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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FCC 92-543

In the Matter of	)	
	)	
Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992	)	MM Docket No. 92-265
	)	
Development of Competition and Diversity in Video Programming Distribution and Carriage	)	

NOTICE OF PROPOSED RULE MAKING

Adopted: December 10, 1992 ; Released: December 24, 1992

Comment date: January 25, 1993
Reply comment date: February 16, 1993

By the Commission:

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I. INTRODUCTION

1. On October 5, 1992, Congress enacted the Cable Television Consumer

Protection and Competition Act of 1992 ("1992 Cable Act").[1] This Notice of Proposed Rule Making seeks comment on the Commission's implementation of Sections 19 and 12 of the 1992 Cable Act, which amend the Communications Act of 1934 by adding new Sections 628 and 616, respectively.[2] First, the Notice addresses the provisions of Section 628 regarding unfair or discriminatory practices in the sale of cable programming. Section 628 is intended to foster the development of competition to traditional cable systems by prescribing regulations that govern the access by competing multichannel systems to cable programming services. The Notice then addresses the provisions of Section 616 that require the Commission to adopt regulations that govern agreements between cable systems -- or other multichannel video programming distributors -- and the programming services they distribute. These regulations on programming carriage agreements are intended to prevent cable systems from taking undue advantage of programming vendors through various practices, including coercing the vendors to exchange ownership interests or exclusive distribution rights in exchange for carriage. In this proceeding, as we develop regulations pertaining to program access and carriage agreements, we seek to serve the congressional intent to prohibit unfair or anticompetitive actions without restraining the amount of multichannel programming available by precluding legitimate business practices common to a competitive marketplace.

II. BACKGROUND

2. The 1992 Cable Act and its legislative history[3] indicate that Congress has found that the cable television industry is highly concentrated.[4] Congress also has concluded that excessive concentration could inhibit the entry of new programmers into the cable industry, thus reducing the number of media voices available to consumers.[5] Moreover, Congress has found that the cable industry has become vertically integrated in that cable systems and programmers are

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[1] Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. (1992).

[2] For the convenience of commenting parties, the specific statutory provisions are attached in Appendix A.

[3] House Committee on Energy and Commerce, H.R. Rep. No. 102-628 (House Report), 102d Cong., 2d Sess. (1992); Senate Committee on Commerce, Science, and Transportation, S. Rep. No. 102-92 (Senate Report), 102d Cong., 1st Sess. (1991); House Committee on Energy and Commerce, H.R. Rep. No. 102-862 (Conference Report), 102d Cong., 2d Sess. (1992), reprinted at Cong. Rec. H 8308 (Sept. 14, 1992).

[4] For example, the House Report observes that the largest multiple system operator (MSO), TCI, controls access to almost 25 percent of the nation's cable subscribers. House Report at 42.

[5] 1992 Cable Act, Section 2(a)(4).

often commonly owned.[6] The House Report notes that, according to the National Cable Television Association (NCTA), 39 of the 68 nationally delivered cable networks have some ownership affiliation with cable operators.[7]

3. In drafting the 1992 Cable Act, Congress was concerned that increased horizontal concentration and vertical integration in the cable industry have created an imbalance of power, both between cable operators and program vendors and between cable operators and their multichannel competitors (i.e., other cable systems, direct broadcast satellite (DBS) providers, satellite master antenna television (SMATV) systems, wireless cable operators, etc.). Therefore, Congress has concluded that vertically integrated program suppliers have the incentive and ability to favor their affiliated cable operators over other multichannel programming distributors.[8]

4. Congress has also concluded that vertically integrated cable operators have the incentive and ability to favor affiliated programmers over unaffiliated programmers with respect to granting carriage on their systems. As a result, cable operators or programmers that compete with the vertically integrated entities may suffer harm to the extent that they do not receive such favorable terms.[9] Congress also has found that non-affiliated programmers are sometimes required to grant cable operators exclusive rights to programming, a financial interest in the programming, or some other additional consideration in return for carriage on the cable system.[10]

5. While the 1992 Cable Act establishes provisions governing program access and carriage agreements, Congress also recognized that vertical integration of cable systems and programming vendors, as well as horizontal concentration in

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[6] For example, the Senate Report notes that Viacom owns programming services such as MTV, Showtime and Nickelodeon, and also owns Viacom Cable Systems, and that TCI has financial interests in American Movie Classics, the Discovery Channel, QVC and Encore. See Senate Report at 25.

[7] House Report at 41.

[8] 1992 Cable Act, Section 2(a)(5). See also Senate Report at 24; House Report at 41-45. The legislative history shows testimony of practices that extend exclusive rights for TNT to certain distributors, while larger cable operators have obtained discounts for Turner programming that are unavailable to smaller multichannel video providers. See Senate Report at 26. In Report in MM Docket No. 89-600, 5 FCC Rcd 4962 (1990) (1990 Cable Report), the Commission similarly concluded that the cable television industry has become increasingly concentrated and vertically integrated, thus providing MSOs and vertically integrated cable operators the potential to pursue anticompetitive actions against programming services or competing multichannel providers. The 1990 Cable Report also found anecdotal evidence that some have indeed used this potential anticompetitively. See 1990 Cable Report at 5006, 5008, and 5021.

[9] 1992 Cable Act, Section 2(a)(5).

[10] See Senate Report at 24; House Report at 42.

the industry, can provide certain benefits to the public. Specifically, the legislative history shows that vertical integration in the cable industry has contributed to enhancing development of innovative programming ventures through efficiencies in financing and by compensating cable systems for assuming the risk associated with launching new programming services.[11]

III. PROGRAMMING ACCESS ISSUES

A. General Program Access Issues in Section 628 of the Communications Act

6. Section 19 of the 1992 Cable Act amends Title VI of the Communications Act of 1934 by creating Section 628, which was promulgated for the purpose of: (1) promoting the public interest by increasing competition and diversity in the multichannel video programming market; (2) increasing the availability of satellite cable and broadcast programming to persons in rural and other areas that are not currently able to receive such programming; and (3) encouraging the development of communications technologies.[12] To accomplish these purposes, Section 628(b) makes it 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" whose purpose or effect is to "hinder significantly" or to "prevent" delivery of programming by multichannel video programming distributors.[13] The law provides greater specificity in the subsections that follow and instructs the Commission to adopt implementing regulations "to specify particular conduct that is prohibited" under this section. At the outset, in developing a proper interpretation of this provision and in implementing the regulations required, we emphasize the importance of arriving at a correct understanding of the Congressional objectives. Accordingly, this is the first matter on which we seek comment.

7. From the structure of Section 628 as well as the legislative history, it

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[11] See House Report at 41.

[12] 1992 Cable Act Section 628(a).

