

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

In the Matter of:)	
)	
Complaint by Everest Midwest Licensee,)	
L.L.C. d/b/a Everest Connections and)	CSR-6094-P
Ex-Op of Missouri d/b/a Unite)	
)	
v.)	
)	
Kansas City Cable Partners and)	
Metro Sports)	

MEMORANDUM OPINION AND ORDER

Adopted: December 19, 2003

Released: December 24, 2003

By the Deputy Chief, Media Bureau:

I. INTRODUCTION

1. Everest Midwest Licensee, L.L.C. d/b/a Everest Connections and Ex-Op of Missouri, Inc. d/b/a Unite (collectively “Everest”) have filed a program access complaint against Kansas City Cable Partners (“Kansas City Cable”) and Metro Sports (“Metro”)¹ alleging that Kansas City Cable is in violation of Sections 628(b) and 628(c)(2)(D) of the Communications Act of 1934, as amended (“Communications Act”),² and Sections 76.1001 and 76.1002(c)(2) of the Commission’s rules.³ Everest requests that the Commission either award damages or initiate forfeiture proceedings against Kansas City Cable for violation of its rules.⁴ For the reasons discussed below, we deny Everest’s complaint and decline to award damages or institute forfeiture proceedings.

II. BACKGROUND

2. In enacting the program access provisions as part of the Cable Television Consumer Protection and Competition Act of 1992 (“1992 Cable Act”), codified in Section 628 of the Communications Act,⁵ Congress sought to minimize the incentive and ability of vertically integrated programming suppliers to favor affiliated cable operators over nonaffiliated cable operators or other multichannel video programming distributors (“MVPDs”) in the sale of satellite cable and satellite broadcast programming.⁶ In *Implementation of Sections 12 and 19 of the Cable Television Consumer*

¹ Kansas City Cable states that Metro Sports is not a separate legal entity, but is the name of the terrestrially-delivered local sports channel developed by Kansas City Cable. Kansas City Cable Answer at n.1.

² 47 U.S.C. §§ 548(b) and 548(c)(2)(D).

³ 47 C.F.R. §§ 76.1001 and 76.1002(c)(2).

⁴ Complaint at 9.

⁵ 47 U.S.C. § 548.

⁶ 1992 Cable Act § 2(a)(5), 106 Stat. 1460-61.

Protection and Competition Act of 1992: Development of Competition and Diversity in Video Programming Distribution and Carriage ("First Report and Order"), the Commission implemented the program access provisions of Section 628.⁷ Section 628(b) prohibits cable operators and vertically integrated programming vendors from engaging in unfair acts or practices,⁸ and states that:

[i]t shall be unlawful for a cable operator, a satellite cable programming vendor in which a cable operator has an attributable interest, or a satellite broadcast programming vendor to engage in unfair methods of competition or unfair or deceptive 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 or satellite broadcast programming to subscribers or consumers.⁹

3. In Section 628(c), Congress instructed the Commission to adopt regulations to prohibit a number of specific practices.¹⁰ For example, Congress absolutely prohibited exclusive contracts between vertically integrated programming vendors and cable operators in areas unserved by cable,¹¹ and generally prohibited exclusive contracts within areas served by cable.¹² The prohibition with regard to served areas, Section 628(c)(2)(D), states that:

with respect to distribution to persons in areas served by a cable operator, [the Commission shall] prohibit exclusive contracts for satellite cable programming or satellite broadcast programming between a cable operator and a satellite cable programming vendor in which a cable operator had an attributable interest or a satellite broadcast programming vendor in which a cable operator has an attributable interest, unless the Commission determines . . . that such contract is in the public interest.¹³

In areas served by cable, Congress recognized that some exclusive contracts between vertically integrated programming vendors and cable operators may serve the public interest by providing countervailing benefits to the programming market or to the development of competition among distributors.¹⁴ In determining whether an exclusive contract is in the public interest, Congress instructed the Commission to consider enumerated public interest factors.¹⁵ The Commission recently retained for five years, until

⁷ *First Report and Order*, 8 FCC Rcd 3359 (1993), *recon.*, 10 FCC Rcd 1902 (1994), *further recon.*, 10 FCC Rcd 3105 (1994). In *Implementation of the Cable Television Consumer Protection and Competition Act of 1992: Petitions for Rulemaking of Ameritech New Media, Inc. Regarding Development of Competition and Diversity in Video Programming Distribution and Carriage*, 13 FCC Rcd 15822 (1998), the Commission amended the program access rules, *inter alia*, to provide, in certain instances, damages for program access violations.

⁸ 47 U.S.C. § 548(b).

⁹ *Id.*

¹⁰ 47 U.S.C. § 548(c).

