In the
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

IN RE: CABLEVISION SYSTEMS CORP. AND MSG HOLDINGS, L.P.,	)	
CABLEVISION SYSTEMS CORP. AND MSG HOLDINGS, L.P.,	)	
PETITIONERS	)	**No. 11-4104**
V.	)	
FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA,	)	
RESPONDENTS	)	

OPPOSITION OF FEDERAL COMMUNICATIONS COMMISSION TO EMERGENCY REQUEST FOR A STAY PURSUANT TO THE ALL WRITS ACT

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INTRODUCTION

Section 628 of the Communications Act prohibits "unfair acts" by cable operators and affiliated programmers that have the "purpose or effect" of "hinder[ing] significantly or prevent[ing]" their competitors from providing "satellite cable programming" to consumers. In an order issued last year, the Federal Communications Commission (FCC or Commission) recognized the unique characteristics of regional sports programming – in particular the fact that it is highly valued by consumers and is non-replicable because a competing video provider cannot provide the same programming. Based on those characteristics, the FCC established a rebuttable presumption that withholding of regional sports programming, including the high definition version of such programming, has the anticompetitive purpose or effect prohibited by Section 628(b). That ruling was recently upheld by the D. C. Circuit.

In this case, the FCC's Media Bureau (the Bureau) issued two orders in September 2011, finding that cable television operator Cablevision and its affiliated programmer Madison Square Garden LP (MSG) had violated Section 628(b) of the Communications Act. The violations arose from MSG's withholding of "must have" high definition sports programming from Verizon and AT&T, competitors of Cablevision that provide video services to consumers in New York City, Buffalo, and Connecticut. The withheld programming included games of the New York Knicks, New York Rangers, Buffalo Sabres, New York Islanders, and New

Jersey Devils, the exclusive rights to which MSG owns in the relevant areas.

After engaging in an extensive analysis of a voluminous record, the Bureau concluded that Cablevision and MSG had failed to produce evidence that rebutted the presumption that MSG's withholding of this programming from Verizon and AT&T violated the statutory prohibition. Additional evidence – including statements of Cablevision's own senior executives – confirmed that withholding the highly coveted high definition feeds of "must have" sports programming had the anticompetitive purpose or effect prohibited by Section 628 of the Communications Act. The Bureau therefore ordered MSG to enter into agreements to license the programming to Verizon and AT&T on non-discriminatory rates, terms and conditions.

Cablevision and MSG have filed with the FCC an administrative appeal from the Bureau orders for review by the full Commission. In the meantime, the companies ask this Court to stay the Bureau's Orders under the All Writs Act, an "extraordinary remedy that may be invoked only if the statutorily prescribed remedy is clearly inadequate." *Reynolds Metals Co. v. FERC*, 777 F.2d 760, 762 (D.C. Cir. 1985) (citation and internal quotation marks omitted).

Such extraordinary relief is not warranted here. Cablevision and MSG are unable to establish that they are likely to ultimately succeed on the merits of their challenges to the Bureau's orders. Moreover, the crux of any stay request, particularly one seeking drastic relief under the All Writs Act, is irreparable injury.

Cablevision's cursory discussion of the irreparable injury it allegedly will suffer if it is required to license the withheld programming to Verizon and AT&T while the agency considers its administrative appeal falls far short of the stringent standards for obtaining stays of administrative action. The Orders do not require Cablevision to withhold any programming from its subscribers, and there is no basis for the claim that the petitioners will suffer irreparable loss to their reputation, or unrecoupable economic injury in the interim. On the other hand, the Orders promote the public interest in promoting fair competition in the video programming distribution market. A stay is unwarranted.

BACKGROUND

1. The Regulatory Setting

In the Cable Television Consumer Protection and Competition Act of 1992 (1992 Cable Act), Pub. L. No. 102–385, 106 Stat. 1460, Congress found that the "cable industry [had] become vertically integrated" and that "[v]ertically integrated program suppliers … have the incentive and ability to favor their affiliated cable operators over nonaffiliated cable operators and programming distributors using other technologies." 1992 Cable Act § 2(a)(5), 106 Stat. 1460–61 (codified at 47 U.S.C. § 521). To address these concerns about competition and barriers to new entry in the video distribution market, Congress added Section 628 to the Communications Act, 47 U.S.C. § 548. *See Cablevision Sys. Corp. v. FCC*, 649 F.3d 695, 709 (D.C. Cir. 2011) ("*Cablevision II*") ("through section 628 'Congress intended to encourage entry and facilitate competition in the video distribution market by existing and potential competitors to traditional cable systems by, among other things, making available to those entities the programming they need to compete in [that] … market.'") (citation omitted).

Crafted in "broad and sweeping terms," *Nat'l Cable & Telecomm. Ass'n v. FCC*, 567 F.3d 659, 664 (D.C. Cir. 2009), with the express "purpose of … increasing competition and diversity in the multichannel video programming market," 47 U.S.C. § 548(a), Section 628(b) prohibits cable operators and cable-owned networks from engaging 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(b).

