REDACTED VERSION

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

In the Matter of	)	
	)	
AT&T Services, Inc. and	)	File No. CSR-8196-P
Southern New England Telephone Company	)	
d/b/a AT&T Connecticut,	)	
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 rules[4] by withholding the high definition ("HD") versions of the MSG and MSG+ Regional Sports Networks ("RSNs") from AT&T Services, Inc. and Southern New England Telephone Company d/b/a AT&T Connecticut (collectively, "AT&T") in the State of Connecticut. The *Order* required MSG to enter into an agreement to license such programming to AT&T 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 AT&T, 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]

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[1] *See* MSG Holdings, L.P. and Cablevision Systems Corporation, Application for Review, File No. CSR-8196-P (filed Sept. 28, 2011) ("*Application for Review*").

[2] *See AT&T Servs. Inc. et al.*, Order, DA 11-1595 (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 ¶¶ 71, 84.

[6] *See* MSG Holdings, L.P. and Cablevision Systems Corporation, Petition for Stay, File No. CSR-8196-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 August 2009, AT&T filed a complaint alleging that Defendants' withholding of the HD versions of the MSG and MSG+ RSNs from AT&T in the State of Connecticut violated these provisions.[8]

3. In January 2010, while AT&T'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 67-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 the MSG HD and MSG+ HD RSNs from AT&T.[14] As a remedy for the violation of Section 628(b), the

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[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* AT&T Services Inc. *et al.*, Program Access and Section 628(b) Complaint, File No. CSR-8196-P (filed Aug. 13, 2009) ("*AT&T 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.

[14] *See generally Order.*

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Bureau ordered MSG to enter into an agreement to license MSG HD and MSG+ HD to AT&T 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 AT&T 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 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]

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[15] *See id*. at ¶¶ 70-72.

[16] *See generally Application for Review*; *Petition for Stay*. AT&T filed Oppositions to the *Stay Petition* and to the *Application for Review*. *See* AT&T, Opposition to Motion for Stay, File No. CSR-8196-P (filed Oct. 5, 2011); AT&T, Opposition to Application for Review, File No. CSR-8196-P (filed Oct. 13, 2011) ("*AT&T Opposition*"). Defendants filed a Reply to AT&T's Opposition to the *Application for Review*. *See* MSG Holdings, L.P. and Cablevision Systems Corporation, Reply, File No. CSR-8196-P (filed Oct. 24, 2011) ("*Defendants' Reply*").

[17] *See AT&T Servs. Inc. et al.*, Order, DA 11-1694 (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 8-13.

[22] *See id*. at 14-16.

[23] *See id*. at 16-18.

[24] *See id*. at 18-21.

[25] *See id*. at 21-23.

[26] *See id*. at 23-25.

[27] *See id*. at 1, 25.

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III. DISCUSSION

7. The Bureau's *Order* found that Defendants violated Section 628(b) of the Act by withholding from AT&T the HD versions of approximately half the hometown major league sports teams in the New York Designated Market Area ("DMA") (*i.e*., Fairfield County, Connecticut) and a third in the Hartford/New Haven DMA.[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" AT&T.[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 a competitive MVPD's inability to offer these networks was one factor that would not only impede the competitive MVPD from obtaining new subscribers, but also cause the competitive MVPD to lose subscribers it had already gained;[31] (ii) Cablevision's advertisements emphasizing AT&T's inability to offer MSG HD and MSG+ HD;[32] (iii) survey evidence demonstrating the importance of local sports programming to consumers in the New York DMA;[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 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

[28] *See Order* at ¶¶ 11, 50.

[29] *See id*. at ¶¶ 25-42.

[30] *See id*. at ¶¶ 43-69.

[31] *See id*. at ¶ 26.

[32] *See id*.

[33] *See id*. at ¶ 48 n.239. As AT&T explained, given the proximity of Connecticut to New York City and the fact that part of the area AT&T serves in Connecticut is in the New York DMA (*i.e*., Fairfield County, Connecticut), this survey is likewise probative for consumers throughout the State of Connecticut. *See id*.

