

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)

MEMORANDUM OPINION AND ORDER

Adopted: November 9, 2011

Released: November 10, 2011

By the Commission:

I. INTRODUCTION

1. By this *Memorandum Opinion and Order* (“*MO&O*”), we deny an Application for Review filed by MSG Holdings, L.P. (“MSG”; formerly Madison Square Garden, L.P.) and Cablevision Systems Corporation (“Cablevision”) (MSG and Cablevision together, the “Defendants”)¹ of the Media Bureau’s (“Bureau”) *Order* released September 22, 2011.² The *Order* found that Defendants violated Section 628(b) of the Communications Act of 1934, as amended (the “Act”),³ and Section 76.1001(a) of the Commission’s rules⁴ by withholding the high definition (“HD”) versions of the MSG and MSG+ Regional Sports Networks (“RSNs”) from Verizon Telephone Companies and Verizon Services Corporation (collectively, “Verizon”) in the New York and Buffalo Designated Market Areas (“DMAs”). The *Order* required MSG to enter into an agreement to license such programming to Verizon within 30 days of the release of the *Order*.⁵ For the reasons discussed below, we deny the *Application for Review* and affirm the Bureau’s *Order*. In order to provide sufficient time for compliance, we grant MSG 15 days after release of this *MO&O* to provide the subject programming to Verizon, unless the parties’ agreement provides MSG a longer time period, in which case the agreed upon time period shall govern. We also dismiss as moot Defendants’ *Petition for Stay* of the Bureau’s *Order*.⁶

¹ See MSG Holdings, L.P. and Cablevision Systems Corporation, Application for Review, File No. CSR-8185-P (filed Sept. 28, 2011) (“Application for Review”).

² See *Verizon Tel. Cos. et al.*, Order, DA 11-1594 (MB Sept. 22, 2011) (“Order”).

³ See 47 U.S.C. § 548(b).

⁴ See 47 C.F.R. § 76.1001(a).

⁵ See Order at ¶¶ 70, 83.

⁶ See MSG Holdings, L.P. and Cablevision Systems Corporation, Petition for Stay, File No. CSR-8185-P (filed Sept. 28, 2011) (“Petition for Stay”).

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II. BACKGROUND

2. Sections 628(b), 628(c)(1), and 628(d) of the Act 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.”⁷ In July 2009, Verizon filed a complaint alleging that Defendants’ withholding of the HD versions of the MSG and MSG+ RSNs from Verizon in the New York and Buffalo DMAs violated these provisions.⁸

3. In January 2010, while Verizon’s complaint was pending, the Commission issued a decision in a rulemaking proceeding (the “2010 Order”) interpreting the Commission’s statutory authority to address “unfair acts” involving terrestrially delivered, cable-affiliated networks pursuant to Section 628(b).⁹ Relying on extensive evidence, including empirical studies, the Commission (i) established a rebuttable presumption that an “unfair act” involving a terrestrially delivered, cable-affiliated RSN has the purpose or effect of “significant hindrance” set forth in Section 628(b);¹⁰ and (ii) due to the growing significance of HD programming to consumers and the inability of standard definition (“SD”) programming to serve as an adequate substitute, concluded that it would analyze 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 of “significant hindrance” set forth in Section 628(b).¹¹ Thus, the Commission concluded that in cases involving an RSN, withholding the HD version is rebuttably presumed to cause “significant hindrance” even if an SD version of the network is made available to competitors.¹² In June 2011, in response to a challenge from the same Defendants here, the United States Court of Appeals for the District of Columbia Circuit (“D.C. Circuit”) upheld the Commission’s decision in substantial part, including the adoption of a rebuttable presumption of “significant hindrance” resulting from the withholding of HD RSNs, such as MSG HD and MSG+ HD.¹³

4. After conducting a proceeding that lasted over two years and involved over a thousand pages of pleadings and studies, extensive discovery, multiple rounds of briefings, and multiple conferences with the parties, the Bureau adopted a 61-page decision that applied the Commission’s interpretation of Section 628(b) to the facts of this case and found that Defendants had violated this provision by withholding

⁷ 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).

⁸ See Verizon Telephone Companies *et al.*, Program Access Complaint, File No. CSR-8185-P (filed July 7, 2009) (“Verizon Complaint”).

⁹ See *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*, 649 F.3d 695 (D.C. Cir. 2011) (“Cablevision II”).

¹⁰ See *id.* at 750, ¶ 8 and 782-83, ¶ 52.

¹¹ See *id.* at 750-51, ¶ 9 and 784-85, ¶¶ 54-55.

¹² See *id.* at 750-51, ¶ 9 and 785, ¶ 55.

¹³ See *Cablevision II*, 649 F.3d at 716-18.

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the MSG HD and MSG+ HD RSNs from Verizon.¹⁴ As a remedy for the violation of Section 628(b), the Bureau ordered MSG to enter into an agreement to license MSG HD and MSG+ HD to Verizon on non-discriminatory rates, terms, and conditions within 30 days of the release of the *Order* (*i.e.*, by October 22, 2011) (the “agreement deadline”) and ordered that Cablevision shall not prevent or otherwise impede MSG from entering into this agreement.¹⁵

5. On September 28, 2011, Defendants filed with the Commission their *Application for Review* as well as a *Petition for Stay* of the *Order*.¹⁶ On October 11, 2011, the Bureau released a decision retaining the October 22, 2011 agreement deadline but staying the *Order* to the extent it would otherwise require MSG to make MSG HD and MSG+ HD programming available to Verizon on or before November 14, 2011.¹⁷ The Bureau explained that it took this action on its own motion to provide the Commission an opportunity to consider Defendants’ *Petition for Stay* and *Application for Review*.¹⁸

6. In their *Application for Review*, Defendants raise eight challenges to the Bureau’s *Order*. First, Defendants claim that the Bureau interpreted the undefined term “significant hindrance” as used in Section 628(b) in a way that is inconsistent with Commission and court precedent.¹⁹ Second, Defendants claim that the Bureau unlawfully relied on the rebuttable presumption of “significant hindrance” pertaining to HD RSNs adopted in the 2010 *Order* and subsequently upheld by the D.C. Circuit.²⁰ Third, Defendants claim that the Bureau arbitrarily and capriciously disregarded the results of surveys which Defendants claim demonstrate that MSG HD and MSG+ HD are not factors driving consumer choice of MVPD.²¹ Fourth, Defendants claim that the Bureau held Defendants to an impermissibly high standard in rebutting the presumption and shifted the burden to Defendants to disprove liability.²² Fifth, Defendants claim that the Bureau unlawfully disregarded substantial evidence pertaining to Defendants’ attempt to rebut the presumption.²³ Sixth, Defendants assert that the *Order* was not the product of reasoned decisionmaking.²⁴ Seventh, Defendants claim that the Bureau erred by finding Defendants’ withholding

¹⁴ See generally *Order*.

¹⁵ See *id.* at ¶¶ 69-71.

¹⁶ See generally *Application for Review*; *Petition for Stay*. Verizon filed Oppositions to the *Stay Petition* and to the *Application for Review*. See Verizon, Opposition to Motion for Stay, File No. CSR-8185-P (filed Oct. 5, 2011); Verizon, Opposition to Application for Review, File No. CSR-8185-P (filed Oct. 13, 2011) (“*Verizon Opposition*”). Defendants filed a Reply to Verizon’s Opposition to the *Application for Review*. See MSG Holdings, L.P. and Cablevision Systems Corporation, Reply, File No. CSR-8185-P (filed Oct. 24, 2011) (“*Defendants’ Reply*”).

¹⁷ See *Verizon Tel. Cos. et al.*, Order, DA 11-1695 (MB Oct. 11, 2011).

¹⁸ See *id.* at ¶ 1.

¹⁹ See *Application for Review* at 3-6.

²⁰ See *id.* at 6-8.

²¹ See *id.* at 8-14.

²² See *id.* at 14-16.

²³ See *id.* at 16-19.

²⁴ See *id.* at 19-21.

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to be “unfair.”²⁵ Eighth, Defendants claim that the *Order* violates Defendants’ First Amendment rights.²⁶ Defendants ask the Commission to reverse and vacate the *Order*.²⁷

III. DISCUSSION

7. The Bureau’s *Order* found that Defendants violated Section 628(b) of the Act by withholding from Verizon the HD versions of approximately half the hometown major league sports teams in the New York and Buffalo DMAs.²⁸ The Bureau found that Defendants’ withholding of the HD versions of this non-replicable and “must have” local sports programming was an “unfair act” because, on balance, the anticompetitive effects of the withholding outweighed any procompetitive benefits.²⁹ The Bureau also found that Defendants had failed to produce evidence that rebutted the presumption that the withholding of this “must have” local sports programming “significantly hindered” Verizon.³⁰ Additional evidence supported the Bureau’s finding, including (i) statements from Cablevision executives stressing the competitive significance of MSG HD and MSG+ HD, including their belief that Verizon’s inability to offer these networks was one factor that would not only impede Verizon from obtaining new subscribers, but also cause Verizon to lose subscribers it had already gained;³¹ (ii) Cablevision’s advertisements emphasizing Verizon’s inability to offer MSG HD and MSG+ HD;³² (iii) survey evidence demonstrating the importance of local sports programming to consumers in New York and Buffalo;³³ and (iv) additional support for the rebuttable presumption of “significant hindrance” pertaining to HD RSNs.³⁴ For the reasons discussed below and stated in the Bureau’s *Order*, we deny Defendants’ *Application for Review* and affirm the Bureau’s *Order*.³⁵ Below, we address Defendants’ challenges to the *Order*.