¹¹ 47 U.S.C. § 548(c)(2)(C).

¹² 47 U.S.C. § 548(c)(2)(D).

¹³ 47 U.S.C. § 548(c)(2)(D); 47 C.F.R. § 76.1002(c)(2).

¹⁴ 47 U.S.C. § 548(c)(2)(4).

¹⁵ 47 U.S.C. § 548(c)(4); 47 C.F.R. § 76.1002(c)(4). Any party seeking to enforce or enter into an exclusive contract in an area served by a cable operator must submit a petition for exclusivity to the Commission for approval. *See* 47 C.F.R. § 76.1002(c)(5).

October 5, 2007, the prohibition on exclusive contracts contained in Section 628(c)(2)(D).¹⁶

III. DISCUSSION

4. Everest is a provider of cable television service competing with Kansas City Cable in Lenexa, Shawnee, and Overland Park, Kansas and Kansas City, Missouri.¹⁷ Ex-Op of Missouri, Inc. d/b/a Unite is Everest's sister company competing with Kansas City Cable in Kearney, Missouri.¹⁸ Kansas City Cable provides service to franchise areas in the greater Kansas City metropolitan area, including the five franchise areas where Everest and Unite provide cable service.¹⁹ Metro is a 24-hour terrestrially-delivered local sports channel created by Kansas City Cable.²⁰ Metro carries a mix of programming produced by Metro and licensed from third parties.²¹ Among the programs that Metro provides are 15 "third tier" pre-season and regular season University of Missouri men's basketball games during the 2002-2003 season.²² The rights to these games are owned by Mizzou Sports Properties ("Mizzou Sports").²³ Mizzou Sports is the entity engaged in the wholesale distribution of the University of Missouri men's basketball games at issue and has no ownership affiliation with any cable operator.²⁴ Kansas City Cable has acquired the exclusive cable distribution rights for the 15 "third tier" games in the Kansas City area from Mizzou Sports.²⁵ Metro provides camera crews and other technical assistance for the game broadcasts.²⁶

5. Everest asserts that the Missouri men's basketball games are transmitted by satellite to many Missouri television broadcast stations and cable systems outside of Kansas City Cable's service area.²⁷ Everest states that cable systems outside of the Kansas City Cable service area obtain the third tier telecasts by carrying the Fox Sports NET Midwest cable channel.²⁸ In the Kansas City area, however, Everest asserts that the Missouri men's basketball games are blacked out on Fox Sports Midwest as a result of Metro's exclusive access to these games.²⁹ Everest asserts that Metro receives the Mizzou Sports satellite feed of the games and retransmits that feed over a terrestrial network to area cable system headends.³⁰ Everest contends that it does not seek to obtain the Missouri men's basketball games from

¹⁶ See *Implementation of the Cable Television Consumer Protection and Competition Act of 1992 - Development of Competition and Diversity in Video Programming Distribution: Section 628(c)(5) of the Communications Act - Sunset of Exclusive Contract Prohibition*, 17 FCC Rcd 12124 (2002) ("Sunset Order").

¹⁷ Complaint at 2.

¹⁸ *Id.* at 3.

¹⁹ *Id.* at 3; Kansas City Cable Answer at 2.

²⁰ Kansas City Cable Answer at 2, 3.

²¹ *Id.*

²² *Id.* Kansas City Cable states that the other 14 "first and second tier" games are available to Everest through local broadcast stations, ESPN and ESPN2. *Id.* at ii.

²³ *Id.*

²⁴ *Id.* at 3 and attached Declaration of Michael K. Behymer, General Manager of Mizzou Sports Marketing.

²⁵ *Id.* at i, 2, and Exhibit D (Agreement between Mizzou Sports and Kansas City Cable).

²⁶ Kansas City Cable Answer at 3.

²⁷ Complaint at 1.

²⁸ *Id.* at 2.

²⁹ *Id.*

³⁰ *Id.* Everest states that Kansas City Cable sells the Metro channel to Comcast's franchisees in the Kansas City metropolitan area, but none of the Comcast cable systems competes with the Kansas City Cable. *Id.* at n.3.

the Metro channel via terrestrial delivery.³¹ Instead, Everest seeks to obtain the games from Fox Sports Net Midwest.³² Everest seeks a finding that Metro's exclusive access to these games violates Section 628(c)(2)(D) of the Communications Act and cannot be exercised to prevent Fox Sports Net Midwest from distributing the third tier games to Everest's franchise areas.