[34] *See id*. at ¶¶ 48-49.

[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 ¶¶ 44-45.

[37] *See id.* at ¶ 45.

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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 AT&T as a competitive choice for a meaningful – *i.e.,* significant – number of consumers. Defendants' withholding foreclosed AT&T from access to the HD versions of approximately half the hometown major league sports teams in the New York DMA (*i.e*., Fairfield County, Connecticut) and a third in the Hartford/New Haven DMA (New York Knicks, New York Rangers, New York Islanders, and New Jersey Devils). The record further shows that a significant percentage of consumers in the New York DMA considered watching a sports team they closely follow to be important.[43] The Bureau's reliance on additional evidence put forth by AT&T supports the conclusion that withholding HD RSN programming in this instance impacted a meaningful number of consumers and

[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 ¶ 44 (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 ¶¶ 25-42; *AT&T Opposition* at 4.

[40] *See Order* at ¶¶ 25-42.

[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 ¶ 48 n.239 (citing Opening Brief of AT&T, File No. CSR-8196-P (filed Jan. 6, 2011) ("*AT&T Post-Discovery Opening Brief*"), Exhibit 6 (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*"))); *see supra* n.33 (explaining significance of this survey for consumers throughout the State of Connecticut).

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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 arrangement nonetheless pay for service from an additional MVPD of their own choice.[50] Here, by

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[44] *See id.* at ¶¶ 48-49.

[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 ¶ 44 (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")).

[50] *See id.*

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contrast, there is no evidence demonstrating that any consumer (let alone "many") in the State of Connecticut is willing to subscribe to AT&T U-verse 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, AT&T has argued – based on record evidence[53] – that Defendants' withholding of HD versions of "must have" RSN programming has hindered significantly its ability to attract customers to subscribe to its U-verse TV service.

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

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[51] *See AT&T Opposition* at 3. 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, AT&T submitted additional evidence supporting the Commission's findings regarding this conduct, as well as statements from Cablevision's own Chief Operating Officer that the inability of another wireline competitor (Verizon) to offer MSG HD and MSG+ HD would impede that competitor from obtaining new subscribers and would cause it 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* ¶ 45 (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.

"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]

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[54] *See Application for Review* at 5; *Cablevision II*, 649 F.3d at 708. Defendants claim that AT&T is not deprived of "all" the games of a local professional team because AT&T 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, 50; *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 AT&T is deprived of the HD games of four 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 AT&T Opposition* at 5 ("If Cablevision's argument that the 'significant hindrance' standard requires exclusion from the market or a hampered ability to compete for *all* consumers were correct, then the Commission could not have focused on access [to] MDU residents – or on sports fans – in its past decisions.").

[57] *See Order* at ¶¶ 44-45 (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 ¶ 44 (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 "viably 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 ¶¶ 44-45.

[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 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).

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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 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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[59] *See Application for Review* at 6-8; *Order* at ¶¶ 47-50; *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 ¶ 50; *see also id*. at ¶¶ 48-49.

[61] *See id.* at ¶ 50; *see also id*. at ¶¶ 48-49. We note that Defendants contend that a statement in one of AT&T's pleadings in this proceeding acknowledges 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 Defendants, Answer to AT&T's Supplement to Program Access Complaint, File No. CSR-8196-P (filed Jan. 6, 2011), at 54 ("*Defendants' Post-Discovery Answer to Supplement*") (citing AT&T Services Inc. *et al.*, Reply, File No. CSR-8196-P (filed Oct. 2, 2009), at 36)). In fact, as the Bureau noted in the *Order*, AT&T later in this proceeding stated that the Commission's findings in the *2010 Order* that consumers do not consider the SD and HD versions of the same network to be substitutes and that the HD version of a network should be treated as distinct from the SD version were "well-grounded in the record before the Commission." Reply Brief of AT&T, File No. CSR-8196-P (filed Jan. 31, 2011), at 30 ("*AT&T Post-Discovery Reply Brief*"); *see Order* at ¶ 78. In any event, AT&T'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 ¶ 65.