[13] Section 2 of the 1992 Cable Act amends Section 602 of the Communications Act to define "multichannel video programming distributor" as "a person such as, but not limited to, a cable operator, a multichannel multipoint distribution service, a direct broadcast satellite service, or a television receive-only satellite program distributor, who makes available for purchase, by subscribers or customers, multiple channels of video programming." We note that the complete scope of this definition is unclear, and that this issue was raised in the Notice implementing the must-carry and retransmission consent provisions of the 1992 Cable Act. See Notice of Proposed Rulemaking in MM Docket No. 92-259, FCC 92-499, released November 19, 1992. Given that the current proceeding raises similar concerns, we seek comment similar to that solicited in the must-carry proceeding on the full scope of the definition of a "multichannel video programming distributor."

appears that Congress's concerns were particularly focused on vertical ownership relationships in the cable industry and the extent to which they may restrict the availability and increase the cost of programming.[14] At the same time, Congress recognized that common ownership of cable systems and programming suppliers can benefit the public. In particular, the legislative history shows that substantial investment by cable operators "stimulated the development of programming that was necessary to flesh out the promise of cable."[15] This Commission has also recognized that MSO investment has enabled certain programming services to remain in operation, while such investment and a ready subscriber base have also promoted the introduction of innovative programming services focused upon narrow audiences.[16] Vertical integration also contributes to an enriched quality of existing programming services, given that a cable operator has a strong incentive to increase its penetration by making the programming that it offers more attractive to potential subscribers. Section 628, however, reflects a Congressional concern with the enhanced market power that can emanate from the integration of large MSOs with programming vendors. Specifically, firms that are vertically integrated could have incentives to favor their own affiliates and to unfairly discriminate against alternative distributors, which could restrain competition in program distribution.[17]

8. With respect to the intended objectives and scope of Section 628, we believe that the proscriptions pertaining to satellite cable programming vendors are apparently focused on practices that are pursued by vertically integrated entities. We seek comment on this interpretation, and on whether the section covers conduct beyond actions that are related to discriminatory incentives caused by vertical integration.[18] Also, given the section's emphasis on vertically integrated entities, we ask whether Section 628 is intended to require vertically integrated firms to conduct themselves in a manner similar to non-integrated firms, thereby minimizing the anticompetitive potential of integration. Alternatively, we ask whether the regulations should

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[14] See Senate Report at 24; House Report at 41-45.

[15] See Senate Report at 26-27.

[16] See 1990 Cable Report at 5009.

[17] The 1990 Cable Report also found anecdotal evidence that some have used this ability in anticompetitive ways. See 1990 Cable Report at 5006, 5008, and 5021.

[18] We emphasize that subsections 628(c)(2)(A), (B), (C), and (D) specifically apply to a cable operator that is vertically integrated with a programming vendor, and attempts by such an entity to unduly influence the vendor's decision to sell, to discriminate in the conditions of sale of programming, or to establish exclusive contracts, respectively. We, however, observe that subsection 628(b), which addresses unfair practices, could apply more broadly to all "cable operators" rather than only to those vertically integrated operators that have an attributable programming interest as specified elsewhere in the Section.

cause vertically integrated firms to function differently than non-integrated firms. In contrast to satellite cable programming vendors, the 1992 Cable Act appears to require that our implementing regulations should prevent all "satellite broadcast programming vendors," regardless of vertical relationships,[19] from pursuing unfair or deceptive actions that would unduly favor cable television systems as compared to other multichannel program outlets, such as MMDS, DBS, or home satellite dish systems. Specifically, it appears that such practices could involve attempts by satellite broadcast programming vendors to unfairly favor cable television systems as larger and more established customers. We, therefore, seek comment on appropriate implementing regulations pertaining to satellite broadcast programming vendors.[20]

9. In order to determine whether a cable operation is vertically integrated under the 1992 Cable Act, we must establish a threshold at which an ownership interest will be considered attributable. The Senate Report states that "[i]n determining what is an attributable interest, it is the intent of the Committee that the FCC use the attribution criteria set forth in 47 C.F.R. Section 73.3555 (notes) or other criteria the FCC may deem appropriate."[21] The Senate version of the programming access provisions was not adopted. The House version, which was adopted with amendments, uses the term "attributable interest" but does not define an attribution benchmark. Therefore, we seek comment on whether we should define "attributable interest" with reference to the attribution threshold generally applicable to the broadcasting industry. We note that the five-percent threshold for outstanding voting stock from the broadcast attribution standard has been followed in the cable-telco cross-ownership proceeding.[22] If the basic broadcast standard is used, should the

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[19] We note that Section 628(b) contains no vertical integration requirement for satellite broadcast programming vendors, but that Section 628(c)(2) could, at least in part, contain such a requirement for such vendors. We invite comment on the extent that we should read Section 628's focus on vertically integrated entities as extending such a limitation to satellite broadcast programming vendors as well. See paragraph 9, infra.

[20] We note that "satellite cable programming vendors" are actually selling rights to the programming involved. By comparison, "satellite broadcast programming vendors" are primarily selling a delivery or carrier service because the programming involved belongs to other parties and rights to its use are conveyed pursuant to "compulsory licensing" provisions of the Copyright Act. We request comment on whether the difference in the functions performed by these two types of programming vendors warrant the application of different criteria under Section 19.

[21] Senate Report at 78.

[22] See Second Report and Order, Recommendation to Congress, and Second Further Notice of Proposed Rulemaking in CC Docket No. 87-266, 7 FCC Rcd 5781, 5819 (1992).

single majority shareholder rule[23] and the other provisions of the broadcast attribution rules also apply?[24] As an alternative, we ask whether we should use some other attribution standard. Commenters should address the rationale underlying the attribution benchmarks adopted for broadcast ownership rules, and discuss the level of influence and control that need to be attributed in order to effectuate any rules adopted in this proceeding. Moreover, will an attribution benchmark by itself be sufficient to determine whether an entity actually controls another entity, or should the Commission establish behavioral guidelines to determine control irrespective of the attribution threshold? If so, what guidelines should be developed? In addition, should the Commission use the broadcast reporting requirement or some other standard to keep track of transfers of control of cable distributors and programmers over time?

10. Section 628 is limited to conduct "the purpose or effect [of which]...is to hinder significantly or prevent any multichannel video programming distributor from providing satellite cable programming or satellite broadcast programming to subscribers or consumers."[25] We seek comment on how this component of the conduct that Section 628 would address, which is a critical threshold requirement under the statute, interacts with the remainder of Section 628 in proscribing specific practices or conduct. The plain language of Section 628(b) suggests that our regulations should only implicate practices that are both (i) "unfair," "deceptive," or "discriminatory," and (ii) could significantly hinder multichannel video programming distributors from providing satellite programming to consumers. This analysis is particularly significant to the extent that conduct might be considered unfair or discriminatory from the vantage point of a particular competitor, yet does not significantly harm competition in multichannel video programming distribution. As a result, the precise showing of harm that we should require to meet the statute's threshold requirement is a critical issue at the outset.[26] Thus, we seek comment on

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[23] See 47 C.F.R. § 73.3555 Note 2(b).

