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Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C.

FILED/ACCEPTED

AUG 13 2009

Federal Communications Commission  
Office of the Secretary

AT&T SERVICES, INC. AND SOUTHERN  
NEW ENGLAND TELEPHONE COMPANY  
D/B/A AT&T CONNECTICUT,

Complainants,

v.

MADISON SQUARE GARDEN, L.P. AND  
CABLEVISION SYSTEMS CORP.,

Defendants.

File No. \_\_\_\_\_

To: The Commission

**PROGRAM ACCESS AND SECTION 628(b) COMPLAINT**

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August 13, 2009

TABLE OF CONTENTS

	Page
INTRODUCTION .....	i
PROGRAM ACCESS AND SECTION 628(b) COMPLAINT .....	1
JURISDICTION .....	6
THE COMPLAINANTS .....	7
THE DEFENDANTS.....	8
STATEMENT OF FACTS .....	13
AT&T’s U-verse TV Service .....	13
Defendants’ History of Withholding Must-Have Programming from AT&T.....	14
Defendants’ Refusal to License the HD Format of MSG and MSG Plus to AT&T.....	17
Defendants’ Refusal to License the HD Format of MSG and MSG Plus to AT&T Has Significant Anticompetitive Effects .....	22
Defendants’ Refusal to License the HD Format of MSG and MSG Plus to AT&T Has Anticompetitive Purpose .....	26
Defendants’ Conduct Violates Established Standards of Fair Competition and Dealing.....	28
Defendants’ Claim that their Refusal to Deal is Procompetitive Is Unsupported and Wrong .....	31
COUNT I .....	33
Unfair Method of Competition and Unfair Practice in Violation of Section 628(b).....	33
COUNT II.....	36
Unreasonable Refusal to Sell Programming in Violation of the Communications Act and Commission Rules .....	36
COUNT III.....	39
Unlawful Avoidance of Program Access Requirements .....	39
COUNT IV.....	41
Undue or Improper Influence in the Decision to Sell, or the Prices, Terms, and Conditions of Sale of, Satellite Cable Programming.....	41

**REDACTED – FOR PUBLIC INSPECTION**

COUNT V..... 42

    Discrimination in the Terms and Conditions  
    of Sale or Delivery of the HD Format of Video Programming ..... 42

REQUEST FOR PENALTIES ..... 43

REQUEST FOR RELIEF ..... 43

**REDACTED – FOR PUBLIC INSPECTION**

**INDEX OF EXHIBITS**

1. Cablevision Systems Corp, Form 10-Q (filed July 30, 2009) (Selected Material)
2. Joint Declaration in Support of Program Access and Section 628(b) Complaint
3. Cablevision Systems Corp., Form 10-K (filed Feb. 26, 2009) (Selected Material)
4. Program Access Complaint, *AT&T Servs., Inc. v. Rainbow Media Holdings, LLC*, File No. CSR-7429-P (FCC filed June 18, 2007) (Selected Material)
5. Letter from Christopher M. Heimann, General Attorney, AT&T Services, Inc., to Mr. Michael Bair, President, MSG Media, *et al.* (July 10, 2009)
6. Letter from Howard J. Symons, Counsel to MSG and Cablevision, to Christopher M. Heimann, General Attorney, AT&T Services, Inc (July 23, 2009)
7. Consumer Electronics Association, *Second Annual Inside the Mind of the HD Sports Fan Study* (January 2007) (Selected Material)
8. Cablevision Industries Storyboard for iO HD (Ad Code: CABVCA-1332) (first aired Mar. 1, 2008)
9. Cablevision Industries Print Advertisement for Long Island Newsday (Ad Code: CABVCA-1585) (Dec. 10, 2008)
10. Cablevision Industries Storyboard for iO Digital Cable Service (Ad Code: CABVCA-1604) (first aired on Jan. 4, 2009)
11. Cablevision Industries Storyboard for iO HD (Ad Code: CABVCA-1627) (first aired Feb. 13, 2009)
12. Cablevision Industries Print Advertisement for New York City (Ad Code: CABVA-1646) (Mar. 12, 2009)
13. Cablevision Industries Print Advertisement for Long Island Newsday (Ad Code: CABVCA-1689) (May 22, 2009)
14. Cablevision Industries Print Advertisement for Long Island Newsday (Ad Code: CABVCA-1724) (July 1, 2009)
15. Cablevision Industries Print Advertisement for Long Island Newsday (Ad Code: CABVCA-1731) (July 7, 2009)

## **REDACTED – FOR PUBLIC INSPECTION**

### **INTRODUCTION**

This case involves Defendants' selective refusal to provide the high definition ("HD") format of must-have regional sports network ("RSN") programming to the one rival that is capable of providing meaningful, wireline-based video competition in Connecticut. AT&T is a multichannel video programming distributor ("MVPD") that is providing wireline-based video service in competition with incumbent cable operators in markets across the country, including parts of Connecticut. Defendants, on the heels of their prior unlawful refusal to provide RSN programming to AT&T in Connecticut, which abated only when the Media Bureau was poised to act on AT&T's prior complaint, have steadfastly refused to provide AT&T access to the HD format of two RSNs – Madison Square Garden Network ("MSG") and Madison Square Garden Plus Network ("MSG Plus") – that hold exclusive rights to sports programming that AT&T requires to compete successfully in Connecticut. Defendants' outright refusal to license the HD format of this programming to AT&T – at the same time as they make the HD format selectively available to other MVPDs, and for the express purpose of hampering AT&T's ability to compete against Defendants' affiliated cable systems in Connecticut – is conduct that has long been recognized as unfair and anticompetitive. It should be condemned as such under Section 628(b) of the Communications Act.

Defendant Cablevision Systems Corp.'s ("Cablevision") defense of its conduct is startling for its candor. Cablevision views the programming at issue here – which includes exclusive rights to the HD format of numerous area sports franchises, including, among others, the New York Knicks professional basketball team and the New York Rangers (both of which are owned by Cablevision), New York Islanders, and New Jersey Devils professional hockey

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teams – as a “competitive differentiator.”<sup>1</sup> In other words, Cablevision seeks to defend its refusal to license must-have programming (in a must-have format) to AT&T precisely *because* it will inhibit AT&T’s ability to compete with Cablevision in the MVPD marketplace. But, although in the ordinary case a vertically integrated company is under no compulsion to license upstream inputs to a rival, that is decidedly not the case where, as here, the input at issue is unique and nonreplicable; where, as here, there is a demonstrated history of voluntary licensing to other parties; and where, as here, Congress has made a judgment that dominant cable incumbents should not be permitted to use control over programming to reinforce their control over the MVPD marketplace. In these circumstances, Defendants’ refusal to license falls squarely within established economic principles condemning anticompetitive behavior and constitutes an “unfair method[] of competition . . . , the purpose or effect of which is to hinder significantly” AT&T’s ability to compete. 47 U.S.C. § 548(b).

Defendants’ purported justification for not licensing the HD format of the programming at issue here has been that the HD format is terrestrially delivered and therefore not subject to the specific program access rules promulgated pursuant to Section 628(c). But Defendants’ conduct is unlawful under Section 628(b) regardless of whether it is also encompassed within the rules the Commission promulgated pursuant to Section 628(c).<sup>2</sup>

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<sup>1</sup> Cablevision Answer to Program Access Complaint, *Verizon Tel. Cos. v. Madison Square Garden, L.P.*, No. CSR-8185-P, at 54 (FCC filed July 28, 2009) (“Cablevision Answer”).

<sup>2</sup> In its answer to Verizon’s complaint, Cablevision asked the Commission to dismiss the complaint on the ground that it was an attempt to “end-run” around the Commission’s pending rulemaking on whether the Commission should extend the program access rules adopted pursuant to Section 628(c) to terrestrially delivered programming, and it undoubtedly will make the same request here. *Id.* at 6. But, as discussed herein, Section 628(b) establishes a broad, statutory prohibition against unfair methods of competition or unfair or deceptive practices by cable operators and their programming affiliates that extends beyond the conduct proscribed by the Commission’s program access rules. Moreover, Section 628(d) specifically provides that any MVPD aggrieved by conduct that “constitutes a violation of subsection (b) of this section, or the

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In Section 628(b), Congress broadly made it “unlawful for a cable operator [or] a satellite cable programming vendor in which a cable operator has an attributable interest . . . to engage in unfair methods of competition or unfair . . . 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 . . . to subscribers or consumers.” 47 U.S.C. § 548(b). In Section 628(c), Congress directed this Commission to promulgate rules implementing Section 628(b) and it prescribed the “[m]inimum contents” of such regulations. *Id.* § 548(c)(2). As this Commission has recognized, the specific practices identified in Section 628(c) are prohibited *per se*. But they are only the bare “minimum” necessary to give effect to Section 628(b); contrary to Defendants’ position, they do not define the full sweep of Section 628(b). As the D.C. Circuit recently held, Section 628(b) is an expansive prohibition on unfair practices that have an anticompetitive purpose or effect and that hinder the provisioning of video programming by MVPDs to subscribers. *See National Cable & Telecomm. Ass’n v. FCC*, 567 F.3d 659 (D.C. Cir. 2009). And, as the Commission itself has long recognized, conduct need not be covered by the “minimum” *per se* violations listed in Section 628(c) in order to run afoul of the expansive prohibition in Section 628(b).<sup>3</sup>

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regulations of the Commission under subsection (c) of this section, may commence an adjudicatory proceeding at the Commission.” 47 U.S.C. § 548(d) (emphasis added). Here, AT&T is not asking the Commission to extend those rules enacted pursuant to Section 628(c) to terrestrially delivered programming (although AT&T believes the Commission should for the reasons articulated in its comments in the pending program access rulemaking proceeding). Rather, AT&T is seeking a ruling by the Commission that, under the specific facts and circumstances of this case, Cablevision’s conduct violates the statutory prohibition in Section 628(b) itself, and thus raises issues distinct from those in the rulemaking proceeding.

<sup>3</sup> *See, e.g.*, First Report and Order, *Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992*, 8 FCC Rcd 3359, ¶ 29 (1993) (“1993 Order”) (finding that “subsection [(c)] includes only the minimum required regulations to be promulgated by the Commission under 628(b), and is not intended to be entirely inclusive”).