[62] *See Application for Review* at 8; *see also Defendants' Reply* at 3.

[63] *See Order* at ¶ 50.

[64] *See Application for Review* at 8-13; *see* Defendants' Supplement to the Record, File No. CSR-8196-P (filed April 9, 2010) ("*Defendants' April 2010 Supplement*"), Exhibit A (Declaration of Leslie Shifrin (March 15, 2010)) ("Shifrin March 2010 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 March 2010 Survey*"); *Defendants' Post-Discovery Answer to Supplement*, Declaration of Leslie Shifrin (Aug. 6, 2010) ("Shifrin Aug. 2010 Decl."), Exhibit I ("OTX Online Testing Exchange Assessing the Impact of AT&T Offering MSG HD/MSG+ HD on AT&T Customer Acquisition") ("*OTX July 2010 Survey*"), Exhibit J ("*Win-Back Survey*"). Defendants submitted two versions of the *OTX Survey*, one of which (the *OTX March 2010 Survey*) focused on Verizon's (continued….)

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

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service area and channel line-up, while the other (the *OTX July 2010 Survey*) focused on AT&T's service area and channel line-up. *See Order* at ¶ 57 n.287. We refer to these surveys collectively as the *OTX Survey*.

[65] *See Order* at ¶¶ 55-56 (discussing *Radius Survey*); *id*. at ¶¶ 57-59 (discussing *OTX March 2010 Survey* and *OTX July 2010 Survey*); *id*. at ¶¶ 60-61 (discussing *Win-Back Survey*). Defendants do not challenge the Bureau's findings regarding the *Win-Back Survey*.

[66] *See Order* at ¶ 56.

[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 AT&T. *See Order* at ¶ 56. 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 (Jan. 5, 2011), 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 ¶ 56.

[68] *See Order* at ¶ 56. 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 ¶ 56; *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 8.

[69] *Order* at ¶ 56.

[70] *See Application for Review* at 9.

[71] *See Order* at ¶ 56. 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 ¶ 56.

evidence, the Bureau was nonetheless required to give weight to the *Radius Survey* because the non-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 AT&T U-verse TV.[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 survey was designed to present two groups of survey respondents with written offers for an AT&T U-verse bundle of video, voice, 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

[73] *See Application for Review* at 9.

[74] *See Order* at ¶ 56. 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' Post-Discovery Answer to Supplement*, Declaration of Professor Eric T. Bradlow (Dec. 23, 2010), at ¶ 18 ("Bradlow Decl.") and Declaration of Professor Dilip Soman (Dec. 23, 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 ¶ 56. 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; *OTX July 2010 Survey* at 3; *see also OTX March 2010 Survey* at 2.

[76] *See Order* at ¶¶ 57-58.

[77] *See id*. at ¶ 57; *OTX July 2010 Survey* at 1; *see also OTX March 2010 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 Aug. 2010 Decl. at ¶¶ 5-6; Soman Decl. at ¶ 15(d); Scott Decl. at ¶ 14; *OTX July 2010 Survey* at 1; *see also* Shifrin March 2010 Decl. at ¶¶ 9-10; *OTX March 2010 Survey* at 1.

[78] *See Order* at ¶ 58 (noting that the offer presented to the Control Group included the statement "You've never seen the game like this – includes all 9 NY sports teams" directly before the statement "Access to a robust offering of HD channels," 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 AT&T by implying that no HD sports were offered. *See Application for Review* at 12; Bradlow Decl. at ¶ 19; Soman Decl. at ¶ 17; *see also* Shifrin March 2010 Decl. at ¶ 14. In fact, the Bureau properly concluded the opposite. *See Order* at ¶ 58. That is, by referring to sports directly before a reference to HD channels, the offer implies that the sports programming was offered in HD. *See id*. (citing *AT&T Post-Discovery Reply Brief* at 13 and Declaration of Philip Johnson (Jan. 31, 2011), at ¶ 7 ("With this juxtaposition, control survey participants who did notice these statements might have inferred HD programming of NY sports teams.") ("Johnson Reply Decl.")). Moreover, the Bureau explained, survey designers could have avoided this problem by using a "filter question" to determine whether Control Group respondents were aware of the absence of MSG HD and MSG+ HD from the offer. *See id*. (citing *AT&T Post-Discovery Reply Brief* at 13 and Johnson Reply Decl. at ¶ 7).

