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

In the Matter of:	)	
	)	
RCN TELECOM SERVICES OF NEW YORK, INC.	)	
	)	
Complainant,	)	
	)	
v.	)	
	)	
CABLEVISION SYSTEMS CORPORATION, MADISON SQUARE GARDEN NETWORK, INC. and FOX SPORTS NET - NEW YORK	)	
	)	
Defendants;	)	File Nos. CSR 99-5404-P and CSR 99-5415-P
	)	
MICROWAVE SATELLITE TECHNOLOGIES, INC.	)	
	)	
Complainant,	)	
	)	
v.	)	
	)	
CABLEVISION SYSTEMS CORPORATION, RAINBOW MEDIA HOLDINGS, INC., MADISON SQUARE GARDEN NETWORK, INC. and FOX SPORTS NET - NEW YORK	)	
	)	
Defendants.	)	

MEMORANDUM OPINION AND ORDER

Adopted: October 6, 1999 **Released: October 7, 1999**

By the Deputy Chief, Cable Services Bureau:

I. INTRODUCTION

1. RCN Telecom Services of New York, Inc. ("RCN") and Microwave Satellite Technologies, Inc. ("MST") (together referred to as "Complainants") filed separate program access complaints (the "Complaints") against Cablevision Systems Corporation ("Cablevision"), Madison Square Garden Network, Inc. ("MSG"), Fox Sports Net - New York ("Fox Sports/NY"), and Rainbow Media Holdings, Inc.

("Rainbow") (collectively referred to as "Defendants").[1] Complainants allege that Defendants have violated Sections 628(b) and (c) of the Communications Act of 1934, as amended ("Communications Act"),[2] and Sections 76.1001, 76.1002(a), 76.1002(b), and 76.1002(c) of the Commission's rules,[3] by engaging in discrimination and unfair practices in conjunction with the distribution of terrestrial and satellite cable programming. Because RCN and MST's complaints are based upon identical facts and raise the same legal issues, we have consolidated the above-captioned proceedings.

II. BACKGROUND

2. Congress enacted the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act")[4] to promote competition, with the view that regulation would be transitional until the video programming distribution market becomes competitive.[5] In enacting the program access provisions, codified in Section 628 of the Communications Act ("Section 628"),[6] Congress sought to minimize the incentive and ability of vertically integrated programming suppliers to favor affiliated cable operators over nonaffiliated cable operators or other multichannel video programming distributors ("MVPDs") in the sale of satellite cable and satellite broadcast programming.[7]

3. Section 628(b) of the Communications Act states that:

> [i]t shall be unlawful for a cable operator, a satellite cable programming vendor in which a cable operator has an attributable interest, or a satellite broadcast programming vendor to engage in unfair methods of competition or unfair or deceptive acts or practices, the purpose or effect of which is to hinder significantly or to prevent any multichannel video programming

[1] RCN and MST incorrectly identified MSG as "MSG Sports Network, Inc." and Fox Sports/NY as "Fox Sports Network - New York" in the Complaints. MST also incorrectly identified Rainbow as "Rainbow Programming, Holdings, Inc." RCN did not name Rainbow as a defendant in its complaint.

[2] 47 U.S.C. § 548(b), (c).

[3] 47 C.F.R. §§ 76.1001, 76.1002(a), (b), (c).

[4] Pub. L. No. 102-385, 106 Stat. 1460 (1992) (codified as amended in scattered sections of 47 U.S.C.).

[5] 1992 Cable Act § 2(b)(2), 106 Stat. 1463. *See also* Communications Act § 601(6), 47 U.S.C. § 521(6) ("The purposes of this title are to . . . promote competition in cable communications and minimize unnecessary regulation that would impose an undue economic burden on cable systems.").

[6] 47 U.S.C. § 548.

[7] 1992 Cable Act § 2(a)(5), 106 Stat. 1460-61. "Satellite cable programming" is "video programming which is transmitted *via* satellite and which is primarily intended for the direct receipt by cable operators for their retransmission to cable subscribers." 47 U.S.C. § 601(d)(1). "Satellite broadcast programming" is broadcast programming when such programming is retransmitted by satellite and the entity retransmitting such programming is not the broadcaster or an entity performing such retransmission on behalf of and with the specific consent of the broadcaster. 47 U.S.C. § 548(i)(3).