Under Section 628, the FCC "has long imposed program access requirements on vertically integrated cable companies in order to limit their ability to withhold satellite programming from competitors." *Cablevision II*, 649 F.3d at 699. In 2010, the FCC adopted rules to close a loophole in its "program access" rules under Section 628. 47 C.F.R. § 76.1001; *Review of the Commission's Program Access Rules and Examination of Programming Tying Arrangements*, 25 FCC Rcd 746 (2010) ("*2010 Order*"). Before the Commission's action, the agency's rules implementing Section 628 applied only to *satellite-delivered* programming – that is, programming delivered by satellite from programmers (such as AMC network) to multichannel video programming distributors or "MVPDs" (such as petitioner Cablevision). As the FCC's Chairman observed in a statement accompanying the *2010 Order* (*id.* at 820), that limitation created a "terrestrial loophole" in the program access rules that gave "free rein to cable operators to lock up local sports events and other popular programming and withhold them from rival providers" where that programming was *terrestrially delivered* – *i.e.*, transmitted to cable operators by fiber-optic lines.

The rules adopted in the *2010 Order* closed the terrestrial loophole by establishing procedures under which the Commission will determine, on a case-by-case basis, whether various practices – including the withholding of terrestrially delivered programming by networks affiliated with cable operators – have the purpose or effect of significantly hindering or preventing competition in violation of Section 628(b). The rules place on the complainant the burden of demonstrating in each case that the defendant cable operator or affiliated network has engaged in an "unfair act" that 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). *2010 Order*, 25 FCC Rcd at 780-82, ¶¶ 50-51.[1]

The Commission recognized that some terrestrially delivered programming, including Regional Sports Networks ("RSNs"), may be non-replicable and sufficiently valuable to consumers that an "unfair act" regarding this programming presumptively – but not conclusively – has the proscribed purpose or effect set forth in Section 628(b). *2010 Order*, 25 FCC Rcd at 750, ¶8 and 782-83, ¶ 52. The Commission explained that RSN programming, in particular, is typically "must have" programming for which there are "no good substitutes." *Id.* ¶ 52 (citing *Adelphia Communications Corp.*, 21 FCC Rcd 8203, 8258 ¶ 124, 8287 ¶ 189 (2006)).[2] Accordingly, rather than requiring litigants and the Commission staff to undertake needlessly repetitive examinations of the same precedent and evidence regarding RSNs, the Commission's rules allow complainants to invoke a

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[1] The Commission pointed to a statistical analysis showing that Comcast's withholding of a terrestrially delivered affiliated Regional Sports Network from competing Direct Broadcast Satellite (DBS) operators caused the percentage of television households subscribing to DBS to decrease by some 40 percent in Philadelphia and 33 percent in San Diego. *Id.* at ¶ 32. Thus, by withholding terrestrially delivered programming, the evidence showed, cable operators could cause consumers to decide not to subscribe to competing MVPDs, thereby hindering the ability of those MVPDs to provide satellite-delivered programming.

[2] As the Commission's prior orders recognized, "'the basis for the lack of adequate substitutes for regional sports programming lies in the unique nature of its core component: 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.'" *Adelphia Order*, 21 FCC Rcd at 8258-59, ¶ 124 (citation omitted).

rebuttable presumption that an "unfair act" involving a terrestrially delivered, cable-affiliated RSN has the purpose or effect set forth in Section 628(b). *Id.* at 782-83, ¶ 52. 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. *Id.*; *see also id.* at 750, ¶ 8.

Recognizing the skyrocketing demand for High Definition (HD) programming, the unique characteristics of that medium and the substantial evidence showing that consumers regard Standard Definition (SD) programming as an inadequate substitute for the HD experience (particularly in the context of sports programming), the Commission also adopted a rebuttable presumption that withholding of an HD feed of RSN programming will be presumed to cause significant hindrance even if an SD feed of the network is made available to competitors. *2010 Order*, 25 FCC Rcd at 784-85, ¶¶ 54-55.

Cablevision sought judicial review of the *2010 Order*. On June 10, 2011, the D.C. Circuit affirmed all but one aspect of that order. *Cablevision II*, 649 F.3d 695. The court first rejected Cablevision's argument that the Commission lacks authority to regulate the withholding of terrestrially delivered, cable-affiliated programming. *Id.* at 705-09. The court was unpersuaded by Cablevision's argument that "'to provide'" programming pursuant to Section 628(b) simply "mean[s] 'to furnish' or 'to make available,'" *id.* at 705, and that the "commercial attractiveness" of the withheld programming therefore "has nothing to do with whether the [competing MVPD] can provide satellite programming," *id.* at 708.

The court explained:

> When a vertically integrated cable programmer limits 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. To use a concrete example, we doubt that Philadelphia baseball fans would switch from cable to an alternative MVPD if doing so would mean they could no longer watch Roy Halladay, Cliff Lee, Roy Oswalt, and Cole Hamels take the mound, even if they thought the alternative MVPD was otherwise superior in terms of price and quality.

Id.

