REDACTED VERSION

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

In the Matter of	)	
	)	
Verizon Telephone Companies and	)	File No. CSR-8185-P
Verizon Services Corp.,	)	
Complainants,	)	
	)	
v.	)	
	)	
Madison Square Garden, L.P. and	)	
Cablevision Systems Corp.,	)	
Defendants	)	

ORDER

Adopted: September 22, 2011 **Released: September 22, 2011**

By the Chief, Media Bureau

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I. INTRODUCTION

1. In this *Order*, we find that Madison Square Garden, L.P. ("MSG LP") and Cablevision Systems Corporation ("Cablevision") (MSG LP and Cablevision together, the "Defendants") violated Section 628(b) of the Communications Act of 1934, as amended (the "Act") and Section 76.1001(a) of the Commission's rules based on our findings that (i) both MSG LP and Cablevision are proper defendants; (ii) Defendants' withholding of the high definition ("HD") versions of the MSG and MSG+ networks from Verizon Telephone Companies and Verizon Services Corporation (collectively, "Verizon") is an "unfair act";[1] and (iii) this "unfair act" has the "effect" of "significantly hindering" Verizon from providing a competing video service, including "satellite cable programming and satellite broadcast programming," to subscribers and consumers in the New York and Buffalo Designated Market Areas

[1] Throughout this *Order*, we use the term "unfair act" as shorthand for the phrase "unfair methods of competition or unfair or deceptive acts or practices." 47 U.S.C. § 548(b); *see* 47 C.F.R. § 76.1001(a).

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(“DMAs”).[2] Accordingly, we grant Count I of Verizon’s program access complaint and order MSG LP to enter into an agreement to license the MSG HD and MSG+ HD networks to Verizon on non-discriminatory rates, terms, and conditions within 30 days of the release of this *Order*. For the reasons discussed herein, we deny the remaining counts set forth in Verizon’s complaint.

II. BACKGROUND

A. Commission’s Rules Addressing Unfair Acts Involving Terrestrially Delivered, Cable-Affiliated Programming

2. Sections 628(b), 628(c)(1), and 628(d) of the Act[3] grant the Commission broad authority to prohibit “unfair acts” of cable operators, satellite cable programming vendors in which a cable operator has an attributable interest, and satellite broadcast programming vendors that have the “purpose or effect” of “hinder[ing] significantly or prevent[ing]” any multichannel video programming distributor (“MVPD”) from providing “satellite cable programming or satellite broadcast programming to subscribers or consumers.”[4] Based on this broad grant of authority, the Commission adopted rules for the processing of complaints alleging one or more of three “unfair acts” involving terrestrially delivered, cable-affiliated programming: undue or improper influence, discrimination, and exclusive contracts.[5] Among other things, these rules require a complainant to demonstrate that the “unfair act” has the “purpose or effect” of “significantly hindering or preventing” the complainant from providing satellite cable programming or satellite broadcast programming to subscribers or consumers, as required by Section 628(b).[6]

3. The Commission has recognized that some terrestrially delivered programming may be non-replicable and sufficiently valuable to consumers that an “unfair act” regarding this programming

[2] 47 U.S.C. § 548(b); 47 C.F.R. § 76.1001(a). Verizon, Cablevision, and MSG LP are each a “Party” and are collectively the “Parties.”

[3] Section 628 was passed as part of the Cable Television Consumer Protection and Competition Act of 1992 (“1992 Cable Act”). *See* Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992).

[4] *See* 47 U.S.C. § 548(b) (“[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.”); 47 U.S.C. § 548(c)(1); 47 U.S.C. § 548(d).

[5] *See* 47 C.F.R. § 76.1001; *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*”), *affirmed in part and vacated in part sub nom. Cablevision Sys. Corp. et al. v. FCC*, 2011 WL 2277217 (D.C. Cir. June 10, 2011) (“*Cablevision II*”). We note that the *Verizon Complaint* was filed six months prior to release of the *2010 Order*. *See* Verizon Telephone Companies *et al*., Program Access Complaint, File No. CSR-8185-P (filed July 7, 2009) (“*Verizon Complaint*”). Many of the Parties’ arguments from earlier stages of this proceeding pertain to the Commission’s statutory authority to address “unfair acts” involving terrestrially delivered, cable-affiliated programming pursuant to Section 628(b). *See, e.g.*, *id*. at ¶¶ 43-45; Defendants, Answer to Program Access Complaint, File No. CSR-8185-P (filed July 28, 2009), at 23-33 (“*Defendants’ Answer*”); Verizon Telephone Companies *et al*, Reply, File No. CSR-8185-P (filed Aug. 13, 2009), at 3-14 (“*Verizon Reply*”). In the *2010 Order*, the Commission interpreted Section 628(b) and addressed arguments regarding the scope of this provision. *See 2010 Order*, 25 FCC Rcd at 757-61, ¶¶ 19-24. Rather than repeating that analysis here, we incorporate by reference the Commission’s interpretation of Section 628(b) from the *2010 Order*.

[6] *See 2010 Order*, 25 FCC Rcd at 780-82, ¶¶ 50-51.

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presumptively – but not conclusively – has the purpose or effect set forth in Section 628(b).[7] The Commission has found that Regional Sports Networks ("RSNs") fall within this category.[8] Accordingly, rather than requiring litigants and the Commission staff to undertake repetitive examinations of RSN precedent and the relevant historical evidence, the Commission allows complainants to invoke a rebuttable presumption that an "unfair act" involving a terrestrially delivered, cable-affiliated RSN has the purpose or effect set forth in Section 628(b).[9] The Commission has explained that the defendant may overcome the presumption by establishing that the "unfair act" does not have the prohibited purpose or effect.[10]

4. In addition, the Commission has concluded that HD programming is growing in significance to consumers[11] and that consumers do not consider the standard definition ("SD") version of a particular channel to be an adequate substitute for the HD version due to the different technical characteristics and sometimes different content.[12] Accordingly, the Commission analyzes the HD version of a network separately from the SD version with similar content for purposes of determining whether an "unfair act" has the purpose or effect set forth in Section 628(b).[13] Thus, the fact that a complainant offers the SD version of a network to subscribers will not alone be sufficient to refute the complainant's

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[7] *See id*. at 750, ¶8 and 782-83, ¶ 52.

[8] *See id*. at 782-83, ¶ 52. In establishing the RSN rebuttable presumption, the Commission relied on evidence in the record supporting the conclusion that RSNs typically offer non-replicable content and are considered "must have" programming by MVPDs. *See id*. at 768-69, ¶ 32 and 782-83, ¶ 52 nn. 205-206. The Commission also relied on an empirical analysis performed in the 2006 *Adelphia Order* assessing the impact of the withholding of terrestrially delivered, cable-affiliated RSNs on the market shares of Direct Broadcast Satellite ("DBS") operators. *See id*. at 768-69, ¶ 32 and 782, ¶ 52 n. 202 (citing *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, 8271, ¶ 149 (2006) ("*Adelphia Order*") (concluding that Comcast's withholding of the terrestrially delivered Comcast SportsNet Philadelphia RSN from DBS operators caused the percentage of television households subscribing to DBS in Philadelphia to be 40 percent lower than what it otherwise would have been; and concluding that Cox's withholding of the terrestrially delivered Cox-4 RSN from DBS operators in San Diego caused the percentage of television households subscribing to DBS in that city to be 33 percent lower than what it otherwise would have been); *Review of the Commission's Program Access Rules and Examination of Programming Tying Arrangements*, MB Docket No. 07-198, Report and Order, 22 FCC Rcd 17791, 17818-19, ¶ 40 and 17876-82, Appendix B (addressing comments concerning the *Adelphia Order* study) (2007) ("*2007 Order*"), *aff'd sub nom. Cablevision Sys. Corp. v. FCC*, 597 F.3d 1306 (D.C. Cir. 2010) ("*Cablevision I*")). The Commission defined an RSN in the same way the Commission has defined that term in previous merger proceedings for purposes of adopting program access conditions: "any non-broadcast video programming service that (1) provides live or same-day distribution within a limited geographic region of sporting events of a sports team that is a member of Major League Baseball, the National Basketball Association, the National Football League, the National Hockey League, NASCAR, NCAA Division I Football, NCAA Division I Basketball, Liga de Béisbol Profesional de Puerto Rico, Baloncesto Superior Nacional de Puerto Rico, Liga Mayor de Fútbol Nacional de Puerto Rico, and the Puerto Rico Islanders of the United Soccer League's First Division and (2) in any year, carries a minimum of either 100 hours of programming that meets the criteria of subheading 1, or 10% of the regular season games of at least one sports team that meets the criteria of subheading 1." *See id*. at 783-84, ¶ 53.

[9] *See id*. at 782-83, ¶ 52.

[10] *See id*.; *see also id*. at 750, ¶ 8.

[11] *See id*. at 784-85, ¶ 54.

[12] *See id*. at 784-85, ¶¶ 54-55.

[13] *See id*. at 784-85, ¶ 54.

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showing that lack of access to the HD version has the purpose or effect set forth in Section 628(b).[14] Similarly, in cases involving an RSN, withholding the HD feed is rebuttably presumed to cause "significant hindrance" even if an SD version of the network is made available to competitors.[15]

B. Appeal of the *2010 Order*

5. The Defendants in this case –MSG LP and Cablevision – each appealed the *2010 Order* to the United States Court of Appeals for the D.C. Circuit ("D.C. Circuit"). On June 10, 2011, the D.C. Circuit issued a decision (i) affirming the Commission's interpretation of Section 628(b) as extending to "unfair acts" involving terrestrially delivered, cable-affiliated programming;[16] (ii) denying the Defendants' facial First Amendment challenge to the Commission's interpretation of Section 628(b);[17] (iii) rejecting as unripe a First Amendment challenge to the Commission's interpretation of Section 628(b) as applied in the New York City video market;[18] (iv) upholding the Commission's decision to establish a rebuttable presumption of "significant hindrance" for "unfair acts" involving RSNs and HD RSNs under both First Amendment and Administrative Procedure Act ("APA") review;[19] (v) affirming under APA review the Commission's decision to hold a "satellite cable programming vendor in which a cable operator has an attributable interest" liable for "unfair acts" involving terrestrially delivered programming;[20] and (vi) affirming under APA review the Commission's decision to hold each of the three types of entity listed in Section 628(b) liable for the "unfair acts" of a terrestrially delivered programmer that the entity wholly owns, controls, or with which it is under common control.[21] The D.C. Circuit vacated just one part of the *2010 Order* – the Commission's decision to treat certain acts involving terrestrially delivered, cable-affiliated programming as categorically "unfair."[22] As discussed in further detail below, the D.C. Circuit's decision on this issue does not preclude the Media Bureau ("Bureau") from assessing on a case-by-case basis whether an act is "unfair" under Section 628(b).[23] The court's mandate issued on July 27, 2011.[24]

C. Verizon's Complaint

6. Complainant Verizon is an MVPD as defined in Section 76.1000(e) of the Commission's rules that provides video service to subscribers in the New York City metropolitan area and Upstate and Western New York, among other areas, via a fiber network known as FiOS.[25] Defendant Cablevision is a cable operator as defined in Section 522(5) of the Act that provides video service in the New York City

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[14] *See id*. at 785, ¶ 55.

[15] *See id*.

[16] *See Cablevision II*, 2011 WL 2277217, at *6-*12.

[17] *See id*. at *13-*15.

[18] *See id*. at *15.

[19] *See id*. at *17-*19.

[20] *See id*. at *19-*20.

[21] *See id*. at *20-*21.

[22] *See id*. at *21-*24.

[23] *See infra* ¶¶ 19-23.

[24] *See* Judgment, File No. 10-1062 (D.C. Cir.).

[25] *See Verizon Complaint* at ii, ¶ 14, and Declaration of Terry Denson and Benjamin Grad (July 7, 2009), at ¶ 5 ("Denson/Grad Decl."); *Defendants' Answer* at ¶ 7.

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metropolitan area, among other areas.[26] Defendant MSG LP owns and operates two RSNs: MSG and MSG+.[27] MSG owns exclusive rights to produce and exhibit within a certain geographic region the games of the New York Knicks (of the National Basketball Association ("NBA")), New York Rangers (of the National Hockey League ("NHL")), and Buffalo Sabres (of the NHL).[28] MSG+ owns exclusive rights to produce and exhibit within a certain geographic region the games of the New York Islanders (of the NHL) and New Jersey Devils (of the NHL), and also televises local and national college football and basketball games.[29] MSG LP delivers the SD versions of MSG and MSG+ to cable operators via satellite and delivers the HD versions of these networks via terrestrial facilities.[30] At the time the *Verizon Complaint* was filed in July 2009, MSG LP was a wholly owned subsidiary of Cablevision.[31] In February 2010, Madison Square Garden, Inc. ("MSG Inc.") was spun off from Cablevision, becoming a separate public company.[32] Defendant MSG LP is now a wholly owned subsidiary of MSG Inc.[33] Despite this spin off, Defendants admit that MSG LP is affiliated with Cablevision pursuant to the Commission's attribution rules because Cablevision and MSG LP share a common controlling shareholder (the Dolan family) and thus are under common control.[34]

7. Verizon claims that Defendants have continually refused to provide Verizon with access to the terrestrially delivered MSG HD and MSG+ HD networks in the New York and Buffalo DMAs.[35] Verizon contends that Defendants initially refused to provide Verizon with access to the HD versions of MSG and MSG+ in 2006 when the parties reached an agreement for Verizon to carry only the SD versions of MSG and MSG+.[36] Verizon claims that it again sought access to the HD versions in 2008 when Verizon was poised to enter the video market in Buffalo as well as later in 2008 in connection with renewal negotiations for the SD versions.[37] Verizon and MSG LP eventually reached a renewal agreement for the SD versions only.[38] Defendants admit that "Verizon has not been offered access to MSG HD and MSG+ HD on any terms."[39] Despite their withholding of MSG HD and MSG+ HD from

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[26] *See Verizon Complaint* at ¶ 17; *Defendants' Answer* at 70 (¶ 17).

[27] *See Verizon Complaint* at ¶¶ 2, 19.

[28] *See id.* at ¶ 20; *Defendants' Answer* at 71 (¶ 20).

[29] *See Verizon Complaint* at ¶ 20; *Defendants' Answer* at 71 (¶ 20).

[30] *See Verizon Complaint* at ¶ 21; *Defendants' Answer* at 10-14 (¶¶ 1-6), 50-52, and Declaration of Steven J. Pontillo (July 28, 2009), at ¶¶ 11-20 ("Pontillo Decl.").

[31] *See Verizon Complaint* at ¶¶ 19, 23; *Defendants' Answer* at 54 n.175.

[32] *See* Madison Square Garden, L.P., Reply to Opposition to Dismiss MSG LP as a Party, File No. CSR-8185-P (filed April 6, 2010) ("*MSG LP Reply to Verizon Opposition to Motion to Dismiss*"); Defendants, Answer to Verizon's Supplement to Program Access Complaint, File No. CSR-8185-P (filed Oct. 13, 2010), at 100-101 ("*Defendants' Post-Discovery Answer to Supplement*").

[33] *See Defendants' Post-Discovery Answer to Supplement* at 100.

[34] *See id*. at 101 n.361; *see also* Reply Brief of Verizon, File No. CSR-8185-P (filed Oct. 22, 2010), at 33 ("*Verizon Post-Discovery Reply Brief*").

[35] *See Verizon Complaint* at ¶¶ 4-7, 26, 42-43; Denson/Grad Decl. at ¶¶ 11-22.

[36] *See Verizon Complaint* at ¶ 4; Denson/Grad Decl. at ¶ 11; *Defendants' Answer* at 15 (¶ 7).

[37] *See Verizon Complaint* at ¶¶ 4-5, 32-37; Denson/Grad Decl. at ¶¶ 12-13; *Defendants' Answer* at 15-16 (¶ 9).

[38] *See Verizon Complaint* at ¶¶ 7, 37; Denson/Grad Decl. at ¶ 18.

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Verizon, Defendants have licensed these networks to many of Verizon's competitors in the New York metropolitan area (including Cablevision, Time Warner, Comcast, DIRECTV, and RCN) and in the Buffalo area (Time Warner, Comcast, and DIRECTV).[40]

8. On June 19, 2009, Verizon notified Defendants of its intention to file a program access complaint based on Defendants' refusal to provide Verizon with access to the HD versions of MSG and MSG+.[41] Defendants responded on June 29, 2009, stating that they had no legal obligation to provide Verizon with access to the HD versions of MSG and MSG+ and that their refusal to do so was not unreasonable, unfair, anticompetitive, or discriminatory.[42] On July 7, 2009, Verizon filed its complaint, raising five separate counts with respect to Defendants' withholding of MSG HD and MSG+ HD from Verizon.[43] Among other things, Verizon asks the Commission to provide a period not to exceed 30 days for Defendants to negotiate nondiscriminatory terms and conditions for Verizon's access to MSG HD and MSG+ HD.[44] Defendants filed an Answer to the *Verizon Complaint*, to which Verizon filed a Reply.[45]

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[39] *See* Joint Letter from Evan T. Leo, Counsel for Verizon, and Christopher J. Harvie, Counsel for Defendants, to Marlene H. Dortch, Secretary, FCC, File No. CSR-8185-P (Aug. 19, 2010), at 3 ("*Parties' Aug. 19th Letter*"); *see also Defendants' Post-Discovery Answer to Supplement* at 80 ("it is true that Verizon cannot obtain access to MSG HD and MSG+ HD"); Defendants' Objections to Verizon's Improperly Propounded and Irrelevant Discovery Requests, File No. CSR-8185-P (filed Sept. 14, 2010), at 5 ("The parties agree that Verizon sought a license to carry MSG HD and MSG+ HD and that it was denied such a license.") ("*Defendants' Sept. 14th Discovery Objection*").

[40] *See Verizon Complaint* at ¶¶ 1, 6, 31; Denson/Grad Decl. at ¶ 20; *Defendants' Sept. 14th Discovery Objection* at 5 ("The parties also agree that MSG HD and MSG+ HD is licensed to other MVPDs, both competitive and outside of Cablevision's footprint."); *see also Defendants' Answer* at 16 n.34, 60; *Verizon Reply* at 18-20; *Defendants' Post-Discovery Answer to Supplement* at 81-82.

[41] *See Verizon Complaint*, Exhibit 2.

[42] *See id*., Exhibit 3.

[43] *See id*. at ¶¶ 41-63. At the request of the Parties, the Bureau adopted a Protective Order in this proceeding to govern the submission of confidential material. *See Verizon Telephone Companies et al. v. Madison Square Garden, L.P. et al.*, Order, 25 FCC Rcd 3888 (MB 2010).

[44] *See Verizon Complaint* at 26.

[45] *See generally Defendants' Answer; Verizon Reply*. The Parties have also made a number of additional filings outside of the authorized pleading cycle but prior to discovery. Defendants filed a Motion to Strike in Part the *Verizon Reply*, alleging that a survey included with the *Verizon Reply* purporting to demonstrate the importance of RSNs, including MSG HD and MSG+ HD, to subscribers in the New York and Buffalo DMAs was a new matter that should have been provided in the *Verizon Complaint*. *See* Defendants, Motion to Strike in Part Verizon's Reply, File No. CSR-8185-P (filed Aug. 31, 2009), at 1-7 ("*Defendants' Motion to Strike Verizon Reply*"); *see also Verizon Reply* at 24-26 and Exhibit 1 (Declaration of Chris Stella (Aug. 13, 2009) ("Stella Decl.") and Global Marketing Research Services Survey of Paid Television Subscribers in NY and Buffalo Designated Market Areas (Aug. 7, 2009) ("*Verizon/GMRS Survey*")). In their motion, Defendants also addressed the substance of the *Verizon/GMRS Survey*, claiming that the survey is flawed and unreliable and that Verizon has mischaracterized its conclusions. *See Defendants' Motion to Strike Verizon Reply* at 7-16 and Declaration of Hal Poret (Aug. 31, 2009) ("Poret Decl."); *see also* Verizon, Response to Defendants' Motion to Strike in Part Verizon's Reply, File No. CSR-8185-P (filed Sept. 14, 2009) ("*Verizon Response to Defendants' Motion to Strike Verizon Reply*"); Defendants, Reply to Verizon's Response to Defendants' Motion to Strike, File No. CSR-8185-P (filed Sept. 24, 2009) ("*Defendants' Reply to Verizon Response to Motion to Strike*"). In addition, Defendants later submitted their own surveys purporting to demonstrate the importance (or lack thereof) of MSG HD and MSG+ HD to subscribers in the New York and Buffalo DMAs, which Verizon claimed were flawed. *See* Defendants' Supplement in Response to Verizon's Late-Filed Consumer Survey, File No. CSR-8185-P (filed March 15, 2010) ("*Defendants' Supplement*"), Exhibit A (Declaration of Leslie Shifrin (March 15, 2010) ("Shifrin Decl.")), Exhibit B ("Radius Global Market

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While Verizon initially elected to prosecute Count I of its complaint under Section 628(d) pursuant to the pre-*2010 Order* framework,[46] Verizon subsequently filed a supplement to its complaint on June 28, 2010 to invoke the post-*2010 Order* framework.[47]

9. During the course of the proceeding, each Party submitted discovery requests as well as objections to the other Party's discovery requests.[48] On August 9, 2010, the Bureau informed the Parties

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Research – Market Research Assessing Reasons for Choice of Television Provider" ("*Defendants'/Radius Survey*")), Exhibit C ("OTX Online Testing Exchange Assessing the Impact of Verizon Offering MSG HD/MSG+ HD on Verizon Customer Acquisition" ("*Defendants'/OTX Survey*")); Verizon, Response to Defendants' Motion for Protective Order and to Supplement the Record, File No. CSR-8185-P (filed March 25, 2010) ("*Verizon Response to Defendants' Supplement*"); Defendants' Reply to Verizon's Response to Motion for Protective Order and to Supplement the Record, File No. CSR-8185-P (filed April 6, 2010) ("*Defendants' Reply to Verizon Response to Supplement*"), Exhibit A (Declaration of Leslie Shifrin (April 6, 2010) ("Shifrin Reply Decl.")). In addition, MSG LP filed a Motion to Dismiss MSG LP as a party to the proceeding, which Verizon opposed as late-filed. *See* Madison Square Garden, L.P., Motion to Dismiss MSG LP as a Party, File No. CSR-8185-P (filed March 15, 2010) ("*MSG LP Motion to Dismiss*"); Verizon, Opposition to Motion to Dismiss MSG LP as a Party, File No. CSR-8185-P (filed March 25, 2010) ("*Verizon Opposition to MSG LP Motion to Dismiss*"); *MSG LP Reply to Verizon Opposition to Motion to Dismiss*. The Parties also submitted additional substantive filings after the close of the pleading cycle. *See, e.g.,* Letter from William H. Johnson, Assistant General Counsel, Verizon, to Marlene H. Dortch, Secretary, FCC, File No. CSR-8185-P (Feb. 12, 2010) ("*Verizon Feb. 12th Letter*"); Letter from Howard J. Symons, Counsel for Defendants, to Marlene H. Dortch, Secretary, FCC, File No. CSR-8185-P (Feb. 25, 2010) ("*Defendants' Feb. 25th Letter*"). In the interest of acting on a complete record, we decline to strike any of these post-pleading-cycle/pre-discovery filings and consider the substantive claims made therein in reaching a decision. We have declined, however, Defendants' request to submit supplemental briefs on the issue of whether the record supports a finding that Defendants have engaged in an "unfair act." *See* Email from Christopher J. Harvie, Counsel for Defendants, to David S. Konczal, Assistant Division Chief, Policy Division, Media Bureau, FCC, File No. CSR-8185-P (Aug. 1, 2011). The request was made on August 1, 2011, over ten months after the close of discovery in this proceeding. *See id*. The parties have had a full opportunity to brief this issue, and the record on this issue is well-developed. *See* Email from David S. Konczal, Assistant Division Chief, Policy Division, Media Bureau, FCC to Christopher J. Harvie, Counsel for Defendants, File No. CSR-8185-P (Aug. 3, 2011); *see also infra* ¶ 22. Moreover, the Bureau informed the parties on July 26, 2011, prior to Defendants' request for supplemental briefing, that the Bureau intended to resolve the pending complaints in the near future, thus granting the Defendants' request would have resulted in unnecessary delay. *See* Email from David S. Konczal, Assistant Division Chief, Policy Division, Media Bureau, FCC to Howard J. Symons, Counsel for Defendants, File No. CSR-8185-P (July 26, 2011).

[46] *See infra* n.54.

[47] *See* Verizon Telephone Companies et al., Supplement to Program Access Complaint, File No. CSR-8185-P (filed June 28, 2010) ("*Verizon Supplement*"); *see also 2010 Order,* 25 FCC Rcd at 751, ¶ 10, 756-57, ¶ 17, 785, ¶ 55, 789, ¶ 64 n.237.

[48] Verizon initially filed a discovery request in August 2009, but later withdrew that request on March 29, 2010. *See* Verizon, Complainant's First Request for the Production of Documents, File No. CSR-8185-P (filed Aug. 31, 2009); *Defendants' Sept. 14th Discovery Objection*; Letter from William H. Johnson, Assistant General Counsel, Verizon, to Nancy Murphy, Associate Bureau Chief, Media Bureau, FCC, File No. CSR-8185-P (March 29, 2010) ("*Verizon March 29th Letter*") (withdrawing discovery request). Two weeks later, on April 12, 2010, Verizon reinstated its discovery request. *See* Letter from William H. Johnson, Assistant General Counsel, Verizon, to Marlene H. Dortch, Secretary, FCC, File No. CSR-8185-P (April 12, 2010) ("*Verizon April 12th Letter*") (attaching Verizon, Complainant's Amended First Request for the Production of Documents (April 12, 2010)). At the request of the Bureau, Defendants submitted their discovery requests in July 2010. *See* Letter from Nancy Murphy, Associate Bureau Chief, Media Bureau, FCC to Howard J. Symons, Counsel for Defendants, and Evan T. Leo, Counsel for Verizon, File No. CSR-8185-P (June 23, 2010); Letter from Howard J. Symons, Counsel for Defendants, to Marlene H. Dortch, Secretary, FCC, File No. CSR-8185-P (July 9, 2010) ("*Defendants' July 9th Letter*"); Defendants' First Request for the Production of Documents, File No. CSR-8185-P (filed July 9, 2010); Defendants' First Set of

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that discovery was necessary for the resolution of Counts I, III, and V and directed the Parties to resolve their outstanding discovery disputes.[49] On August 19, 2010, the Parties submitted a joint letter describing their agreement regarding the scope of discovery to be conducted.[50] The Bureau established September 20, 2010 for the end of discovery, October 12, 2010 for post-discovery opening briefs, and October 22, 2010 for post-discovery reply briefs.[51]

III. DISCUSSION

A. Count I – "Unfair Act" in Violation of Section 628(b) of the Act and Section 76.1001(a) of the Rules

10. In Count I, Verizon alleges that Defendants' withholding of MSG HD and MSG+ HD from Verizon is an "unfair act" that has the "effect" and "purpose" of "significantly hindering" Verizon from providing "satellite cable programming or satellite broadcast programming to subscribers or consumers," as prohibited by Section 628(b) of the Act and Section 76.1001(a) of the Commission's rules.[52] As discussed in greater detail below, we determine that Defendants violated these provisions based on our findings that (i) both MSG LP and Cablevision are proper defendants; (ii) Defendants' withholding of the HD versions of the MSG and MSG+ networks from Verizon is an "unfair act"; and (iii) this "unfair act" has the "effect" of "significantly hindering" Verizon from providing a competing video

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Interrogatories, File No. CSR-8185-P (filed July 9, 2010); Letter from William H. Johnson, Assistant General Counsel, Verizon, to Marlene H. Dortch, Secretary, FCC, File No. CSR-8185-P (July 21, 2010); Verizon, Objections to Defendants' First Request for the Production of Documents, File No. CSR-8185-P (filed July 21, 2010); Letter from Howard J. Symons, Counsel for Defendants, to Marlene H. Dortch, Secretary, FCC, File No. CSR-8185-P (July 29, 2010) ("*Defendants' July 29th Letter*"); Letter from William H. Johnson, Assistant General Counsel, Verizon, to Marlene H. Dortch, Secretary, FCC, File No. CSR-8185-P (Aug. 2, 2010).