A. The Bureau’s Interpretation of “Significant Hindrance” Was Proper and Consistent with Commission Precedent

8. Based on a thorough review of existing Commission and court precedent pertaining to the term “significant hindrance,”³⁶ the Bureau in the *Order* concluded that “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

²⁵ See *id.* at 22-23.

²⁶ See *id.* at 24-25.

²⁷ See *id.* at 1, 25.

²⁸ See *Order* at ¶¶ 10, 49.

²⁹ See *id.* at ¶¶ 24-41.

³⁰ See *id.* at ¶¶ 42-68.

³¹ See *id.* at ¶ 25.

³² See *id.*

³³ See *id.* at ¶ 47 n.224.

³⁴ See *id.* at ¶¶ 47-48.

³⁵ In their *Petition for Stay*, Defendants ask the Commission to stay the *Order* pending resolution of their *Application for Review*. See *Petition for Stay* at 1-2. In light of our decision to deny Defendants’ *Application for Review*, we dismiss the *Petition for Stay* as moot.

³⁶ See *Order* at ¶¶ 43-44.

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MVPD as a competitive choice for a meaningful number of consumers.”³⁷ Defendants do not contend that the Bureau’s decision misconstrues the statutory term “significant hindrance.” Rather, Defendants claim that the first prong – “whether an MVPD has been hindered relative to its competitors” – could be satisfied by any successful competitive initiative.³⁸ Defendants’ criticism, however, ignores the fact that Section 628(b) first requires the Commission to assess whether the challenged conduct is “unfair” before it considers whether the conduct has resulted in “significant hindrance.”³⁹ Determining whether challenged conduct is “unfair” requires balancing the anticompetitive harms of the challenged conduct against the procompetitive benefits.⁴⁰ Many competitive initiatives, such as offering superior customer service, are not “unfair” and thus the Commission will have no reason to consider whether such conduct results in “significant hindrance” under Section 628(b).

9. Defendants contend that the second prong – “whether the hindrance is substantial enough to eliminate the MVPD as a competitive choice for a meaningful number of consumers” – is impermissibly vague and allows the Bureau “unbounded discretion” to vary the requisite quantity of affected consumers in individual cases.⁴¹ In the *2010 Order*, the Commission specifically adopted a case-by-case approach for assessing “significant hindrance” resulting from “unfair acts” involving terrestrially delivered, cable-affiliated programming to allow for an evaluation of the facts presented in individual cases.⁴² For the reasons stated by the Bureau, the record in this proceeding supports the conclusion that the withholding of HD RSN programming eliminated Verizon as a competitive choice for a meaningful – *i.e.*, significant – number of consumers. Defendants’ withholding foreclosed Verizon from access to the HD versions of approximately half the hometown major league sports teams in the New York DMA (New York Knicks, New York Rangers, New York Islanders, and New Jersey Devils) and the Buffalo DMA (Buffalo Sabres). The record further shows that a significant percentage of consumers in the New York DMA and Buffalo DMA considered watching a sports team they closely follow to be important.⁴³ The

³⁷ *Id.* at ¶ 44.

³⁸ See *Application for Review* at 4. This requirement, as originally adopted by the Commission in the *1993 Program Access Order*, simply reflects the commonsense notion that a complainant alleging “significant hindrance” must be harmed in the competitive marketplace. See *Order* at ¶ 43 (citing *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, 3374, ¶ 41 n.26 (1993) (“We note that our analysis of the hindrance in the context of an alleged unfair practice will focus on whether the purpose or effect of the practice was to hinder or harm the complainant relative to its competitors.”)).

³⁹ See *Order* at ¶¶ 24-41; *Verizon Opposition* at 9-10.

⁴⁰ See *Order* at ¶¶ 24-41.

⁴¹ See *Application for Review* at 4-5.

⁴² See *2010 Order*, 25 FCC Rcd at 785-86, ¶ 56 (“We decline to adopt specific evidentiary requirements with respect to proof, in a complaint brought under Section 628(b), that the defendant’s alleged activities have the purpose or effect of hindering significantly or preventing the complainant from providing satellite cable programming or satellite broadcast programming. The evidence required to satisfy this burden will vary based on the facts and circumstances of each case and may depend on, among other things, whether the complainant is a new entrant or an established competitor and whether the programming the complainant seeks to access is new or existing programming.”).

⁴³ See *Order* at ¶ 47 n.224 (citing *Verizon Telephone Companies et al.*, Reply, File No. CSR-8185-P (filed Aug. 13, 2009), Exhibit 1 (Declaration of Chris Stella (Aug. 13, 2009) and Global Marketing Research Services Survey of Paid Television Subscribers in NY and Buffalo Designated Market Areas (Aug. 7, 2009) (“*Verizon/GMRS Survey*”))).

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Bureau's reliance on additional evidence put forth by Verizon supports the conclusion that withholding HD RSN programming in this instance impacted a meaningful number of consumers and thus resulted in "significant hindrance."⁴⁴ In adjudicating the program access complaint before it, the Bureau was under no obligation to define the outer boundaries of what constitutes a "meaningful number" of consumers in order to decide that the hindrance was "significant" on the particular facts of this case. Moreover, the Bureau's finding is fully consistent with (and supported by) the Commission's prior determination that withholding of HD RSN programming is rebuttably presumed to impact a meaningful number of consumers and thus to result in "significant hindrance."⁴⁵ In upholding that decision, the D.C. Circuit held 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."⁴⁶

10. Defendants also claim that the Bureau's interpretation of "significant hindrance" is inconsistent with the *Bulk Billing Order*,⁴⁷ where the Commission found that bulk billing arrangements, which allow an MVPD to provide service to every resident of a multiple dwelling unit (MDU) at a significant discount from the usual retail rate, do not result in "significant hindrance."⁴⁸ We see no inconsistency. As the Bureau explained in the proceeding below, the Commission's finding of no "significant hindrance" in the *Bulk Billing Order* was based on record evidence demonstrating that (i) competing MVPDs wire MDUs for service even in the presence of bulk billing arrangements;⁴⁹ and (ii) many MDU residents who have access to an MVPD service through their landlord under a bulk billing

⁴⁴ See *id.* at ¶¶ 47-48.

⁴⁵ See *2010 Order*, 25 FCC Rcd at 750-51, ¶¶ 8-9, 768, ¶ 32, 782-83, ¶ 52, 784-85, ¶¶ 54-55. The Commission reached this conclusion based on its findings that RSNs have no good substitutes, are important for competition, are non-replicable, and that SD is not an adequate substitute for HD programming. See *Order* at ¶¶ 3-4 (citing *2010 Order*, 25 FCC Rcd at 750-51, ¶¶ 8-9, 768, ¶ 32, 782-83, ¶ 52, 784-85, ¶¶ 54-55); *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) (stating that RSNs 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"). Among other things, the Commission relied on empirical studies concluding that withholding of RSN programming from Direct Broadcast Satellite ("DBS") operators caused the percentage of television households subscribing to DBS to be 33-40 percent lower than what it otherwise would have been. See *Order* at ¶ 3 (citing *2010 Order*, 25 FCC Rcd at 750, ¶ 8, 768, ¶ 32, 782-83, ¶ 52). While Defendants criticize the *Order* for failing to provide a similar quantitative assessment of the impact of withholding in this case (see *Application for Review* at 5 n.17), the Commission specifically provided in the *2010 Order* that it "will not require litigants and the Commission staff to undertake repetitive examinations of our RSN precedent and the relevant historical evidence. Instead, we recognize the weight of the existing precedent and categorical evidence concerning RSNs by allowing 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)." *2010 Order*, 25 FCC Rcd at 782-83, ¶ 52.

⁴⁶ *Cablevision II*, 649 F.3d at 716-17; see *id.* at 717 ("We likewise find reasonable the Commission's decision to extend its rebuttable presumption to RSN HD programming.").

⁴⁷ 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 (2010) ("Bulk Billing Order").

⁴⁸ See *Application for Review* at 3-4; *Defendants' Reply* at 2; see also *Order* at ¶ 43 (discussing *Bulk Billing Order*).

