

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

In the Matter of)	
)	
DISH Network L.L.C.,)	
Complainant,)	
)	
v.)	File No. CSR-8367-P
)	
Madison Square Garden, Inc.,)	
Madison Square Garden, L.P., and)	
Cablevision Systems Corp.,)	
Defendants.)	

ORDER

Adopted: May 6, 2011

Released: May 6, 2011

By the Chief, Media Bureau:

I. INTRODUCTION

1. For the reasons discussed below, we dismiss Count III of the program access complaint filed by DISH Network L.L.C. (“DISH”) against Madison Square Garden, Inc. and Madison Square Garden L.P. (collectively, “MSG Inc.”) and Cablevision Systems Corp. (“Cablevision”) in which DISH alleges that Cablevision exercised undue or improper influence over MSG Inc.’s decisions regarding the licensing of the MSG and MSG+ regional sports networks (“RSNs”) to DISH.¹ Because Count III is the only count in the DISH complaint that implicates Cablevision, we also dismiss Cablevision as a defendant to the above-captioned complaint. In addition, with respect to Counts I and II of the DISH complaint, we direct DISH and MSG Inc. to file with the Commission (and serve on the other party) by May 16, 2011, either requests for discovery or a letter stating that the party elects not to request discovery.

II. BACKGROUND

2. On September 16, 2010, DISH filed a program access complaint against MSG Inc. and Cablevision.² DISH states that it carried the MSG and MSG+ RSNs in New York pursuant to an agreement that [REDACTED].³

3. In Count I, DISH claims that MSG Inc. during renewal negotiations insisted on tying [REDACTED].⁴ DISH claims that MSG Inc. [REDACTED].⁵ In response, MSG Inc. [REDACTED].⁶

¹ This *Order* is an interlocutory order and does not resolve DISH’s program access complaint. Reconsideration or review of interlocutory orders prior to a decision on the merits is limited by Section 76.10 of the Commission’s rules. See 47 C.F.R. § 76.10.

² See DISH Network L.L.C., Program Access Complaint, File No. CSR-8367-P (filed Sept. 16, 2010) (“DISH Complaint”).

³ See *id.* at ¶ 17.

⁴ See *id.* at ¶ 2; see also *id.* at ¶¶ 31-36 and Declaration of Carolyn Crawford (Sept. 15, 2010), at ¶ 2 (“Crawford Decl.”).

MSG Inc. also contends that DISH [REDACTED].⁷ Moreover, MSG Inc. contends that DISH [REDACTED]⁸ and that [REDACTED].⁹ DISH contends that MSG Inc.'s alleged tying violates Section 628(b) of the Communications Act of 1934, as amended (the "Act") and Section 76.1001(a) of the Commission's rules, which prohibit "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.¹⁰ DISH claims that MSG Inc.'s conduct amounts to an "unfair act" under Section 628(b), which MSG Inc. disputes.¹¹ DISH claims further that MSG Inc.'s conduct has the "purpose or effect" of "significantly hindering" DISH from providing satellite cable programming or satellite broadcast programming to subscribers or consumers.¹² DISH argues that MSG and MSG+ are "must have" RSNs that are particularly critical to DISH subscribers in New York and that it faces the prospect of losing a large number of consumers if it cannot offer these networks.¹³ DISH further claims that MSG Inc.'s [REDACTED].¹⁴ MSG Inc. denies that its conduct has the "purpose or effect" of "significantly hindering" DISH. MSG Inc. contends that [REDACTED];¹⁵ [REDACTED];¹⁶ [REDACTED];¹⁷ DISH does not carry another RSN in the New York market, thus demonstrating [REDACTED];¹⁸ and [REDACTED].¹⁹

4. In Count II, DISH alleges, based on information and belief, that MSG Inc. violated the discrimination provision in Section 628(c)(2)(B) of the Act and Section 76.1002(b) of the Commission's rules by refusing to provide DISH with access to MSG and MSG+ [REDACTED].²⁰ DISH claims that MSG Inc. [REDACTED].²¹ DISH also states that it [REDACTED].²² In response, MSG Inc. contends that it [REDACTED];²³ [REDACTED];²⁴ and it [REDACTED].²⁵ MSG Inc. also states that it [REDACTED].²⁶

⁵ See *id.* at ¶ 17 and Crawford Decl. at ¶ 2; DISH Network L.L.C., Reply, File No. CSR-8367-P (filed Nov. 2, 2010), at 6, 10 ("DISH Reply").

