

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)
)
The Regional Sports Network) MB Docket No. 11-128
Marketplace)

COMMENTS OF AT&T

Introduction.

AT&T Inc., on behalf of itself and its operating company affiliates (collectively, “AT&T”), welcomes this opportunity to offer the following comments in response to the Commission’s Public Notice seeking comment on issues relating to regional sports network (“RSN”) access and carriage in order to prepare a report as provided in the *Adelphia Order*.¹ As the Commission repeatedly has recognized, regional sports network access is essential to competition in the video marketplace because of the high demand for such programming by a large and important segment of consumers, and because such programming is non-duplicable.² While there is plenty of competition for most programming, there simply are no alternatives for those that want to watch their favorite local team’s games. RSNs have used their control over such programming to demand ever-higher access fees, which, in turn, has contributed to the

¹ *Media Bureau Seeks Comment on The Regional Sports Network Marketplace*, Public Notice, MB Docket No. 11-128, DA 11-1238 (rel. Jul. 26, 2011) (“Public Notice”), citing *Applications for Consent to the Assignment and/or Transfer of Control of Licenses, Adelphia Communications Corp., Assignors to Time Warner Cable, inc., Assignees, et al.*, Memorandum Opinion and Order, 21 FCC Rcd 8203 (2006) (“*Adelphia Order*”).

² *Review of the Commission’s Program Access Rules and Examination of Programming Tying Arrangements*, MB Docket No. 07-198, First Report and Order, 25 FCC Rcd 746, ¶¶ 9, 52 (2010) (*Terrestrial Program Access Order*) (citing Commission precedent regarding the competitive significance of RSN programming), subsequent history omitted.

upward spiral in pay-TV rates. And, as AT&T's own experience with Cox's Channel 4 San Diego and Cablevision/Madison Square Garden's MSG and MSG+ RSN programming in Connecticut demonstrate, incumbent cable operators have used their control over access to affiliated RSNs to hinder competition in downstream video distribution markets. As a consequence, the Commission should consider extending the RSN access conditions adopted in the *Adelphia Order* not only temporally but also to all RSNs vertically affiliated with a cable operator or other multichannel video programming distributor (MVPD).

Discussion.

The critical importance to video competition of RSN access can hardly be over-stated. Just last year, in the *Terrestrial Program Access Order*, the Commission found that such programming is "highly valued by consumers," and that the inability of an MVPD to access RSN programming is likely to significantly hinder the ability of an MVPD to compete in the downstream video distribution market because a large number of consumers will refuse to purchase its service and elect instead to buy service from competitors offering such programming.³ The Commission's findings in this regard have been confirmed by both AT&T's own experience and consumer surveys showing that a very large percentage of customers will not even *consider* switching to an alternative video provider that does not offer regional sports

³ *Terrestrial Program Access Order* at ¶¶ 52, 31-35. See also *Implementation of the Cable Television Consumer Protection and Competition Act of 1992*, Report and Order and Notice of Proposed Rulemaking, 22 FCC Rcd 17791, ¶ 39 (2007); *Implementation of the Cable Television Consumer Protection and Competition Act of 1992*, Report and Order, 17 FCC Rcd 12124, ¶ 33 (2002) ("We agree with the competitive [video providers'] assertion that if they were to be deprived of only some of this 'must have' programming, their ability to retain subscribers would be jeopardized."); *Adelphia Order* at ¶ 151 (2006) ("[T]here is substantial evidence that a large number of consumers will refuse to purchase DBS service if the provider cannot offer an RSN"); *id.* ¶ 124 ("RSNs are often considered 'must-have programming' ... Hence, [a video provider's] ability to gain access to RSNs and the price and other terms of conditions of access can be important factors in its ability to compete with rivals.").

programming.⁴ Moreover, the value of such programming has increased dramatically in recent years because, while audiences for other programming and networks have fragmented (and their ratings thus have fallen) as the number of network channels has grown, sporting events have continued to draw large audiences, enabling sports networks to charge a premium to reach those viewers.⁵

RSN programming also is impossible to replicate. Typically, there is only one league for any given sport, only one home team for that sport, and only one network has the exclusive right to televise that team's games. As a consequence, "no amount of investment can duplicate . . . such programming."⁶

Given these marketplace dynamics, it should come as no surprise that RSN license fees (including those charged by unaffiliated RSNs and those affiliated with downstream video distributors) have been skyrocketing. Just yesterday, the LA Times reported that "ESPN and regional sports channels are the most expensive basic cable channels on the dial – often costing distributors . . . three times more than what they pay for news or entertainment networks such as USA, TNT and Discovery."⁷ And the increased cost of such programming inevitably gets passed on to consumers.⁸

⁴ See, Letter from Christopher Heimann, AT&T, to Marlene Dortch, FCC, MB Docket No. 07-198, Attach. 3 at 10-11 (Dec. 16, 2009) ("AT&T Complaint Submission"); *id.* Attach. 3, Sambar Decl. ¶¶ 4-9; *id.* Attach. 4 at 30-32. See also Letter from William Johnson, Verizon, to Marlene Dortch, FCC, MB Docket Nos. 07-29 & 07-198, at 4-5 & n.9 (Jan. 6, 2010) ("Verizon Ex Parte").