[49] *See* Letter from David S. Konczal, Assistant Division Chief, Policy Division, Media Bureau, FCC to Evan T. Leo, Counsel for Verizon, and Howard J. Symons, Counsel for Defendants, File No. CSR-8185-P (Aug. 9, 2010), at 1 ("*Bureau Aug. 9th Letter*").

[50] *See Parties' Aug. 19th Letter*. In light of the settlement of the outstanding discovery disputes, the Parties' pending discovery objections and the Defendants' request to refer the discovery disputes to an Administrative Law Judge are moot. *See* Letter from Howard J. Symons, Counsel for Defendants, to Marlene H. Dortch, Secretary, FCC, File No. CSR-8185-P (May 6, 2010); *Defendants' July 29th Letter* at 6.

[51] *See* Letter from David S. Konczal, Assistant Division Chief, Policy Division, Media Bureau, FCC to Evan T. Leo, Counsel for Verizon, and Howard J. Symons, Counsel for Defendants, File No. CSR-8185-P (Aug. 25, 2010), at 2. The Parties agreed to a mutual exchange of opening briefs and reply briefs rather than the pleading schedule established in the *2010 Order*. *See Parties' Aug. 19th Letter* at 4; *see also 2010 Order*, 25 FCC Rcd at 789, ¶ 64 n.237. The Commission has established an aspirational goal of resolving program access complaints within five months from the submission of a complaint for denial of programming cases, and within nine months for all other program access complaints, such as price discrimination cases. *See 2007 Order*, 22 FCC Rcd at 17856, ¶ 107; *see also 2010 Order*, 25 FCC Rcd at 747, ¶ 1 n.2. In addition to a denial of programming, the present case involves undue influence and evasion claims, thus the nine-month goal applies. While this would establish April 2010 as the goal for resolving this complaint, this proceeding was further complicated by the intervening *2010 Order* adopted in January 2010 in which the Commission interpreted Section 628(b) and its application to terrestrially delivered, cable-affiliated programming; the Defendants' appeal of the *2010 Order* to the D.C. Circuit; Verizon's decision to supplement its complaint in June 2010; and the Parties' decision to engage in extensive discovery. *See Implementation of the Cable Television Consumer Protection and Competition Act of 1992*, Report and Order, 13 FCC Rcd 15822, 15842-43, ¶ 41 (1998) (explaining that the aspirational goals for resolving program access cases do not apply to cases involving complex discovery or extra pleadings based upon new information).

[52] *See Verizon Complaint* at ¶¶ 41-45; *Verizon Supplement* at 4.

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service, including "satellite cable programming and satellite broadcast programming," to subscribers and consumers in the New York and Buffalo DMAs.[53] Accordingly, we grant Count I of Verizon's program access complaint and order MSG LP to enter into an agreement to license the MSG HD and MSG+ HD networks to Verizon on non-discriminatory rates, terms, and conditions within 30 days of the release of this *Order*.

1. Verizon Properly Invoked the Framework Adopted in the *2010 Order*

11. We reject Defendants' claim that Verizon waived its right to prosecute its complaint pursuant to the post-*2010 Order* framework by initially requesting immediate Commission action on Count I pursuant to Section 628(d) under the pre-*2010 Order* framework.[54] Defendants allege that the Commission adopted an "either/or" approach in the *2010 Order*, such that an entity with a pending complaint could elect *either* (i) to continue to prosecute the complaint pursuant to Section 628(d) under the pre-*2010 Order* framework, *or* (ii) to prosecute the complaint under the post-*2010 Order* framework by supplementing the complaint.[55] Defendants argue that Verizon, by initially requesting immediate Commission action on Count I pursuant to Section 628(d) under the pre-*2010 Order* framework, waived any benefit from the post-*2010 Order* framework.[56] We reject Defendants' arguments. The Commission in the *2010 Order* never stated or implied that an entity with a pending complaint could not initially elect to prosecute its complaint pursuant to Section 628(d) under the pre-*2010 Order* framework and then to subsequently supplement the complaint to take advantage of the post-*2010 Order* framework.[57] Moreover, we note that the *2010 Order* did not establish a deadline for filing a supplement to invoke the

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[53] Because we conclude below that Defendants' withholding of MSG HD and MSG+ HD from Verizon is an "unfair act" that has the "effect" of "significantly hindering" Verizon from providing "satellite cable programming or satellite broadcast programming to subscribers or consumers," we find it unnecessary to also address whether Defendants' conduct has the "purpose" of "significantly hindering" Verizon. *See* 47 U.S.C. § 548(b) (prohibiting "unfair acts" that have the "purpose or effect" of "significantly hindering" an MVPD from providing satellite cable programming or satellite broadcast programming to subscribers or consumers); 47 C.F.R. § 76.1001(a) (same); *see also Verizon Complaint* at ¶¶ 40-42; *Verizon Reply* at 21-22; Opening Brief of Verizon, File No. CSR-8185-P (filed Oct. 12, 2010), at 1-2, 6-9, 12 ("*Verizon Post-Discovery Opening Brief*"); *Verizon Post-Discovery Reply Brief* at 32; *Defendants' Post-Discovery Answer to Supplement* at 6-7, 78; *Verizon Post-Discovery Reply Brief* at 32; Reply Brief of Defendants, File No. CSR-8185-P (filed Oct. 22, 2010), at 13 ("*Defendants' Post-Discovery Reply Brief*").

[54] *See Defendants' Feb. 25th Letter* at 2; *see also Verizon Feb. 12th Letter* at 1-4 (noting that the NBA and NHL seasons were underway and urging prompt Commission action based on the existing record); *Verizon March 29th Letter* (withdrawing discovery request "[i]n the interest of obtaining a speedy resolution" based on the existing record); *Verizon April 12th Letter* at 4 (stating that Verizon has "urged the Commission to grant our pending complaint promptly before the end of the current sports seasons").

[55] *See Defendants' Feb. 25th Letter* at 2; *see also* Letter from Howard J. Symons, Counsel for Defendants, to Marlene H. Dortch, Secretary, FCC, File No. CSR-8185-P (April 19, 2010), at 1-2 ("*Defendants' April 19th Letter*"); *Defendants' July 9th Letter* at 2.

[56] *See Defendants' Feb. 25th Letter* at 2; *see also Defendants' April 19th Letter* at 1-2; *Defendants' July 9th Letter* at 2.

[57] The Commission stated that a complainant could continue to prosecute its complaint pursuant to Section 628(d) under the pre-*2010 Order* framework and, "[i]n addition," could supplement its complaint to take advantage of the post-*2010 Order* framework. *See 2010 Order*, 25 FCC Rcd at 751, ¶ 10; *see also id*. at 785, ¶ 55, 789, ¶ 64 n.237; Letter from William H. Johnson, Assistant General Counsel, Verizon, to Marlene H. Dortch, Secretary, FCC, File No. CSR-8185-P (April 26, 2010), at 2 (stating that the *2010 Order* contemplates that complainants may simultaneously continue to prosecute pending complaints and supplement those complaints to take advantage of the post-*2010 Order* framework).

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post-*2010 Order* framework.[58] In this case, Verizon initially elected to prosecute Count I under Section 628(d) pursuant to the pre-*2010 Order* framework.[59] Before the Commission could act on that request, Verizon requested instead to prosecute its complaint pursuant to the post-*2010 Order* framework.[60] We conclude that Verizon's election was authorized by the *2010 Order*. We also reject Defendants' claim that procedural fairness and principles of administrative efficiency and economy require Verizon to be held to its initial decision to proceed pursuant to Section 628(d) under the pre-*2010 Order* framework.[61] We find no basis in the record for concluding that Defendants were in any way prejudiced by Verizon's actions.[62] Indeed, nothing in the *2010 Order* or the Commission's rules would have prevented Verizon from continuing to prosecute its complaint pursuant to the pre-*2010 Order* framework, subsequently withdrawing that complaint, and then refiling its complaint under the post-*2010 Order* framework.

2. Verizon Has Demonstrated that Defendants Violated Section 628(b) of the Act and Section 76.1001(a) of the Rules

12. Section 628(b) of the Act and Section 76.1001(a) of the Commission's rules require a complainant to establish three elements in order to demonstrate a violation of these provisions: (i) the defendant is within one of the three categories of entities covered by these provisions (*i.e.*, a cable operator, a satellite cable programming vendor in which a cable operator has an attributable interest, or a satellite broadcast programming vendor); (ii) the defendant (or a terrestrial cable programming vendor that the defendant wholly owns, controls, or with which it is under common control) has engaged in an "unfair act"; and (iii) the "purpose or effect" of the "unfair act" is to "significantly hinder or prevent" an MVPD from providing satellite cable programming or satellite broadcast programming to subscribers or consumers.[63] For the reasons discussed below, we find that Verizon has established each element.

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[58] *See 2010 Order*, 25 FCC Rcd at 751, ¶ 10 (permitting complainants to file a supplement after the effective date of the rules adopted in the *2010 Order*, but not specifying a deadline for filing the supplement); *see also id*. at 785, ¶ 55 and 789, ¶ 64 n.237.

[59] *See supra* n.54.

[60] *See Verizon April 12th Letter* at 2 (stating that Verizon has requested Defendants to reconsider their refusal to provide access to MSG HD and MSG+ HD and that, if they refuse, Verizon intends to supplement its complaint if not granted by that time); *Verizon Supplement* at 1, 4-5 (stating that Defendants refused to provide access to MSG HD and MSG+ HD after the effective date of the rules adopted in the *2010 Order* and supplementing the complaint accordingly). With respect to Count I, we note that Verizon has elected to prosecute this count pursuant to only the post-*2010 Order* framework. *See Parties' Aug. 19th Letter* ("The Commission may proceed with respect to Count One of Verizon's Complaint based on Cablevision's post-[*2010*] *Order* denial of Verizon's request to license MSG HD and MSG+ HD and the post-[*2010*] *Order* framework for resolving such disputes. The Commission does not need to apply the pre-[*2010*] *Order* framework to Count One."). Accordingly, we need not, and do not, consider Defendants' claim that applying the Commission's interpretation of Section 628(b) in the *2010 Order* to an act that occurred prior to the *2010 Order* is impermissibly retroactive. *See Defendants' Feb. 25th Letter* at 2-6; Letter from Howard J. Symons, Counsel for Defendants, to Marlene H. Dortch, Secretary, FCC, File No. CSR-8185-P (April 2, 2010).

[61] *See Defendants' April 19th Letter* at 1-2; *see also Defendants' July 9th Letter* at 2.

[62] Similarly, we find no basis for concluding that Defendants were prejudiced by Verizon's decision to withdraw and then to subsequently resubmit two weeks later its request for discovery. *See supra* nn.48, 54; *Defendants' April 19th Letter* at 2-4.

[63] *See* 47 U.S.C. § 548(b); 47 C.F.R. § 76.1001(a).

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a. Both MSG LP and Cablevision Are Proper Defendants to Count I

(i) MSG LP

13. Section 628(b) of the Act and Section 76.1001(a) of the Commission's rules apply to the "unfair acts" of, among other entities, a "satellite cable programming vendor in which a cable operator has an attributable interest."[64] Defendants concede that (i) MSG LP is a "satellite cable programming vendor"[65] and (ii) a cable operator (Cablevision) has an attributable interest in MSG LP.[66] While MSG LP claims that a "satellite cable programming vendor" cannot be liable under Section 628(b) of the Act and Section 76.1001(a) of the Commission's rules when the conduct at issue involves only terrestrial programming and not satellite programming,[67] this argument has been rejected by both the Commission[68] and the D.C. Circuit.[69] Accordingly, MSG LP is a proper defendant to Count I.

14. The record also establishes that MSG LP is a "terrestrial cable programming vendor" because it delivers MSG HD and MSG+ HD via terrestrial means.[70] Defendants argue, however, that the Commission's definition of "terrestrial cable programming vendor" excludes a "satellite cable

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[64] *See* 47 U.S.C. § 548(b); 47 C.F.R. § 76.1001(a); *see also* 47 U.S.C. § 548(i)(2) (the "term 'satellite broadcast programming vendor' means a person engaged in the production, creation, or wholesale distribution for sale of satellite cable programming, but does not include a satellite broadcast programming vendor").

[65] *See Defendants' Answer* at 71 (¶ 22) ("Admitting that MSG is a 'satellite cable programming vendor' only to the extent that it licenses certain satellite cable programming not at issue in this case."); Pontillo Decl. at ¶ 13; *MSG LP Motion to Dismiss* at 3 ("MSG is also in the business of providing satellite-delivered services such as Fuse and the standard definition MSG and MSG Plus program services").

[66] *See Defendants' Post-Discovery Answer to Supplement* at 101 n.361.

[67] *See id.* at 117-118 ("Where the only programming at issue is terrestrially-delivered, the entity delivering the programming is not acting as a satellite cable programming vendor for purposes of any dispute under Section 628(b), and is therefore not subject to jurisdiction under that provision in such circumstances."); *MSG LP Motion to Dismiss* at 1-4.

[68] *See 2010 Order*, 25 FCC Rcd at 779, ¶ 49 n.192 ("Nothing in the statute excludes an otherwise covered entity from the reach of Section 628(b) simply because the conduct at issue is not covered by the statutorily defined activities of a 'cable operator' or 'satellite cable programming vendor.' To the contrary, under Section 628(b), so long as the provider itself meets the statutory definition of a covered entity, it is prohibited from engaging in any unfair or deceptive acts or practices that hinder significantly or prevent any MVPD from providing satellite cable or satellite broadcast programming to consumers.").

[69] *See Cablevision II*, 2011 WL 2277217, at *19 ("In defining satellite cable vendors, Congress could have required that an entity would be covered 'only 'when' or 'to the extent' that it provides the regulation-triggering services.' . . . But as the Commission recognized in its order, Congress imposed no such limitation.") (citations omitted).

[70] *See* 47 C.F.R. § 76.1000(m) (defining "terrestrial cable programming vendor"); 47 C.F.R. § 76.1000(l) (defining "terrestrial cable programming"). Defendants admit that MSG LP distributes MSG HD and MSG+ HD terrestrially and that MSG LP is thus a "terrestrial cable programming vendor." *See MSG LP Reply to Verizon Opposition to Motion to Dismiss* at 1-2 ("The programming sought by Verizon in the instant Complaint, MSG HD and MSG+ HD, is terrestrially-delivered . . . . [T]herefore, MSG is a terrestrial cable programming vendor . . . ."); *see also Defendants' Answer* at 10-14 (¶¶ 1-5); *MSG LP Motion to Dismiss* at 2 ("The only programming at issue in Verizon's Complaint is the terrestrially-delivered MSG HD and MSG Plus HD services."); *Defendants' Post-Discovery Answer to Supplement* at 93 ("[T]he only programming at issue is terrestrially-delivered."). Contrary to Defendants' claim, there was no "defect" in the *Verizon Supplement*. *See Defendants' Post-Discovery Answer to Supplement* at 93. Rather, the record clearly establishes that MSG HD and MSG+ HD are "terrestrial cable programming" and that MSG LP is a "terrestrial cable programming vendor." There was no reason for Verizon to re-establish in its *Supplement* what had already been established in the existing record.

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programming vendor," such that a single entity cannot be both a "terrestrial cable programming vendor" and a "satellite cable programming vendor."[71] Defendants claim that the Commission's definition means that the only type of programmer that can qualify as a "terrestrial cable programming vendor" is one that distributes *only* terrestrial cable programming.[72] Thus, Defendants contend, because MSG LP distributes "satellite cable programming" (MSG SD, MSG+ SD, Fuse)[73] in addition to terrestrial cable programming, it cannot be a "terrestrial cable programming vendor."[74]

15. We find that Defendants' interpretation of the Commission's definition contradicts established Commission precedent and would create a significant loophole that would eviscerate the protections afforded by the program access rules applicable to both satellite-delivered and terrestrially delivered programming. First, Defendants' interpretation contradicts the Commission's holding in the *2010 Order*, which has been upheld by the D.C. Circuit, that a "satellite cable programming vendor" that also distributes terrestrial cable programming can violate Section 628(b) of the Act to the extent it is providing terrestrial cable programming.[75] This holding indicates that the Commission expected entities that distribute both satellite cable programming and terrestrial cable programming to be subject to complaints under the procedures established in the *2010 Order*. Second, we note that the Commission's definition of "terrestrial cable programming vendor" mirrors Congress's definition of "satellite cable programming vendor" in the 1992 Cable Act, which excludes a "satellite broadcast programming vendor."[76] Under Defendants' interpretation, a single entity cannot simultaneously be both a "satellite cable programming vendor" and a "satellite broadcast programming vendor." Thus, Defendants' view would mean that the only type of programmer that can qualify as a "satellite cable programming vendor" is one that distributes *only* satellite cable programming, to the exclusion of satellite broadcast programming. Such an interpretation would create a loophole in the rules applicable to satellite-delivered programming whereby an entity that distributes satellite cable programming could avoid liability merely by distributing some satellite broadcast programming as well. Congress, however, never stated or implied any intention to create such a loophole. The Commission in the *2010 Order* simply followed the definitional structure used by Congress in the 1992 Cable Act. We can discern no reason for Congress in the 1992 Cable Act or for the Commission in the *2010 Order* to exclude programmers from certain program access rules because they distribute more than one type of programming subject to the rules. Rather, Congress's definition of "satellite cable programming vendor" and the Commission's definition of "terrestrial cable programming vendor" reflect the definitions of the underlying programming these

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[71] *See Defendants' Post-Discovery Answer to Supplement* at 93-95; *Defendants' Post-Discovery Reply Brief* at 35; *see also* 47 C.F.R. § 76.1000(m) (defining "terrestrial cable programming vendor" as "a person engaged in the production, creation, or wholesale distribution for sale of terrestrial cable programming, *but does not include a satellite broadcast programming vendor or a satellite cable programming vendor*") (emphasis added).

[72] *See Defendants' Post-Discovery Answer to Supplement* at 94 n.339.

[73] *See Defendants' Answer* at 71 (¶ 22) ("Admitting that MSG is a 'satellite cable programming vendor' only to the extent that it licenses certain satellite cable programming not at issue in this case."); Pontillo Decl. at ¶ 13; *MSG LP Motion to Dismiss* at 3 ("MSG is also in the business of providing satellite-delivered services such as Fuse and the standard definition MSG and MSG Plus program services").

[74] *See Defendants' Post-Discovery Answer to Supplement* at 93-95.

[75] *See Cablevision II*, 2011 WL 2277217, at *19; *2010 Order*, 25 FCC Rcd at 779, ¶ 49 n.192.

[76] *See* 47 U.S.C. § 548(i)(2) (defining "satellite cable programming vendor" as "a person engaged in the production, creation, or wholesale distribution for sale of satellite cable programming, *but does not include a satellite broadcast programming vendor*") (emphasis added).

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vendors distribute, which are defined to exclude certain other types of programming.[77] Thus, we find no basis for interpreting the Commission's definitions to mean that a single entity cannot be both a "terrestrial cable programming vendor" and a "satellite cable programming vendor."[78]

(ii) Cablevision

16. We also find that Cablevision is a proper defendant to Count I. In the *2010 Order*, the Commission established that an entity listed in Section 628(b) (*i.e.*, a cable operator, a satellite cable programming vendor in which a cable operator has an attributable interest, or a satellite broadcast programming vendor) can be held liable for the "unfair act" of a terrestrial cable programming vendor that it wholly owns, controls, or with which it is under common control.[79] The D.C. Circuit upheld the Commission's decision on this point.[80] Here, Defendants concede that Cablevision (a "cable operator") is under common control with MSG LP because it shares a common controlling shareholder with MSG LP (the Dolan family).[81]

17. Accordingly, because Cablevision (a "cable operator") is under common control with MSG LP (a "terrestrial cable programming vendor"[82] alleged to have engaged in an "unfair act" under Section 628(b)), Cablevision is a proper defendant to Count I. Defendants object, however, to the Commission's conclusion in the *2010 Order* that a cable operator under common control with a terrestrial cable programming vendor will be "deemed responsible" for the programmer's decision to withhold programming from a competing MVPD because the programmer's actions are designed to benefit its affiliated cable operator.[83] The D.C. Circuit agreed with the Commission and upheld this decision.[84] In

[77] *See* 47 U.S.C. § 548(i)(1) ("The term 'satellite cable programming' has the meaning provided under section 605 of this title, *except that such term does not include satellite broadcast programming*.") (emphasis added); 47 C.F.R. § 76.1000(l) (defining "terrestrial cable programming" as "video programming which is transmitted terrestrially or by any other means other than satellite and which is primarily intended for direct receipt by cable operators for their retransmission to cable subscribers, *except that such term does not include satellite broadcast programming or satellite cable programming*") (emphasis added).

[78] Defendants contend that it would be "untenable" for the Commission (i) in determining whether MSG LP is a proper defendant under a Section 628(b) claim, to classify MSG LP as a "satellite cable programming vendor" even when it is acting as a distributor of terrestrial cable programming because it distributes other satellite programming not at issue in the dispute; and (ii) in determining whether MSG LP is a "terrestrial cable programming vendor" for purposes of the definition of that term in Section 76.1000(m), to rule that MSG LP is not a "satellite cable programming vendor" when it acts as a distributor of terrestrial cable programming even though it also distributes satellite programming not at issue in the dispute. *See Defendants' Post-Discovery Reply Brief* at 35 n.128. There is no basis for Defendants' contention with respect to Section 76.1000(m), however, because we find that MSG LP is both a "satellite cable programming vendor" and a "terrestrial cable programming vendor" under the applicable definitions.

[79] *See 2010 Order*, 25 FCC Rcd at 786-87, ¶ 57 ("We conclude that Section 628(b) allows complaints against the entities listed in Section 628(b) based on the unfair acts of their affiliated programmers delivering programming by terrestrial means, where the facts establish that the programmer is wholly owned by, controlled by, or under common control with one or more of these entities.").

[80] *See Cablevision II*, 2011 WL 2277217, at *19-*21.

[81] *See Defendants' Post-Discovery Answer to Supplement* at 101 n.361; *see also Verizon Post-Discovery Reply Brief* at 33.

[82] *See supra* ¶¶ 14-15.

[83] *See Defendants' Post-Discovery Answer to Supplement* at 118-119; *see also 2010 Order*, 25 FCC Rcd at 786-87, ¶ 57.

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any event, the record of this proceeding supports the Commission's conclusion on this issue. Defendants assert that MSG LP "has entered into a mutually beneficial arrangement in which it receives value and consideration in exchange for allowing Cablevision to continue to effectuate its product differentiation strategy."[85] Thus, Defendants contend, the Commission cannot presume that MSG LP's decision to withhold programming from Verizon was designed to benefit Cablevision exclusively.[86] While the record reflects Defendants' position that Cablevision will benefit from this arrangement by differentiating its video service and thereby providing it with a competitive advantage over Verizon,[87] Defendants provide no evidence of any "value and consideration" that MSG LP has received from this arrangement. In fact, by foregoing licensing fees and advertising revenue by withholding MSG HD and MSG+ HD from Verizon, MSG LP is acting counter to its economic interests in order to support Cablevision's product differentiation strategy.[88] Moreover, while Defendants assert that MSG LP receives "substantial

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[84] *See Cablevision II*, 2011 WL 2277217, at *20 ("But 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. . . . For example, 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.") (citations omitted).

[85] *Defendants' Post-Discovery Reply Brief* at 38.

[86] *See Defendants' Post-Discovery Answer to Supplement* at 119.

[87] *See Defendants' Answer* at 4-5 ("MSG HD and MSG+ HD represented a way not just for Cablevision to differentiate itself from then-existing video competitors like DBS; it also constituted an investment in the future that would differentiate Cablevision from all video programming providers – cable and satellite."), at 7 (stating that Defendants are not prohibited from "employing a lawful pro-competitive strategy of product differentiation, simply because it may result in making Verizon's video offering less attractive to a subset of its potential customer base"), at 15 (¶ 7) (stating that Defendants declined to license MSG HD and MSG+ HD to Verizon in order to "continue to utilize MSG HD and MSG+ HD as a product differentiator for Cablevision"), at 34 (stating that Defendants opted to "use MSG HD and MSG+ HD as a means of differentiating themselves in the marketplace"), at 38 (stating that Defendants "regard MSG HD and MSG+ HD as a worthwhile way to differentiate the Cablevision video product offering from FiOS TV"); *Defendants' Post-Discovery Answer to Supplement* at 6 ("Verizon lacks a license to distribute MSG HD and MSG+ HD as a result of a product differentiation strategy aimed at distinguishing Cablevision's video service offerings in New York and New Jersey."), at 79 ("[T]he decision not to license MSG HD and MSG+ HD to Verizon was undertaken in furtherance of a product differentiation strategy designed to distinguish Cablevision's video offering from Verizon."); *see also id*. at 81 (stating that forced sharing would require a firm to share its "competitive advantages"), at 83 (stating that its product differentiation strategy "may make Verizon's video program offerings appear less attractive to some small segment of customers"); *see also Defendants' Post-Discovery Reply Brief* at 38-39.