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Defendants' refusal to license the HD format of MSG and MSG Plus to AT&T accordingly may be condemned under Section 628(b) regardless of whether it runs afoul of Commission regulations promulgated under Section 628(c). And such condemnation is required on the facts of this case. First, Cablevision's refusal to license the HD format of MSG and MSG Plus has an obvious anticompetitive purpose – as noted, Cablevision has acknowledged that it will not license the HD format to AT&T precisely because it believes doing so will impair AT&T's ability to win and retain subscribers. Second, Cablevision's refusal to deal has a substantial anticompetitive effect, as confirmed both by this Commission's unbroken series of orders finding that access to RSN programming is critical to an MVPD's ability to compete with entrenched cable incumbents and by Defendants' own conduct in refusing to license programming it otherwise has every incentive to license. Third, even as Defendants have refused to license to AT&T, they have voluntarily licensed the HD format of MSG and MSG Plus to other MVPDs (including DirecTV), demonstrating both that they lack any legitimate, efficiency justification for refusing to license to AT&T and that their refusal to deal is motivated only by an anticompetitive purpose. Defendants' conduct, in short, is a straightforward "unfair method[] of competition" and "unfair . . . practice[]" under Section 628(b).

For these reasons and others explained below, this Commission should act expeditiously to remedy Defendants' unlawful conduct.

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To: The Commission

**PROGRAM ACCESS AND SECTION 628(b) COMPLAINT**

1. Pursuant to Section 628 of the Communications Act of 1934, as amended, 47 U.S.C. § 548, and the Commission's rules, 47 C.F.R. §§ 76.1000 *et seq.*, Southern New England Telephone Company d/b/a AT&T Connecticut ("AT&T Connecticut"), which provides a multichannel video programming service in Connecticut using Internet Protocol ("IP") video technology and is classified as an MVPD, and AT&T Services, Inc., which negotiates for and purchases video programming on behalf of AT&T Connecticut and other affiliated local telephone companies, file this Complaint to obtain access to certain video programming services of Madison Square Garden, L.P. ("Madison Square Garden").

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2. Defendant Madison Square Garden is a limited partnership wholly owned by Defendant Cablevision.<sup>4</sup> Madison Square Garden provides regional sports programming to Cablevision and to other MVPDs in, as relevant here, the New York City metropolitan area and parts of Connecticut. Madison Square Garden’s regional sports programming is televised on MSG and MSG Plus. Defendants provide MSG and MSG Plus in two formats: standard definition and HD. Regardless of the format in which Madison Square Garden delivers MSG and MSG Plus, the underlying programming content on the standard definition and HD feeds of each network is virtually the same.

3. MSG and MSG Plus are RSNs that are vertically integrated with Cablevision. This Commission has consistently recognized that RSN programming is “must-have” programming – that is, programming that consumers demand and without which MVPDs cannot compete effectively. RSN programming “is unique because it is particularly desirable and cannot be duplicated.” *Adelphia Order* ¶ 189.<sup>5</sup> That is especially so here, where MSG and MSG Plus own the exclusive broadcasting rights for numerous professional sports teams – including the New York Knicks and the New York Rangers (both of which are owned by Cablevision), the New York Islanders, the New Jersey Devils, and others – that are extremely popular in AT&T Connecticut’s service area. And that is also especially so, as explained below, where such programming is provided in the HD format, which has become the must-have format for RSN programming. For that reason, without timely access to the HD format of MSG and MSG Plus, AT&T cannot deliver to consumers programming that they demand and likely receive from their

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<sup>4</sup> As discussed below, Madison Square Garden is a wholly owned subsidiary of Rainbow Media Holdings, LLC, which, in turn, is owned by Cablevision via a holding company.

<sup>5</sup> See Memorandum Opinion and Order, *Applications for Consent to the Assignment and/or Transfer of Control of Licenses Adelphia Communications Corporation to Time Warner Cable Inc.*, 21 FCC Rcd 8203 (2006) (“*Adelphia Order*”).

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current MVPD, impairing AT&T's ability to offer a video programming service that can compete effectively with entrenched incumbent cable operators.

4. This Commission has found that access to RSN programming is critically important to MVPDs, especially new entrants seeking to compete with entrenched cable incumbents: “[A]n MVPD’s ability to provide service that is competitive with an incumbent cable operator is significantly harmed if denied access to ‘must have’ vertically integrated programming for which there are no good substitutes, such as regional . . . sports networks.” *News Corp. Order* ¶ 44.<sup>6</sup> Similarly, the Commission has found that “an MVPD’s ability to provide a service that is competitive with the incumbent cable operator is significantly harmed if the MVPD is denied access to popular, vertically integrated programming for which no good substitute exists . . . including services that are considered ‘must have’ . . . such as regional . . . sports programming.” *2002 Order* ¶ 34.<sup>7</sup>

5. The HD format of RSN programming is particularly crucial to an MVPD’s ability to compete. Demand for sports programming is a driving force behind the growth in both HD television sets (“HDTVs”) and HD programming. The same consumers who demand access to RSN programming are accordingly also the same consumers who are most likely to demand such sports programming in an HD format. Indeed, Cablevision’s extensive advertising campaign

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<sup>6</sup> Memorandum Opinion and Order, *General Motors Corp., and Hughes Elect. Corp., Transferors, and the News Corp. Ltd., Transferee, for Authority to Transfer Control*, 19 FCC Rcd 473 (2004) (“*News Corp. Order*”); *id.* at ¶ 133 (explaining that “[s]ince [the Commission] first began tracking regional cable programming networks . . . it has repeatedly recognized the importance of regional sports programming to MVPD offerings,” and that “there are no readily acceptable close substitutes” for RSNs); *see also* Twelfth Annual Report, *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 21 FCC Rcd 2503, ¶ 205 (2006) (“Access to must have programming, including . . . regional sports networks, on a timely basis and at competitive rates is a key competitive issue for all MVPDs.”).

<sup>7</sup> Report and Order, *Implementation of the Cable Television Consumer Protection and Competition Act of 1992*, 17 FCC Rcd 12124 (2002) (“*2002 Order*”).

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touting its exclusive carriage of the HD format of MSG and MSG Plus is unambiguous evidence that the HD format of RSN programming has tremendous competitive significance. The HD format, in other words, has become the must-have format for RSN programming (which itself is must-have programming). Its competitive significance will only continue to grow.

6. This case involves Defendants' outright refusal to license the HD format of MSG and MSG Plus to AT&T. Defendants' have refused to do so despite the fact that Defendants are willing to negotiate with AT&T for access to other Cablevision-affiliated HD programming, despite the fact that AT&T has obtained access to the standard format of that same programming, and despite the fact that Defendants have licensed both the standard and HD formats of that programming to other MVPDs (including Comcast Corporation ("Comcast"), Time Warner Cable Inc. ("TWC"), and DirecTV) – but only to those MVPDs that do not provide the type of wireline video competition that the Commission has recognized is the only form of competition that effectively constrains incumbent cable operators' prices.<sup>8</sup> Defendants' steadfast, selective refusal to license the HD format of MSG and MSG Plus – on any terms – is a naked anticompetitive restraint: it constitutes denial of a vital programming input for the sole purpose of benefitting Cablevision's distribution arm at the expense of AT&T's ability to compete with

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<sup>8</sup> See Report on Cable Industry Prices, *Implementation of Section 3 of the Cable Television Consumer Protection and Competition Act of 1992*, 24 FCC Rcd 259, ¶ 3 (MB 2009) ("2009 Cable Industry Price Report") ("Cable prices decrease substantially when a second wireline cable operator enters the market. It does not appear from these results that DBS effectively constrains cable prices. Thus, in the large number of communities in which there has been a finding that the statutory test for effective competition has been met due to the presence of DBS service, competition does not appear to be restraining price as it does in the small number of communities with a second cable operator."); *id.* at ¶ 14 ("In markets with two competing cable operators, the results show that the incumbent operator charges 14.1 percent less, on average, all other things held constant, than operators charge in markets where a second cable operator is not present.").

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Cablevision in Connecticut.<sup>9</sup> Defendants have no legitimate, non-discriminatory basis for refusing to make the HD format of MSG and MSG Plus available to AT&T.<sup>10</sup>

7. Defendants' refusal to deal with AT&T with respect to the HD format of MSG and MSG Plus constitutes an unlawful and unfair method of competition or an unfair or deceptive act or practice, in violation of 47 U.S.C. § 548(b) and 47 C.F.R. § 76.1001, and unlawful discrimination in violation of 47 U.S.C. § 548(c)(2)(B) and 47 C.F.R. § 76.1002(b). Cablevision's undue or improper influence over Madison Square Garden independently constitutes a violation of 47 U.S.C. § 548(c)(2)(A) and 47 C.F.R. § 76.1002(a).

8. To redress these violations of the Communications Act and the Commission's rules, AT&T requests that the Commission expeditiously issue an order (i) declaring that Defendants' refusal to license the HD format of MSG and MSG Plus to AT&T is unlawful under Section 628 of the Communications Act and the Commission's rules; (ii) requiring Defendants immediately to provide all formats of MSG and MSG Plus to AT&T on reasonable and non-discriminatory rates, terms, and conditions; and (iii) instituting a forfeiture proceeding based on

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<sup>9</sup> AT&T competes head-to-head with Cablevision in much of its Connecticut service area. *See* Cablevision Systems Corp, Form 10-Q at 44 (filed July 30, 2009) ("Cablevision 10-Q") (cited selections from 10-Q attached as Exhibit 1) ("AT&T offers service in competition with [Cablevision] in most of our Connecticut service area. Competition from incumbent telephone companies has contributed to slower video revenue growth rates in 2009 and this competition may continue to negatively impact our video revenue and our video revenue growth rates in the future.").

<sup>10</sup> Indeed, in its statements to investors, Cablevision has observed that "Madison Square Garden's [regional sports programming business and Fuse] derive[] [their] revenues from affiliation fees paid by cable television operators (including our cable television systems), DBS operators and telephone companies that provide video service and from sales of advertising. Increases in [such] . . . revenues result from a combination of changes in rates and changes in the number of viewing subscribers." *Id.* at 46. Plainly, Madison Square Garden would have every incentive to sell its regional sports programming to AT&T in order to maximize its revenues, and would do so, were it not for Cablevision's desire to inhibit AT&T's ability to compete effectively in the downstream distribution market in Connecticut.