[24] We note that we are currently considering revision of the broadcast attribution criteria. See Notice of Proposed Rule Making in MM Docket No. 92-51, 7 FCC Rcd 2654 (1992). In the event that we subsequently adopt new broadcast attribution criteria, we seek comment on whether these programming access rules should be revised accordingly.

[25] See 1992 Cable Act, Section 628(b).

[26] For example, in order to evaluate a complaint involving an unjustified price differential, we ask commenters to identify factors that would indicate whether that unjustified price differential restrains any multichannel video program distributor from providing programming to subscribers or consumers. See discussion at paragraphs 16-25, infra. In particular, we seek comment on what evidence, if any, a complainant must provide to show that the price differential prevented the complainant from carrying this or any programming. We also ask what evidence, if any, a complainant must provide to show that unjustified discrimination in prices threatened the viability of the complainant's service because the resulting retail price of the service was too high to be attractive to consumers. We seek comment on what additional

whether, when adjudicating complaints filed pursuant to the implementing regulations for Section 628, our analysis should consider harm to (i) consumers, as measured by the availability of, or quantity of, programming to consumers in the relevant market;[27] or (ii) to other multichannel video distributors in the relevant market; or (iii) to both consumers and other multichannel competitors. We seek comment on the proper interpretation of the statute and approach to implementing Section 628.

11. When evaluating the existence of "harm" under Section 628, we question what geographic market would be relevant to determining whether a proscribed behavior, such as an unjustified price differential by one program vendor between two programming distributors, causes anticompetitive harm in the market. As a general matter, how should we define the relevant market to the extent that the purposes of the prohibitions are intended to address conduct associated with vertical integration? For instance, should we measure harm within a local market or across different local markets?[28] Should our prohibitions generally apply in these local markets where an entity is in fact vertically integrated, i.e., where it holds an attributable interest in the local cable system? We also seek comment on whether our standard for establishing "harm" -- or, more generally, our regulatory focus -- should exclude certain entities that lack significant anticompetitive potential due to their limited holdings or negligible market share as programming vendors or cable operators, such that the degree of vertical integration might be deemed de minimis.[29]

12. We also ask commenters to address how we can best accomplish Section 628's objectives in a manner that is faithful to the policy of Congress in the 1992 Cable Act to "rely on the marketplace, to the maximum extent feasible"[30] in promoting the availability of programming to the public through cable television and other video distribution media. Furthermore, we seek comment on whether our proposals for enhancing programming access -- including the proposed standards for determining discriminatory behavior as detailed below -- fulfill the Congressional intent as expressed in the 1992 Cable Act and the

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evidence would be relevant for determining the existence of anticompetitive harm.

[27] For example, with respect to the statutory prohibition against price discrimination, should we permit certain price differentials that may adversely affect multichannel competitors but cause no harm to consumers as measured by the availability of, or amount of, programming in the relevant market?

[28] For instance, we question whether a price differential between the rate that a programmer charges to a Tucson cable operator as compared to the rate charged to an Orlando cable operator causes any anticompetitive harm to the programming market in Orlando.

[29] Alternatively, we could exclude such entities through the analysis developed to determine whether a cable operator has an "attributable" interest in a program distributor. See paragraph 9, supra.

[30] See 1992 Cable Act, Section 2(b)(2).

legislative history. We also solicit detailed allegations or evidence regarding unfair practices in distributing cable programming, as well as analysis of the potential consequences, to assist us in prescribing regulations governing particular conduct by cable operators and programming vendors.[31]

A. Specific Provisions of Section 628 of the Communications Act

13. Section 628 directs the Commission, at minimum, to prescribe specific regulations related to: (1) undue or improper influence by a cable operator on an affiliated satellite programming service in selling programming to unaffiliated multichannel video programming distribution services; (2) discrimination in the prices, terms, and conditions of sale or delivery of satellite programming among or between cable systems, other multichannel video distributors, or their agents; and (3) contractual exclusivity between cable operators and programming vendors in the sale of satellite programming.[32] In addition, the Commission is directed to establish an adjudicatory process for resolving disputes under Section 628, to report annually to Congress on the state of competition in the programming delivery, and to provide penalties for the filing of frivolous complaints. The following discussion focuses on issues for comment and proposed standards relating to specific concerns, such as "undue influence," price discrimination, and exclusive agreements.

1. "Undue Influence" in Programming Distribution

14. Section 628(c)(2)(A) specifically directs the Commission to prohibit a cable operator that is vertically integrated with a satellite cable or satellite broadcast programming vendor from unduly or improperly influencing the vendor's decision to sell programming, or the prices or terms of sale of that programming, to an unaffiliated multichannel programming distributor.[33] We seek comment on the scope of activities or practices that we should consider "undue influence" by a cable operator upon such a programming vendor's decisions in selling programming. We also request comment on standards to

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[31] For instance, the Commission's 1990 Cable Report cites examples of such favoritism by vertically integrated MSOs and programming services. See n. 8, supra. Similarly, in the context of satellite retransmission of "superstation" and network programming, the Commission has found significant disparities in some of the prices charged by some carriers to home satellite dish distributors as compared to the prices charged to cable companies and other customers, and has concluded that some of the disparities are unjustified by the cost of providing service. See Second Report in Gen. Docket No. 89-88, 6 FCC Rcd 3312, 3317, 3321 (1991).

[32] We seek comment on whether Congress intended for the Commission to regulate any additional "unfair methods of competition or unfair or deceptive acts or practices" beyond those specified in Section 628(c). In particular, we ask whether other practices that are precluded by the various antitrust laws -- such as refusals to deal or "tying" arrangements -- are encompassed within the terms of Section 628 and warrant Commission regulation.

[33] Section 628(c)(2)(A).

apply in distinguishing practices that would constitute "undue influence" from other actions that may occur during the normal course of negotiations over the prices and conditions of programming sales. In addition, we ask how we may distinguish a cable operator's influence from a program vendor's independent conduct.

2. Discrimination in Programming Distribution

15. Section 628(c)(2)(B) requires the Commission to prohibit a programming vendor that is vertically integrated with a cable operator from discriminating in the prices, terms, and conditions of sale or delivery of satellite programming among or between cable systems, other multichannel video distributors, or their agents or buying groups.[34] We ask commenters to identify such practices that we should consider "discriminatory." To establish a discrimination standard, we seek specific evidence of discriminatory practices. Moreover, we seek comment on objective standards we may apply to distinguish discriminatory behavior -- with respect to pricing or other practices -- from legitimate business behavior that may occur in the video program distribution marketplace. Indeed, we are especially interested in examples of pricing practices for certain types of programming that may employ a graduated pricing structure in order to facilitate broad program distribution. We also seek comment on specific situations in which a "uniform" pricing requirement could reduce the amount of programming available to subscribers.