[88] See *Defendants' Answer* at 55 (stating that there is nothing "undue for a vertically-integrated cable company to forego distribution revenue that may be available from licensing its programming to an unaffiliated competitor in order for the distribution arm of the business to differentiate its product offering"), at 56 ("Firms routinely opt to forego revenue that might otherwise be gained from licensing an input to non-affiliates in order to benefit another arm of a shared enterprise."); *Defendants' Post-Discovery Reply Brief* at 38; *see also Verizon Complaint* at ¶ 57 ("But for its affiliation with Cablevision, Madison Square Garden, L.P. would have every incentive to sell [] both the standard-definition and HD formats of its regional sports programming to Verizon in order to maximize its revenues. Selling all formats of this programming to Verizon would allow Madison Square Garden, L.P. to increase its revenue and corresponding profits, either through increased license fees or increased HD viewership leading to increased advertising sales or sponsorship opportunities, or both. If Defendants were to do so, however, it would result in lost subscribers for Cablevision . . . ."); *Verizon Reply* at 18 ("[A]part from its relationship with Cablevision, MSG would have a financial incentive to license both feeds of the subject programming to Verizon."); *Verizon Post-Discovery Opening Brief* at 17-18 ("Even after the Madison Square Garden entities were spun off to (continued….)

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promotional, marketing and other benefits" from Cablevision, they provide no support for this assertion.[89] Thus, Defendants have offered no facts that would undermine the Commission's conclusion in the *2010 Order*, as applied here, that MSG LP's withholding of MSG HD and MSG+ HD from Verizon is designed to benefit Cablevision and that Cablevision (in addition to MSG LP) is therefore an appropriate defendant under Count I.[90]

b. Defendants' Withholding of MSG HD and MSG+ HD from Verizon Is an "Unfair Act"

18. In Count I, Verizon alleges that the Defendants have engaged in the "unfair act" of withholding MSG HD and MSG+ HD from Verizon while at the same time licensing these networks to certain of Verizon's competitors in the New York and Buffalo DMAs.[91] As discussed in further detail below, we conclude that (i) the D.C. Circuit's decision to vacate the Commission's ruling that withholding of terrestrially delivered, cable-affiliated programming is categorically "unfair" does not prevent the Commission from addressing on a case-by-case basis whether withholding is "unfair"; (ii) Congress and the Commission have provided guidance on how to interpret the term "unfair act"; thus, the issue of whether Defendants' withholding here is an "unfair act" does not present a new or novel issue that would preclude Bureau action on delegated authority; and (iii) applying this precedent and guidance to the facts presented, Verizon has satisfied its burden of demonstrating that Defendants' withholding in this case is an "unfair act."[92]

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become an independent, publicly-traded company, they still refuse to deal with Verizon, foregoing revenues (and obligations to Madison Square Garden, L.P.'s independent shareholders) to help Cablevision fend off competition from Verizon."); *Verizon Post-Discovery Reply Brief* at 33 and Declaration of Coleman Bazelon (Oct. 22, 2010), at ¶ 10 ("Bazelon Decl.").

[89] *See Defendants' Answer* at 56.

[90] *See 2010 Order*, 25 FCC Rcd at 786-87, ¶ 57. As noted above, MSG LP provides both satellite-delivered programming and terrestrially delivered programming. Thus, even if Cablevision were not a proper defendant to Count I, this would not undermine our finding that MSG LP is a proper defendant nor would it prevent us from issuing a remedy. *See supra* ¶ 13.

[91] *See Verizon Complaint* at ¶¶ 41-45 (referring to Defendants' withholding of MSG HD and MSG+ HD from Verizon); *Verizon Supplement* at 1-4 (referring to Defendants' refusal to provide Verizon with access to MSG HD and MSG+ HD); *see also Verizon Complaint* at ¶¶ 1, 6, 31; Denson/Grad Decl. at ¶ 20 (discussing other MVPDs that have access to MSG HD and MSG+ HD); *Verizon Supplement* at 3 (same). Defendants admit that "Verizon has not been offered access to MSG HD and MSG+ HD on any terms." *See Parties' Aug. 19th Letter* at 3. Despite Defendants' claim, there was no requirement for Verizon to cite a specific Commission rule in its *Supplement*. *See Defendants' Post-Discovery Answer to Supplement* at 91.

[92] We note that, in addition to letters filed by the Parties, Commission staff held a joint meeting on June 27, 2011 with the Parties to discuss the impact of the D.C. Circuit's decision on the complaint. *See* Letter from Michael E. Glover, Senior Vice President and Deputy General Counsel, Verizon, to William T. Lake, Chief, Media Bureau, FCC, File No. CSR-8185-P (June 15, 2011) ("*Verizon June 15th Letter*"); Letter from Howard J. Symons, Counsel for Defendants, to William T. Lake, Chief, Media Bureau, FCC, File No. CSR-8185-P et al. (June 22, 2011) ("*Defendants' June 22nd Letter*"); Letter from Michael E. Glover, Senior Vice President and Deputy General Counsel, Verizon, to William T. Lake, Chief, Media Bureau, FCC, File No. CSR-8185-P (June 24, 2011) ("*Verizon June 24th Letter*"); Letter from Howard J. Symons, Counsel for Defendants, to Marlene H. Dortch, Secretary, FCC, File No. CSR-8185-P et al. (June 29, 2011) ("*Defendants' June 29th Letter*"); Letter from William H. Johnson, Assistant General Counsel, Verizon, to Marlene H. Dortch, Secretary, FCC, File No. CSR-8185-P et al. (June 29, 2011) ("*Verizon June 29th Letter*").

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(i) The D.C. Circuit's Ruling in *Cablevision II* Affirms the Commission's Authority to Address Whether Withholding Is an "Unfair Act" on a Case-by-Case Basis

19. In the *2010 Order*, the Commission defined three acts involving terrestrially delivered, cable-affiliated programming as categorically "unfair" under Section 628(b): exclusive contracts, discrimination, and undue or improper influence.[93] The Commission defined these three acts as categorically "unfair" because Congress had made a conclusive legislative judgment in Section 628(c)(2) that these same acts are categorically "unfair" with respect to satellite-delivered, cable-affiliated programming.[94] Moreover, the Commission found that these acts involving terrestrially delivered, cable-affiliated programming – like comparable acts involving satellite-delivered, cable-affiliated programming – have the potential to impede entry into the video distribution market and to hinder existing competition in the market.[95] The D.C. Circuit disagreed, holding that the Commission cannot assume that congressional judgments regarding satellite programming necessarily apply to terrestrial programming.[96] Moreover, the D.C. Circuit explained that the Commission in deciding to label certain conduct as "unfair" simply because it might negatively affect competition failed to consider whether that conduct is "unfair" despite it being procompetitive in some cases.[97] The D.C. Circuit stated:

> [W]e take no position on the ultimate issue of exactly how the Commission should define the inherently ambiguous statutory term "unfair." *See Chevron,* 467 U.S. at 842–43. But if the Commission believes that conduct involving the withholding of terrestrial programming should be treated as categorically unfair, *as opposed to assessing fairness on a case-by-case basi*s or perhaps adopting a public interest exception mirroring the one for satellite programming, *see* 47 U.S.C. § 628(c)(2)(D), (c)(4), then it must grapple with whether its definition of unfairness would apply to conduct that appears procompetitive and, if so, whether that result would comport with section 628.[98]

The D.C. Circuit proceeded to "vacate that portion of the Commission's order treating certain acts of terrestrially delivered programming withholding as categorically unfair and remand to the Commission for further proceedings consistent with this opinion."[99]

20. We find the court's language to be clear that the Commission may address on a case-by-case basis whether conduct involving terrestrially delivered, cable-affiliated programming is "unfair."[100]

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[93] *See* 47 C.F.R. § 76.1001(b).

[94] *See 2010 Order*, 25 FCC Rcd at 778-79, ¶ 48; *see also* 47 U.S.C. § 548(c)(2).

[95] *See 2010 Order*, 25 FCC Rcd at 778-79, ¶ 48.

[96] *See Cablevision II*, 2011 WL 2277217, at *21 (stating that the Commission "failed to justify its assumption that just because Congress treated certain acts involving satellite programming as unfair, the same acts are necessarily unfair in the context of terrestrial programming").

[97] *See id*. at *23.

[98] *See id*. at *24 (emphasis added).

[99] *See id*.

[100] Defendants speculate that the D.C. Circuit expected that the Commission would first conduct a rulemaking on remand and then would conduct any case-by-case assessments after the remand proceeding is completed. *See Defendants' June 22nd Letter* at 5; *Defendants' June 29th Letter* at 5-6. We reject this view because there is no discussion in the court's opinion as to when a remand proceeding must be conducted and whether it must precede any case-by-case assessments. *See Verizon June 24th Letter* at 2-3.

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While Defendants do not dispute this point,[101] they argue that the Commission must first conduct a notice-and-comment rulemaking before it can adopt a case-by-case approach.[102] According to Defendants, when a court vacates an agency's order or rule, the effect is to return to the rule that existed before the vacated rule took effect.[103] Defendants argue that, prior to the *2010 Order*, the Commission had reached a definitive interpretation of its rules that withholding of terrestrially delivered programming can never be "unfair."[104] Citing D.C. Circuit precedent, Defendants argue that the Commission can change this substantive interpretation of its rule only after a notice-and-comment rulemaking.[105] We disagree. An agency may, through adjudication, interpret an ambiguous term in its governing statute or its regulations.[106] While Defendants rely on D.C. Circuit precedent to claim that the Commission must conduct a notice-and-comment rulemaking before the Commission can change its substantive interpretation of the term "unfair," the pre-*2010 Order* decisions they cite do not purport to interpret the term "unfair" in any Commission "rule." Rather, those decisions address the term "unfair" in Section 628(b) of the Act.[107] As the D.C. Circuit has explained, an agency does not have to engage in notice-and-

[101] *See Defendants' June 22nd Letter* at 5 ("the court did not rule out the assessment of 'unfairness' on 'a case-by-case basis'").

[102] *See id*. at 2-5; *Defendants' June 29th Letter* at 2-9.

[103] *See Defendants' June 22nd Letter* at 2; *Defendants' June 29th Letter* at 2.

[104] *See Defendants' June 22nd Letter* at 2; *Defendants' June 29th Letter* at 3. Defendants cite the following Commission-level cases in support of their position. *See DirecTV, Inc. v. Comcast Corp*., 13 FCC Rcd 21822, 21838, ¶ 32 (CSB 1998) ("We are not persuaded that the facts alleged are sufficient to constitute a Section 628(b) violation. . . . [W]e decline to find that, standing alone, Comcast's decision to deliver Comcast SportsNet terrestrially and to deny that programming to DirecTV is 'unfair.'"), *aff'd*, 15 FCC Rcd 22802, 22808 ¶ 14 (2000) (noting that the Bureau declined to find that "standing alone, [Comcast's] decision to deliver Comcast SportsNet terrestrially and to deny that programming to [Complainants] is 'unfair'" and stating that "[c]omplainants have submitted nothing to cause us to question the Bureau's reasoning on this issue"); *RCN Telecom Services of New York, Inc. v. Cablevision Systems, Inc. et al*., 14 FCC Rcd 17093, 17105-06, ¶ 25 (CSB 1999) ("We are not persuaded that the facts alleged are sufficient to establish a Section 628(b) violation. . . . [W]e decline to find that, standing alone, Defendants' decision to deliver the overflow programming terrestrially via MetroChannels and to deny that programming to Complainants is 'unfair' under Section 628(b)."), *aff'd*, 16 FCC Rcd 12048, 12053, ¶ 15 (2001) (stating that "no basis exists to warrant reversal" of the Bureau's decision).

[105] *See Defendants' June 22nd Letter* at 2-3; *Defendants' June 29th Letter* at 2-3 (citing *Paralyzed Veterans v. D.C. Arena L.P*., 117 F.3d 579, 586 (D.C. Cir. 1997); *Alaska Professional Hunters Ass'n, Inc. v. FAA*, 177 F.3d 1030, 1033-34 (D.C. Cir. 1999)).

[106] *See BP West Coast Products, LLC v. FERC*, 374 F.3d 1263, 1272 (D.C. Cir. 2004) ("When Congress authorizes an agency to adjudicate complaints arising under a statute, the agency's interpretations of that statute announced in the adjudications are generally entitled to *Chevron* deference."); *St. Luke's Hosp. v. Sebelius*, 611 F.3d 900, 907 (D.C. Cir. 2010) ("Within the context of an agency adjudication, the Secretary generally may lawfully interpret a regulation notwithstanding its retroactive effect.").

[107] *See DIRECTV*, 15 FCC Rcd at 22084, ¶ 4 and 22807, ¶ 13; *RCN*, 16 FCC Rcd at 12049-50, ¶ 4 and 12053, ¶ 15. At the time of these pre-*2010 Order* decisions, the Commission's rule (47 C.F.R. § 76.1001) mirrored the prohibition against "unfair acts" in Section 628(b) and did not give any additional content to the statutory term "unfair." *See Gonzales v. Oregon*, 546 U.S. 243, 257 (2006) (stating that "the existence of a parroting regulation does not change the fact that the question here is not the meaning of the regulation but the meaning of the statute" and holding that heightened deference not due to Attorney General's interpretation of its regulation that merely paraphrases statutory text).

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comment rulemaking to alter its interpretation of a statutory term.[108] Accordingly, any alleged change in the interpretation of the meaning of "unfair" is not an amendment to a "rule" requiring notice-and-comment rulemaking. In any event, prior to the *2010 Order*, the Commission never adopted a definitive interpretation of its rules holding that conduct involving terrestrially delivered, cable-affiliated programming, including withholding, is always "fair" or never "unfair." In fact, the Commission held that "unfair acts" involving terrestrially delivered, cable-affiliated programming can be cognizable under Section 628(b).[109] The pre-*2010 Order* cases cited by Defendants merely establish that withholding of terrestrially delivered, cable-affiliated programming is not unfair "standing alone" or on a *per se* basis. The D.C. Circuit has agreed with this interpretation of the Commission's previous decisions.[110] The Commission never stated or implied that it could not rule in an individual case that withholding of terrestrially delivered, cable-affiliated programming is "unfair" based on the facts presented. Thus, the *status quo ante* with respect to "unfair acts" involving terrestrially delivered, cable-affiliated programming does not preclude assessing such conduct on a case-by-case basis.[111]

21. Defendants also argue that a rulemaking is envisioned by Section 628(c)(1) and, in any event, is the appropriate vehicle to define whether conduct is "unfair" because this issue will impact more than the parties to this complaint.[112] We disagree. First, an agency is free to interpret statutes either through rulemaking or adjudication.[113] Second, Section 628(d) specifically authorizes case-by-case adjudication as one option at the Commission's disposal for enforcing Section 628(b).[114] Third, as discussed below, our determination as to whether Defendants have engaged in an "unfair act" is based on

[108] *See Alaska Professional Hunters*, 177 F.3d at 1034 ("an agency has less leeway in its choice of the method of changing its interpretation of its regulations than in altering its construction of a statute"); *Paralyzed Veterans*, 117 F.3d at 586 ("The government is certainly correct in suggesting that the doctrine of deference to an agency's interpretation of its own regulation and *Chevron* deference are analogous. But Congress . . . has said more, specifically on the subject of regulations. Under the APA, agencies are obliged to engage in notice and comment before formulating regulations, which applies as well to 'repeals' or 'amendments.'").

[109] *See 2010 Order*, 25 FCC Rcd at 759-60, ¶ 22 ("The Commission itself has specifically held that unfair acts involving terrestrially delivered, cable-affiliated programming can be cognizable under Section 628(b)."). While the cases cited by the Commission pertained to moving programming from satellite to terrestrial delivery, the Commission never stated or implied that this is the only conduct that might be "unfair" under Section 628(b).

[110] *See Cablevision II*, 2011 WL 2277217, at *12 (noting that the "Commission pointed out that it had recognized that complaints concerning terrestrial withholding might, under some circumstances, be cognizable under" Section 628(b) and stating further that the pre-*2010 Order* cases "addressed only the permissibility of an across-the-board ban on terrestrial withholding").

[111] We note that in the cases cited by Defendants, the Commission did not find any anticompetitive effect resulting from the conduct at issue, thus there was no basis to deem the conduct at issue in those cases "unfair." *See DIRECTV*, 15 FCC Rcd at 22807, ¶ 13 (finding no basis to conclude that the conduct at issue precluded MVPDs from providing satellite cable programming); *RCN*, 16 FCC Rcd at 12053, ¶ 15 (same). Conversely, as discussed below, we find anticompetitive effects from the withholding at issue in this case. *See infra* Section III.A.2.c. We proceed to weigh these anticompetitive effects against the procompetitive benefits of Defendants' withholding and conclude that, on balance, the conduct at issue here is "unfair." *See infra* ¶¶ 24-41.

[112] *See Defendants' June 22nd Letter* at 3-4; *Defendants' June 29th Letter* at 2, 5-7.

[113] *See SEC v. Chenery Corp.*, 332 U.S. 194, 202-03 (1947).

[114] *See* 47 U.S.C. § 548(d).

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applying well-known precedent and guidelines established by Congress and the Commission to the specific facts of this case.[115]

22. Defendants also contend that it would be unfair to the Parties if the Commission were to proceed to address whether Defendants have engaged in an "unfair act" without first allowing supplemental record development on the issue, including discovery and briefing.[116] We find this argument unavailing. Verizon's complaint was filed, and the pleading cycle closed, several months before the Commission had established certain acts involving terrestrially delivered, cable-affiliated programming as categorically "unfair" in the *2010 Order*. As discussed below, Verizon put forth evidence in its complaint as to whether Defendants' withholding amounted to an "unfair act," and Defendants filed a response to those claims.[117] Moreover, as discussed in further detail below, we apply well-known precedent and guidelines to assess whether Defendants' withholding here is an "unfair act," including a test put forth by Defendants.[118] All Parties have had ample opportunity, over the course of more than two years, to address whether the conduct here is "unfair" under this precedent and guidelines.

(ii) The Bureau Has Delegated Authority to Consider Whether Withholding Is an "Unfair Act"

23. Despite Defendants' claims to the contrary, the issue of whether Defendants' withholding of MSG HD and MSG+ HD from Verizon is an "unfair act" is not a new or novel issue that would require a Commission, rather than Bureau, decision.[119] The following precedent and guidelines established by Congress and the Commission require the Bureau to weigh the anticompetitive harms of an act against the procompetitive benefits to determine whether or not, on balance, the act is "unfair." First, Congress has

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[115] *See infra* ¶¶ 24-41.

[116] *See Defendants' June 22nd Letter* at 6; *Defendants' June 29th Letter* at 6-8.

[117] *See infra* ¶¶ 25-26. As discussed above, Verizon filed a request for discovery in August 2009, to which Defendants objected in September 2009, several months before the Commission had established certain acts involving terrestrially delivered, cable-affiliated programming as categorically "unfair" in the *2010 Order*. *See supra* n.48. Despite the need at the time to resolve the issue of whether Defendants' conduct was "unfair," Defendants took the position that discovery was "neither necessary nor proper"; that the Commission had "before it all of the relevant evidence that it needs to decide this matter"; and that, even if the Commission rejected Defendants' legal arguments, "the only potentially material fact would be the extent to which the lack of access to MSG HD and MSG+ HD has caused competitive harm by 'hinder[ing] significantly' or 'preventing' Verizon from providing satellite cable programming." *Defendants' Sept. 14th Discovery Objection* at 2-3, 10-11. Moreover, even after release of the *2010 Order* but before the D.C. Circuit's decision in *Cablevision II*, Defendants argued that Verizon had not alleged one of the three acts deemed categorically "unfair" in the *2010 Order* and that Verizon was thus required to establish that Defendants had engaged in an "unfair act." *See Defendants' Post-Discovery Answer to Supplement* at 90 ("[Verizon's] Supplemental Complaint fails to allege and/or establish that it has been subject to an unfair practice cognizable under the new rules adopted by the Commission in the [*2010 Order*]. The [*2010 Order*] makes clear that, in addition to having the burden of proving competitive harm . . ., a program access complainant also has the burden of proving that the Defendant has engaged in an 'unfair practice' proscribed by the Commission. While Defendants have acknowledged throughout this proceeding that Verizon has been declined a license for MSG HD and MSG+ HD in furtherance of a product differentiation strategy, that circumstance does not, in and of itself, constitute an unfair practice or relieve Verizon of its burden of proof regarding that element of its claim under the new rules."). Thus, even after the release of the *2010 Order* but before the D.C. Circuit's decision in *Cablevision II*, Defendants' position was that Verizon had the burden to establish an "unfair act." Defendants had every opportunity to pursue this issue during discovery and in their post-discovery briefs.

[118] *See infra* ¶¶ 24-41.

[119] *See Defendants' June 22nd Letter* at 4; *Defendants' June 29th Letter* at 9; *see also* 47 C.F.R. § 0.283(c).

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set forth five factors in Section 628(c)(4) of the Act to assess when considering whether an exclusive programming arrangement serves the "public interest."[120] In applying these factors, the Commission is required to weigh the harms that an exclusive arrangement may cause in the video distribution market against the benefits that may result in the video programming market.[121] While Congress established these factors for exclusive contracts involving satellite-delivered, cable-affiliated programming, we find, consistent with Commission precedent, that they are also useful in assessing the potentially anticompetitive and procompetitive aspects of withholding of terrestrially delivered, cable-affiliated programming.[122] Second, in the *MDU Order*,[123] the Commission weighed the anticompetitive harms of exclusive contracts between cable operators and owners of multiple dwelling units ("MDU") against the procompetitive benefits of these contracts before concluding that these contracts are categorically "unfair."[124] Unlike the Section 628(c)(4) factors, which require the Commission to analyze the effects of an exclusive arrangement in the video distribution and video programming markets, the *MDU Order*

[120] *See* 47 U.S.C. § 548(c)(4). This provision provides that, in determining whether an exclusive contract for satellite-delivered, cable-affiliated programming in an area served by a cable operator is in the public interest, the Commission shall consider "each of the following factors with respect to the effect of such contract on the distribution of video programming in areas that are served by a cable operator: (A) the effect of such exclusive contract on the development of competition in local and national multichannel video programming distribution markets; (B) the effect of such exclusive contract on competition from multichannel video programming distribution technologies other than cable; (C) the effect of such exclusive contract on the attraction of capital investment in the production and distribution of new satellite cable programming; (D) the effect of such exclusive contract on diversity of programming in the multichannel video programming distribution market; and (E) the duration of the exclusive contract." 47 U.S.C. § 548(c)(4); *see also* 47 C.F.R. § 76.1002(c)(4).

[121] *See Time Warner Cable*, Memorandum Opinion and Order, 9 FCC Rcd 3221, 3225, ¶ 25 (1994) ("*Court TV Exclusivity Petition*").

[122] *See Cablevision II*, 2011 WL 2277217, at *22, *24 (explaining that, with the factors in Section 628(c)(4), Congress "sought to balance the need for regulatory intervention in markets possessing significant barriers to competition with its recognition that vertical integration and exclusive dealing arrangements are not always pernicious and, depending on market conditions, may actually be procompetitive"); *see also id.* at *22 (noting that the framework Congress adopted for exclusive arrangements involving satellite-delivered, cable-affiliated programming "accords with the generally accepted view in antitrust and other areas that exclusive contracts may have both procompetitive and anticompetitive purposes and effects") (citations omitted). For example, the Commission previously found that exclusive arrangements play an important role in the growth and viability of local cable news networks. *See New England Cable News Channel,* Memorandum Opinion and Order, 9 FCC Rcd 3231, 3236, ¶¶ 37-39 and 3237, ¶ 43 (1994) ("*NECN Exclusivity Petition*"); *see also* S. Rep. No. 102-92 (1991), at 28, *reprinted in* 1992 U.S.C.C.A.N. 1133, 1161 ("The Committee believes that exclusivity can be a legitimate business strategy where there is effective competition."); *Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992: Development of Competition and Diversity in Video Programming Distribution and Carriage*, First Report and Order, 8 FCC Rcd 3359, 3385, ¶ 65 (1993) ("*1993 Order*") ("Particularly with respect to new programming, we recognize that there may well be circumstances in which exclusivity could be shown to meet the public interest test, especially when the launch of local origination programming is involved that may rely heavily on exclusivity to generate financial support due to its more limited appeal to a specific regional market."); *see id*. at 3385, ¶ 65 n.83 ("[I]t is possible that local or regional news channels could be economically infeasible absent an exclusivity agreement.").

[123] *See Exclusive Service Contracts for Provision of Video Services in Multiple Dwelling Units and Other Real Estate Developments,* Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd 20235 (2007) ("*MDU Order*"), *aff'd sub nom*. *Nat'l Cable & Telecomm. Ass'n v. FCC*, 567 F.3d 659 (D.C. Cir. 2009).

[124] *See id*. at 20243, ¶ 16 and 20248-49, ¶ 26 ("We further find that although exclusivity clauses may in certain cases be beneficial, at least in the short term, to consumers, the harms of exclusivity clauses outweigh their benefits.").

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requires a more general inquiry into the potential anticompetitive harms and procompetitive benefits of an allegedly "unfair act."[125] Third, the Commission's program access rules applicable to satellite-delivered, cable-affiliated programming provide that withholding is permissible provided there is a "legitimate business justification" for the conduct.[126] If a defendant can demonstrate a "legitimate business justification" for withholding content from a competitor (for example, due to a concern with the distributor's history of defaulting on other programming contracts), then it is unlikely that the conduct can be considered "unfair" under Section 628(b).

(iii) Based on Established Precedent and Guidelines, Defendants' Withholding Is an "Unfair Act"

24. Applying the precedent and guidelines set forth above, as well as an additional test advocated by Defendants, we find that Defendants' withholding of MSG HD and MSG+ HD from Verizon is an "unfair act." As an initial matter, we note that Verizon as the complainant has the burden to establish that Defendants' conduct is an "unfair act." Below, we begin by examining Defendants' procompetitive justifications for their withholding of MSG HD and MSG+ HD from Verizon and then apply the precedent and guidelines set forth above.

(a) Defendants' Procompetitive Justifications for Withholding

25. Verizon has provided evidence that Defendants' decision to withhold MSG HD and MSG+ HD from Verizon was intended to provide Cablevision with a competitive advantage over Verizon in the video distribution market. Verizon provides various statements from Cablevision executives referring to the significance of MSG HD and MSG+ HD as a competitive differentiator. For example, Cablevision's Chief Operating Officer ("COO") stated that the refusal to sell MSG HD and MSG+ HD to Verizon was one factor that would not only impede Verizon from obtaining new subscribers, but would also cause Verizon to lose subscribers it had already gained.[127] In response to questions regarding how

[125] In the *MDU Order*, the Commission acknowledged the procompetitive aspects of granting cable operators exclusive access to MDUs, such as helping to obtain financing to wire an entire building, attracting investment in marginally attractive MDUs, and attracting an MVPD into a new real estate development. *See id*. at 20247-48, ¶¶ 24-25. The anticompetitive harms included denying residents a choice in MVPD service, barring new entry and competition for both video services and bundled services, and discouraging the deployment of broadband facilities. *See id*. at 20244-47, ¶¶ 17-23.