The court also upheld under the First Amendment and the Administrative Procedure Act the Commission's decision to establish a rebuttable presumption of "significant hindrance" for "unfair acts" involving RSNs' "must have" programming (in both HD and SD format). The court concluded that in the *2010 Order*, the Commission had "advanced compelling reasons to believe that withholding RSN programming is, given its desirability and non-replicability, uniquely likely to significantly impact the MVPD market." 649 F.3d at 717. The court also found reasonable the Commission's decision to extend the rebuttable presumption to RSN HD programming. Noting the record evidence cited in the *2010 Order* of "cable operators' marketing campaigns touting the carriage of HD programming, and record comments describing the rapidly growing demand for HD televisions," the court concluded that "the Commission's determination that the impact of RSN

SD programming withholding will extend to RSN HD programming 'is a predictive judgment that [the agency] is entitled to make and to which we defer.'" *Cablevision II*, 649 F.3d at 717 (citation omitted).

The D.C. Circuit further rejected as "meritless" Cablevision's argument that "the Commission's presumptions are impermissibly content-based and therefore deserve strict scrutiny" under the First Amendment. *Cablevision II*, 649 F.3d at 717. "Given record evidence demonstrating the significant impact of RSN programming withholding," the court explained, "the Commission's presumptions represent a narrowly tailored effort to further the important governmental interest of increasing competition in video programming." *Id.* at 718. Thus, the court concluded that the presumptions satisfy intermediate First Amendment scrutiny.

The court explained that by "imposing liability only when complainants demonstrate that a company's unfair act has 'the purpose or effect' of 'hinder[ing] significantly or … prevent[ing]' the provision of satellite programming, 47 U.S.C. § 548(b), the Commission's terrestrial programming rules specifically target activities where the governmental interest is greatest." 649 F.3d at 712-13. The court concluded that the Commission had "satisfied its constitutional burden" in light of the substantial record showing, for example, that cable operators continue to control two-thirds of the market nationally and more in some local markets, that the largest cable operators are still substantially vertically integrated with the most popular cable program networks and with nearly half of all regional sports networks, and that cable prices have risen in excess of inflation. *Id.* at 712.

The court also rejected as unripe Cablevision's argument that given the asserted level of competition in the New York City market in which it operates, the rules adopted in the *2010 Order* were unconstitutional as applied. The court held that "because petitioners' as-applied challenge depends on facts about the New York City market that are absent from the administrative record, we believe that further factual development in a ruling by the Commission with respect to a specific complaint would significantly advance our ability to deal with the legal issues presented." *Cablevision II*, 649 F.3d at 713. "[I]f petitioners are correct about the state of competition in the market they serve," the court added, they would have "powerful evidence" in a subsequent enforcement proceeding "that their terrestrial programming withholding has no significant impact on the delivery of satellite programming." *Id.* (emphasis added).

The D.C. Circuit vacated and remanded only one part of the *2010 Order* – the FCC's decision to treat certain acts involving terrestrially delivered, cable-affiliated programming as categorically "unfair." *See Cablevision II*, 649 F.3d at 720-22. The Court took "no position on … how the Commission should define the inherently ambiguous statutory term 'unfair'" and indicated that it was open to the Commission to "assess[] fairness on a case-by-case basis." *Id.* at 722-23.

2. The Verizon and AT&T Complaints

In July and August 2009, respectively, Verizon and AT&T filed complaints with the FCC claiming that Cablevision Systems Corp. (a vertically integrated cable operator) and its affiliate MSG LP (collectively Cablevision) had refused to provide them with access to the terrestrially delivered MSG HD and MSG+ HD networks in violation of the FCC's program access rules. *See Verizon Tel. Cos.*, DA 11-1594 ¶ 7 (MB Sept. 22, 2011) ("*Verizon Order*"). MSG owns exclusive rights to produce and exhibit within a specific geographic region the games of the New York Knicks, New York Rangers and Buffalo Sabres. *Id.* ¶ 6. MSG+ owns exclusive rights to produce and exhibit within a different region the games of the New York Islanders and New Jersey Devils, and also televises local and national college football and basketball games. *Id.* 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. *Id.*[3]

Verizon, an MVPD that provides "FiOS" video service, alleged that Cablevision had refused to provide Verizon with access to the MSG HD and MSG+ HD networks in the New York City and Buffalo metropolitan areas beginning in 2006,

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[3] It is undisputed that MSG LP is "affiliated" with Cablevision for purposes of the Commission's attribution rules because Cablevision and MSG LP share a common controlling shareholder (the Dolan family) and thus are under common control. *See id.*

when the cable operator allowed Verizon to carry the SD versions of those networks. Cablevision admitted it had denied Verizon access to HD feeds of MSG HD and MSG+ HDon any terms. It is also undisputed that Cablevision has licensed those networks to many of Verizon's competitors in the New York City area (including Cablevision, Time Warner, Comcast, DIRECTV, and RCN) and in the Buffalo area (Time Warner, Comcast, and DIRECTV). *Verizon Order,* ¶¶ 6-9.