16. We propose to determine whether certain programming vendors have pursued discriminatory actions against unaffiliated multichannel video distributors through the enforcement process for resolving complaints. This process requires a complainant to establish a prima facie case. We propose to resolve complaints of alleged instances of discrimination by using a system of presumptions that will be developed in this proceeding.[35] We also seek comment on whether we should utilize a two-step approach for evaluating allegations of discriminatory behavior that determines (i) whether price differentials are justifiable or "discriminatory" and (ii) if "discriminatory," whether the discriminatory practice has prevent or hindered significantly any multichannel video programming distributor from providing satellite programming to subscribers or consumers.[36] In this regard, we observe that the 1992 Cable Act appears to mandate that we consider the second component of this approach regarding the harm or hindrance resulting from an alleged discriminatory practice. We request that commenters address the merits of this approach as well as any system of presumptions it could incorporate.

17. Issues related to justifiable price differentials. Section 628 of the 1992 Cable Act states that programming vendors are not prohibited from (1) imposing reasonable requirements to account for differences in (a)

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[34] Section 628(c)(2)(B).

[35] See discussion at paragraph 38, infra.

[36] See discussion at paragraph 10, supra.

creditworthiness, (b) offering of service, (c) financial stability, (d) character, and (e) technical quality; (2) accounting for actual and reasonable differences in the cost of creation, sale, or delivery of programming; and (3) accounting for economies of scale, cost savings, or other direct and legitimate economic benefits that are reasonably attributable to the number of subscribers served by the distributor. We seek comment on appropriate means of defining and measuring each of these factors, as well as on the types of data that we should require vendors to submit when relying on one or more of the factors to explain a price differential.[37] In particular, we ask commenters to suggest how we may distinguish and measure considerations of "creditworthiness," "financial stability," or other factors. For instance, we note that substantial cash flow may enable highly leveraged cable operators or other multichannel video distributors that are not otherwise "creditworthy" to become "financially stable." As for accounting for differences in costs, we recognize that delivery of an encrypted signal to individual home satellite dish (HSD) subscribers may be more expensive -- and less secure from piracy -- than delivery to the head end of a cable system. We seek information on the actual expense differentials of these two delivery modes. With respect to accounting for economies of scale and economic benefits reasonably attributable to size, we ask commenters to address the extent to which we should consider such factors beyond volume discounts for distributing programming. We also seek comment on how we may allow for differences in negotiations between a programming vendor and various multichannel video programming distributors, particularly as individual distributors might be willing to trade different terms for pricing changes. Also, because of the evolving nature of multichannel video services, we seek comment on an appropriate method of comparing the "technical quality" of various services, particularly in instances where only prototype models are available for a prospective service. In such cases, can program vendors be expected to enter distribution contracts, subject to conditions of a pre-determined level of objective technical quality in actual operation? In addition, we ask commenters to recommend any measures that we could employ as proxies for the various permissible causes of pricing differentials.

18. We also ask whether the statute permits the Commission to consider other economic factors that could cause price differences, including certain factors that are related to costs such as the volume of subscribers served or the direct costs of delivery, particularly if these aspects would increase the availability of programming. If so, we ask commenters to discuss any legitimate economic factors that are relevant and permissible under the statute. For instance, we seek comment on whether we should consider the extent that a programming service is sold with certain conditions or arrangements -- such as discounts for prepayment or for performance in marketing a service to subscribers, or an allowance for serving as a marketing agent -- for particular purchasers. We also ask commenters to address whether

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[37] With respect to the factor regarding the cost of "creation, sale, delivery or transmission" of programming, we particularly seek comment on the appropriate definition or type of costs that we should consider in evaluating a given price differential. See colloquy between Senators Kerry and Inouye found in Congressional Record, United States Senate, October 5, 1992, at S16671.

we can assign an appropriate magnitude of price differential that we could attribute to each factor to avoid resorting to an ad hoc justification in every case based on demonstrations of specific costs and circumstances.

19. We also seek to develop standards that we could apply in distinguishing between justifiable and discriminatory price differences, and we propose four options below for developing such objective standards. In addition to the issues and questions for comment that are presented with each option, we seek comment on any other standards that parties consider appropriate, including combinations of the following options.

20. Option 1: Allowance for a "reasonable" price differential. An initial standard for determining price discrimination could be derived from information gathered in this proceeding that would allow for a reasonable region of price differentials, depending upon the factors involved, within which we would rebuttably presume that a disparity in price is not discriminatory. Conversely, we would presume that a price differential of a magnitude that exceeds the established "reasonable region" is due to a discriminatory practice, but a showing of significant legitimate factors could rebut the presumption and cause us to consider the price difference acceptable. We believe that this approach is appropriate because of Section 628's explicit allowance for permissible factors for price differentials. Furthermore, to the extent that detailed data on the magnitude -- and the contributing factors -- of current differentials is available through the record and the enforcement process, we believe that a sufficiently broad region or allowance might reduce the administrative burden in resolving complaints. We seek comment both on the merits of such an approach relative to its potential burden for the Commission and the industry, as well as on an appropriate method for determining the parameters for the "reasonable region." Similarly, we ask commenters to address whether different thresholds are necessary for different technologies. Finally, in order to apply this approach, we seek comment on the nature of appropriate evidence and sufficient showings required to rebut the proposed presumptions related to price discrimination complaints.

21. Option 2: Section 202 of the Communications Act. Another option for defining "discrimination" as prohibited by Section 628 of the 1992 Cable Act is to use a standard similar to that developed to implement Section 202(a) of the Communications Act.[38] Under Section 202's standard, it is unlawful for a common carrier to engage in "unjust or unreasonable discrimination" in the provision of "like" communications services or to give any "unreasonable preference or advantage" to any person. In order to prove a violation of Section 202(a), a complainant must show that (1) the services in question are "like," (2) discrimination has occurred, and (3) such discrimination is not just or reasonable. Although we recognize that the entities that Congress intended to regulate in Section 628 of the 1992 Cable Act[39] would not be

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[38] 47 U.S.C. § 202(a).