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the offers presented to both groups either stated or implied that MSG HD and MSG+ HD were likely available, the survey was unreliable.[79]

16. We reject Defendants' argument that the written offer presented to the Control Group was appropriate because it allegedly mirrors AT&T's real-world advertisements.[80] The Bureau found that the first page of this offer mirrored AT&T'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* AT&T'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 AT&T'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]

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[79] *See Order* at ¶ 58.

[80] *See Application for Review* at 10.

[81] *See Order* at ¶ 58. 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 AT&T'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 AT&T'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 "You've never seen the game like this." *See OTX July 2010 Survey* at 1; Shifrin Aug. 2010 Decl. at ¶ 11; Bradlow Decl. at ¶ 19; Soman Decl. at ¶ 17; *see also OTX March 2010 Survey* at 1; Shifrin March 2010 Decl. at ¶ 14 .

[82] The Bureau found the offer presented to the Control Group to be misleading because it implied that AT&T offers all local sports in HD. The Bureau did not reach this conclusion based on the failure of the offer (consistent with AT&T'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 statement "You've never seen the game like this – includes all 9 NY sports teams" appeared directly before the statement "Access to a robust offering of HD channels," which likely misled some Control Group respondents to believe that MSG HD and MSG+ HD were available. *See Order* at ¶ 58.

[83] *See id.* at ¶ 58 n.299; *OTX July 2010 Survey* at 3; *see also OTX March 2010 Survey* at 2.

[84] *See Order* at ¶ 58 n.299.

[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* AT&T." *See Order* at ¶ 59 (emphasis added). In fact, the *OTX Survey* sought only whether respondents would "consider" switching, not whether they would choose AT&T. *See OTX July 2010 Survey* at 3; *see also OTX March 2010 Survey* at 2.

[87] *See Order* at ¶ 58.

[88] *See id.* at ¶ 58 n.299.

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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 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 AT&T'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

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

[90] *See Order* at ¶ 58 n.300.

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

[92] *See Order* at ¶ 53 n.271 ("Because all four 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 four studies lead to convergent results.").

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

[94] *See Order* at ¶¶ 55-61.

[95] *See Application for Review* at 13; *Order* at ¶¶ 18 n.102, 26-27, 54. 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 AT&T. *See Order* at ¶ 54. Rather, the Bureau explained, Defendants could instead benefit by licensing this content to AT&T and earning increased licensing fees and advertising revenues. *See id*.

[96] *See Order* at ¶ 54.

[97] *Application for Review* at 13.

[98] *See Radius Survey* at 1 (concluding that the availability of local sports in HD is **[REDACTED** **]** for consumers when choosing a video provider); *OTX July 2010 Survey* at 1 (concluding that AT&T's ability to offer MSG HD and MSG+ HD would not result in "any meaningful (continued….)

properly concluded that the survey results conflict with Defendants' real-world actions and statements 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

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increase in customers"); *Defendants' Post-Discovery Answer to Supplement* at 62 and Exhibit J at 1 (concluding that, in response to the question of why respondents decided to leave AT&T U-verse TV service and subscribe to Cablevision instead, **[REDACTED**

]); *see also OTX March 2010 Survey* at 1 (concluding that Verizon's ability to offer MSG HD and MSG+ HD would not result in "any meaningful increase in customers").

