

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
Revision of the Commission's Program)	MB Docket No. 12-68
Access Rules)	
)	

**COMMENTS OF THE MADISON SQUARE GARDEN COMPANY
ON THE FURTHER NOTICE OF PROPOSED RULEMAKING**

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December 14, 2012

TABLE OF CONTENTS

Introduction and Summary	1
I. A Rebuttable Presumption Of Unfairness For Exclusive Contracts For Cable-Affiliated Regional Sports Networks Is Unwarranted And Unsupported By Any Empirical Evidence.....	4
II. There Is No Basis For Adopting A Rebuttable Presumption In Favor Of A Standstill For Complaints About Cable-Affiliated Regional Sports Networks, And Such A Presumption Is Inimical To Fair License Negotiations.....	8
III. Adopting Rebuttable Presumptions Against A Programming Network Based On A Previous Successful Complaint Would Be Unwarranted And Unfair.	12
IV. The Commission Should Not Adopt A Rebuttable Presumption Of Unfairness And Significant Hindrance For Exclusivities Involving Cable-Affiliated National Sports Networks.	14
Conclusion	16

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The Madison Square Garden Company (“MSG”) submits the following comments in response to the Order and Further Notice of Proposed Rulemaking (“*FNRPM*”) issued by the Commission in the above-captioned proceeding.^{1/}

INTRODUCTION AND SUMMARY

In the *Order*, the Commission correctly concluded that the level of competition in the market for the distribution of video programming and the availability of a case-by-case complaint resolution process obviated any need for continuation of the *per se* ban on exclusive contracts for satellite-delivered, cable-affiliated programming networks.^{2/} Competing multichannel video programming distributors (“MVPDs”) now seek a number of special presumptions that would essentially prejudge exclusivity complaints in favor of complainants and undermine the case-by-case determination process the Commission concluded was appropriate when it allowed the *per se* ban to sunset in the *Order*.^{3/} The Commission should reject these entreaties to use presumptions to effectively reconstruct a *per se* prohibition of exclusivity for cable-affiliated programming, particularly sports-related networks.

^{1/} *Revision of the Commission’s Program Access Rules*, Report and Order in MB Docket Nos. 12-68, 07-18,05-192, Further Notice of Proposed Rulemaking in MB Docket No. 12-68, Order on Reconsideration in MB Docket No. 07-29, FCC 12-123 (Oct. 5, 2012) (“*Order & FNRPM*”).

^{2/} *Order & FNRPM* ¶ 31.

^{3/} *See, e.g.*, Letter from Kevin G. Rupy, Senior Director, Policy Development, U.S. Telecom, to Marlene H. Dortch, Secretary, FCC, at 3-5 (Sept. 26, 2012) (filed in MB Docket No. 12-68).

The Commission has already provided competing MVPDs an advantage in complaint proceedings by adopting a rebuttable presumption of significant hindrance from regional sports network (“RSN”) exclusivity.^{4/} That presumption was at least nominally grounded in empirical evidence provided by statistical analysis in a previous Commission proceeding. Irrespective of the merits of the evidence supporting that presumption, the four additional presumptions addressed in the *FNPRM* lack any empirical support or even a sound basis. To survive judicial review, however, evidentiary presumptions such as those proposed in the *Order & FNRPM* must be grounded in a “sound and rational connection” between the proved and presumed fact, such that the existence of the former renders the latter so likely that it would be wasteful to require the complainant to present evidence of it.^{5/} As explained below, each of the four proposed new presumptions fails to meet this standard.

First, there is no sound basis for the proposal that exclusivity for a cable-affiliated RSN should be subject to a rebuttable presumption of unfairness. The D.C. Circuit in *Cablevision Systems Corp. v. FCC* invalidated the Commission’s initial decision to automatically deem as “unfair” all withholdings involving terrestrially-delivered programming.^{6/} Condemning all RSN exclusivities as presumptively unfair would replicate precisely the sort of prejudgment on a key statutory element cautioned against by the D.C. Circuit. In the wake of that decision, the Commission opted for case-by-case assessment of unfairness in terrestrial withholding cases involving an RSN, weighing the procompetitive benefits of the conduct against the anticompetitive harms. There is no reason to depart from that approach here. Indeed, the proposed rebuttable presumption lacks an empirical basis, with no tangible evidence to support a

^{4/} *Order & FNRPM* ¶ 55.

