

William H. Johnson  
Assistant General Counsel



1320 N. Courthouse Road  
9<sup>th</sup> Floor  
Arlington, VA 22201  
Phone 703-351-3060  
Fax 703-351-3658  
will.h.johnson@verizon.com

**EX PARTE OR LATE FILED**

June 29, 2011

**Ex Parte**

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

**ORIGINAL**

FILED/ACCEPTED

JUN 29 2011

Federal Communications Commission  
Office of the Secretary

**Re: *Review of the Commission's Program Access Rules and Examination of Programming Tying Arrangements, MB Docket No. 07-198***  
***Verizon Telephone Cos. v. Madison Square Garden, L.P., File No. CSR-8185-P***

Dear Ms. Dortch:

On June 27, 2011, Leora Hochstein of Verizon; Scott Angstreich, Aaron Panner, and Jeffrey Harris of Kellogg, Huber, Hansen, Todd, Evans & Figel, P.L.L.C.; Christopher Heimann and James Smith of AT&T; Howard Symons and Christopher Harvie of Mintz, Levin, Cohen, Ferris, Glovsky and Popeo, P.C.; Henk Brands of Paul, Weiss, Rifkind, Wharton & Garrison LLP; Catherine Bohigian and Clifford Harris of Cablevision; Adam Levine of Madison Square Garden, L.P.; and the undersigned met with William Lake, Michelle Carey, Mary Beth Murphy, Steve Broeckaert, David Konczal, and Nancy Murphy of the Media Bureau; and Austin Schlick, Nandan Joshi, and Susan Aaron of the General Counsel's office to discuss questions the General Counsel's office and the Media Bureau posed with regard to the D.C. Circuit's recent decision in *Cablevision Systems Corp. v. FCC*, No. 10-1062, 2011 WL 2277217 (D.C. Cir. June 10, 2011). Verizon reiterated in this meeting that the Commission can and should act immediately on Verizon's complaint, which has now been pending for nearly two years, and put an end to Cablevision's unlawful withholding of must-have, non-replicable regional sports programming. The D.C. Circuit's recent decision provides no basis for further delay.

Consistent with the positions set forth in the attached letters, Verizon explained that the D.C. Circuit's decision in *Cablevision* confirmed the Commission's authority to remedy Cablevision's unlawful withholding of the high-definition (HD) feeds of its two affiliated regional sports network (RSN) channels, MSG and MSG+, and rejected Cablevision's central

No. of Copies rec'd 0+2  
List A B C D E

defenses of its refusal to sell those channels to Verizon on any terms. Verizon explained further that the Commission can — and should — move expeditiously to rule on Verizon’s long-pending complaint against Cablevision and Madison Square Garden, L.P., and that it can resolve the question whether Cablevision’s withholding of its affiliated HD RSN programming is unfair, and in violation of 47 U.S.C. § 548(b), through its adjudication of Verizon’s complaint, without first pursuing a rulemaking on remand from the D.C. Circuit’s decision. The statute expressly authorizes the Commission to identify and remedy violations of § 548(b) through case-by-case adjudications, *see* 47 U.S.C. § 548(d), and the D.C. Circuit expressly confirmed the Commission’s authority to “assess[ ] [the] fairness” of a cable operator’s withholding of terrestrially delivered RSN programming “on a case-by-case basis,” *Cablevision*, 2011 WL 2277217, at \*24.

Cablevision’s contrary arguments, raised in its June 22, 2011 letter<sup>1</sup> and reiterated at the meeting, are transparent efforts to manufacture further delay, so that an additional NBA and NHL season can begin with consumers in the New York metropolitan area and Buffalo unable to obtain a competitive package of programming that includes their favorite teams’ games in the high definition they demand. Verizon has addressed all of Cablevision’s claims in the attached letters and here addresses a single point on which Cablevision’s counsel dwelled at length during the meeting.

Specifically, Cablevision claimed that the Commission would violate the rule announced in *Paralyzed Veterans of America v. D.C. Arena L.P.*, 117 F.3d 579 (D.C. Cir. 1997), and applied in *Alaska Professional Hunters Association, Inc. v. FAA*, 177 F.3d 1030 (D.C. Cir. 1999), if it were to move directly to adjudicate Verizon’s complaint without first conducting a rulemaking on remand from *Cablevision*. That is wrong. The heavily criticized *Paralyzed Veterans* rule<sup>2</sup> is simply an exception to the general rule that notice-and-comment procedures are not required before agencies promulgate interpretive rules. *See* 5 U.S.C. § 553(b)(3)(A). *Paralyzed Veterans* requires an agency to use notice-and-comment procedures before adopting an interpretive rule only if that new interpretive rule “significantly revises” the agency’s prior “definitive interpretation” of a regulation. *Alaska Prof’l Hunters*, 177 F.3d at 1034. None of the orders Cablevision cites in its letter (at 2 n.6) authoritatively interprets a regulation at all, let alone in a way that would preclude the finding in an adjudication that Cablevision’s withholding of HD RSN programming is “unfair” and violates § 548(b).