⁶ See Madison Square Garden, Inc. and Madison Square Garden L.P., Answer, File No. CSR-8367-P (filed Oct. 12, 2010), at 3, 33 ¶ 2 ("MSG Answer").

⁷ See *id.* at 12 and Declaration of Andrea Greenberg (Oct. 12, 2010), at ¶ 22 ("Greenberg Decl.").

⁸ See *id.* at 3, 6, 13 and Greenberg Decl. at ¶¶ 3, 22.

⁹ See *id.* at 3, 8, 10, 21 and Greenberg Decl. at ¶ 8.

¹⁰ See DISH Complaint at ¶¶ 31-36; DISH Reply at 4-12; *see also* 47 U.S.C. § 548(b); 47 C.F.R. § 76.1001(a). We use the term "unfair act" as shorthand for the phrase "unfair methods of competition or unfair or deceptive acts or practices" as stated in Section 628(b).

¹¹ See DISH Complaint at ¶ 32; DISH Reply at 5-10; *but see* MSG Answer at 17-20.

¹² See DISH Complaint at ¶ 32; DISH Reply at 4-12.

¹³ See DISH Complaint at ¶¶ 3, 5, 11, 33; DISH Reply at 11-12.

¹⁴ See DISH Complaint at ¶ 34 and Crawford Decl. at ¶¶ 17-18; DISH Reply at 11.

¹⁵ See MSG Answer at 4, 23.

¹⁶ See *id.* at 19, 23, 26.

¹⁷ See *id.* at 4, 19, 23, 25.

¹⁸ See *id.* at 3, 11, 25 and Greenberg Decl. at ¶ 15.

¹⁹ See *id.* at 3, 10-11, 25 and Greenberg Decl. at ¶ 15.

²⁰ See DISH Complaint at ¶¶ 4, 37-39; *see also* 47 U.S.C. § 548(c)(2)(B); 47 C.F.R. § 76.1002(b).

²¹ See DISH Complaint at ¶¶ 4, 39 and Crawford Decl. at ¶¶ 2, 11, 19; DISH Reply at 13.

²² See DISH Complaint at ¶ 39 n.22, Crawford Decl. at ¶ 11, and Exhibit B.

²³ See MSG Answer at 28 and Greenberg Decl. at ¶ 16.

5. In Count III, DISH alleges, based on information and belief, that Cablevision violated Section 628(c)(2)(A) of the Act and Section 76.1002(a) of the Commission's rules by exercising undue or improper influence over MSG Inc.'s decisions regarding the licensing of MSG and MSG+ to DISH.²⁷ DISH notes that MSG Inc. and Cablevision have a common controlling shareholder.²⁸ DISH contends that Cablevision or this common controlling shareholder have used their control over MSG Inc. to unduly or improperly influence MSG Inc. [REDACTED].²⁹ In response, MSG Inc. and Cablevision argue that DISH has not made any factual showing supporting this claim.³⁰

6. On April 13, 2011, Media Bureau staff held a status conference with DISH and MSG Inc. to discuss the status of the complaint. This interlocutory Order memorializes the issues resolved during this status conference.

III. DISCUSSION

A. Count III – Undue or Improper Influence

7. We dismiss Count III of DISH's complaint alleging that Cablevision exercised undue or improper influence over MSG Inc.'s decisions regarding the licensing of MSG and MSG+ to DISH. As an initial matter, while DISH's complaint contains a conclusory statement that Cablevision exercised undue or improper influence over MSG Inc., it fails to specify any facts supporting its claim against *Cablevision*. Instead, DISH's complaint theorizes about the financial incentive that the Dolan family (the common controlling shareholder of MSG Inc. and Cablevision) has to unduly or improperly influence MSG Inc.³¹ The Dolan family, however, is not named as a defendant to the complaint. Moreover, DISH's complaint fails to specify any facts indicating that the Dolan family or Cablevision had any involvement in MSG Inc.'s decisions regarding the licensing of MSG and MSG+ to DISH. DISH may not rely solely on general and conclusory allegations, and must provide evidence to support its claims. In the *1993 Program Access Order*, the Commission specifically stated that a complaint alleging undue or improper influence must be supported by documentary evidence of the alleged violation or by an affidavit signed by an officer of the complainant MVPD setting forth the basis for the allegation.³² DISH's complaint does not comply with this requirement because it does not provide documentary evidence of undue or improper influence nor does it provide an affidavit signed by an officer setting forth the basis for a claim of undue or improper influence. Accordingly, we dismiss Count III of DISH's program access complaint. In addition, because Count III is the only count in DISH's program access complaint that implicates Cablevision, we also dismiss Cablevision as a defendant to the above-captioned complaint.