^{5/} *Order & FNRPM* ¶ 77.

^{6/} *Cablevision Systems Corp. v. FCC*, 649 F. 3d 695, 721-23 (D.C. Circuit 2011).

conclusion that the pro-competitive benefits of an RSN exclusivity will nearly always be outweighed by any possible anticompetitive effects. To the contrary, the *Order* itself recognized that “withholding of a cable-affiliated RSN does not always have a significant competitive impact.”^{7/} The proposed presumption of unfairness should be rejected.

Second, the proposal to create a rebuttable presumption that an MVPD complaining about exclusivity by an RSN should be entitled to a standstill also lacks merit. The standard for determining whether to grant a standstill is a fact-specific process that considers four factors: likelihood of the complaining MVPD to prevail on the merits of its complaint, harm to the MVPD, harm to the RSN, and the public interest. To presume that a complaining MVPD will meet this standard in every case is tantamount to having no standard at all. Further, presuming that MVPDs with existing contracts are entitled to guaranteed carriage during the pendency of a complaint effectively empowers them to indefinitely invalidate exclusive agreements with their competitors. Not only is this an unfair and unreasonable restriction on the contracting rights of cable-affiliated RSNs, it also affords competing MVPDs undue leverage to seek below-market rates and other unreasonable conditions in license negotiations, since such programmers would be effectively blocked from utilizing cable exclusivity as an alternative to capitulating to such terms. The end result will be to harm, rather than promote, fair competition.

Third, the proposal to adopt rebuttable presumptions of unfairness and significant hindrance against any cable-affiliated programmer (not just RSNs) based on a previous successful complaint against that programmer is both unwarranted and unfair. This proposal would effectively reinstate the *per se* ban by precluding case-by-case review of subsequent program access challenges involving a programmer solely because one of the programmer’s

^{7/} *Order* at ¶ 49.

contracts was previously adjudicated to be in violation of the rules. The proposal would preclude a fair assessment of the competitive impact of subsequent exclusive contracts, taking full account of the particular characteristics and market conditions associated with those contracts.

Fourth, the proposed rebuttable presumptions with regard to exclusivity in national sports network programming also lack a sound basis. While the RSN presumption relied to a large extent on a statistical analysis in the *Adelphia* proceeding, there is no similar empirical support for the proposition that withholding of national sports networks could have comparable effects. To the contrary, such networks lack the local team sports programming that the Commission has deemed important to competing MVPDs. There is no need or basis for adopting a rebuttable presumption with respect to national sports programming.

I. A REBUTTABLE PRESUMPTION OF UNFAIRNESS FOR EXCLUSIVE CONTRACTS FOR CABLE-AFFILIATED REGIONAL SPORTS NETWORKS IS UNWARRANTED AND UNSUPPORTED BY ANY EMPIRICAL EVIDENCE.

The Commission concluded in the *Order* that marketplace conditions are sufficiently competitive to warrant elimination of the *per se* ban on exclusive contracts for cable-affiliated programming.^{8/} As the Commission explained, the better approach in resolving complaints is to rely on “a case-by-case approach [that] allows for an individualized assessment of exclusive contracts based on the facts presented in each case.”^{9/} Having determined that marketplace conditions warrant allowing cable-affiliated programmers to enter into exclusive arrangements, the Commission should not negate that determination by contemporaneously presuming that all such agreements involving RSNs are both unfair and a significant hindrance to competition.

The Commission has previously determined that the question of whether an exclusive contract is an unfair act under Section 628(b) requires “balancing the anticompetitive harms of

^{8/} *Order & FNRPM* ¶¶ 29-30.

^{9/} *Order & FNRPM* ¶ 31.

the challenged conduct against the procompetitive benefits.”^{10/} Given the fact- and market-specific nature of such balancing, the Commission cannot conclude that simply because an exclusive contract involves a cable-affiliated RSN, it is probable that the anti-competitive effects of the arrangement will outweigh the pro-competitive benefits.^{11/} In the *Adelphia Order*, a statistical review found that in one of the three markets studied RSN exclusivity had no adverse effect on MVPD competition.^{12/} While the Commission pointed to unique characteristics of the particular RSN and the market at issue to explain the lack of an adverse competitive effect,^{13/} those circumstances highlight the folly of disregarding a case-by-case analysis and simply presuming unfairness in all cases.

