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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

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Federal Communications Commission
Office of the Secretary

AT&T SERVICES, INC. AND SOUTHERN
NEW ENGLAND TELEPHONE COMPANY
D/B/A AT&T CONNECTICUT,

Complainants,

v.

MADISON SQUARE GARDEN, L.P. AND
CABLEVISION SYSTEMS CORP.,

Defendants.

File No. _____

To: The Commission

PROGRAM ACCESS AND SECTION 628(b) COMPLAINT

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INTRODUCTION

This case involves Defendants' selective refusal to provide the high definition ("HD") format of must-have regional sports network ("RSN") programming to the one rival that is capable of providing meaningful, wireline-based video competition in Connecticut. AT&T is a multichannel video programming distributor ("MVPD") that is providing wireline-based video service in competition with incumbent cable operators in markets across the country, including parts of Connecticut. Defendants, on the heels of their prior unlawful refusal to provide RSN programming to AT&T in Connecticut, which abated only when the Media Bureau was poised to act on AT&T's prior complaint, have steadfastly refused to provide AT&T access to the HD format of two RSNs – Madison Square Garden Network ("MSG") and Madison Square Garden Plus Network ("MSG Plus") – that hold exclusive rights to sports programming that AT&T requires to compete successfully in Connecticut. Defendants' outright refusal to license the HD format of this programming to AT&T – at the same time as they make the HD format selectively available to other MVPDs, and for the express purpose of hampering AT&T's ability to compete against Defendants' affiliated cable systems in Connecticut – is conduct that has long been recognized as unfair and anticompetitive. It should be condemned as such under Section 628(b) of the Communications Act.

Defendant Cablevision Systems Corp.'s ("Cablevision") defense of its conduct is startling for its candor. Cablevision views the programming at issue here – which includes exclusive rights to the HD format of numerous area sports franchises, including, among others, the New York Knicks professional basketball team and the New York Rangers (both of which are owned by Cablevision), New York Islanders, and New Jersey Devils professional hockey

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teams – as a “competitive differentiator.”¹ In other words, Cablevision seeks to defend its refusal to license must-have programming (in a must-have format) to AT&T precisely *because* it will inhibit AT&T’s ability to compete with Cablevision in the MVPD marketplace. But, although in the ordinary case a vertically integrated company is under no compulsion to license upstream inputs to a rival, that is decidedly not the case where, as here, the input at issue is unique and nonreplicable; where, as here, there is a demonstrated history of voluntary licensing to other parties; and where, as here, Congress has made a judgment that dominant cable incumbents should not be permitted to use control over programming to reinforce their control over the MVPD marketplace. In these circumstances, Defendants’ refusal to license falls squarely within established economic principles condemning anticompetitive behavior and constitutes an “unfair method[] of competition . . . , the purpose or effect of which is to hinder significantly” AT&T’s ability to compete. 47 U.S.C. § 548(b).

Defendants’ purported justification for not licensing the HD format of the programming at issue here has been that the HD format is terrestrially delivered and therefore not subject to the specific program access rules promulgated pursuant to Section 628(c). But Defendants’ conduct is unlawful under Section 628(b) regardless of whether it is also encompassed within the rules the Commission promulgated pursuant to Section 628(c).²

¹ Cablevision Answer to Program Access Complaint, *Verizon Tel. Cos. v. Madison Square Garden, L.P.*, No. CSR-8185-P, at 54 (FCC filed July 28, 2009) (“Cablevision Answer”).

² In its answer to Verizon’s complaint, Cablevision asked the Commission to dismiss the complaint on the ground that it was an attempt to “end-run” around the Commission’s pending rulemaking on whether the Commission should extend the program access rules adopted pursuant to Section 628(c) to terrestrially delivered programming, and it undoubtedly will make the same request here. *Id.* at 6. But, as discussed herein, Section 628(b) establishes a broad, statutory prohibition against unfair methods of competition or unfair or deceptive practices by cable operators and their programming affiliates that extends beyond the conduct proscribed by the Commission’s program access rules. Moreover, Section 628(d) specifically provides that any MVPD aggrieved by conduct that “constitutes a violation of subsection (b) of this section, or the