6. At issue in this proceeding is whether Kansas City Cable's exclusive rights to the third tier Missouri men's basketball games are prohibited pursuant to the Communications Act and the Commission's rules. Section 628(c)(2)(D) generally prohibits exclusive contracts between a cable operator and a satellite cable programming vendor in which a cable operator has an attributable interest.³³ We find that neither Mizzou Sports nor Metro can be so categorized. Mizzou Sports has no cable affiliation. Further, although affiliated with a cable operator, Metro is terrestrially delivered and therefore is not a satellite cable programming vendor.

7. Everest argues that, because Metro receives some of its content via satellite, Metro should be deemed a satellite cable programming vendor. It is well settled that it is the vendor's distribution method, not its method of content receipt, that determines whether programming is subject to program access jurisdiction.³⁴ Everest alleges that Metro should also be held to be a satellite cable programming vendor because it engages in the production, creation, and wholesale distribution of Mizzou Sports' basketball broadcasts. We disagree. As Kansas City Cable demonstrates in its Answer, "Mizzou Sports maintains sole discretion in licensing the games . . . ; is entirely responsible for establishing wholesale prices; retains the rights to allow others to air highlights of the telecasts; controls the advertising spots in its telecasts; employs the announcers; provides the opening and closing billboards; provides the graphics; supervises and controls all camera crews and technicians; retains all revenues from the commercials it sells during the games and assumes all financial risks for the programming."³⁵ The technical assistance provided by Metro, as a sub-contractor under Mizzou Sports direction, does not

³¹ Everest Reply at 12, 15. Kansas City Cable alleges that Everest's Complaint is procedurally defective because Everest never requested to purchase the relevant programming from Metro and, therefore, Metro never refused such request as required by 47 C.F.R. § 76.1003(c)(6)(iii). Kansas City Cable Answer at 18. Kansas City Cable was notified of Everest's interest in obtaining the third tier Missouri men's basketball games. *See* Complaint at Exhibit G -- Letter to Kansas City Cable, Mizzou Sports, and The University of Missouri from Rachel Lipman Reiber, Vice President of Regulatory and Government Affairs, Everest Connections (December 3, 2002). As Everest has stated, it did not seek to obtain the men's basketball games from Metro via terrestrial delivery, but wanted to obtain the games from Fox Sports Network which is blacked out because of the agreement between Kansas City Cable and Mizzou Sports. With regard to prefiling notice, our rule states that the notice must be sufficiently detailed so that its recipient(s) can determine the specific nature of the complaint. *See* 47 C.F.R. § 76.1003(b). In this case, we believe that Kansas City Cable was put on sufficient notice regarding Everest's interest in purchasing the programming. As Kansas City Cable has stated, Metro is not a separate legal entity, but the name of the terrestrially-delivered local sports channel developed by Kansas City Cable. *See supra* n.1. We do not believe that Everest's notice in this case was defective.

³² Everest Reply at 12.

³³ 47 U.S.C. § 548(c)(2)(D). It is undisputed that the exclusive contract at issue was not submitted to the Commission for public interest approval.

³⁴ By its express terms, Section 628 of the Communications Act does not apply to terrestrially-delivered services. *See Sunset Order*, 17 FCC Rcd 12158. The Commission has previously found that terrestrially-delivered services are not providing satellite cable programming even though some of the content thereof is received by satellite. *See RCN Telecom Services of New York, Inc. v. Cablevision Systems Corp.*, 16 FCC Rcd 12048 (2001), *aff'd* *RCN Telecom Services Inc. v. Cablevision Systems Corporation et al.*, 14 FCC Rcd 17093 (1999); *DIRECTV, Inc. v. Comcast Corporation*, 15 FCC Rcd 22802 (2000), *aff'd* *EchoStar Communications Corporation v. Comcast Corporation*, 14 FCC Rcd 2089 (1999), *DIRECTV, Inc. v. Comcast Corporation*, 13 FCC Rcd 21822 (1998), *aff'd sub nom. EchoStar Communications Corporation v. FCC*, No. 01-1032 (D.C. Cir. June 11, 2002).

³⁵ Kansas City Cable Answer at 4.

somehow transform Metro into a satellite cable programming vendor.