[39] This section applies to satellite cable programming vendors in which a cable operator has an attributable interest and to satellite broadcast programming vendors. See Section 628(c)(2)(B).

subject to the current provisions of Section 202 if they are not providing common carrier services,[40] the Commission could adopt a standard similar to Section 202 as a basis of a definition of discrimination in these new regulations. The Commission has used this standard in another proceeding to evaluate the existence and extent of discrimination in some aspects of the video programming distribution market.[41] Section 202 could offer the most appropriate standard because it addresses the term "unlawful discrimination" in providing communications services and, therefore, may be more relevant than other laws that do not specifically regulate telecommunications entities. We request comment on whether a standard similar to Section 202 of the Communications Act is an appropriate basis for judging discriminatory practices by vertically integrated cable operators and programming distributors in violation of Section 628. We also seek comment on suggested modifications to the standards used to enforce Section 202 that could facilitate its use as a discrimination standard in the context of the cable industry.

22. Option 3: Antitrust standards. Section 2 of the Clayton Act,[42] as amended by the Robinson-Patman Act,[43] prohibits any person engaged in commerce from discriminating "in price between different purchasers of commodities of like grade or quality...where the effect of such discrimination may be to substantially lessen competition or tend to create a monopoly in any line of commerce." Under the Robinson-Patman Act, price differences may reflect either cost differences or changes in market conditions, thus allowing price differences by a firm where the lower price is intended to meet the equally low price of a competitor. In addition, under this analysis price discrimination is prohibited only where the effect may be to substantially lessen competition, and thus price differences that do not harm competition are permissible. Although the Robinson-Patman Act is generally applied to the pricing of goods or commodities rather than services, we believe that the 1992 Cable Act and the price discrimination provisions in Section 628 provide ample authority for the Commission to apply appropriate standards to program pricing for the cable industry and other multichannel competitors. We also recognize that questions have been raised regarding the Robinson-Patman Act's treatment of price discrimination cases and whether the standard may conflict with particular

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[40] National Rural Telecommunications Cooperative v Southern Satellite Systems, Inc., 7 FCC Rcd 3213, 3214 (1992). See also H.R. Rep. No. 100-887, Part 2, 100th Cong. 2d. Sess. 13, 15 (1988).

[41] See Notice of Inquiry in Gen. Docket No. 89-88, 4 FCC Rcd 3883 (1989) (inquiring into the existence of discrimination in providing superstation and network station programming). See also Report, 5 FCC Rcd 523 (1989), and Second Report, 6 FCC Rcd 3312 (1991) (finding some disparities in prices charged by carriers to HSD as compared to other customers not justified by cost of providing service).

[42] See Clayton Act (1914), 15 U.S.C. §§ 12 et. seq., 44.

[43] See Robinson-Patman Act (1936), 15 U.S.C. §§ 13, 13a, 13b, 21a.

aspects of economic theory.[44] Accordingly, we seek comment on the extent that we may apply any of the related antitrust standards for price discrimination, or at least certain useful principles from the legislation.[45] We also ask commenters to consider whether an anticompetitive or "predatory" harm to competition in distributing programming is necessary in order for discrimination to occur. Given that the Robinson-Patman Act governs price differences for "goods of like grade or quality," we ask parties to comment on the how this standard might apply to cable programming. Similarly, if a particular programming service is sold under different conditions or arrangements for various customers, should sufficiently dissimilar conditions cause us to consider the services "distinct in grade or quality?"

23. Option 4: Price comparisons as applied in other regulations. We also request that commenters consider the applicability of principles for price comparison from other areas of federal regulation. For example, we question whether principles underlying the regulations and policies utilized by the International Trade Administration of the Commerce Department ("ITA") in anti-dumping analysis can be used to develop FCC regulations to implement Section 628 of the 1992 Cable Act.[46] In anti-dumping cases, U.S. product manufacturers challenge the pricing policies of foreign competitors, alleging that such foreign competitors charge prices that are below the market level in the U.S. in order to gain unfair competitive advantages over U.S. manufacturers. When evaluating such challenges, the ITA must compare the prices charged by the foreign manufacturer or distributor in the U.S. with the price charged in the manufacturer's home market, or a third country market if there are no home market sales, to determine whether the foreign company is engaging in unfair sales practices in the U.S. The ITA has developed detailed regulations that govern the price comparison process.[47]

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[44] Illustrative discussions of the Robinson-Patman Act may be found in symposia on the occasion of the Act's 50th Anniversary. See The Antitrust Bulletin, (Fall 1986); Antitrust Law Journal (April 1986).

[45] In considering the Robinson-Patman Act as a price discrimination standard for the cable industry, we believe that the "secondary-line injury" cases -- where certain customers of the discriminating firm experience harm due to paying input prices that are higher than another customer with whom they compete directly -- will raise the most useful issues. See Federal Trade Commission v. Morton Salt Co., 334 U.S. 37 (1948). Conversely, "primary-line injury" cases that involve harm to direct competitors of a firm that discriminates by charging a predatory lower price to consumers in a restricted region may not be as useful. See Utah Pie Co. v. Continental Baking Co., 386 U.S. 685 (1967).

[46] For a general overview of the fair value determination in antidumping cases, see Potts, Linda F. and Lyons, James M., Trade Agreements Act: Administrative Policy and Practice in Antidumping Investigations, 6 N.C.J Int'l L. and Com. Reg. 483-526 (Summer 1981).

[47] See 19 C.F.R. Part 353.

24. Of course, we recognize that price discrimination complaints concerning video programming filed pursuant to Section 628 will raise allegations of unfair overpricing. Moreover, dumping cases involve pricing comparisons for manufactured goods, rather than services, which could thus involve costs relevant only to manufactured goods. However, the underlying principles used for ITA's price comparisons may remain applicable. For example, the ITA recognizes the need for various types of adjustments to the actual prices charged to allow fair comparisons between the pricing practices used by the foreign manufacturer in different markets. Thus, the ITA has established specific classes of pricing adjustments. These include adjustments for circumstances of sale (related to costs associated with differing credit terms, guarantees, warranties, commissions, and product-specific advertising directed at the purchasers of the product),[48] differences in quantities (volume discounts),[49] and level of trade (sales to wholesalers vs. sales to retailers).[50]

25. We seek comment on how we could apply any, or some combination, of the above options to develop regulations that (i) take into account relevant differences between the programming distributor's customers that are necessary to make fair pricing comparisons, and (ii) will enable the Commission to determine whether price differentials are legitimate or are the result of unfair practices.[51] Furthermore, we ask whether we could permit certain practices that cause price differentials given a showing that non-vertically integrated programming vendors also employ such a practice. We also seek comment on how to easily identify the appropriate video programming sales agreements that we should use to make the price comparisons necessary to resolve particular discrimination complaints. We also seek comment on how, to the extent possible, we can expedite the complaint process by developing standardized formulas, possibly utilizing objective values for the types of price adjustments contemplated above to minimize disputes between the parties relating to specific computations. Finally, in addition to distinguishing between reasonable price differentials and those that are discriminatory, we seek comment on what factors should be considered in the second component of any analysis that would consider whether a discriminatory price differential causes anticompetitive "harm" to multichannel programming distributors or consumers.