---

<sup>1</sup> Letter from Howard J. Symons, Mintz, Levin, Cohen, Ferris, Glovsky and Popeo, P.C., to William T. Lake, Chief, Media Bureau, FCC, MB Docket No. 07-198, CSR 8185-P, CSR 8196-P (June 22, 2011).

<sup>2</sup> *See* I Richard J. Pierce, Jr., *Administrative Law Treatise* § 6.4, at 456 (5th ed. 2010) (explaining that the *Paralyzed Veterans* rule is “inconsistent with the APA, unsupported by precedents, inconsistent with scores of precedents, and it has terrible effects”).

Indeed, the Commission addressed each of the orders Cablevision cites in its *2010 Order*.<sup>3</sup> The Commission found that those decisions were consistent with the Commission's conclusion that § 548(b) reaches unfair practices with respect to terrestrial RSN programming and that, to the extent those earlier decisions were inconsistent, "we reject that view." *2010 Order* ¶ 22. The D.C. Circuit expressly affirmed the Commission on this point, so no further rulemaking could be needed to alter findings in those prior decisions. *See Cablevision*, 2011 WL 2277217, at \*12.

Furthermore, none of those prior decisions authoritatively construed a then-existing regulation defining "unfair" in § 548(b) to exclude the withholding of terrestrial RSN programming. On the contrary, the two Commission decisions Cablevision cites expressly recognize that practices with respect to terrestrial programming can be unfair and violate § 548(b), explaining that "moving programming from satellite to terrestrial delivery could be cognizable under 628(b) as an unfair" practice.<sup>4</sup> But the Commission did not hold — or even hint — in those orders that moving programming was the *only* unfair practice with respect to terrestrial programming, let alone that withholding terrestrial RSN programming is a *fair* practice. The other two decisions Cablevision cites were staff decisions, which do not bind the Commission, *see Cablevision*, 2011 WL 2277217, at \*12, and therefore cannot trigger the *Paralyzed Veterans* rule.<sup>5</sup> And none of the decisions purported to interpret any Commission regulation at all. This case, therefore, is a far cry from those in which the D.C. Circuit has applied the *Paralyzed Veterans* rule to require an agency to promulgate an interpretive rule through notice-and-comment rulemaking.<sup>6</sup>

---

<sup>3</sup> *Review of the Commission's Program Access Rules and Examination of Programming Tying Arrangements*, First Report and Order, 25 FCC Rcd 746 (2010) ("*2010 Order*").

<sup>4</sup> *DIRECTV, Inc. v. Comcast Corp.*, Memorandum Opinion and Order, 15 FCC Rcd 22802, ¶ 13 (2000); *accord RCN Telecom Servs. of New York, Inc. v. Cablevision Sys. Corp.*, Memorandum Opinion and Order, 16 FCC Rcd 12048, ¶ 15 (2001).

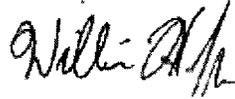
<sup>5</sup> *See Devon Energy Corp. v. Kempthorne*, 551 F.3d 1030, 1040 (D.C. Cir. 2008) (holding that the *Paralyzed Veterans* rule requires "a definitive and binding statement on behalf of the agency [that] come[s] from a source with the authority to bind the agency"), *cert. denied*, 130 S. Ct. 86 (2009).

<sup>6</sup> *Compare Alaska Prof'l Hunters*, 177 F.3d at 1035 (requiring the FAA to use a notice-and-comment rulemaking if it wanted to change its interpretation of a regulation that the agency had "uniformly," though informally, interpreted for "almost thirty years" in the context of Alaska guide pilots, and which had become "an authoritative departmental interpretation"), and *Environmental Integrity Project v. EPA*, 425 F.3d 992, 994-95, 997-98 (D.C. Cir. 2005) (holding that, where EPA in two adjudications had authoritatively construed two regulations to impose independent duties, the agency was required to use notice-and-comment rulemaking to conclude that the same two regulations impose alternative, rather than separate, duties), with *Devon Energy*, 551 F.3d at 1041 (rejecting claim that agency was required to engage in notice-and-comment rulemaking to change interpretation found in "guidance documents" that were "far

Marlene H. Dortch  
June 29, 2011  
Page 4

Verizon continues respectfully to request that the Commission resolve its complaint against Cablevision promptly.

Sincerely,



William H. Johnson

Enclosures

cc: Austin Schlick, General Counsel  
William T. Lake, Media Bureau  
Howard J. Symons, Attorney for Defendants  
Christopher J. Harvie, Attorney for Defendants  
David Ellen, Cablevision  
Lucinda Treat, Madison Square Garden, L.P.  
Adam Levine, Madison Square Garden, L.P.

---

from conclusive in what they said” and “did not come from sources who had the authority to bind the agency”), and *Paralyzed Veterans*, 117 F.3d at 587 (finding that DOJ had “never authoritatively adopted a position contrary to its” more recent interpretation of its regulation and so refusing to apply the *Paralyzed Veterans* rule in *Paralyzed Veterans* itself).