8. Even were we to conclude otherwise, we do not believe the programming in question is satellite cable programming as defined by the Communications Act. Satellite cable programming is “video programming which is transmitted via satellite and which is *primarily* intended for the direct receipt by cable operators for their retransmission to cable subscribers.”³⁶ In this instance, it is undisputed that Mizzou Sports utilizes a satellite feed to relay the Missouri men’s basketball games to various television stations, cable networks and some cable systems that have licensed the games from Mizzou Sports. According to Kansas City Cable, the Mizzou Sports satellite feeds of these basketball games are primarily intended for direct receipt by the eight television stations licensed by Mizzou Sports to broadcast the games.³⁷ Kansas City Cable asserts that the broadcast coverage of the games accounts for over 3,000,000 television households, or 83.7 percent of its total audience share.³⁸ Everest disputes Kansas City Cable’s submission of Mizzou Sports’ broadcast audience reach because the games Everest seeks to obtain are only carried by stations KJPX, KOMU and KCZ, and two of these stations -- KJPX and KCZ -- are not included on the list of stations intended for the Mizzou Sports feeds of the Missouri men’s basketball games at issue.³⁹

9. Kansas City Cable asserts that the Mizzou Sports satellite feeds are secondarily intended for receipt by national and regional sports networks, such as ESPN, Fox Sports Net Midwest and Metro, for insertion into the programming schedule of such networks.⁴⁰ Kansas City Cable asserts that regional sports networks comprise approximately 14 percent of the total audience for the Missouri men’s basketball games.⁴¹ Because the contract for the Missouri men’s basketball games is between Mizzou and Kansas City Cable, rather than Mizzou and Metro, Everest contends that this means that the satellite feeds of the games should be considered as programming primarily intended for direct receipt by a cable operator for transmission to cable subscribers.⁴² We do not agree. The University of Missouri men’s basketball games are programming inputs that are delivered by satellite to broadcasters and cable networks, such as Metro, for insertion into programming line-ups. There is no reasonable way to conclude that these feeds are primarily intended for the direct receipt by cable operators for their retransmission to cable subscribers.⁴³ Kansas City Cable asserts that only about 2.4 percent of the Mizzou Sports satellite feeds are intended for direct receipt by cable systems.⁴⁴ Accordingly, such programming cannot qualify as satellite cable programming.

10. Finally, we reject Everest’s claim that Kansas City Cable has violated Section 628(b) of the Communications Act which prohibits cable operators and vertically integrated programming vendors from engaging in unfair acts or practices.⁴⁵ Section 628(b) may not, without more, be invoked against

³⁶ 47 U.S.C. § 605(d)(1) (emphasis added).

³⁷ Kansas City Cable Answer at 5.

³⁸ *Id.*, Exhibit B (the licensed broadcast stations include KMCI, Lawrence, KS, KOMU-TV, Columbus, MO, KRCG, Jefferson, MO, KCLG-CA (formerly KJPX-LP) Neosho, MO, WDKA, Paducah, KY, KPLR-TV, St. Louis, MO, K15CZ, Springfield, MO, and KYOU-TV, Ottumwa, IA).

³⁹ Everest Reply at 5.

⁴⁰ Kansas City Cable Answer at 5.

⁴¹ *Id.*, Exhibit B.

⁴² Everest Reply at 5-6.

⁴³ A review of the Metro program lineup attached to Kansas City Cable’s Answer indicates that Metro is a 24 hour cable channel dedicated to coverage of Kansas City area sports. See Kansas City Cable Answer, Exhibit B.

⁴⁴ Kansas City Cable Answer at 5, Exhibit B.

⁴⁵ 47 U.S.C. § 548(b); 47 C.F.R. § 76.1001.

conduct that is lawful under another provision of the Communications Act.⁴⁶ The Commission has stated that although Section 628(b) broadly prohibits cable operators from engaging in “unfair methods of competition,” this section of the Act “cannot be read in isolation.”⁴⁷ Section 628(c)(2)(D) permits exclusive contracts between cable operators and non-vertically integrated satellite programming vendors. In the instant case, we have determined that the exclusive programming agreement between Mizzou Sports and Kansas City Cable is permitted under Section 628(c)(2)(D) of the Act.⁴⁸ Accordingly, we find that Kansas City Cable has not violated Section 628(b) of the Communications Act.⁴⁹

IV. ORDERING CLAUSES

11. Accordingly, **IT IS ORDERED** that the program access complaint filed by Everest Midwest Licensee, L.L.C. d/b/a Everest Connections and Ex-Op of Missouri, Inc. d/b/a Unite against Kansas City Cable Partners and Metro Sports **IS DENIED**.

12. This action is taken pursuant to delegated authority under Section 0.283 of the Commission’s rules.⁵⁰

FEDERAL COMMUNICATIONS COMMISSION

William H. Johnson
Deputy Chief, Media Bureau

⁴⁶ *American Cable Company and Jay Copeland v. Comcast Corp. et al.*, 11 FC Rcd 10090, 10117 (1996).

⁴⁷ *Id.* at 10114.

⁴⁸ 47 U.S.C. § 548(c)(2)(D).

⁴⁹ 47 U.S.C. § 548(b).

⁵⁰ 47 C.F.R. § 0.283.