[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" another wireline competitor (Verizon FiOS TV) was that Verizon FiOS TV's "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 Verizon FiOS TV, 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) **[REDACTED**

]. *Order* at ¶ 26. 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 AT&T'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 AT&T Opposition* at 8.

[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).

and inconclusive evidence."[108] Consistent with the D.C. Circuit's decision, the Bureau thoroughly 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 AT&T'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]

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[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.").

[109] *See Application for Review* at 14-16; *Defendants' Reply* at 3.

[110] *See Order* at ¶ 51; *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 ¶ 62; *Application for Review* at 14-15.

[112] *See Application for Review* at 14-15; *Defendants' Reply* at 3.

[113] *See Order* at ¶ 51. 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 ¶¶ 62, 64.

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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 AT&T 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 AT&T, not Defendants, to perform a regression analysis.[116] Second, in response to data they submitted in the record demonstrating that **[REDACTED**

], Defendants claim that the Bureau should have required AT&T, 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 AT&T'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

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[115] *See Application for Review* at 15-16; *Defendants' Reply* at 3.

[116] *See Application for Review* at 15; *see also Order* at ¶ 64. "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 service. *See Order* at ¶¶ 62, 64. "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*; *see also infra* ¶ 31.

[117] *See Application for Review* at 15 n.70; *see also Order* at ¶ 62 n.322.

[118] *See Order* at ¶¶ 62 and n.322; *id*. at ¶ 64.

[119] *See id*. at ¶ 64. Indeed, as the Bureau noted, while AT&T provided data comparing its penetration rate for HD service in Connecticut to its penetration rate for HD service in other areas that AT&T serves, 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"; (ii) there are a "myriad of possible alternative explanations [that] remain entirely unexplored" for AT&T's HD penetration rate in Connecticut; and (iii) "[m]ere comparison of AT&T's HD penetration rate in Connecticut with average HD penetration in other areas served by AT&T 'does not actually test the effect of MSG HD and MSG+ HD exclusion.'" *See id.* (citations omitted).

[120] *See Application for Review* at 16-18.

[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 16. 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.

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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 AT&T's alleged "marketplace success,"[124] but properly found the evidence insufficient to obviate the need for evidence isolating the impact of Defendants' withholding of MSG HD and MSG+ HD from AT&T.[125] The Bureau also considered AT&T'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 AT&T's performance does not mean that a lack of access to MSG HD and MSG+ HD does not "significantly hinder" AT&T; and (ii) the particular RSN programming at issue here is non-replicable and has no close substitutes, thus eliminating AT&T'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 AT&T'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 AT&T given its lack of MSG HD and MSG+ HD.[129] While Defendants claim that the satisfaction of AT&T's current customers demonstrates that MSG HD and MSG+ HD are not "must have" for many customers in the State of Connecticut,[130] the record reflects that the number of AT&T U-verse TV subscribers at present is **[REDACTED**

].[131] As the Bureau explained, the salient question is whether these potential subscribers, whom AT&T seeks to subscribe to its U-verse TV service, would be unwilling to switch to AT&T 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]

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[122] *See Order* at ¶¶ 54-69.

[123] *See id*. at ¶¶ 51, 69.

[124] *See Application for Review* at 16.

[125] *See Order* at ¶¶ 62, 64.

[126] *See Application for Review* at 16-17.

[127] *See Order* at ¶ 68.

[128] *See Application for Review* at 17-18.

[129] *See Order* at ¶ 67.

[130] *See Application for Review* at 18.

[131] *See Order* at ¶ 62.

[132] *See id.* at ¶ 67.

[133] 47 U.S.C. § 548(b).

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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 AT&T'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 further support for the Bureau's conclusion that these surveys were flawed.[137] With respect to AT&T'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, including certain MVPDs in Connecticut that do not carry MSG HD and MSG+ HD, 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] Moreover, despite Defendants' claim, the Bureau specifically considered **[REDACTED**

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[134] *See Application for Review* at 18-21.

[135] *See id*. at 18.