AT&T, an MVPD that provides "U-verse TV service," filed a similar complaint alleging that Cablevision has refused to provide it with access to the MSG HD and MSG+ HD networks in Connecticut. *AT&T Serv., Inc.*, DA 11-1595 ¶¶ 6-9 (MB Sept. 22, 2011)("*AT&T Order*").[4] Cablevision has admitted those allegations.

3. The Media Bureau Rulings

The Chief of the FCC's Media Bureau, pursuant to delegated authority, found that Cablevision violated Section 628(b) of the Communications Act by withholding the MSG HD and MSG+ HD RSNs from Verizon and AT&T. *Verizon Tel. Cos.*, DA 11-1594 (MB Sept. 22, 2011); *AT&T Serv., Inc.*, DA 11-

[4] Both Verizon's and AT&T's complaints preceded the FCC's adoption of the new rules in the *2010 Order*. The Commission stated when it adopted that order that a pending complaint could continue to be processed under the prior rules or that the complaint could be supplemented to take advantage of the new rules. *2010 Order*, 25 FCC Rcd at 789 ¶ 64 & n.237. Both Verizon and AT&T supplemented their complaints. *See Verizon Order* ¶ 11; *AT&T Order* ¶ 12.

1595 (MB Sept. 22, 2011).[5]

The Bureau determined that Cablevision's withholding of MSG HD and MSG+ HD from Verizon and AT&T was an "unfair act" under Section 628(b). *Verizon Order* ¶¶ 18-41; *AT&T Order* ¶¶ 19-42. It concluded that "the anticompetitive effects of Defendants' withholding of MSG HD and MSG+ HD from Verizon outweigh any precompetitive benefits." *Verizon Order* ¶ 41; *see also AT&T Order* ¶ 42. Based on Commission precedent applying the "significant hindrance" standard in Section 628(b), as well as the rebuttable presumption of "significant hindrance" for HD RSNs established by the Commission in the *2010 Order*, the Bureau also concluded that Cablevision's withholding of MSG HD and MSG+ HD from Verizon had the "effect" of "significantly hindering" Verizon and AT&T from providing competing video services, including "satellite cable programming and satellite broadcast programming," to subscribers and consumers in their respective service areas in New York City, Buffalo, and Connecticut. *Verizon Order* ¶¶ 42-68; *AT&T Order* ¶¶ 43-69.

Noting that the D. C. Circuit in *Cablevision II* had upheld the rebuttable presumption of "significant hindrance" for HD RSNs, the Bureau found that "the

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[5] The Bureau released both public and non-public versions of the orders. Petitioners have submitted to the Court only the public version, from which confidential and financial information submitted by the parties under seal pursuant to a protective order was redacted. We have submitted to the Court under seal the non-public versions of the orders.

record here provides further support for the Commission's conclusion regarding the growing significance of HD RSNs to consumers." *Verizon Order* ¶ 47; *AT&T Order* ¶¶ 48. The Bureau pointed to evidence showing the rapidly increasing sales of HDTV sets (with a significant number of consumers in New York City and Buffalo owning HDTV sets) and that purchasers of HDTV sets highly value HD programming. *Id.* The Bureau also noted that homes with HD service are more likely to watch sports programming than homes without HD service, that MVPDs have made large investments to support the growing demand for HD, and that consumers do not consider the SD version of a channel to be an adequate substitute for the HD version. *Id.* The Bureau concluded that Verizon and AT&T had submitted evidence "buttressing the application of that presumption here" and that Cablevision had failed to come forward with evidence that rebutted the presumption. *Verizon Order* ¶ 68; *AT&T Order* ¶ 69. Thus, the Bureau found that Cablevision's withholding of the MSG HD and MSG+ HD programming "has the 'effect' of 'significantly hindering'" Verizon and AT&T in their ability to provide video programming, including satellite-delivered programming. *Id.*

As a remedy, the Bureau ordered MSG to enter into agreements to license MSG HD and MSG+ HD to Verizon and AT&T on non-discriminatory rates, terms, and conditions within 30 days of the release of the *Orders,* and prohibited Cablevision from preventing or otherwise impeding MSG from entering into those agreements. *Verizon Order* ¶¶ 83, 84; *AT&T Order* ¶¶ 84, 85.

4. The Bureau's Interim Stay Pending Administrative Review

On September 28, 2011, Cablevision filed with the FCC petitions for administrative stays of both Bureau orders, as well as applications for review of those orders by the full Commission. *See* 47 U.S.C. § 155(c)(4). On October 11, 2011, the Bureau stayed each Order "to the extent it would otherwise require MSG to make the programming available to Verizon [and AT&T] on or before November 14, 2011." *Verizon Tel. Cos.*, DA 11-1694 (MB Oct. 11, 2011) (*Verizon Interim Stay Order*); *AT&T Serv., Inc.*, DA 11-1695 (MB Oct. 11, 2011) (*AT&T Interim Stay Order*). The Bureau explained that it had taken "this action on [its] own motion to provide the Commission an opportunity to consider the Defendants' [Stay] *Petition* and Application for Review," and that it "express[ed] no view whether Defendants' showings in the *Petition* satisfy any of the requirements for a stay." *Verizon Interim Stay Order*, ¶ 1 & n.7; *AT&T Interim Stay Order*, ¶ 1 & n.7.