⁴⁹ See *Order* at ¶ 43 (citing *Bulk Billing Order*, 25 FCC Rcd 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")).

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arrangement nonetheless pay for service from an additional MVPD of their own choice.⁵⁰ Here, by contrast, there is no evidence demonstrating that any consumer (let alone “many”) in the New York or Buffalo DMA is willing to subscribe to Verizon FiOS TV after having already subscribed to another MVPD (*e.g.*, Cablevision or DIRECTV) that offers MSG HD and MSG+ HD.⁵¹ The Commission also found it “especially significant” in the *Bulk Billing* proceeding “that Verizon, which more than any other commenter . . . argued that building exclusivity clauses deterred competition and other pro-consumer effects, ma[de] no claim . . . that bulk billing hinders significantly or, as a practical matter, prevents it from introducing its service into MDUs.”⁵² In short, there was no record that would have supported a finding of “significant hindrance” in the *Bulk Billing Order*. Here, by contrast, Verizon has argued – based on record evidence⁵³ – that Defendants’ withholding of HD versions of “must have” RSN programming has hindered significantly its ability to attract customers to subscribe to its FiOS TV service.

⁵⁰ See *id.*

⁵¹ See *Verizon Opposition* at 9. The Commission stated in the *Bulk Billing Order* that bulk billing “may deter a second MVPD in some cases . . . because it limits the entrant’s patronage to residents in the MDU who are willing to pay for the services of two MVPDs or who simply insist on receiving the services of the second MVPD for the characteristics of that service (*e.g.*, high-speed broadband for a home business).” 25 FCC Rcd at 2465, ¶ 15 (emphasis added). The only evidence cited in support of that proposition consisted of comments from an individual who complained about having to “pay[] double” for a second MVPD service in addition to the service provided under a bulk billing arrangement with her MDU. See *Comments of Tammy Callarman* (noting that she subscribed to a second MVPD (Verizon), notwithstanding the existence of a bulk billing arrangement with Century Communications). The *Bulk Billing Order* did not cite any evidence that bulk billing arrangements deter a meaningful (*i.e.*, significant) number of consumers from subscribing to a second MVPD service. To the contrary, it relied on record evidence showing that “many” consumers choose to do so. *Bulk Billing Order*, 25 FCC Rcd at 2470, ¶ 26. The record in this case is very different. The presumption of “significant hindrance” applied by the Bureau (*see supra* ¶ 9) was based on an empirical study conducted by the Commission regarding the significant impact of withholding of RSN programming on consumers in two major markets. See *Cablevision II*, 649 F.3d at 716-17 (upholding presumption based on substantial evidence). Moreover, in this case, Verizon submitted additional evidence supporting the Commission’s findings regarding this conduct, as well as statements from Cablevision’s own Chief Operating Officer that Verizon’s inability to offer MSG HD and MSG+ HD would impede Verizon from obtaining new subscribers and would cause Verizon to lose subscribers it had already gained. See *supra* ¶ 7.

Defendants appear to read the *Bulk Billing Order* as supporting their argument that “significant hindrance” under Section 628(b) cannot be found where the challenged “unfair act” makes a competing MVPD’s service “less attractive” to consumers. See *Application for Review* at 3-4. We do not read the *Bulk Billing Order* as establishing such a proposition, and – even if it did – we would reject that proposition as contrary to the D.C. Circuit’s decision in *Cablevision II*. In that case, the court rejected Defendants’ 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.*; see also *Order* at ¶ 44 (noting that the *Cablevision II* 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.’”) (quoting *Cablevision II*, 649 F.3d at 708).

⁵² *Bulk Billing Order*, 25 FCC Rcd at 2470, ¶ 26.

⁵³ See *supra* ¶ 7.

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11. Defendants also claim that the D.C. Circuit in *Cablevision II* held that a lack of commercial attractiveness resulting from withholding could cause “significant hindrance” only where (i) an MVPD is deprived of all games of a local professional team, thus rendering expansion “uneconomical”,⁵⁴ and (ii) the withholding makes “it completely impossible for competitors to enter or survive in a market.”⁵⁵ On the contrary, the court merely provided illustrative examples of how a lack of commercial attractiveness could result in “significant hindrance.”⁵⁶ Moreover, Defendants’ reading of *Cablevision II*, as the Bureau noted, is inconsistent with the plain language of Section 628(b) as well as court and Commission precedent because it would require a showing of complete foreclosure.⁵⁷ The D.C. Circuit in *Cablevision II* specifically rejected the claim that “significant hindrance” requires a showing of complete foreclosure, stating that “[t]he 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.”⁵⁸

⁵⁴ See *Application for Review* at 5; *Cablevision II*, 649 F.3d at 708. Defendants claim that Verizon is not deprived of “all” the games of a local professional team because Verizon has access to the SD versions of MSG and MSG+. See *Application for Review* at 5. But, as the Bureau explained, the Commission in the *2010 Order* determined that the SD and HD versions of the same network are not substitutes. See *Order* at ¶¶ 4, 49; *2010 Order*, 25 FCC Rcd at 784-85, ¶ 54. The D.C. Circuit affirmed the Commission’s decision on this issue. See *Cablevision II*, 649 F.3d at 717. Moreover, the withholding in the current case is even more egregious than that described by the D.C. Circuit in *Cablevision II* because Verizon is deprived of the HD games of five local professional teams, not merely one team. See *id.* at 708.

⁵⁵ *Application for Review* at 5; see *Cablevision II*, 649 F.3d at 709.

⁵⁶ See *Cablevision II*, 649 F.3d at 708-09. In fact, the D.C. Circuit has upheld the Commission’s finding that every exclusive contract between a cable operator and an owner of an MDU “significantly hinders” MVPDs even though there was no finding that these contracts rendered expansion “uneconomical” or rendered it impossible for competitors to enter or survive in the video distribution market. See *Nat'l Cable & Telecomm. Ass'n v. FCC*, 567 F.3d 659 (D.C. Cir. 2009); *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”); see also *Verizon Opposition* at 8 (“If *Cablevision* were correct in asserting that a competitor’s competitive viability is sufficient to bar a finding of significant hindrance, then exclusion from serving a significant number of consumers living in MDUs would not be enough — so long as those providers were able to attract enough other consumers to stay in the market.”).

⁵⁷ See *Order* at ¶¶ 43-44 (explaining that Section 628(b), which prohibits “unfair acts” that have the purpose or effect “to hinder significantly or to prevent” an MVPD from providing programming to subscribers or consumers, indicates that Congress intended “significant hindrance” to mean something less than complete foreclosure, or prevention, from providing service); see also *Cablevision II*, 649 F.3d at 708-09. Defendants also contend that the Bureau ignored the Commission’s previous statement that “significant hindrance” is a “higher standard” than impairment. See *Application for Review* at 6; *Defendants’ Reply* at 1-2. The Bureau, however, appropriately considered this guidance in its assessment of the Commission precedent pertaining to the meaning of “significant hindrance.” See *Order* at ¶ 43 (citing *2010 Order*, 25 FCC Rcd at 781, ¶ 51 n.200). While Defendants argue that the Commission’s statement means that a complainant cannot be “significantly hindered” if it is able to “viable compete” (see *Application for Review* at 6; *Defendants’ Reply* at 2), this argument again equates “significant hindrance” with complete foreclosure or “prevention” from providing service, an equation which the Bureau appropriately rejected. See *Order* at ¶¶ 43-44.

⁵⁸ *Cablevision II*, 649 F.3d at 708. Moreover, despite Defendants’ contrary claim, the D.C. Circuit never stated or implied that a complainant can demonstrate “significant hindrance” only by showing that it is “completely impossible for competitors to enter or survive in a market.” See *Application for Review* at 5. Rather, the D.C. Circuit noted that Defendants conceded that the “Commission can in principle regulate terrestrial withholding when such withholding completely prevents an MVPD from competing, thus preventing that MVPD from providing (continued....)

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B. The Bureau’s Reliance on the Rebuttable Presumption of “Significant Hindrance” Pertaining to HD RSNs Was Proper

12. Defendants also claim that the Bureau unlawfully relied on the rebuttable presumption of “significant hindrance” pertaining to HD RSNs adopted in the *2010 Order* and subsequently upheld by the D.C. Circuit.⁵⁹ We find that the Bureau thoroughly addressed and correctly rejected Defendants’ claims that it was inappropriate to apply the rebuttable presumption in this case.⁶⁰ Accordingly, we uphold the Bureau’s decision on this point.⁶¹ While Defendants contend that the Bureau should have taken their claims regarding the applicability of the rebuttable presumption into account in determining the “quantum of evidence needed to rebut the presumption,”⁶² the Bureau properly explained that Defendants’ claims did not in any way undermine the rebuttable presumption established by the Commission.⁶³

C. The Bureau’s Analysis of Defendants’ Consumer Surveys Was Proper

13. Defendants claim that the Bureau arbitrarily and capriciously disregarded the results of two surveys which Defendants claim demonstrate that MSG HD and MSG+ HD are not factors driving consumer choice of MVPD.⁶⁴ The Bureau, however, thoroughly reviewed the methodology underlying

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satellite programming.” *Cablevision II*, 649 F.3d at 709. Based on this concession, the D.C. Circuit explained that Defendants “have no basis for arguing that section 628 *unambiguously* precludes the Commission from regulating where it has evidence that such withholding ‘hinder[s] significantly,’ an MVPD from competing with the incumbent cable operator to deliver satellite programming to customers.” *Id.* (emphasis in original) (citations omitted).