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Defendants' repeated failure to comply with the Communications Act and the Commission's rules.

### JURISDICTION

9. The Commission has jurisdiction to consider this Complaint under 47 U.S.C. § 548(d) and 47 C.F.R. § 76.1003.

10. The full Commission should act on AT&T's Complaint in the first instance. The Media Bureau has previously determined that a complaint filed by AT&T seeking access to regional sports programming raised novel issues of first impression that the Bureau was not authorized to decide on "delegated authority." Memorandum Opinion and Order, *AT&T Servs. Inc. v. CoxCom, Inc.*, 24 FCC Rcd 2859, ¶¶ 13, 16 (MB 2009) (denying complaint "without prejudice"); *see* 47 C.F.R. § 0.283(c). Although the Commission has delegated enforcement of program access and carriage complaints to the Media Bureau, *see* 47 C.F.R. § 0.61(f)(7), that is no barrier to the full Commission itself addressing a complaint in the first instance, *see, e.g.*, Memorandum Opinion and Hearing Designation Order, *TCR Sports Broad. Holding, L.L.P. v. Comcast Corp.*, 21 FCC Rcd 8989 (2006) (order by full Commission finding that an unaffiliated RSN had established a *prima facie* case of program carriage discrimination without prior order by the Media Bureau), especially where the Bureau itself believes it cannot act.

11. The Commission should resolve this case expeditiously, within five months from the date of the Complaint. The Commission has held that "denial of programming cases" involving an "unreasonable refusal to sell," such as the case here, "should be resolved within five months of the submission of the complaint to the Commission." Report and Order, *Implementation of the Cable Television Consumer Protection and Competition Act of 1992*, 13 FCC Rcd 15822, ¶ 41 (1998) ("1998 Implementation Order"). The Commission recently reaffirmed this commitment. *See* Report and Order and Notice of Proposed Rulemaking,

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*Implementation of the Cable Television Consumer Protection and Competition Act of 1992*, 22 FCC Rcd 17791, ¶ 107 (2007) (“2007 Program Access Order”). This timeframe is particularly appropriate because, like Verizon’s recent complaint against Defendants raising similar issues, see Program Access Complaint, *Verizon Telephone Cos. v. Madison Square Garden, L.P.*, File No. CSR-8185-P (FCC filed July 7, 2009), this case should “not involve complex or repeated discovery.” *1998 Implementation Order* ¶ 41.<sup>11</sup>

**THE COMPLAINANTS**

12. Complainant AT&T Connecticut operates a communications network in Connecticut that provides access lines and associated services to residential and business customers. AT&T Connecticut provides residential customers with an IP video service known as U-verse TV service in Connecticut in, among other places, portions of Hartford, New Haven, East Haven, West Haven, Stamford, Greenwich, Bridgeport, Orange, Bristol, Danbury, Hamden, Milford, Middletown, Naugatuck, New Britain, New Canaan, Darien, Shelton, Stratford, Wallingford, Waterbury, Westport, Weston, Woodbridge, Easton, Fairfield, and Norwalk. As explained below, AT&T competes head-to-head in many of these communities against Cablevision.

13. Complainant AT&T Services, Inc. is a Delaware corporation with its principal place of business in Dallas, Texas. AT&T Services, Inc. is a wholly owned subsidiary of AT&T Inc. that provides management and specialized services to its parent company and the parent

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<sup>11</sup> AT&T believes that all counts in this Complaint that do not contain allegations on information and belief can be decided expeditiously without discovery. For those counts with allegations on information and belief, discovery may be appropriate. In the interest of expedition, AT&T respectfully submits that the Commission should decide counts that may be decided based on the briefs first, prior to authorizing discovery on remaining counts. See, e.g., 47 C.F.R. § 76.8(a)(5) (in any part 76 proceeding, Commission and Commission staff may hold a status conference at any time to assess the need for and the extent of discovery); *id.* § 76.1003(j).

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company’s direct and indirect subsidiaries and affiliates. Among its other activities, AT&T Services, Inc. purchases products and services, including rights to television programming, on behalf of AT&T Connecticut and other affiliated communications service providers. *See* Joint Declaration in Support of Program Access and Section 628(b) Complaint ¶ 19 (“Joint Decl.” attached as Exhibit 2).

14. Herein, AT&T Connecticut and AT&T Services, Inc. are collectively referred to as “AT&T.” AT&T is a multichannel video programming distributor for purposes of the Communications Act and the Commission’s rules, because AT&T “makes available for purchase, by subscribers or customers, multiple channels of video programming.” 47 U.S.C. § 522(13); 47 C.F.R. § 76.1000(e).

15. Pursuant to 47 C.F.R. § 76.1003(c)(1), AT&T’s contacts for the purpose of this Complaint are:

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**THE DEFENDANTS**

16. Defendant Cablevision is the fifth largest cable television operator in the United States.<sup>12</sup> Cablevision operates incumbent cable systems in the New York and Hartford/New Haven Designated Market Areas (“DMAs”) in Connecticut.<sup>13</sup>

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<sup>12</sup> *See* NCTA, *Top 25 MSOs – As of December 2008*, <http://www.ncta.com/Stats/TopMSOs.aspx> (citing Kagan research).

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17. Cablevision is a “cable operator” because it “provides cable service over a cable system and directly or through one or more affiliates owns a significant interest in such cable system.” 47 U.S.C. § 522(5), (6); 47 C.F.R. § 76.5 (a), (cc), (ff).

18. Cablevision’s address is 1111 Stewart Avenue, Bethpage, NY 11714, and its telephone number is (516) 803-2300.

19. Cablevision provides cable service in the western and central portions of Connecticut in competition with AT&T’s U-verse TV service.<sup>14</sup> In Stamford, Connecticut, for example, Cablevision is the incumbent cable television operator, and it offers its subscribers MSG and MSG Plus in the HD format.<sup>15</sup> AT&T also provides U-verse video service in the Stamford area, but it is unable to provide MSG and MSG Plus in HD format to its subscribers. According to Cablevision’s filings with the SEC, AT&T’s U-verse video service competes with Cablevision’s cable service in most of its Connecticut service area.<sup>16</sup>

20. Furthermore, Cablevision has successfully petitioned the Media Bureau for relief from federal cable rate regulation on the ground that it faces competition from AT&T in several communities in Connecticut. *See* Memorandum Opinion and Order, *Cablevision of Connecticut, L.P. and Cablevision Systems of Southern Connecticut, L.P., Petition for Determination of Effective Competition in various Connecticut Communities*, 23 FCC Rcd 8538, Attach. A (MB 2008) (granting petition for effective competition based on competition from AT&T in

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<sup>13</sup> A DMA is a group of counties in which the largest broadcast viewing share is given to the same geographically designed group of broadcast stations. Connecticut has two DMAs: the New York and Hartford-New Haven DMAs.

<sup>14</sup> *See* Optimum, *Channel Lineups*, [http://www.optimum.com/channel\\_lineups.jsp](http://www.optimum.com/channel_lineups.jsp) (listing channel lineups for Fairfield, Milford, Southport, Stratford, Litchfield, Orange, Woodbridge, and Norwalk).

<sup>15</sup> *See* Optimum, *Channel Lineup > Norwalk*, <http://www.optimum.com/lineup.jsp?regionId=30>.

<sup>16</sup> *See* Cablevision 10-Q at 44.

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Greenwich, Stamford, New Canaan, Darien, Norwalk, Westport, Weston, Wilton, Easton, Redding, Fairfield, Bridgeport, Stratford, Orange, Woodbridge, Milford).

21. Defendant Madison Square Garden, L.P. is a wholly owned subsidiary of Rainbow Media Holdings, L.L.C. (“Rainbow”).<sup>17</sup> Rainbow, in turn, is a “wholly-owned subsidiary” of CSC Holdings – a Delaware holding company of Cablevision.<sup>18</sup>

22. Cablevision and Madison Square Garden are closely integrated.<sup>19</sup> Madison Square Garden’s two chief corporate officers – Chairman James L. Dolan and Vice Chairman Hank J. Ratner – also serve as the President/Chief Executive Officer and Vice Chairman of

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<sup>17</sup> See Cablevision Systems Corp., Form 10-K at 2 (filed Feb. 26, 2009) (“Madison Square Garden is a wholly owned subsidiary of Rainbow Media Holdings.”) (“Cablevision 10-K”) (cited selections attached as Exhibit 3).

<sup>18</sup> *Id.* at 1.

<sup>19</sup> Cablevision has recently announced a spin-off of Madison Square Garden. That spin-off has no relevance to AT&T’s Complaint: at all relevant times, Madison Square Garden and Cablevision were vertically integrated; they remain so today; and, on information and belief, even if Cablevision proceeds with the spin-off as announced, Madison Square Garden will remain affiliated with Cablevision under the Commission’s attribution standards. See, e.g., New York Times, *Cablevision Approves Madison Square Garden Spinoff* (July 30, 2009), available at <http://dealbook.blogs.nytimes.com/2009/07/30/cablevision-approves-madison-square-garden-spinoff/?hp> (noting that Cablevision chief executive James L. Dolan “will be the executive chairman of the spun-off company, which, like Cablevision, will be controlled by the Dolan family through their ownership of a special class of shares”); Dow Jones Newswires, *Cablevision Board Approves MSG Spinoff; 2Q Profit Slips 8.1%* (July 30, 2009) available at [http://money.cnn.com/news/newsfeeds/articles/djf500/200907300858DOWJONESDJONLINE000659\\_FORTUNE5.htm](http://money.cnn.com/news/newsfeeds/articles/djf500/200907300858DOWJONESDJONLINE000659_FORTUNE5.htm) (noting that, under the proposal, “James Dolan would become MSG’s chairman and remain Cablevision’s president and chief executive” and that “Hank Ratner would oversee MSG’s day-to-day operations and remain Cablevision’s vice chairman.”). In addition, according to Cablevision’s 10-K, the Dolan family – which has executed a voting agreement that has the effect of causing the voting power of Class B stockholders to be cast as a block with respect to the election of directors elected by Class B shareholders – collectively own all of Cablevision’s Class B stock and approximately 70% of the total voting power of all outstanding Cablevision common stock. See Cablevision 10-K at 34. On information and belief, the Dolan family’s ownership and voting power in the spin-off will be the same as in the parent company.