The *Order* correctly recognized that “unique factors at play in individual cases can dictate the extent to which withholding of an RSN impacts competition.”^{14/} There are a myriad of such factors, including the size of the market, the number of MVPDs in the market, the nature of the video offerings of those MVPDs (including whether they offer exclusive sports content or do not carry certain sports content), the number of professional and NCAA Division I sports teams, the number of RSNs in the market, the amount and type of sports programming carried by the RSN, and the popularity and performance of the teams carried by the RSN. These and other

^{10/} *Order & FNRPM* ¶ 77.

^{11/} See *National Mining Association v. Department of Interior*, 177 F.3d 1, 6 (D.C. Cir. 1999) (“[A]n evidentiary presumption is only permissible if there is a sound and rational connection between the proved and inferred facts, and when proof of one fact renders the existence of another fact so probable that it is sensible and timesaving to assume the truth of the inferred fact until the adversary disproves it”).

^{12/} *Applications for Consent to the Assignment and/or Transfer of Control of Licenses, Adelphia Communications Corporation, Assignors to Time Warner Cable, Inc., Assignees, et al.*, Memorandum Opinion and Order, 21 FCC Rcd 8203, ¶ 149 (2006) (“*Adelphia Order*”).

^{13/} *Adelphia Order* ¶ 151 & n.503.

^{14/} *Order & FNRPM* ¶ 49.

factors differ from market to market, which will inevitably result in variable determinations regarding the competitive impact of each particular exclusivity.

In its review of the *2010 Program Access Order*, the D.C. Circuit cautioned the Commission against conflating the “unfairness” prong of Section 628(b) with the “significant hindrance prong” for which the Commission has already established a rebuttable presumption against RSN exclusivity, with the court suggesting that there are legal impediments to treating certain types of program withholding as “categorically unfair as opposed to assessing fairness on a case-by-case basis.”^{15/} Shortly after the court’s decision, the Media Bureau affirmed the propriety of using a case-by-case basis to assess the fairness of RSN exclusivity,^{16/} suggesting application of the five factors Congress set forth in Section 628(c)(4).^{17/} In affirming the Bureau’s reliance on this case-by-case approach, the Commission emphasized that the Bureau’s resolution of the unfairness issue “was based on a careful weighing of the evidence presented in this case and does not prejudge future cases, including those involving non-replicable programming such as RSNs.”^{18/} There is no reason for the Commission to depart from that approach here.

Further, there is simply no evidence to support the notion that each individual case of RSN exclusivity that may arise is so likely to be unfair that unfairness must be presumed in

^{15/} *Cablevision Systems Corp.*, 649 F.3d at 721-23.

^{16/} See *Verizon Tel. Cos. et al.*, Order, 26 FCC Rcd 13145, ¶ 20 (MB 2011) (“*Verizon/MSG Bureau Order*”), affirmed, *Verizon Tel. Cos. et al.*, Memorandum Opinion and Order, 26 FCC Rcd 15849 (2011), appeal on other grounds pending sub nom. *Cablevision Sys. Corp. v. FCC*, No. 11-4780 (2d Cir.).

^{17/} The five factors the Bureau considered were: (A) the effect of the exclusive contract on the development of competition in local and national MVPD markets; (B) the effect of the exclusive contract on competition from non-cable MVPDs; (C) the effect of the exclusive contract on the attraction of capital investment in the production and distribution of new programming; (D) the effect of the exclusive contract on diversity of programming; and (E) the duration of the exclusive contract. *Verizon/MSG Bureau Order* ¶ 23.