[126] Withholding of satellite-delivered, cable-affiliated programming, also known as a "refusal to sell," is a form of non-price discrimination under the program access rules. *See 1993 Order*, 8 FCC Rcd at 3364, ¶ 14 and 3412-13, ¶ 116. Such conduct is permissible if there is a legitimate business reason for the conduct. *See id*. at 3412-13, ¶ 116 ("We believe that the Commission should distinguish 'unreasonable' refusals to sell from certain legitimate reasons that could prevent a contract between a vendor and a particular distributor, including (i) the possibility of parties reaching an impasse on particular terms, (ii) the distributor's history of defaulting on other programming contracts, or (iii) the vendor's preference not to sell a program package in a particular area for reasons unrelated to an existing exclusive arrangement or a specific distributor."); *Bell Atlantic Video Servs. Co. v. Rainbow Programming Holdings Inc. and Cablevision Sys. Corp.*, Memorandum Opinion and Order, 12 FCC Rcd 9892, 9899, ¶ 18 (CSB 1997) ("We find that BVS has met its burden of establishing the elements of a non-price discrimination claim [and] that Defendants have not met their burden of establishing that Rainbow has legitimate business reasons for refusing to sell its programming to BVS . . . .").

[127] *See Verizon Complaint* at ¶ 30 (quoting Cablevision's COO as stating that one of the "factors he believed would slow or reverse any subscriber flow to FiOS" was that "FiOS' video product lacks key components, specifically the HD formats of MSG and Fox Sports NY [now MSG Plus] . . . .") (citing Craig Moffett et al., Bernstein Research, *Cablevision (CVC): Management Commentary Supports Bullish View . . . Capital Intensity Falls, and Margins*
(continued….)

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Cablevision is competing with FiOS, Cablevision's COO emphasized that Cablevision's ability to provide MSG HD and MSG+ HD provided a competitive advantage over Verizon.[128] An internal Cablevision memo specifically listed Verizon's lack of MSG HD and MSG+ HD as one of the factors that distinguishes Cablevision from Verizon.[129] In addition, Verizon provides evidence that Cablevision has emphasized in advertisements in various media both its ability to offer MSG HD and MSG+ HD and Verizon's inability to offer these same networks, thus demonstrating the importance of these networks.[130] For example, Verizon provides numerous examples of Cablevision[131] advertisements stating that (i) "iO TV gives you every game of all 9 NY sports teams in spectacular High Definition.";[132] (ii) "No one has more NY sports in HD than iO TV.";[133] (iii) "Get over 100 HD channels on iO TV. Including all these FiOS doesn't have." (listing MSG HD and MSG+ HD);[134] (iv) "FiOS doesn't have . . . every HD game of all nine New York sports teams.";[135] and (v) **[REDACTED**].[136]

26. Defendants do not dispute that their withholding of MSG HD and MSG+ HD from Verizon is intended to provide Cablevision with a way to differentiate its service from Verizon and

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Rise, at 4 (April 5, 2007)); *see also Verizon Post-Discovery Opening Brief* at 7. Defendants do not deny that Cablevision's COO made this statement.

[128] *See Verizon Complaint* at ¶¶ 3, 30 (quoting Cablevision's COO in response to a question regarding how Cablevision is competing with Verizon FiOS TV as stating that "four of the nine professional sports teams in New York. If you want to see them in HD, you have to get them from us.") (citing Statement of Tom Rutledge, COO, Cablevision Systems Corp., Thomson StreetEvents, *Cablevision Systems Corp. at UBS Global Media and Communications Conference*, at 9 (Dec. 8, 2008)); *see also Verizon Post-Discovery Opening Brief* at 6-7. Defendants do not deny that Cablevision's COO made this statement.

[129] *See Verizon Complaint*, Exhibit 5 (Memo from John Bickham, President – Cable and Communications, Cablevision, to All Cable & Communications Employees (May 22, 2008) (attaching *The Top 10 Facts Every Cablevision Employee Should Know About Verizon and FiOS*)); *Verizon Post-Discovery Opening Brief* at 12 and Appendix C (DEF000043) (**[REDACTED**]).

[130] *See Verizon Complaint* at ¶ 30 and Exhibit 4; *Verizon Reply* at 21; *Verizon Post-Discovery Opening Brief* at 8-9 and Appendices A and C; *Verizon Post-Discovery Reply Brief* at 9-10; Bazelon Decl. at ¶ 11; *see also Verizon Post-Discovery Opening Brief* at 12 and Appendix C (DEF000011, DEF00018) (**[REDACTED**]).

[131] Cablevision markets its video service under the "iO TV" name.

[132] *See, e.g., Verizon Complaint* at Exhibit 4; *Verizon Post-Discovery Opening Brief,* Appendix A (VZ-MSG-0000006); *see also Verizon Complaint* at ¶ 30 (noting that Cablevision's website (visited in February 2009) emphasizes that Cablevision has "all the HD games of all 9 New York sports teams").

[133] *See, e.g., Verizon Complaint* at Exhibit 4; *Verizon Post-Discovery Opening Brief,* Appendix A (VZ-MSG-0000001); *see also Verizon Complaint* at ¶ 30 (noting that Cablevision's website (visited in February 2009) emphasizes that Cablevision has the "most hi-def NY sports channels").

[134] *See Verizon Post-Discovery Opening Brief,* Appendix A (VZ-MSG-0000021).

[135] *See id.* (VZ-MSG-0000081).

[136] *See id.* at Appendix C (DEF000022).

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thereby gain a competitive advantage.[137] Defendants contend, however, that product differentiation strategies are legitimate business decisions that are typically regarded as procompetitive.[138] Defendants claim two distinct consumer welfare benefits resulting from their withholding strategy: (i) more vigorous competition in the video distribution market;[139] and (ii) increased incentives of both Defendants and Verizon to invest in their own programming.[140]

(b) Section 628(c)(4) Factors

27. In this section, we apply the five factors set forth in Section 628(c)(4) to Defendants' withholding of MSG HD and MSG+ HD from Verizon.[141] We conclude that the anticompetitive harms of Defendants' withholding in the video distribution market outweigh any procompetitive benefits in the video programming market.

(i) Development of Competition in Local and National MVPD Markets

28. We find that the first factor under Section 628(c)(4) – the effect of the exclusive arrangement on "the development of competition in local and national [MVPD] markets" – weighs against Defendants' withholding of MSG HD and MSG+ HD from Verizon.[142] In previous cases applying Section 628(c)(4), the Commission has found that an exclusive arrangement harms competition when the network withheld is "popular" and "established" and when other MVPDs have expressed an interest in carrying the network.[143] The record evidence here reflects that MSG HD and MSG+ HD are

[137] *See supra* n.87.

[138] *See Defendants' Answer* at 36 (stating that their decision to withhold MSG HD and MSG+ HD from Verizon "promotes consumer welfare by enhancing output and intensifying competition among both content creators and content distributors"); *Bulow/Owen Study* at 3 (stating that "the discretion to choose one's distribution channels, up to and including the decision to use a single channel exclusively, usually is pro-competitive because it permits sellers to differentiate their products to make them more attractive to consumers"); *see also Defendants' Answer* at 7-8, 20 (¶ 14), 34-38, 45 n.140, 56; *Bulow/Owen Study* at 1-9; *Defendants' Feb. 25th Letter* at 7, 9; *Defendants' Post-Discovery Answer to Supplement* at 6-7, 79-83, 99; *Defendants' Post-Discovery Reply Brief* at 5, 39.

[139] *See Bulow/Owen Study* at 1; *see also id*. at 5 ("exclusivity . . . permits MVPDs to compete more vigorously by differentiating their products" and that "markets with differentiated products are more likely to exhibit vigorous price competition than markets with homogeneous products"), at 10 ("Product differentiation is competition in 'product space,' and it is no less important to promoting consumer welfare than price competition."); *see also Defendants' Answer* at 34-38; *Defendants' Post-Discovery Answer to Supplement* at 82-83; *Defendants' Post-Discovery Reply Brief* at 5.

[140] *See Bulow/Owen Study* at 1; *see also id*. at 5 (stating that exclusivity can "increase both the quantity and quality of video programming (and thus, presumably, the diversity of program content) by increasing incentives to invest in programming"), 7-9, 11-12; *Defendants' Post-Discovery Answer to Supplement* at 79 n.287 ("[I]f a cable operator is unable . . . to utilize programming it develops as a product differentiator, the incentive to invest in and develop new programming diminishes, and program diversity will suffer."); *see also Defendants' Answer* at 34-38; *Defendants' Post-Discovery Answer to Supplement* at 79-82; *Defendants' Post-Discovery Reply Brief* at 39.

[141] *See* 47 U.S.C. § 548(c)(4); 47 C.F.R. § 76.1002(c)(4).

[142] *See* 47 U.S.C. § 548(c)(4)(A); 47 C.F.R. § 76.1002(c)(4)(i).

[143] *See Court TV Exclusivity Petition*, 9 FCC Rcd at 3227, ¶ 37 (finding that Time Warner Cable's exclusive arrangement with the "popular" Court TV network would limit the development of competition in the video distribution market in New York City); *NECN Exclusivity Petition*, 9 FCC Rcd at 3235, ¶¶ 30-31 (finding that New England Cable News ("NECN") channel's exclusive arrangement with cable operators would not have an effect on competition in local or national video distribution markets that could not be offset by public interest benefits (continued….)

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popular and established networks that virtually every MVPD in the New York and Buffalo DMAs is either already carrying or has requested to carry.[144] Moreover, the Commission has found that competition may be harmed when an exclusive arrangement denies only one competitor in the market from access to the network.[145] As discussed below, we conclude that the withholding at issue here "significantly hinders" at least one competitor (Verizon) from competing in the New York and Buffalo DMAs which in turn harms consumers by limiting video competition in those markets.[146] The impact on competition is particularly acute here in light of the Commission's recognition that wireline entrants such as Verizon pose a greater competitive threat than DBS to cable operators and data indicating that DBS operators do not constrain the price of cable service to the extent that wireline MVPDs do.[147] Accordingly, we find that this factor weighs against Defendants' withholding.

29. To be sure, Defendants argue that their withholding of MSG HD and MSG+ HD from Verizon will promote, rather than harm, competition by allowing Cablevision to differentiate its service from Verizon and by encouraging Verizon to develop a competitive response, which might include investing in its own programming.[148] We do not dispute that product differentiation strategies may be

(Continued from previous page)
considering that no MVPD had requested carriage of NECN); *see also NewsChannel*, Memorandum Opinion and Order, 10 FCC Rcd 691, 694, ¶ 21 (CSB 1994) (finding that NewsChannel's exclusive arrangement with cable operators would not have an effect on competition in the video distribution market considering that no competitor had expressed an interest in carry the channel and that NewsChannel was a new service with unknown demand that "cannot be considered popular programming") ("*NewsChannel Exclusivity Petition*"); *Cablevision Indus. Corp.*, Memorandum Opinion and Order, 10 FCC Rcd 9786, 9789, ¶ 19 (CSB 1995) (finding that the Sci-Fi Channel's exclusive arrangement with cable operators would limit the development of competition in local video distribution markets considering that the Sci-Fi Channel was a "popular" and "established" service with 16.3 million subscribers nationwide) ("*Sci-Fi Exclusivity Petition*"); *Outdoor Life Network and Speedvision Network*, Memorandum Opinion and Order, 13 FCC Rcd 12226, 12233-35, ¶¶ 14-17 (CSB 1998) (finding that the exclusive arrangements proposed by Outdoor Life Network and Speedvision Network would limit the development of competition in local and national video distribution markets considering that each network had 13.5-14.5 million subscribers nationwide and that MVPDs had expressed an interest in carrying the networks) ("*Outdoor Life/Speedvision Exclusivity Petition*").

[144] *See supra* ¶ 7 (noting other MVPDs that carry MSG HD and MSG+ HD); *infra* ¶¶ 47-48, 62 (noting popularity of RSNs, including HD RSNs such as MSG HD and MSG+ HD).

[145] *See Court TV Exclusivity Petition*, 9 FCC Rcd at 3227, ¶ 37 and 3228, ¶ 39 (finding that Time Warner Cable's exclusive arrangement with Court TV would harm competition in the New York City video distribution market, despite the fact that DBS providers could carry the network, because one SMATV operator would be denied access).

[146] *See infra* Section III.A.2.c; *see also infra* nn.295, 304 (noting that Defendants' claim of robust competition is belied by the fact that incumbent cable market share in the New York DMA far exceeds the national average and that Cablevision has raised its rates in excess of inflation despite the number of competitors in the market).

[147] *See 2010 Order*, 25 FCC Rcd at 765, ¶ 29; *Implementation of Section 3 of the Cable Television Consumer Protection and Competition Act of 1992, Statistical Report on Average Rates for Basic Service, Cable Programming Service, and Equipment*, MM Docket No. 92-266, Report on Cable Industry Prices, 24 FCC Rcd 259, 261, ¶ 3 (MB 2009); *see also Implementation of Section 3 of the Cable Television Consumer Protection and Competition Act of 1992, Statistical Report on Average Rates for Basic Service, Cable Programming Service, and Equipment*, MM Docket No. 92-266, Report on Cable Industry Prices, 26 FCC Rcd 1769, 1785, ¶ 34 (MB 2011). Indeed, Defendants concede that they license MSG HD and MSG+ HD to DBS operators because, unlike Verizon, DBS operators do not offer voice or broadband service. *See Defendants' Answer* at 60-61; *Bulow/Owen Study* at 12; *Defendants' Post-Discovery Answer to Supplement* at 82; *Defendants' Post-Discovery Reply Brief* at 40; *see also Verizon Reply* at 19.

[148] *See Bulow/Owen Study* at 1-9; *see also supra* ¶ 26.

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procompetitive in many instances,[149] but the key distinction here is that the product differentiation strategy involves non-replicable and popular RSN programming.[150] As the Commission has explained, "when programming is non-replicable and valuable to consumers, such as regional sports programming, no amount of investment can duplicate the unique attributes of such programming, and denial of access to such programming can significantly hinder an MVPD from competing in the marketplace."[151] In other words, given the non-replicable nature of the content on MSG HD and MSG+ HD, Verizon has no ability to formulate a viable competitive response that would allow Verizon to compete for the many subscribers that highly value these networks.[152] Indeed, even if MSG LP's exclusive rights to the sports programming shown on MSG HD and MSG+ HD were to expire at some point in the future, two of the teams shown on MSG are owned by Cablevision, thus eliminating any potential chance Verizon might have in the future to acquire the rights to these games.[153]

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[149] *See 2007 Order*, 22 FCC Rcd at 17835, ¶ 63 ("We recognize the benefits of exclusive contracts and vertical integration . . ., such as encouraging innovation and investment in programming and allowing for 'product differentiation' among distributors.").

[150] The games on MSG HD and MSG+ HD are not "replicated" on the SD versions of the networks that Verizon carries. As the Commission has found previously, consumers do not consider the SD version of a particular channel to be an adequate substitute for the HD version due to the different technical characteristics and sometimes different content. *See 2010 Order*, 25 FCC Rcd at 784-85, ¶¶ 54-55.

[151] *Id*. at 750-51, ¶ 9; *see also id*. ("If particular programming is replicable, our policies should encourage MVPDs or others to create competing programming, rather than relying on the efforts of others, thereby encouraging investment and innovation in programming and adding to the diversity of programming in the marketplace.").

[152] Defendants note that Verizon has developed its own local news channel (FiOS 1) to differentiate its video product. *See Defendants' Answer* at 19-20 (¶ 13), 38; *Defendants' Feb. 25th Letter*, Attachment at 8. As the Commission has recognized previously, however, local and regional news channels are "readily replicable" programming. *2010 Order*, 25 FCC Rcd at 750-51, ¶ 9; *Verizon Post-Discovery Reply Brief* at 30 (**[REDACTED**

]); *see also Verizon Reply* at 6 ("The fact that regional sports programming cannot be replicated means that competitors have nowhere to turn and no ability to themselves create a suitable alternative for consumers. . . . [C]ompetitive providers simply lack the option of investing in or developing their own substitute, given the extraordinary barriers to entry in sports programming (e.g., leagues tightly limit team creation and many sports teams already have exclusive or nearly exclusive programming contracts with a video programming network.")) and at 23; *Verizon Post-Discovery Opening Brief* at 14; *Verizon Post-Discovery Reply Brief* at 12-13, 27, 31-32; Bazelon Decl. at ¶ 8.

[153] *See Verizon Complaint* at 8-9 (¶ 20) ("Defendants also own the underlying Knicks and Rangers franchises, thereby ensuring that they will continue to control the television rights for these teams for the foreseeable future."); *Verizon Reply* at 23 ("The fact of the matter is that Verizon cannot obtain this programming or create its own programming to compete with HD regional sports programming no matter how great its investment."); *Verizon Post-Discovery Opening Brief* at 14 ("Defendants own 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. Defendants also own the underlying Knicks and Rangers franchises, thereby ensuring that they will continue to control the television rights for these teams for the foreseeable future. Neither Verizon nor any other entity can establish new teams to independently develop similar programming; league rules would prevent a new franchise."); *id*. at 15 ("Defendants' 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."); *see also Verizon Reply* at 6; *Verizon Post-Discovery Reply Brief* at 12-13.

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(ii) The Effect of Withholding on Alternative Video Providers to Incumbent Cable Operators

30. We also find that the second factor – the effect of the exclusive arrangement on "competition from [MVPD] technologies other than cable" – weighs against Defendants' withholding of MSG HD and MSG+ HD from Verizon.[154] In previous decisions, the Bureau has interpreted the term "technologies other than cable" to mean alternative video providers that compete with incumbent cable operators.[155] Moreover, the Commission has found that this factor weighs against a proposed exclusive arrangement even if some competitors are allowed to carry the network, as is the case with Defendants' withholding strategy.[156] We conclude below that the withholding of the popular and established MSG HD and MSG+ HD networks at issue here "significantly hinders" at least one competitor (Verizon) from serving as an alternative to incumbent cable operators in the New York and Buffalo DMAs.[157] Accordingly, consistent with Commission precedent, we find that this factor weighs against Defendants' withholding.

(iii) Attraction of Investment in New Programming

31. We find no basis to conclude that the third factor – the effect of the exclusive arrangement on "the attraction of capital investment in the production and distribution of new . . . cable programming" – weighs in favor of Defendants' withholding of MSG HD and MSG+ HD from Verizon.[158] The Commission has noted that this factor recognizes that exclusive arrangements "are typically used by suppliers to create incentives for distributors to aggressively promote and sell a particular product" and "may be offered to engender distributor support for a fledgling service to help it gain a foothold in the market."[159] Moreover, the Commission has explained that when "a programmer requires the ability to offer an added incentive to attract investment, carriage and support of the service, such that without the incentive the programming service could not be launched or become viable, exclusivity may be in the public interest."[160] In previous cases, the Commission has found that this factor weighs in favor of an exclusive arrangement when the network is a fledgling service that needs to offer

[154] *See* 47 U.S.C. § 548(c)(4)(B); 47 C.F.R. § 76.1002(c)(4)(ii).

[155] *See Outdoor Life/Speedvision Exclusivity Petition*, 13 FCC Rcd at 12233-34, ¶¶ 14-15 (referring to telephone companies that "offer competition to incumbent cable operators"); *Sci-Fi Exclusivity Petition*, 10 FCC Rcd at 9789, ¶ 17 (stating that the first and second factors require the Commission to assess the development of competition to "incumbent cable operators").

[156] *See Court TV Exclusivity Petition*, 9 FCC Rcd at 3228, ¶ 39 (finding that this factor weighs against the proposed exclusive arrangement despite the fact that the network was available to DBS operators); *see also Sci-Fi Exclusivity Petition*, 10 FCC Rcd at 9790, ¶ 21 (finding that this factor weighs against the proposed exclusive arrangement despite the fact that the network was available to television receive-only and DBS operators); *Outdoor Life/Speedvision Exclusivity Petition*, 13 FCC Rcd at 12235-36, ¶ 19 (finding that this factor weighs against the proposed exclusive arrangement despite the fact that the network was available to DBS operators); *see also supra* ¶ 7 (noting other MVPDs that carry MSG HD and MSG+ HD).

[157] *See infra* Section III.A.2.c.

[158] *See* 47 U.S.C. § 548(c)(4)(C); 47 C.F.R. § 76.1002(c)(4)(iii).

[159] *NECN Exclusivity Petition*, 9 FCC Rcd at 3236, ¶ 33.

[160] *Id.* at 3236, ¶ 34; *see Court TV Exclusivity Petition*, 9 FCC Rcd at 3228, ¶ 39; *see also NewsChannel*, 10 FCC Rcd at 694-95, ¶ 23.

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exclusivity to distributors in order to obtain carriage and attract capital investments.[161] The Commission has found that this factor weighs against an exclusive arrangement when the network is established and does not currently need to offer exclusivity in order to obtain carriage and attract capital investments.[162]

32. MSG HD and MSG+ HD are established networks launched in the late 1990s with exclusive rights to televise the games of five major professional sports teams, which is some of the most valuable and popular programming available.[163] Defendants have not asserted, nor could they credibly claim, that MSG HD and MSG+ HD are fledgling services that MVPDs will carry and promote only if they can be guaranteed exclusivity with respect to Verizon. The importance of MSG HD and MSG+ HD to consumers means that MVPDs will carry these networks without any guarantee of exclusivity.[164] Indeed, in explaining why they do not offer Verizon access to MSG HD and MSG+ HD in markets not served by Cablevision, Defendants do not claim that the reason is because MVPDs in those markets have demanded exclusivity with respect to Verizon as a condition for carriage of MSG HD and MSG+ HD. Rather, Defendants claim that doing so would complicate Cablevision's product differentiation strategy.[165]

33. While Defendants put forth the theory that requiring MSG LP to share MSG HD and MSG+ HD with Verizon will reduce the economic incentives of Cablevision to invest in the networks,[166] they have put forth no evidence demonstrating that this theory motivated their withholding strategy. In addition, Defendants put forth no evidence demonstrating that this withholding strategy has resulted in increased investment in the networks or that it has improved the quantity and quality of programming on the networks. At most, Defendants claim that MSG LP "has entered into a mutually beneficial arrangement in which it receives value and consideration in exchange for allowing Cablevision to

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[161] *See NECN Exclusivity Petition*, 9 FCC Rcd at 3236, ¶¶ 33-39 (finding that a fledgling, start-up, regional news channel with a limited potential subscriber base may need the ability to offer exclusivity in order to attract investment, promotion, and carriage); *see also NewsChannel*, 10 FCC Rcd at 694-95, ¶¶ 23-26 (finding that a new regional and local news channel with a limited potential subscriber base that requires distributors to install equipment in each headend to receive the programming requires the ability to offer exclusivity in order to secure carriage commitments and to ensure its financial viability).

[162] *See Court TV Exclusivity Petition*, 9 FCC Rcd at 3228-29, ¶¶ 42-50 (finding that an established network with a growing subscriber base and nationwide appeal did not require the ability to offer exclusivity in order to gain acceptance or to attract capital investments for its production, promotion, distribution, or carriage); *see also Sci-Fi Exclusivity Petition*, 10 FCC Rcd at 9790, ¶¶ 23-26 (finding that exclusivity was not vital for the continued viability of a popular and established network); *Outdoor Life/Speedvision Exclusivity Petition*, 13 FCC Rcd at 12237-40, ¶¶ 22-25 (finding that networks did not face unique hurdles that required exclusivity).

[163] *See infra* ¶ 47 (noting ratings evidence indicating that RSNs are popular programming and that RSNs receive significantly higher license fees than other types of programming); *Defendants' Answer* at 10-11 (¶ 1), 15 (¶ 7) and Pontillo Decl. at ¶ 3 (stating that MSG HD was launched in the fall of 1998 and MSG+ HD was launched in the spring of 1999).

[164] *See Court TV Exclusivity Petition*, 9 FCC Rcd at 3228-29, ¶ 44 (noting that the popularity of a network "creates incentives for all cable operators to market and add the service, particularly if a competitor carries it").

[165] *See Defendants' Answer* at 61 n.197 (stating that licensing MSG HD and MSG+ HD to Verizon in areas not served by Cablevision would "undercut Defendants' attempt to use those services as a product differentiator by Cablevision . . . [by] dilut[ing] the efficacy of Defendants' marketing efforts, engender[ing] customer confusion, and likely lead[ing] Verizon to intensify pressure to obtain the services for its subscribers living in areas served by Cablevision"); *see also Defendants' Post-Discovery Answer to Supplement* at 82 n.297.

[166] *See Defendants' Answer* at 37-38; *Defendants' Post-Discovery Answer to Supplement* at 79 n.287, 81, 107; *Bulow/Owen Study* at 1, 4-5; *see also supra* ¶ 26.

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continue to effectuate its product differentiation strategy."[167] Defendants provide no evidence concerning the "value and consideration" that MSG LP has received from this arrangement. Nor have Defendants provided any evidence that the "value and consideration" that MSG LP receives from Cablevision exceeds the licensing fees and advertising revenues that MSG LP has foregone by withholding these networks from Verizon. There is no dispute that MSG HD and MSG+ HD are established networks with valuable and popular programming. Defendants have not alleged, let alone provided evidence, that the continued development of these networks is contingent upon further financing from Cablevision, as opposed to revenues earned from advertising and licensing fees charged to MVPDs.[168] Even if MSG LP were reliant on further financing from Cablevision, Defendants have not claimed that any alleged financing from Cablevision would be unavailable if MSG LP licensed MSG HD and MSG+ HD to Verizon.[169] Similarly, Defendants assert that MSG LP receives "substantial promotional, marketing and other benefits" from Cablevision, but they provide no support for this assertion and, in any event, do not allege that Cablevision would cease such support if MSG LP licensed MSG HD and MSG+ HD to Verizon.[170] Accordingly, consistent with Commission precedent, we find that the third factor does not weigh in favor of Defendants' withholding.

(iv) The Effect on Diversity of Programming in the MVPD Market

34. We find no basis to conclude that the fourth factor – the effect of the exclusive arrangement on "diversity of programming in the [MVPD] market" – weighs in favor of Defendants' withholding of MSG HD and MSG+ HD from Verizon.[171] The Commission has explained that an exclusive arrangement "may promote diversity in the programming market when used to provide incentives for cable operators to promote and carry a new and untested programming service."[172] In

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[167] *Defendants' Post-Discovery Reply Brief* at 38.

[168] *See Court TV Exclusivity Petition*, 9 FCC Rcd at 3229, ¶ 49 ("[A]s Court TV grows, more of its financial needs may be met with outside revenue from licensing fees from competitors."); *NECN Exclusivity Petition*, 9 FCC Rcd at 3237-38, ¶ 48 ("As consumer demand for the service develops, cable operator reliance on exclusivity as an incentive to continue to carry NECN should change. Moreover, NECN's losses in the future can eventually be lessened by the revenue and increased advertising that can be generated from increased distribution through sales to competing distributors.").