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Cablevision, respectively.<sup>20</sup> Madison Square Garden operates two networks that televise regional sports programming, MSG and MSG Plus.<sup>21</sup> MSG and MSG Plus are distributed in two formats – standard definition and HD. Madison Square Garden negotiates carriage agreements with MVPDs (such as AT&T) for access to MSG and MSG Plus. This Complaint involves Defendants’ refusal to license to AT&T access to the HD format of MSG and MSG Plus.

23. MSG and MSG Plus carry more than 300 live sporting events in the HD format.<sup>22</sup> Madison Square Garden owns the exclusive rights<sup>23</sup> to produce and exhibit games of the New York Knicks (NBA), New York Rangers (NHL), Buffalo Sabres (NHL), New York Liberty (WNBA), and New York Red Bulls (MLS).<sup>24</sup> MSG Plus owns exclusive rights to produce and exhibit games of the New York Islanders (NHL) and New Jersey Devils (NHL), and also televises local and national college football and basketball games produced by Fox Sports Net.<sup>25</sup>

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<sup>20</sup> See The Garden.com, *James L. Dolan*, available at <http://www.thegarden.com/corporate/james-dolan.html> (listing James L. Dolan as Chairman of Madison Square Garden and President and Chief Executive Officer of Cablevision); The Garden.com, *Hank J. Ratner*, available at <http://www.thegarden.com/corporate/hank-ratner.html> (listing Hank J. Ratner as the Vice Chairman of Madison Square Garden and Cablevision).

<sup>21</sup> See The Garden.com, *Corporate Information*, available at <http://www.thegarden.com/corporate/index.html> (explaining that Madison Square Garden oversees MSG and MSG Plus); Cablevision 10-K at 1-2 (explaining that MSG Plus was formerly Fox Sports Net New York).

<sup>22</sup> See Linda Moss, *Comcast Launches MSG HD in New Jersey: More Than 300 Games Now Available in HD*, Multichannel News (Oct. 23, 2008) (“Moss, *Comcast Launches MSG HD*”), available at <http://www.multichannel.com/article/CA6608210.html>.

<sup>23</sup> A small number of games of these professional teams typically are televised on national cable or broadcast networks but the majority are available only on MSG and MSG Plus.

<sup>24</sup> See Moss, *Comcast Launches MSG HD*; *MSG.com, FSN New York Rebranded as MSG Plus*, (Mar. 3, 2008) (“*MSG.com, FSN-NY Rebranded as MSG Plus*”), available at [http://www2.msg.com/msg\\_content\\_news.jsp?articleID=v0000msgn20080303T173109096](http://www2.msg.com/msg_content_news.jsp?articleID=v0000msgn20080303T173109096).

<sup>25</sup> See Moss, *Comcast Launches MSG HD*; *MSG.com, FSN-NY Rebranded as MSG Plus*.

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Defendants also own the New York Knicks and New York Rangers professional franchises,<sup>26</sup> ensuring that they will continue to control the television rights for these professional teams. Because Connecticut is so close to New York, and because it has only a single professional sports team located in the state (the Connecticut Sun (WNBA)), the New York-based sports programming provided by MSG and MSG Plus is in high demand in Connecticut. *See* Joint Decl. ¶ 13.

24. MSG and MSG Plus provide “satellite cable programming” within the meaning of 47 C.F.R. § 76.1000(h) because the programming is transmitted via satellite and is primarily intended for direct receipt by cable operators for their retransmission to cable subscribers.<sup>27</sup> As discussed below, the fact that Cablevision also distributes the HD format of this satellite cable programming by terrestrial means does not alter the legal fact that the underlying programming itself is satellite delivered.

25. Madison Square Garden is a “satellite cable programming vendor,” as defined in 47 C.F.R. § 76.1000(i), because it is engaged in the production, creation, or wholesale distribution for sale of “satellite cable programming.”

26. By virtue of its ownership interest in Madison Square Garden, Cablevision has a “cognizable” and “attributable” interest in Madison Square Garden, as defined in 47 C.F.R. § 76.501 & nn. 1-5 and 47 C.F.R. § 76.1000(b). Accordingly, Madison Square Garden is a satellite cable programming vendor in which a cable operator has an attributable interest.

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<sup>26</sup> *See* Cablevision 10-K at 1 (“Our Madison Square Garden segment owns and operates . . . the New York Knickerbockers professional basketball team, [and] the New York Rangers professional hockey team.”).

<sup>27</sup> *See* Memorandum Opinion and Order, *RCN Telecom Servs. of New York, Inc. v. Cablevision Sys. Corp.*, 16 FCC Rcd 12048, ¶ 7 (2001) (“MSG and Fox Sports/NY [now MSG Plus] are satellite-delivered programming services”).

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27. Madison Square Garden’s address is 4 Pennsylvania Plaza, New York, NY 10001, and its telephone number is (212) 465-6000.

### STATEMENT OF FACTS

#### AT&T’s U-verse TV Service

28. In an effort to bring needed competition to the market for video services,<sup>28</sup> AT&T has undertaken a multi-billion dollar capital initiative, known as Project Lightspeed, to deploy more than 40,000 miles of new fiber-optic facilities. That rollout of fiber technology is enabling AT&T to provide its customers with a “triple-play” offering of Voice over Internet Protocol (“VOIP”), broadband Internet access services, and U-verse TV service, in competition with services provided by incumbent cable operators. *See* Joint Decl. ¶ 5.

29. AT&T’s competitive entry into the video marketplace promises to expand consumer choice and to provide needed competition to incumbent cable operators, such as Cablevision. As this Commission has said, “Congress and the Commission have repeatedly found . . . that entry by [local exchange carriers] and other providers of wire-based video service into various segments of the multichannel video marketplace will produce major benefits for consumers. A significant increase in multichannel competition usually results in lower prices, more channels, and a greater diversity of information and entertainment from more sources.”<sup>29</sup>

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<sup>28</sup> *See, e.g.*, Report and Order and Further Notice of Proposed Rulemaking, *Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended by the Cable Television Consumer Protection and Competition Act of 1992*, 22 FCC Rcd 5101, ¶ 19 (2007) (“*Section 621 Order*”) (“Most communities in the United States lack cable competition, which would reduce cable rates and increase innovation and quality of service.”), *petitions for review denied*, *Alliance for Community Media v. FCC*, 529 F.3d 763 (6th Cir. 2008), *cert. denied*, 129 S. Ct. 2821 (2009); *id.* (“In the vast majority of communities, cable competition simply does not exist.”).

<sup>29</sup> Report and Order and Further Notice of Proposed Rulemaking, *Exclusive Service Contracts for Provision of Video Services in Multiple Dwelling Units and Other Real Estate Developments*, 22 FCC Rcd 20235, ¶ 17 (2007), *aff’d National Cable & Telecomm. Ass’n v.*

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30. As a result of AT&T’s substantial investment in Project Lightspeed, AT&T currently makes U-verse video service available in markets across its 22-state footprint, including portions of Connecticut. *See id.* ¶ 9.

**Defendants’ History of Withholding Must-Have Programming from AT&T**

31. Successful video programming distribution requires access to video programming. AT&T’s ability to provide U-verse TV service in competition with cable incumbents and other MVPDs accordingly depends upon its access to video programming, especially must-have programming such as MSG and MSG Plus. *See supra* ¶¶ 3-5.

32. Cablevision and its affiliated video programming entities, however, have long attempted to thwart AT&T’s competitive entry in Connecticut and elsewhere by denying AT&T timely access to video programming and thus impairing AT&T’s ability to undermine Cablevision’s market power in the distribution marketplace. *See, e.g.,* Cablevision 10-Q at 44 (“Competition from incumbent telephone companies has contributed to slower video revenue growth rates in 2009 and this competition may continue to negatively impact our video revenue and our video revenue growth rates in the future.”).

33. AT&T first reached out to Defendants in an effort to license access to Cablevision-affiliated video programming in 2005, in connection with AT&T’s anticipated commercial launch of U-verse TV service in select markets across the nation. *See* Joint Decl. ¶ 22. AT&T sought at that time access to certain national networks owned by Cablevision affiliates, as well as access to the must-have programming of Fox Sports Net Bay Area (“FSN Bay Area”) (an RSN showing professional sports programming in the San Francisco area), MSG,

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*FCC*, 567 F.3d 659 (D.C. Cir. 2009) (“*MDU Order*”); *Section 621 Order* ¶ 2 (“[c]ompetition for delivery of bundled services will benefit consumers by driving down prices and improving the quality of service offerings”).

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and Fox Sports Net New York (Fox Sport Net New York is now MSG Plus; for convenience, AT&T refers to this network as MSG Plus throughout). *See id.* ¶¶ 21-22.

34. Although an unaffiliated programming vendor would have every incentive to sell its programming to MVPDs expeditiously (indeed, Cablevision's SEC filings acknowledge that its affiliated RSNs' revenues depend on affiliation license fees paid by MVPDs, including wireline video competitors, *see supra* ¶ 6 n.10), AT&T's negotiations for access to programming affiliated with Cablevision took years. As is recounted more fully in AT&T's prior program access complaint, Cablevision affiliates – primarily Rainbow, which at the time oversaw negotiations for access to national networks as well as RSNs – engaged in an obvious strategy of delay and pretext in an effort to delay or deny AT&T access to programming AT&T needed to launch U-verse TV service successfully. *See Program Access Complaint, AT&T Servs., Inc. v. Rainbow Media Holdings, LLC*, File No. CSR-7429-P (FCC filed June 18, 2007) (attached as Exhibit 4).

35. By April 2007, AT&T and Rainbow had finally agreed in theory to a carriage agreement with AT&T covering Rainbow's national networks as well as FSN Bay Area, a regional network – in an area where Cablevision did *not* compete with AT&T – that was essential to AT&T's commercial launch in San Francisco. However, Defendants at that time took the extraordinary position that they would not provide MSG and MSG Plus to AT&T in Connecticut because, they insisted, AT&T did not have a proper franchise to provide video service in Connecticut. *See Joint Decl.* ¶ 26.

36. Because by that time a Connecticut franchising authority had expressly held that AT&T did not need a cable franchise to provide video service in Connecticut, and because Defendants' refusal to license RSN programming to AT&T based on their disagreement with the

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Connecticut authority's decision was unreasonable, AT&T provided Defendants notice in May 2007 of its intent to file a program access complaint with this Commission.