^{18/} *Verizon Telephone Companies and Verizon Services Inc. v. Madison Square Garden, L.P. and Cablevision Systems Corp.*, Memorandum Opinion and Order, 26 FCC Rcd 15849, ¶ 32 (2011).

every instance. In upholding the Commission’s decision to adopt a presumption of significant hindrance with regard to terrestrially-delivered RSNs,^{19/} the D.C. Circuit found it important that the Commission relied on its *Adelphia* proceeding regression analysis of the impact of RSN exclusivity on competitive MVPDs to demonstrate the validity of the presumption.^{20/} Extension of the presumption to satellite-delivered RSNs in the *Order & FNRPM* similarly relied on the empirical analysis in the *Adelphia* proceeding.^{21/} The Commission has conducted no empirical analysis to attempt to support a presumption of unfairness for all exclusive RSN contracts, nor undertaken any assessment of whether, in a competitive environment where cable operators compete against direct broadcast satellite (“DBS”) providers, telephone companies offering video services, and a growing array of online video platforms, anticompetitive harms resulting from any RSN exclusivity will outweigh procompetitive benefits of exclusivity with such regularity that a presumption is warranted. In the absence of empirical evidence, the Commission cannot lawfully conclude that a presumption is justified.

^{19/} A presumption the Commission extended to satellite-delivered RSNs in the *Order & FNRPM*. See *Order & FNRPM* ¶ 55.

^{20/} *Cablevision Systems Corp. v. FCC*, 649 F. 3d 695, 712-13 (D.C. Circuit 2011).

^{21/} See *Order & FNRPM* ¶ 55; *2010 Program Access Order* ¶ 52 (citing analysis in the Commission’s *Adelphia Order* and adopting a rebuttable presumption of significant hindrance to avoid “requir[ing] litigants and the Commission staff to undertake repetitive examinations of our RSN precedent and the relevant historical evidence”). Whether the six-year old regression analysis performed in the *Adelphia Order* could still today offer a reliable basis for any sort of presumption regarding the competitive effect of an RSN exclusivity is certainly subject to debate, given the changes in the video marketplace that have taken place since then. The *Adelphia* study only examined the impact of RSN withholding on the expected penetration level of DBS providers furnishing only a standalone offering of video service, failed to account for competition from the telephone companies video offerings, and made no attempt at all to assess the impact of RSN withholding on an MVPD that offers video as part of a triple- or quadruple-play of communications service. See Bruce Owen, *Bundling Undermines the RSN Presumption* (“Owen Paper”), attached as Exhibit K to *Verizon Telephone Companies and Verizon Services Corp. v. Madison Square Garden, L.P. and Cablevision Systems Corp.*, File No. CSR-8185-P, Defendants’ Answer to Verizon’s Supplement to Program Access Complaint (October 12, 2010).

II. THERE IS NO BASIS FOR ADOPTING A REBUTTABLE PRESUMPTION IN FAVOR OF A STANDSTILL FOR COMPLAINTS ABOUT CABLE-AFFILIATED REGIONAL SPORTS NETWORKS, AND SUCH A PRESUMPTION IS INIMICAL TO FAIR LICENSE NEGOTIATIONS

The Supreme Court has observed that a standstill order “is an extraordinary and drastic remedy, one that should not be granted unless the movant, by a clear showing, carries the burden of persuasion.”^{22/} The Court suggested that “the requirement for substantial proof is much higher” for a standstill type of remedy than even the requirement of proof applying to a motion for summary judgment.^{23/} Creating a rebuttable presumption that a complainant should be entitled to this extraordinary remedy without any showing other than the simple fact that the complaint involves an RSN is wholly incompatible with these standards.

The Commission applies a four-factor test in connection with a standstill request, evaluating whether: (i) the complainant is likely to prevail on the merits of its complaint; (ii) the complainant will suffer irreparable harm without a standstill; (iii) grant of a standstill will substantially harm other interested parties; and (iv) the public interest favors grant of a standstill.^{24/} There is no sound basis for presuming that a complaining MVPD will prevail in application of this standard simply because it undertook the ministerial act of filing a complaint about an exclusive RSN arrangement. Such a presumption would be tantamount to adopting a *per se* regime in the standstill phase of a complaint proceeding. It would be patently unfair to prejudge the merits of a standstill request without considering the particulars of the dispute and the impact of the exclusivity on the market at issue.

^{22/} *Mazurek v. Armstrong*, 520 US 968, 972 (1997) (quoting 11A C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure § 2948, pp. 129-130 (2d ed. 1995)).

^{23/} *Mazurek*, 520 US at 972.

^{24/} *Order & FNRPM* ¶ 78. See also *2010 Program Access Order* ¶ 73 (citing *Virginia Petroleum Jobbers Ass’n v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958)).