[169] In applying the Section 628(c)(4) factors, the Commission has explained that it assesses whether exclusivity is currently required to attract investment and carriage, not whether exclusivity was needed when the network was first launched. *See Court TV Exclusivity Petition*, 9 FCC Rcd at 3228-29, ¶ 44; *see also Defendants' Answer* at 10-11 (¶ 1) and Pontillo Decl. at ¶ 3 (stating that Cablevision was the only distributor willing to devote capital and channel capacity to MSG HD and MSG+ HD when these networks were launched in 1998-1999). In any event, Defendants concede that when Verizon began providing video service in New York in 2006, MSG HD and MSG+ HD had already been in existence for seven years and were already carried by other MVPDs. *See Defendants' Answer* at 10-11 (¶ 1), 15 (¶ 7), 34; *see also id*. at 13-14 (¶ 5) (noting that MSG LP began to license MSG HD and MSG+ HD to other MVPDs in 2005); *Verizon Complaint* at ¶ 4 (stating that Verizon first began deploying FiOS in New York in 2006). Thus, when Verizon entered the market, MSG HD and MSG+ HD were already established and popular networks, thereby undermining any suggestion that the networks were fledgling services dependent upon financing from Cablevision or that Defendants were required to offer MVPDs exclusivity with respect to Verizon as an inducement to carry the networks.

[170] *See Defendants' Answer* at 56.

[171] *See* 47 U.S.C. § 548(c)(4)(D); 47 C.F.R. § 76.1002(c)(4)(iv).

[172] *NECN Exclusivity Petition*, 9 FCC Rcd at 3237, ¶ 40.

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previous cases, the Commission has found that this factor weighs in favor of exclusive arrangements for new and untested networks,[173] but not for established and successful networks.[174]

35. As discussed above, MSG HD and MSG+ HD are established networks with valuable and popular programming. Defendants do not allege that the continued carriage and development of these networks is dependent on Defendants' withholding strategy. Thus, we find no basis to conclude that Defendants' withholding strategy is needed to enhance diversity of programming. Defendants theorize, however, that requiring MSG LP to share MSG HD and MSG+ HD with Verizon will reduce Verizon's incentive to invest in its own programming, thereby reducing diversity of programming.[175] As the Commission has explained previously, however, RSN programming is non-replicable and "no amount of investment can duplicate the unique attributes of such programming."[176] Accordingly, consistent with Commission precedent, we find that the fourth factor does not weigh in favor of Defendants' withholding.

(v) Duration of Withholding

36. We find that the fifth factor – the duration of the exclusive arrangement – weighs against Defendants' withholding of MSG HD and MSG+ HD from Verizon.[177] The Bureau has previously found even a three-year exclusivity period to be excessive for a network that is popular and that MVPDs seek to

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173 *See id.* at 3237, ¶¶ 40-43 (finding that exclusivity will promote the financial survival of a regional news service and thereby enhance diversity of programming); *see also NewsChannel*, 10 FCC Rcd at 695, ¶¶ 27-29 (finding that exclusivity will promote the successful launch and financial survival of a new and unique regional news service and thereby enhance diversity of programming).

174 *See Court TV Exclusivity Petition*, 9 FCC Rcd at 3229, ¶ 51 (finding that exclusivity is not currently needed for an existing and successful service and is therefore not needed to promote diversity of programming); *see also Sci-Fi Exclusivity Petition*, 10 FCC Rcd at 9791, ¶¶ 27-29 (finding that exclusivity is not currently needed for an existing and successful service and is therefore not needed to promote diversity of programming); *Outdoor Life/Speedvision Exclusivity Petition*, 13 FCC Rcd at 12240, ¶ 26 (finding that exclusivity is not currently needed for a network with 13.5-14.5 million subscribers that various MVPDs seek to carry and is therefore not needed to promote diversity of programming).

175 *See Bulow/Owen Study* at 7-9; *see also Verizon Complaint*, Exhibit 3 (Letter from Howard J. Symons, Counsel for Defendants, to Stan Tugentman, Verizon (June 29, 2009), at 2 ("Verizon clearly has the resources to acquire, invest in and develop its own programming.")); *Defendants' Post-Discovery Answer to Supplement* at 110.

176 *2010 Order*, 25 FCC Rcd at 750-51, ¶ 9; *see also supra* n.152 (noting that Verizon has invested in replicable local news programming); *Verizon Reply* at 6 ("The fact that regional sports programming cannot be replicated means that competitors have nowhere to turn and no ability to themselves create a suitable alternative for consumers. . . . [C]ompetitive providers simply lack the option of investing in or developing their own substitute, given the extraordinary barriers to entry in sports programming (e.g., leagues tightly limit team creation and many sports teams already have exclusive or nearly exclusive programming contracts with a video programming network).") and at 23; *Verizon Post-Discovery Opening Brief* at 14 ("Defendants own 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. Defendants also own the underlying Knicks and Rangers franchises, thereby ensuring that they will continue to control the television rights for these teams for the foreseeable future. Neither Verizon nor any other entity can establish new teams to independently develop similar programming; league rules would prevent a new franchise."); *Verizon Post-Discovery Reply Brief* at 30 (**[REDACTED**

]); *id*. at 12-13, 27, 31-32; Bazelon Decl. at ¶ 8.

177 *See* 47 U.S.C. § 548(c)(4)(E); 47 C.F.R. § 76.1002(c)(4)(v).

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carry.[178] The withholding here is of unlimited duration given that Defendants have provided no indication that they will ever license MSG HD and MSG+ HD to Verizon on any terms.

(vi) Conclusion

37. The first, second, and fifth factors under Section 628(c)(4) suggest significant anticompetitive harms resulting from Defendants' withholding of MSG HD and MSG+ HD from Verizon. While the two remaining factors could potentially tip the scales in favor of a finding that Defendants' withholding is procompetitive on balance, we find no basis on this record to conclude that Defendants' withholding will promote the benefits of exclusive arrangements for the programming market (*i.e.*, attraction of capital investment or increased programming diversity). Accordingly, applying the factors set forth in Section 628(c)(4) and the Commission's interpretation of those factors, we conclude that the anticompetitive harms of Defendants' withholding are not offset by any procompetitive benefits to the programming market.

(c) *MDU Order*

38. In the *MDU Order*, the Commission weighed the anticompetitive harms of exclusive contracts between cable operators and MDU owners against the procompetitive benefits and concluded that, on balance, these contracts are categorically "unfair."[179] Applying this analysis here, we find two significant anticompetitive harms resulting from Defendants' withholding. First, as discussed below, Defendants' withholding "significantly hinders" a wireline entrant from competing in the New York and Buffalo DMAs, which in turn harms consumers by limiting video competition in those markets.[180] Second, as the Commission has recognized previously, an act that impedes the ability of an MVPD to provide video service can also impede the ability of an MVPD to provide broadband services.[181] These anticompetitive harms, however, may be outweighed by the procompetitive benefits of withholding.[182]

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[178] *See Sci-Fi Exclusivity Petition*, 10 FCC Rcd at 9791, ¶ 30 n.78 (rejecting a three-year period of exclusivity given that Sci-Fi Channel was a popular service that at least one MVPD had sought to carry). The Commission has explained that in assessing the duration of an exclusive arrangement, it will "evaluate whether the proposed exclusivity has been sufficiently tailored to provide exclusivity for the minimum time period reasonably required to achieve the public interest benefits identified by the petitioner without imposing the kind of effect on the development of competition in the distribution market that Congress sought to ameliorate through the program access provisions." *Court TV Exclusivity Petition*, 9 FCC Rcd at 3226, ¶ 30; *see also id.* at 3230, ¶ 54 (finding a 15-year period of exclusivity to be "excessive" and not consistent with the statute); *NECN Exclusivity Petition*, 9 FCC Rcd at 3237-38, ¶¶ 44-51 (finding a seven-year period of exclusivity to be "reasonable" in light of the finding that the public interest benefits of the proposed exclusive arrangement offset any effect on competition); *Outdoor Life/Speedvision Exclusivity Petition*, 13 FCC Rcd at 12240-41, ¶ 27 (finding it unnecessary to assess whether a four-year period of exclusivity was appropriate in light of the lack of public interest benefits to offset the adverse effects on competition in the local and national video distribution markets); *NewsChannel*, 10 FCC Rcd at 695-96, ¶¶ 30-35 (finding a seven-year period of exclusivity to be "reasonable" in light of the finding that the public interest benefits of the proposed exclusive arrangement offset any effect on competition).

[179] *See MDU Order*, 22 FCC Rcd at 20243, ¶ 16 and 20248-49, ¶ 26.

[180] *See infra* Section III.A.2.c; *see also supra* ¶ 28.

[181] *See 2010 Order*, 25 FCC Rcd at 771-72, ¶ 36 (stating that a "wireline firm's decision to deploy broadband is linked to its ability to offer video" and that an act that "imped[es] the ability of MVPDs to provide video service . . . can also impede the ability of MVPDs to provide broadband services").

[182] *See Cablevision II*, 2011 WL 2277217, at *23 (stating that "labeling conduct unfair simply because it might in some circumstances negatively affect competition in the video distribution market" fails to consider whether such conduct should be treated as unfair "despite it being procompetitive in a given instance").

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The only procompetitive benefit put forth by Defendants is that their withholding strategy will allow Cablevision to differentiate its service from Verizon, thereby leading to more vigorous competition in the video distribution market and increasing the incentives of both Defendants and Verizon to invest in their own programming.[183] While we do not preclude the possibility that the facts in an individual case may reveal that the procompetitive benefits of product differentiation outweigh the anticompetitive harms of withholding, we find no basis to reach that conclusion on the facts presented here. As discussed above, the key distinction in this case is that the content withheld from Verizon is non-replicable and popular RSN programming that "no amount of investment can duplicate."[184] Because Verizon has no ability to formulate a viable competitive response that would allow Verizon to compete for the many subscribers that highly value these networks, we find that the anticompetitive harms of Defendants' withholding outweigh the procompetitive benefits.

(d) Legitimate Business Justification

39. The Commission's program access rules applicable to satellite-delivered, cable-affiliated programming permit withholding provided there is a "legitimate business justification" for the conduct.[185] The only justification put forth by Defendants is that their withholding strategy will allow Cablevision to differentiate its service from Verizon.[186] While we do not preclude the possibility that product differentiation may be a legitimate business justification for withholding terrestrially delivered, cable-affiliated programming based on the facts presented in an individual case, we decline to reach that conclusion here given the non-replicable and popular nature of the content withheld from Verizon. We find that product differentiation is not a legitimate business justification here because Verizon has no ability to formulate a viable competitive response that would allow Verizon to compete for the many subscribers who, today, highly value these networks.[187]

(e) FTC Definition

40. Defendants have put forth their own test for assessing whether conduct is "unfair," which is based on the Federal Trade Commission's Unfairness Policy Statement.[188] We find that Defendants' withholding of MSG HD and MSG+ HD from Verizon is "unfair" under this test as well. We thus need not decide how much weight should be given to Defendants' proposed test. The first factor requires the conduct at issue to "present an imminent, substantial, non-speculative threat of injury to consumers (as opposed to competitors)."[189] As discussed later herein, Defendants' withholding "significantly hinders" Verizon from competing in the New York and Buffalo video distribution markets, which in turn harms

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[183] *See supra* ¶ 26. As discussed above, there is no evidence of any procompetitive benefits from Defendants' withholding strategy for the programming market. *See supra* ¶¶ 31-35.

[184] *2010 Order*, 25 FCC Rcd at 750-51, ¶ 9; *see also supra* ¶¶ 29, 35.

[185] *See 1993 Order*, 8 FCC Rcd at 3412-13, ¶ 116.

[186] *See supra* ¶ 26.

[187] *See supra* ¶¶ 29, 35.

[188] *See Defendants' June 22nd Letter* at 5 (citing *FTC Unfairness Policy Statement*, Dec. 17, 1980, *reprinted in Int'l Harvester Co.,* 104 F.T.C. 949 (1984)); *see also* 15 U.S.C. § 45(n) ("The Commission shall have no authority under this section or section 57a of this title to declare unlawful an act or practice on the grounds that such act or practice is unfair unless the act or practice causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition.").

[189] *See Defendants' June 22nd Letter* at 5.

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consumers by limiting competition in those markets and by impeding broadband deployment.[190] The second factor requires that the conduct at issue "must not be outweighed by any countervailing benefits to consumers or competition that the practice produces."[191] As discussed above, we conclude that the anticompetitive harms of Defendants' withholding outweigh any procompetitive benefits.[192] The third factor requires that the act impose an injury that consumers could not reasonably avoid by "survey[ing] the available alternatives, choos[ing] those that are most desirable, and avoid[ing] those that are inadequate or unsatisfactory."[193] As the Commission has explained previously, RSNs such as MSG HD and MSG+ HD are unique because they "purchase exclusive rights to show sporting events and sports fans believe that there is no good substitute for watching their local and/or favorite team play an important game."[194] Moreover, the Commission has explained that RSN programming is "non-replicable and valuable to consumers" and that "no amount of investment can duplicate the unique attributes of such programming."[195] Thus, by withholding MSG HD and MSG+ HD from Verizon, Defendants have eliminated a competitive choice for those consumers who desire MSG HD and MSG+ HD.[196] Accordingly, even applying the test advocated by Defendants, we find Defendants' withholding of MSG HD and MSG+ HD from Verizon to be an "unfair act."

(f) Conclusion

41. After applying precedent and guidelines established by Congress and the Commission, as well as an additional test advocated by Defendants, we conclude that the anticompetitive effects of Defendants' withholding of MSG HD and MSG+ HD from Verizon outweigh any procompetitive benefits and that Defendants' withholding is, on balance, an "unfair act."

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[190] *See infra* Section III.A.2.c; *see also supra* ¶¶ 28, 38.

[191] *See Defendants' June 22nd Letter* at 5.

[192] *See supra* ¶¶ 24-38.

[193] *See Defendants' June 22nd Letter* at 5 (citing *FTC Unfairness Policy Statement*, Dec. 17, 1980, *reprinted in Int'l Harvester Co.,* 104 F.T.C. 949 (1984)).

[194] *See General Motors Corporation and Hughes Electronics Corporation, Transferors and The News Corporation Limited, Transferee*, Memorandum Opinion and Order, 19 FCC Rcd 473, 535, ¶ 133 (2004) ("*News/Hughes Order*").

[195] *2010 Order*, 25 FCC Rcd at 750-51, ¶ 9.

[196] The fact that Defendants make the SD versions of MSG and MSG+ available to Verizon does not change our conclusion. *See supra* ¶ 4 and *infra* ¶ 48 (noting the Commission's conclusion, as well as additional evidence supporting the conclusion, that HD programming is growing in significance to consumers and that consumers do not consider the SD version of a particular channel to be an adequate substitute for the HD version due to the different technical characteristics and sometimes different content). Moreover, the fact that Defendants make MSG HD and MSG+ HD available to DBS operators does not change our conclusion. Not all consumers can receive DBS service due to signal obstructions and difficulties with antenna siting. *See 2007 Order*, 22 FCC Rcd at 17879, Appendix B, ¶ 13 (noting impact of signal obstruction on DBS reception); United States Government Accountability Office, *Telecommunications: Direct Broadcast Satellite Subscribership Has Grown Rapidly, But Varies Across Different Types of Markets*, GAO-05-257 (April 2005), at 4, 13-14 (noting impact of signal obstruction on DBS reception) (*available at* http://www.gao.gov/new.items/d05257.pdf). Moreover, as discussed above, Defendants acknowledge that DBS operators do not present consumers with the same competitive choice as a wireline entrant such as Verizon because DBS operators do not offer voice or broadband service. *See supra* n.147. Moreover, the Commission has found that DBS operators do not constrain the price of cable service to the extent that wireline entrants do. *See id*.

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c. Defendants' Withholding of MSG HD and MSG+ HD from Verizon Has the "Effect" of "Significantly Hindering" Verizon

42. As discussed below, we conclude that Defendants' withholding of MSG HD and MSG+ HD from Verizon in the New York and Buffalo DMAs has the "effect" of "significantly hindering" Verizon from providing a competing video service, including "satellite cable programming and satellite broadcast programming," to subscribers and consumers in these DMAs.[197] We begin by reviewing Commission precedent on the "significant hindrance" standard. We then assess the "effect" of the conduct at issue.

(i) The "Significant Hindrance" Standard

43. Defendants' claims notwithstanding, prior Commission decisions establish that the "significant hindrance" standard does not require a complainant to demonstrate that it is completely foreclosed from competing in the video distribution market or that its commercial viability is in jeopardy.[198] In 1993, in initially establishing the program access rules, the Commission stated that a complainant alleging "significant hindrance" under Section 628(b) "must show that its ability to distribute programming to customers has been hampered in some fashion" and that the Commission will focus on whether the purpose or effect of the practice is "to hinder or harm the complainant relative to its competitors."[199] In 2007, the Commission found that MVPDs were "significantly hindered" as a result of exclusive deals between cable operators and MDU owners, despite the fact that only 30 percent of Americans lived in MDUs and the percentage of Americans living in an MDU subject to an exclusive

[197] As an initial matter, Defendants claim that dismissal of the *Verizon Complaint* is warranted because Verizon is not prevented or significantly hindered from providing any "satellite cable programming" or "satellite broadcast programming" when the only programming being withheld is terrestrially delivered. *See Defendants' Post-Discovery Answer to Supplement* at 22-23; *Defendants' Post-Discovery Reply* at 7; *see also Defendants' Answer* at 31. The Commission, and now the D.C. Circuit, have considered and rejected this argument. *See Cablevision II*, 2011 WL 2277217, at *10-*11 ("The problem with petitioners' argument is that it wrongly assumes an MVPD's lack of commercial attractiveness will never prevent or significantly hinder it from providing satellite programming."); *2010 Order*, 25 FCC Rcd at 768-69, ¶ 32, 770-71, ¶ 35, and 774-75, ¶ 39.

[198] *See Defendants' Post-Discovery Reply Brief* at 5 ("Verizon has offered no evidence suggesting that the commercial viability of FiOS TV is significantly impaired . . . ."), at 8 ("Verizon likewise has failed to present any evidence that lack of access to MSG/+ HD renders its provision of video service in NY and NJ uneconomic or commercially non-viable."), at 10-11 ("The record . . . offers no basis for concluding that the commercial viability of Verizon's video offering is impaired in any material respect . . . ."); *Defendants' Post-Discovery Answer to Supplement*, Exhibit K (Bruce M. Owen, Bundling Undermines the RSN Presumption, at 9 ("Verizon is apparently viable as a distributor of video services . . . .") ("*Owen Study*")); *Defendants' Reply to Verizon Response to Motion to Strike* at 3 (referring to a practice that "entirely forecloses entry into the relevant marketplace"); *Defendants' Feb. 25th Letter* at 6-8 (stating that none of the evidence demonstrates that Verizon has been significantly hindered from providing a competitively viable service); *Defendants' Answer* at 8 (stating that the evidence "is hardly suggestive of a company whose competitive viability is being stymied or hindered significantly") and Exhibit 3 (Jeremy I. Bulow and Bruce M. Owen, Analysis of Competition and Consumer Welfare Issues in Verizon's Access Complaint Against Cablevision and Madison Square Garden, at 10 ("There is no evidence in the complaint that MSG's HD program services are essential for entry (successful or otherwise) into the business. To the contrary, Verizon itself offers apparently viable video distribution service in the Cablevision service areas without offering MSG HD and MSG+ HD.") ("*Bulow/Owen Study*")); *see also Verizon Post-Discovery Reply Brief* at 14-17 (stating that Defendants have misinterpreted the statutory standard to require a showing of complete foreclosure or that the complainant's competitive viability is in doubt); Bazelon Decl. at ¶¶ 15-16.

[199] *1993 Order,* 8 FCC Rcd at 3374, ¶ 41.

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deal is lower.[200] The Commission prohibited all such exclusive deals, regardless of the size of the MDU or the number of MDUs in a given market area.[201] In the *2010 Order*, the Commission explained that, in attempting to demonstrate "significant hindrance," a complainant "cannot simply rely on the fact that some impairment to providing service may have occurred because of its lack of access to cable-affiliated, terrestrially delivered programming."[202] In the same decision, the Commission found "significant hindrance" when withholding of an RSN resulted in a 33 percent to 40 percent reduction in expected DBS market share.[203] Finally, in March 2010, the Commission addressed bulk billing arrangements, which allow an MVPD to provide service to every resident of an MDU at a significant discount from the usual retail rate.[204] The Commission explained that these arrangements may deter a second video provider from serving a building because residents would have to pay twice, thereby increasing the second provider's cost to consumers.[205] But, while the Commission acknowledged that these arrangements "may make entry by other MVPDs marginally less attractive," it further found that these arrangements are not present in most MDUs[206] and that it did not have a basis for finding that they "significantly hinder" MVPDs from providing service where the record demonstrated that "many" consumers are willing to pay twice for video service and some MVPDs have wired MDUs for service despite the presence of bulk billing arrangements.[207]

44. Thus, rather than requiring an MVPD to demonstrate complete foreclosure or that its commercial viability is in doubt, we believe this precedent establishes that the salient issue in assessing "significant hindrance" is whether an MVPD has been hindered relative to its competitors and whether the hindrance is substantial enough to eliminate the MVPD as a competitive choice for a meaningful number of consumers. For example, in the *MDU Order* and *2010 Order*, although the Commission found that MVPDs were "significantly hindered," there was no indication that MVPDs were incapable of competing in the marketplace or that they were poised to exit the market without access to MDU residents or to an RSN.[208] This precedent is consistent with Section 628(b), which prohibits "unfair acts" that have

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[200] *See MDU Order*, 22 FCC Rcd at 20235-36, ¶ 1, 20237, ¶ 3, 20239-41, ¶¶ 8-10, 20243-44, ¶ 16, and 20250-51, ¶ 29.

[201] *See id*. at 20251, ¶ 33 and 20253-54, ¶ 38.

[202] *See 2010 Order*, 25 FCC Rcd at 781, ¶ 51 n.200.

[203] *See id*. at 768, ¶ 32 and 782, ¶ 52 n. 202. Based on this evidence, as well as the non-replicability of RSNs, the Commission established a rebuttable presumption that withholding of an RSN results in "significant hindrance." *See supra* ¶ 3.

[204] *See Exclusive Service Contracts for Provision of Video Services in Multiple Dwelling Units and Other Real Estate Developments,* Second Report and Order, 25 FCC Rcd 2460, 2461, ¶ 2, 2463, ¶ 10, and 2470, ¶ 26 (2010).

[205] *See id*. at 2461, ¶ 2 and 2464, ¶ 12.

[206] *See id*. at 2464, ¶ 12.

[207] *See id*. at 2470, ¶ 26 ("second MVPD providers wire MDUs for video service even in the presence of bulk billing arrangements and [] many consumers choose to subscribe to those second video services"). The Commission also found that exclusive marketing arrangements, whereby an MVPD has the exclusive right to certain means of marketing its service to residents of an MDU, do not result in "significant hindrance." *See id*. at 2471-72, ¶ 31 and 2473, ¶ 36. The record indicated that these arrangements, which are not present in "most" MDUs, confer a slight advantage on the MVPD subject to the arrangement, but there is no indication that they "significantly hinder" competitors from providing service. *See id*. at 2473, ¶ 36.

[208] *See Verizon Post-Discovery Reply* at 16 ("[I]n the *MDU Order*, the Commission prohibited exclusive access arrangements that it found to significantly hinder competitive entry, even though cable incumbents made similar (continued….)

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the purpose or effect "to hinder significantly *or to prevent*" an MVPD from providing programming to subscribers or consumers.[209] This language indicates that Congress intended "significant hindrance" to mean something less than complete foreclosure, or prevention, from providing service. This interpretation is also supported by the D.C. Circuit's decision upholding the *2010 Order*. In rejecting Defendants' argument that withholding of terrestrially delivered programming does not significantly hinder an MVPD from providing "satellite cable programming or satellite broadcast programming," the court explained that this argument "wrongly assumes an MVPD's *lack of commercial attractiveness* will never prevent or significantly hinder it from providing satellite programming."[210] The court also explained that when an MVPD is denied 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."[211]

45. We also reject Defendants' claim that the Commission should be guided exclusively by antitrust precedent in applying the "significant hindrance" standard.[212] Congress specifically adopted the program access regime, including Section 628(b), as a new remedy separate and apart from antitrust enforcement.[213] Moreover, the Commission has previously explained that antitrust and program access laws "address similar but not identical concerns."[214]

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arguments there that new entrants could and did compete for consumers who did not live at properties covered by such agreements.").

209 47 U.S.C. § 548(b) (emphasis added).

210 *Cablevision II*, 2011 WL 2277217, at *10 (emphasis added).

211 *See id*.; *see also id*. at *11 ("But given petitioners' concession that the Commission can in principle regulate terrestrial withholding when such withholding completely prevents an MVPD from competing, thus preventing that MVPD from providing satellite programming, they have no basis for arguing that section 628 *unambiguously* precludes the Commission from regulating where it has evidence that such withholding 'hinder[s] significantly,' 47 U.S.C. § 548(b), an MVPD from competing with the incumbent cable operator to deliver satellite programming to customers.") (emphasis in original).

212 *See Defendants' Post-Discovery Answer to Supplement* at 47-48, 98-99; *Owen Study* at 3 n.5 and 9; *Defendants' Answer* at 45 n.140; *Defendants' Feb. 25th Letter* at 8-9.

213 *See* S. Rep. No. 102-92 (1991), at 29, *reprinted in* 1992 U.S.C.C.A.N. 1133, 1162 ("The legislation provides new FCC remedies and does not amend existing antitrust laws. All antitrust and other remedies which can be pursued under current law by multichannel video programming distributors are therefore unaffected by this section.").

214 *See 1993 Order,* 8 FCC Rcd at 3404, ¶ 102 ("[W]hile antitrust precedents and other regulatory approaches address related concepts that might be particularly useful in defining the permissible factors for differentials, directly importing these concepts into the Section 628 process risks confusing the two bodies of law involved, which address similar but not identical concerns."); *see also Court TV Exclusivity Petition*, 9 FCC Rcd at 3226-27, ¶ 35 ("[I]t would be flatly inconsistent with the Cable Act to find an exclusivity provision presumptively lawful simply because it might not rise to the level of a Sherman Act violation."); *Defendants' Post-Discovery Reply Brief* at 15.

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(ii) The Record Supports Application of a Rebuttable Presumption of "Significant Hindrance" for HD RSNs

46. Because MSG HD and MSG+ HD are RSNs as defined by the Commission,[215] Defendants' withholding of these networks from Verizon is subject to the rebuttable presumption of "significant hindrance" established in the *2010 Order*.[216] Moreover, although Defendants license the SD versions of MSG and MSG+ to Verizon, the Commission has established that this alone is not sufficient to rebut the presumption applicable to the HD version.[217] Verizon has put forth evidence that provides additional support for the rebuttable presumption for HD RSNs. Although this evidence is not necessary to bring the presumption into play, we nonetheless review the evidence given its presence in the record.