[136] *See Order* at ¶¶ 56, 58, 61.

[137] *See id*. at ¶ 54; *see also supra* ¶ 18.

[138] *See supra* ¶ 23 (stating that the evidence purporting to demonstrate AT&T's success in the State of Connecticut was insufficient to obviate the need for evidence isolating the impact of Defendants' withholding of MSG HD and MSG+ HD from AT&T); *see also Order* at ¶ 62 and n.314 (discussing AT&T's statements and other evidence purporting to demonstrate AT&T's general success); *id.* at ¶ 66 (explaining that, as the Commission held previously and Defendants conceded, the salient issue is not the amount of sports or HD programming AT&T offers in general; rather, the key issue is whether AT&T has been "significantly hindered" without MSG HD or MSG+ HD).

[139] *See Application for Review* at 19.

[140] *See Order* at ¶ 48 n.235.

[141] *See id*. at ¶¶ 3, 50-51; *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 19.

[143] *See Order* at ¶ 48 n.235.

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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.[144] 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 AT&T, thereby demonstrating the market importance of the networks;[145] and (ii) the Commission has previously recognized that ratings "are not a perfect predictor of consumer response to the withholding of a network."[146]

27. Fourth, Defendants claim that the *Order* cites Cablevision's recent rate increase but "does not even mention" AT&T's rate increase.[147] In fact, the Bureau considered and carefully explained the significance of both rate increases to the issues raised in this case.[148] Moreover, despite Defendants' claim, the Bureau specifically considered **[REDACTED**

].[149] The Bureau concluded that the existence of other factors that may impact AT&T's performance does not mean that a lack of access to MSG HD and MSG+ HD does not "significantly hinder" AT&T.[150]

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.[151] As an initial matter, the Bureau noted that other evidence cited by Defendants establishes that over half of all households are capable of viewing HD programming.[152] In any event, the Bureau squarely addressed the survey noted by Defendants in their *Application for Review* and found the data to support, rather than undermine, the rebuttable presumption pertaining to HD RSNs.[153]

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[144] *See Application for Review* at 19.

[145] *See Order* at ¶ 63.

[146] *See id*. (citing *2007 Order*, 22 FCC Rcd at 17817-18, ¶ 39). The Bureau cited the **[REDACTED**
] 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*.

[147] *See Application for Review* at 19-20.

[148] *See supra* ¶ 23 (stating that the evidence purporting to demonstrate AT&T's success in the State of Connecticut was insufficient to obviate the need for evidence isolating the impact of Defendants' withholding of MSG HD and MSG+ HD from AT&T); *see also Order* at ¶ 62 and n.315 (discussing AT&T's rate increase and other evidence purporting to demonstrate AT&T's general success); *id*. at ¶ 62 and nn.313, 324 (explaining that Defendants' claim of robust competition is belied by the fact that incumbent cable market share in Fairfield County, Connecticut (New York DMA) (**[REDACTED** **]**) and in the Hartford/New Haven DMA (**[REDACTED** **]**) 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).

[149] *See Application for Review* at 20; *see also Order* at ¶ 68 n.356.

[150] *See Order* at ¶ 68.

[151] *See Application for Review* at 20.

[152] *See Order* at ¶ 49 n.250.

[153] *See id*. 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 ¶ 49.

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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 AT&T's decision to advertise its sports and HD programming.[154] In fact, the Bureau specifically and sensibly addressed AT&T's decision to advertise its sports and HD programming.[155]

30. Seventh, Defendants contend that the Bureau improperly failed to give weight to data pertaining to AT&T's status on a nationwide basis, including its financial resources.[156] 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 AT&T's video service in the State of Connecticut.[157]

31. Eighth, Defendants claim that **[REDACTED**

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] the Bureau explained that these raw penetration numbers are insufficient to rebut the presumption absent an analysis that isolates the impact of the "unfair act" at issue."[161]

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[154] *See Application for Review* at 20.