With respect to the first factor, the Commission cannot rationally conclude that the mere act of challenging an RSN exclusivity cannot be deemed “soundly and rationally” connected to a conclusion that the challenged arrangement is an unfair act that significantly hinders competition. It would be particularly inappropriate to “daisy-chain” the presumption of significant hindrance into a presumption of entitlement to the extraordinary remedy of a standstill order, given the truncated process of adjudicating such requests and its substantial impact on both the parties to the complaint and the parties to the challenged exclusivity.

In addressing the other three factors, the Commission typically applies a “balancing of the hardships,” weighing the three factors together, giving particular weight to the public interest.^{25/} But there is no basis for the Commission to presume that this balancing will typically result in a decision in favor of a standstill. There is no reason, for example, to automatically presume that the harm to the complaining MVPD in the absence of a standstill will always be greater than the harm of a standstill to the programmer or to the cable operator that is a party to the challenged arrangement. To the contrary, since the proposed standstill presumption here would indefinitely undo the benefits of an exclusive arrangement between the programmer and another distributor and offer no guarantee that, upon a resolution of the complaint in favor the defendant-programmer, that distributor would still be interested in resuming the arrangement, there clearly will be ample harm inflicted on both the programmer and the third-party distributor whose exclusivity has been negated by the standstill. Likewise, given the Commission’s

^{25/} See, e.g., *AT&T Corp., et al., Complainants, v. Ameritech Corporation, Defendant, and Qwest Communications Corporation, Defendant/Intervenor*, Memorandum Opinion and Order, 13 FCC Rcd 14508, ¶ 22 (1998).

recognition that exclusivity arrangements may be procompetitive,^{26/} there is also no *a priori* reason to presume that the public interest favors a standstill in every case involving an RSN.

By providing an MVPD with a virtual guarantee of continued carriage regardless of how unreasonable its negotiating demands, a presumptive standstill would give MVPDs a substantial and unwarranted advantage in negotiations with a cable-affiliated RSN. It also could restrict a programmer's options in response to a commercially unreasonable proposal. For instance, a standstill guarantee would enable an MVPD that was only willing to continue carriage of an RSN if it could pay below-market rates to effectively block or undo an exclusivity offered by that network to another distributor simply by bringing a challenge to that arrangement. While any standstill would be temporary, lasting no longer than the complaint proceeding, it could impose more permanent damage to the RSN by blocking an attempt by the RSN to enter into a potentially procompetitive exclusivity arrangement with another MVPD. The RSN will not only lose the benefits of the exclusive arrangement during any standstill, but may very well lose the exclusive arrangement altogether as there will be no guarantee that the counterparty will be willing to continue in the arrangement following the complaint process. In fact, the threat of a standstill alone will likely have a chilling effect on a counterparty's willingness to enter into an exclusive arrangement with a cable-affiliated RSN or alternatively, will likely result in a cable-affiliated RSN being forced to assume deal terms, risks and liabilities that it would otherwise not assume.^{27/}

A standstill presumption also threatens to negate the importance of the expiration date of a license agreement. Contract length is often a heavily negotiated provision that involves give-

^{26/} See, e.g., *Order & FNRPM* ¶ 35; *id.* n.151 (“[W]e find no basis to assume that the anticompetitive impact of exclusive arrangements always outweighs the procompetitive benefits.”).

^{27/} A standstill could also cause the RSN to be in a breach of the challenged arrangement or otherwise trigger draconian remedies under the arrangement.

and-take on other items. The contract terms and expiration dates vary across MVPDs, so that at any given time there are both older contracts that may not reflect the most current market rates and terms, and newer agreements that do. In addition, term expiration may sometimes coincide with the beginning of a professional or collegiate sports season. An MVPD party to an older, expiring contract could persist in offering only below-market rates and block the programmer from responding by entering into exclusivity with a different distributor by filing a complaint and invoking its presumptive entitlement to a standstill, thereby gaining continued carriage during a new season for an indefinite period of time on terms that do not reflect the prevailing market. The end result would be to distort the marketplace and inhibit fair and reasonable license negotiations by tipping the scales in favor of MVPDs that seek to leverage the threat of a program access complaint to gain better terms and conditions of carriage.