37. Subsequently, in June 2007, the Connecticut Legislature enacted legislation establishing procedures for the franchising of wireline video providers (such as AT&T). The legislation also authorized existing providers to continue providing video service in the state pending receipt of franchising authority. AT&T postponed the filing of its program access complaint in the hope that Defendants would recognize that passage of this legislation fully resolved any conceivable concern that Defendants could possibly have had regarding AT&T's authority to provide U-verse TV service in Connecticut. *See id.* ¶ 29.

38. Defendants, however, refused to acknowledge the Connecticut legislation, and, at the same time, raised new issues that they claimed prevented them from licensing MSG and MSG Plus to AT&T, including a new claim that AT&T was in breach of a separate programming contract regarding on-demand programming. *See id.* ¶ 30. AT&T accordingly filed a program access complaint on June 18, 2007.

39. In responding to AT&T's complaint, Defendants raised still more new reasons purportedly justifying their refusal to license RSN programming to AT&T in Connecticut, including signal quality and security concerns. These rationales were obviously pretextual: they were raised only after Defendants finally recognized that their franchise justification was implausible; they were unsupported by competent evidence; AT&T had reached agreements with hundreds of other video programming vendors; and Rainbow itself was already providing programming to AT&T without any evidence of signal quality or security shortcomings.

40. In October 2007, shortly after this Commission's staff suggested a decision was forthcoming – but after Defendants' litigation strategy had delayed carriage by several months

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(until after the start of the NBA and NHL seasons, prior to which AT&T had sought to gain access to MSG and MSG Plus) – Defendants finally agreed to license RSN programming to AT&T starting in November 2007. *See id.* ¶ 32.

**Defendants' Refusal to License the HD Format of MSG and MSG Plus to AT&T**

41. With respect to the HD feed of particular programming, a common practice in the industry is to include HD rights along with a carriage agreement with respect to the standard definition format of any national or regional network. *See id.* ¶ 33. During negotiations in the 2005-2007 time frame, Rainbow made clear that following that common practice would slow down the negotiations and that it was in the interests of the parties to treat access to the HD format of such programming on a separate track. *See id.* AT&T obliged this request in light of the imperative of securing access to Cablevision-affiliated programming prior to commercial launches of U-verse TV service. *See id.*

42. On June 12, 2007, Adam Levine of Rainbow and Tom Rawls and Rob Thun on behalf of AT&T held a conference call to discuss outstanding carriage issues. Mr. Levine acknowledged at that time that AT&T had sought the HD format of FSN Bay Area as a standard term of the original agreement (which was to serve as a template for other RSN deals) but that each side had agreed to handle HD issues separately after closure of the original deal in light of AT&T's desire to get to the market quickly in the San Francisco area. *See id.* ¶ 34. Mr. Levine stated, however, that Rainbow would not license the HD format of MSG and MSG Plus because, he claimed, that format was delivered terrestrially and was thus outside the scope of the program access rules. *See id.* Mr. Levine offered no other business justification for not providing the HD format to AT&T. *See id.*

43. AT&T expressed to Rainbow at that time that AT&T was very interested in working out a business arrangement to secure access to the HD format of all of Rainbow's

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programming, including MSG and MSG Plus, but that the HD issue could be set aside for the time being. *See id.* ¶ 35.

44. Subsequently, in October 2007, in the course of Defendants' settling AT&T's prior complaint, AT&T again sought an agreement with respect to the HD format of MSG and MSG Plus, but Defendants refused on the ground that the HD format is delivered terrestrially. *See id.* ¶ 36. Defendants offered no other business justification for not providing the HD format to AT&T. Although AT&T disagreed with Rainbow's understanding of the Commission's program access rules, AT&T agreed to set the issue aside to avoid further delay in securing access to the standard definition format of vital RSN programming. *See id.*

45. Since October 2007, the HD format has only increased in competitive significance, especially for RSN programming. *See id.* ¶ 37; *infra* ¶¶ 58-61. AT&T has therefore persisted in its effort to secure access to the HD format of Defendants' RSN programming in Connecticut, namely – MSG and MSG Plus. *See Joint Decl.* ¶ 37.

46. In view of Defendants' position that MSG and MSG Plus in the HD format were terrestrially delivered and therefore would not offer its programming to AT&T, AT&T initially sought to gain rights to the satellite-delivered HD format of Defendants' national networks – i.e., AMC, Fuse, IFC, and WE. *See id.* ¶ 38. From January 2008 through October 2008, AT&T sought to acquire the HD format of AMC, Fuse, IFC, and WE, but AT&T encountered the same slow rolling tactics that Defendants had employed previously in licensing content to AT&T. *See id.*

47. In January 2008, Mr. Thun of AT&T initiated conversations with John Pezzini, Senior Vice President of Distribution at Rainbow, about securing the rights to deliver the HD format of AMC, Fuse, IFC, and WE. Mr. Pezzini suggested at that time that the grant of such

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rights would have to be determined at a higher level within Rainbow. *See id.* ¶ 39. From January through October of 2008, Mr. Thun made multiple, subsequent requests for access to the HD format of Defendants' national programming. *See id.*

48. In early October 2008, Mr. Pezzini made a verbal offer to Mr. Thun that Rainbow would be willing to grant AT&T access to the HD format of AMC, Fuse, IFC, and WE in exchange for amending the Sundance Channel carriage agreement. *See id.* ¶ 40. AT&T's agreement with respect to AT&T's carriage of the Sundance Channel was negotiated prior to Rainbow's ownership of the network and it contains a provision **[[begin highly confidential]]**  
**[[end highly confidential]]**. *See id.* Because the right to **[[begin highly confidential]]**

**[[end highly confidential]]** is valuable to a programming vendor (such as Rainbow), it is in Rainbow's economic interest that the Sundance agreement be amended.

49. AT&T did not believe this proposal reflected fair market value because, among other things, it is AT&T's understanding that the HD format of Rainbow's national programming is provided to other MVPDs at no extra cost as part of carriage agreements governing the standard definition feeds of those networks and AT&T already has an agreement for the standard definition format of these networks. *See id.* ¶ 41. Accordingly, in early November 2008, Mr. Thun officially countered Rainbow's verbal proposal via an email to Bob Broussard of Rainbow seeking what AT&T believed to be a fair market exchange of value – namely, by offering to amend the Sundance carriage agreement **[[begin highly confidential]]**

**[[end highly confidential]]** in exchange for the HD format of AMC, Fuse, IFC, and WE, as well as MSG and MSG Plus. *See id.*

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50. On November 14, 2008, Mr. Broussard told Mr. Thun that such a deal could not include the HD format of MSG and MSG Plus. *See id.* ¶ 42. Mr. Broussard stated at that time that Rainbow would not (and did not need to) even make an offer to AT&T for access to MSG and MSG Plus in the HD format notwithstanding that the HD format was available to other MVPDs, such as DirecTV. *See id.* Mr. Broussard reiterated Rainbow's negotiating position in December 2008, when AT&T again sought access to the HD format of MSG and MSG Plus. *See id.*

51. On April 23, 2009, Chris Lauricella met on behalf of AT&T with Mr. Pezzini, and Jennifer Kanter, Director of Distribution at Rainbow. *See id.* ¶ 43. At this meeting, Mr. Lauricella repeated AT&T's offer to remove **[[begin highly confidential]]**

**[[end highly confidential]]** in exchange for Rainbow licensing the HD format of Defendants' national and regional networks, including MSG and MSG Plus, to AT&T. *See id.* The Rainbow representatives advised Mr. Lauricella that their offer also remained the same: the HD feeds of Cablevision-affiliated national networks would be granted to AT&T if it released the **[[begin highly confidential]]**

**[[end highly confidential]]**, but the HD feeds of MSG and MSG Plus were not on the table. *See id.*

52. On April 28, 2009, Mr. Lauricella met with Brad Samuels and Guy Cacciarelli, the Executive Vice President and Vice President of Content Distribution for FUSE/MSG Media. *See id.* ¶ 44. Mr. Lauricella again expressed AT&T's desire to secure access to the HD format for all of Cablevision-affiliated programming, including MSG and MSG Plus. *See id.* Messrs. Samuels and Cacciarelli indicated that they would be willing to consider providing AT&T access to the HD format of certain programming in exchange for **[[begin highly confidential]]**

[[end highly confidential]] but that

MSG and MSG Plus would not be included in any deal. *See id.*

53. On July 10, 2009, faced with Defendants' outright refusal to provide AT&T with the HD format of MSG and MSG Plus on any terms, AT&T provided Defendants with AT&T's notice of intent to file a complaint alleging violations of Section 628 and the Commission's implementing rules pursuant to 47 C.F.R. § 76.1003(b).<sup>30</sup>

54. Counsel for Cablevision and Madison Square Garden responded to AT&T's letter on July 23, 2009.<sup>31</sup> In that letter, Defendants did not set forth any business justification for refusing to provide the HD format of MSG and MSG Plus to AT&T. Rather, Defendants insisted that "terrestrially-delivered programming is not subject to the program access rules."<sup>32</sup> Defendants gave no indication in the letter that there were any terms or conditions on which they would make the HD format of MSG and MSG Plus available to AT&T. Defendants also asserted that "MSG has invested years and substantial sums to develop its programming services" and that AT&T's remedy to Defendants' refusal to license the HD format of programming networks with exclusive rights to unique, non-replicable programming was to "invest in" and "develop its own programming."<sup>33</sup>

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<sup>30</sup> *See* Letter from Christopher M. Heimann, General Attorney, AT&T Services, Inc., to Mr. Michael Bair, President, MSG Media, *et al.* (July 10, 2009) (attached as Exhibit 5).

<sup>31</sup> *See* Letter from Howard J. Symons, Counsel to MSG and Cablevision, to Christopher M. Heimann, General Attorney, AT&T Services, Inc (July 23, 2009) (attached as Exhibit 6) ("Cablevision Letter").

<sup>32</sup> *Id.* at 1.

<sup>33</sup> *Id.* at 2.