⁵⁹ See *Application for Review* at 6-8; *Order* at ¶¶ 46-49; see also *Cablevision II*, 649 F.3d at 716-18; *2010 Order*, 25 FCC Rcd at 750-51, ¶¶ 8-9, 782-85, ¶¶ 52-55.

⁶⁰ See *Order* at ¶ 49; see also *id.* at ¶¶ 47-48.

⁶¹ See *id.* at ¶ 49; see also *id.* at ¶¶ 47-48. We note that Defendants contend that a statement in one of Verizon’s pleadings in this proceeding concedes that the “must have” component of the programming at issue is the content of the games, rather than the format. See *Application for Review* at 7 (citing *Verizon Telephone Companies et al.*, Reply, File No. CSR-8185-P (filed Aug. 13, 2009), at 17). In fact, as the Bureau noted in the *Order*, Verizon later in this proceeding asserted that “[t]he 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, and HD regional sports programming in particular.” Reply Brief of Verizon, File No. CSR-8185-P (filed Oct. 22, 2010), at 6; see *Order* at ¶ 77. In any event, Verizon’s initial statement is insufficient to undermine the Commission’s conclusion in the *2010 Order*, reached in the context of a rulemaking proceeding and subsequently upheld by the D.C. Circuit, that the SD and HD versions of the same network are distinct and are not considered adequate substitutes by consumers. See *2010 Order*, 25 FCC Rcd at 750-51, ¶ 9, 784-85, ¶¶ 54-55; *Cablevision II*, 649 F.3d at 717.

We also reject Defendants’ claim that the Bureau “disregard[ed]” the *Owen Study* pertaining to bundling. See *Application for Review* at 7. As the Bureau explained, neither the *Owen Study* nor any other submission in the record provided “empirical data . . . 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.” *Order* at ¶ 64.

⁶² See *Application for Review* at 8; see also *Defendants’ Reply* at 3.

⁶³ See *Order* at ¶ 49.

⁶⁴ See *Application for Review* at 8-14; 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 Research – Market Research Assessing Reasons for Choice of Television Provider”) (“*Radius Survey*”), Exhibit C (“OTX Online Testing Exchange Assessing the Impact of Verizon Offering MSG HD/MSG+ HD on Verizon Customer Acquisition”) (“*OTX Survey*”); see also Defendants, Answer to Verizon’s Supplement to Program Access Complaint, File No. (continued....)

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each of these surveys, considered the expert opinions presented by both sides, and explained in detail why each survey was materially flawed and thus too unreliable to support the factual propositions for which it was offered.⁶⁵

14. With respect to the *Radius Survey*, while the Bureau identified several fundamental problems with the survey,⁶⁶ Defendants take issue with only two.⁶⁷ First, as the Bureau noted, the *Radius Survey* did not provide the actual text of the questions and probing techniques used for the survey.⁶⁸ The Bureau explained that this omission rendered 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.”⁶⁹ Defendants claim that the non-directive probing technique is well-established in the industry and recognized as a means of guarding against bias, thus the Bureau should have assumed that none of the questioning and probing here were biased.⁷⁰ As the Bureau explained, however, the *Radius Survey* offers no basis on which the Bureau could verify this claim without the actual text of the questions and probing techniques used.⁷¹ Second, the Bureau explained that the *Radius Survey* demonstrates, at most, that MSG HD and MSG+ HD are not “top of mind” considerations, but that this does not necessarily mean that these networks are not significant to many consumers.⁷² Defendants claim that, in evaluating the evidence, the Bureau was nonetheless required to give weight to the *Radius Survey* because the non-

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CSR-8185-P (filed Oct. 13, 2010) (“Defendants’ Post-Discovery Answer to Supplement”), Exhibit G (“Win-Back Survey”).

⁶⁵ See Order at ¶¶ 54-55 (discussing *Radius Survey*); *id.* at ¶¶ 56-58 (discussing *OTX Survey*); *id.* at ¶¶ 59-60 (discussing *Win-Back Survey*). Defendants do not challenge the Bureau’s findings regarding the *Win-Back Survey*.

⁶⁶ See Order at ¶ 55.

⁶⁷ See *Application for Review* at 8-9. Defendants contend that the Bureau was wrong in characterizing one of their experts (Dr. Scott) as supporting the Bureau’s conclusions on two matters. See *Application for Review* at 12 n.55. For example, Defendants contend that the Bureau was wrong in characterizing Dr. Scott as supporting the conclusion that the *Radius 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. See Order at ¶ 55. Dr. Scott, however, specifically stated that the methodology used in the *Radius Survey* “does not address the question of whether or not consumers would switch subscription television providers in order to receive MSG HD or MSG+ HD” *Defendants’ Post-Discovery Answer to Supplement*, Declaration of Professor Carol A. Scott (Oct. 12, 2010), at ¶ 6(b) (“Scott Decl.”). In any event, regardless of whether Dr. Scott supports the Bureau’s conclusions on these matters, the Bureau’s conclusions were proper and amply supported by the record. See Order at ¶ 55.

⁶⁸ See Order at ¶ 55. Defendants contend that the *Radius Survey* includes a list of “[k]ey questions asked,” but in fact it provides only a broad outline of the subject matter of the questions. See *Application for Review* at 8; *Order* at ¶ 55; *Radius Survey* at 2. With respect to probing questions, Defendants concede that the “actual text of probing questions was not included.” See *Application for Review* at 9.

⁶⁹ *Order* at ¶ 55.

⁷⁰ See *Application for Review* at 9.

⁷¹ See Order at ¶ 55. Defendants also contend that the Bureau does not explain how a survey questioner could use probing techniques to induce a respondent *not* to mention a factor (such as MSG HD and MSG+ HD) that is important to them. See *Application for Review* at 9. Because the actual text of the questions and probing techniques were not provided, the Bureau could not verify, for example, whether questioners suggested factors other than MSG HD and MSG+ HD for respondents to consider. Moreover, while the *Radius Survey* conclusorily asserts that “[q]uality control procedures were implemented . . . including explicit interviewing instructions,” these instructions were not submitted to the Bureau. See *Radius Survey* at 3.

⁷² See Order at ¶ 55.

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directive probing ensured that respondents would dig below their “top of mind” considerations.⁷³ Again, however, the Bureau explained that there was no basis in the record to assess the extensiveness of the probing used to elicit responses, or whether the probing was biased or misleading.⁷⁴ In sum, the Bureau properly concluded that the survey was too unreliable to rebut the presumption of “significant hindrance.”

15. Defendants also contend that the Bureau erred by failing to consider the results of the *OTX Survey*, which sought to assess whether the availability of MSG HD and MSG+ HD impacts whether consumers will “consider” switching to Verizon FiOS.⁷⁵ We find no error because the Bureau considered the *OTX Survey*, correctly determined it was unreliable, and thus properly gave it no weight.⁷⁶ The *OTX Survey* was designed to present two groups of survey respondents with written offers for a Verizon FiOS bundle of voice, video, and Internet service, with the only difference between the offers being the presence or absence of MSG HD and MSG+ HD.⁷⁷ The Bureau found a fundamental problem with the survey design in that, while the written offer presented to one group (the Test Group) stated that MSG HD and MSG+ HD were available, the written offer presented to the other group (the Control Group) also implied that MSG HD and MSG+ HD were available.⁷⁸ We agree with the Bureau’s finding that, because the offers presented to both groups either stated or implied that MSG HD and MSG+ HD were likely available, the survey was unreliable.⁷⁹

⁷³ See *Application for Review* at 9.

⁷⁴ See *Order* at ¶ 55. Defendants’ experts likewise assert that the probing conducted was “exhaustive,” but the *Radius Survey* provides no basis to assess the adequacy of the probing. See 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), Exhibit A (Declaration of Leslie Shifrin (April 6, 2010) at ¶ 13) (“Shifrin Reply Decl.”); Defendants’ Post-Discovery Answer to Supplement, Declaration of Professor Eric T. Bradlow (Oct. 11, 2010), at ¶ 19 (“Bradlow Decl.”) and Declaration of Professor Dilip Soman (Oct. 11, 2010), at ¶ 16 (“Soman Decl.”). Moreover, the Bureau explained that under the questions posed, it is possible that some respondents simply never thought of the possibility that they might lose MSG HD or MSG+ HD programming. See *Order* at ¶ 55. Thus, even apart from the fundamental flaws in the *Radius Survey* that rendered it unreliable, the Bureau properly found that the survey did not support the factual propositions for which it was offered. See *id.*

⁷⁵ See *Application for Review* at 9-11; see *OTX Survey* at 2.