26. Definition and treatment of buying groups. Section 628(c)(2)(B) states that the 1992 Cable Act's protections against price discrimination apply to "agents" and "buying groups" of cable systems and other multichannel video distributors. We seek comment on issues relevant to defining the class of

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[48] See 19 C.F.R. § 353.15(a).

[49] See 19 C.F.R. § 353.14.

[50] See 19 C.F.R. § 353.19.

[51] We note that some of the adjustments defined in the antidumping area could provide models for developing the "reasonable region" for pricing discussed in Option 1. See paragraph 20, supra.

"agents" or "buying groups" covered by this provision. Are there any circumstances under which it would be appropriate to establish parameters for such protected "agents" or "groups"? For example, would it ever be appropriate to establish limits concerning the size of individual entities permitted to aggregate for purposes of purchasing programming under regulated pricing policies? It could be argued that we should require the cooperatives or associations who seek to experience the benefits of the law through price discounts -- or other favorable considerations -- based on size to agree to unitary treatment for other relevant purposes, such as billing, uniform contract provisions, or joint and several liability under a single program contract. Would such requirements be necessary to establish a level playing field for the regulated programmers, by allowing them to gain economies from dealing with a single entity when multichannel distributors aggregate to avail themselves of any benefits derived pursuant to Section 628(c)(2)(B)?

27. Implementation of Anti-discrimination Rules. We note that the statute is silent concerning enforcement of anti-discrimination rules with respect to existing contracts. We tentatively conclude that any pricing policies or restrictions developed to implement Section 628 should not be applied retroactively against existing contracts. Commenters should provide us with analysis in this regard and address the extent that the Commission should implement Section 628 with respect to existing contracts. If we apply such policies prospectively only, waiting for existing contracts to expire, we may not achieve the results Congress envisioned from the requirements of Section 628 in a timely fashion given the long term nature of many programming agreements. Thus, we seek comment on whether we should establish a prospective deadline for compliance that will give parties to long-term programming contracts sufficient notice and time for renegotiation. If so, we seek comment on an appropriate compliance deadline for existing contracts. We also seek comment on the current duration of existing programming contracts, so we may gauge the practical effects of any proposed deadline. In addition, we seek comment on whether we should require that any renewals of existing contracts subsequent to the adoption of this Notice comply with the new rules, or whether we should require compliance only in contracts signed after the effective date of any rules we adopt. We also seek comment on whether parties to contracts, or negotiations, that are subject to our new rules may base a claim of discrimination on comparisons with contracts that predate our rules, or rather, only other contracts entered into under our new rules.

3. Exclusive Contracts

28. Another statutory provision aimed at promoting competition and increased access to video programming is the requirement contained in Section 628(c)(2)(C) that the Commission develop rules that:

> prohibit practices, understandings, arrangements, and activities, including exclusive contracts for satellite cable programming or satellite broadcast programming between a cable operator and a satellite cable programming vendor or a satellite broadcast programming vendor, that prevent a multichannel video programming distributor from obtaining such programming from any satellite cable programming vendor in which a cable operator has an attributable

> interest or any satellite broadcast programming vendor in which a cable operator has an attributable interest for distribution to persons in areas not served by a cable operator as of the date of enactment of this section....[52]

Similarly, Section 628(c)(2)(D) requires the Commission to prohibit exclusive contracts in areas "served by a cable operator" unless the Commission determines that the exclusive contract is in the public interest pursuant to Section 628(c)(4). We seek comment on whether the lack of reference to the public interest finding of Section 628(c)(4) for contracts in areas "not served by a cable operator" means that Section 628(c)(2)(C) makes exclusive contracts in such areas a per se violation.

29. In implementing these provisions, we first seek comment on the appropriate determination of whether an area is served by a cable operator. The Conference Report states, "[f]or purposes of this section, the conferees intend that an area 'served' by a cable system be defined as an area actually passed by a cable system and which can be connected for a standard connection fee."[53] How should we define "area"? The language in the Conference Report suggests that this should be a local market determination related to a particular cable system. Alternative multichannel video program distributors, however, may serve a somewhat different market than an individual cable operator. Thus, we seek comment on the appropriate definition of "area" for purposes of this provision.

30. We note that Section 628(c)(2)(C) prohibits "practices, understandings, arrangements and activities, including exclusive contracts" (emphasis added) in areas not served by a cable operator, while Section 628(c)(2)(D) only prohibits "exclusive contracts" (unless deemed to be in the public interest) in areas served by a cable operator. We ask commenters to consider the significance of this distinction, as well as how we might identify other "practices, understandings, arrangements and activities" that should be prohibited pursuant to Section 628(c)(2)(C).

31. In our 1990 Cable Report, we noted various types of contractual restrictions on program access that apparently are used in the industry, such as (i) prohibitions against or restrictions on a multichannel video programming vendor's distribution into areas served by a wired cable operator, (i.e., a provision that a programming vendor may not provide programming to its customers located within a wired cable operator's service area); (ii) requirements to renegotiate agreements (i.e., between programmers and wireless cable operators) once the multichannel distributor reached a stated penetration level; and (iii) time-delay requirements (i.e., a requirement that an MMDS distributor not air certain programming until a specified time after that programming has been aired by another distributor, such as a wired cable

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[52] 47 U.S.C. § 628(c)(2)(C).

[53] See Conference Report No. 102-862 at 93.

operator).[54] Did Congress intend that such practices be prohibited when adopting Section 628(c)(2)(C)? Are there other similar practices that restrict access to programming that should be prohibited pursuant to that section?

32. In our 1990 Cable Report, we also noted that programming vendors sometimes required that a multichannel competitor purchase programming from a local cable operator to whom the programming vendor had given subdistribution rights for its franchise area.[55] While such agreements do not necessarily "prevent" another multichannel video programming distributor from obtaining programming, they create the potential for disparate, and perhaps unfair, access treatment. What limits, if any, can and should be imposed on such subdistribution arrangements?

33. We also seek comment on what data should be required to demonstrate that an exclusive contract in violation of these provisions has been made. For administrative reasons, we do not believe that it would be practical to require prior approval of exclusive arrangements. Thus, we propose to enforce the regulations adopted pursuant to this Section through the complaint process, and we seek comments on the merits of this approach. If we are nonetheless urged to require prior approval of exclusive agreements, however, we seek comment on how to develop practical, expeditious procedures for evaluating requests for approval of exclusive agreements. For example, how will a multichannel competitor establish the existence of an "exclusive" contract if it does not have access to the contract? What if the contract is not written? What will be required to establish a prima facie case that any exclusivity "practice, understanding, arrangement" exists? How can a program distributor likely to be aggrieved by such practices obtain the evidence necessary to substantiate a complaint to the Commission?