ARGUMENT

THE STAY REQUEST SHOULD BE DENIED

Cablevision seeks a stay of the Media Bureau orders under the All Writs Act. "[R]elief under the All Writs Act, 28 U.S.C. § 1651 (1982), is an 'extraordinary remedy that may be invoked only if the statutorily prescribed remedy' is clearly inadequate." *Reynolds Metals Co. v. FERC*, 777 F.2d 760, 762 (D.C. Cir.

1985). In addition, a party seeking a stay must satisfy the traditional requirements for such relief: (1) it will likely prevail on the merits; (2) it will suffer irreparable harm unless a stay is granted; (3) other interested parties will not be harmed if a stay is granted; and (4) a stay will serve the public interest. *Thapa v. Gonzales*, 460 F.3d 323, 334 (2d Cir. 2006).

A "stay is an 'intrusion into the ordinary processes of administration and judicial review,' … and accordingly 'is not a matter of right, even if irreparable injury might otherwise result to the appellant.'" *Nken v. Holder*, 129 S. Ct. 1749, 1757 (2009) (citation omitted). Moreover, where, as here, an applicant seeks a stay "that will affect government action taken in the public interest pursuant to a statutory or regulatory scheme, the injunction should be granted only if the moving party meets the more rigorous likelihood-of-success standard" rather than simply demonstrating that it has presented a serious question on the merits that provides a fair ground for litigation. *Metro Taxicab Bd. of Trade v. City of New York*, 615 F.3d 152, 156 (2d Cir. 2010), *cert. denied*, 131 S.Ct. 1569 (2011).

Cablevision has failed to satisfy these stringent standards.

A. Cablevision Is Not Entitled To An Automatic Stay.

Cablevision first contends that under Section 5(c) of the Communications Act, 47 U.S.C. § 155(c), it is entitled to an "automatic stay" of the Bureau orders pending the Commission's action on its applications for review. This argument is foreclosed by the Commission's longstanding interpretation of the Communications Act – an interpretation that has been upheld by the D.C. Circuit.

Section 5(c)(3) of the Act provides that Bureau orders issued on delegated authority have "the same force and effect" as orders of the Commission "unless reviewed as provided in paragraph (4) of this subsection." 47 U.S.C. § 155(c)(3). In turn, paragraph (4), 47 U.S.C. § 155(c)(4), sets forth the review process under which the Commission can review decisions of its subordinate bureaus.

As the Commission explained in *Continental Cablevision of New Hampshire, Inc.*, 96 F.C.C. 2d 926, 928 (1984), the language of Section 5(c)(3) refers to "a proceeding which has been reviewed, not to the mere filing of an application for review." Accordingly, although the Commission "may in its discretion" issue a stay until review is completed, the agency's rules have long provided that actions taken on delegated authority are otherwise "effective upon release of the document containing the full text of such action." 47 C.F.R. § 1.102(b). *See* 28 Fed. Reg. 12415 (1963).

"'Congress' use of a verb tense is significant in construing statutes.'" *Barscz v. Director, Office of Workers' Comp. Programs and Elec. Boat Corp.*, 486 F.3d 744, 750 (2d Cir. 2007) (quoting *United States v. Wilson*, 503 U.S. 329, 333 (1992)). Here, the tense of the word "reviewed" in Section 5(c)(3) (rather than "under review" or "being reviewed," *see* Stay Request at 13) indicates a completed review process – not the mere commencement of that process. More than twenty-five years ago, the D.C. Circuit upheld the Commission's interpretation of section

5(c)(3) as a "permissible construction of the statute," and saw "no reason to set aside a practice" that had at that time "been in effect for more than a quarter of a century." *Committee to Save WEAM v. FCC*, 808 F.2d 113, 119 (D.C. Cir. 1986).

In an attempt to bolster its counter-textual reading of Section 5(c)(3), Cablevision invokes the general principles governing the finality of administrative decisions under Section 10(c) of the Administrative Procedure Act, 5 U.S.C. § 704. Stay Request at 11. This argument fares no better. By its terms, the statutory language on which Cablevision relies does not apply where (as here) a statute expressly requires a litigant who seeks judicial review of an intermediate agency order to exhaust its administrative remedies before the agency.[6] Furthermore, the Communications Act expressly provides that orders of the FCC's bureaus that are issued on delegated authority have the "same force and effect" as orders of the Commission unless the bureau orders have been "reviewed" by the Commission. 47 U.S.C. § 155(c)(3).

It is hardly error, much less cause for "mandamus review" (Stay Request at

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[6] *See* 5 U.S.C. § 704 ("*Except as otherwise expressly required by statute*, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.") (emphasis added). *See also* 47 U.S.C. § 155(c)(7) (provision of the Communications Act expressly requiring exhaustion of administrative remedies via filing of application for review before seeking judicial review).