## CERTIFICATE OF SERVICE

I, Jennifer Pelzman, hereby certify that on this 29th day of June, 2011, a copy of the foregoing letter was served on the parties listed below by electronic mail, FedEx and/or hand delivery, in addition to electronic submission to the Federal Communication Commission's Electronic Comment Filing System.

/s/ Jennifer Pelzman  
Jennifer Pelzman

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

Austin Schlick  
General Counsel  
Federal Communications Commission  
445 12th Street S.W.  
Washington, DC 20554

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

David Ellen  
Cablevision Systems Corp.  
1111 Stewart Avenue  
Bethpage, NY 11714

Adam Levine  
Lucinda Treat  
Madison Square Garden, L.P.  
Two Penn Plaza  
Eighth Floor  
New York, NY 10121

Howard J. Symons  
Christopher J. Harvie  
Mintz, Levin, Cohn, Ferris, Glovsky and  
Popeo, P.C.  
701 Pennsylvania Avenue N.W.  
Suite 900  
Washington, DC 20004

Michael E. Glover, Verizon,  
letter to William T. Lake, FCC  
(June 15, 2011)

Michael E. Glover  
Senior Vice President and  
Deputy General Counsel

RECEIVED - FCC  
JUN 15 2011  
Federal Communications Commission  
Bureau / Office



1320 North Courthouse Road  
Ninth Floor  
Arlington, VA 22201

(703) 351-3860  
micheal.e.glover@verizon.com

June 15, 2011

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

Dear Mr. Lake:

In *Cablevision Systems Corp. v. FCC*, No. 10-1062 (D.C. Cir. June 10, 2011), the D.C. Circuit considered and rejected virtually all of the arguments petitioners Cablevision and Madison Square Garden, L.P. (collectively, "Cablevision") raised with respect to the Commission's 2010 Order<sup>1</sup> and which Cablevision has also raised in opposition to Verizon's program access complaint. The D.C. Circuit has thus confirmed the Commission's authority to remedy Cablevision's unlawful withholding of the high-definition ("HD") feeds of its two affiliated RSN channels, MSG and MSG+, and rejected Cablevision's central defenses of its refusal to sell those channels to Verizon on any terms. Verizon, therefore, respectfully requests that the Commission rule promptly on Verizon's complaint.

**The D.C. Circuit Confirmed the Commission's Statutory Authority To Remedy Unlawful Withholding of Terrestrially Delivered RSN Programming**

In *Cablevision*, the court first rejected Cablevision's claim that the text of § 628 prevents the Commission from remedying unfair practices by cable operators with respect to terrestrially delivered RSN programming that significantly hinder competitors from providing to consumers competitively attractive programming packages that include satellite programming. See slip op. at 12-21.

The court also rejected Cablevision's claim that "commercial attractiveness has nothing to do with whether [an] MVPD can provide satellite programming" for purposes of § 628(b). *Id.*

---

<sup>1</sup> *Review of the Commission's Program Access Rules and Examination of Programming Tying Arrangements*, First Report and Order, 25 FCC Rcd 746 (2010) ("2010 Order").

at 19. The court expressly found that a “lack of commercial attractiveness” resulting from a cable operator’s unfair acts could “significantly hinder [an MVPD] from providing satellite programming” within the meaning of § 628(b). *Id.* As the D.C. Circuit explained — in reasoning directly applicable to Cablevision’s withholding of RSN programming from Verizon — “[w]hen a vertically integrated cable programmer limits access to programming that customers want and that competitors are unable to duplicate — *like the games of a local team selling broadcast rights to a single sports network* — competitor MVPDs will find themselves at a serious disadvantage when trying to attract customers away from the incumbent cable company.” *Id.* at 20 (emphasis added). The D.C. Circuit’s holding directly refutes Cablevision’s claims here that Verizon’s gains in the New York video marketplace to date preclude the Commission from finding that Cablevision’s withholding has reduced Verizon’s commercial attractiveness to consumers, so that Cablevision is liable under § 628(b). And, in fact, although there are inherent limitations in any market share data given the myriad factors that can impact penetration, market share data in the record show that Verizon’s inability to offer consumers MSG and MSG+ in HD has substantially hindered its ability to compete in the New York video marketplace.<sup>2</sup>

The court next found that the Commission acted reasonably in interpreting § 628(b) to apply to unfair practices with respect to terrestrially delivered RSN programming that significantly hinder competitors from providing to consumers competitively attractive programming packages that include satellite programming. *See slip op.* at 22. The D.C. Circuit specifically pointed to the Commission’s determination that “terrestrial programming like RSNs,” which “are both non-replicable and highly coveted, have become necessary for MVPDs to compete fully with vertically integrated cable companies.” *Id.* Indeed, the court found that the Commission’s approach “aligns . . . closely with Congress’s core purpose in enacting section 628,” because “preventing vertically integrated cable companies from engaging in unfair dealing over programming, precisely the conduct the [Commission’s] order addresses, was the primary reason Congress enacted section 628.” *Id.* at 22-23. In short, the D.C. Circuit’s decision puts to rest all of Cablevision’s claims here that the Commission lacks authority under § 628 to remedy Cablevision’s unlawful conduct in refusing to sell the terrestrially delivered HD feeds of MSG and MSG+ to Verizon on any terms.