²⁴ See *id.* at 27-28 and Greenberg Decl. at ¶¶ 35-39.

²⁵ See *id.* at 28; see also *id.* at 5, 26.

²⁶ See *id.* at 28 n.73.

²⁷ See DISH Complaint at ¶¶ 40-42; see also 47 U.S.C. § 548(c)(2)(A); 47 C.F.R. § 76.1002(a).

²⁸ See DISH Complaint at ¶ 42.

²⁹ See *id.*; DISH Reply at 13-14.

³⁰ See MSG Answer at 5-6, 29-30; Cablevision Systems Corp., Answer, File No. CSR-8367-P (filed Oct. 12, 2010), at 2-3.

³¹ See DISH Complaint at ¶ 42.

³² See *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, 3425, ¶ 148 (1993) ("1993 Program Access Order").

B. Count I – Tying/Count II – Discrimination

8. Counts I and II of DISH's program access complaint present factual issues that the Commission (or Media Bureau acting on delegated authority) must resolve in ruling on the merits of the complaint. As discussed below, before ruling on these factual issues, we direct DISH and MSG Inc. to each elect whether they intend to engage in discovery with respect to these Counts.

9. Before proceeding to resolve Count I, we direct the parties to elect whether they intend to engage in discovery on the factual issues raised in that count, including the issue of whether MSG Inc.'s conduct has the "purpose or effect" of "significantly hindering" DISH. As discussed above, the parties have submitted conflicting evidence on that issue.³³ The Commission has previously explained that the discovery process enables both the complainant and the defendant to obtain additional evidence pertaining to the issue of "significant hindrance" under Section 628(b).³⁴ Further factual development through discovery on the issue of whether MSG Inc.'s conduct has the "purpose or effect" of "significantly hindering" DISH may be useful in resolving Count I.

10. With respect to Count II, we find that DISH has established a *prima facie* case of program access discrimination pursuant to the procedures set forth in the Commission's rules and the *1993 Program Access Order*.³⁵ The Commission has explained that a complainant alleging program access discrimination must make a *prima facie* showing that there is a difference between the rates, terms, or conditions charged or offered to the complainant MVPD and its competitor.³⁶ To the extent that the complainant does not have documentary evidence of a differential, such as a rate card or the competitor's contract, the Commission's rules allow the complainant to allege discrimination based on information and belief if the complaint contains the following information.³⁷ First, the complaint must contain an affidavit signed by an officer of the complainant alleging that a differential in price, terms, or conditions exists.³⁸ DISH's complaint [REDACTED].³⁹ Second, the complaint must contain a description of the nature and extent (if known or reasonably estimated by the complainant) of the differential.⁴⁰ While DISH does not provide a description of the extent of any differential, we find that such a description could not be "known or reasonably estimated by" DISH [REDACTED]. Third, the complaint must contain a statement that the defendant refused to provide specific comparative information.⁴¹ DISH's complaint [REDACTED].⁴² MSG Inc. [REDACTED]. While MSG Inc. claims that it [REDACTED].⁴³ Because MSG Inc. [REDACTED].⁴⁴ Accordingly, DISH has established a *prima facie* case of discrimination

³³ See *supra* ¶ 3.

³⁴ See *Review of the Commission's Program Access Rules and Examination of Programming Tying Arrangements*, First Report and Order, 25 FCC Rcd 746, 785-86, ¶ 56 (2010), *appeal pending sub nom. Cablevision Sys. Corp. et al. v. FCC*, Nos. 10-1062, 10-1088 (D.C. Cir.).

³⁵ See 47 C.F.R. § 76.1003(c)(4); *1993 Program Access Order*, 8 FCC Rcd at 3416, ¶ 125.

³⁶ See *1993 Program Access Order*, 8 FCC Rcd at 3416, ¶ 125; see also 47 C.F.R. § 76.1003(c)(4).