14), for the agency to adhere to its interpretation of a statute when that interpretation has long been embodied in rules that have been upheld on judicial review. Cablevision's mere filing of an application for review therefore did not automatically stay the Bureau's orders.[7]

B. Cablevision Is Not Entitled To A Discretionary Stay.

In the alternative, Cablevision seeks to obtain a discretionary stay from this Court. Stay Request at 15-30. As we explain, it fails to show that it satisfies the standards for such relief.

1. Cablevision Fails to Show That It Is Likely To Succeed On The Merits.

a. Significant Hindrance. Cablevision acknowledges that the D.C. Circuit concluded "that there might be cases where particular terrestrial programming would be so important to the MVPD's ability to market its satellite programming that, without the terrestrial service, it would be significantly hindered in its ability to furnish satellite service to willing consumers." Stay Request at 17. Cablevision nonetheless claims that it was error for the Commission to find that video programming distributors are significantly hindered by the withholding of HD RSN programming without "examin[ing] the impact" on the ability of Verizon and AT&T "to stay in the market." *Id.* at 18.

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[7] Needless to say, if the Commission acts on the pending applications for review by November 14, *see* p. 15, *supra*, Cablevision's automatic stay argument – and indeed its entire All Writs Act request – will be rendered moot.

But as the Bureau explained, the Commission concluded in the *2010 Order* that the "significant hindrance" standard in Section 628(b) does not require an MVPD to prove it is "incapable of competing in the marketplace" or is "poised to exit the market." *Verizon Order* ¶ 44; *AT&T Order* ¶ 45. The "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." *Verizon Order* ¶ 44; *AT&T Order* ¶ 45. Contrary to Cablevision's contention (Stay Request at 18), the Bureau's approach was entirely proper: if a competing MVPD like Verizon or AT&T is eliminated as a competitive choice for a meaningful number of consumers, it obviously will be hindered in its ability to provide satellite-delivered programming to those consumers. And the Bureau reasonably determined that when there is such an impact on a "meaningful number" of consumers, the hindrance is "significant."

Moreover, the D. C. Circuit previously rejected Cablevision's argument that the "commercial attractiveness [of withheld programming] has nothing to do with whether the MVPD can provide satellite programming," *Cablevision II*, 649 F.3d at 708. The court recognized that the "lack of commercial attractiveness" due to withholding of "RSNs that are both nonreplicable and highly coveted" *can* "significantly hinder" a competing MVPD by, for instance, hindering its ability to compete for baseball fans. *Id.* at 708. As the Bureau's Orders noted, the court "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.'" *Verizon Order* ¶ 45 (quoting *Cablevision II*, 649 F.3d at 708); *AT&T Order* ¶ 46 (same). Thus, it was fully consistent with *Cablevision II* for the Bureau to ask whether a "meaningful number" of consumers would eliminate Verizon or AT&T as a "competitive choice" for their video programming (including satellite-delivered programming) because of the inability of those MVPDs to offer "must have" RSN programming. To the extent that Cablevision argues to the contrary, it is impermissibly seeking to relitigate issues that the D.C. Circuit conclusively resolved against it. *See NML Capital Ltd. v. Banco Central de la Republica Argentina*, 652 F.3d 172, 185 (2d Cir. 2011) ("Issue preclusion bars successive litigation of an issue of fact or law actually litigated and resolved in a valid court determination essential to a prior judgment.").

Finally, Cablevision claims that "there is not a shred of evidence in the record suggesting that Verizon and AT&T's inability to offer high-definition versions of the professional games shown on the MSG channels impedes their ability to provide satellite programming to their customers." Stay Request at 19. That is plainly incorrect. In addition to Cablevision's failure to submit probative evidence that overcame the rebuttable presumption upheld by the D.C. Circuit in

Cablevision II, there was ample record evidence "that RSNs are highly valued by consumers and important for competition." *Verizon Order* ¶ 47; *AT&T Order* ¶ 48 (citing record materials). Indeed, the Bureau added: "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. 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." *Verizon Order* ¶ 53; *AT&T Order* ¶ 54. By emphasizing the allegedly irreparable harm that it will suffer if it is unable to rely on its product differentiation strategy (based on withholding of HD feeds of MSG and MSG+), *see* Stay Request at 29, Cablevision only reinforces the Bureau's point.

The Bureau also identified record evidence that withholding the HD channels "was intended to provide Cablevision with a competitive advantage over Verizon in the video distribution market." *Verizon Order* ¶ 25; *AT&T Order* ¶ 26. The Bureau noted, for instance, that Cablevision's Chief Operating Officer had "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." *Verizon Order* ¶ 25 & n.127; *see also AT&T Order* ¶ 26. The Bureau also cited "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." *Id.* In short, Cablevision's own words belie its contention that withholding of HD RSN programming does not materially hinder its competitors.

b. The Presumption. Cablevision next claims that the Bureau held it to an impermissibly high standard in rebutting the presumption and shifted the burden to it to disprove liability. Stay Request at 19-21. In fact, the Bureau made clear that its rebuttable presumption did not shift the burden of proof to defendants, but simply required defendants to come forward with evidence to rebut or meet the presumption. *Verizon Order* ¶ 50; *AT&T Order* ¶ 51. The Bureau reasonably concluded that Cablevision failed to meet that burden.

