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EX PARTE OR LATE FILED

June 29, 2011

FILED/ACCEPTED

Ex Parte

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

ORIGINAL

JUN 29 2011

Federal Communications Commission
Office of the Secretary

Re: *AT&T Services, Inc. v. Madison Square Garden, L.P. & Cablevision Systems Corp.*, File No. CSR-8196-P; *Review of the Commission's Program Access Rules and Examination of Programming Tying Arrangements*, MB Docket No. 07-198

Dear Ms. Dortch:

On Monday, June 27th, 2011, Christopher Heimann and James Smith of AT&T and Aaron Panner and Jeffrey Harris of Kellogg, Huber, Hansen, Todd, Evans & Figel, met with Austin Schlick, Nandan Joshi, and Susan Aaron of the Office of General Counsel, and William Lake, Nancy Murphy, Mary Beth Murphy, David Konczal, Michelle Carey, and Steven Broeckaert of the Media Bureau regarding the above-captioned proceedings. Counsel for Verizon, Cablevision, and Madison Square Garden were also present at the meeting.

At the meeting, counsel for AT&T responded to questions from Commission staff and explained — consistent with AT&T's letters of June 20th and 24th — that: (1) the Commission may proceed with case-by-case adjudication of complaints alleging unfair acts involving terrestrially delivered programming, and need not conduct an additional notice-and-comment rulemaking proceeding regarding the meaning of "unfair" under section 628(b); and (2) the Commission should act promptly on AT&T's pending complaint, as Cablevision and Madison Square Garden (collectively, "Defendants") have exhaustively briefed and argued all relevant issues, including whether their conduct should be treated as "unfair."

AT&T writes briefly to address two points that were discussed at the meeting:

1. Relying on *Paralyzed Veterans of America v. D.C. Arena, L.P.*, 117 F.3d 579 (D.C. Cir. 1997), and *Alaska Professional Hunters Association, Inc. v. FAA*, 177 F.3d 1030 (D.C. Cir. 1999), Defendants argued that the Commission must define "unfair" acts through notice-and-comment rulemaking because the Commission had determined, under law as it stood

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before the *2010 Program Access Order*,¹ that the withholding of terrestrial programming is, categorically, not “unfair” within the meaning of section 628(b). That argument mischaracterizes the Commission’s pre-2010 decisions, ignores the impact of the *2010 Program Access Order*, and misreads the D.C. Circuit’s holdings in *Cablevision Systems Corp. v. FCC*, No. 10-1062, slip op. (D.C. Cir. June 10, 2011).

In *Paralyzed Veterans*, the court held that an agency must conduct a notice-and-comment rulemaking proceeding before making a “fundamental change in its interpretation of a substantive regulation.” 117 F.3d at 586. But that is not what the Commission did here. In the Commission orders that *Cablevision* cites, the Commission “specifically held that unfair acts involving terrestrially delivered, cable-affiliated programming *can* be cognizable under Section 628(b).” *2010 Program Access Order* ¶ 22 & n.80 (emphasis added).² The Commission did not indicate, much less hold, that the withholding of terrestrial programming could *never* be an unfair practice under section 628(b). Indeed, the D.C. Circuit endorsed the Commission’s reading of its prior orders, noting that, even before issuing the *2010 Program Access Order*, “the Commission . . . had recognized that complaints concerning terrestrial withholding might, under some circumstances, be cognizable under subsection (b).” *Cablevision*, slip op. at 23.³

In any event, *Cablevision*’s claim that the D.C. Circuit’s decision in *Cablevision* could be read to *restore* a supposed terrestrial loophole is contrary to the express holding of that case, which affirmed the Commission’s decision to “authoriz[e] the filing of complaints alleging that an MVPD or satellite programming vendor violated section 628(b) by (1) engaging in unfair terrestrial programming withholding that (2) prevented or significantly impaired an MVPD from providing satellite programming to customers.” *Id.* at 9-10; *see also id.* at 2-3. The only aspect of the Commission’s order that the D.C. Circuit vacated was rules defining certain types of conduct related to terrestrial programming as *categorically* unfair. Even assuming — contrary to

¹ First Report and Order, *Review of the Commission’s Program Access Rules and Examination of Programming Tying Arrangements*, 25 FCC Rcd 746 (2010) (“*2010 Program Access Order*”).

² *See also* Memorandum Opinion and Order, *DIRECTV, Inc. v. Comcast Corp.*, 15 FCC Rcd 22802, ¶ 13 (2000); Memorandum Opinion and Order, *RCN Telecom Servs. of N.Y., Inc. v. Cablevision Sys. Corp.*, 16 FCC Rcd 12048, ¶ 15 (2001).

³ *Cablevision*’s citations to two Media Bureau orders are irrelevant, since a Media Bureau ruling cannot, by definition, constitute a binding Commission interpretation; in any event, those orders contain no statement that the withholding of terrestrial programming can never constitute an unfair practice, as the Commission has already explained. *See 2010 Program Access Order* ¶ 22.

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fact and for the sake of argument — that the Commission had previously recognized a “terrestrial loophole,” the D.C. Circuit’s vacatur of certain categorical rules would not restore any loophole (the definitive elimination of which the D.C. Circuit affirmed), but would simply leave Cablevision’s conduct subject to the statutory prohibition in section 628(b). *See* 47 U.S.C. § 548(d) (MVPD aggrieved by conduct that “it alleges constitutes a violation of subsection (b) . . . or the regulations of the Commission under subsection (c)” may commence an adjudicatory proceeding before the Commission (emphasis added)).

2. Contrary to Defendants’ argument, there is no need for additional briefing or factual development regarding whether Defendants’ withholding of MSG HD and MSG+ HD is “unfair.” AT&T’s complaint — which was filed *before* the Commission adopted the *per se* unfairness rule that was remanded in *Cablevision* — alleged that Defendants’ conduct was an “unfair method of competition and unfair practice,” and Defendants responded to those allegations at length in their Answer.⁴ Defendants also addressed the question of unfairness in their supplemental briefing following the *2010 Program Access Order*. *See* Defendants’ Opening Br. at 132-35 (Jan. 6, 2011). Indeed, during our June 27th meeting with Commission staff, Defendants were unable to identify a single additional fact or argument regarding “unfairness” that they have not already addressed in their extensive prior briefing.

In sum, Defendants offer no persuasive reason why the Commission should not promptly issue a ruling on AT&T’s complaint, which has now been pending for nearly two years.

Sincerely,



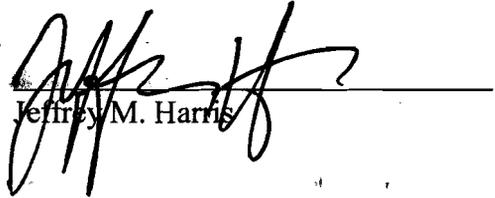
Aaron M. Panner

cc: Austin Schlick
William Lake
Steven Broeckaert
David Konczal
Mary Beth Murphy
Nancy Murphy
Diana Sokolow

⁴ *See* AT&T’s Program Access and Section 628(b) Complaint at 33-36 (Aug. 13, 2009); Answer to Program Access Complaint at 25-63 (Sept. 17, 2009) (arguing that “Defendants have not engaged in unfair methods of competition in violation of section 628(b)”).

CERTIFICATE OF SERVICE

I, Jeffrey M. Harris, hereby certify that, on this 29th day of June 2011, copies of the foregoing letter were served by hand upon Defendants' outside counsel of record.


Jeffrey M. Harris

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