⁷⁶ See *Order* at ¶¶ 56-57.

⁷⁷ See *id.* at ¶ 56; *OTX Survey* at 1. Defendants’ experts stated that, because the only difference between the offers presented was the availability of MSG HD and MSG+ HD, any statistical difference in responses between the groups to the question of whether they would “consider” switching based on the offer can be attributed to the presence or absence of MSG HD and MSG+ HD. See Shifrin Decl. at ¶¶ 9-10; Soman Decl. at ¶ 15(d); Scott Decl. at ¶ 14; see also *OTX Survey* at 1.

⁷⁸ See *Order* at ¶ 57 (noting that the offer presented to the Control Group included a “reference to ‘tons of sports, including all 9 NY sports teams’ [that] appeared directly after a reference to ‘[m]ore than 335 all-digital channels, and over 70 in HD,’” thereby misleadingly implying that MSG HD and MSG+ HD were available). Defendants claim that the Bureau did not consider the opinions of their experts that the offer presented to the Control Group was biased in favor of Verizon by implying that no HD sports were offered. See *Application for Review* at 13; Shifrin Decl. at ¶ 14; Shifrin Reply Decl. at ¶ 24; Bradlow Decl. at ¶ 20; Soman Decl. at ¶ 17. In fact, the Bureau properly concluded the opposite. See *Order* at ¶ 57. That is, by referring to sports directly after a reference to HD channels, the offer implies that the sports programming was offered in HD. See *id.*; see also Verizon, Response to Defendants’ Motion for Protective Order and to Supplement the Record, File No. CSR-8185-P (filed March 25, 2010), at 4-5.

⁷⁹ See *Order* at ¶ 57.

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16. We reject Defendants' argument that the written offer presented to the Control Group was appropriate because it allegedly mirrors Verizon's real-world advertisements.⁸⁰ The Bureau found that the first page of this offer mirrored Verizon's real-world advertisements only to the extent that neither emphasize the lack of MSG HD and MSG+ HD.⁸¹ The Bureau explained, even if Verizon's real-world advertisements were as misleading as the written offer presented to the Control Group,⁸² then this may entice some consumers to "consider" switching, which is precisely what the *OTX Survey* asked respondents.⁸³ We agree with the Bureau, however, that before real-world consumers choose to switch video service providers, they are likely to compare the offerings of different video providers (which were not presented to the survey respondents here) and to ensure that the video service provider they select has the channels and features they desire.⁸⁴ Defendants claim that because survey respondents were presented with Verizon's channel line-up, they had every opportunity to ensure that their desired channels were offered.⁸⁵ But, the *OTX Survey* did not ask whether respondents would actually switch providers based on the offer presented. Rather, it asked Control Group respondents whether they would "consider" switching.⁸⁶ As the Bureau explained, when presented with such a limited question and the misleading survey offer, there was no reason for respondents to proceed past the first page to the channel line-up because the offer implied that MSG HD and MSG+ HD were available.⁸⁷ In the real world, those respondents who might "consider" switching will likely ensure that their prospective video service provider has all of the channels and features they desire before actually switching.⁸⁸

17. Defendants also claim that the *Order* is inconsistent in criticizing the written offer presented to the Control Group for failing to indicate to respondents that MSG HD and MSG+ HD were not available while at the same time noting that overemphasizing the lack of a network may bias the study.⁸⁹ We see no inconsistency. To the contrary, we agree with the Bureau that in order to obtain

⁸⁰ See *Application for Review* at 10.

⁸¹ See *Order* at ¶ 57. This is consistent with the *OTX Survey* and the statements of Defendants' experts. Neither the *OTX Survey* nor Defendants' experts state that the first page of the offer presented to the Control Group is identical to Verizon's real-world advertisements. Rather, the *OTX Survey* and Defendants' experts state that the first page of the offer presented to the Control Group mirrors Verizon's real-world advertisements only to the extent that neither emphasize the lack of MSG HD and MSG+ HD and that both include the tag line "tons of sports." See *OTX Survey* at 1; Shifrin Decl. at ¶ 14; Shifrin Reply Decl. at ¶ 21; Bradlow Decl. at ¶ 20; Soman Decl. at ¶ 17.

⁸² The Bureau found the offer presented to the Control Group to be misleading because it implied that Verizon offers all local sports in HD. The Bureau did not reach this conclusion based on the failure of the offer (consistent with Verizon's real-world advertisements) to emphasize the lack of MSG HD and MSG+ HD. Rather, the Bureau found the offer to be misleading because 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 Control Group respondents to believe that MSG HD and MSG+ HD were available. See *Order* at ¶ 57.

⁸³ See *id.* at ¶ 57 n.282; *OTX Survey* at 2.

⁸⁴ See *Order* at ¶ 57 n.282.

⁸⁵ See *Application for Review* at 10-11.

⁸⁶ We note that the Bureau stated that the *OTX Survey* "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." See *Order* at ¶ 58 (emphasis added). In fact, the *OTX Survey* sought only whether respondents would "consider" switching, not whether they would choose Verizon. See *OTX Survey* at 2.

⁸⁷ See *Order* at ¶ 57.

⁸⁸ See *id.* at ¶ 57 n.282.

⁸⁹ See *Application for Review* at 9-10.

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reliable and meaningful results, the offer presented to the Control Group should have provided respondents with an adequate indication that MSG HD and MSG+ HD were not available so that they could make a sufficiently informed assessment of the offer. The Bureau properly recognized, however, that indicating that the HD programming is not available requires a careful balance to avoid overemphasizing the negative aspects of lacking these networks to avoid biasing the study.⁹⁰ There was no reason to determine whether such a balance had been struck here, however, because the offer presented to the Control Group misleadingly implied that these networks were in fact available, thereby rendering the *OTX Survey* unreliable.

18. Defendants also claim that the Bureau failed to consider the similar results of the surveys submitted by Defendants,⁹¹ but the Bureau properly addressed this issue.⁹² Defendants further claim that the Bureau did not consider the opinions put forth by Defendants' experts,⁹³ but the *Order* demonstrates that the Bureau considered and weighed the opinions provided by both Defendants' and Verizon's experts in reaching its conclusion that the surveys were materially flawed and thus unreliable for their intended purpose.⁹⁴ Defendants also take issue with the Bureau's conclusion that Defendants' surveys, which purport to demonstrate that the availability of MSG HD and MSG+ HD is not a factor for consumers when choosing an MVPD, conflict with Defendants' strategy of using MSG HD and MSG+ HD as a competitive differentiator and stressing the importance of MSG HD and MSG+ HD in their public statements and their advertising.⁹⁵ The Bureau held that the contradiction between the survey results and Defendants' real-world actions and statements further supports the conclusion that the surveys contain significant flaws and deficiencies that render them unreliable.⁹⁶ Defendants claim that there is no contradiction because the availability of MSG HD and MSG+ HD might be important to a "small group" of consumers.⁹⁷ That is not, however, what Defendants' flawed surveys concluded.⁹⁸ Thus, the Bureau properly concluded that the survey results conflict with Defendants' real-world actions and statements

⁹⁰ See *Order* at ¶ 57 n.283.

⁹¹ See *Application for Review* at 11-12.

⁹² See *Order* at ¶ 52 n.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.").

⁹³ See *Application for Review* at 12-13.

⁹⁴ See *Order* at ¶¶ 54-60.

⁹⁵ See *Application for Review* at 13-14; *Order* at ¶¶ 17 n.87, 25-26, 53. The Bureau noted that, if consumers truly attach no significance to the availability of MSG HD and MSG+ HD, as Defendants' surveys purport to show, then there appears to be no reason for Defendants to withhold these networks from Verizon. See *Order* at ¶ 53. Rather, the Bureau explained, Defendants could instead benefit by licensing this content to Verizon and earning increased licensing fees and advertising revenues. *See id.*

⁹⁶ See *Order* at ¶ 53.

⁹⁷ *Application for Review* at 14.

⁹⁸ See *Radius Survey* at 1 (concluding that the availability of local sports in HD is [REDACTED] [REDACTED] for consumers when choosing a video provider); *OTX Survey* at 1 (concluding that Verizon's ability to offer MSG HD and MSG+ HD would not result in "any meaningful increase in customers"); *Defendants' Post-Discovery Answer to Supplement* at 55 and Exhibit G at 2 (concluding that, in response to the question of why respondents decided to leave Verizon FiOS TV service and subscribe to Cablevision instead, only a [REDACTED] [REDACTED]).