34. We further note that Section 628(c)(2)(C) specifically prohibits those actions that "prevent a multichannel video programming distributor from obtaining... programming." Thus, it appears that an analysis of anticompetitive harm, such as restricted or inhibited access to programming, is required to find violations of this provision. What evidence should the Commission consider when determining whether specific practices, understandings, arrangements, or activities restrict, inhibit or otherwise limit access to programming? We also ask whether this provision imposes any duty on a programmer to deal with non-affiliated programming distributors.

35. With respect to exclusive contracts, Section 628(c)(4) sets forth the criteria to be considered by the Commission when determining whether an exclusive contract is in the public interest, and thus not prohibited by Section 628 (c)(2)(D). These factors are the effect of such exclusive contract on (i) the development of competition in local and national multichannel video programming markets; (ii) competition from multichannel video programming distribution technologies other than cable; (iii) the attraction of capital investment in the production and distribution of new

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[54] See 1990 Cable Report at 5021.

[55] Id.

satellite cable programming; and (iv) diversity of programming in the multichannel video programming distribution market. In addition, the Commission is to consider the duration of the exclusive contract. We seek comment on objective standards or benchmarks that can be developed or considered to assess each of these criteria.[56] Moreover, are these the only factors that the Commission is permitted to consider? If not, what other factors are relevant to such a determination? Are there other benefits to exclusivity that should be considered?

36. We also ask commenters to identify, where possible, specific instances where we could establish in advance by rule that limited exclusive distribution agreements presumably are permitted under Section 628(c)(4). For example, we recognize that exclusive distribution rights are often given to encourage distributors to carry new program services. Such exclusive rights may well be essential to the introduction of new services and, thus, should be permitted to the extent necessary to ensure continued program diversity. Therefore, it may be in the public interest to define, at the outset, a rule that would permit exclusive distribution contracts for new program services. Such contracts could be deemed to meet the public interest test of Section 628(c)(4) if they were limited to a specific duration, e.g., two years, that would facilitate the launch of the new service. We seek comment on this proposal and the appropriate limitations on such contracts. Commenters are also asked to provide other examples of contracts that could be presumed to serve the public interest.

37. Finally, we note that Section 628(c)(4)(D) refers to the effect of an exclusive contract on diversity in the "multichannel video programming distribution market." Given Section 628(c)(4)(B)'s reference to "local and national" markets, should we infer a similar local and national market focus to interpret Section 628(c)(4)(D), or should we employ some other type of market analysis?

C. Enforcement

38. Section 628(d) of the 1992 Cable Act provides that any multichannel video programming distributor aggrieved by conduct that it alleges to violate Section 628(b) or (c) may commence an adjudicatory proceeding at the Commission. Section 628(f) requires the Commission to prescribe regulations to implement this section, including provisions for expedited review by the Commission, procedures for data collection, and provision for penalties against any person filing a frivolous complaint.

39. We propose to adopt rules governing a formal complaint process that would resolve disputes without a hearing unless there are substantial and material issues of fact that cannot be resolved by the staff or through stipulation by the parties. We propose to develop a complaint process based on certain procedures used in complaint cases regarding the lowest unit charges

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[56] In addition, how will the Commission determine the exact terms of an unwritten "agreement," and thus be able to assess whether that agreement is in the public interest?

filed under Section 315(b) of the Communications Act[57] and those used in processing common carrier complaints under Section 208 of the Communications Act.[58] In developing this process, we propose to limit the pleading cycle to encourage substantive discussions of the issues in dispute, and to expedite complaint resolution by eliminating unnecessary pleadings. For example, we propose to permit a complaint and response. Replies would not be permitted, and parties against whom a complaint is filed would not be permitted to file separate motions to dismiss or motions for summary judgment -- any such requests should be included in the answer. We seek comment on these proposals.

40. We propose to require that complaints set forth specific allegations of misconduct and include affidavits by knowledgeable persons, or other tangible evidence, to support each allegation made in the complaint. Failure to plead each claim with specificity or to include supporting factual evidence for each allegation will result in dismissal of that portion of the complaint. We propose to require defendants to respond in 20 days. Answers should provide substantive support of all factual allegations or denials. We seek comment on these proposals.

41. After the staff has reviewed the pleadings, it would determine whether the complainant has established a prima facie case. At this point, if a prima facie case has been made, we tentatively believe that the staff should hold a status conference to attempt to resolve any factual disputes and to determine whether early resolution is possible based on the staff's preliminary determinations. At the status conference, the staff should also discuss with the parties appropriate limitations on discovery. Given the statutory directive for expeditious resolution of Section 628 complaints, we propose to allow the parties to elect to utilize our Alternative Dispute Resolution ("ADR") process.[59] We seek comment on whether we would be required to

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[57] See Report and Order, MM Docket No. 91-168, 7 FCC Rcd 678 (1991), recon. denied, 7 FCC Rcd 4611 (1992); see also Order, 7 FCC Rcd 6661 (1992), app. for rev. aff'd. in part, FCC 92-528, released November 30, 1992.

[58] See 47 C.F.R. §§ 1.720 - 1.734. We seek comment on the extent to which these rules provide a useful model for processing complaints filed under Section 628. We particularly seek comment on the discovery permitted by these rules. Section 628(f)(2) explicitly requires the Commission to establish procedures for "collect[ing] such data, including the right to obtain copies of all contracts and documents reflecting arrangements and understandings alleged to violate this section, as the Commission requires to carry out this section...." We believe that it is important to craft regulations that will minimize, as much as possible, the impact on Commission resources of enforcing Section 628's requirements. Thus, we believe that this provision authorizes the Commission to establish rules governing discovery by the parties to a complaint of the data necessary to resolve Section 628 disputes, so long as appropriate safeguards are imposed to protect proprietary information. See paragraph 47, infra. We seek comment on this interpretation of our authority.

[59] See Initial Policy Statement and Order, CC Docket No. 91-919, 6 FCC Rcd 5669 (1991).

implement specific procedures for ADR in this area and, if so, what those procedures should encompass. We also seek comment on ways to encourage parties to elect to resolve disputes through ADR. For example, should ADR for program access disputes include specific provisions for discovery, when appropriate, to provide an incentive for complainants to agree to ADR? We seek comment on these proposals.

42. We also seek comment on what standard the Commission should employ to determine whether a prima facie case has been made, and whether a single standard can be used for all complaints brought under Section 628, or whether different standards must be developed for different types of claims, e.g., a price discrimination claim as opposed to another type of unfair practices claim. In addition, we question whether the information necessary to establish a prima facie case is readily available to potential complainants aggrieved by violations of regulations adopted to implement Section 628. If not, what minimum threshold showing can be made with available information that would be appropriately required to establish a prima facie case?