**The D.C. Circuit Confirmed that the First Amendment Does Not Prevent the Commission From Remedying Cablevision’s Unlawful Withholding of HD RSN Programming**

The court rejected Cablevision’s First Amendment challenges to the Commission’s interpretation of § 628. *See id.* at 24-30. The court explained that it would “apply intermediate scrutiny to the Commission’s order, recognizing that [it] ha[d] already concluded that . . . promoting competition in the MVPD market . . . represents an important government interest.” *Id.* at 25. The court found that the “Commission’s terrestrial programming rules specifically target activities where the governmental interest is greatest” because the Commission will “impos[e] liability only when complainants demonstrate that a company’s unfair act has ‘the purpose or effect’ of ‘hinder[ing] significantly or . . . prevent[ing]’ the provision of satellite

---

<sup>2</sup> *See* Verizon Op. Br. 16-17 (Oct. 12, 2010); Verizon Reply Br. 10-11 (Oct. 22, 2010).

programming.” *Id.* at 26. The court’s holding thus disposes of Cablevision’s identical facial First Amendment claims in this case. *See id.* at 27.

The D.C. Circuit also rejected Cablevision’s First Amendment challenges to the Commission’s decision to adopt a rebuttable presumption that withholding terrestrially delivered RSN programming — whether entirely or the HD feed only — has the purpose or effect that § 628 prohibits. *See id.* at 37-38. The court found that the “clear and undisputed evidence shows that the Commission established presumptions for RSN programming due to that programming’s economic characteristics, not to its communicative impact,” so strict scrutiny does not apply. *Id.* And the court found Cablevision’s claim that the rebuttable presumptions failed intermediate scrutiny “equally meritless.” *Id.* at 38. The court reasoned that, in light of “record evidence demonstrating the significant impact of RSN programming withholding, the Commission’s presumptions represent a narrowly tailored effort to further the important governmental interest of increasing competition in video programming.” *Id.*

Finally, the court addressed Cablevision’s claim that the specific competitive dynamics in New York City render the Commission’s terrestrial programming rules unconstitutional as applied to Cablevision’s withholding of RSN programming in that marketplace. The court found that Cablevision’s challenge was unripe, in large part because this proceeding was still pending. *See id.* at 29. However, the court noted that, if Cablevision were “correct about the state of competition” in its service area within the New York City marketplace, Cablevision would “have powerful evidence that [its] terrestrial programming withholding has no significant impact on the delivery of satellite programming.” *Id.* at 30. But, in fact, Cablevision has no such evidence, and the record shows that Cablevision’s withholding of MSG and MSG+ in HD has substantially hindered Verizon in providing to consumers competitively attractive programming packages that include satellite programming, including in the New York City marketplace. Cablevision’s attempts to rebut that evidence have been based on its claims about Verizon’s general success in the marketplace without those HD channels. But, as explained above, the D.C. Circuit squarely rejected Cablevision’s contention that “commercial attractiveness” has nothing to do with § 628, and found that an MVPD can be substantially hindered if — as the record shows is the case here<sup>3</sup> — withholding of must-have, non-replicable RSN programming reduces the commercial attractiveness of the MVPD’s programming packages to consumers. As the court concluded, the Commission acts consistent with the First Amendment when it remedies the “withholding of highly desirable terrestrially delivered cable programming, like RSNs,” where, as here, the record shows that the withholding “inhibits competition” in a marketplace. Slip op. at 26.

**The D.C. Circuit Upheld the Commission’s Rebuttable Presumption that Withholding HD Feeds of RSN Programming Has the Purpose Or Effect § 628 Prohibits**

The court reviewed and rejected Cablevision’s substantive challenges to the Commission’s decision to adopt a rebuttable presumption that withholding terrestrially delivered RSN programming — whether the entire RSN or only the HD feed — has the purpose or effect of substantially hindering a competing MVPD in providing to consumers competitively attractive

---

<sup>3</sup> *See* Verizon Op. Br. 6-18 (Oct. 12, 2010); Verizon Reply Br. 5-11 (Oct. 22, 2010).

programming packages that include satellite programming. The court found that the “Commission advanced compelling reasons to believe that withholding RSN programming is, given its desirability and non-replicability, uniquely likely to significantly impact the MVPD market.” *Id.* at 36. Moreover, specifically with regard to the rebuttable presumption that applies to “RSN HD programming,” the court noted that the Commission properly relied on “consumer survey data, evidence from cable operators’ marketing campaigns touting the carriage of HD programming, and record comments describing the rapidly growing demand for HD televisions.” *Id.* at 37. That evidence included Verizon’s submission of *Cablevision*’s marketing materials,<sup>4</sup> in which Cablevision repeatedly touts both its access to MSG HD and MSG+ HD, and that Verizon’s FiOS service cannot match that offering.