⁵ Joe Flint & Dawn C. Chmielewski, *How High Can Fees for Sports Rights Go?*, L.A. Times, Sept. 8, 2011, available at <http://www.latimes.com/business/la-fi-ct-sports-rights-20110908.0,7676976.story> (last checked Sept. 8, 2011) ("How High Can Fees for Sports Rights Go?"); *id.* ("At a time when the media landscape is fragmenting and people are scattered up and down the dial, major events are the one thing that can aggregate those audiences.") quoting David M. Carter, a professor of sports business at USC's Marshall School of Business.

⁶ *Terrestrial Program Access Order* at ¶ 9.

⁷ *How High Can Fees for Sports Rights Go?*

In light of the growing importance of sports programming, and the significant impact on consumers of rapidly escalating RSN license fees, the Commission's notice seeking comment on the RSN marketplace in order to prepare a report on RSN access issues is particularly timely. The Commission's authority to address many of these issues may be limited (particularly as they relate to RSNs unaffiliated with MVPDs), but its examination and forthcoming report on these issues can provide valuable insight to congressional leaders and other policymakers better positioned to take action to protect consumers.

Whatever the limits on the Commission's authority to address issues relating to access to RSNs unaffiliated with MVPDs, the Commission plainly has authority to address issues relating to access to RSN programming in which the Applicants (Time Warner and Comcast), and other MVPDs, hold an interest. The latter (*i.e.*, RSNs owned or affiliated with MVPDs) raise additional concerns beyond those posed by the rapid escalation of license fees. In particular, because of their affiliation with downstream video distributors, such RSNs may have an incentive to withhold access to their programming from competing MVPDs in order to hinder competition to their MVPD affiliates. As AT&T previously has documented, cable incumbents repeatedly have sought to do just that – that is, use their control over affiliated RSN programming to hinder their competitors' ability to offer consumers a viable competitive

⁸ *Id.* (“Ultimately, this all gets passed along to the consumer,” said Scott Rosner, a professor of sports business at the Wharton School of the University of Pennsylvania.”); *Expensive Regional Sports Networks are Becoming Pay-TV’s Achilles Heel*, VideoNuze.com, Aug. 22, 2011 (“RSNs aren’t new, but . . . teams and conferences have getting creative and aggressive about their TV rights, driving up the fees pay-TV operators and ultimately subscribers are required to pay.”), available at <http://www.videonuze.com/blogs/print.php?id=3187> (last checked Sept. 8, 2011).

alternative.⁹ And while the Commission's 2007 and 2010 program access rule revisions (in particular, its extension of the exclusive access prohibition in 2007, and its 2010 order closing the so-called terrestrial loophole) were essential steps to address this issue, they were by no means sufficient to assure that MVPDs will gain access to must-have RSN programming.

AT&T notes in this regard that its dispute with Cablevision regarding access to MSG's regional sports programming remains pending before the Commission more than two years after AT&T filed its complaint and more than 18 months after the Commission adopted its *Terrestrial Program Access Order*, not to mention almost 3 months after the D.C. Circuit upheld that order in all important respects. Although section 628 of the Act and the Commission's rules plainly entitle AT&T to the RSN access it seeks, continued delay in enforcing AT&T's rights has inhibited its ability to offer subscribers (in particular the large number of subscribers that will not consider switching to an alternative that does not include their favorite sports teams in HD) a viable, competitive alternative. In the end, competition and consumers are the losers.

For these reasons, the Commission must take further action to ensure that the objectives of the program access provisions of the Act and its rules are met, and that the 2007 and 2010 program access rule revisions are not for naught. In particular, the Commission must be particularly vigilant about overseeing developments in the RSN marketplace, and enforcing its program access rules with respect to RSN programming. It also must take action to ensure that any disputes over access to RSN programming are resolved quickly. In light of the critical importance of RSN programming to video competition, and the time-sensitive nature of obtaining access to such programming (given the relatively short duration of sports seasons),

⁹ See *AT&T Services, Inc., et al. v. Cox*, Program Access Complaint, File No. CSR-8066-P (filed Sept. 11, 2008); *AT&T Services, Inc., et al. v. Cablevision/MSG*, Program Access and Section 628(b) Complaint, File No. CSR-8196-P (filed Aug. 13, 2009).

justice delayed in this context is justice denied. Accordingly, to expedite resolution of disputes over access to RSN programming, the Commission should consider extending the RSN access conditions adopted in the *Adelphia Order* not only temporally but also to all RSNs vertically affiliated with a cable operator or other multichannel video programming distributor.

Respectfully submitted,

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