing] those that are most desirable, and avoid[ing] those that are inadequate or unsatisfactory."[8/] The Commission's test for unfairness should similarly turn on harm to consumer welfare; there is nothing "unfair" about conduct that does not harm consumers.[9/]

7/ *See* 3B AREEDA AND HOVENKAMP, ANTITRUST LAW, ¶ 773b, at 240-41 ("The plaintiff must show that the desired resource is not just helpful but vital to its competitive viability."); *see also Alaska Airlines, Inc. v. United Airlines, Inc.*, 948 F.2d 536, 544 (9th Cir. 1991) (no essential facilities claim unless withholding input confers "power to *eliminate* competition in the downstream market") (emphasis in original).

8/ *See* FTC Unfairness Policy Statement, Dec. 17, 1980, *reprinted in Int'l Harvester Co.*, 104 F.T.C. 949 (1984). The FTC Unfairness Policy Statement was later codified at 15 U.S.C. § 45(n).

9/ While section 628(b) prohibits conduct based on its "*purpose or* effect," the purpose element comes *after* the predicate requirement that the act itself be unfair or deceptive. Thus, purpose is relevant only if conduct is unfair. As noted above, unfairness should be analyzed by the effect that conduct has on consumers. Without the predicate effect on consumers required to make conduct itself unfair, the "purpose" of the conduct is irrelevant because there is no unfairness where there is no effect on consumers. This view finds support in the antitrust laws, which are concerned primarily with consumer effects. *See, e.g., United States v. Microsoft*, 253 F.3d 54, 59 (D.C. Cir. 2001) (focus of monopolization analysis is upon market effect, not on intent); *Schachar v. Am. Acad. of Opthalmology*, 870 F.2d 397, 400 (7th Cir. 1989) ("Animosity, even if rephrased as 'anticompetitive intent,' is not illegal without anticompetitive effects.").

Even with respect to antitrust claims for which intent is an express element, such as attempted monopolization, intent is relevant only when there is proof that the *likely effect on the market* would be anticompetitive, and even then the intent element requires specific intent to remove competition through unlawful means in order to raise prices, as opposed to the simple intent of a competitor to provide a more

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

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

Sincerely,

Howard J. Symons

Howard J. Symons

cc: Austin Schlick
Stuart Benjamin
Marilyn Sonn
Susan Aaron
William Lake
Robert Ratcliffe
Nancy Murphy
Steven Broeckaert
Mary Beth Murphy
David Konczal
Diana Sokolow
Sherrese Smith
Joshua Cinelli
Jamila Bess Johnson
Joshua Cinelli
Rick Kaplan
Rosemary Harold
Millie Kerr

---

attractive product and thereby win customers from other competitors. *See, e.g.*, *Microsoft*, 253 F.3d at 80-84 (holding that there can be no liability for an alleged attempt to monopolize in the absence of market analysis showing a dangerous probability of anticompetitive effects); *Ass'n for Intercollegiate Athletics for Women v. NCAA*, 735 F.2d 577, 585 (D.C. Cir. 1984) (the specific intent required for an attempted monopolization claim is not satisfied by a "malevolent" motive, but rather requires a showing that the defendant intended to acquire monopoly power by driving its rival from the market by exclusionary or predatory means).

CERTIFICATE OF SERVICE

I, Ernest C. Cooper, hereby certify that on this 22th day of June 2011, the foregoing Letter of Cablevision Systems Corporation was served on the following by Federal Express:

Christopher M. Heimann
AT&T Services, Inc.
1120 20th Street, N.W., Suite 1000
Washington, D.C. 20036

Aaron M. Panner
Kellogg, Huber, Hansen, Todd, Evans & Figel, P.L.L.C.
1615 M Street, N.W., Suite 400
Washington, D.C. 20036
Counsel for AT&T

Edward Shakin
William H. Johnson
Verizon
1320 North Courthouse Road
9th Floor
Arlington, VA 22201

Evan T. Leo
Kellogg, Huber, Hansen,
Todd, Evans & Figel, P.L.L.C.
1615 M. St., NW
Suite 400
Washington, DC 20036
Counsel for Verizon

Helgi C. Walker
Eve Klindera Reed
Brendan J. Morrissey
Wiley Rein LLP
1776 K Street, NW
Washington DC 20006
Counsel for Verizon

Ernest C. Cooper