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In Section 628(b), Congress broadly made it “unlawful for a cable operator [or] a satellite cable programming vendor in which a cable operator has an attributable interest . . . to engage in unfair methods of competition or unfair . . . acts or practices, the purpose or effect of which is to hinder significantly or to prevent any multichannel video programming distributor from providing satellite cable programming . . . to subscribers or consumers.” 47 U.S.C. § 548(b). In Section 628(c), Congress directed this Commission to promulgate rules implementing Section 628(b) and it prescribed the “[m]inimum contents” of such regulations. *Id.* § 548(c)(2). As this Commission has recognized, the specific practices identified in Section 628(c) are prohibited *per se*. But they are only the bare “minimum” necessary to give effect to Section 628(b); contrary to Defendants’ position, they do not define the full sweep of Section 628(b). As the D.C. Circuit recently held, Section 628(b) is an expansive prohibition on unfair practices that have an anticompetitive purpose or effect and that hinder the provisioning of video programming by MVPDs to subscribers. *See National Cable & Telecomm. Ass’n v. FCC*, 567 F.3d 659 (D.C. Cir. 2009). And, as the Commission itself has long recognized, conduct need not be covered by the “minimum” *per se* violations listed in Section 628(c) in order to run afoul of the expansive prohibition in Section 628(b).³

regulations of the Commission under subsection (c) of this section, may commence an adjudicatory proceeding at the Commission.” 47 U.S.C. § 548(d) (emphasis added). Here, AT&T is not asking the Commission to extend those rules enacted pursuant to Section 628(c) to terrestrially delivered programming (although AT&T believes the Commission should for the reasons articulated in its comments in the pending program access rulemaking proceeding). Rather, AT&T is seeking a ruling by the Commission that, under the specific facts and circumstances of this case, Cablevision’s conduct violates the statutory prohibition in Section 628(b) itself, and thus raises issues distinct from those in the rulemaking proceeding.

³ *See, e.g.*, First Report and Order, *Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992*, 8 FCC Rcd 3359, ¶ 29 (1993) (“1993 Order”) (finding that “subsection [(c)] includes only the minimum required regulations to be promulgated by the Commission under 628(b), and is not intended to be entirely inclusive”).

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Defendants' refusal to license the HD format of MSG and MSG Plus to AT&T accordingly may be condemned under Section 628(b) regardless of whether it runs afoul of Commission regulations promulgated under Section 628(c). And such condemnation is required on the facts of this case. First, Cablevision's refusal to license the HD format of MSG and MSG Plus has an obvious anticompetitive purpose – as noted, Cablevision has acknowledged that it will not license the HD format to AT&T precisely because it believes doing so will impair AT&T's ability to win and retain subscribers. Second, Cablevision's refusal to deal has a substantial anticompetitive effect, as confirmed both by this Commission's unbroken series of orders finding that access to RSN programming is critical to an MVPD's ability to compete with entrenched cable incumbents and by Defendants' own conduct in refusing to license programming it otherwise has every incentive to license. Third, even as Defendants have refused to license to AT&T, they have voluntarily licensed the HD format of MSG and MSG Plus to other MVPDs (including DirecTV), demonstrating both that they lack any legitimate, efficiency justification for refusing to license to AT&T and that their refusal to deal is motivated only by an anticompetitive purpose. Defendants' conduct, in short, is a straightforward "unfair method[] of competition" and "unfair . . . practice[]" under Section 628(b).

For these reasons and others explained below, this Commission should act expeditiously to remedy Defendants' unlawful conduct.

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PROGRAM ACCESS AND SECTION 628(b) COMPLAINT

1. Pursuant to Section 628 of the Communications Act of 1934, as amended, 47 U.S.C. § 548, and the Commission's rules, 47 C.F.R. §§ 76.1000 *et seq.*, Southern New England Telephone Company d/b/a AT&T Connecticut ("AT&T Connecticut"), which provides a multichannel video programming service in Connecticut using Internet Protocol ("IP") video technology and is classified as an MVPD, and AT&T Services, Inc., which negotiates for and purchases video programming on behalf of AT&T Connecticut and other affiliated local telephone companies, file this Complaint to obtain access to certain video programming services of Madison Square Garden, L.P. ("Madison Square Garden").

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2. Defendant Madison Square Garden is a limited partnership wholly owned by Defendant Cablevision.⁴ Madison Square Garden provides regional sports programming to Cablevision and to other MVPDs in, as relevant here, the New York City metropolitan area and parts of Connecticut. Madison Square Garden’s regional sports programming is televised on MSG and MSG Plus. Defendants provide MSG and MSG Plus in two formats: standard definition and HD. Regardless of the format in which Madison Square Garden delivers MSG and MSG Plus, the underlying programming content on the standard definition and HD feeds of each network is virtually the same.

3. MSG and MSG Plus are RSNs that are vertically integrated with Cablevision. This Commission has consistently recognized that RSN programming is “must-have” programming – that is, programming that consumers demand and without which MVPDs cannot compete effectively. RSN programming “is unique because it is particularly desirable and cannot be duplicated.” *Adelphia Order* ¶ 189.⁵ That is especially so here, where MSG and MSG Plus own the exclusive broadcasting rights for numerous professional sports teams – including the New York Knicks and the New York Rangers (both of which are owned by Cablevision), the New York Islanders, the New Jersey Devils, and others – that are extremely popular in AT&T Connecticut’s service area. And that is also especially so, as explained below, where such programming is provided in the HD format, which has become the must-have format for RSN programming. For that reason, without timely access to the HD format of MSG and MSG Plus, AT&T cannot deliver to consumers programming that they demand and likely receive from their

⁴ As discussed below, Madison Square Garden is a wholly owned subsidiary of Rainbow Media Holdings, LLC, which, in turn, is owned by Cablevision via a holding company.