**Defendants' Refusal to License the HD Format of MSG and MSG Plus to AT&T Has Significant Anticompetitive Effects**

55. In order to compete with incumbent cable providers, AT&T must be able to provide popular programming that consumers demand. The HD format of MSG and MSG Plus is highly popular programming, particularly in Connecticut because of its proximity to New York and the lack of professional sports teams in the state, and thus is critically important to AT&T's ability to compete.

56. This Commission has time and again recognized that RSN programming is “must-have” programming, *see supra* ¶¶ 3-4; *see, e.g., Adelfia Order* ¶ 124 (RSN programming is “must have” programming and “an MVPD’s ability to gain access to” such programming is important “to compete with rivals”); *News Corp. Order* ¶ 133, and that the denial of such programming to unaffiliated MVPDs substantially undermines competition. As the Commission has explained, access to must-have programming “is necessary for competition in the video distribution market to remain viable. An MVPD’s ability to compete will be significantly harmed if denied access to popular vertically integrated programming for which no good substitute exists.” *2007 Program Access Order* ¶ 39.

57. Indeed, the Commission has previously found that, where an incumbent withholds a single RSN, it impairs the ability of competing video providers to attract subscribers. *See, e.g., Adelfia Order* ¶ 149 (“In the San Diego DMA, lack of access to RSN programming is estimated to cause a 33% reduction in the households subscribing to DBS service.”); *id.* ¶ 146 (reviewing nationwide data, and concluding that “DBS providers have unusually low market shares in markets where they cannot provide local sports programming to their subscribers,” including in Philadelphia); Brief for Respondent Federal Communications Commission, *Cablevision Sys. Corp. v. FCC*, Nos. 07-1425 & 07-1487, at 38 (D.C. Cir. Aug. 13, 2008) (“the

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Philadelphia and San Diego examples provide ‘empirical evidence’ . . . that the withholding of just a single network can impair the ability of competitive MVPDs to attract subscribers”).

58. It is not enough, moreover, to obtain access to the standard format of RSN programming. The HD format of RSN programming is critically, and increasingly, important to an MVPD’s ability to compete. The HD format of all programming is in high demand. More than 45 percent of American households have an HDTV, up from less than 20 percent in 2006.<sup>34</sup> But the ability of an MVPD to offer *sports* programming in the HD format is particularly important. Nielsen data, for example, show higher levels of sports viewing and engagement in HD homes, with ratings for sporting events 20 percent higher in HD homes compared to U.S. households as a whole.<sup>35</sup>

59. Furthermore, a 2007 study concluded that “57% of HDTV owners can be classified as sports fans, a number representing about 16.2 million U.S. households.”<sup>36</sup> These “HDTV owner sports fans invest heavily in technology and media consumption” – sports fans “spend 37% more time watching television programming . . . than non fans.”<sup>37</sup> Indeed, “48% of HDTV owner sports fans report purchasing their set to watch a specific sporting event” and “one in three HDTV owner sports fans indicate they always or often use high-definition programming as the determining factor for what they watch.”<sup>38</sup> In addition, even among non-HDTV owners,

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<sup>34</sup> See, e.g., Simon Flannery et al., Morgan Stanley, *Broadband Outlook: Recent Sell-Off an Opportunity in Recurring Revenue Models* at 11, Exh. 25 (Oct. 17, 2008); Walter Mossberg, *Family Snapshots in the Splendor of HD*, Wall St. J. Online (Nov. 26, 2008), available at <http://online.wsj.com/article/SB122766053302758377.html>.

<sup>35</sup> See Nielsen Special Report, 2008 — *a Banner Year in Sports?* at 3-4 (2008), available at <http://pl.nielsen.com/site/documents/2008ABannerYearinSportsDecember2008.pdf>

<sup>36</sup> Consumer Electronics Association, *Second Annual Inside the Mind of the HD Sports Fan Study* at 3 (January 2007) (excerpts attached as Exhibit 7) (“*Second HD Sports Fan Study*”).

<sup>37</sup> *Id.*

<sup>38</sup> *Id.* (emphasis omitted).

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“48% . . . expect to purchase a high-definition display within two years,”<sup>39</sup> making clear that the HD format of sports programming will only continue to increase in competitive significance.<sup>40</sup>

60. Empirical evidence also establishes that an MVPD’s ability to provide the HD format of sports programming affects consumers’ choice of MVPD providers. Specifically, a 2005 study concluded that “45 percent of HDTV sports fans would consider switching to another source of HD sports if superior to their current package.”<sup>41</sup> In short, the available evidence establishes that HD is the must-have format of must-have programming.

61. The HD format of MSG and MSG Plus is accordingly vitally important to AT&T’s ability to compete as a new entrant in the MVPD marketplace in Connecticut. Combined, MSG and MSG Plus carry more than 300 live games of multiple professional sports teams, as well as other must-have college and local sports programming. *See* Joint Decl. ¶ 52. This non-replicable sports programming is in high demand in Connecticut given the proximity of New York City and the fact that Connecticut has only one professional sports team located in the state. *See id.* AT&T’s inability to provide the HD format of this popular programming thus impairs AT&T’s ability to attract new subscribers and to retain the subscribers that it has, especially when AT&T’s competitors, such as Cablevision, do carry the HD format of such programming in Connecticut. *See id.* ¶¶ 10-18, 51-53. As explained further in the Joint

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<sup>39</sup> *Id.* at 4.

<sup>40</sup> A 2005 study reached similar conclusions. *See* Consumer Electronics Association Press Release, *Sports Fans Drive HD Television Sales According to New Survey* at 1 (Jan. 17, 2006) (summarizing study, which concluded that “[s]ports fans” – *i.e.*, the same subscribers who demand access to RSN programming – “are driving the sales of new high-definition televisions” and that “[n]early 60 percent of [HDTV] owners consider themselves sports fans” and that “[n]early 50 percent of HDTV owners cited HD sports programming as the primary force behind their HDTV purchase”), *available at* [http://www.ce.org/shared\\_files/pr\\_attachments/20060110\\_SVG\\_survey.doc](http://www.ce.org/shared_files/pr_attachments/20060110_SVG_survey.doc).

<sup>41</sup> *Id.*

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Declaration, the penetration rate for AT&T's HD product in Connecticut compared to its penetration rate in other markets is unambiguous evidence of the anticompetitive effects of Defendants' refusal to license the HD format of MSG and MSG Plus to AT&T. *See id.* ¶¶ 18, 51. That evidence confirms that sports programming is a driving force behind HD penetration.

62. Indeed, the mere fact that Defendants will not license the HD format of MSG and MSG Plus to AT&T in order to differentiate its cable service – as discussed further below – is itself compelling evidence of anticompetitive effect. Absent an interest in thwarting AT&T's competitive entry – thus benefiting Cablevision's distribution business – Madison Square Garden, as a programming vendor, would have every economic incentive to license the HD format of MSG and MSG Plus to AT&T. *See supra* ¶ 6 n.10 (citing SEC filings acknowledging that MSG depends on affiliation licensing revenues from MVPDs). Defendants' own conduct – sacrificing the short-term benefits of licensing MSG and MSG Plus in the HD format to AT&T – is accordingly rational only *if* there is an anticompetitive effect on AT&T.

63. It is no answer to suggest, as Defendants have stated,<sup>42</sup> that AT&T should simply develop its own comparable HD programming. As this Commission has held, RSN programming is non-replicable, *see Adelfia Order* ¶ 189; *see supra* ¶¶ 3-4, a conclusion that Cablevision's executives have publicly acknowledged, *see infra* ¶ 65. That is especially the case where Cablevision itself owns important underlying sports franchises – i.e., the New York Knicks and the New York Rangers. *See* Cablevision 10-K at 1.

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<sup>42</sup> *See* Cablevision Letter at 2; *see also* Cablevision Answer at 35 (suggesting that denying access of the HD format to rivals will promote investment).

**Defendants’ Refusal to License the HD Format of MSG and MSG Plus to AT&T Has Anticompetitive Purpose**

64. In enacting Section 628 of the Communications Act, Congress recognized that vertical integration would give vertically integrated programming vendors powerful incentives to discriminate against unaffiliated MVPDs.<sup>43</sup> Congress feared that integrated entities would use control over *programming* as a competitive weapon against competing *distributors*. The evidence is convincing that Cablevision’s refusal to license the HD format of MSG and MSG Plus to AT&T has the very anticompetitive purpose – and effect – Congress feared.

65. *First*, Cablevision is fully aware of the competitive importance of HD programming, particularly with respect to regional sports. While at the same time denying AT&T access to regional sports programming in HD, Cablevision trumpets that it is the *only* source in its territory for all local sports programming in HD.<sup>44</sup> Furthermore, in response to questions regarding how Cablevision is competing with rival competitors, Cablevision’s Chief Operating Officer (“COO”), Tom Rutledge, recently emphasized the anticompetitive advantage it retains by virtue of its control over HD regional sports programming. MSG and MSG Plus, he stressed, carry “four of the nine professional sports teams in New York. If you want to see them in HD, *you have to get them from us.*”<sup>45</sup> Likewise, in November 2007, Mr. Rutledge told

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<sup>43</sup> See, e.g., 2002 Order ¶ 24 (“In enacting the program access provisions of the 1992 Cable Act, Congress concluded that vertically integrated program suppliers also have the incentive and ability to favor their affiliated cable operators over nonaffiliated cable operators and programming distributors using other technologies.”) (internal quotation marks and alterations omitted).

<sup>44</sup> See Exhibits 8-15 (Cablevision ad frames proclaiming that HD sports programming is unavailable on competing MVPDs). The disclaimers remove DirecTV from that claim because DirecTV does have the HD format of MSG and MSG Plus.

<sup>45</sup> *Cablevision Systems Corp. at Global Media and Communication Conference*, Fair Disclosure Wire at 9 (Dec. 8, 2008) (statement by Cablevision COO Tom Rutledge) (emphasis added).

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investors not only that Cablevision “currently carr[ies] more regional HD than any of our competitors,” but also that “we have more HD and On Demand HD *that our competitors can’t replicate.*”<sup>46</sup>

66. There is thus no question that Cablevision views the HD format of RSN programming as a competitive weapon. Cablevision affirmatively touts the fact that refusing to provide access to the HD format of this unique, non-replicable regional sports programming has the purpose of significantly hindering rivals’ ability to compete – singling out AT&T, Verizon, and DISH as MVPDs without the HD format of must-have sports programming. *See* Joint Decl. ¶ 15. Indeed, Defendants have refused to provide MSG and MSG Plus in HD format not only to AT&T, but also to other video providers that compete directly with Cablevision. Upon information and belief, Cablevision refuses to provide MSG and MSG Plus in HD format to the DISH Network, RCN, and Verizon. By contrast, Cablevision does provide MSG and MSG Plus in HD format to other cable incumbents – including Comcast and TWC<sup>47</sup> – that serve non-overlapping areas and thus do not compete against Cablevision, as well as to DirecTV.<sup>48</sup>

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<sup>46</sup> *Cablevision Q3 2007 Earnings Call Transcript*, Fair Disclosure Wire at 10 (Nov. 8, 2007) (statement by Cablevision COO Tom Rutledge) (emphasis added); *see also* Shirley Brady, *Cablevision Launches MLB Extra Innings*, Cable360.net (May 4, 2007), available at <http://www.cable360.net/video/23310.html> (quoting Cablevision executive vice president of programming Mac Budill: Cablevision’s digital services offering “is the best choice for New York-area sports fans, featuring leading national sports programming, all four regional sports networks, and the most local sports in high-definition.”).

<sup>47</sup> *See, e.g.*, Time Warner Cable, *Channel Lineup: Manhattan*, available at <http://www.timewarnercable.com/Customerservice/Clu/Clu.ashx?CLUID=536&Image1=&Zip=>; Moss, *Comcast Launches MSG HD*.

<sup>48</sup> Defendants’ licensing of the HD format of MSG and MSG Plus to DirecTV does not suggest that Defendants lack an anticompetitive purpose in denying such programming to wireline competitors such as AT&T. This Commission has frequently found that “[c]able prices decrease substantially when a second wireline [competitor] enters the market. It does not appear . . . that DBS effectively constrains cable prices.” *2009 Cable Industry Price Report* ¶ 3; *see MDU Order* ¶ 17 (2007) (“our most recent Cable Price Survey Reports show that the presence of

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67. *Second*, the anticompetitive purpose of Defendants’ conduct is evidenced by the absence of any legitimate business reason for not providing the HD format of MSG and MSG Plus to AT&T, apparently on any terms or conditions. Cablevision’s recent statements in answering a similar complaint by another wireline competitor, Verizon, confirm as much. In its answer, Cablevision acknowledges that its refusal to deal may “make[]” its wireline rivals’ “video offering[s] less attractive to a subset of its potential customer base.”<sup>49</sup> Cablevision defends its refusal to deal, not on the ground that dealing with wireline competitors would impose any costs on Madison Square Garden, but on the ground that Cablevision seeks to use the HD format of MSG and MSG Plus as a “competitive differentiator.”<sup>50</sup> Competitive differentiation in this context, however, is but a euphemism for inflicting a competitive disadvantage on wireline rivals (such as AT&T); Cablevision’s forthright admission is therefore unambiguous evidence of anticompetitive purpose. *See* 47 U.S.C. § 548(b) (making unlawful “unfair methods of competition or unfair or deceptive acts” with the “purpose or effect” of hindering the delivery of satellite cable programming).

**Defendants’ Conduct Violates Established Standards of Fair Competition and Dealing**

68. The anticompetitive and exclusionary nature of Cablevision’s conduct is further confirmed by the fact that Defendants do make MSG and MSG Plus available to some MVPDs, such as Comcast, TWC, and DirecTV.<sup>51</sup>

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a second wire-based MVPD competitor clearly holds prices down more effectively than is the case where DBS is the only alternative”).

<sup>49</sup> *See* Cablevision Answer at 7.

<sup>50</sup> *Id.* at 9.

<sup>51</sup> *See id.* at 5 (acknowledging that, “[i]n 2005, MSG began to license certain MVPDs to carry MSG HD and MSG+ HD”).

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69. Although Section 628(c) may not impose a *per se*, mandatory duty on Cablevision to license the HD format of MSG and MSG Plus to AT&T, that is hardly the end of the story. To be sure, a business ordinarily has a right “to select its customers and to refuse” to deal with other customers, but, contrary to Defendants’ understanding, that right is “neither absolute nor exempt from regulation.” *Lorain Journal Co. v. United States*, 342 U.S. 143, 155 (1951). When such a right is “exercise[d] as a purposeful means of monopolizing interstate commerce” by a defendant with market power (and Cablevision, as the dominant, cable incumbent in parts of Connecticut, has substantial market power in the MVPD marketplace), it can be condemned as anticompetitive. *Id.* at 155; *see id.* at 153-55 (a newspaper publisher’s refusal to deal with advertising customers who did business with a rival radio station represented a refusal to deal proscribed by antitrust law); *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 601-04 (1985).

70. Cablevision’s selective refusal to deal with AT&T qualifies as unfair competition and anticompetitive conduct under these established standards. Cablevision’s voluntary licensing of the HD format of MSG and MSG Plus to some MVPD customers coupled with its refusal to deal with its wireline rivals (e.g., AT&T and Verizon) reflects “a willingness to forsake short-term profits” or other economic gains “to achieve an anticompetitive end,” which the Supreme Court has identified as evidence of an anticompetitive refusal to deal. *Verizon Comm’n, Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 409 (2004).

71. In that respect, Cablevision’s conduct is analogous to that long condemned as anticompetitive. In *Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973), a vertically integrated utility company that provided retail and wholesale electric power was held to have attempted to monopolize and to have monopolized the market for retail distribution. *See* 410

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U.S. at 368. Like Cablevision’s refusal to license the HD format of MSG and MSG Plus to AT&T as an input to retail service, the defendant (Otter Tail) refused to wheel power at the wholesale level for municipalities that elected not to renew retail distribution franchises with Otter Tail and instead to provide retail power on their own through municipal plants. *See id.* The Supreme Court found that it was “clear” that this strategy reflected Otter Tail’s use of its “strategic dominance” over wholesale transmission “to foreclose potential entrants into the retail area” in violation of the Sherman Act. *Id.* at 377 (internal quotation marks omitted).

72. Cablevision, like Otter Tail, is in the business of selling RSN programming through its programming arm, Madison Square Garden, but it is attempting to use its monopoly control over the HD format of RSN programming – a vital input to downstream MVPD service – to squelch competition at the distribution level (and thus to maintain its market power in the MVPD marketplace) by refusing to deal with AT&T. Such conduct is anticompetitive. *See Trinko*, 540 U.S. at 410 (explaining that *Otter Tail* turned on the fact “the defendant was already in the business of providing a certain service to certain customers . . . and refused to provide the same service to certain other customers”); IIB Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* § 772d3, at 223 (3d ed. 2008) (unilateral refusal to deal may be anticompetitive where it is “‘irrational’ in the sense that the defendant sacrificed an opportunity to make a profitable sale only because of the adverse impact the refusal would have on a rival”).

73. Furthermore, Cablevision’s refusal to license the HD format of MSG and MSG Plus to AT&T – on the theory that AT&T should develop its own video programming assets if it wishes to compete with Cablevision in the distribution marketplace, *see supra* ¶ 54 – is an effort to create two levels at which AT&T must compete (namely, the RSN marketplace in Connecticut and New York and the MVPD marketplace in Connecticut) and in which AT&T must challenge

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Cablevision’s market power if AT&T wishes to compete successfully in the MVPD marketplace. There is broad consensus that such a two-level entry foreclosure strategy is unfair and anticompetitive conduct that can substantially impair competitive entry, leading to the durability of Cablevision’s market power in the downstream distribution market.<sup>52</sup>

**Defendants’ Claim that their Refusal to Deal is Procompetitive Is Unsupported and Wrong**

74. Defendants have further stated, both in responding to AT&T’s notice letter and in answering Verizon’s complaint, that exclusive arrangements can have procompetitive benefits.<sup>53</sup> Although this statement is certainly correct, as far as it goes, it provides no justification whatsoever for Defendants’ conduct here.

75. *First*, where no competitors have the capability to duplicate a denied input, the theory that exclusivity will spur investment or that so-called forced sharing will retard incentives to invest is unfounded. *See* IIIB Areeda & Hovenkamp, *Antitrust Law* § 771b, at 196 (the concern with undermining incentives to invest “may be insubstantial in the case where neither the plaintiff nor anyone else could ever duplicate the claimed input in any effective way”). This

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<sup>52</sup> *See, e.g., Town of Concord v. Boston Edison Co.*, 915 F.2d 17, 23-24 (1st Cir. 1990) (Breyer, C.J.) (“a monopolist who extends his monopoly to a second industry level raises ‘entry barriers,’ thereby fortifying his monopoly position”; by creating two-levels of a monopoly, “the monopolist, by expanding its monopoly power, has made entry by new firms more difficult” and “the added security of a two-level monopoly could even lead that monopolist to raise its prices”); Kenneth L. Glazer & Abbott B. Lipsky, Jr., *Unilateral Refusals to Deal Under Section 2 of the Sherman Act*, 63 *Antitrust L.J.* 749, 794 (1995) (“A monopolist who engages in either practice may have legitimate reasons for the refusal, but the conduct may protect monopoly over multiple levels of economic activity – telephone service and telecommunications equipment; aluminum ingot and fabrication of aluminum products. If, in cases like *Otter Tail* and *MCI*, the monopolist’s conduct makes one-level entry very difficult, the monopolist may be insulated from competition at both levels by the additional barriers to entry created by the need for two-level entry. Entry at one or both levels may be blockaded by regulation, as it was at the level of local telephone access in *MCI*. Or, since the costs of two-level entry can be prohibitive even without regulatory barricades, judicial intervention might be justified where the likely potential net efficiencies of the proposed remedy are sufficiently large.”) (internal citations omitted).

<sup>53</sup> *See, e.g., Cablevision Letter* at 2 (noting that AT&T has defended “its exclusive contract for the iPhone”); *Cablevision Answer* at 34-36.

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Commission has repeatedly held that RSN programming is must-have programming precisely *because* it cannot be duplicated and consumers demand it. *See, e.g., Adelpia Order* ¶ 189; *supra* ¶¶ 3-4. Cablevision’s executives concur in that assessment, *see supra* ¶ 65, which is undoubtedly correct because no amount of investment by AT&T would allow AT&T to create an RSN in the HD format carrying New York City’s major professional sports teams, given Cablevision’s refusal to allow it to do so and especially given Cablevision’s ownership of the New York Knicks and New York Rangers franchises. Furthermore, the must-have nature of RSN programming – unlike other potential inputs – is durable and is not likely to be overcome by technological change or innovation: RSN programming is programming that will always be in demand by consumers and will remain non-replicable.

76. *Second*, although Congress required the Commission to adopt regulations “prohibit[ing] exclusive contracts,” 47 U.S.C. § 548(c)(2)(D), Congress anticipated that there may be some instances in which exclusive video programming contracts are not unlawful. It therefore set forth safe harbor provisions. *See id.* § 548(c)(4). Tellingly, Cablevision has made no effort to establish that any exclusive arrangement between Cablevision and Madison Square Garden satisfies the safe harbor provisions adopted by Congress. In this particular regulatory context, then, Congress has already struck the balance between the procompetitive and anticompetitive benefits of exclusivity. And, indeed, this is not a case about exclusive contracts at all. Madison Square Garden makes MSG and MSG Plus available in the HD format to multiple MVPDs, including Cablevision, Comcast, TWC, and DirecTV. This is accordingly a case about a selective refusal to deal with a wireline competitor for the purpose and with the effect of preventing that competitor from competing effectively in the MVPD marketplace.

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77. *Third*, while exclusive arrangements have procompetitive benefits when there is significant downstream competition (e.g., in the wireless telecommunications industry<sup>54</sup>), such meaningful downstream competition is absent in the video marketplace (which has long been dominated by entrenched cable incumbents, such as Cablevision). *See, e.g., Section 621 Order* ¶ 19. This Commission’s refusal to allow the ban on exclusive programming contracts to sunset is clear evidence of that. *See, e.g., 2007 Program Access Order* ¶ 1 (finding that the statutory ban on exclusive programming contracts “continues to be necessary to preserve and protect competition and diversity in the distribution of video programming”).

**COUNT I**

**Unfair Method of Competition and Unfair Practice in Violation of Section 628(b)**

78. AT&T incorporates by reference the foregoing paragraphs as though fully stated herein.

79. The Communications Act and the Commission’s rules make it “unlawful” for a “satellite cable programming vendor in which a cable operator has an attributable interest . . .

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<sup>54</sup> Defendants will no doubt contend, as they have elsewhere, that their conduct parallels handset exclusivity in the wireless industry. The analogy fails, however, because, among other reasons, no amount of investment or innovation can result in RSN programming comparable to the programming that Defendants refuse to license, and because Cablevision is a dominant incumbent cable operator that faces nothing like the intense competition evident in both the wireless and consumer electronics manufacturing industry. Additionally, unlike Cablevision (which is vertically integrated with MSG and MSG Plus), wireless providers do not own or control the handset manufacturers with which they have negotiated exclusivity arrangements. Because wireless handset exclusivity arrangements are, thus, negotiated on an arm’s length basis between unaffiliated entities subject to robust competition in the upstream handset and downstream wireless markets, there simply is no risk that such arrangements are anticompetitive in purpose or effect. Moreover, the proof is in the pudding. Rather than constraining competition, the exclusivity arrangement between AT&T and Apple for the iPhone was not only a key driver of the success of the iPhone itself but has spurred a torrent of innovation and investment in the smart handset segment of the market by both consumer electronics manufacturers and wireless providers alike, as they scramble to develop an “iPhone beater.” The Palm Pre and Blackberry Storm are but two examples of that innovation.

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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 . . . to subscribers or consumers.” 47 U.S.C. § 548(b); 47 C.F.R. § 76.1001.

80. Madison Square Garden is a “satellite cable programming vendor.”

81. Cablevision is a “cable operator” with an “attributable interest” in Madison Square Garden.

82. AT&T is an MVPD that “provid[es] satellite cable programming . . . to subscribers and consumers.” *See* Joint Decl. ¶¶ 6-7.

83. Defendants’ refusal to license AT&T access to the HD format of MSG and MSG Plus is an “unfair method[] of competition” and/or “unfair . . . act[] or practice[]” in violation of Section 628(b) of the Communications Act and Section 76.1001 of the Commission’s rules.

84. Defendants’ refusal to license AT&T access to the HD format of MSG and MSG Plus has the “purpose” of “hinder[ing] significantly” AT&T’s ability to “provid[e] satellite cable programming . . . to subscribers or consumers.” 47 U.S.C. § 548(b); 47 C.F.R. § 76.1001. Defendants’ marketing emphasis on HD programming evidences that Defendants are aware that the HD format of RSN programming is crucial to consumers, and that by denying the HD format to new entrants like AT&T, Defendants can thwart competitive entry.

85. Furthermore, the licensing of the HD format of MSG and MSG Plus to AT&T would be a profitable activity for MSG and MSG Plus – as evidenced by Defendants’ course of dealing in making the HD format available to other MVPDs with which Cablevision does not directly compete and also to DirecTV and by AT&T’s offer to drop the **[[begin highly confidential]]** **[[end highly confidential]]** in exchange for the

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HD format of MSG and MSG Plus. Defendants’ refusal to engage in otherwise profitable transactions – which they engage in with other MVPDs and which they publicly acknowledge are the key source of revenue for MSG and MSG Plus, *see supra* ¶ 6 n.10 – confirms that Defendants’ refusal to license the HD format to AT&T has an anticompetitive purpose and that Defendants’ conduct is an unfair method of competition. Defendants’ stated position that AT&T must enter the marketplace at two levels if it wishes to compete in one market is further evidence of Defendants’ anticompetitive purpose.

86. Defendants’ refusal to license AT&T access to the HD format of MSG and MSG Plus has the “effect” of “hinder[ing] significantly” AT&T’s ability to “provid[e] satellite cable programming . . . to subscribers or consumers.” 47 U.S.C. § 548(b); 47 C.F.R. § 76.1001. As RSNs, MSG and MSG Plus are must-have programming for consumers, and they are crucial to AT&T’s ability to compete as an MVPD in Connecticut. *See, e.g., Adelphia Order* ¶¶ 124, 189-190; *2002 Order* ¶ 34; *2007 Program Access Order* ¶ 39. Because Connecticut has only one professional sports team and because of the proximity of New York City and Connecticut, the New York City-based professional sports programming shown by MSG and MSG Plus is in high demand in Connecticut. *See Joint Decl.* ¶ 13.

87. The HD format of MSG and MSG Plus, moreover, is critical to AT&T’s ability to attract new subscribers and to retain the subscribers that it has. *See id.* ¶¶ 14-18. It is sports fans, the natural subscriber base for RSNs such as MSG and MSG Plus, who are most concerned about selecting an MVPD that offers sports programming in the HD format.

88. Because Defendants’ unfair and anticompetitive conduct impairs AT&T’s ability to provide a competing video service (through which AT&T delivers satellite programming to consumers and subscribers), that conduct violates Section 628(b) and the Commission’s rules

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irrespective of whether the HD format of MSG and MSG Plus is satellite cable programming. *See National Cable & Telecomm. Ass'n v. FCC*, 567 F.3d at 663-65. The text, structure, and purposes of Section 628 establish that conduct that is not proscribed by Section 628(c) (for example, because the underlying programming that is withheld is terrestrially delivered) may nonetheless be prohibited by Section 628(b). *See, e.g., 1993 Order* ¶ 29 (finding that “subsection [(c)] includes only the minimum required regulations to be promulgated by the Commission under 628(b), and is not intended to be entirely inclusive”).

**COUNT II**

**Unreasonable Refusal to Sell Programming in Violation  
of the Communications Act and Commission Rules**

89. AT&T incorporates by reference the foregoing paragraphs as though fully stated herein.

90. Under the Communications Act and the Commission’s rules, a satellite cable programming vendor in which a cable operator has an attributable interest may not unreasonably refuse to license “satellite cable programming” to competing, unaffiliated MVPDs. 47 U.S.C. §§ 548(b) & (c); 47 C.F.R. §§ 76.1001-76.1002.

91. Madison Square Garden is a “satellite cable programming vendor.”

92. Cablevision is a “cable operator” with an “attributable interest” in Madison Square Garden.

93. MSG and MSG Plus are “satellite cable programming.” 47 C.F.R. § 76.1000(h). Defendants provide the standard definition format of MSG and MSG Plus via satellite. Furthermore, the content of MSG and MSG Plus programming is virtually the same whether the programming is provided in a standard definition format or an HD format. The HD format of

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MSG and MSG Plus is accordingly also “satellite cable programming” because the underlying *programming* is delivered via satellite.

94. In refusing to license AT&T access to the HD format of MSG and MSG Plus, Defendants are unreasonably refusing to sell video programming to AT&T. Such conduct is a form of non-price discrimination proscribed by the Communications Act and the Commission’s program access rules. *See* 47 U.S.C. § 548(c); 47 C.F.R. § 76.1002(b); *1993 Order* ¶¶ 37, 116.

95. Defendants have no legitimate, non-discriminatory business justification for refusing to license the HD format of MSG and MSG Plus to AT&T. *See* 47 C.F.R. § 76.1002(b)(1)-(3).

96. That Defendants currently deliver the HD format of MSG and MSG Plus terrestrially does not, as Defendants have argued, render the program access rules inapplicable. The rules apply to “satellite cable programming.” MSG and MSG Plus are satellite cable programming. That is true not only with respect to the standard definition format of MSG and MSG Plus “programming,” but to all of the technical formats of the “programming,” including the HD format, which Defendants have chosen to deliver terrestrially. The applicability of the program access rules, in other words, depends on whether “programming” content is provided via satellite, not on whether the particular technical *format* of the programming happens to be provided via satellite. Put differently, the difference between standard definition and HD formats does not render the underlying “programming” different.<sup>55</sup> Cablevision itself has

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<sup>55</sup> *See, e.g.*, Thirteenth Annual Report, *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 24 FCC Rcd 542, ¶ 16 (2009) (“The major broadcast networks (ABC, CBS, Fox, and NBC) now provide their most popular *programming* in high-definition *format*.”) (emphases added); Statement of Commissioner Robert M. McDowell attached to Declaratory Ruling, Order, and Notice of Proposed Rulemaking, *Closed Captioning of Video Programming*, 23 FCC Rcd 16674 (2008) (“It also is appropriate for us to clarify, to the extent anyone seriously needs such guidance, that the mere transition of a programming channel