Cablevision has not rebutted the Commission’s presumption. On the contrary, the record here confirms that Cablevision is withholding the HD feeds of MSG and MSG+ from Verizon for the purpose of substantially hindering Verizon’s ability to provide to consumers competitively attractive programming packages that include satellite programming. For example, Cablevision’s Chief Operating Officer pointed to the fact that, as a result of Cablevision’s withholding, “FiOS’ video product lacks key components, specifically the HD versions of *MSG* and *Fox Sports NY* [now *MSG+*],” which he identified as a factor that “would slow or reverse any subscriber flows to FiOS.”<sup>5</sup> Internal Cablevision documents tell the same story about Cablevision’s reasons for refusing to sell MSG and MSG+ in HD to Verizon on any terms.<sup>6</sup>

Moreover, the record further confirms that Cablevision’s withholding is having the effect of substantially hindering Verizon in the manner § 628 prohibits. In addition to market share data — which, despite their inherent limitations, show that Verizon’s ability to compete in the New York video marketplace has been substantially hindered by the inability to offer consumers MSG and MSG+ in HD<sup>7</sup> — the record contains evidence that Cablevision marketing campaigns tout that FiOS does not have MSG and MSG+ in HD, that Cablevision instructs its employees to stress this fact, and that consumers value HD local sports programming and point to the lack of MSG and MSG+ in HD as a reason (perhaps their only reason) to stay with Cablevision; internal Verizon and Cablevision documents also confirm the significance of the HD feeds of MSG and MSG+ to the companies’ respective abilities to compete in the marketplace.<sup>8</sup>

---

<sup>4</sup> See 2010 Order ¶ 54 n.215.

<sup>5</sup> Verizon Op. Br. at 6-7 (Oct. 12, 2010).

<sup>6</sup> See Verizon Op. Br. at 10-11, 12-13 (Oct. 12, 2010); Verizon Reply Br. 5-6, 10 (Oct. 22, 2010).

<sup>7</sup> See Verizon Op. Br. 16-17 (Oct. 12, 2010); Verizon Reply Br. 10-11 (Oct. 22, 2010).

<sup>8</sup> See Verizon Op. Br. 8-14 (Oct. 12, 2010); Verizon Reply Br. 6-10 (Oct. 22, 2010).

**The D.C. Circuit Affirmed the Commission’s Determination that a Cable Company Can Be Held Liable for the Actions of an Affiliated Terrestrial Programmer Under Common Control**

The D.C. Circuit also affirmed the Commission’s common sense conclusion that a cable operator can be held liable for the actions of its affiliated terrestrial programmer, where — as here — both are under common control. *See slip op.* at 38-41. As the court explained, “the Commission has determined, reasonably in our view, that discriminatory practices by terrestrial programmers will often be intended in part to benefit a cable operator under common ownership.” *Id.* at 40. Indeed, in reasoning equally applicable to this case, the court noted that “if a cable operator has one DBS competitor and one wireline competitor but considers the latter a greater threat to its dominant position, exclusive arrangements between an affiliated terrestrial programmer and the DBS company that keep must-have programming from the wireline company will redound to the cable operator’s benefit.” *Id.* at 41. Cablevision refuses to sell MSG and MSG+ in HD to Verizon on any terms, even as those channels are made available to DIRECTV and Dish, and to other cable companies that do not compete directly with Cablevision.

Nor can there be any doubt that Cablevision and Madison Square Garden are under common control — by Charles Dolan and his family — and that Cablevision is unduly and improperly influencing Madison Square Garden’s decisions concerning which providers get access to its programming.<sup>9</sup> Indeed, even after Madison Square Garden’s parent company (Madison Square Garden, Inc.) was spun off to become an independent, publicly-traded company, Madison Square Garden still refuses to deal with Verizon, foregoing revenues (and obligations to its independent shareholders) to help Cablevision fend off competition from Verizon.

**The D.C. Circuit Confirmed that the Commission Can Determine, on a Case-By-Case Basis, That Withholding of RSN Programming Is Unfair**

Finally, the D.C. Circuit recognized that the Commission remains free to “assess[] [the] fairness” of a cable operator’s withholding of terrestrially delivered RSN programming “on a case-by-case basis,” through individual adjudications such as this one. *Slip op.* at 47; *see also, e.g., Cassell v. FCC*, 154 F.3d 478, 486 (D.C. Cir. 1998) (applying the “well settled” rule that “the choice between rulemaking and adjudication lies in the first instance within the [agency’s] discretion”) (internal quotation marks omitted; alteration in original). The Commission, therefore, can — and should — act now on the record in this case to assess whether Cablevision’s conduct in withholding from Verizon the HD feeds of MSG and MSG+ is unfair.