Cablevision protests (Stay Request at 21) that the Commission was "fundamentally mistaken" because it treated the presumption as "evidence itself." Stay Request at 21 (quoting *Pizzarello v. United States*, 408 F.2d 579, 583 (2d Cir. 1978)). But, as the D. C. Circuit held in *Cablevision II*, the presumption was itself based on substantial record evidence. *See* 649 F.3d at 716-17. Moreover, the case upon which Cablevision relies does not suggest that a presumption "disappears entirely" (Stay Request at 20) whenever a litigant proffers what it characterizes as "non-trivial evidence" (*id.*). Rather, the case makes clear that the limited effect of a presumption results from the fact that it "disappears upon the introduction of evidence to overcome it." *Pizzarello*, 408 F.2d at 583 (citing cases). What the Bureau found here, and explained in detail, was that Cablevision's evidence did *not* overcome the presumption. *Verizon Order* ¶¶ 46-68; *AT&T Order* ¶¶ 47-69; *see also* p. 25, *infra* (noting flaws in Cablevision's surveys).

c. _*The Record Evidence*_. Cablevision's next argument reduces to the contention that the Bureau abused its discretion by incorrectly weighing the record evidence. *See* Stay Request at 22 (asserting that "no rational decisionmaker could find significant hindrance on the record below"). That claim is meritless. As the Bureau comprehensively detailed, there was ample evidentiary support for the conclusion that Cablevision had engaged in unfair acts that had the effect of significantly hindering Verizon and AT&T from providing competing video services. *See Verizon Order* ¶¶ 18-68; *AT&T Order* ¶¶ 19-69.

Cablevision contends that there was a "wealth of evidence" to the contrary, including the general popularity of Verizon's and AT&T's video offerings. Stay Request at 22. As the Bureau explained, however, any "general success" that Verizon or AT&T may enjoy in the market for video programming does not "isolat[e] the impact of the key variable here – the presence or absence of MSG HD and MSG+ HD." *Verizon Order* ¶ 61; *AT&T Order* ¶ 62. In other words, the key question was whether Verizon's and AT&T's lack of access to the withheld HD programming significantly hindered them from obtaining more customers (and thus delivering satellite programming to those customers), notwithstanding their "general success" in the video distribution market.

Cablevision complains that the Bureau should not have found defects in the survey evidence it submitted (Stay Request at 24), but the Bureau explained at length why it found each survey deficient. *Verizon Order* ¶¶ 54-60; *AT&T Order* ¶¶ 55-61. The Radius Survey did "not directly address the key issue of the impact of the lack of MSG and MSG+ HD on the willingness of consumers to choose" Verizon or AT&T, *Verizon Order* ¶ 55; *AT&T Order* ¶ 56; the OTX Survey did not make clear to respondents that the HD programming was not offered by Cablevision's competitors, *Verizon Order* ¶ 57; *AT&T Order* ¶ 58; and the Win-Back Survey suffered from a fatal "selection bias," as it singled out respondents who were more likely to consider HD programming an insignificant factor and price an important consideration, *Verizon Order* ¶ 60; *AT&T Order* ¶ 61. Finally, as the Bureau observed, "[i]f consumers attach no significance to the availability of MSG HD and MSG + HD, as Defendants' surveys purport[ed] to show, then it is hard to explain why Defendants stress the importance of that HD programming in their public statements and their advertising," and Cablevision's steadfast withholding of those networks from Verizon and AT&T would make little sense. *Verizon Order* ¶ 53; *AT&T Order* ¶ 54.

This record evidence more than meets the highly deferential substantial-evidence standard of review that would apply if the Court were reviewing the merits of this case. *See, e.g., Cellular Phone Task Force v. FCC*, 205 F.3d 82, 89

(2d Cir. 2000). Cablevision therefore does not come close to establishing that it is likely to succeed on its abuse of discretion argument.

d. The Unfairness Requirement.

Cablevision also claims that the Bureau "provided no coherent explanation" of why the withholding of HD programming in this case was "unfair." Stay Request at 25-26. On the contrary, the Bureau "conclude[d] that the anticompetitive harms of Defendants' withholding in the video distribution market outweigh any procompetitive benefits in the video programming market." *Verizon Order* ¶ 27; *AT&T Order* ¶ 28. To be sure, it did not "preclude the possibility" that the facts in a different case "may reveal that the procompetitive benefits of product differentiation outweigh the anticompetitive harms of withholding," but the record in this case established the contrary. The Bureau also emphasized that "the key distinction here is that the product differentiation strategy involves non-replicable and popular RSN programming." *Verizon Order* ¶ 29; *AT&T Order* ¶ 30. As the Bureau explained, "the content withheld from Verizon is non-replicable and popular RSN programming that 'no amount of investment can duplicate.'" *Verizon Order* ¶ 38; *AT&T Order* ¶ 39.

