

June 29, 2011

VIA HAND DELIVERY AND ECFS

Marlene H. Dortch
Secretary
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 Ms. Dortch:

On June 27, 2011, Clifford Harris and Catherine Bohigian of Cablevision Systems Corp. (“Cablevision”), Adam Levine of Madison Square Garden Holdings, L.P. (“MSG”), Henk Brands of Paul, Weiss, Rifkind, Wharton & Garrison LLP, and Howard Symons and Christopher Harvie of Mintz Levin, met with General Counsel Austin Schlick, Media Bureau Chief William Lake, staff from the Office of General Counsel and the Media Bureau listed below, and representatives from Verizon and AT&T to discuss the impact of the D.C. Circuit’s decision in *Cablevision v. Federal Communications Commission* on the above-captioned proceedings. Media Bureau staff in attendance were Michelle Carey, Nancy Murphy, Steven Broecker, Mary Beth Murphy, and David Konczal. Attending from the Office of General Counsel’s office were Susan Aaron and Nandan Joshi.

At the meeting, Cablevision and MSG reiterated their view, set forth in their June 22, 2011 letter to Mr. Lake in the above-captioned proceedings,^{1/} that, as a result of the D.C. Circuit’s vacatur of that part of the Commission’s *2010 Program Access Order* condemning all

^{1/} See Letter from Howard J. Symons, Mintz, Levin, Cohn, Ferris, Glovsky & Popeo PC, to William T. Lake, Chief, Media Bureau, Federal Communications Commission, MB Docket No. 07-198, CSR-8185-P, CSR-8196-P (June 22, 2010) (“Cablevision/MSG June 22 Letter”).

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terrestrial withholding as categorically unfair,^{2/} the Commission is obliged to conduct a notice and comment proceeding concerning the unfairness prong of its rules governing access to terrestrial programming before the Media Bureau can address the above-captioned complaints.^{3/}

As a threshold matter, there appears to be little dispute with respect to two points. First, the Commission must conduct a rulemaking in which it decides how to effectuate the D.C. Circuit's remand. Second, the complainants do not seriously contest that, until the Commission addresses the meaning of "unfair" in section 628(b), the Media Bureau lacks authority to decide the pending complaints.

What is in dispute between the parties is whether the rulemaking must precede action on the complaints. Contrary to the claims of AT&T and Verizon at the meeting, it must. That course is compelled by the *Paralyzed Veterans/Alaska Professional Hunters* doctrine because the court's vacatur leaves only the Commission's pre-2010 administrative interpretations of its rules in place, which the Commission cannot override except by way of notice and comment rulemaking. Conducting the rulemaking first is also compelled by logic and fairness: if there is going to be a rulemaking, it simply makes no sense to run ahead of it in an adjudication.

I. In the Wake of the D.C. Circuit's Vacatur, the Commission Can Rule the Withholding of Terrestrial Programming "Unfair" Only by Way of a Notice and Comment Rulemaking

As we explained in our June 22 letter, the effect of the D.C. Circuit's invalidation of the categorical unfairness rule is to restore the regulatory *status quo ante* that preceded its adoption in the *2010 Program Access Order*.^{4/} Prior to that *Order*, numerous decisions had declined to proscribe the withholding of terrestrial programming.^{5/} If the Commission wishes to change the

^{2/} *Cablevision v. Federal Communications Commission*, No. 10-1062, slip op. at 47-48 (June 10, 2011) ("*Cablevision v. FCC*"). See also *Review of the Commission's Program Access Rules and Examination of Program Tying Arrangements, First Report and Order*, 25 FCC Rcd 746, ¶¶ 47-49 (2010) ("*2010 Program Access Order*").

^{3/} Defendants' position regarding the manner in which the Commission should effectuate the D.C. Circuit's remand and the impact of that remand on the pending complaint proceedings does not in any way alter or affect its view, expressed in its filings in both proceedings, that neither Verizon nor AT&T have demonstrated significant hindrance from the lack of access to MSG HD and MSG+ HD.

^{4/} See generally *Cablevision/MSG June 22 Letter* at 2-3.

^{5/} See *id.* at 2.