In effect, a guaranteed standstill offers an MVPD significant leverage in seeking to obtain favorable license terms from cable-affiliated programmers, enabling it to block the programmer from pursuing an alternative business strategy via exclusivity with another distributor and affording the complaining MVPD continued carriage for an indefinite period of time regardless of how unreasonable its license proposal may be. It also would severely disadvantage cable-affiliated RSNs relative to other RSNs and programmers, who would be unburdened by any standstill or other regulation that would impact their ability to enter into exclusive arrangements. Such a dynamic would inevitably hamper the ability of cable-affiliated RSNs to invest in and bid for content and to otherwise compete for distribution and viewers on a level playing field with its competitors. For example, a significant competitor to MSG's RSNs in the New York market is

the YES Network, an RSN featuring games of the Yankees and Nets, that is unaffiliated with any cable operator.^{28/}

A standstill order is indeed extraordinary relief, requiring a programming network that has not been found in violation of any Commission rules to continue providing its programming to an MVPD after the contract for that programming has expired, while also denying it the opportunity of realizing the contractual benefits it has negotiated with a third party. Access to that relief should not be given lightly and should not be presumed. A complainant seeking such extraordinary relief should bear the burden of proving that in its particular circumstances it is likely to prevail on the merits, that absent a standstill it will be irreparably harmed, and that the balance of that harm against harms to the programmer and the public interest warrant a standstill order. A rebuttable presumption fails to provide the careful and particularized analysis such an important decision demands, and should therefore be rejected.

III. ADOPTING REBUTTABLE PRESUMPTIONS AGAINST A PROGRAMMING NETWORK BASED ON A PREVIOUS SUCCESSFUL COMPLAINT WOULD BE UWWARRANTED AND UNFAIR.

There is no basis for concluding that a cable-affiliated exclusivity that violates Section 628(b) with respect to one MVPD presumptively establishes that any other exclusivity entered into by that network also violates Section 628(b).^{29/} This proposal would unfairly brand a cable-affiliated programmer found once to have contravened Section 628(b) as a potential serial offender, all of whose exclusivity arrangements are presumptively invalid regardless of the particular facts associated with the other exclusivity arrangement.

^{28/} See Press Release, News Corporation, News Corporation and Yankee Global Enterprises Announce News Corporation's Acquisition of an Equity Stake in the Yes Network (Nov. 20, 2012), available at <http://msn.foxsports.com/press>.

^{29/} Order & FNRPM ¶ 81.

The impact of an exclusivity can vary from arrangement to arrangement, depending upon the size and competitive characteristics of the market, the affected distributors, the viewership and popularity of the programming in the particular market, the availability of substitutes, and a myriad of other factors. A cable-affiliated programmer should not be deprived of the right to have a challenged exclusive arrangement adjudicated based upon the market impact and specific characteristics of that agreement, simply because another exclusivity it entered into was judged to contravene Section 628(b). There is no legal foundation for the Commission to conclude that it can prejudge the pro-competitive benefits and anti-competitive effects of an exclusive arrangement entered into in an urban market in California based upon an exclusivity involving that same network entered into a rural market in Tennessee.

The practical effect of this proposal would be to reinstate the *per se* ban, since MVPDs are unlikely to negotiate for exclusivity if the proposed arrangement could effectively be undone simply because of the invalidation of another agreement entered into by the same programmer, even if it was with a different distributor in a wholly different market. With such a rule in place, MVPDs would be unlikely to proffer the additional consideration normally associated with an exclusive arrangement without thoroughly examining the cable-affiliated programmers' current and prospective exclusivities with other distributors, and the costs, complexities and burdens associated with such a process would be untenable. The end result would be negate the beneficial effects of the sunset granted in the *Order* by depriving cable-affiliated programmers of the ability to pursue exclusivities that would promote investment and development of new networks or expand distribution and viewership. This outcome also would unfairly harm cable-affiliated programmers relative to unaffiliated programmers that would be free from the constraint on exclusivity imposed by this presumption.

IV. THE COMMISSION SHOULD NOT ADOPT A REBUTTABLE PRESUMPTION OF UNFAIRNESS AND SIGNIFICANT HINDRANCE FOR EXCLUSIVITIES INVOLVING CABLE-AFFILIATED NATIONAL SPORTS NETWORKS.