Indeed, the record here shows that Cablevision’s withholding of that RSN programming presents the paradigm case of an unfair practice. Madison Square Garden, L.P. owns the exclusive rights to produce and exhibit games of the New York Knicks, New York Rangers, Buffalo Sabres, New York Islanders, and New Jersey Devils. It acquired access to this “must-

---

<sup>9</sup> *See Verizon Op. Br.* 17-18 (Oct. 12, 2010); *Verizon Reply Br.* 32-33 (Oct. 22, 2010).

have” programming (and in two cases, the actual sports franchises featured in this programming) before Verizon entered the marketplace and at a time when Cablevision faced little video competition. Verizon thus had no opportunity to obtain the programming when it first entered the marketplace, and Cablevision has prevented Verizon from gaining access to it ever since. The sports programming on MSG and MSG+ in HD is unique, and Verizon — and those consumers for whom this is must-have programming — cannot replicate it or find any meaningful substitute. Moreover, Madison Square Garden, L.P.’s ownership of the Knicks and Rangers franchises and rights to produce and exhibit the games means that Verizon will not have a future right to bid for broadcast rights, creating a persistent barrier to effective competition from new MVPDs seeking to broadcast this programming. Indeed, Cablevision has used this programming as a weapon to handicap direct competitors and to extend the legacy of its former monopoly franchises.<sup>10</sup> Cablevision’s refusal to deal with Verizon — even as DBS operators and cable operators that do not compete directly with Cablevision are allowed to air MSG and MSG+ in HD — is plainly “pernicious” and there is nothing about it that “may actually be precompetitive.” Slip op. at 43-44.

Although the D.C. Circuit found the Commission had not explained satisfactorily the Commission’s conclusion that withholding *any* terrestrial programming is categorically unfair, *see id.* at 41-47, the court’s ruling provides no support for Cablevision’s claims that its withholding of terrestrial RSN programming from Verizon is fair. In rejecting the Commission’s categorical conclusion, the court focused on the way the Commission’s determination affected “local cable news networks,” which are “readily replicable by competitive MVPDs.” *Id.* at 45-46 (internal quotation marks omitted). The court did not identify any problems with the Commission’s determination that withholding of uniquely desirable and non-replicable RSN programming is unfair and, instead, repeatedly endorsed the Commission’s findings with respect to RSN programming. *See, e.g., id.* at 20 (“When a vertically integrated cable programmer limits access to programming that customers want and that competitors are unable to duplicate — like the games of a local team selling broadcast rights to a single sports network — competitor MVPDs will find themselves at a serious disadvantage when trying to attract customers away from the incumbent cable company.”); *id.* at 36 (“[T]he Commission advanced compelling reasons to believe that withholding RSN programming is, given its desirability and non-replicability, uniquely likely to significantly impact the MVPD market.”).

In sum, and notwithstanding any claims Cablevision might make, there is no longer any possible reason for the Commission to delay resolving Verizon’s complaint. Indeed, the Commission long ago concluded that cases such as this should be resolved within five months.<sup>11</sup> In less than a month, it will have been two years since Verizon filed its original complaint. Moreover, about nine months have passed since the parties completed briefing on Verizon’s supplemental complaint, which Verizon filed in response to the Commission’s *2010 Order*. Consumers in the New York metropolitan area and Buffalo have missed out on another NBA and

---

<sup>10</sup> *See* Verizon Op. Br. 14-15 (Oct. 12, 2010); Verizon Reply Br. 12-13 (Oct. 22, 2010).

<sup>11</sup> *Implementation of the Cable Television Consumer Protection and Competition Act of 1992*, Report and Order, 13 FCC Rcd 15822, ¶ 41 (1998).

William T. Lake  
June 15, 2011  
Page 7 of 7

NHL season — they have waited long enough. Verizon respectfully requests that the Commission resolve this matter promptly.

Sincerely,

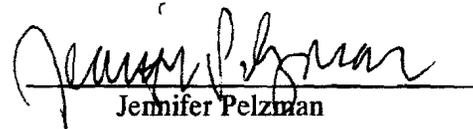
A handwritten signature in cursive script that reads "Michael Glover / MS".

Michael E. Glover

cc: Chairman Julius Genachowski  
Commissioner Michael J. Copps  
Commissioner Robert M. McDowell  
Commissioner Mignon Clyburn  
Marlene Dortch, Secretary  
Howard J. Symons, Attorney for Defendants  
Christopher J. Harvie, Attorney for Defendants  
David Ellen, Cablevision  
Lucinda Treat, Madison Square Garden, L.P.  
Adam Levine, Madison Square Garden, L.P.

**CERTIFICATE OF SERVICE**

I, Jennifer Pelzman, hereby certify that on this 15th day of June, 2011, a copy of the foregoing letter was served on the parties listed below by electronic mail, FedEx and/or hand delivery.



Jennifer Pelzman

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

Chairman Julius Genachowski  
Commissioner Michael J. Copps  
Commissioner Robert M. McDowell  
Commissioner Mignon Clyburn  
Federal Communications Commission  
445 12th Street S.W.  
Washington, DC 20554

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

David Ellen  
Cablevision Systems Corp.  
1111 Stewart Avenue  
Bethpage, NY 11714

Adam Levine  
Lucinda Treat  
Madison Square Garden, L.P.  
Two Penn Plaza  
Eighth Floor  
New York, NY 10121

Howard J. Symons  
Christopher J. Harvie  
Mintz, Levin, Cohn, Ferris, Glovsky and  
Popeo, P.C.  
701 Pennsylvania Avenue N.W.  
Suite 900  
Washington, DC 20004