47. In upholding the rebuttable presumption of "significant hindrance" for RSNs, the D.C. Circuit explained 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."[218] Verizon has provided additional support for the Commission's conclusion that such networks are non-replicable and critically important to consumers and competition.[219] The record here contains MSG LP's statements from a previous litigation conceding that close substitutes do not exist for

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[215] The record establishes that MSG HD and MSG+ HD satisfy the Commission's definition of an RSN. *See supra* n.8 (defining RSN); *Defendants' Answer* at 71 (¶ 20) (admitting that MSG has exclusive rights to the New York Knicks (NBA), New York Rangers (NHL), and Buffalo Sabres (NHL), among others, and that MSG+ has exclusive rights to the New York Islanders (NHL) and New Jersey Devils (NHL), among others); *see also Verizon Complaint* at 8 n.11 (stating that a small number of these teams' games are televised on national networks and that the majority of the games are available only though MSG and MSG+).

[216] *See supra* ¶ 3.

[217] *See supra* ¶ 4.

[218] *Cablevision II*, 2011 WL 2277217, at *18.

[219] *See supra* n.8; *2010 Order*, 25 FCC Rcd at 750, ¶ 8 and 782-83, ¶ 52. Defendants contend that the fact that certain MVPDs choose not to carry certain RSNs in some markets demonstrates that RSNs are not indispensable. *See Defendants' Answer* at 41; *Defendants' Post-Discovery Answer to Supplement* at 39. We do not find that this undermines the rebuttable presumption because the record here contains no evidence of the circumstances that led to the MVPDs' decision to refrain from carrying an RSN. *See Verizon Post-Discovery Reply Brief* at 25. For example, the MVPDs' decision to refrain from carrying the RSNs may have been driven by the high cost of an RSN or an RSN's demand for unreasonable terms; in such a situation, the fact of non-carriage may suggest that the RSN views itself as providing indispensable, "must have" programming. In addition, while Defendants state that all content is non-replicable due to copyright restrictions (s*ee Defendants' Post-Discovery Reply Brief* at 24; *see also Defendants' Post-Discovery Answer to Supplement* at 38), the Commission has previously recognized that RSNs are unique because they "typically purchase exclusive rights to show sporting events and sports fans believe that there is no good substitute for watching their local and/or favorite team play an important game." *News/Hughes Order*, 19 FCC Rcd at 535, ¶ 133; *see Verizon Post-Discovery Opening Brief* at 14 ("Defendants own 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. Defendants also own the underlying Knicks and Rangers franchises, thereby ensuring that they will continue to control the television rights for these teams for the foreseeable future. Neither Verizon nor any other entity can establish new teams to independently develop similar programming; league rules would prevent a new franchise."); *see also id.* at 15; *Verizon Post-Discovery Reply Brief* at 12-13; *Verizon Reply* at 6, 23. Moreover, Defendants have previously recognized in statements to investors the significance of non-replicable content. *See Verizon Post-Discovery Answer to Supplement* at 7 (quoting Cablevision's COO as stating that Cablevision "currently carr[ies] more regional HD than any of our competitors" and that Cablevision has "more HD and On Demand HD that our competitors can't replicate") (citing *Cablevision Q3 2007 Earnings Conference Call Transcript* (Nov. 8, 2007)); *see also Verizon Feb. 12th Letter*, Attachment at 4.

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sports content.[220] Moreover, the record contains additional evidence supporting the Commission's conclusion that RSNs are highly valued by consumers and important for competition.[221] This evidence includes ratings demonstrating that RSNs are popular programming, **[REDACTED**

];[222] evidence that RSNs receive significantly higher license fees than other types of programming, thus indicating their value and importance to consumers;[223] and results from a consumer survey demonstrating that a significant number of consumers in New York and Buffalo watch RSNs.[224]

48. The D.C. Circuit also upheld the rebuttable presumption of "significant hindrance" for HD RSNs,[225] and the record here provides further support for the Commission's conclusion regarding the growing significance of HD RSNs to consumers.[226] This includes evidence showing that sales of HDTV

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[220] *See Verizon Reply* at 23 (quoting MSG LP as stating in a complaint filed with a federal district court that "'[c]lose substitutes do not exist'" for sports programming and that "'watching . . . major league men's professional ice hockey is not reasonably interchangeable with watching . . . other sports or other leisure activities'") (quoting Complaint, Madison Square Garden, L.P. v. National Hockey League, No. 07-CIV-8455 (S.D.N.Y.) (Sept. 28, 2007)); *see also Verizon Post-Discovery Opening Brief* at 15. These statements pertain specifically to hockey, which accounts for four of the major professional sports teams shown on MSG HD and MSG+ HD.

[221] *See 2010 Order*, 25 FCC Rcd at 750-51, ¶¶ 8-9 and 782-83, ¶ 52.

[222] *See Verizon Post-Discovery Reply Brief* at 23-25; **[REDACTED**

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[223] *See Verizon Complaint* at ¶ 3; *Verizon Feb. 12th Letter*, Attachment at 1; *Verizon Post-Discovery Opening Brief* at 13.

[224] The *Verizon/GMRS Survey* entailed two telephone surveys of subscribers to paid video programming services in the New York and Buffalo DMAs conducted between July 28 and August 4, 2009. *See* Stella Decl. at ¶ 3; *Verizon/GMRS Survey* at 4. In the New York DMA, a total of 851 interviews were conducted, and the survey data had a margin of error of +/- 3.4 percent at a confidence interval of 95 percent. *See* Stella Decl. at ¶ 5; *Verizon/GMRS Survey* at 4. In the Buffalo DMA, a total of 658 interviews were conducted, and the survey data had a margin of error of +/- 3.8 percent at a confidence interval of 95 percent. *See* Stella Decl. at ¶ 5; *Verizon/GMRS Survey* at 4. When asked how often they watch a regional sports channel, 39 percent of respondents in the New York DMA and 32 percent of respondents in the Buffalo DMA stated at least several times per week. *See Verizon/GMRS Survey* at 2 and Question 8. In addition, when asked how important it is to watch a game of a team they closely follow, 58 percent of respondents in the New York DMA and 66 percent of respondents in the Buffalo DMA stated that it was "very important" or "somewhat important." *See id.* at Question 6. While Defendants contend that there are a number of flaws with the *Verizon/GMRS Survey*, Defendants have identified no specific issues pertaining to these two questions. *See Defendants' Motion to Strike Verizon Reply* at 7-16; Poret Decl.; *Defendants' Post-Discovery Answer to Supplement*, Declaration of Professor Eric T. Bradlow (Oct. 11, 2010), at ¶ 10 ("Bradlow Decl."), Declaration of Professor Carol A. Scott (Oct. 12, 2010), at ¶¶ 9-11 ("Scott Decl."), Declaration of Professor Dilip Soman (Oct. 11, 2010), at ¶ 10 ("Soman Decl."); *Verizon Response to Defendants' Motion to Strike Verizon Reply* at 12-13 (noting that, despite a typo in the survey results, all of the respondents subscribed to cable or satellite television service and all of the respondents were responsible for making decisions about which cable provider is used by the household).

[225] *See Cablevision II*, 2011 WL 2277217, at *19.

[226] *See 2010 Order*, 25 FCC Rcd at 784-85, ¶¶ 54-55. Among other evidence, the Commission in the *2010 Order* noted the following: DTV sales are growing at 50 percent per year; the Consumer Electronics Association ("CEA") has estimated that, by 2011, the number of HDTVs sold in the United States will reach 170 million, which is roughly
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sets are growing, with a significant number of consumers in the New York and Buffalo DMAs owning HDTV sets;[227] those consumers that have purchased HDTV sets highly value HD programming;[228] HD homes are more likely to watch sports programming than non-HD homes;[229] MVPDs have made large

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one set for every two Americans; more than 45 percent of American households own an HD television set, up from less than 20 percent in 2006; a 2005 CEA survey concluding that "45 percent of HDTV sports fans would consider switching to another source of HD sports if superior to their current package." *See id*. at 784-85, ¶ 54 n.216.

[227] *See Verizon/GMRS Survey* at Question 3 (67 percent of subscribers in the New York DMA and 57 percent of subscribers in the Buffalo DMA have an HDTV set); *Verizon Post-Discovery Opening Brief* at 12 and Appendix C (DEF000011) (**[REDACTED**

]); *id*. at 14 and Appendix C (DEF000080, DEF000210) (*LRG/HDTV 2009 Report* concluding that (i) as of October 2009, nearly half of all households had an HDTV set and an additional 37 percent of households were "very interested" or "somewhat interested" in purchasing HDTV in the next year; and (ii) estimating an increase in the number of HD households from 67 million in 2010 to 105 million in 2014) (citing Leichtman Research Group, *HDTV 2009: Consumer Awareness, Interest and Ownership* (4Q2009), at 6 ("*LRG/HDTV 2009 Report*")); Bazelon Decl. at ¶ 11; *see also Defendants' Post-Discovery Answer to Supplement* at 37-38 (data from Leichtman Research Group indicating that 46 percent of U.S. households have an HDTV set, an increase from 45 percent cited by the Commission in the *2010 Order*) (citing Press Release, Leichtman Research Group, Nearly Half of U.S. Households Have an HDTV Set (Nov. 30, 2009), available at http://www.leichtmanresearch.com/ press/113009release.pdf).

[228] *See Verizon Complaint* at ¶ 28 (2008 Nielsen data stating that 20 percent of consumers who have an HDTV set and subscribe to HD service watch HD programs "every time" they watch television and 45 percent watch HD "most of the time") (citing Mike Robuck, *CTAM, Nielsen Research: Adult Viewers Still Prefer TVs for Viewing*, CedMagazine.com, July 1, 2009, available at http://www.cedmagazine.com/CTAM-Nielsen-research-Adult-viewers-prefer-TV-viewing.aspx); *id.* (Horowitz Associates' *State of Digital and Interactive TV 2008* study concluding that 70 percent of HD homes watch HD programming every day) (citing George Winslow, *HD Viewing Patterns Equate to Fuzzy Math*, Multichannel News, Oct. 13, 2008, available at http://www.multichannel.com/ article/87774-HD_Viewing_Patterns_Equate_To_Fuzzy_Math.php); *id*. (2008 data from Knowledge Networks finding that about one-third of people who have HDTV say they go straight to the HD section of their programming guides) (citing Joe Mandese, *Data Offers Clear Picture of Game-Changing Media Technology: It's HDTV*, Media Daily News, Aug. 19, 2008, available at http://www.mediapost.com/publications/?fa=Articles.showArticle&art_aid =88768); *Verizon Post-Discovery Opening Brief,* Appendix C (DEF000133) (*LRG/HDTV 2009 Report* concluding that 45 percent of respondents watch more programs in HD than programs not in HD); *Verizon Post-Discovery Reply Brief* at 29 (**[REDACTED**

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[229] *See Verizon Complaint* at ¶ 27 and *Verizon Post-Discovery Opening Brief* at 21 (*2008 Nielsen Report* showing higher levels of sports viewing and engagement in HD homes, with ratings for sporting events 20 percent higher in HD homes compared to U.S. households as a whole) (citing Nielsen Special Report, *2008 – a Banner Year in Sports?* (2008), at 3-4, available at http://pl.nielsen.com/ trends/documents/ 2008ABannerYear inSports December2008.pdf ("*Nielsen 2008 Report*")); *Verizon Post-Discovery Opening Brief* at 13-14 and Appendix C (DEF000134, DEF000176, DEF000184) (*LRG/HDTV 2009 Report* finding that HDTV owners watch sports more than average and that the highest percentage of HD viewers (30 percent) listed sports as the type of channel they would add first); *id*., Appendix C (DEF000159) (*LRG/HDTV 2009 Report* finding that 40 percent of households with incomes above $75,000 cite sports programming as their "first choice" of HD programming).

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investments to support the growing demand for HD;[230] and both Verizon and Cablevision advertise their HD offerings.[231] The record also contains additional evidence supporting the Commission's conclusion that, due to technical[232] and content[233] differences between SD and HD, consumers do not consider the SD version of a particular channel to be an adequate substitute for the HD version.[234] Moreover, we note that both Congress and the United States Court of Appeals for the Ninth Circuit have recently recognized the critical nature of HD programming in today's video marketplace.[235]

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[230] *See Verizon Complaint* at ¶ 29 (stating that Verizon and other MVPDs have made large investments to offer a wider array of HD programming; citing Morgan Stanley estimate that cable and satellite companies will spend $13-$14 billion to increase their HDTV capacity); Denson/Grad Decl. at ¶ 9 ("Because customer expectation for HD sports is so strong, in every other market in which Verizon competes, it carries regional sports programming in HD format where such programming is made available."); *Verizon Post-Discovery Opening Brief* at 12 and Appendix C (DEF000045) (**[REDACTED**

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[231] *See Verizon Complaint* at ¶ 30 and Exhibit 4 (providing Cablevision advertisements emphasizing its ability to offer all nine New York sports teams in HD); *Verizon Post-Discovery Opening Brief* at 8-9 and Appendices A and C (same); *id*. at 12 and Appendix C (DEF000011, DEF00018) (**[REDACTED**

]); *Verizon Post-Discovery Reply Brief* at 9-10 and Bazelon Decl. at ¶ 11 (noting Cablevision's advertising of sports in HD); *Defendants' Answer* at 18-19 (¶ 12) and 44-45 (noting Verizon's advertising and statements emphasizing its HD offerings); *Defendants' Post-Discovery Answer to Supplement* at 44-45 and Exhibit C (noting Verizon's advertising and statements emphasizing its HD offerings); *Defendants' Post-Discovery Reply Brief*, Exhibit A (noting Verizon's advertising and statements emphasizing its HD offerings).

[232] *See Defendants' Answer* at 48 (noting that HD has materially different resolution, depth, audio, and display than SD); *Verizon Post-Discovery Opening Brief* at 10-11 and Appendix C (DEF002076) (**[REDACTED**

]); *Verizon Post-Discovery Reply Brief* at 7 (**[REDACTED**

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[233] *See Defendants' Answer* at 48 and Declaration of Adam Levine (July 29, 2009), at ¶ 13 (noting that content may differ between the SD and HD versions of a network) ("Levine July 2009 Decl.").

[234] *See 2010 Order*, 25 FCC Rcd at 784-85, ¶¶ 54-55; *Verizon Post-Discovery Reply Brief* at 6 ("The record confirms that the HD format of MSG and MSG+ is distinct from the standard definition feed, and that there is strong independent consumer demand for HD programming generally . . . .").

[235] In Section 207 of the Satellite Television Extension and Localism Act of 2010 ("STELA"), Congress accelerated the timetable pursuant to which satellite providers that carry local stations in HD must carry "qualified noncommercial educational television stations" in HD. *See* Pub. L. No. 111-175, § 207, 124 Stat. 1218 (amending 47 U.S.C. § 338 (2006)). In affirming a federal district court's decision denying a motion for a preliminary injunction, the United States Court of Appeals for the Ninth Circuit explained that Congress in passing Section 207 "recognized whether a program is offered in HD affects whether viewers watch it." *See DISH Network Corp. v. FCC*, 636 F.3d 1139, 1149 (9th Cir. 2011), *amended by* 2011 WL 3449485 (Aug. 9, 2011). The court held "it was reasonable for Congress to conclude that allowing satellite carriers to delay offering PBS in HD would lead to anticompetitive results." *See id*. The court also cited a New York Times article "stating that shortly before STELA's passage, half of the country was watching television in HD format and that 'HD may limit the number of channels that viewers turn to, because once they can watch programs in HD, they have little desire to watch anything (continued….)

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(iii) Defendants Have Failed to Rebut the Presumption

49. The *2010 Order* provides that a defendant to a complaint alleging an "unfair act" involving a terrestrially delivered, cable-affiliated RSN will have the opportunity to rebut the presumption of significant hindrance.[236] As an initial matter, Defendants contend that the facts of the withholding at issue in the Philadelphia and San Diego cases used to support the Commission's adoption of a rebuttable presumption for RSNs are distinct from the facts of this case.[237] Accordingly, Defendants argue that it would be inappropriate to apply the rebuttable presumption in this case.[238] We disagree that these distinctions are meaningful. First, Defendants contend that the RSNs at issue in the previous cases had exclusive rights to the games of all of the local major professional sports teams in the market, whereas the present case involves only two of the four RSNs in the New York DMA.[239] In fact, the percentage of local major professional sports teams withheld in New York (44 percent) and Buffalo (50 percent) is comparable or identical to the percentage withheld in the San Diego case (50 percent).[240] Second,

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of a lower quality.'" *See id*. (quoting Brian Stelter, *Crystal-Clear, Maybe Mesmerizing,* N.Y. Times, May 24, 2010, B4).

Defendants claim that data in the record undermine the rebuttable presumption for HD RSNs. Based on data indicating that 46 percent of U.S. households have an HDTV set (*see supra* n.227) and that 66 percent of those households owning an HDTV set subscribe to HD service, Defendants claim that only 33 percent of households (46 percent * 66 percent) are capable of viewing HD RSN programming. *See Defendants' Post-Discovery Answer to Supplement* 38 (2009 data from Magid Media Futures) (citing George Winslow, *Mixed Picture: HD Penetration Up, But Viewer Confusion Persists*, Multichannel News, Dec. 12, 2009, available at http://www.multichannel.com/article/439945-Mixed_Picture_HD_Penetration_ Up_But_Viewer_ Confusion_ Persists.php?rssid=20059). We find this percentage to be significant and that it supports, rather than undermines, the rebuttable presumption for HD RSNs. *See* Bazelon Decl. at ¶ 10. Indeed, as discussed above, the Commission found that MVPDs were "significantly hindered" as a result of exclusive deals between cable operators and MDU owners when the record reflected that 30 percent of Americans lived in MDUs and the percentage of Americans living in an MDU subject to an exclusive deal is lower. *See supra* ¶ 43.

[236] *See 2010 Order*, 25 FCC Rcd at 782-83, ¶ 52.

[237] *See supra* n.8; *Defendants' Answer* at 40 n.121; *Defendants' Post-Discovery Answer to Supplement* at 48-51, 64-65, 115-16; *Owen Study* at 2-9; *Defendants' Post-Discovery Reply Brief* at 31-32 n.110.

[238] *See Defendants' Post-Discovery Answer to Supplement* at 48-51, 64-65, 115-16; *Defendants' Post-Discovery Reply Brief* at 31-32 n.110.

[239] *See Defendants' Answer* at 40 n.121; *Defendants' Post-Discovery Answer to Supplement* at 48 n.168; *Defendants' Post-Discovery Reply Brief* at 31-32 n.110. In addition to MSG and MSG+, there are two additional RSNs in the New York DMA: YES Network (showing the games of the New York Yankees of MLB and the New Jersey Nets of the NBA) and SportsNet New York (showing the games of the New York Mets of MLB). *See Defendants' Post-Discovery Answer to Supplement* at 42-43, 49. Verizon has access to the SD and HD versions of YES Network and SportsNet New York. *See id*.

[240] By "local major professional sports," we refer to football (NFL), baseball (MLB), basketball (NBA), and hockey (NHL) teams whose home stadiums are located in the applicable DMAs. In the New York DMA, there are nine local major professional sports teams, four of which are withheld from Verizon: football (New York Giants and New York Jets); baseball (New York Yankees and New York Mets); basketball (New York Knicks (withheld) and New Jersey Nets); and hockey (New York Rangers (withheld), New York Islanders (withheld), and New Jersey Devils (withheld)). In the Buffalo DMA, there are two local major professional sports teams, one of which is withheld from Verizon: football (Buffalo Bills) and hockey (Buffalo Sabres (withheld)). In the San Diego DMA, there are two local major professional sports teams, one of which is withheld from competitors: football (San Diego Chargers) and baseball (San Diego Padres (withheld)). In addition, we note that the percentage of major professional sports teams withheld in San Diego would be even less if out-of-DMA basketball and hockey teams (continued….)

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Defendants note that the RSNs in the Philadelphia and San Diego cases show professional baseball games, which they claim involve one of the nation's two most popular sports, whereas MSG HD and MSG+ HD show professional basketball and hockey games only.[241] The Commission, however, included professional basketball and hockey, along with professional football, baseball, and other sports, in the definition of an RSN and the accompanying rebuttable presumption.[242] Had the Commission deemed basketball or hockey as insufficiently popular or otherwise not relevant, it would not have included these sports in the definition of an RSN. Third, Defendants note that the Philadelphia and San Diego cases involved complete withholding (both SD and HD), whereas the present case involves withholding of only the HD version of the RSNs.[243] As discussed above, however, the Commission has already determined that withholding the HD version is rebuttably presumed to cause "significant hindrance" even if an SD version of the network is made available to competitors.[244] Fourth, Defendants note that the Philadelphia and San Diego cases assessed the impact of withholding on DBS operators only, whereas the present case involves a wireline MVPD that bundles its video service with voice, data, and wireless services, which Defendants claim decreases the competitive significance of any individual network.[245] As discussed below, however, Defendants offer no empirical support for the claim that bundling reduces the importance of RSNs to consumers when making a choice in a video provider.[246]

50. In any event, the *2010 Order* provides a defendant with the opportunity to bring forth evidence tending to show that distinctions such as these – or other facts – rebut the presumption that Verizon has been significantly hindered.[247] Defendants have the opportunity to introduce evidence

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from the adjacent Los Angeles DMA that are available to MVPDs in San Diego are included in this analysis. We also note that in the Philadelphia DMA, there are four local major professional sports teams, three of which were withheld from DBS operators: football (Philadelphia Eagles); baseball (Philadelphia Phillies (withheld)); basketball (Philadelphia 76ers (withheld)); and hockey (Philadelphia Flyers (withheld)). While the percentage of local major professional sports teams withheld in Philadelphia (75 percent) is greater than in either New York or Buffalo, this does not undermine the fact that the percentage of teams withheld in New York and Buffalo is similar to San Diego, where the Commission found that withholding of an RSN resulted in "significant hindrance."

241 *See Defendants' Post-Discovery Answer to Supplement* at 116. Defendants do not provide support for the assertion that baseball is "one of the nation's two most popular sports." *See id*. Even if true, Defendants do not provide evidence that this is also true in the New York and Buffalo DMAs.

242 *See supra* n.8 (stating definition of RSN). Moreover, MSG LP has conceded in a previous litigation that close substitutes do not exist for professional hockey. *See supra* n.220.

243 *See Defendants' Answer* at 42-43; *Defendants' Feb. 25th Letter* at 7; *Defendants' Post-Discovery Answer to Supplement* at 5-6, 48, 50-51, 116; *Defendants' Post-Discovery Reply Brief* at 31-32 n.110.

244 *See supra* ¶ 4.

245 *See Defendants' Post-Discovery Answer to Supplement* at 64-65; *Owen Study* at 2-9; *Defendants' Post-Discovery Reply Brief* at 31-32 n.110.

246 *See infra* ¶ 64.

247 The Commission adopted a rebuttable presumption for RSNs based on Commission precedent and the weight of empirical data demonstrating that withholding of an RSN results in significant hindrance. *See 2010 Order*, 25 FCC Rcd at 782-83, ¶ 52. The Commission specifically declined to adopt a *per se* prohibition on withholding of RSNs because of data involving withholding of a single RSN in Charlotte which did not show a statistically significant effect on predicted market share. *See id*. at 770-71, ¶ 35 (citing *Adelphia Order,* 21 FCC Rcd at 8271, ¶ 149 and 8271-72, ¶ 151 (concluding that withholding of a terrestrially delivered RSN in Charlotte did not show a statistically significant effect on predicted market share, and noting that the RSN showed the games of the Charlotte Bobcats, a relatively new team that did not yet have a strong enough following to induce large numbers of subscribers to switch MVPDs)). Thus, despite the overwhelming evidence demonstrating the critical nature of RSNs to competition, the (continued….)

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tending to show that, as they contend, these distinctions mean that Verizon's inability to access MSG HD and MSG+ HD is "far less severe" than the withholding at issue in the Philadelphia and San Diego cases.[248] As Defendants note, a rebuttable presumption does not shift the burden of proof to Defendants; rather, it requires Defendants to come forward with evidence that rebuts or meets the presumption.[249] Here, Defendants have put forth two types of evidence to rebut the presumption: survey evidence and non-survey evidence. With respect to the survey evidence, we find below that the results of the surveys contradict the stated purpose of Defendants' product differentiation strategy and, in any event, the surveys contain material flaws and deficiencies that render them insufficiently reliable to overcome the Commission's presumption. With respect to the non-survey evidence, we find below that this evidence is also unavailing because it fails to isolate the impact of the lack of MSG HD and MSG+ HD on the willingness of consumers to choose Verizon. Thus, we conclude that Defendants have failed to rebut the presumption that their withholding of MSG HD and MSG+ HD from Verizon has the "effect" of "significantly hindering" Verizon.

(a) Survey Evidence

51. In the *2010 Order*, the Commission declined to adopt specific evidentiary requirements for assessing "significant hindrance," stating instead that the evidence required will vary based on the facts and circumstances of each case.[250] The Commission provided two illustrative examples of empirical evidence that litigants might consider providing in assessing "significant hindrance."[251] First, a litigant might provide an appropriately crafted regression analysis that estimates what the complainant's market share in the MVPD market would be if it had access to the programming and how that compares to its actual market share.[252] Second, a litigant might provide statistically reliable survey data indicating the likelihood that customers would choose not to subscribe to or switch to an MVPD that did not carry the withheld programming.[253] The Commission explained that the reliability of the regression analysis, survey data, or other empirical data will be assessed on a case-by-case basis.[254]

52. In their effort to come forward with empirical evidence that would rebut the presumption, Defendants have elected not to rely on a regression analysis. Rather, Defendants rely on three consumer surveys purporting to demonstrate that MSG HD and MSG+ HD are not a significant factor to consumers in the New York DMA and Buffalo DMA when choosing an MVPD. For the reasons discussed below, we find that the results of these surveys contradict the stated purpose of Defendants' product

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Commission recognized the possibility that the facts in certain cases may reveal that withholding of an RSN does not result in significant hindrance.

[248] *See Defendants' Post-Discovery Answer to Supplement* at 48.

[249] *See id.* at 12-13, 115; *Defendants' Post-Discovery Reply Brief* at 31-32; *see also Cablevision II*, 2011 WL 2277217, at *17 ("Reviewing the Commission's order, we think it clear that its rebuttable presumptions shift only the burden of production.").

[250] *See 2010 Order*, 25 FCC Rcd at 785-86, ¶ 56.

[251] *See id*.

[252] *See id*.

[253] *See id*.

[254] *See id*.