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stressing the importance of MSG HD and MSG+ HD, thus providing additional support for the conclusion that the surveys contain significant flaws and deficiencies that render them unreliable.⁹⁹ Even if there was no conflict between the survey results and Defendants' real-world actions, however, the significant flaws and deficiencies noted by the Bureau stand on their own without this additional support.

D. The Bureau Appropriately Applied the Rebuttable Presumption of "Significant Hindrance" Pertaining to HD RSNs

19. Defendants contend that the quantum of evidence required to defeat a rebuttable presumption is low but the Bureau held Defendants to an impermissibly high standard.¹⁰⁰ We disagree. While the D.C. Circuit held that the rebuttable presumptions adopted in the *2010 Order* shift only the burden of production,¹⁰¹ a defendant cannot meet this burden by producing just *any* evidence, no matter how unpersuasive.¹⁰² Indeed, such a standard would effectively nullify the presumption.¹⁰³ Rather, as court and Commission precedent make clear, the evidence put forth to rebut a presumption must be substantial,¹⁰⁴ sufficient,¹⁰⁵ persuasive,¹⁰⁶ or exculpatory,¹⁰⁷ and not amount to merely "general allegations and inconclusive evidence."¹⁰⁸ Consistent with the D.C. Circuit's decision, the Bureau thoroughly

⁹⁹ For example, the Bureau noted that (i) Cablevision's Chief Operating Officer ("COO") stated 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]"; (ii) in response to questions regarding how Cablevision is competing with FiOS, Cablevision's COO emphasized that for "four of the nine professional sports teams in New York[, i]f you want to see them in HD, you have to get them from us"; and (iii) 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. *Order* at ¶ 25. In addition, the Bureau noted 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. *See id.*

¹⁰⁰ *See Application for Review* at 14-16 (stating that "a party need only show that there is a question of fact regarding the subject matter of the presumption"); *Defendants' Reply* at 3.

¹⁰¹ *See Cablevision II*, 649 F.3d at 716 ("Reviewing the Commission's order, we think it clear that its rebuttable presumptions shift only the burden of production.").

¹⁰² *See Verizon Opposition* at 4, 16.

¹⁰³ *See 2010 Order*, 25 FCC Rcd at 782-83, ¶ 52 (establishing the rebuttable presumption "recognize[s] the weight of the existing precedent and categorical evidence concerning RSNs" and avoids "requir[ing] litigants and the Commission staff to undertake repetitive examinations of our RSN precedent and the relevant historical evidence").

¹⁰⁴ *See Harlem Taxicab Ass'n v. Nemesh*, 191 F.2d 459, 461 (D.C. Cir. 1951) ("When *substantial* evidence contrary to a presumption is introduced, . . . 'the presumption falls out of the case'") (emphasis added, citations omitted).

¹⁰⁵ *See McCann v. Newman Irrevocable Trust*, 458 F.3d 281, 288 (3d Cir. 2006) ("the presumption shifts the burden of producing *sufficient* evidence to rebut the presumed fact") (emphasis added).

¹⁰⁶ *See Johnson v. Shalala*, 60 F.3d 1428, 1435 (9th Cir. 1995).

¹⁰⁷ *See Garvey v. National Transp. Safety Bd.*, 190 F.3d 571, 579 (D.C. Cir. 1999).

¹⁰⁸ *See Continental Cablevision of New Hampshire, Inc.*, Memorandum Opinion and Order, 96 F.C.C.2d 926, ¶ 5 (1984) ("general allegations and inconclusive evidence are insufficient to overcome a presumption of adequate signal quality"); *see also New England Video, Keene, N.H. Request for Waiver of Section 74.1103 of the Commission's Rules*, Memorandum Opinion and Order, 7 F.C.C.2d 231, ¶ 3 (1967) ("Petitioner's general allegations concerning the transmissions of WRLP fall far short of the showing required to overcome the presumption that an adequate signal is provided the community.").

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reviewed the evidence put forth by Defendants and properly concluded that it was insufficient to rebut the presumption.

20. Defendants claim that the Bureau shifted the burden to Defendants to disprove liability.¹⁰⁹ In fact, the Bureau specifically explained in the *Order* that 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.¹¹⁰ In support of their argument, Defendants emphasize that the Bureau noted 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.¹¹¹

Contrary to Defendants’ understanding, the language quoted above does not mean that the Bureau reversed the burden of proof.¹¹² Rather, the Bureau correctly observed that evidence failing to isolate the impact of the “unfair act” at issue – in this case, the presence or absence of MSG HD and MSG+ HD – is unlikely to be persuasive in attempting to rebut the presumption of “significant hindrance.”¹¹³ And, on the specific facts presented here, it was highly significant that Defendants failed to isolate this important variable by supplying a regression analysis or other competent evidence, including a reliable survey.¹¹⁴

21. Defendants provide two examples of evidence they claim militates against a finding of “significant hindrance” and which, they claim, should have shifted the onus to Verizon to overcome the presumption of no “significant hindrance.”¹¹⁵ First, in response to penetration data they submitted in the record, Defendants claim the Bureau should have required Verizon, not Defendants, to perform a regression analysis.¹¹⁶ Second, in response to data they submitted in the record demonstrating that

¹⁰⁹ See *Application for Review* at 14-16; *Defendants’ Reply* at 3.

¹¹⁰ See *Order* at ¶ 50; see also *Cablevision II*, 649 F.3d at 716 (“Reviewing the Commission’s order, we think it clear that its rebuttable presumptions shift only the burden of production.”).

¹¹¹ *Order* at ¶ 61; *Application for Review* at 15.

¹¹² See *Application for Review* at 15; *Defendants’ Reply* at 3.

¹¹³ See *Order* at ¶ 50. We do not understand the Bureau’s *Order* to have suggested that evidence demonstrating a complainant’s substantial market share or penetration rate can never, under any circumstances, rebut the presumption of “significant hindrance,” absent a regression analysis or other evidence isolating the impact of the complainant’s lack of access to the relevant RSN programming. In any event, we do not adopt such an approach in this *MO&O*. Rather, we conclude that, even assuming that there may be situations where a complainant’s market share and/or penetration rate is itself so substantial that it weighs against the presumption of “significant hindrance,” Defendants did not present such evidence in this case. See *infra* ¶ 23. We note that this is consistent with our prior guidance in the *2010 Order* that a regression analysis or reliable survey data are illustrative examples of evidence that litigants might consider providing in assessing the issue of “significant hindrance.” See *2010 Order*, 25 FCC Rcd at 785-86, ¶ 56. As noted in the text, Defendants in this case provided neither a regression analysis nor reliable survey evidence isolating the impact of the “unfair act.”

¹¹⁴ See *Order* at ¶¶ 61, 63.

¹¹⁵ See *Application for Review* at 15-16; *Defendants’ Reply* at 3.

¹¹⁶ See *Application for Review* at 16; see also *Order* at ¶ 63. “Penetration” data refers to an MVPD’s share of video subscribers only in those geographic regions within a defined market area (e.g., a DMA) where the MVPD provides (continued....)

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] in the New York DMA, Defendants claim that the Bureau should have required Verizon, not Defendants, to come forward with evidence demonstrating whether there are other factors explaining [REDACTED]

].¹¹⁷ But as the Bureau properly explained, differences in penetration levels or subscriber numbers may be attributable to several factors.¹¹⁸ Accordingly, on the record presented here, raw penetration or subscriber numbers are insufficient to rebut the presumption absent an analysis (such as a regression analysis) that isolates the impact of the “unfair act” at issue.¹¹⁹

E. The Bureau Did Not Disregard Substantial Evidence

22. Defendants claim that the Bureau impermissibly limited the type of evidence Defendants could use to rebut the presumption by requiring Defendants to isolate how the absence of MSG HD and MSG+ HD has impacted Verizon’s ability to provide a competing video service.¹²⁰ As discussed above, evidence that does not isolate the impact of the “unfair act” at issue is unlikely to be sufficient or persuasive in attempting to rebut the presumption of “significant hindrance” pertaining to HD RSNs.¹²¹ In any event, the Bureau did not disregard any evidence and, in fact, considered all evidence presented by Defendants.¹²² The Bureau properly found that the evidence presented was insufficient and unpersuasive and thus failed to rebut the presumption.¹²³

23. The Bureau considered Defendants’ claims regarding Verizon’s alleged “marketplace success,”¹²⁴ but properly found the evidence insufficient to obviate the need for evidence isolating the (Continued from previous page) —

service. See *Order* at ¶¶ 61, 63. “Market share” data refers to an MVPD’s share of all video subscribers within a defined market area (e.g., a DMA), including subscribers in geographic regions where the MVPD does not currently provide service. See *id.*

¹¹⁷ See *Application for Review* at 16 n.68; see also *Order* at ¶ 61 n.302.

¹¹⁸ See *Order* at ¶¶ 61 and n.302; *id.* at ¶ 63.