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now-governing *status quo ante*, the Administrative Procedure Act (APA) requires it to do so through a notice and comment proceeding.^{6/}

Commission staff suggested at the June 27 meeting that pre-2010 precedent was overridden by paragraph 22 of the *2010 Program Access Order*, which the D.C. Circuit's decision left undisturbed, but this reading of paragraph 22 is mistaken. The Commission's pre-2010 precedent on terrestrial withholding embodied two distinct holdings. First, the pre-2010 precedent addressed the issue that would later become the subject of Part II of the D.C. Circuit's decision: it held that section 628(b) cannot be read to reach terrestrial programming at all — because the express authority conferred on the Commission by section 628(c)(2) to address competing MVPD access to satellite cable programming effectively precluded it from regulating terrestrial programming in a similar fashion under Section 628(b).^{7/} Second, the pre-2010 precedent addressed the issue that would later become the subject of Part IV of the D.C. Circuit's decision: pre-2010 precedent held that withholding terrestrial programming cannot in any event be viewed as “unfair.”^{8/}

^{6/} See *Paralyzed Veterans v. D.C. Arena L.P.*, 117 F.3d 579, 586 (D.C. Cir. 1997); *Alaska Professional Hunters Ass'n, Inc. v. FAA*, 177 F.3d 1030, 1033-34 (D.C. Cir. 1999); *Sprint Corp. v. FCC*, 315 F.3d 369, 374 (D.C. Cir. 2003).

^{7/} See, e.g., *RCN Telecom Services of New York, Inc., et. al. v. Cablevision Systems, Inc. et al.*, 16 FCC Rcd 12048, ¶ 18 (2001) (“[G]iven that 628 does not by its terms apply to terrestrially-delivered programming, it is not appropriate for the Commission to exercise ancillary jurisdiction to extend . . . program access regulation to terrestrially delivered programming.”); *Implementation of Section 301 of the Telecommunications Act of 1996, Open Video Systems*, 11 FCC Rcd 18223, ¶ 197 (1996) (“We also decline to extend the program access requirements . . . beyond . . . satellite delivered programming.”); *Everest Midwest Licensee v. Kansas City Cable Partners and Metro Sports*, 18 FCC Rcd 26679, ¶ 10 (MB 2003) (because “the exclusive programming agreement . . . is permitted under Section 628(c)(2)(D) . . . we find that [defendant] has not violated Section 628(b)”); *Dakota Telecom Inc. v. CBS Broadcasting, Inc. d/b/a Midwest SportsChannel and Bresnan Commc'ns*, 14 FCC Rcd 10500, ¶ 21 (CSB 1999) (“Section 628(b) may not be used to preclude programming practices clearly permitted under the more specific provisions of Section 628(c).”) (“*Dakota Telecom*”); *American Cable Co. & Jay Copeland v. Telecable of Columbus, Inc.*, 11 FCC Rcd 10090, ¶ 55 (CSB 1996) (“Having determined that the programming agreements are not prohibited by Section 628(c)(2)(D) . . . we cannot find that the agreements are unlawful under the broad language of Section 628(b).”).

^{8/} See, e.g., *DirecTV, Inc. v. Comcast Corp.*, 15 FCC Rcd 22802, ¶ 14 (2000) (“[W]e decline to find that, standing alone, Comcast's decision to deliver SportsNet terrestrially and to deny programming to Complainants is ‘unfair’ under Section 628(b).”) (internal quotation marks and brackets omitted); *RCN Telecom Services of New York, Inc. v. Cablevision Systems, Inc. et al.*, 14 FCC Rcd 17093, ¶ 25 (CSB 1999) (“[W]e decline to find that, standing alone, Defendants' decision to deliver the overflow programming terrestrially via MetroChannels and to deny that programming to Complainants is ‘unfair’ under Section 628(b).”); *EchoStar Communications Corp. v. Comcast Corporation*, 14 FCC Rcd 2089, ¶ 28 (1999). (1999) (“[W]e decline to find that, standing alone, Defendants' decision to deliver SportsNet terrestrially and to deny that programming to EchoStar is ‘unfair’ under Section 628(b).”); *Dakota Telecom* ¶ 22 (defendant's “insistence of its exclusive rights . . . cannot be considered an unfair or

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Paragraph 22 addressed only the first element of the pre-2010 precedent: it held only that “unfair acts involving terrestrially delivered, cable-affiliated programming can be cognizable under Section 628(b).”^{9/} Paragraph 22 did not address the second set of holdings, *i.e.*, when (if ever) the withholding of terrestrial programming is “unfair.” That issue is addressed in paragraphs 48-49 of the *2010 Order*^{10/} — the paragraphs adopting the categorical unfairness rule that was vacated by the D.C. Circuit.^{11/} The effect of that vacatur is to restore the pre-2010 precedents on that point until the Commission abrogates those precedents anew — by way of a notice-and-comment proceeding.^{12/}

Nothing in paragraph 22 suggests that the Commission there had reversed the prior Bureau decisions (three of which were affirmed by the full Commission on review) holding that terrestrial withholding was not unfair. The D.C. Circuit itself also read paragraph 22 to address the issue of the Commission’s threshold statutory authority over terrestrial programming.^{13/}

deceptive practice in violation of Section 628(b)”; *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’ under Section 628(b).”).