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differentiation strategy and, in any event, they suffer from significant flaws and deficiencies that render them unreliable for their intended purposes in this proceeding.[255]

(i) The Results of Defendants' Surveys Contradict Their Product Differentiation Strategy

53. As discussed above, Defendants' stated reason for withholding MSG HD and MSG+ HD from Verizon is to provide Cablevision with a way to differentiate its service from Verizon and thereby gain a competitive advantage.[256] Indeed, Defendants and their experts state that they expect at least some consumers in the New York DMA and Buffalo DMA to refrain from choosing Verizon because it lacks MSG HD and MSG+ HD.[257] Defendants' surveys, however, purport to demonstrate that the availability of MSG HD and MSG+ HD is not a factor for consumers in the New York DMA and Buffalo DMA when choosing an MVPD. If consumers attach no significance to the availability of MSG HD and MSG+ HD, as Defendants' surveys purport to show, then it is hard to explain why Defendants stress the importance of that HD programming in their public statements and their advertising.[258] Moreover, in that instance there appears to be no reason for Defendants to withhold these networks from Verizon. Instead, Defendants would benefit by licensing this content to Verizon and earning increased licensing fees and advertising revenues.[259] Defendants do not attempt to explain the contradiction between the survey results and their real-world actions, which further supports our conclusion below that these surveys contain significant flaws and deficiencies that render them unreliable.

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[255] Because all three of these surveys contain significant flaws and deficiencies, and we do not know what other evidence Defendants chose not to present, we assign no significance to the fact that the three studies lead to convergent results. *See* Soman Decl. at ¶¶ 8, 20.

[256] *See supra* n.87 and ¶¶ 25-26.

[257] *See Defendants' Answer* at 7 (stating that withholding MSG HD and MSG+ HD from Verizon "may result in making Verizon's video offering less attractive to a subset of its potential customer base"); *Bulow/Owen Study* at 10-11 ("There is no doubt that Verizon would be better off, at least in the short run, if MSG HD and MSG+ HD were available to it at a rate below Verizon's reservation price."); *Defendants' Post-Discovery Answer to Supplement* at 83 (stating that withholding MSG HD and MSG+ HD from Verizon "may make Verizon's video program offerings appear less attractive to some small segment of customers"); *see also supra* ¶ 25 (noting statements from Cablevision executives and Cablevision documents emphasizing the competitive importance of its competitors' inability to offer MSG HD and MSG+ HD).

[258] *See Verizon Post-Discovery Reply Brief* at 18 ("[I]f the programming at issue was not important to a significant number of customers, why would Cablevision spend heavily on advertising that not only mentions but centers on that programming? If the programming was not important to a significant number of consumers, why would Defendants inform analysts that Cablevision's withholding of this programming will help shield it from competition from Verizon?").

[259] *See Verizon Post-Discovery Opening Brief* at 17 ("The importance of this programming is underscored by Defendants' concerted efforts to deny access to Verizon's customers, no matter the Defendants' costs in foregone revenue for MSG or collective litigation costs."); Bazelon Decl. at ¶ 10 ("[I]f the programming is not important to consumers, its presence or absence will not significantly influence the consumers' choice of MVPD. From an economic perspective, therefore, Defendants' withholding of the programming suggests they believe it will change the choice of provider for a significant number of subs – enough to overcome the losses in licensing fees as a result of withholding the programming."); *Verizon Reply* at 21-22 ("If the HD product did not handicap Verizon's ability to provide a meaningful competitive option to consumers, Cablevision would have no rational reason so adamantly to withhold it."); *see also Verizon Complaint* at 23-24 (¶ 57); *Verizon Reply* at 18; *Verizon Post-Discovery Opening Brief* at 18.

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(ii) Defendants' Survey Evidence Is Not Reliable

(a) Defendants'/Radius Survey

54. The *Defendants'/Radius Survey* entailed a telephone survey conducted in February/March 2010 of 503 adults who subscribe to a pay television provider or rely on over-the-air television reception; are decision-makers in their household for selecting a video provider; and live within the New York DMA where Cablevision and Verizon FiOS TV service areas overlap.[260] The survey used open-ended, non-leading questions.[261] Respondents could mention anything in response to the survey questions.[262] When asked for their reasons for selecting, switching to, or staying with their current video service provider, **[REDACTED** **]**.[263] Other factors were mentioned far more frequently: price (70 percent), general satisfaction (67 percent), and customer service/reliability (66 percent).[264] The *Defendants'/Radius Survey* concludes that MSG HD and MSG+ HD are not "top of mind" or meaningful factors and, in fact, are **[REDACTED** **]** for consumers when choosing a video provider.[265]

55. We find this survey suffers from deficiencies that render it unreliable. Experts on behalf of both Parties explain that an open-ended questioning technique has disadvantages, such as creating difficulties in properly documenting the results.[266] For example, to the extent that respondents stated they would not switch video providers because they were "generally satisfied," one reason for their satisfaction with their current provider may be that they receive MSG HD and MSG+ HD. While the study indicates that exhaustive and non-directive probing was used to allow respondents to expand on their reasons for selecting, switching to, or staying with their current video service provider,[267] Defendants provide only a

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[260] *See Defendants'/Radius Survey* at 1. The survey did not include residents from the Buffalo DMA.

[261] *See id*. at 2; Shifrin Decl. at ¶ 6; Shifrin Reply Decl. at ¶ 7; *Defendants' Post-Discovery Answer to Supplement* at 53.

[262] *See Defendants'/Radius Survey* at 2; Shifrin Decl. at ¶ 6; Shifrin Reply Decl. at ¶ 7*; Defendants' Post-Discovery Answer to Supplement* at 53. Defendants provided declarations from experts in survey and data analysis opining that the survey methodology was valid. *See* Bradlow Decl. at ¶ 19; Scott Decl. at ¶ 13; Soman Decl. at ¶¶ 15-16.

[263] **[REDACTED**]. *See Defendants'/Radius Survey* at 4.

[264] *See id.*

[265] *Defendants'/Radius Survey* at 1, 4; *see also Defendants' Supplement* at 2-3; *Defendants' Post-Discovery Answer to Supplement* at 51-53. Defendants provided declarations from experts in survey and data analysis opining that the results demonstrate that subscribers attach low importance to local sports in HD as a factor in their choice of video service provider. *See* Bradlow Decl. at ¶ 19; Scott Decl. at ¶¶ 6(b), 13; Soman Decl. at ¶¶ 15-16.

[266] *See* Scott Decl. at ¶ 13; Bazelon Decl. at ¶ 19 (quoting a text on marketing research as stating "'[b]ecause of the freedom allowed respondents, the responses to open-ended questions are often so vague that they can be misclassified by coders in spite of the detailed instructions given them'") (quoting Dawn Iacobucci and Gilbert A. Churchill, Marketing Research: Methodological Foundation, 9th Edition (Ohio: Thomson South-Western 2005) at 408); *id*. ("[O]nce coded, the data can be difficult to interpret and often are not subject to statistical analysis. In fact, open-ended surveys are more typically deployed before concrete research questions are formed – the open-ended nature being less restrictive in eliciting information from subjects. In the current case, a specific research question was known, making the need for open-ended questions unnecessary.").

[267] *See* Shifrin Decl. at ¶ 6; *Defendants'/Radius Survey* at 2; Shifrin Reply Decl. at ¶¶ 8, 13; *Defendants' Post-Discovery Answer to Supplement* at 51-52, 61; Bradlow Decl. at ¶ 19; Soman Decl. at ¶ 16.

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broad outline and not the actual text of the questions and probing techniques used for the survey.[268] This omission renders it impossible to assess whether the probing questions asked were biased or misleading and the nature and extent of the probing used to elicit responses. We also note, as Defendants' own expert concedes, that the survey does not directly address the key issue of the impact of the lack of MSG HD and MSG+ HD on the willingness of consumers to choose Verizon.[269] While the *Defendants'/Radius Survey* concludes that MSG HD and MSG+ HD are not "top of mind" considerations, this does not necessarily mean that these networks are not significant to many consumers.[270] It is possible, for example, that some respondents simply never thought of the possibility that they might lose MSG HD or MSG+ HD programming. That MSG HD or MSG+ HD was not one of the first things that came to the respondents' minds when attempting to recall their reasons for selecting, switching to, or staying with their current video service provider does not mean that these networks are irrelevant in their decision-making process.

(b) Defendants'/OTX Survey

56. The *Defendants'/OTX Survey* used a test versus control methodology.[271] The respondents were non-Verizon FiOS TV customers who are decision makers in their household for selecting a video provider and who live in areas where Cablevision and Verizon FiOS TV service areas overlap.[272] The Control Group of 312 respondents saw an offer for Verizon FiOS TV that had no reference to MSG HD or MSG+ HD, but did reference that Verizon FiOS TV offers "tons of sports, including all 9 NY sports teams" (the "No-HD Offer").[273] The Test Group of 317 respondents saw an offer for Verizon FiOS TV that included a reference to MSG HD and MSG+ HD and touted the availability of "all 9 NY sports teams in HD" (the "HD Offer").[274] Based on these descriptions, the respondents were asked how likely they would be to consider switching or not switching to Verizon.[275] Based on the responses, the survey concludes that the number of consumers more likely to choose Verizon FiOS TV with MSG HD and MSG+ HD over Verizon FiOS TV without MSG HD and MSG+ HD is not statistically significant.[276]

[268] *See Defendants'/Radius Survey* at 2-3 ("Other reasons – *Open/Ended* (*using non-directive probing*)").

[269] *See* Scott Decl. at ¶ 6(b) ("[T]his methodology does not address the question of whether or not consumers would switch subscription television providers in order to receive MSG HD or MSG+ HD . . . ."); *Verizon Post-Discovery Reply Brief* at 19.

[270] *See Verizon Response to Defendants' Supplement* at 3-4.

[271] *See* Shifrin Decl. at ¶ 3; *Defendants'/OTX Survey* at 1; Shifrin Reply Decl. at ¶ 17; *Defendants' Post-Discovery Answer to Supplement* at 54.

[272] *See Defendants'/OTX Survey* at 2.

[273] *See id.* at 1 and Appendix at 3; *see also* Shifrin Decl. at ¶ 3; *Defendants' Post-Discovery Answer to Supplement* at 54.

[274] *See Defendants'/OTX Survey* at 1 and Appendix at 1; *see also* Shifrin Decl. at ¶ 3; *Defendants' Post-Discovery Answer to Supplement* at 54.

[275] *See Defendants'/OTX Survey* at 2; *see also Defendants' Post-Discovery Answer to Supplement* at 54. Defendants provided declarations from experts in survey and data analysis opining that the survey methodology was valid. *See* Bradlow Decl. at ¶ 20; Scott Decl. at ¶¶ 6(c), 14-16; Soman Decl. at ¶ 17.

[276] *See* Shifrin Decl. at ¶ 8; *Defendants'/OTX Survey* at 3; Shifrin Reply Decl. at ¶ 17; *Defendants' Post-Discovery Answer to Supplement* at 53-54; *see also* Bradlow Decl. at ¶ 20; Scott Decl. at ¶¶ 6(c), 16; Soman Decl. at ¶ 17.

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57. We find that the *Defendants'/OTX Survey* is flawed because there was no meaningful difference between the offers viewed by the Control Group and the Test Group.[277] The No-HD Offer (used for the Control Group) did not make clear that MSG HD and MSG+ HD were not offered.[278] For example, the reference to "tons of sports, including all 9 NY sports teams" appeared directly after a reference to "[m]ore than 335 all-digital channels, and over 70 in HD," which likely misled some respondents to believe that the No-HD Offer included MSG HD and MSG+ HD.[279] We do not find that the channel line-up provided with the offer was sufficient to mitigate this flaw.[280] We find it unlikely that respondents viewing the No-HD Offer would scour a list of hundreds of channels to determine which channels were included, especially considering that the first page of the offer specifically emphasized the amount of sports and HD channels available, thereby implying that MSG HD and MSG+ HD were included. The fact that the No-HD Offer mirrors Verizon's real-world advertisements, which do not emphasize its lack of MSG HD and MSG+ HD, does not alter our conclusion.[281] We would not expect Verizon to emphasize in an advertisement those networks that it cannot offer. The purpose of the study, however, was not to assess Verizon's advertisements but instead to determine specifically whether respondents were more likely to choose Verizon FiOS TV with MSG HD and MSG+ HD than without these networks.[282] Thus, providing respondents viewing the No-HD Offer with an adequate indication that MSG HD and MSG+ HD were not available was critical to the reliability of the study.[283] Given the misleading nature of the No HD Offer, however, it is entirely possible that some respondents assumed or concluded that MSG HD and MSG+ HD were available, thereby undermining the survey results.[284] Accordingly, we find the failure of the No-HD Offer to adequately indicate to respondents that MSG HD and MSG+ HD were not available – or at least to avoid implying that these channels were available – renders the *Defendants'/OTX Survey* unreliable.

58. We nevertheless note for future guidance that the *Defendants'/OTX Survey* presents a useful survey design for attempting to address the issue of whether withholding programming results in "significant hindrance." The survey appropriately sought to isolate the key variable at issue in this case – the impact of the lack of MSG HD and MSG+ HD on the willingness of consumers to choose Verizon. Absent the failure to adequately indicate to respondents viewing the No-HD Offer that MSG HD and

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[277] *See Verizon Response to Defendants' Supplement* at 4-5.

[278] *See Defendants'/OTX Survey*, Appendix at 3.

[279] *See id*.

[280] *See id*., Appendix at 4; Shifrin Reply Decl. at ¶ 23; *see also Verizon Response to Defendants' Supplement* at 5.

[281] *See* Shifrin Reply Decl. at ¶¶ 21, 23; *see also* Shifrin Decl. at ¶¶ 13-14; Bradlow Decl. at ¶ 20; Scott Decl. at ¶ 16; Soman Decl. at ¶ 17.

[282] To the extent Verizon's advertisements (as depicted in the No-HD Offer) lead real-world consumers to believe that Verizon offers MSG HD and MSG+ HD, such advertisements may entice consumers to consider switching to Verizon, but we find it unlikely that consumers choose a video provider based solely on an advertisement. Rather, we believe it likely that most consumers compare the offerings of different video providers and ensure that the video service provider they select has the channels and features they desire before switching to that provider. Thus, in order to determine whether respondents would be more likely to choose Verizon FiOS TV if it had MSG HD and MSG+ HD than if it did not, it was critical to provide respondents viewing the No-HD Offer with an adequate indication that MSG HD and MSG+ HD were not available.

[283] To be sure, as Defendants' expert notes, overemphasizing the lack of a network may bias the study. *See* Shifrin Reply Decl. at ¶ 20. The *Defendants'/OTX Study*, however, took this advice to an extreme by obscuring the absence of MSG HD and MSG+ HD in the No-HD Offer and even implying that the networks were offered.

[284] *See Verizon Response to Defendants' Supplement* at 4.

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MSG+ HD were not available, we would have proceeded to assess the results of the survey to determine whether Defendants had rebutted the presumption of "significant hindrance."

(c) Defendants' Win-Back Survey

59. The *Defendants' Win-Back Survey* was an online survey conducted in August 2010 of 734 customers who accepted a Cablevision "win back" offer and switched from Verizon to Cablevision between July 2009 and June 2010.[285] The survey asked the following open-ended, non-leading questions, to which respondents could answer with any reasons of their choosing:[286]

> "(1) Why did you decide to leave Verizon FiOS TV service and subscribe to iO TV? Please be as specific as possible and tell us all reasons that may have influenced your decision to leave Verizon FiOS TV service and choose iO TV service; and (2) What was the one main reason for your decision to leave Verizon FiOS TV service and choose iO TV service?"[287]

[REDACTED

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].[289] Defendants contend that this demonstrates that absence of MSG HD and MSG+ HD is not a significant factor in consumer choice of MVPD.[290]

60. We find this survey suffers from flaws and deficiencies that render it unreliable as support for Defendants' positions. As Verizon's expert explains, the study suffers from selection bias because the sample is made up of customers who (i) initially selected Verizon, thereby indicating that lack of MSG HD and MSG+ HD was not a significant factor to them, and (ii) find price to be an important consideration, as demonstrated by their decision to accept a discounted offering to switch back to Cablevision.[291] The sample is skewed towards individuals who would not be expected to value MSG HD and MSG+ HD highly (given their initial selection of Verizon) and who consider price a decisive factor (given their acceptance of the discounted offer). Moreover, the survey was conducted online and there is no indication of any probing performed to allow respondents to expand on their reasons for switching.[292] In addition, for the same reasons discussed above regarding the *Defendants'/Radius Survey*,

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[285] *See Defendants' Post-Discovery Answer to Supplement* at 54 n.191 and Exhibit G at 1.

[286] *See id*.

[287] *Id*. Defendants provided declarations from experts in survey and data analysis opining that the survey methodology was valid. *See* Bradlow Decl. at ¶ 19; Scott Decl. at ¶ 19; Soman Decl. at ¶ 18.

[288] *See Defendants' Post-Discovery Answer to Supplement* at 55 and Exhibit G.

[289] *See id.*

[290] *See id.* at 54. Defendants provided declarations from three experts in survey and data analysis opining that the results demonstrate that the unavailability of MSG HD and MSG+ HD did not play a significant role in driving the sampled customers back to Cablevision. *See* Bradlow Decl. at ¶¶ 18, 23; Scott Decl. at ¶¶ 20-21; Soman Decl. at ¶ 18.

[291] *See* Bazelon Decl. at ¶ 20.

[292] *See Defendants' Post-Discovery Answer to Supplement* at 54 n.191 and Exhibit G at 1.

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the *Defendants' Win-Back Survey* suffers from the following deficiencies: (i) the open-ended questioning technique creates difficulties in properly documenting the results; and (ii) the survey does not directly address the key issue of the impact of the lack of MSG HD and MSG+ HD on the willingness of consumers to choose Verizon.[293]

(b) Non-Survey Evidence

61. We also find that the non-survey evidence put forth by Defendants does not – individually or collectively – rebut the presumption of "significant hindrance." First, Defendants provide evidence purporting to demonstrate Verizon's general success in the New York DMA despite the lack of MSG HD and MSG+ HD.[294] This evidence includes the following: (i) the allegedly robust level of competition in the New York DMA;[295] (ii) statements Verizon has made regarding its success;[296] (iii) Verizon's decision to raise its rates;[297] (iv) **[REDACTED**

];[298] (v) Verizon's decision to expand and market its service in the New York DMA;[299] and (vi) the fact that Verizon's subscriber count has increased,[300] **[REDACTED**

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[293] *See supra* ¶ 55.

[294] Defendants also provide evidence regarding Verizon's investment in its video-capable network throughout the nation, its enterprise value, and its status as the seventh-largest MVPD in terms of subscribers nationwide. *See Defendants' Post-Discovery Answer to Supplement* at 3, 87-88; *see also Defendants' Answer* at 16-17 (¶ 10). This pertains to nationwide data and not the pertinent issue of the impact of Defendants' withholding on the willingness of consumers to choose Verizon in the New York and Buffalo DMAs.

[295] *See Defendants' Answer* at 16-18 (¶¶ 10-11), 43-44, 65-66; *Defendants' Post-Discovery Answer to Supplement* at 6, 35-36. Defendants' claim of robust competition is belied by the fact that incumbent cable market share in the New York DMA far exceeds the national average and that Cablevision has raised its rates in excess of inflation despite the number of competitors in the market. *See 2010 Order*, 25 FCC Rcd at 763, ¶ 27 n.97 (citing Nielsen data indicating that the share of MVPD subscribers held by "wired cable operators" in the New York DMA was 88.5 percent as of July 2009, while other data indicated that the market share held by cable operators nationwide was approximately 63.5 percent); *Defendants' Post-Discovery Answer to Supplement* at 41 (stating that Cablevision's 2010 rate increases averaged about 3 percent); U.S. Department of Labor, Bureau of Labor Statistics, News Release, *Consumer Price Index – December 2010*, at 1 (stating that during 2010, the Consumer Price Index increased by 1.5 percent for all items and by 0.8 percent for all items less food and energy). Cablevision does not contend that increases in costs, such as programming costs, are primarily responsible for its rate increases. While Defendants state that all of New York City and virtually all other franchise areas in New York and New Jersey where FiOS TV is offered are subject to "effective competition," the Commission has explained that the statutory "effective competition" test serves a limited and defined purpose and is not relevant in assessing "significant hindrance." *See 2010 Order*, 25 FCC Rcd at 763, ¶ 27 n.97; *see also Defendants' Post-Discovery Answer to Supplement* at 36.

[296] *See Defendants' Answer* at 43-44; *Defendants' Post-Discovery Answer to Supplement* at 4, 24-26; *Defendants' Post-Discovery Reply Brief* at 2; *see also* Bradlow Decl. at ¶ 21; Soman Decl. at ¶ 19.

[297] *See Defendants' Post-Discovery Answer to Supplement* at 40-41; *see also Defendants' Answer* at 8, 44; *Defendants' Feb. 25th Letter* at 7, Attachment at 4.

[298] *See Defendants' Post-Discovery Answer to Supplement* at 32-35; *Defendants' Post-Discovery Reply Brief* at 8-9.

[299] *See Defendants' Answer* at 17-18 (¶ 11); *Defendants' Post-Discovery Answer to Supplement* at 24, 41-42, 77 and Highly Confidential Appendix, Tabs 6, 21.

[300] *See Defendants' Answer* at 8, 17-18 (¶ 11), 43; *Defendants' Post-Discovery Answer to Supplement* at 26-27.

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].[302] Defendants' evidence purporting to demonstrate Verizon's general success is contradicted by other evidence in the record indicating that **[REDACTED**

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[301] *See Defendants' Post-Discovery Answer to Supplement* at 27-29, 77 and Highly Confidential Appendix, Tabs 3, 22. We note that Verizon entered the video market in New York approximately five years ago with zero video customers. *See supra* n.169. We do not find it dispositive that Verizon, as the new entrant in the video market, would experience an increase in subscribership **[REDACTED**

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[302] *See Defendants' Post-Discovery Answer to Supplement* at 27-28; *Defendants' Post-Discovery Reply Brief* at 4, 29. **[REDACTED**

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[303] *See Verizon Complaint* at ¶ 4; **[REDACTED**

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[304] Nielsen data indicates that, as of July 2010, the share of multichannel video subscribers held by "wired cable operators" in the New York DMA was 87.9 percent. *See* ADS and Wired-Cable Penetration by DMA: DMA Household Universe (July 2010) (data available at http://www.tvb.org/planning_buying/184839/4729/72555). **[REDACTED**

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].[305] In any event, we find that Defendants' evidence, standing alone, fails to rebut the presumption of "significant hindrance" because it fails to isolate how the absence of MSG HD and MSG+ HD has impacted Verizon's ability to provide a competing video service. As discussed above, the relevant inquiry in assessing "significant hindrance" is whether an MVPD has been hindered relative to its competitors and whether the hindrance is substantial enough to eliminate the MVPD as a competitive choice for a meaningful number of consumers.[306] Defendants' evidence purporting to demonstrate Verizon's general success in the New York DMA fails to isolate the impact of the lack of MSG HD and MSG+ HD on the willingness of consumers to choose Verizon. We note that a complainant attempting to establish that an "unfair act" has resulted in "significant hindrance" could not simply rely on evidence that its service is generally performing poorly. Rather, the complainant would need to provide evidence explaining how the "unfair act" has contributed to such performance. Likewise, in coming forward with evidence to rebut the presumption here, Defendants cannot simply rely on what they perceive to be Verizon's general success in the affected markets without isolating the impact of the key variable here – the presence or absence of MSG HD and MSG+ HD.[307]

62. Second, Defendants claim that MSG HD has lower ratings than many well-known SD channels, thereby undermining the claim that lack of these networks has a significant impact on Verizon.[308] Despite what they claim to be low ratings, however, Defendants continue to emphasize MSG

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]. Thus, while the D.C. Circuit has stated that evidence of robust competition in a market would provide "powerful evidence that [] terrestrial programming withholding has no significant impact on the delivery of satellite programming," the record here contains no such evidence. *Cablevision II*, 2011 WL 2277217, at *15.

[305] **[REDACTED**

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[306] *See supra* ¶¶ 43-44.

[307] While Defendants have attempted to provide such evidence with their surveys, we find that evidence flawed and deficient for the reasons discussed above. *See supra* ¶¶ 51-60.

[308] *See Defendants' Answer* at 41-42; Levine July 2009 Decl. at ¶ 14; *Defendants' Post-Discovery Answer to Supplement* at 37 and Declaration of Adam Levine (Oct. 12, 2010), at ¶ 6 (stating that MSG HD and MSG+ HD have lower ratings than SD networks such as A&E, ABC, Bravo, CBS, CNN, ESPN, Food Network, Fox, HGTV, Lifetime, MSG, MSG+, NBC, SNY, TNT, WE, USA, and YES) ("Levine Oct. 2010 Decl."); **[REDACTED**

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HD and MSG+ HD in advertisements and continue to withhold this programming from Verizon.[309] As with the survey results noted above, if Defendants believe that the ratings data mean that subscribers do not significantly value MSG HD and MSG+ HD, then Defendants have little to gain from advertising the availability of these networks and no reason to withhold these networks from Verizon and to forgo substantial licensing fees and advertising revenue in the process. Defendants do not attempt to explain this contradiction. Moreover, while the Commission has recognized the importance of ratings in assessing the value of programming to viewers, it has also recognized that ratings "are not a perfect predictor of consumer response to the withholding of a network."[310] Ratings do not purport to measure the intensity of some consumers' desire to view a network. While a network may have low ratings, it may also have no good substitutes, thus prompting those subscribers who value the network to refrain from subscribing to a video provider that does not carry the network. The Commission has recognized that RSNs such as MSG HD and MSG+ HD are examples of networks that have "no good substitutes," explaining that RSNs "typically purchase exclusive rights to show sporting events and sports fans believe that there is no good substitute for watching their local and/or favorite team play an important game."[311] Thus, allegedly low ratings notwithstanding, those subscribers who value MSG HD and MSG+ HD are likely reluctant to switch to an MVPD that does not offer these networks. In addition, ratings for HD networks are currently understated because not all households have HDTVs.[312] As the Commission recognized in the *2010 Order*, however, HD is growing in importance to consumers.[313] While the ratings for MSG HD and MSG+ HD may appear low at present, the ratings for MSG SD and MSG+ SD indicate that the programming provided by those channels is popular,[314] **[REDACTED**

].[315] In light of the growing significance of HD, we can expect ratings for the HD versions to continue to rise as more households obtain HDTV sets and subscribe to HD service offerings.[316]

63. Third, **[REDACTED**

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[309] *See supra* n.87 and ¶¶ 25-26.

[310] *2007 Order*, 22 FCC Rcd at 17817-18, ¶ 39.

[311] *News/Hughes Order*, 19 FCC Rcd at 535, ¶ 133; *see supra* n.219.

[312] *See supra* nn.226-227 (discussing percentage of households with HDTVs).

[313] *See supra* ¶ 4.

[314] *See Verizon Post-Discovery Reply Brief* at 23.

[315] *See supra* n.222.

[316] *See supra* ¶ 48.

[317] *See supra* n.305.