³⁷ See 47 C.F.R. § 76.1003(c)(4); *1993 Program Access Order*, 8 FCC Rcd at 3417, ¶ 126.

³⁸ See 47 C.F.R. § 76.1003(c)(4); *1993 Program Access Order*, 8 FCC Rcd at 3417, ¶ 126.

³⁹ See DISH Complaint, Crawford Decl. at ¶¶ 11, 19 [REDACTED].

⁴⁰ See 47 C.F.R. § 76.1003(c)(4); *1993 Program Access Order*, 8 FCC Rcd at 3417, ¶ 126.

⁴¹ See 47 C.F.R. § 76.1003(c)(4); *1993 Program Access Order*, 8 FCC Rcd at 3417, ¶ 126.

⁴² See DISH Complaint at ¶ 39 n.22 and Crawford Decl. at ¶ 11; see also Exhibit B [REDACTED].

⁴³ See MSG Answer at 28; see also *id.* at 5, 26.

⁴⁴ See *1993 Program Access Order*, 8 FCC Rcd at 3417, ¶ 126.

based on information and belief. The parties may elect to engage in discovery with respect to the issues raised in Count II.⁴⁵

11. The Commission's program access rules provide for party-to-party discovery.⁴⁶ Before proceeding to rule on the factual issues raised in Counts I and II, we direct DISH and MSG Inc. to file with the Commission (and serve on the other party) by May 16, 2011, either requests for discovery or a letter stating that the party elects not to request discovery. To the extent a party files a discovery request, and the responding party opposes one or more of these discovery requests, the responding party shall file with the Commission (and serve on the party requesting discovery) an opposition by May 26, 2011. To the extent an opposition is filed, the party filing the discovery request may file with the Commission (and serve on the responding party) a reply by May 31, 2011. To the extent there are any disputes pertaining to discovery, we direct the parties to meet and confer to resolve those disputes. We also direct the parties to file with the Commission a joint filing by June 10, 2011, containing the following information: (i) a statement that the parties have reached an agreement as to what information will be exchanged; (ii) an explanation of what information will be exchanged and by when; (iii) proposed dates for supplemental briefs and reply briefs that will allow DISH and MSG Inc. to each address information exchanged during discovery; and (iv) to the extent any discovery disputes remain, a description of those disputes and what discovery issues DISH and MSG Inc. are asking the Media Bureau to resolve.

IV. ORDERING CLAUSES

12. 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 Sections 76.1000-76.1003 of the Commission's rules, 47 C.F.R. §§ 76.1000-76.1003, Count III of DISH's above-captioned program access complaint is **DISMISSED**.

13. **IT IS FURTHER ORDERED** that Cablevision Systems Corp. is **DISMISSED** as a defendant to DISH's above-captioned program access complaint.

14. **IT IS FURTHER ORDERED** that, with respect to Counts I and II of DISH's above-captioned program access complaint, DISH and MSG Inc. **SHALL FILE** with the Commission (and serve on the other party) by **MAY 16, 2011**, either requests for discovery or a letter stating that the party elects not to request discovery.

⁴⁵ See *id.* at 3416, ¶ 125 ("When filing a complaint, the burden is on the complainant MVPD to make a *prima facie* showing that there is a difference between the terms, conditions or rates charged (or offered) to the complainant and its competitor by a satellite broadcast programming vendor or a vertically integrated satellite cable programming vendor that meets our attribution test."); *id.* at 3364, ¶ 15 ("When evaluating a discrimination complaint, we will initially focus on the difference in price paid by (or offered to) the complainant as compared to that paid by (or offered to) a competing distributor. The [defendant] program vendor will then have to justify the difference using the statutory factors set forth in Section 628(c)(2)(B). . . . In all cases, the [defendant] programmer will bear the burden to establish that the price differential is adequately explained by the statutory factors."); see also 47 U.S.C. § 548(c)(2)(B); 47 C.F.R. § 76.1002(b)(1)-(4).

⁴⁶ See 47 C.F.R. § 76.1003(j).

15. This action is taken pursuant to authority delegated by Section 0.283 of the Commission's rules.⁴⁷

FEDERAL COMMUNICATIONS COMMISSION

William T. Lake
Chief, Media Bureau

⁴⁷ 47 C.F.R. § 0.283.