Michael E. Glover, Verizon,  
letter to William T. Lake, FCC  
(June 24, 2011)

Michael E. Glover  
Senior Vice President and  
Deputy General Counsel

RECEIVED - FCC

JUN 24 2011

Federal Communications Commission  
Bureau / Office



1320 North Courthouse Road  
Ninth Floor  
Arlington, VA 22201

(703) 351-3860  
micheal.e.glover@verizon.com

June 24, 2011

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

Dear Mr. Lake:

Cablevision's letter of June 22, 2011 is yet another attempt to manufacture delay. Verizon filed its complaint *two years* ago, and each day of further delay enables Cablevision to continue selectively to withhold the HD fees of MSG and MSG+, to the detriment of consumers. Cablevision argues that the D.C. Circuit's recent decision requires additional delay, including a full-blown rulemaking proceeding and further factual development briefing in this proceeding. But Cablevision mischaracterizes the Court's decision and ignores both basic principles of administrative law and the extensive factual and legal record developed to date in this long-pending case. There is nothing to Cablevision's latest claims, and the Commission can and should decide this matter promptly.

1. As an initial matter, the statute expressly authorizes the Commission to identify and remedy violations of section 628(b) through case-by-case adjudications, such as Verizon's complaint. See 47 U.S.C. § 548(d). There is no ambiguity on this score, and that should be the end of the matter.

Cablevision nonetheless claims (at 3) that the D.C. Circuit's decision somehow overrides the statute. That is nonsense. The D.C. Circuit's decision makes abundantly clear that the Commission may evaluate whether the withholding of programming is "unfair" on "a case-by-case basis" through adjudication, as an alternative to adopting rules that treat certain conduct as "categorically unfair." Slip Op. at 47. That also is consistent with bedrock administrative law that an agency is free to interpret statutes either through rulemaking or through adjudication. See, e.g., *SEC v. Chenery Corp.*, 332 U.S. 194, 202-03 (1947). Although the Commission initially took a rulemaking approach, nothing binds it to that approach going forward. See *National Small Shipments Traffic Conference, Inc. v. ICC*, 725 F.2d 1442, 1448 (D.C. Cir. 1984).

Cablevision argues (at 2) that the D.C. Circuit's decision requires a return to "the pre-2010" status quo, which it characterizes as one where "the Commission had reached a definitive interpretation . . . under which the withholding of terrestrially-delivered programming was not 'unfair.'" Not so. The core issue before the D.C. Circuit was whether acts involving terrestrially delivered programming could ever constitute unfair acts within the reach of section 628(b). The D.C. Circuit squarely rejected Cablevision's various arguments that they could not, and repeatedly invoked the example of unique, non-replicable regional sports programming, such as the HD feeds at issue here, as the paradigm case. *See, e.g.*, Slip Op. at at 20 ("When a vertically integrated cable programmer limits access to programming that customers want and that competitors are unable to duplicate — like the games of a local team selling broadcast rights to a single sports network — competitor MVPDs will find themselves at a serious disadvantage when trying to attract customers away from the incumbent cable company."); *id.* at 36 ("[T]he Commission advanced compelling reasons to believe that withholding RSN programming is, given its desirability and non-replicability, uniquely likely to significantly impact the MVPD market.").

In any event, the fact is that, prior to 2010, the Commission had concluded that unfair acts involving terrestrially delivered programming could violate section 628(b). *See 2010 Program Access Order* ¶ 22 ("The Commission itself has specifically held that unfair acts involving terrestrially delivered, cable-affiliated programming can be cognizable under Section 628(b)."). Under the pre-2010 status quo, the Commission made these determinations on a case-by-case basis, and a return to that status quo would reinstitute that settled approach. The D.C. Circuit, moreover, rejected Cablevision's claim that the *2010 Program Access Order* departed from the Commission's prior position. Slip Op. at 23.

Nor is Cablevision correct (at 3-4) that the statute somehow "envisions that the Commission define 'unfair' practices by way of rulemaking." As noted, the statute expressly authorizes the Commission to enforce the prohibition in section 628(b) through "adjudicatory proceeding[s]." 47 U.S.C. § 548(d). Although section 628(c)(1) directs the Commission to "specify particular conduct that is prohibited by subsection (b)," that provision does not require the Commission to promulgate in advance rules that specify each and every possible type of conduct that will be held to be "unfair" in an adjudication. Indeed, even the regulation the Commission promulgated recognized that the categories of unfair practices it identified was not an exhaustive list. *See* 47 C.F.R. § 76.1001(b) (noting that the statutory term "includes, but is not limited to," the listed categories). The D.C. Circuit, moreover, expressly confirmed the Commission's authority to identify unfair practices on a case-by-case basis. Slip Op. at 47.

Finally, nothing in the D.C. Circuit's opinion "envisioned," much less required the Commission to proceed on remand by rulemaking — much less to do so before adjudicating Verizon's long-pending complaint. Cablevision's contrary argument (at 5) blatantly mischaracterizes the Court's opinion. Indeed, the Court said exactly the opposite, making clear that the Commission had the choice "to assess[] fairness on a case-by-case basis" *or* to take another attempt at justifying an approach under which "the withholding of terrestrial programming should be treated as categorically unfair." Slip Op. at 47. Cablevision is forced to acknowledge this language, but argues that the Court envisioned that case-by-case assessment

“would occur after the Commission had completed its remand proceeding.” But Cablevision can point to nothing in the Court’s opinion supporting this view.