[318] *See Defendants' Post-Discovery Answer to Supplement* at 29-32; *Defendants' Post-Discovery Reply Brief* at 4, 27-29 and **[REDACTED**

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].[322] Defendants, however, have made no attempt to isolate the impact on Verizon's market penetration of the key factor at issue in this case – the presence or absence of MSG HD and MSG+ HD.[323] Defendants have stated that "regression analyses represent the Commission's preferred means of assessing the impact of the lack of access to RSN programming," yet Defendants have made no attempt to present such an analysis here using these market penetration data and other data obtained during the course of discovery.[324] While it may be difficult to perform a regression analysis,[325] to the extent a party relies on market share or penetration data in assessing "significant hindrance," such an analysis is critical to isolate the impact of the variable at issue and to provide meaning to raw market share or penetration figures. Accordingly, we find that these data standing alone do not specifically

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[319] *See Defendants' Post-Discovery Answer to Supplement* at 29; *see also* **[REDACTED**

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[320] *See Defendants' Post-Discovery Answer to Supplement* at 30-32; *Defendants' Post-Discovery Reply Brief* at 4, 27-29; **[REDACTED** **]**.

[321] *See Defendants' Post-Discovery Answer to Supplement* at 30-32; *Defendants' Post-Discovery Reply Brief* at 27-29; **[REDACTED** **]**.

[322] **[REDACTED**

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[323] Indeed, in response to data provided by Verizon showing that Cablevision's market penetration is higher than other incumbent cable operators in their respective service areas, Defendants stated that "[t]here are numerous factors that bear upon the question of why Cablevision's penetration in its service area is higher than other MSOs in their particular footprints," but that penetration figures alone do not "ascertain empirically whether the presence or absence of HD RSN programming can be said to account for these differences." *Defendants' Feb. 25th Letter* at 12; *id*. at 8 ("Verizon made no effort to offer any regression analysis that might demonstrate material differences in its penetration levels in the NYMA relative to other markets, taking into account other relevant factors that might explain such differences, arguably attributable to its lack of MSG HD and MSG+ HD."); *see also Defendants' Post-Discovery Reply Brief* at 25 **[REDACTED**

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[324] *Defendants' Feb. 25th Letter* at 8.

[325] *See Verizon Post-Discovery Opening Brief* at 17 n.52.

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address the key issue of how the absence of MSG HD and MSG+ HD has impacted Verizon's ability to provide a competing video service.[326]

64. Fourth, noting that Verizon bundles video with voice, data, and wireless service, Defendants argue that this increases the number of variables a consumer considers in choosing a provider and diminishes the relevance of any single variable, such as the availability of an HD RSN.[327] We find this argument unavailing. There is no empirical data in the record to support the claim that bundling of video, voice, data, and wireless service shrinks the importance of HD RSNs to consumers in selecting a video provider.[328] In fact, Defendants' decision to emphasize the availability of MSG HD and MSG+ HD in its advertising indicates Defendants' view that this programming is significant to consumers despite bundling.[329]

65. Fifth, Defendants argue that Verizon's claim that it is "significantly hindered" without MSG HD and MSG+ HD is belied by the fact that Verizon offers a large amount of sports and HD programming and has touted the availability of this programming in its advertising and other public statements.[330] The Commission has rejected this same argument previously.[331] As Defendants have argued, the salient issue here is not the amount of sports or HD programming Verizon offers in general; rather, the key issue is whether Verizon has been "significantly hindered" without MSG HD or MSG+ HD.[332] The availability of other sports programming or other HD programming does not address the key

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[326] **[REDACTED**

] raw penetration numbers are not dispositive absent a regression analysis isolating the magnitude of the impact of the lack of MSG HD and MSG+ HD.

[327] *See Defendants' Post-Discovery Answer to Supplement* at 61-65; *Owen Study*; *Defendants' Post-Discovery Reply Brief* at 9-10.

[328] *See Verizon Post-Discovery Reply Brief* at 22.

[329] *See supra* ¶ 25; *see also Verizon Post-Discovery Reply Brief* at 22-23.

[330] *See Defendants' Answer* at 18-19 (¶ 12), 39, 44-45; *Defendants' Feb. 25th Letter* at 7; *Defendants' Post-Discovery Answer to Supplement* at 4-6, 42-45; Bradlow Decl. at ¶¶ 12-13; *Defendants' Post-Discovery Reply Brief* at 9-10, 13.

[331] *See 2010 Order*, 25 FCC Rcd at 770, ¶ 34 ("The salient point for purposes of Section 628(b) is not the total number of programming networks available or the percentage of these networks that are vertically integrated with cable operators, but rather the popularity of the particular programming that is withheld and how the inability of competitive MVPDs to access that programming in a particular local market may impact their ability to provide a commercially attractive MVPD service.") (citing *2007 Order,* 22 FCC Rcd at 12140, ¶ 38); *see also 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*, Report and Order, 17 FCC Rcd 12124, 12139, ¶ 33 (2002) ("*2002 Order*") ("cable programming – be it news, drama, sports, music, or children's programming – is not akin to so many widgets").

[332] *See Defendants' Post-Discovery Answer to Supplement* at 17 ("The instant proceeding is not about whether HD in general is important to consumers or whether Verizon's HD offerings in the aggregate are viable. It is about (continued….)

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issue of how the absence of MSG HD and MSG+ HD has impacted Verizon's ability to provide a competing video service.

66. Sixth, Defendants provide evidence that **[REDACTED]**[333] and that Verizon's customer satisfaction rating is higher than other MVPDs despite Verizon's lack of MSG HD and MSG+ HD.[334] Both of these factors are germane to the issue of whether current Verizon subscribers are satisfied with Verizon's service, not whether potential subscribers, whom Verizon's business plan requires to be potentially available to be won-over,[335] would be unwilling to switch to Verizon given its lack of MSG HD and MSG+ HD. Current Verizon subscribers have chosen Verizon despite its lack of MSG HD and MSG+ HD, thus indicating that the absence of these networks was not a critical factor in their choice of video provider.

67. Seventh, Defendants argue that **[REDACTED]**.[336] We find this unavailing. The salient issue here is the significance of one particular factor – Verizon's inability to offer MSG HD and MSG+ HD. That there are other factors that may impact Verizon's performance even more does not mean that access to MSG HD and MSG+ HD is unnecessary for Verizon to compete effectively. In addition, **[REDACTED]**,[337] RSNs are non-replicable and have no close substitutes, thus eliminating Verizon's ability to match its competitors' offering of MSG HD and MSG+ HD.[338]

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whether the absence of MSG HD and MSG+ HD from the FiOS TV lineup significantly hinders Verizon from delivering satellite cable programming.").

333 **[REDACTED]**

334 *See Defendants' Post-Discovery Answer to Supplement* at 36-37; *Defendants' Post-Discovery Reply Brief* at 10.

335 *See Verizon Complaint* at ¶ 42 ("By withholding regional sports, Defendants are denying Verizon a necessary component to compete effectively for the many customers who demand their regional sports in HD, and denying those same consumers a meaningful competitive choice. Because these customers will not consider a competing service that does not include their regional sports in HD, Verizon cannot provide them the programming that makes up its service."); *see also Verizon Post-Discovery Reply Brief* at 16-17 (stating that while "Verizon has been able to attract some consumers who may find HD regional sports as optional rather than mandatory, Section 628(b) nonetheless condemns Defendants' unfair acts that deny a competitive choice to the many other consumers who do insist on such programming").

336 *See Defendants' Post-Discovery Answer to Supplement* at 5, 66-78 and Highly Confidential Appendix, Tabs 14-20; *Defendants' Post-Discovery Reply Brief* at 18-20; *see also Verizon Post-Discovery Opening Brief* at 10 and Appendix B (VZ-MSG-0003396, VZ-MSG-0003509, VZ-MSG-0003515).

337 **[REDACTED]**; *see Defendants' Post-Discovery Answer to Supplement* at 5, 66-78 and Highly Confidential Appendix, Tabs 14-20; *Defendants' Post-Discovery Reply Brief* at 18-20.

338 *See Verizon Post-Discovery Reply Brief* at 29-30; Bazelon Decl. at ¶ 8.

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(c) Conclusion

68. In the *2010 Order*, the Commission established a rebuttable presumption that Defendants' withholding of MSG HD and MSG+ HD from Verizon has the "effect" of "significantly hindering" Verizon from providing a competing video service, including "satellite cable programming and satellite broadcast programming," to subscribers and consumers in the New York and Buffalo DMAs. Verizon has submitted evidence buttressing the application of that presumption here. Defendants were required to come forward with evidence that rebuts or meets the presumption and Verizon's evidence. Defendants have put forth two types of evidence: survey evidence and non-survey evidence. With respect to the survey evidence, we conclude above that the results of these surveys contradict the stated purpose of Defendants' product differentiation strategy and, in any event, the surveys themselves contain material flaws and deficiencies that render them unreliable. With respect to the non-survey evidence, we conclude that this evidence fails to isolate the impact of the lack of MSG HD and MSG+ HD on the willingness of consumers to choose Verizon. Because the evidence here fails to rebut the presumption as supplemented by Verizon's evidence, we conclude that Defendants' withholding of MSG HD and MSG+ HD from Verizon has the "effect" of "significantly hindering" Verizon.[339]

3. Remedy

69. For the reasons set forth above, we conclude that Defendants have violated Section 628(b) of the Act and Section 76.1001(a) of the Commission's rules based on (i) their "unfair act" of withholding MSG HD and MSG+ HD from Verizon; and (ii) our finding that this "unfair act" has the "effect" of "significantly hindering" Verizon from providing a competing video service, including "satellite cable programming and satellite broadcast programming," to subscribers and consumers in the New York and Buffalo DMAs. The Commission's rules provide for broad remedies for violation of the program access rules, including "the establishment of prices, terms, and conditions for the sale of programming to the aggrieved [MVPD]."[340] We establish the following remedies for Defendants' violation of our rules.

70. First, we require MSG LP to enter into an agreement to license the MSG HD and MSG+ HD networks to Verizon on non-discriminatory rates, terms, and conditions within 30 days of the release of this *Order*. We believe that 30 days will provide a sufficient time for MSG LP and Verizon to reach an agreement on the terms of carriage while ensuring that Verizon receives prompt access to the programming. In addition, in light of Defendants' steadfast withholding of this programming from Verizon over the past several years, we are concerned that Defendants may use the negotiating process to further delay Verizon's access to this programming by insisting that Verizon accept discriminatory rates, terms, and conditions. To address this concern, we emphasize that MSG LP must offer to license MSG HD and MSG+ HD to Verizon on non-discriminatory rates, terms, and conditions and, assuming Verizon's acceptance, enter into such a contract with Verizon.[341]

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[339] We note that Verizon has submitted survey evidence in the record to demonstrate that Defendants' withholding of MSG HD and MSG+ HD has "significantly hindered" Verizon. *See supra* n.45. Other than our reliance on certain aspects of this survey to provide further support for the rebuttable presumption of "significant hindrance" for HD RSNs (*see supra* nn.224, 227), we need not consider this survey evidence here in light of Defendants' failure to rebut the presumption.

[340] The Commission's rules also provide for damages and specify further that the remedies set forth in the rules are "in addition to and not in lieu of the sanctions available under title V or any other provision of the Communications Act." 47 C.F.R. § 76.1003(h).

[341] If MSG LP insists on discriminatory rates, terms, and conditions, we will consider that a violation of this *Order* without requiring Verizon to demonstrate any further "significant hindrance."

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71. Second, as discussed above, Cablevision is a proper defendant to Count I because it is under common control with MSG LP and is deemed responsible (along with MSG LP) for the withholding of MSG HD and MSG+ HD from Verizon.[342] Accordingly, we require that Cablevision shall not prevent or otherwise impede MSG LP from entering into the license agreement described above and provide that Cablevision (along with MSG LP) shall be held responsible and subject to further remedies including, but not limited to, forfeitures and other penalties, if MSG LP fails to enter into such an agreement.

4. First Amendment

72. Our action here comports with the First Amendment. As an initial matter, to the extent Defendants' First Amendment claims amount to a facial challenge to the rules adopted in the *2010 Order*,[343] the D.C. Circuit has already rejected that challenge.[344] To the extent that Defendants are challenging our decision based on the facts of this case, we reject these claims.[345] As the D.C. Circuit and Commission have explained previously, the program access rules are subject to intermediate scrutiny, under which government action will be upheld if it "furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest."[346] We discuss below how our action here satisfies each of these three elements.

73. First, in *Time Warner*, the court found that the governmental interest Congress intended to serve in enacting the program access provisions was "the promotion of fair competition in the video marketplace," and that this interest was substantial.[347] Moreover, the court noted Congress's conclusion that "the benefits of these provisions – the increased speech that would result from fairer competition in the video programming marketplace – outweighed the disadvantages [resulting in] the possibility of reduced economic incentives to develop new programming."[348] We find that this governmental interest remains substantial today. In both the *2007 Order* and *2010 Order*, the Commission noted that (i) incumbent cable operators still have a dominant share of MVPD subscribers; (ii) there is evidence that cable prices have risen in excess of inflation; and (iii) incumbent cable operators still own significant programming.[349] Based on these factors, the Commission concluded that "regulations intended to

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[342] *See supra* ¶¶ 16-17.

[343] *See Defendants' Post-Discovery Answer to Supplement* at 104-109.

[344] *See Cablevision II*, 2011 WL 2277217, at *13-*15.

[345] *See Defendants' Post-Discovery Answer to Supplement* at 109-11.

[346] *Time Warner Entertainment Co. L.P. v. FCC*, 93 F.3d 957, 978 (D.C. Cir. 1996) (quoting *Turner Broadcasting System, Inc. v. FCC,* 512 U.S. 622, 662 (1994) (quoting *United States v. O'Brien,* 391 U.S. 367, 377 (1968))); *see also Cablevision II*, 2011 WL 2277217, at *13; *Cablevision I*, 597 F.3d at 1311; *2010 Order*, 25 FCC Rcd at 775, ¶ 41; *2007 Order*, 22 FCC Rcd at 17837-38, ¶ 65.

[347] *Time Warner*, 93 F.3d at 978. Moreover, one of Congress' express findings in enacting the 1992 Cable Act was that "[t]here is a substantial governmental and First Amendment interest in promoting a diversity of views provided through multiple technology media." 1992 Cable Act, § 2(a)(6).

[348] *Time Warner,* 93 F.3d at 979 (citing S. Rep. No. 102-92 (1991), at 26-28, *reprinted in* 1992 U.S.C.C.A.N. 1133, 1159-61).

[349] *See 2010 Order*, 25 FCC Rcd at 775-76, ¶ 42; *2007 Order*, 22 FCC Rcd at 17837-38, ¶ 65; *see also Cablevision II*, 2011 WL 2277217, at *14.

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promote competition in the video distribution market in accordance with the objectives of Congress are still warranted."[350] All of these same factors are present in this case.

74. Second, in *Time Warner*, the court held that the governmental objective served by the statutory program access provisions was unrelated to the suppression of free expression.[351] Similarly, our decision here to address Defendants' withholding of MSG HD and MSG+ HD from Verizon is not based on programming content but is instead intended to address the "significant hindrance" that results to Verizon's ability to provide a competing video service and the harm to competition in the video distribution market. Our action here responds to concerns about competition, not content. Thus, our action is content-neutral and unrelated to the suppression of free speech.

75. Third, any alleged restriction on speech resulting from our decision here "is no greater than is essential to the furtherance" of Congress's interest in promoting competition in the video distribution market.[352] The Commission has explained previously that withholding of cable-affiliated programming from rival MVPDs "may harm the ability of MVPDs to compete with incumbent cable operators, thereby resulting in less competition in the marketplace to the detriment of consumers."[353] We conclude here that Defendants' withholding of MSG HD and MSG+ HD from Verizon has resulted in such harm.[354] By adopting a remedy that requires Defendants to license these networks to Verizon on a non-discriminatory basis, our remedy is tailored to further the substantial governmental interest of promoting competition in the video distribution market for the benefit of consumers.

B. Count II – Unreasonable Refusal to Sell

76. In Count II, Verizon claims that because Defendants distribute the SD versions of MSG and MSG+ via satellite, the underlying programming content on those networks must be considered satellite-delivered regardless of whether a particular version of the programming content (such as the HD version) is distributed terrestrially.[355] Thus, Verizon contends that, although Defendants distribute MSG HD and MSG+ HD via terrestrial facilitates, the underlying programming content is the same as that displayed on MSG SD and MSG+ SD and therefore must be considered satellite-delivered programming to which the program access rules adopted pursuant to Section 628(c) apply.[356] Accordingly, Verizon claims that Defendants' refusal to sell MSG HD and MSG+ HD to Verizon violates the program access

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[350] *2010 Order*, 25 FCC Rcd at 775-76, ¶ 42; *see also 2007 Order*, 22 FCC Rcd at 17837-38, ¶ 65.

[351] *See Time Warner,* 93 F.3d at 978.

[352] *Id.*

[353] *2010 Order*, 25 FCC Rcd at 762-63, ¶ 26.

[354] *See supra* Section III.A.2.c.

[355] *See Verizon Complaint* at ¶¶ 46-51; *Verizon Reply* at 15-18; *Verizon Supplement* at 4. Verizon brought Count II pursuant to Section 628(c) as well as Section 628(b). *See Verizon Complaint* at ¶ 50; *Verizon Supplement* at 4. We interpret Verizon's Section 628(b) claim in Count II to be identical to Count I (*i.e.*, that Defendants have engaged in an "unfair act" of withholding MSG HD and MSG+ HD from Verizon that has the "purpose" or the "effect" of "significantly hindering" Verizon). Because we consider this claim in addressing Count I, we will not consider it again in addressing Count II. Accordingly, we strike Count II to the extent it is redundant with Count I.

[356] *See Verizon Complaint* at ¶¶ 48-49; *Verizon Reply* at 15-18.

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rules applicable to satellite-delivered programming under Section 628(c), specifically the prohibition on unreasonable non-price discrimination.[357]

77. We reject Verizon's arguments and deny Count II. Having found that the SD and HD versions of the same network have different technical characteristics and content and are not considered adequate substitutes by consumers, the Commission in the *2010 Order* concluded that it would treat the HD version of a particular network as a distinct service from the SD version of the same network.[358] The record here supports that finding, demonstrating that the SD and HD versions of MSG and MSG+ have different technical qualities as well as programming content.[359] Even Verizon now concedes that "[t]he record confirms that the HD format of MSG and MSG+ is distinct from the standard definition feed."[360] Because the Commission has already established that the HD and SD versions of a network are distinct, we decline to conclude that distributing the SD version of a network via satellite converts a terrestrially delivered HD version of the same network into satellite-delivered programming subject to Section 628(c).[361]

C. Count III – Evasion

78. In Count III, Verizon claims that Defendants have sought to evade the program access rules applicable to satellite-delivered programming under Section 628(c) by distributing MSG HD and MSG+ HD via terrestrial facilities.[362] In response, Defendants contend that they have legitimate business reasons for distributing MSG HD and MSG+ HD via terrestrial facilities.[363] They explain that Cablevision had an existing fiber network that was used to distribute MSG HD when it launched in 1998 and that satellite transponder costs would have been expensive and unnecessary.[364] Defendants state that they continue to believe that terrestrial distribution makes financial sense and note that switching now to satellite delivery would add up-front costs for additional satellite uplink equipment and recurring monthly costs for leasing transponder capacity.[365] Moreover, they explain that the broad geographic distribution provided by satellite technology is unnecessary for regional networks such as MSG HD and MSG+ HD.[366] Defendants also submit that terrestrial distribution has certain technical advantages over satellite distribution.[367]

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[357] *See Verizon Complaint* at ¶ 50. Unlike with terrestrially delivered programming, the rules applicable to satellite-delivered programming adopted pursuant to Section 628(c) do not require a showing of "significant hindrance." *See 1993 Order*, 8 FCC Rcd at 3377-78, ¶¶ 47-49.

[358] *See 2010 Order*, 25 FCC Rcd at 784-85, ¶¶ 54-55.

[359] *See Defendants' Answer* at 48-49, 59-60; Levine July 2009 Decl. at ¶ 13.

[360] *Verizon Post-Discovery Reply Brief* at 6.

[361] Because we deny Count II on other grounds, we will not consider Defendants' arguments regarding the impact on Count II of a release agreed to by the Parties in connection with a previous program access dispute. *See Defendants' Answer* at 49-50.

[362] *See Verizon Complaint* at ¶¶ 52-54.

[363] *See Defendants' Answer* at 13-14 (¶¶ 4-6), 50-52; Pontillo Decl. at ¶¶ 14-20.

[364] *See Defendants' Answer* at 51; Pontillo Decl. at ¶ 14.

[365] *See Defendants' Answer* at 13 (¶ 5), 51; Pontillo Decl. at ¶ 17.

[366] *See Defendants' Answer* at 14 (¶ 6); Pontillo Decl. at ¶ 17.

[367] *See Defendants' Answer* at 14 (¶ 6), 52; Pontillo Decl. at ¶¶ 18-19.

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79. The Bureau informed the Parties that discovery was necessary for the resolution of Count III.[368] Despite having the opportunity to obtain relevant information through discovery, however, Verizon has put forth no evidence that supports its allegations concerning Defendants' reasons for distributing MSG HD and MSG+ HD terrestrially. Based on this lack of evidence of evasion, we deny Count III.

D. Count IV – Undue or Improper Influence

80. In Count IV, Verizon claims that Cablevision is exercising undue or improper influence over MSG LP's decision to withhold MSG HD and MSG+ HD from Verizon, in violation of Section 628(c)(2)(A) of the Act and Section 76.1002(a) of the Commission's rules.[369] Verizon alleges only a violation of Section 628(c), which does not apply to the terrestrially delivered MSG HD and MSG+ HD.[370] Verizon thus appears to be arguing that MSG HD and MSG+ HD should be considered satellite-delivered because the underlying programming content is delivered via satellite on MSG SD and MSG+ SD,[371] an argument we reject for the same reasons discussed above in denying Count II.[372] Accordingly, we deny Count IV.

E. Count V – Discrimination

81. In Count V, Verizon alleges that Defendants violated Section 628(c) by refusing to sell the satellite-delivered MSG SD and MSG+ SD to Verizon in a package along with MSG HD and MSG+ HD.[373] Verizon alleges that Defendants have offered and sold a package of the SD and HD versions of MSG and MSG+ to other MVPDs.[374] Among other arguments, Defendants assert in response that MSG SD and MSG+ SD are licensed separately from MSG HD and MSG+ HD, thus precluding a claim that the Defendants have treated Verizon differently than other MVPDs.[375] The Bureau informed the Parties that discovery was necessary for the resolution of Count V.[376] Despite having the opportunity to obtain relevant information through discovery, however, Verizon has put forth no evidence that would undermine Defendants' assertions that MSG SD and MSG+ SD are licensed separately from MSG HD

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[368] *See Bureau Aug. 9th Letter* at 1.

[369] *See Verizon Complaint* at ¶¶ 55-58; *Verizon Supplement* at 4.

[370] *See Defendants' Answer* at 52-53. While the *Verizon Complaint* alleged a violation of only Section 628(c) in Count IV, the *Verizon Supplement* adds an additional claim that Defendants have violated a rule adopted pursuant to Section 628(b) in the *2010 Order* which prohibits undue or improper influence involving terrestrially delivered, cable-affiliated programming. *See Verizon Supplement* at 4. We deny Verizon's attempt to use its *Supplement* to convert into a Section 628(b) claim what was originally filed as solely a Section 628(c) claim.

[371] *See Verizon Reply* at 15-18.

[372] *See supra* ¶ 77.

[373] *See Verizon Complaint* at ¶¶ 59-63; *Verizon Reply* at 18-20 ("It is this discrimination in the terms of sale of the standard definition programming, which is unquestionably satellite-delivered, that forms the basis of Verizon's discrimination claim."); *Verizon Supplement* at 4. Verizon brought Count V pursuant to Section 628(c) as well as Section 628(b). *See Verizon Complaint* at ¶¶ 60, 63; *Verizon Supplement* at 4. We interpret Verizon's Section 628(b) claim in Count V to be identical to Count I (*i.e.*, that Defendants have engaged in an "unfair act" of withholding of MSG HD and MSG+ HD from Verizon that has the "purpose" or the "effect" of "significantly hindering" Verizon). Because we consider this claim in addressing Count I, we will not consider it again in addressing Count V. Accordingly, we strike Count V to the extent it is redundant with Count I.

[374] *See Verizon Complaint* at ¶ 61; *Verizon Reply* at 18-20.

[375] *See Defendants' Answer* at 59-60; Levine July 2009 Decl. at ¶¶ 4, 13.

[376] *See Bureau Aug. 9th Letter* at 1.

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and MSG+ HD. Based on this lack of evidence of discrimination in the sale of satellite-delivered programming, we deny Count V.[377]

IV. ORDERING CLAUSES

82. Accordingly, **IT IS ORDERED** that, pursuant to Sections 4(i), 4(j), and 628 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), and 548, and Section 76.1001 of the Commission's rules, 47 C.F.R. § 76.1001, Count I of the above-captioned complaint filed by Verizon Telephone Companies and Verizon Services Corporation against Madison Square Garden, L.P. and Cablevision Systems Corporation **IS GRANTED** to the extent indicated herein.

83. **IT IS FURTHER ORDERED** that Madison Square Garden, L.P. shall enter into an agreement to license the MSG HD and MSG+ HD networks to Verizon on non-discriminatory rates, terms, and conditions within 30 days of the release of this *Order* and in accordance with the terms of this *Order*.

84. **IT IS FURTHER ORDERED** that Cablevision Systems Corporation shall not prevent or otherwise impede Madison Square Garden, L.P. from entering into the license agreement with Verizon as required by this *Order*.

85. **IT IS FURTHER ORDERED** that both Cablevision Systems Corporation and Madison Square Garden, L.P. shall be held responsible and subject to further remedies including, but not limited to, forfeitures and other penalties, if Madison Square Garden, L.P. fails to enter into the license agreement with Verizon as required by this *Order*.

86. **IT IS FURTHER ORDERED** that Counts II, III, IV, and V of the above-captioned complaint filed by Verizon Telephone Companies and Verizon Services Corporation against Madison Square Garden, L.P. and Cablevision Systems Corporation **ARE HEREBY DENIED** for the reasons discussed herein.

87. **IT IS FURTHER ORDERED** that, pursuant to Section 76.1003(h)(1) of the Commission's rules, 47 C.F.R. § 76.1003(h)(1), this *Order* **SHALL BE EFFECTIVE** upon release.

88. This action is taken pursuant to authority delegated by Section 0.283 of the Commission's rules, 47 C.F.R. § 0.283.

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William T. Lake
Chief, Media Bureau

[377] Because we deny Count V on other grounds, we will not consider Defendants' arguments regarding the impact on Count V of a release agreed to by the Parties in connection with a previous program access dispute or whether Count V was filed in compliance with the program access statute of limitations. *See Defendants' Answer* at 61-65.