⁵ See Memorandum Opinion and Order, *Applications for Consent to the Assignment and/or Transfer of Control of Licenses Adelphia Communications Corporation to Time Warner Cable Inc.*, 21 FCC Rcd 8203 (2006) (“*Adelphia Order*”).

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current MVPD, impairing AT&T's ability to offer a video programming service that can compete effectively with entrenched incumbent cable operators.

4. This Commission has found that access to RSN programming is critically important to MVPDs, especially new entrants seeking to compete with entrenched cable incumbents: “[A]n MVPD’s ability to provide service that is competitive with an incumbent cable operator is significantly harmed if denied access to ‘must have’ vertically integrated programming for which there are no good substitutes, such as regional . . . sports networks.” *News Corp. Order* ¶ 44.⁶ Similarly, the Commission has found that “an MVPD’s ability to provide a service that is competitive with the incumbent cable operator is significantly harmed if the MVPD is denied access to popular, vertically integrated programming for which no good substitute exists . . . including services that are considered ‘must have’ . . . such as regional . . . sports programming.” *2002 Order* ¶ 34.⁷

5. The HD format of RSN programming is particularly crucial to an MVPD’s ability to compete. Demand for sports programming is a driving force behind the growth in both HD television sets (“HDTVs”) and HD programming. The same consumers who demand access to RSN programming are accordingly also the same consumers who are most likely to demand such sports programming in an HD format. Indeed, Cablevision’s extensive advertising campaign

⁶ Memorandum Opinion and Order, *General Motors Corp., and Hughes Elect. Corp., Transferors, and the News Corp. Ltd., Transferee, for Authority to Transfer Control*, 19 FCC Rcd 473 (2004) (“*News Corp. Order*”); *id.* at ¶ 133 (explaining that “[s]ince [the Commission] first began tracking regional cable programming networks . . . it has repeatedly recognized the importance of regional sports programming to MVPD offerings,” and that “there are no readily acceptable close substitutes” for RSNs); *see also* Twelfth Annual Report, *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 21 FCC Rcd 2503, ¶ 205 (2006) (“Access to must have programming, including . . . regional sports networks, on a timely basis and at competitive rates is a key competitive issue for all MVPDs.”).

⁷ Report and Order, *Implementation of the Cable Television Consumer Protection and Competition Act of 1992*, 17 FCC Rcd 12124 (2002) (“*2002 Order*”).

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touting its exclusive carriage of the HD format of MSG and MSG Plus is unambiguous evidence that the HD format of RSN programming has tremendous competitive significance. The HD format, in other words, has become the must-have format for RSN programming (which itself is must-have programming). Its competitive significance will only continue to grow.

6. This case involves Defendants' outright refusal to license the HD format of MSG and MSG Plus to AT&T. Defendants' have refused to do so despite the fact that Defendants are willing to negotiate with AT&T for access to other Cablevision-affiliated HD programming, despite the fact that AT&T has obtained access to the standard format of that same programming, and despite the fact that Defendants have licensed both the standard and HD formats of that programming to other MVPDs (including Comcast Corporation ("Comcast"), Time Warner Cable Inc. ("TWC"), and DirecTV) – but only to those MVPDs that do not provide the type of wireline video competition that the Commission has recognized is the only form of competition that effectively constrains incumbent cable operators' prices.⁸ Defendants' steadfast, selective refusal to license the HD format of MSG and MSG Plus – on any terms – is a naked anticompetitive restraint: it constitutes denial of a vital programming input for the sole purpose of benefitting Cablevision's distribution arm at the expense of AT&T's ability to compete with

⁸ See Report on Cable Industry Prices, *Implementation of Section 3 of the Cable Television Consumer Protection and Competition Act of 1992*, 24 FCC Rcd 259, ¶ 3 (MB 2009) ("2009 Cable Industry Price Report") ("Cable prices decrease substantially when a second wireline cable operator enters the market. It does not appear from these results that DBS effectively constrains cable prices. Thus, in the large number of communities in which there has been a finding that the statutory test for effective competition has been met due to the presence of DBS service, competition does not appear to be restraining price as it does in the small number of communities with a second cable operator."); *id.* at ¶ 14 ("In markets with two competing cable operators, the results show that the incumbent operator charges 14.1 percent less, on average, all other things held constant, than operators charge in markets where a second cable operator is not present.").