There is neither empirical evidence nor a sound basis for a rebuttable presumption that an exclusive contract involving a national sports network is inherently unfair or inevitably significantly hinders MVPDs' ability to provide satellite-delivered cable programming.^{30/}

The Commission adopted the rebuttable presumption of significant hindrance for terrestrial RSNs (extended to satellite-delivered RSNs in the *Order & FNRPM*) based upon empirical analysis it conducted in the *Adelphia Order*.^{31/} Regardless of the merits of that analysis, which purported to show harm to rival MVPDs from exclusive contracts for RSNs in two local markets,^{32/} it cannot serve as the evidentiary basis for a rebuttable presumption with regard to a national sports network. As the Commission explained when conducting that analysis, "the basis for the lack of adequate substitutes for regional sports programming lies in the unique nature of its core component: . . . sports fans believe that there is no good substitute for watching their local and/or favorite team play an important game."^{33/} This rationale is inapposite with respect to national, cable-affiliated networks since they are not, by definition, concentrating on games that appeal to specific local markets.

Such a presumption also would be counter-productive and hinder the distribution of sports programming in new markets. For example, some RSNs, including MSG, seek to distribute a national feed of their programming outside their regional market footprint, utilizing

^{30/} *Order & FNRPM* ¶ 80.

^{31/} *Order & FNRPM* ¶¶ 48, 55.

^{32/} *Adelphia Order*, Appendix D.

^{33/} *Adelphia Order* ¶ 124 (quoting *General Motors Corporation and Hughes Electronics Corporation, Transferors, and The News Corporation Limited, Transferee*, Memorandum Opinion and Order, 19 FCC Rcd 473, ¶ 133 (2004)).

content for which they may have wider distribution rights. While such a national feed typically does not include local professional sports programming due to league territorial restrictions, it may include some college football and basketball content.^{34/} For a program service featuring out-of-market games and sports content, exclusivity can be a key element in generating interest and commitment from distributors. It would make no sense to subject nationally-distributed out-of-market RSNs, which are typically carried (if at all) on an MVPD's lightly penetrated sports tier, to any sort of evidentiary presumption that would inhibit their ability to utilize exclusivity. To the contrary, if exclusivity cannot be offered to entice some distant-market MVPDs to grant carriage on their systems, the end result would be to reduce the aggregate amount of sports programming available to multichannel subscribers. Accordingly, the Commission should decline to adopt presumptions of unfairness and/or significant hindrance for national sports programming.

* * * * *

Finally, adoption of any of the four presumptions discussed here – either singly or in total – would contravene the First Amendment rights of cable-affiliated programmers. In the wake of its recognition of both the competitiveness of the video programming marketplace and the adequacy of a case-by-case litigation under Section 628(b), effectively reinstating the *per se* ban by adopting any of the presumptions proposed here would not pass First Amendment muster. Singling out cable-affiliated RSNs for heightened curbs on their ability to use exclusivity

^{34/} Of course, even if a national feed of an out-of-market RSN contained the volume of Division I NCAA football or basketball programming that if in-market would meet the *Order's* definition of an RSN, *see Order* at ¶ 56, there would be no basis for adopting a presumption of significant hindrance or unfairness with respect to such a network, because there is no evidence that an exclusivity involving any such out-of-market programming could have any adverse competitive impact on the market for video programming distribution.

represents a content-based restriction that would be subject to strict scrutiny.^{35/} To pass a strict scrutiny review, the Commission would need to demonstrate that the proposed presumptions are narrowly tailored to serve a compelling government interest, a difficult hurdle to surmount given today's vigorously competitive video marketplace and the absence of any evidence at all that case-by-case adjudication *without* special presumptions is somehow necessary to ensure competition in video programming distribution.^{36/}

CONCLUSION

For the reasons described above, the Commission should reject proposals to adopt additional rebuttable presumptions for program access complaints about exclusive agreements involving cable-affiliated programmers.

Respectfully submitted,

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^{35/} *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 624 (1994) (“Our precedents thus apply the most exacting scrutiny to regulations that suppress, disadvantage, or impose differential burdens upon speech because of its content.”).

^{36/} *See, e.g., Republican Party of Minn. v. White*, 536 U.S. 765, 774-75 (2002).