2. In a further bid for delay, Cablevision argues (at 6) that the D.C. Circuit’s decision has “additional repercussions that warrant further briefing and record development.” But over the course of the past two years, there has been extensive briefing and discovery on every conceivable legal and factual issue, including specifically the “unfairness” of Cablevision’s practices. Indeed, the attachment to Cablevision’s own letter – a letter it filed on January 8, 2010 – puts the lie to its claim (at 6) that it did not have sufficient opportunity to “present legal argument with respect to the ‘unfair issue.’” That entire letter is devoted to precisely that issue.

Nor is there any need for further factual development. Although Cablevision asserts (at 6) that it must be “given the opportunity to develop facts,” it does not identify a single fact or piece of evidence that is not already in the record and that Cablevision has not previously had the opportunity to develop. The facts are what they are, and both parties have been given ample opportunities over the last two years to develop them.

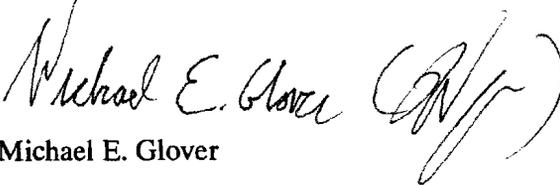
The “three other aspects of the court’s decision” to which Cablevision refers (at 7-8) likewise do not “warrant further consideration and briefing,” but instead demonstrate that the proper way to proceed is through adjudication of the complaint on the existing record. With respect to the “significant hindrance” standard, the D.C. Circuit’s opinion affirms that this is properly evaluated on a case-by-case basis, and expressly *rejects* Cablevision’s argument that this standard can be met only when a competitor is prevented from “delivering satellite programming to customers” entirely. Slip Op. at 19; *see id.* at 19-21. Cablevision’s claim (at 7) that the opinion “strongly indicated” that this standard could be met only where there is such complete foreclosure is directly at odds with the Court’s actual words. And in no case does Cablevision explain (much less demonstrate) that the facts necessary to adjudicate significant hindrance are somehow incomplete; to the contrary, it concedes (at 8) that it has “produced considerable evidence” on this score. Cablevision urges the Commission to rule on the evidence already in the record. On this last point, Verizon agrees.

3. Finally, Cablevision argues (at 4) that the Media Bureau “lacks authority to decide Verizon’s . . . claims until the full Commission adopts a new ‘unfairness’ rule.” This argument fails, as an initial matter, because the Commission is under no obligation to adopt new rules, as set forth above. Moreover, determining whether certain conduct should be treated as “unfair” for purposes of Section 628(b) is well within the Media Bureau’s delegated authority powers. All the novel questions of law, fact, and policy have already been decided in the *2010 Program Access Order* and the D.C. Circuit’s opinion; all the Media Bureau needs to do now is apply the specific facts of this case to those settled determinations. 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.

William T. Lake  
June 24, 2011  
Page 4 of 4

For the foregoing reasons, Verizon respectfully requests that the Commission resolve this matter promptly.

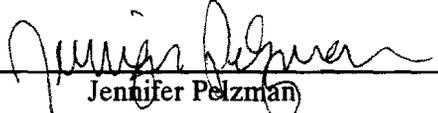
Sincerely,

  
Michael E. Glover

cc: Chairman Julius Genachowski  
Commissioner Michael J. Copps  
Commissioner Robert M. McDowell  
Commissioner Mignon Clyburn  
Austin Schlick, General Counsel  
Marlene Dortch, Secretary  
Howard J. Symons, Attorney for Defendants  
Christopher J. Harvie, Attorney for Defendants  
David Ellen, Cablevision  
Lucinda Treat, Madison Square Garden, L.P.  
Adam Levine, Madison Square Garden, L.P.

**CERTIFICATE OF SERVICE**

I, Jennifer Pelzman, hereby certify that on this 24th day of June, 2011, a copy of the foregoing letter was served on the parties listed below by electronic mail, FedEx and/or hand delivery.



Jennifer Pelzman

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

Chairman Julius Genachowski  
Commissioner Michael J. Copps  
Commissioner Robert M. McDowell  
Commissioner Mignon Clyburn  
Federal Communications Commission  
445 12th Street S.W.  
Washington, DC 20554

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

David Ellen  
Cablevision Systems Corp.  
1111 Stewart Avenue  
Bethpage, NY 11714

Adam Levine  
Lucinda Treat  
Madison Square Garden, L.P.  
Two Penn Plaza  
Eighth Floor  
New York, NY 10121

Howard J. Symons  
Christopher J. Harvie  
Mintz, Levin, Cohn, Ferris, Glovsky and  
Popeo, P.C.  
701 Pennsylvania Avenue N.W.  
Suite 900  
Washington, DC 20004