^{9/} *2010 Program Access Order* ¶ 22; *see id.* (“[T]o the extent that prior decisions could be read as precluding the consideration of program access complaints involving terrestrially-delivered, cable-affiliated programming under Section 628(b), we reject that view”).

^{10/} *Id.*, ¶ 48 (determining that “conduct with respect to terrestrially delivered, cable-affiliated programming that is similar to the categorically prohibited conduct concerning satellite-delivered, cable-affiliated programming . . . constitutes ‘unfair methods of competition or unfair or deceptive acts or practices’ under Section 628(b).”); *see id.* ¶ 49 (“We thus conclude that actions by cable operators, satellite cable programming vendors in which a cable operator has an attributable interest or satellite broadcast programming vendors involving terrestrially delivered, cable-affiliated programming that would be prohibited by the program access rules under Section 628(c)(2) but for the terrestrial loophole . . . are ‘unfair methods of competition or unfair or deceptive acts or practices’ within the meaning of Section 628(b).”).

^{11/} *Cablevision v. FCC*, slip op. at 41-42, 46-47.

^{12/} *See Paralyzed Veterans*, 117 F.3d at 586; *Alaska Professional Hunters Ass’n, Inc.*, 177 F.3d at 1033-34. Under the pre-*Order* framework, the Commission had ruled that only withholding of terrestrial programming that had migrated from satellite to terrestrial delivery for purposes of evading the program access rules was at risk of being proscribed as “unfair”. *See e.g. 2010 Program Access Order*, ¶ 67 (“The Commission has stated in previous program access complaint proceedings that vertically integrated cable operators that migrate their programming to terrestrial delivery could violate Section 628(b) in some instances”).

^{13/} *Cablevision v. FCC*, slip op. at 23 (“True, the Commission also acknowledged that some decisions by its former Cable Services Bureau could be read to suggest that subsection (c)(2) affirmatively limits the Commission’s ability to regulate terrestrial withholding.”) (citing *2010 Program Access Order* at 759-60 & n. 77 ¶ 22).

Indeed, any suggestion that paragraph 22 abrogated *both* previous decisions on the statutory authority point *and* previous decisions on the unfairness issue cannot be reconciled with the holding of *Cablevision v. FCC*.^{14/}

Nor is there any merit to the suggestion made by AT&T at the meeting that the court's decision somehow preserved Commission authority to determine "unfair practices" with respect to terrestrial programming on a non-categorical, case-by-case basis – because the 2010 *Order* adopted no such approach. While the 2010 *Order* expressly prescribed a case-by-case assessment of the "significant hindrance" prong of the "unfair competition" rule,^{15/} it did not do so with respect to the "unfairness" element of the rule. Further, the Commission's alteration of the applicable legal landscape was confirmed by its determination that it "would not entertain" complaints alleging that terrestrial withholdings predating the effective date of the 2010 *Program Access Order* violated its new rules.^{16/} By highlighting that it avoided the prohibition against retroactive rulemaking by applying its new rules only to conduct post-dating the effective date of the *Order* its new rules,^{17/} the Commission acknowledged that it was departing from the pre-existing regulatory framework and altering the "legal consequences" associated with terrestrial withholding.^{18/}

II. Logic and Fairness Likewise Compel that the Remand Rulemaking Should Precede Adjudication of the Complaints

Quite apart from the *Paralyzed Veterans/Alaska Professional Hunters* doctrine, there can be no real doubt that the Commission is required to conduct a notice and comment proceeding in order to faithfully effectuate the D.C. Circuit's remand. The D.C. Circuit's opinion vacated "the

^{14/} Compare *Cablevision v. FCC*, slip op. at 23 (holding that the Commission had "provide[d] a reasoned explanation" for its abrogation of prior Bureau decisions regarding the Commission's statutory authority over terrestrial programming) with *id.* at 47 (holding that the Commission had not provided "'a satisfactory explanation for its action' in defining certain acts of terrestrial withholding as categorically unfair").