[155] The Bureau explained that, as the Commission held previously and Defendants conceded, the salient issue is not the amount of sports or HD programming AT&T offers in general; rather, the key issue is whether AT&T has been "significantly hindered" without MSG HD or MSG+ HD. *See Order* at ¶ 66. Defendants' decision to emphasize MSG HD and MSG+ HD in advertisements provided additional support for the significance of these networks. *See id*. at ¶¶ 26, 63.

[156] *See Application for Review* at 21-22.

[157] *See Order* at ¶ 62 n.312. 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 20-21. Any such expectations, however, did not contemplate that RSN programming would be withheld from telco competitors.

[158] *See Application for Review* at 21; *see also supra* n.116 (discussing the distinction between "penetration" data and "market share" data).

[159] *See Order* at ¶ 62 n.324.

[160] *See id.* at ¶ 62 n.322.

[161] *See id.* at ¶ 64 n.346 (**[REDACTED**

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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;"[162] and (ii) held that withholding RSN programming will always be "unfair."[163] On the contrary, consistent with *Cablevision II* and Commission precedent, the Bureau weighed the anticompetitive harms of Defendants' withholding against the procompetitive benefits.[164] There is no basis for Defendants' assertion that the Bureau found Defendants' conduct to be "unfair" because it resulted in "significant hindrance."[165] 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.[166] In addition, despite Defendants' claims,[167] the Bureau specifically found that the withholding at issue here harmed competition and consumers in the impacted markets.[168] Defendants repeat their claim that it is significant that some consumers in the State of Connecticut have a choice of up to five MVPDs, but the Bureau found that incumbent cable market share in the State of Connecticut far exceeds the national average and that Cablevision has raised its rates in excess of inflation despite the number of competitors in the market.[169] While Defendants claim that their withholding of MSG HD and MSG+ HD will

[162] *See Application for Review* at 21; *Defendants' Reply* at 5.

[163] *See Application for Review* at 22; *Defendants' Reply* at 5.

[164] *See Order* at ¶¶ 25-42.

[165] *See Application for Review* at 21. 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 ¶¶ 29-30 (citing 47 U.S.C. § 548(c)(4)(A)). While the Bureau found that Defendants' withholding MSG HD and MSG+ HD "significantly hindered" AT&T and thereby harmed consumers by limiting competition in the video distribution market (*see id.* at ¶ 29), 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 ¶ 38; *see also id*. at ¶¶ 39-40. 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 ¶¶ 28-42 (noting that withholding may promote investment in and carriage of a network).

[166] *See Order* at ¶¶ 25-42; *Application for Review* at 22. 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 22-23. In fact, Defendants themselves deemed AT&T and other wireline entrants as their "closest" competitors and conceded that they license programming to DBS operators because, unlike AT&T, DBS operators do not offer voice or broadband service. *See Defendants' Post-Discovery Answer to Supplement* at 98; *see also Order* at ¶ 29 n.162. The Commission has also found that DBS operators do not constrain the price of cable service to the extent that AT&T and other wireline entrants do. *See Order* at ¶ 29 n.162. 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 ¶ 29.

[167] *See Application for Review* at 23.

[168] *See Order* at ¶¶ 29, 39, 41, 48, 62 nn.313 and 323-324; *id*. at ¶¶ 75-76.

[169] *See id.* at ¶ 62 nn.313 and 323-324.

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."[170]

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.[171] 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."[172] 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.[173]

I. Compliance Deadline

34. The *Order* required MSG to enter into an agreement to license MSG HD and MSG+ HD to AT&T 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 AT&T on or before November 14, 2011.[174] 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 AT&T, 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**.

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[170] *See id*. at ¶ 30 (quoting *2010 Order*, 25 FCC Rcd at 750-51, ¶ 9). **[REDACTED**

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[171] *See Application for Review* at 23-25; *Defendants' Reply* at 5.

[172] *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.

[173] *See Order* at ¶¶ 73-76.

[174] *See AT&T Servs. Inc. et al.*, Order, DA 11-1694 (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