¹¹⁹ See *id.* at ¶ 63. [REDACTED]

] Defendants argued that the data were insufficient because (i) “regression analyses represent the Commission’s preferred means of assessing the impact of the lack of access to RSN programming”; [REDACTED]

[

¹²⁰ See *Application for Review* at 16-19.

¹²¹ See *supra* ¶ 20. Defendants claim that the Commission in the *Bulk Billing Order* did not isolate the impact of the practice at issue and instead considered only whether, notwithstanding the practice at issue, MVPDs could compete effectively. See *Application for Review* at 17. In fact, the Commission in the *Bulk Billing Order* specifically analyzed the impact of the bulk billing arrangements at issue and found that they do not result in “significant hindrance.” See *supra* ¶ 10.

¹²² See *Order* at ¶¶ 53-68.

¹²³ See *id.* at ¶¶ 50, 68.

¹²⁴ See *Application for Review* at 17.

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impact of Defendants' withholding of MSG HD and MSG+ HD from Verizon.¹²⁵ The Bureau also considered Verizon's internal documents, [REDACTED]

[¹²⁶] The Bureau properly found the evidence unpersuasive and insufficient to rebut the presumption because (i) the existence of other factors that may impact Verizon's performance does not mean that a lack of access to MSG HD and MSG+ HD does not "significantly hinder" Verizon; and (ii) the particular RSN programming at issue here is non-replicable and has no close substitutes, thus eliminating Verizon's ability to match its competitors' offering of MSG HD and MSG+ HD.¹²⁷ Defendants also claim that the Bureau "disregard[ed] entirely" their evidence regarding the satisfaction of Verizon's current customers.¹²⁸ In fact, the Bureau specifically addressed this evidence and properly concluded that this evidence did not address whether potential subscribers would be unwilling to switch to Verizon given its lack of MSG HD and MSG+ HD.¹²⁹ While Defendants claim that the satisfaction of Verizon's current customers demonstrates that MSG HD and MSG+ HD are not "must have" for many customers in the New York area,¹³⁰ the record reflects that the number of Verizon FiOS TV subscribers at present is [REDACTED]

[¹³¹] As the Bureau explained, the salient question is whether these potential subscribers, whom Verizon seeks to subscribe to its FiOS service, would be unwilling to switch to Verizon given its lack of MSG HD and MSG+ HD.¹³² Indeed, Section 628(b) specifically requires the Commission to assess whether an "unfair act" has the purpose or effect of "significantly hindering" an MVPD from providing programming to "subscribers or consumers," reflecting Congress's concern with the impact of challenged conduct on both an MVPD's current and potential customers.¹³³

F. The Bureau's Order Was the Product of Reasoned Decisionmaking

24. Defendants assert that the *Order* was not the product of reasoned decisionmaking.¹³⁴ First, Defendants argue that the Bureau deemed their statements conceding the importance of MSG HD and MSG+ HD to "nullify entirely" their survey results demonstrating the opposite, yet the Bureau inconsistently ignored Verizon's statements and advertisements attesting to its success and the robustness of its sports programming.¹³⁵ In fact, the Bureau appropriately deemed Defendants' surveys unreliable due to their fundamental flaws;¹³⁶ Defendants' contradictory statements and actions simply provided

¹²⁵ See *Order* at ¶¶ 61, 63.

¹²⁶ See *Application for Review* at 17-18.

¹²⁷ See *Order* at ¶ 67.

¹²⁸ See *Application for Review* at 18-19.

¹²⁹ See *Order* at ¶ 66.

¹³⁰ See *Application for Review* at 19.

¹³¹ See *Order* at ¶ 61.

¹³² See *id.* at ¶ 66.

¹³³ 47 U.S.C. § 548(b).

¹³⁴ See *Application for Review* at 19-21.

¹³⁵ See *id.* at 19.

¹³⁶ See *Order* at ¶¶ 55, 57, 60.

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further support for the Bureau’s conclusion that these surveys were flawed.¹³⁷ With respect to Verizon’s statements and advertisements, the Bureau specifically considered this evidence and explained why they did not rebut the presumption of “significant hindrance.”¹³⁸

25. Second, Defendants claim that prior instances of withholding in Philadelphia and San Diego “weigh heavily” in the Bureau’s decision, but other instances where MVPDs have elected not to carry RSNs have no bearing on whether RSN programming is “must have.”¹³⁹ In fact, the Bureau specifically considered other instances where MVPDs do not carry RSNs and found that they did not undermine the rebuttable presumption because the record contained no evidence of the circumstances that led to the MVPDs’ decisions to refrain from carrying an RSN.¹⁴⁰ The Philadelphia and San Diego cases, in contrast, were important here because (i) MVPDs sought to carry the RSNs at issue but were denied; and (ii) the Commission analyzed empirically the impact of this withholding and found that it “significantly hindered” competitors.¹⁴¹

26. Third, Defendants contend that the Bureau dismissed evidence demonstrating that MSG HD and MSG+HD have lower ratings than many well-known SD channels.¹⁴² In fact, the Bureau carefully considered this evidence and explained that (i) despite these allegedly low ratings, Defendants continue to emphasize MSG HD and MSG+ HD in advertisements and continue to withhold this programming from Verizon, thereby demonstrating the market importance of the networks;¹⁴³ and (ii) the Commission has previously recognized that ratings “are not a perfect predictor of consumer response to the withholding of a network.”¹⁴⁴

27. Fourth, Defendants claim that the *Order* cites Cablevision’s recent rate increase but “does not even mention” Verizon’s rate increase.¹⁴⁵ In fact, the Bureau considered and carefully explained the significance of both rate increases to the issues raised in this case.¹⁴⁶

¹³⁷ See *id.* at ¶ 53; see also *supra* ¶ 18.

¹³⁸ See *supra* ¶ 23 (stating that the evidence purporting to demonstrate Verizon’s success in the New York and Buffalo DMAs was insufficient to obviate the need for evidence isolating the impact of Defendants’ withholding of MSG HD and MSG+ HD from Verizon); *see also Order* at ¶ 61 and n.296 (discussing Verizon’s statements and other evidence purporting to demonstrate Verizon’s general success); *id.* at ¶ 65 (explaining that, as the Commission held previously and Defendants conceded, the salient issue 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).

¹³⁹ See *Application for Review* at 20.

¹⁴⁰ See *Order* at ¶ 47 n.219.

¹⁴¹ See *id.* at ¶¶ 3, 49-50; *see also 2010 Order*, 25 FCC Rcd at 768-69, ¶ 32 and 782, ¶ 52 n.202. In *Cablevision II*, the D.C. Circuit stated that the Commission’s regression analysis studying the impact of withholding of RSNs in Philadelphia and San Diego “constitute[d] substantial evidence that supports the Commission’s adoption of a presumption” of “significant hindrance” for RSNs. *Cablevision II*, 649 F.3d at 717.

¹⁴² See *Application for Review* at 20.

¹⁴³ See *Order* at ¶ 62.

¹⁴⁴ See *id.* (citing 2007 *Order*, 22 FCC Rcd at 17817-18, ¶ 39). The Bureau cited the substantial ratings for MSG SD and MSG+ SD to demonstrate that, in light of the growing significance of HD, the ratings for the HD versions will continue to rise as more households obtain HDTV sets and subscribe to HD service offerings. *See id.*

¹⁴⁵ See *Application for Review* at 20.

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28. Fifth, Defendants claim that the *Order* “does not even mention” data which they claim demonstrate that only one out of three households has an HDTV set and subscribes to HD service, and is thus capable of viewing HD RSN programming.¹⁴⁷ In fact, the Bureau squarely addressed this survey and found the data to support, rather than undermine, the rebuttable presumption pertaining to HD RSNs.¹⁴⁸

29. Sixth, Defendants contend that the Bureau emphasized Defendants’ advertising of MSG HD and MSG+ HD as an indication of “significant hindrance,” but gave no weight to Verizon’s decision to advertise its sports and HD programming.¹⁴⁹ In fact, the Bureau specifically and sensibly addressed Verizon’s decision to advertise its sports and HD programming.¹⁵⁰

30. Seventh, Defendants contend that the Bureau improperly failed to give weight to data pertaining to Verizon’s status on a nationwide basis, including its financial resources.¹⁵¹ The Bureau properly explained, however, that such nationwide data do not address the pertinent issue here of how the withholding of MSG HD and MSG+ HD impacts Verizon’s video service in the New York and Buffalo DMAs.¹⁵²

31. Eighth, Defendants claim that the Bureau did not accurately state the level of competition in the marketplace.¹⁵³ On the contrary, there was no contradiction in the figures cited by the Bureau,¹⁵⁴

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¹⁴⁶ See *supra* ¶ 23 (stating that the evidence purporting to demonstrate Verizon’s success in the New York and Buffalo DMAs was insufficient to obviate the need for evidence isolating the impact of Defendants’ withholding of MSG HD and MSG+ HD from Verizon); *see also Order* at ¶ 61 and n.297 (discussing Verizon’s rate increase and other evidence purporting to demonstrate Verizon’s general success); *id.* at ¶ 61 and nn.295, 304 (explaining that Defendants’ claim of robust competition is belied by the fact that incumbent cable market share in the New York DMA ([REDACTED] J) far exceeds the national average (63.5 percent) and that Cablevision has raised its rates in excess of inflation despite the number of competitors in the market).