> distributor from providing satellite cable programming or satellite broadcast programming to subscribers or consumers.[8]

In Section 628(c), Congress instructed the Commission to promulgate regulations that:

> (A) establish effective safeguards to prevent a cable operator which has an attributable interest in a satellite cable programming vendor or a satellite broadcast programming vendor from unduly or improperly influencing the decision of such vendor to sell, or the prices, terms, and conditions of sale of, satellite cable programming or satellite broadcast programming to any unaffiliated multichannel video programming distributor; [and][9]
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> (B) prohibit discrimination by a satellite cable programming vendor in which a cable operator has an attributable interest or by a satellite broadcast programming vendor in the prices, terms, and conditions of sale or delivery of satellite cable programming or satellite broadcast programming among or between cable systems, cable operators, or other MVPDs or their agents or buying groups. . . .[10]

4. In *Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992: Development of Competition and Diversity in Video Programming Distribution and Carriage*, MM Docket No. 92-265, First Report and Order ("*Program Access Report and Order*"),[11] the Commission concluded that non-price discrimination is included within the prohibition against discrimination set forth in Section 628(c)(2)(B). While the Commission did not attempt to identify all types of non-price discrimination that could occur, the Commission stated that "one form of non-price discrimination could occur through a vendor's 'unreasonable refusal to sell', or refusing to initiate discussions with a particular distributor when the vendor has sold its programming to that distributor's competitor." The Commission cautioned, however that "'unreasonable' refusals to sell" should be distinguished from "certain

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[8] 47 U.S.C. § 548(b).

[9] 47 U.S.C. § 548(c)(2)(A).

[10] 47 U.S.C. § 548(c)(2)(B). Congress provided limited exceptions to this prohibition. A satellite programming vendor is not prohibited from:

> (i) imposing reasonable requirements for creditworthiness, offering of service, and financial stability and standards regarding character and technical quality; (ii) establishing different prices, terms, and conditions to take into account actual and reasonable differences in the cost of creation, sale, delivery, or transmission of satellite cable programming or satellite broadcast programming; (iii) establishing different prices, terms, and conditions which take into account economies of scale, cost savings, or other direct and legitimate economic benefits reasonably attributable to the number of subscribers served by the distributor; or (iv) entering into an exclusive contract that is permitted under subparagraph (D) [of this section].

Id.

[11] 8 FCC Rcd 3359 (1993).

legitimate reasons that could prevent a contract between a vendor and a particular distributor."[12] Such legitimate reasons would include:

> (i) the possibility of [the] parties reaching an impasse on particular terms, (ii) the distributor's history of defaulting on other programming contracts, or (iii) the vendor's preference not to sell a program package in a particular area for reasons unrelated to an existing exclusive arrangement or a specific distributor.[13]

III. THE FACTS

5. RCN operates an open video system in New York City pursuant to a certification issued by the Commission and pursuant to RCN's open video system agreement with the city. RCN offers MVPD service over its system to approximately 50,000 subscribers in Manhattan, Queens, and the Bronx.[14] MST is a private cable operator offering MVPD service to subscribers throughout the New York metropolitan area.[15]

6. Cablevision is a multiple system operator ("MSO") that owns and operates cable systems in various parts of the country including New York City. Cablevision currently provides MVPD service to approximately 2.7 million subscribers in the New York metropolitan area.[16] Cablevision owns a majority interest in Rainbow, a programming and entertainment company, which in turn owns a controlling interest in the entity which ultimately owns and controls MSG and Fox Sports/NY.[17] MSG and Fox Sports/NY are satellite-delivered programming services operating in the New York metropolitan market which provide subscribers with telecasts of numerous New York professional major league sport contests as well as local collegiate and amateur sporting events.[18] MSG and Fox Sports/NY own the rights to televise games played by the Knicks and the Nets (teams of the National Basketball Association), the Rangers, Islanders and Devils (teams of the National Hockey League), and the Yankees and the Mets (Major League Baseball teams).[19]

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[12] *Id.*

[13] *Id.* (footnote omitted).

[14] RCN Complaint at 6.

[15] MST Complaint at 1.

[16] RCN Complaint at 2.

[17] Defendants' Answer (RCN), Affidavit of C. Travers at ¶ 3; Defendants' Answer (MST), Affidavit of C. Travers at ¶ 3.

[18] *Id.* at 7.

[19] RCN Complaint at 6-7.

Because MSG and Fox Sports/NY distribute their programming through satellite technology, it is considered "satellite cable programming" subject to the program access rules.[20]

7. Since the late 1980's, MST has distributed the programming services now known as MSG and Fox Sports/NY to its subscribers in the New York metropolitan area.[21] RCN and its predecessors have distributed these programming services in the New York area since the early 1990's.[22] Due to the large number of professional sports teams in the New York area, it is often the case that a number of the teams are playing simultaneously. In the past when this occurred, Defendants often provided "overflow" games to distributors of MSG and Fox Sports/NY, including Complainants. MSG and Fox Sports/NY would each produce a primary game for distribution as part of their regular service and produce certain of the games on a secondary or overflow basis as well.[23] Distributors typically would clear channel capacity elsewhere on their systems in order to telecast these overflow games.[24] Under their contracts with MSG and Fox Sports/NY, distributors usually were required only to use "reasonable" or "best" efforts in order to make capacity available for the overflow programming.[25] Neither MSG nor Fox Sports/NY ever established a body of sports programming specifically designated as "overflow programming."[26] Rather, the foregoing process operated in an *ad hoc* manner and depended upon when and what conflicts occurred.[27] According to Defendants, the *ad hoc* nature of this process and inconsistent channel placement had a negative impact on ratings for the games and on the advertising revenue generated by the games.[28]

8. On August 5, 1998, Rainbow launched a new programming service tailored for the New York metropolitan market called the MetroChannels.[29] Rainbow distributes the MetroChannels terrestrially using Cablevision's fiber optic transport network connecting various headends serving the metropolitan

[20] 47 U.S.C. §§ 548(a), 605(d)(1).

[21] Defendants' Answer (MST) at 7.

[22] Defendants' Answer (RCN) at 7.

[23] Defendants' Answer (RCN) at 11; Defendants' Answer (MST) at 11.

[24] *Id.*

[25] *Id.*

[26] Cablevision Answer (RCN) at 11, n. 20; Cablevision Answer (MST) at 11, n. 22.

[27] Defendants' Answer (RCN) at 11; Defendants' Answer (MST) at 11.

[28] *Id.*

[29] *Id.* at 7.

area.[30] The MetroChannels consist of three services: MetroGuide, MetroLearning, and MetroTraffic and Weather. The MetroChannels provide a variety of local programming content including cultural events, educational services, and sports programming, much of which is original and has not appeared before on any other programming service.[31] In January of 1999, MSG and Fox Sports/NY began to use MetroGuide as an outlet for the overflow games previously distributed through the independent distributors of MSG and Fox Sports/NY in the manner described above.[32] In addition, MSG and Fox Sports/NY moved a portion of the overflow programming to local broadcast stations.[33]

9. In meetings and through written correspondence, RCN and MTS attempted without success to negotiate with Defendants for the right to carry the overflow programming Defendants now distribute *via* the MetroChannels.[34] RCN and MTS did not seek carriage rights for the MetroChannels service as a whole. In letters to Complainants, counsel for the MetroChannels asserted that the MetroChannels are a terrestrially-delivered service and that the programming contained on the MetroChannels is not subject to the program access rules. Counsel stated that Defendants will not extend carriage rights to Complainants for any of the programming on the MetroChannels.[35] After providing Defendants with the requisite notice of their intent to file a program access complaint, Complainants initiated these proceedings alleging that the refusal to license Complainants to carry the sports programming previously distributed *via* MSG and Fox Sports/NY as overflow programming violates the program access provisions of the Communications Act.[36]

IV. THE PLEADINGS

10. Complainants allege that Defendants' refusal to negotiate carriage of the overflow programming constitutes an impermissible refusal to sell prohibited by Section 628(c)(2)(B).[37] RCN argues that if this programming were transmitted by satellite, Defendants' refusal to sell would constitute an impermissible form of non-price discrimination. RCN maintains that Defendants have shifted the

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[30] *Id.* at 9-10.

[31] *Id.* at 7.

[32] *Id.* at 11. According to RCN, from the time Defendants began distribution *via* the MetroChannels through the end of April 1999, there have been approximately 26 overflow games. RCN Complaint at 7.

[33] RCN Complaint at 8.

[34] RCN Complaint at 8-9; MST Complaint at 4.

[35] RCN Complaint, Exh. D; MST Complaint, Exh. B.

[36] 47 U.S.C. §§548(b), (c); *see* 47 C.F.R. § 76.1003(a).

[37] RCN Complaint at 11; MST Complaint at 6.

programming to terrestrial distribution *via* the MetroChannels in order to evade application of the program access rules and that the Commission has authority under a combination of Sections 4(i) and 303(r) of the Communications Act to prohibit such evasions.[38] Sections 4(i) and 303(r), RCN argues, empower the Commission to adopt ancillary measures that extend beyond narrow statutory mandates when necessary to implement the Act and further its goals. RCN contends that the purpose of Section 628 is to promote competition and diversity in the multichannel video programming market. RCN asserts that while Section 628 addresses only satellite programming, movement of satellite programming to terrestrial distribution in order to evade the program access rules frustrates its pro-competitive goals and that the Commission can act pursuant to Sections 4(i) and 303(r) to restrict such activity.[39] RCN argues that nothing in the language of Section 628 or its legislative history prohibits such an assertion of jurisdiction over satellite programming recently shifted to terrestrial distribution with an evasive intent.[40]

11. Complainants reference two recent decisions of the Cable Services Bureau (the "Bureau") denying program access complaints involving similar facts and based upon similar arguments regarding extension of the Commission's jurisdiction to prohibit possible evasions of the program access rules through transition to terrestrial delivery.[41] To the extent the Bureau held in *DIRECTV v. Comcast* or *EchoStar v. Comcast* that it does not have such jurisdiction pursuant to Sections 4(i) and 303(r), RCN asks the Bureau to overrule or distinguish its decisions in those cases.[42] Complainants also argue that the facts of *DIRECTV* and *EchoStar* are distinguishable from those underlying their respective complaints. In this regard, Complainants state that they previously carried all of the overflow programming at issue, whereas the complainant in *DIRECTV* carried only a portion of the disputed programming and in *EchoStar* the complainant did not carry any of the programming at issue.[43] Complainants also contend that their cases are distinguishable because in this case the ownership of the rights to televise the sports contests involved has remained at all relevant times with Defendants, whereas in *DIRECTV* and *EchoStar* the parties undertook the

[38] RCN Complaint at 17 (*citing* Communications Act §§ 4(i) and 303 (r), 47 U.S.C. § 154(i) and 47 U.S.C. § 303(r)). Section 4(i) provides that "the Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions." Section 303(r) states that one of the general powers of the Commission is to "[m]ake such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this Act. . . ." MST did not base its complaint on Sections 4(i) and 303(r) but includes a general reference to these provisions in its reply. MST Reply at 11.

[39] RCN Complaint at 21.

[40] *Id.* at 20-21. RCN and MST also argue that the Commission has general authority under Section 628 itself to police evasions of this provision. RCN Complaint at 22; MST Complaint at 8.

[41] *See DIRECTV, Inc. v. Comcast Corp.*, 13 FCC Rcd. 21822 (1998), *app. for rev. pending* ("*DIRECTV*"); *EchoStar Communications Corp.* v. *Comcast Corp.*, 14 FCC Rcd. 2089 (1999), *app. for rev. pending* ("*EchoStar*").

[42] RCN Complaint at 21.

[43] RCN Complaint at 14; MST Complaint at 8.

shift to terrestrial distribution only after acquisition of the distribution rights from an unaffiliated third party.[44]

12. Complainants further argue that Defendants' refusal to negotiate for carriage of the overflow programming while offering it to other MVPDs as part of the MetroChannels constitutes an unfair practice under Section 628(b). RCN maintains that the statutory prohibition contained in Section 628(b) is broader than the specific prohibitions on discrimination in Section 628(c), arguing that the only requirement for triggering the prohibition in Section 628(b) is that the unfair conduct in question prevents an MVPD "from providing satellite cable programming or satellite broadcast programming to subscribers or consumers."[45] RCN argues that the status of the contested programming itself as "satellite cable programming" is irrelevant as long as a party can show it has been harmed in its general ability to provide satellite cable programming.[46] RCN and MST assert that Defendants' refusal to license them to carry the disputed programming hinders their provision of satellite programming and their ability to compete in the New York market, thus resulting in a violation of Section 628(b).[47]

13. Finally, Complainants maintain that Defendants' movement of the overflow programming and refusal to license Complainants to carry the programming constitutes the imposition of an exclusivity agreement against Complainants in the New York metropolitan area in violation of Section 628(c)(2)(D) of the Communications Act and Sections 76.1002(c)(4) and (c)(5) of the Commission's rules.[48] Complainants assert that Defendants have not obtained a Commission determination that this exclusive arrangement serves the public interest or obtained prior approval from the Commission for the arrangement. Complainants argue that Defendants' failure to do so violates the foregoing provisions which prohibit certain exclusive contracts for satellite cable programming or satellite broadcast programming without Commission approval.[49]

14. In their Answers, Defendants argue that the Commission is granted only limited authority to adjudicate disputes regarding access to satellite cable programming, defined as "video programming which is transmitted *via* satellite."[50] Defendants assert that their conduct does not violate Sections 628(b) or 628(c) since the MetroChannels, and the overflow programming now incorporated therein, are terrestrially-

[44] *Id.*

[45] RCN Complaint at 24; RCN Reply at 10. While MST asserts the same general argument, it does not elaborate on its reasoning. MST Complaint at 10.

[46] RCN Reply at 10-11.

[47] RCN Reply at 10-11; MST Complaint at 10.

[48] 47 U.S.C. § 548(c)(2)(D), 47 C.F.R. §§ 76.1002(c)(4), (5).

[49] RCN Complaint at 26-27; MST Complaint at 11.

[50] Defendants' Answer (RCN) at 12-13; Defendants' Answer (RCN) at 12-13.

delivered and do not constitute satellite cable programming.[51] Defendants cite Congress' use of the phrase "satellite cable programming" as evidence that Congress intended to limit application of the program access rules to satellite programming. Defendants argue that the legislative history reveals that Congress considered and rejected the idea that the program access rules apply to terrestrially-delivered programming.[52] Defendants argue that the Commission's ancillary authority set forth in Sections 4(i) and 303(r) cannot serve as a basis for the Commission to apply the program access provisions to terrestrially-delivered programming given that Congress expressly limited these provisions to satellite-delivered programming.[53] Defendants reason that if the Commission were to extend application of the statute to terrestrial programming, despite the clear language of the statute, it would violate well established principles of statutory construction.[54]

15. Defendants argue that *DIRECTV* and *EchoStar* are controlling and that Complainants have failed to distinguish these decisions.[55] Defendants assert that like Complainants here, the complainant in *DIRECTV* had previously carried the programming at issue and that this fact was not a basis for the Bureau's refusal to apply the program access rules in that case.[56] Defendants also reject Complainants' other proffered distinction of *DIRECTV* and *EchoStar* which was based upon the fact that in this case Defendants held the distribution rights to the programming at issue prior to the transition to terrestrial delivery. Defendants argue that while the transfer of distribution rights in conjunction with the move to terrestrial delivery may have been considered as one factor in the *DIRECT TV* and *EchoStar* decisions, it was not central to the analysis.[57] Defendants maintain that the MetroChannels are clearly a new service regardless of the continuity in ownership of the distribution rights to certain of the programming carried on this service.[58]

16. Defendants reject Complainants' argument that the Commission has authority under Sections 4(i) or 303(r) or Section 628 itself to police evasions of the program access rules and argue that no such evasion can be found on these facts in any event. Defendants deny the allegation that they incorporated

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[51] *Id.*

[52] Defendants' Answer (RCN) at 16-17; Defendants' Answer (MST) at 15-16. Defendants maintain that the program access provisions adopted by the Senate extended to terrestrially-delivered programming services, while the House bill, which was ultimately enacted, applied only to satellite-delivered programming services.

[53] Defendants' Answer (RCN) at 20; Defendants' Answer (MST) at 19, n. 54.

[54] *Id.* (citing *Green v. Block Laundry Machine Co.*, 490 U.S. 504 (1989); *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 499 U.S. 437 (1991).

[55] Defendants' Answer (RCN) at 17; Defendants' Answer (MST) at 16.

[56] Defendants' Answer (RCN) at 18; Defendants' Answer (MST) at 17.

[57] Defendants' Answer (RCN) at 19; Defendants' Answer (MST) at 18.

[58] *Id.*

the overflow programming into the terrestrially-delivered MetroChannels in order to evade the program access rules.[59] According to Defendants, they have expended significant resources in developing the MetroChannels as a ground-breaking new "hyper-local" programming service with extensive content in the areas of news, entertainment, and sports. Defendants argue that the inclusion of such a small amount of content previously transmitted *via* satellite cannot be considered credible evidence of evasive conduct.[60] Defendants explain that adoption of terrestrial distribution for the MetroChannels was a rational and legitimate business decision based on a determination that terrestrial distribution would be significantly less expensive than satellite distribution and better suited for the type of programming and interactive services that will be included.[61] Defendants assert that because they had access to Cablevision's pre-existing terrestrial infrastructure, terrestrial distribution was the most economical option.[62] Defendants also state that because the MetroChannels are a regional service, there is no reason to incur the higher costs associated with satellite distribution.[63]

17. Defendants further assert that Complainants have failed to state a claim under Section 628(b). As an initial matter, Defendants argue that the terrestrial programming at issue is beyond the scope of Section 628(b), which they argue applies only to programming delivered *via* satellite.[64] Defendants next assert that the decision to move this programming to terrestrial delivery is permitted under the law and is not an unfair practice.[65] Defendants also maintain that their refusal to sell the overflow programming is not an unfair practice since no other MVPD can purchase this programming separately as Complainants desire.[66] Defendants further argue that Complainants fail to state a Section 628(b) claim because they cannot demonstrate a purpose on the part of Defendants to cause the requisite harm or make a showing of the harm itself.[67] As discussed above, Defendants contend that they made the decision to transition the programming to terrestrial delivery for legitimate business reasons and not for any prohibited purpose. Defendants also

[59] Defendants' Answer (RCN) at 23; Defendants' Answer (MST) at 20.

[60] Defendants' Answer (RCN) at 24; Defendants' Answer (MST) at 21.

[61] Defendants' Answer (RCN) at 25-26; Defendants' Answer (MST) at 22-23.

[62] Defendants' Answer (RCN) at 25; Defendants' Answer (MST) at 22.

[63] *Id.*

[64] Defendants' Answer (RCN) at 30; Defendants' Answer (MST) at 27.

[65] Defendants' Answer (RCN) at 31; Defendants' Answer (MST) at 29.

[66] *Id.*

[67] Defendants' Answer (RCN) at 32; Defendants' Answer (MST) at 29.

assert that Complainants have presented no evidence demonstrating that their inability to distribute the overflow programming has hindered their competitive position in the New York market.[68]

18. Defendants maintain that Complainants' request for only the overflow programming now incorporated into the MetroChannels, rather than the entire MetroChannels service, is not cognizable under Section 628.[69] Defendants argue that the relevant legislative history and the structure of the program access rules indicate that they govern access to integrated programming services and not to the specific programs that make up such services.[70] In response, RCN references other portions of the legislative history and argues that the program access rules can apply on a program-specific basis.[71] RCN also states that not only have Defendants refused to negotiate carriage of the overflow programming by itself, they also have refused to negotiate carriage of the complete MetroChannels programming package.[72]

19. Lastly, Defendants argue that their conduct does not violate the restrictions on exclusive contracts contained in Section 628(c)(2)(D). Defendants argue that this provision by its terms applies only to contracts for programming delivered *via* satellite and that the terrestrial programming in dispute is not covered by Section 628(c)(2)(D).[73]

V. DISCUSSION

20. The central legal issues underlying the Complaints are essentially the same as those involved in *DIRECTV* and *EchoStar*. We therefore rely substantially on the analysis set forth in those decisions in resolving the Complaints. The primary issues disputed in this proceeding are as follows:

(1) Does the Commission have the authority to take action against evasions of the program access rules involving terrestrially-delivered programming and, if so, is Defendants' conduct actionable as an evasion of Section 628(c)(2)(B)?

(2) Does Defendants' conduct involve unfair or anti-competitive action the purpose or effect of which is to hinder Complainants' distribution of "satellite cable programming" in violation of Section 628(b)?

[68] Defendants' Answer (RCN) at 33; Defendants' Answer (MST) at 30.

[69] Defendants' Answer (RCN) at 34; Defendants' Answer (MST) at 31.

[70] Defendants' Answer (RCN) at 35-36; Defendants' Answer (MST) at 32-33.

[71] RCN Reply at 18-19.

[72] *Id.* at 18.

[73] Defendants' Answer (RCN) at 41; Defendants' Answer (MST) at 37.

(3) Does Defendants' conduct violate the restrictions on exclusive contracts contained in Section 628(c)(2)(D)?

21. Section 628 is generally understood to be a mechanism for ensuring that MVPDs that are competing with traditional cable television systems are not deprived, through exclusive contracts, discriminatory pricing, or otherwise, of access to vertically integrated "satellite cable programming." Section 628(c)(2)(B) prohibits a "satellite cable programming vendor" in which a cable operator has an attributable interest from engaging in discrimination in the prices, terms or conditions of the sale or delivery of satellite cable programming to competing MVPDs.[74]

22. Complainants do not argue that the overflow programming is in fact "satellite cable programming."[75] Rather, they assert that Defendants' movement of this programming from satellite to terrestrial delivery constitutes an attempt to evade Section 628(c)(2)(B), and that the Commission can act to prevent such conduct pursuant to the ancillary authority granted in Sections 4(i) and 303(r) or the general jurisdiction of Section 628. Assuming for the sake of argument that the Commission has the authority to act against evasions in some circumstances (an issue the Commission has considered elsewhere),[76] we are not persuaded here that the totality of the circumstances demonstrates an intent to evade our rules. Because we conclude that evasive conduct is not present, we do not address Complainants' arguments under Sections 4(i), 303(r) and 628.

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[74] Communications Act § 628(c)(2)(B), 47 U.S.C. § 548 (c)(2)(B).

[75] In its reply, RCN argues that if the overflow games transmitted from distant venues are delivered *via* satellite to Defendants' headend, these "away" games are covered by the express terms of Section 628. RCN Reply at 11. Because RCN did not plead sufficient facts to support this argument and raises it in an untimely manner on reply, we will not consider the argument in these proceedings.

[76] *See Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992: Petition for Rulemaking of Ameritech New Media, Inc.*, Report and Order, 13 FCC Rcd. 15,822, 15,856 (1998). In this Report and Order, the Commission stated:

> The record developed in this proceeding fails to establish that the conduct complained of, *i.e.*, moving the transmission of programming from satellite to terrestrial delivery to avoid the program access rules, is significant and causing demonstrative competitive harm at this time. The Commission has received only two complaints against the same vertically-integrated programmer related to moving the transmission of programming from satellite to terrestrial delivery to avoid the program access rules. Where the record fails to indicate a significant competitive problem, we are reluctant to promulgate general rules prohibiting activity particularly where reasonable issues are raised regarding the scope of the statutory language. In circumstances where anti-competitive harm has not been demonstrated, we perceive no reason to impose detailed rules on the movement of programming from satellite delivery to terrestrial delivery that would unnecessarily inject the Commission into the day-to-day business decisions of vertically-integrated programmers. While the record does not indicate a significant anti-competitive impact necessitating Commission action at this time, we believe that the issue of terrestrial distribution of programming could eventually have substantial impact on the ability of alternative MVPDs to compete in the video marketplace. We note that Congress is considering legislation which, if enacted, would introduce important changes to the program access provisions, including clarification of the Commission's jurisdiction over terrestrially-delivered programming. The Commission will continue to monitor this issue and its impact on competition in the video marketplace.
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> *Id.*

23. We find that Defendants have provided convincing evidence that their decision to move the sports programming previously distributed on an overflow basis *via* MSG and Fox Sports/NY to the MetroChannels, as well as their decision to distribute the MetroChannels terrestrially, were based upon legitimate business and marketing considerations. Defendants have invested substantial resources in developing the MetroChannels as a new "hyper-local" service tailored to the interests of specific communities and offering a wide range of original news, entertainment, and sports content. The sports programming at issue is only a small part of the programming offered on the MetroChannels. Defendants articulate a clear, marketing-based rationale for including the overflow sports programming as part of the "electronic newspaper" design upon which the MetroChannels are based. Defendants also detailed the practical difficulties in the previous overflow method of distribution which they sought to eliminate by transferring the programming to the MetroChannels. Significantly, the overflow programming was never a separate programming service offered by the Defendants. Moreover, the fact that the migrated programming represents only a small amount of the sports programming for the New York area, the majority of which remains available to Complainants *via* MSG, Fox Sports/NY and other outlets, is evidence that an evasive intent was not involved.[77] Finally, Defendants provided substantial evidence that terrestrial distribution of the MetroChannels is dramatically less expensive and more technically appropriate for this type of locally-oriented service than satellite distribution.[78] In light of the foregoing, we cannot conclude that evasive conduct is involved.

24. Complainants also argue that Defendants' conduct violates Section 628(b) of the Communications Act. This provision reads as follows:

> It shall be unlawful for a cable operator, a satellite cable programming vendor in which a cable operator has an attributable interest, or a satellite broadcast programming vendor to engage in unfair methods of competition or unfair or deceptive acts or practices, the purpose or effect of which is to hinder significantly or to prevent any multichannel video programming distributor from providing satellite cable programming or satellite broadcast programming to subscribers or consumers.[79]

Complainants assert that Section 628(b) has broad applicability and does not require that the unfair practices in question hinder the distribution of satellite programming directly. Complainants assert that Defendants' unfair denial of the terrestrially-delivered overflow programming violates Section 628(b) because without

[77] According to Defendants, over 600 games telecast in the New York area between October 1998 and October 1999 will be available to Complainants. Defendants' Answer (RCN) at 27, n. 83; Defendants' Answer (MST) at 24, n. 73. RCN asserts that between January and April 1999, it was denied access to 26 overflow games as a result of movement of this programming. RCN Complaint at 7.

[78] Defendants stated that terrestrial distribution of the MetroChannels would cost approximately $205,000 per month, as compared to between $800,000 and $1,500,000 per month for satellite delivery or approximately $550,000 per month for delivery *via* a shared digital uplink facility. Defendants' Answer (RCN), Exh. 1 at ¶12; Defendants' Answer (MST), Exh. 1 at ¶12.

[79] 47 U.S.C. § 548 (b).

this programming in their line up, Complainants' satellite-delivered programming is less appealing to subscribers.[80]

25. We are not persuaded that the facts alleged are sufficient to establish a Section 628(b) violation. In order to find a violation of Section 628(b), the Commission must make two independent determinations. First, the Commission must determine that the defendant has engaged in unfair methods of competition or unfair or deceptive acts or practices. Second, the Commission must determine that the unfair acts or practices, if found, had the purpose or effect of hindering significantly or preventing an MVPD from providing satellite cable programming to subscribers or consumers. Here, we do not believe that the record supports a conclusion that Defendants have engaged in unfair or deceptive acts in transferring the overflow programming to the MetroChannels.[81] In enacting Section 628, Congress determined that while cable operators generally must make available to competing MVPDs vertically-integrated programming that is satellite-delivered, they do not have a similar obligation with respect to programming that is terrestrially-delivered. Complainants' argument would have us find that it is somehow unfair for a cable operator to move a programming service from satellite delivery to terrestrial delivery if it means that a competing MVPD may no longer be afforded access to the service. We find no evidence in Section 628 that Congress intended such a result. Congress did not prohibit cable operators from delivering any particular type of service terrestrially, did not prohibit cable operators from moving any particular service from satellite to terrestrial delivery, and did not provide that program access obligations remain with a programming service that has been so moved. Thus, given our prior finding that Defendants' actions do not amount to an attempt to evade our rules, we decline to find that, standing alone, Defendants' decision to deliver the overflow programming terrestrially *via* the MetroChannels and to deny that programming to Complainants is "unfair" under Section 628(b).

26. Complainants' final argument is that Defendants' conduct constitutes the imposition of an exclusive agreement for which Defendants have not obtained the prior approval and public interest determination required under Section 628(c)(2)(D) and the Commission's implementing rules.[82] Section 628(c)(2)(D) applies to certain exclusive contracts for "satellite cable programming or satellite broadcast programming."[83] As we stated in *DIRECTV* and *EchoStar*:

> We believe that the correct reading of Section 628(c) is that the provisions in question apply to satellite cable programming, not programming that was "previously" satellite-delivered, or the "equivalent" of satellite cable programming, or programming that would qualify as satellite cable programming, but for its terrestrial delivery. The statute defines "satellite

[80] RCN Reply at 10-11; MST Complaint at 10.

[81] Because we do not find Defendants' actions to be unfair or deceptive, we need not address whether such actions had the purpose or effect of hindering significantly or preventing an MVPD from providing satellite cable programming to subscribers or consumers.

[82] 47 U.S.C. § 548(c)(2)(D); 47 C.F.R. § 76.1002(c)(4), (5).

[83] 47 U.S.C. § 548(c)(2)(D).

> cable programming" as that which *is* transmitted via satellite.[84] This reading is consistent with the legislative history of Section 628 which indicates that the version of the program access provision that the Senate adopted would have extended to terrestrially-delivered programming services but the House bill, that was eventually adopted, did not.[85] This indicates a specific intention to limit the scope of the provision to satellite services.[86]

As with Complainants' Section 628(b) argument, Complainants' prohibited exclusive contract argument presupposes that Defendants' movement of the overflow games from satellite delivery to terrestrial delivery constitutes improper conduct requiring the treatment of the programming at issue as satellite delivered programming subject to the program access rules. To the contrary, we find that the record supports a conclusion that Defendants have not engaged in unfair or deceptive acts in transferring the overflow programming to the MetroChannels. Accordingly, because the programming at issue is terrestrially-delivered it does not constitute satellite cable programming. We therefore must deny Complainants' Section 628(c)(2)(D) claim.

27. Lastly, in its complaint, RCN requested discovery in order to explore the motivation for Defendants' conduct in conjunction with its evasion claims. Section 76.1003(g) of the Commission's rules provides that Commission staff have discretion to order discovery in program access disputes if they believe the record is insufficient.[87] We believe the pleadings and supporting affidavits submitted in these proceedings provide sufficient detail regarding the creation of the MetroChannels and the decision to distribute this service terrestrially, as well as the decision to shift distribution of the overflow programming to the MetroChannels. We do not believe that discovery is necessary to supplement the record and deny RCN's petition for discovery.

VI. ORDERING CLAUSES

28. Accordingly, **IT IS ORDERED**, that the complaints filed in CSR 99-5404-P by RCN Telecom Services of New York, Inc. and in CSR 99-5415-P by Microwave Satellite Technologies, Inc. **ARE DENIED**.

29. **IT IS FURTHER ORDERED**, that the Petition for Discovery filed by RCN Telecom Services of New York, Inc. as part of its complaint in CSR 99-5404-P **IS DENIED.**

30. This action is taken pursuant to authority delegated by Section 0.321 of the Commission's rules, 47 C.F.R. § 0.321.

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[84] 47 U.S.C. § 605(d)(1)(emphasis added).

[85] *See* H.R. Conf. Rep. No. 862, 102d Cong., 2d Sess. at 91-3 (1993).

[86] *DIRECTV*, 13 FCC Rcd at 21,834 (footnote omitted); *EchoStar*, 14 FCC Rcd at 2099 (footnote omitted).

[87] 47 C.F.R. § 76.1003(g).

FEDERAL COMMUNICATIONS COMMISSION

William H. Johnson
Deputy Chief, Cable Services Bureau