Cablevision contends that "the same can be said of all product differentiation." Stay Request at 25. Not so. As the D. C. Circuit recognized, "[w]hen a vertically integrated cable programmer limits 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 – competing MVPDs will find themselves at a serious disadvantage when trying to attract customers away from the incumbent cable company." *Cablevision II*, 649 F.3d at 708. Thus, while "only Chrysler has the Hemi engine," Stay Request at 25, other companies can manufacture automobiles with similar characteristics. But if a sports fan wants to see the New York Rangers or the Buffalo Sabres in HD, "no amount of invest-ment" will suffice to meet the demand if the programming is withheld. *2010 Order*, 25 FCC Rcd at 750 ¶ 9. *Accord Cablevision II*, 649 F.3d at 708. The Bureau reasonably concluded that the unique and non-replicable nature of this programming made the anticompetitive harms of Cablevision's withholding outweigh any procompetitive benefits.

e. The First Amendment. Finally, Cablevision reiterates its oft-repeated (and oft-rejected) claim that the Bureau's orders violate the First Amendment. Stay Request at 26-27. It is well settled that Section 628 of the Communications Act and the Commission's implementing rules do not facially violate the First Amendment. *See Cablevision II*, 649 F.3d at 711-13 (discussing prior precedent). With respect to Cablevision's as-applied First Amendment challenge to the Com-mission's program access rules, the D.C. Circuit explained in rejecting that chal-lenge as unripe: "*if* petitioners are correct about the state of competition in the market they serve, then, should they face an enforcement proceeding, they will have powerful evidence that their terrestrial programming withholding has no significant impact on the delivery of satellite programming." *Cablevision II*, 649 F.3d at 713 (emphasis added). But as shown above, ample record evidence supported the Bureau's conclusion that Cablevision was *not* correct about the state of competition in the markets it serves. The Bureau therefore properly rejected the company's constitutional claim.

2. Cablevision Has Failed To Demonstrate That It Will Suffer Irreparable Injury Absent A Stay.

"'[A] finding of irreparable harm [is] an absolute requirement for an award of injunctive relief.'" *Stewart v. U.S.I.N.S.*, 762 F.2d 193, 199 (2d Cir. 1985). (quoting *Triebwasser & Katz v. American Tel. & Tel. Co.*, 535 F.2d 1356, 1359 (2d Cir. 1976)). Such harm must be "neither remote nor speculative, but actual and imminent," and of a type that "cannot be remedied if a court waits until the end of trial to resolve the harm." *Grand River Enter. Six Nations, Ltd. v. Pryor,* 481 F.3d 60, 66 (2d Cir. 2007) (internal quotation marks omitted); *see also Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985 (injury must be "both certain and great … actual and not theoretical"). Cablevision's vague and unsubstantiated claims do not come close to meeting these stringent standards.

The orders do not require Cablevision to withdraw any programming from its subscribers. Instead, they require that the HD RSN programming provided by MSG and MSG+ be licensed to Verizon and AT&T as it has been licensed to a number of other MVPDs. It is difficult to see how the orders could cause Cablevision to suffer any "loss of reputation" or incur a "loss of customers" or "loss of revenue" that could not be recouped if it ultimately prevailed on judicial review. *See* Stay Request at 29. In any event, Cablevision's unsupported assertions that it will have to "scrap some advertising" and its speculation that it will lose some customers – an undefined number that Cablevision itself describes as "competitively insignificant" (Stay Request at 29) – fail to meet the demanding standard necessary to stay an agency order pending judicial review.

3. A Stay Would Harm Other Parties and The Public Interest.

In each of the orders at issue here, the Media Bureau found that Cablevision's withholding of this programming constituted an "unfair act" within the meaning of the Communications Act and the FCC's rules. It also found that those unfair acts had "the 'effect' of 'significantly hindering'" Verizon and AT&T "from providing a competing video service … to subscribers and consumers." *Verizon Order* ¶ 1; *AT&T Order* ¶ 1. A stay of the Bureau's orders would harm Verizon and AT&T by permitting that significant hindrance to remain in place.

A stay of the Bureau's orders would not be in the public interest. Congress enacted Section 628 to "promote the public interest, convenience, and necessity by increasing competition and diversity in the multichannel video programming market." 47 U.S.C. § 548(a). In this case, the Bureau found that Cablevision's withholding of MSG HD and MSG+ HD from Verizon and AT&T harms consumers by limiting video competition for RSN programming in the New York

City, Buffalo, and Connecticut markets. *See, e.g., Verizon Order* ¶¶ 28, 40; *AT&T Order* ¶¶ 29, 41. A stay would only perpetuate that harm.

CONCLUSION

For the foregoing reasons, Cablevision's emergency request for stay should be denied.

Respectfully submitted,

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11-4104

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Cablevision Systems Corporation and MSG Holdings, L.P., Petitioner
v.

Federal Communications Commission and the United States of America, Respondents.

CERTIFICATE OF SERVICE

I, C. Grey Pash, Jr., hereby certify that on October 20, 2011, I electronically filed the foregoing Opposition of Federal Communications Commission to Emergency Request for a Stay Pursuant to the All Writs Act with the Clerk of the Court for the United States Court of Appeals for the Second Circuit by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

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