¹⁴⁷ See *Application for Review* at 20.

¹⁴⁸ See *Order* at ¶ 48 n.235. Moreover, as the Commission previously held and the record here supports, HD continues to grow in significance. See *2010 Order*, 25 FCC Rcd at 784-85, ¶¶ 54-55; *Order* at ¶ 48.

¹⁴⁹ See *Application for Review* at 20-21.

¹⁵⁰ The Bureau explained that, as the Commission held previously and Defendants conceded, the salient issue 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. See *Order* at ¶ 65. Defendants’ decision to emphasize MSG HD and MSG+ HD in advertisements provided additional support for the significance of these networks. See *id.* at ¶¶ 25, 62.

¹⁵¹ See *Application for Review* at 21.

¹⁵² See *Order* at ¶ 61 n.294. Defendants contend that Congress and the Commission expected telcos to be unique video competitors whose entry would bring durable, effective competition. See *Application for Review* at 21. Any such expectations, however, did not contemplate that RSN programming would be withheld from telco competitors.

¹⁵³ See *Application for Review* at 21.

¹⁵⁴ See *id.* The Bureau (i) noted data cited in the *2010 Order* demonstrating that incumbent cable market share in the New York DMA far exceeds the national average (see *Order* at ¶ 61 n.295 (citing *2010 Order*, 25 FCC Rcd at 763, ¶ 27 n.97)); and (ii) updated this figure based on the record evidence here to demonstrate that incumbent cable market share in the New York DMA continues to far exceed the national average. See *id.* at ¶ 61 n.304.

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and the record evidence demonstrates that incumbent cable operators such as Cablevision continue to dominate the market.¹⁵⁵

G. The Bureau’s Finding that Defendants’ Withholding Is “Unfair” Was Proper

32. Defendants argue that the Bureau (i) conflated the definition of “unfair” with “significantly hindered,” such that any activity that is found to “significantly hinder” a competitor also will be found “unfair;”¹⁵⁶ and (ii) held that withholding RSN programming will always be “unfair.”¹⁵⁷ On the contrary, consistent with *Cablevision II* and Commission precedent, the Bureau weighed the anticompetitive harms of Defendants’ withholding against the procompetitive benefits.¹⁵⁸ There is no basis for Defendants’ assertion that the Bureau found Defendants’ conduct to be “unfair” because it resulted in “significant hindrance.”¹⁵⁹ The Bureau’s conclusion that Defendants’ conduct here was, on balance, “unfair” was based on a careful weighing of the evidence presented in this case and does not prejudge future cases, including those involving non-replicable programming such as RSNs.¹⁶⁰ In addition, despite Defendants’ claims,¹⁶¹ the Bureau specifically found that the withholding at issue here harmed competition and consumers in the impacted markets.¹⁶² Defendants repeat their claim that it is

¹⁵⁵ See *Order* at ¶ 61 nn.295, 303-304. None of these incumbent cable operators are among the four different competitors that Defendants claim that Cablevision faces competition from in the market. See *Application for Review* at 21, 23.

¹⁵⁶ See *Application for Review* at 22; *Defendants’ Reply* at 5.

¹⁵⁷ See *Application for Review* at 22-23; *Defendants’ Reply* at 5.

¹⁵⁸ See *Order* at ¶¶ 24-41.

¹⁵⁹ See *Application for Review* at 22. The impact of Defendants’ conduct on competition in the video distribution market was one of the statutory factors the Bureau considered in assessing whether Defendants’ conduct was “unfair.” See *Order* at ¶¶ 28-29 (citing 47 U.S.C. § 548(c)(4)(A)). While the Bureau found that Defendants’ withholding MSG HD and MSG+ HD “significantly hindered” Verizon and thereby harmed consumers by limiting competition in the video distribution market (*see id.* at ¶ 28), it noted that other factors could potentially tip the scales in favor of a finding that the withholding is procompetitive on balance and, thus, is not “unfair” despite the impact on competition in the video distribution market. See *id.* at ¶ 37; *see also id.* at ¶¶ 38-39. Thus, Defendants are wrong when they argue that the Bureau found that withholding of RSN programming will always be “unfair.” See *Application for Review* at 22. The Bureau specifically noted potential procompetitive benefits from withholding even non-replicable RSN programming that may outweigh any anticompetitive harms based on the facts presented. See *Order* at ¶¶ 27-41 (noting that withholding may promote investment in and carriage of a network).

¹⁶⁰ See *Order* at ¶¶ 24-41; *Application for Review* at 22-23. Defendants also contend that the Bureau found that withholding of programming from wireline entrants is more likely to be “unfair” than withholding from other MVPDs. See *Application for Review* at 23. In fact, Defendants themselves deemed Verizon and other wireline entrants as their “closest” competitors and conceded that they license programming to DBS operators because, unlike Verizon, DBS operators do not offer voice or broadband service. See *Defendants’ Post-Discovery Answer to Supplement* at 82; *see also Order* at ¶ 28 n.147. The Commission has also found that DBS operators do not constrain the price of cable service to the extent that Verizon and other wireline entrants do. See *Order* at ¶ 28 n.147. The Bureau did not find, however, that withholding from wireline entrants is always more likely to be “unfair” than withholding from other MVPDs. Rather, in assessing one of the statutory factors in one of the tests used in the unfairness analysis (“the development of competition in local and national [MVPD] markets”), the Bureau noted that Defendants have conceded that they withhold MSG HD and MSG+ HD from only their “closest” competitors and that this factor was relevant in assessing the impact on the development of competition under this factor. See *id.* at ¶ 28.

¹⁶¹ See *Application for Review* at 23.

¹⁶² See *Order* at ¶¶ 28, 38, 40, 47, 61 nn.295 and 303-304; *id.* at ¶¶ 74-75.

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significant that some consumers in New York have a choice of up to five MVPDs, but the Bureau found 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.¹⁶³ While Defendants claim that their withholding of MSG HD and MSG+ HD will encourage other MVPDs to invest and innovate, the Commission has previously concluded that “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.”¹⁶⁴

H. The *Order* Comports with the First Amendment

33. Defendants claim that the *Order* violates the First Amendment as applied to Defendants and the facts of this case.¹⁶⁵ 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.”¹⁶⁶ We need not repeat the Bureau’s sound analysis here, other than to state that the Bureau properly held that the decision satisfied the requirements of intermediate scrutiny.¹⁶⁷

I. Compliance Deadline

34. The *Order* required MSG to enter into an agreement to license MSG HD and MSG+ HD to Verizon within 30 days of the release of the *Order* (*i.e.*, by October 22, 2011). On October 11, 2011, the Bureau released a decision retaining this deadline but staying the *Order* to the extent it would otherwise require MSG to make MSG HD and MSG+ HD available to Verizon on or before November 14, 2011.¹⁶⁸ In order to provide sufficient time for compliance, we grant MSG 15 days after release of this *MO&O* to provide MSG HD and MSG+ HD to Verizon, unless the parties’ agreement provides MSG a longer period, in which case the agreed upon time period shall govern.

IV. ORDERING CLAUSES

35. Accordingly, **IT IS ORDERED** that, pursuant to Sections 4(i), 4(j), 5(c), and 628 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 155(c), 548, and Section 1.115 of the Commission’s rules, 47 C.F.R. § 1.115, the Application for Review filed by MSG Holdings, L.P. and Cablevision Systems Corporation **IS DENIED**.

¹⁶³ See *id.* at ¶ 61 nn.295, 303-304.

¹⁶⁴ See *id.* at ¶ 29 (quoting *2010 Order*, 25 FCC Rcd at 750-51, ¶ 9).

¹⁶⁵ See *Application for Review* at 24-25; *Defendants’ Reply* at 5.

¹⁶⁶ *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*, 649 F.3d at 710-11; *Cablevision I*, 597 F.3d at 1311; *2010 Order*, 25 FCC Rcd at 775, ¶ 41; *2007 Order*, 22 FCC Rcd at 17837-38, ¶ 65.

¹⁶⁷ See *Order* at ¶¶ 72-75.

¹⁶⁸ See *Verizon Tel. Cos. et al.*, Order, DA 11-1695 (MB Oct. 11, 2011).

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36. **IT IS FURTHER 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 1.43 of the Commission's rules, 47 C.F.R. § 1.43, the Petition for Stay filed by MSG Holdings, L.P. and Cablevision Systems Corporation **IS DISMISSED AS MOOT**.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary