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

In the Matter of:	)	
	)	
AT&T Services Inc. and Pacific Bell Telephone Company d/b/a SBC California d/b/a AT&T California,	)	CSR-8066-P
	)	
v.	)	
	)	
CoxCom, Inc.	)	

MEMORANDUM OPINION AND ORDER

Adopted: March 9, 2009 **Released: March 9, 2009**

By the Senior Deputy Chief, Policy Division, Media Bureau:

I. INTRODUCTION

1. On October 6, 2008, Complainant Pacific Bell Telephone Company d/b/a SBC California d/b/a AT&T California and AT&T Services, Inc. ("AT&T") filed a program access complaint[1] against CoxCom, Inc. ("Cox") pursuant to Sections 628(b) of the Communications Act of 1934, as amended (the "Act"), and Sections 76.7(a), 76.1001 and 76.1003(a) of the Commission's rules.[2] AT&T alleges Cox's withholding of channel Cox-4 from carriage by AT&T on its U-verse TV system in San Diego, California constitutes an unfair practice under Section 628(b) because the purpose or effect of Cox's actions has been to significantly hinder AT&T's ability to provide satellite-delivered programming to consumers. In addition, AT&T seeks an injunction requiring Cox to immediately negotiate a license agreement with AT&T for Cox-4, and an order of damages and forfeiture penalties. Cox has filed an answer to AT&T's Complaint,[3] to which AT&T has replied.[4] For the reasons discussed below, AT&T's Complaint is denied.

II. BACKGROUND

2. In enacting the program access provisions contained in Section 628 of the Act,[5] Congress sought to prohibit unfair methods of competition or unfair or deceptive practices that hinder or prevent

[1] AT&T Amended Program Access Complaint, filed Oct. 6, 2008 (hereinafter "Complaint").

[2] 47 U.S.C. § 548(b); 47 C.F.R. §§ 76.7(a), 76.1001 and 76.1003(a).

[3] CoxCom Answer to Amended Program Access Complaint, filed Oct. 27, 2008 ("Answer").

[4] Reply of AT&T to Answer to Amended Program Access Complaint, filed Nov. 21, 2008 ("Reply"). We note that both AT&T and Cox filed numerous supplemental pleadings. Because we deny AT&T's Complaint without prejudice to its refiling at an appropriate time, and the basis for our denial is not affected by those pleadings, we need not determine whether these pleadings are admissible or meritorious.

[5] 47 U.S.C. § 548.

any MVPD from providing satellite-delivered programming to consumers.[6] Section 628(b) of the Communications Act states that:

> 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.[7]

3. In Section 628(c), Congress instructed the Commission, inter alia, 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][8]
>
> (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 multichannel video programming distributors, or their agents or buying groups....[9]

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, First Report and Order* ("*Program Access Report and Order*"),[10] the Commission concluded that non-price discrimination is included within the prohibition against discrimination set forth in Section 628(c). 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."[11]

5. "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."[12] "Satellite broadcast programming" is broadcast video 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

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[6] *See In the Matter of Implementation of the Cable Television Consumer Protection And Competition Act of 1992: Review of the Commission's Program Access Rules and Examination of Programming Tying Arrangements*, 22 FCC Rcd 17791, 17798 ¶ 8 (2007) ("*2007 Program Access Order*").

[7] 47 U.S.C. § 548(b).

[8] 47 U.S.C. § 548(c)(2)(A).

[9] 47 U.S.C. § 548(c)(2)(B).

[10] 8 FCC Rcd 3359, 3412 ¶ 116 (1993).

[11] *Id*.

[12] 47 U.S.C. § 705(d)(1).

broadcaster.[13]

III. FACTS

6. AT&T is a multichannel video programming distributor ("MVPD") that on June 4, 2007, began providing U-verse TV ("U-verse") – a multichannel, Internet-Protocol-based video programming service – to consumers in San Diego.[14] In the San Diego area, U-verse competes against incumbent cable operators such as Cox and Time Warner (incumbent MVPDs).[15] AT&T asserts that through essentially non-overlapping footprints, Cox and Time Warner serve a combined total of 87.1 percent of all MVPD subscribers in San Diego.[16]

7. In order to compete effectively with these incumbent MVPDs, AT&T argues it must have popular programming that consumers demand.[17] However, AT&T asserts it has been unable to secure access to core "must-have" programming that it needs in San Diego, specifically channel "Cox-4."[18] Cable operator Cox owns Cox-4 (also known as "4-SD"), a cable-programming network that carries local news, entertainment, and sports programming and that is wholly terrestrially-delivered.[19] Most importantly for AT&T, Cox-4 has the exclusive right to broadcast the regular season games played by Major League Baseball's San Diego Padres ("Padres").[20] Prior to and after the commencement of its U-verse service, AT&T attempted several times to license Cox-4, but Cox has refused to grant AT&T the right to carry the channel.[21]

8. Cox states the majority of Cox-4's programming consists not of sports but of locally-originated, community focused news, public affairs, and entertainment programs.[22] Apart from its exclusive right to Padres games, Cox-4 has no other exclusive sports programming.[23]

9. AT&T asserts that after the launch of U-verse in San Diego, lack of Cox-4's Padres programming in its lineup significantly hampered AT&T's efforts to gain and keep subscribers for U-verse in San Diego.[24] AT&T supports its arguments by citing internally conducted studies in which San

[13] 47 U.S.C. § 548(i)(3).

[14] Complaint at 3-4, 6.

[15] *Id*. at 7.

[16] *Id*. at 7 & n.7 (citing 2007 Program Access Order, 22 FCC Rcd at 17828 ¶ 52 n.277.

[17] *Id*. at 7.

[18] *Id*.

[19] Answer at 6, 8. The programming on Cox-4/Channel 4-SD is "delivered and distributed either by fiber optic cable or terrestrial microwave to several other wireline MVPDs and satellite master antenna television ("SMATV") operators throughout the San Diego market" using Cox's infrastructure or third-party owned terrestrial facilities. Declaration of Craig Nichols at 3 ("Nichols Decl."). Cox-4/4-SD has always been terrestrially delivered because "Cox already owned much of the terrestrial fiber infrastructure necessary for distribution when it started the channel," and "the ready availability of terrestrial fiber and microwave facilities to reach places Cox's facilities did not made it unnecessary for Cox to secure satellite distribution"; furthermore, "none of [Cox-4/4-SD's] local sports or other programming has been moved from satellite to terrestrial delivery." Nichols Decl. at 3-4.

[20] Answer at 6; *see also* Nichols Decl. at 1.

[21] Answer at 8-10 (citing Declaration of Daniel York at 4-6 & Exs. 1-5 ("York Decl.")).

[22] Answer at 6.

[23] Answer at 6-8.

[24] Complaint at 10; Declaration of Christopher Sambar at 2 ("Sambar Decl.").

Diegan survey respondents highly valued Padres programming, expressed a preference for television services which offered it, and declined to accept substitutes which did not.[25] AT&T asserts such attitudes have negatively affected its U-verse sales in San Diego.[26] AT&T also argues its failure to obtain Padres programming has markedly impacted its customer retention and cancellation rates, resulting in a loss of existing and prospective customers.[27] Consequently AT&T has experienced a loss of present and expected revenues.[28]

IV. DISCUSSION

10. AT&T argues Cox's withholding of Cox-4's terrestrially-delivered programming constitutes an unfair method of competition, or unfair and deceptive act or practice, which has both the purpose and effect of significantly hindering AT&T's ability to deliver satellite-delivered programming to consumers in San Diego, in violation of Section 628(b) of the Communications Act.[29]

11. AT&T first argues the Commission made clear in its *MDU Rulemaking* that Section 628(b) is broad enough to reach any type of anticompetitive behavior that significantly hinders a competitive video provider's ability to supply satellite-delivered cable programming to consumers.[30] AT&T asserts the Commission has also acknowledged in several adjudications that cable operators could violate Section 628(b) by denying access to terrestrially-delivered programming.[31] However, as AT&T concedes, in those cases the Commission focused on the question of whether the defendants had shifted programming from satellite to terrestrial distribution in an effort to evade the program access rules.[32] Nevertheless, AT&T argues that in granting it the relief it seeks, the Commission need not resolve whether 628(b) can be read to preclude exclusive contracts for terrestrially-delivered programming in all circumstances, it need only find that this particular instance of withholding directly depresses competition for satellite-delivered video programming.[33] Finally, even leaving aside the direct reach of Section 628(b), AT&T asserts the Commission has ancillary authority to issue whatever orders or rules are necessary to prevent Cox's anticompetitive behavior pursuant to Sections 1, 2(a), 4(i), 201(b), and 303(r) of the Communications Act.[34]

12. As Cox points out, in order to find a violation of Section 628(b), the Commission must make

[25] *Id*. at 10-11 (citing Sambar Decl. at 2-3, Exs. 2-4).

[26] *Id*. at 12 (citing Sambar Decl. at 4).

[27] *Id*. at 12-13 (citing Sambar Decl. at 4, 9).

[28] *Id*. at 13 (citing Sambar Decl. at 7-11).

[29] Complaint at 17, 19 (citing 47 U.S.C. § 548(b)).

[30] *Id.* at 19, 23 (*citing Exclusive Service Contracts for Provision of Video Services in Multiple Dwelling Units and Other Real Estate Developments*, 22 FCCR 20255, ¶ 43 n.132 (2007) ("*MDU Order*")).

[31] *Id*. at 22 (citing *DirecTV, Inc. v. Comcast Corp.*, 15 FCC Rcd 22802, 22807 ¶ 13 (2000) ("[T]here may be some circumstances where moving programming from satellite to terrestrial delivery could be cognizable under 628(b) as an unfair method of competition or deceptive practice if it precluded competitive MVPDs from providing satellite cable programming."); *RCN Telecom Servs. of New York, Inc. v. Cablevision Systems Corp.*, 16 FCC Rcd 12048, 12053 ¶ 15 (2001)(withholding of certain terrestrially-delivered programming could violate Section 628(b) "if it preclude[s] competitive MVPDs from providing satellite cable programming.").

[32] *Id*. at 23.

[33] *Id*. at 18-19.

[34] *Id*. at 32-33.

two independent determinations.[35] First, the Commission must determine that the defendant has engaged in unfair methods of competition or unfair or deceptive acts or practices.[36] Second, the Commission must determine that the unfair acts or practices, if found, had the purpose or effect of hindering significantly or preventing a MVPD from providing satellite cable programming to subscribers or consumers.[37] Cox argues AT&T's claim fails because it has not and cannot demonstrate either one of these elements as a matter of law.[38] First, Cox argues Section 628(b) does not apply to denials of access to terrestrially delivered programming.[39] And second, even if there were any legal basis to force access to terrestrially-delivered programming under Section 628(b), it argues AT&T has not shown that it would be entitled to such relief.[40]

13. Section 628 requires cable operators to make satellite-delivered vertically-integrated programming available to competing MVPDs on reasonable and nondiscriminatory prices, terms and conditions. Section 628 does not impose a similar obligation with respect to programming that is terrestrially-delivered.[41] There is no dispute between the parties that Cox-4 is, and has always been, a terrestrially-delivered programming service.[42] Our prior decisions have refused to find the withholding of terrestrially-delivered programming a violation of Section 628(b) in such cases.[43] Nor has the Commission granted relief pursuant to 628(b) under the theory that merely withholding terrestrial programming hinders or prevents the provision of satellite-cable programming.[44] Finally, we do not determine it appropriate in the context of a delegated authority complaint proceeding to extend program access regulation to terrestrially-delivered programming through the exercise of ancillary jurisdiction.[45]

14. More recently, in its *2007 Program Access Order*, the Commission again clarified that the "plain language of Section 628(b), like Section 628(c)(2)(D)," expressly employs the terms "satellite cable programming" and "satellite broadcast programming."[46] Furthermore, the Commission discussed that as a consequence of this "terrestrial loophole," terrestrial programming has continued to be withheld from competitive MVPDs.[47] The Commission noted "that withholding of terrestrially delivered cable-

[35] Answer at 10 (citing *DirecTV*, 15 FCC Rcd at 22806 ¶ 10); *see also DirecTV, Inc. v. Comcast Corp*., 13 FCC Rcd 21822, 21837 ¶ 32 (1998).

[36] *Id*.

[37] *Id*.

[38] *Id*. at 10.

[39] *Id*.

[40] *Id*.

[41] *DirecTV, Inc.*, 15 FCC Rcd at 22806 ¶ 10, n.32 (2000) (citing *DirecTV, Inc.*, 13 FCC Rcd at 21837 ¶ 32; *EchoStar Comm. Corp. v. Comcast Corp.*, 14 FCC Rcd 2089, 2102 ¶ 28 (1999)).

[42] *See* Answer at 8 & Nichols Decl. at 3-4.

[43] *DirecTV, Inc.*, 13 FCC Rcd at 21837 ¶ 32; *EchoStar Comm.*, 14 FCC Rcd at 2102 ¶ 28 (1999); *see also RCN Telecom Servs. v. Cablevision Sys. Corp*., 14 FCC Rcd 17093, 17105-6 ¶ 25 (1999).

[44] *RCN Telecom Servs.,* 14 FCC Rcd at 17105-6 ¶¶ 24-25; *aff'd* 16 FCC Rcd at 12053 ¶ 15.

[45] *RCN Telecom Servs.*, 16 FCC Rcd at 12055 ¶ 18.

[46] 2007 Program Access Order, 22 FCC Rcd at 17861 ¶ 116.

[47] *2007 Program Access Order*, 22 FCC Rcd at 17810 ¶ 29 (2007) ("[W]here the exclusive contract prohibition does not apply, such as in the case of terrestrially delivered programming, vertically integrated programmers have withheld and continue to withhold programming from competitive MVPDs."); *id*. at 17817 ¶ 39 ("[F]or vertically integrated programming that is delivered terrestrially and therefore beyond the scope of Section 628(c)(2)(D), there is factual evidence that cable operators have withheld this programming from competitors and, in two instances -- in San Diego and Philadelphia -- there is empirical evidence that such withholding has had a material adverse impact (continued....)

affiliated programming is a significant concern that can adversely impact competition in the video distribution market.[48] In particular, the Commission discussed the situation of Cox-4 in San Diego.[49]

15. At the time it issued its *2007 Program Access Order*, the Commission also issued its *2007 Program Access NPRM*, in which it sought comment "on whether it would be appropriate to extend [the] program access rules to all terrestrially delivered cable-affiliated programming pursuant to Sections 4(i), 201(b), 303(r), 601(6), 612(g), 616(a), 628(b), or 706, or any other provision under the Communications Act."[50] It further asked "whether [the Commission] ha[s] the authority to extend [its] program access rules to all terrestrially delivered cable-affiliated programming by way of statutory provisions granting general authority to the Commission, in light of the specific authority in Section 628 that limits their scope to satellite programming."[51]

16. Under existing precedent, there is no basis for us to grant the relief requested by AT&T in its Complaint. As discussed above, the Commission is concerned about the withholding of vertically integrated terrestrially-delivered programming from competing MVPDs and has initiated a rulemaking to investigate potential solutions to this problem that lie within the Commission's jurisdiction. Given that these issues are raised in the *2007 Program Access NPRM,* we find that rulemaking process, and not the instant adjudication, to be the correct forum for determining these issues. Accordingly, AT&T's complaint is hereby denied without prejudice to its refiling depending upon the resolution of these issues raised in the *2007 Program Access NPRM.*

(...continued from previous page)
on competition in the video distribution market."); *id*. at 17819-20 ¶ 41 (2007) ("[T]here is substantial evidence that, when the exclusive contract prohibition does not apply, such as in the case of terrestrially delivered programming, vertically integrated programmers may have an incentive to withhold programming from these recent entrants."); *see also Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Development of Competition and Diversity in Video Programming Distribution: Section 628(c)(5) of the Communications Act: Sunset of Exclusive Contract Prohibition*, 17 FCC Rcd 12124, 12158 ¶ 73 (2002) ("Given this express decision by Congress to limit the scope of the program access provisions to satellite delivered programming, we continue to believe that the statute is specific in that it applies only to satellite delivered cable and broadcast programming.").

[48] *2007 Program Access NPRM*, 22 FCC Rcd at 17791, 17860 ¶ 116 (2007).

[49] *See id*. at 17859-60 ¶ 115.

[50] *Id*. at 17860 ¶ 116.

[51] *Id*. at 17861 ¶ 116.

V. ORDERING CLAUSES

17. Accordingly, **IT IS ORDERED** that the program access complaint filed by Pacific Bell Telephone Company d/b/a SBC California d/b/a AT&T California and AT&T Services, Inc., pursuant to Sections 628(b) of the Communications Act of 1934, 47 U.S.C. § 548(b), as amended, and Sections 76.7(a), 76.1001 and 76.1003(a) of the Commission's rules, 47 C.F.R. §§ 76.7(a), 76.1001 and 76.1003(a), **IS HEREBY DENIED** as discussed herein.

18. This action is taken pursuant to delegated authority pursuant to Section 0.283 of the Commission's rules.[52]

FEDERAL COMMUNICATIONS COMMISSION

Steven A. Broeckaert
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[52] 47 C.F.R. § 0.283.