^{15/} See 2010 *Program Access Order* at ¶ 7 ("[R]ecord evidence indicates that cable operators have engaged in unfair acts involving certain terrestrially delivered, cable-affiliated programming; and these unfair acts have impacted competition in the video distribution market in certain cases. We conclude, however, that there is insufficient record evidence to conclude that unfair acts involving terrestrially delivered, cable-affiliated programming will have the purpose or effect set forth in Section 628(b) in every case. Accordingly, we adopt a case-by-case approach rather than a *per se* rule for addressing these unfair acts.").

^{16/} See *id.* ¶ 64.

^{17/} The *Order* states that withholding of non-migrated terrestrially-delivered programming had been "a source of concern" for the Commission for several years, but this statement too only reinforces the fact that the pre-*Order* landscape did not proscribe such conduct. See 2010 *Program Access Order*, ¶ 67.

^{18/} See *id.* and n. 238.

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portion of the Commission's order treating certain acts of terrestrially delivered programming withholding as categorically unfair" and then remanded the matter to the Commission "for further proceedings consistent with this opinion."^{19/} Under the "mandate rule," an agency on remand "must implement both the letter and the spirit of the appellate court's mandate and may not disregard the explicit directives of that court."^{20/} Refusing to hold "further proceedings consistent with this opinion" would disregard the explicit directives of the D.C. Circuit. The Commission may not do so: it must conduct rulemaking proceedings on remand.^{21/}

Given the need for the Commission to conduct a rulemaking, logic and fairness dictate that its completion should precede adjudication of the pending complaints. *First*, sound practice and fundamental fairness dictate that a rulemaking required to remedy an invalidated portion of an agency order should be completed prior to resolving pending adjudications that will be affected by the agency's remedial measures. All parties in the pending complaint proceedings should have the opportunity to argue that the evidence does – or does not – support a finding of "unfairness" as properly and lawfully defined by the Commission in accordance with the D.C. Circuit's decision.^{22/} It would be anomalous for the Commission to undertake the process of fashioning a new rule on remand in accordance with the guidance provided by the court, while declining to apply the remediated rule to a pending complaint, since the risk of inconsistent application of the Commission's rules is particularly high in such a circumstance.^{23/} There is no

^{19/} *Cablevision v. FCC*, slip op. at 47-48.

^{20/} *United States v. Lee*, 358 F.3d 315, 321 (5th Cir. 2004); *accord Scott v. Mason Coal Co.*, 289 F.3d 263, 267 (4th Cir. 2002); *Coal Employment Project v. Dole*, 900 F.2d 367, 368 (D.C. Cir. 1990); *City of Cleveland, Ohio v. Federal Power Commission*, 561 F.2d 344, 346 (D.C. Cir. 1977).

^{21/} *See Independent U.S. Tanker Owners Committee v. Dole*, 809 F.2d 847, 854 (D.C. Cir. 1987) ("In fashioning a remedy for an agency's failure to present an adequate statement of basis and purpose, this court . . . may vacate the rule, thus requiring the agency to initiate another rulemaking proceeding if it would seek to confront the problem anew.").

^{22/} *See Applications of Susan Lundborg et al. for Construction Permit for a New Commercial FM Station in South Padre Island, Texas*, 3 FCC Rcd 1, ¶ 5 (citing *Satellite Broadcasting Company, Inc. v. FCC*, 824 F.2d 1, 3 (D.C. Cir. 1987)) ("Traditional concepts of due process incorporated into administrative law preclude an agency from penalizing a private party for violating a rule without first providing adequate notice of the substance of the rule.").

^{23/} *Cf. Vermont Yankee Nuclear Power v. Natural Resources Defense Council*, 435 U.S. 519, 532 n.10 (1978) (noting that appellate court's decision invalidating portion of agency rules that failed to take adequate account of environmental issues in connection with licensing of nuclear power plants required the agency to revise its regulations to ensure that "environmental matters [were] considered in pending proceedings"). Even in circumstances where courts have stopped short of vacating an agency rule, action on pending cases brought under the affected rule has been held in abeyance pending a rulemaking that implements the court's directives. *National Organization of Veteran's Advocates v. Secretary of Veteran's Affairs*, 260 F.3d 1365, 1380 (Fed. Cir. 2001) ("But even though we do not now invalidate the regulation, its validity is at this point open to question. Under these circumstances, we conclude that it would be inappropriate for the agency to further process claims under section 1318 until the validity or

benefit associated with shielding the pending complaints from the public input, consideration of alternative views and proposals, and other benefits accruing from a notice and comment proceeding effectuating the remand.^{24/}

Second, adjudicating the complaints prior to the completion of the rulemaking runs the risk of pre-judging – or appearing to pre-judge – the outcome of the notice and comment proceeding.^{25/} To avoid the specter of inconsistent results, arguments and proposals that might yield a rule in tension with the outcome of the already-decided complaint proceedings might be downplayed or disregarded, while those in concert with that outcome may be elevated or emphasized. Such a circumstance would vitiate the benefits of the notice and comment process, and cast doubt on the fairness of the proceeding.^{26/} A notice and comment proceeding is clearly the most appropriate vehicle for undertaking the complex analysis required by the remand and ensuring that interested parties have an opportunity to participate in the deliberations over the meaning of “unfair” – particularly since this issue has industry-wide ramifications.^{27/} But the efficacy of that approach would be undermined by announcing a new unfairness rule in a pending adjudication before completion of the rulemaking.

Third, resolving the complaint before completing the rulemaking is particularly problematic here. The parties had no occasion to directly address the issue of whether the

invalidity of the regulation is finally established. Accordingly we direct the Department of Veterans Affairs to stay all proceedings involving claims for DIC benefits under section 1318, whose outcome is dependent on the regulation in question, pending the conclusion of an expedited rulemaking.”).

^{24/} See *Sprint Corp. v. FCC*, 315 F.3d 369, 373 (D.C. Cir. 2003) (“[T]he notice requirement improves the quality of agency rulemaking by exposing regulations to diverse public comment, ensures fairness to affected parties, and provides a well-developed record that enhances the quality of judicial review.”) (internal quotation marks omitted).

^{25/} *McLouth Steel Prods. Corp. v. Thomas*, 838 F.2d 1317, 1325 (D.C. Cir. 1988) (“[A]dequate notice and opportunity to comment must be provided *before* promulgation of a rule, not later.”).

^{26/} See *Rural Cellular Association v. FCC*, 588 F.3d 1095, 1101 (D.C. Cir. 2009) (“The opportunity for comment must be a meaningful opportunity, and we have held that in order to satisfy this requirement, an agency must also remain sufficiently open-minded.”) (citations omitted); *National Tour Brokers Ass’n v. United States*, 591 F.2d 896, 293 (D.C. Cir. 1978) (“[T]he purpose behind the requirement that the parties be able to comment on the rule . . . is both (1) to allow the agency to benefit from the expertise and input of the parties who file comments with regard to the proposed rule, and (2) to see to it that the agency maintains a flexible and open-minded attitude towards its own rules, which might be lost if the agency had already put its credibility on the line in the form of ‘final’ rules. People naturally tend to be more close-minded and defensive once they have made a ‘final’ determination.”).

^{27/} For example, at the June 27 meeting Commission staff suggested that the criteria set forth in Section 628(c)(4) might be the type of factors to take account in determining “unfairness.” Defendants submit that this is precisely the sort of issue that should be addressed by interested parties in a notice and comment proceeding.

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conduct at issue could be proscribed as “unfair” because the new rules – under which both Verizon and AT&T opted to proceed – automatically ascribed that label to that conduct.^{28/} Suggestions by counsel for AT&T and Verizon that Defendants somehow clairvoyantly placed into the record material that is relevant to a new unfairness rule that has not even been developed are unavailing. In its current form, the record in both the rulemaking proceeding adopting the *2010 Program Access Order* and the complaint proceedings is insufficient to form the basis of a well-grounded unfairness rule.

The rulemaking, moreover, should include a round of comments and replies on non-categorical approaches to the issue of unfairness. The FNRPM that preceded the 2010 Program Access Order alluded to the unfairness issue in only a single sentence, and even that sentence addressed only so-called “evasion” issues.^{29/} The *2010 Order* itself devoted only two sentences in a single footnote to consideration of whether there should be anything other than a categorical rule, and gave consideration to only a single commenter opining on the issue.^{30/} In the absence of a fresh and complete record on this fundamental point, the Commission should provide a full opportunity for comment.

Fourth, adjudicating the complaints prior to finishing the remand rulemaking risks running afoul of the court’s mandate. For example, at the meeting, Verizon and AT&T effectively suggested that, irrespective of the boundaries of whatever “unfairness” rule is adopted by the Commission, the conduct at issue in the complaint proceedings is inherently unfair because it involves “non-replicable” RSN programming.^{31/} But that approach is nothing more than a variant of the categorical rule vacated by the D.C. Circuit, and thus would carry a strong risk of contravening the mandate.^{32/}

^{28/} To be sure, Defendants challenged the legal basis for the categorical unfairness rule in the complaint proceedings, *see e.g.*, CSR 8196-P, Defendants Answer to AT&T’s Supplement to Program Access Complaint, January 6, 2011, at 132-35, but such a challenge in no way equates to argument that the facts of the complaint proceedings fail to satisfy the attributes of “unfair” conduct that will be identified by the Commission in connection with its effectuation of the remand.

^{29/} *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, Report and Order and Notice of Proposed Rulemaking*, 22 FCC Rcd 17791, ¶117 and n. 520 (2007).

^{30/} *See 2010 Program Access Order* at n. 190.

^{31/} Of course, as Defendants have repeatedly pointed out, unlike all other instances of RSN withholding condemned by the Commission, the sports programming at issue has been, throughout the pendency of the complaints, fully replicated on the standard-definition, satellite-delivered MSG and MSG+ networks already licensed to Verizon and AT&T.

^{32/} *See Iowa Utils. Bd. v. FCC*, 135 F.3d 535, 542-43 (mandamus appropriate in response to Commission’s continued imposition of portions of an order in various individual administrative adjudications, notwithstanding invalidation of those sections by the court of appeals).

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Finally, the Commission should reject AT&T and Verizon's implicit position that the length of the current proceedings somehow compels the Commission to act without giving due regard to principles of administrative law and the court's mandate. That the complaints have been pending for nearly two years cannot be laid at Defendants' doorstep: briefing on the initial complaints in both proceedings was completed by October 2009. The Commission then, partly in response to comments submitted by AT&T and Verizon, opted to change its rules, and the complainants chose to have their complaints adjudicated under those new rules – thereby deferring consideration until after OMB approval and the effective date of the new rules. Further, it was Complainants, not Defendants, that initially sought discovery in these proceedings. In any event, the duration of the instant proceedings offers no justification for the procedural corner-cutting advocated by Complainants.

III. Until the Commission Acts, the Media Bureau Lacks Authority to Decide the Complaints

As a result of the court's vacatur, the question of when a withholding of terrestrial programming can be considered "unfair" constitutes a "novel question of law" that can only be resolved by the full Commission.^{33/} There is no "controlling Commission-level precedent for the Bureau to follow" in connection with resolving the issue of whether a terrestrial withholding constitutes an "unfair practice," thereby rendering that issue "novel" for purposes of the Commission's rules.^{34/} Thus, the Bureau cannot decide the pending complaint proceedings absent completion of the remand rulemaking. Neither of the Complainants has seriously contested this point.^{35/} Accordingly, completing the rulemaking before moving to decision in the complaint proceedings not only constitutes the fair and logical way to proceed, it is also consistent with the Commission's own rules of procedure.

* * *

^{33/} See Cablevision/MSG June 22 Letter at 4.

^{34/} *In the Matter of R&S Media; For Application to Modify the Construction Permit of Station KBNH(FM), Homedale, Idaho; For Application for License to Cover Construction Permit; For Request for Program Test Authority*, 19 FCC Rcd 6300, ¶ 16 (2004) (novel question arises in the absence of "controlling Commission-level precedent for the Bureau to follow").

^{35/} See Letter from Michael E. Glover, Senior Vice President and Deputy General Counsel, Verizon, to William T. Lake, Chief, Media Bureau, Federal Communications Commission, at 3 (filed June 24, 2011) ("In any event, Verizon's complaint was originally filed with the Commission which clearly has the authority to rule on it in the first instance should it choose to do so."); Letter from Aaron Panner, Counsel to AT&T, to Marlene H. Dortch, Secretary, Federal Communications Commission, at 3 (File No. CSR-8196-P) (filed June 24, 2011) ("In any event, AT&T's complaint was filed before the Commission, not the Media Bureau, and the full Commission clearly has the authority to act on the complaint in the first instance.").

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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.

Sincerely,

/s/ Howard J. Symons

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

cc: Austin Schlick
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CERTIFICATE OF SERVICE

I, Ernest C. Cooper, hereby certify that on this 29th day of June 2011, the foregoing Letter of Cablevision Systems Corporation and Madison Square Garden, L.P. was served on the following by Federal Express:

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