43. We also seek comment on what sorts of presumptions could be established for evaluating whether a complainant has made a prima facie case. Could objective criteria be developed? Could specific benchmarks be used as an evidentiary factor in complaint cases, such as specified program penetration levels that shift the burdens of proof for the complaint proceedings prescribed by Section 628? In this regard, we note that the stated purpose of Section 628 is to "promote the public interest, convenience, and necessity by increasing competition and diversity in the multichannel video programming market, to increase the availability of satellite cable programming and satellite broadcast programming to persons in rural and other areas not currently able to receive such programming, and to spur the development of communications technologies." Penetration benchmarks could possibly provide a useful tool for measuring the availability of programming and, thus, ascertaining whether the behavior complained of violates Section 628.[60] For example, if a specific MMDS operator files a complaint against a program service alleging unfair behavior that impedes its access to programming, it may be relevant to consider whether other MMDS operators are, in fact, distributing the same programming. If so, and the penetration level of the programming on MMDS systems meets the designated benchmark, would this be relevant evidence that the programmer is not engaging in behavior in violation of Section 628? Are there circumstances under which such evidence could reach a level to warrant a presumption that would require the complainant to meet a higher burden of proof to establish a prima facie case?[61] Or, are there too many other factors affecting such

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[60] Commenters should address the type of harm that must be shown to establish a benchmark. See discussion at paragraph 10, supra.

[61] Under such an approach, the Commission could, for instance, make an initial determination that if the penetration level of a particular satellite cable program service ("Program Service X") to MMDS operators is below a specified percentage, then a rebuttable presumption in favor of a complainant concerning its access to "Program Service X" would be built into the complaint process in determining whether a prima facie case has been presented.

penetration levels to permit a fair inference of discrimination based on any such disparity?

44. Similarly, we ask whether there are any circumstances under which it would be appropriate to consider the relationship between the volume of programming sold by a vertically integrated program supplier to alternative delivery media, such as MMDS or TVROs, and the volume of programming sold by that program supplier to its affiliated cable systems. For example, what would be the relevance, if any, of a showing by a vertically integrated programming supplier that it sold the majority of its programming, or some substantial volume of sales, to such alternative delivery media, but sold a comparatively small volume of programming to its affiliated cable systems, in a complaint case alleging that the programmer is engaging in anticompetitive behavior? What sales volumes or comparative relationship between the sales volumes could be relevant? Again, we ask whether there are too many other factors affecting such sales volumes to permit a fair inference of discrimination based on any such disparity. We seek comment on, and encourage commenters to propose, other benchmarks or objective criteria relevant to determining whether a prima facie case has been made.

45. After the status conference with the Commission staff, if the parties elected to continue to pursue a formal proceeding, and if discovery were required, we propose that the staff would issue a discovery order setting forth procedures for, and limitations on, discovery.[62] We seek comment on the forms of discovery that should be permitted as of right, and what forms of discovery

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Alternatively, if the penetration level of "Program Service X" to MMDS operators reaches that specified percentage, the burden of proof for the complainant could be increased, or the complainant could be prevented from arguing that the service provider engages in systematic discrimination, or the service provider could enjoy a rebuttable presumption in its favor. What effect, if any, would the use of penetration benchmarks as evidence, or to provide a rebuttable presumption for either party in the complaint process, have on the competitive marketplace for satellite cable programming? Would any such use of penetration benchmarks afford undue protection to program suppliers that do, in fact, engage in unjustified discrimination against a particular operator? If distribution penetration benchmarks are used, should they be established at a national, regional or local level, and should there be different levels established for different services (i.e. DBS vs. MMDS vs. satellite dish)? If so, what should these levels be? We seek comment on whether the total national, regional or local penetration of a particular service itself should be considered when establishing an appropriate program access benchmark (or, program distribution penetration level) for that service. Finally, we seek comment on the evidence needed to rebut either presumption based upon such a benchmark for program penetration.

[62] In developing this complaint process, we seek to limit the administrative burden on Commission staff to the greatest possible extent. For this reason, we believe that discovery procedures should minimize Commission involvement in the analysis of voluminous evidentiary materials but provide access by the parties to the information necessary to resolve a complaint.

should be permitted only on a showing of special need. For example, should a complainant routinely be entitled to a specified number of interrogatories and document production requests as a matter of right, with depositions permitted only upon a special showing, or should the staff determine the parameters of discovery on a case-by-case basis?

46. We seek comment on what, if any, self-executing discovery could be adopted. For example, could particular documents be identified in this proceeding, in addition to those set forth in Section 628(f)(2), that would be clearly relevant to resolving the various kinds of complaints that could arise under Section 628? We seek comment on practical, expeditious ways for the staff to resolve discovery disputes. In addition, we seek comment on what period of time, such as 60 days, would be appropriate within which to require completion of discovery.

47. We also propose that the staff discovery order include a protective order with respect to document production that limits examination of the documents produced to parties designated in the order (and the Commission), and prohibits further dissemination of the information revealed therein.[63] We further propose to permit defendants to redact proprietary information not relevant to the resolution of the complaint, such as the specific identity of a customer (but not the type of multichannel video programming distributor involved), so long as the defendant provided a general description of the nature of the redacted information. We invite other suggestions, as well, for protecting proprietary information without undermining legitimate discovery. We propose to adopt a specific rule that requires the parties to abide by the terms of the staff protective order.

48. Within 30 days after completion of discovery, the complainant would be required to file an amended complaint based on the information discovered. The defendant would have 15 days to respond. The parties would again be given the opportunity to elect ADR. If ADR is not selected, the staff would impose an appropriate sanction where it finds that our rules have been violated, or it would dismiss the complaint. In appropriate circumstances, the dispute may be referred to an administrative law judge ("ALJ") for resolution. Any final decision rendered by the staff or an ALJ may be appealed directly to the full Commission. See 47 C.F.R. § 1.115.

49. Section 628(e)(1) provides that the Commission has the power to order appropriate remedies, including, if necessary, the power to establish prices, terms and conditions of sale of programming to an aggrieved multichannel video programming distributor. We seek comment on what additional remedies would be deemed "appropriate" for Section 628 violations. In addition, Section 628(e)(2) specifically states that any such remedies are in addition to and not in lieu of the Commission's authority to impose forfeitures pursuant to title V

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[63] Failure to abide by the terms of any protective order issued by the Commission or its staff may result in the imposition of sanctions which could include those set forth in 47 C.F.R. § 1.24 (censure, suspension or disbarment of persons practicing before the Commission), as well as possible dismissal of the complaint.

of the Communications Act for violations of its regulations. We seek comment on the appropriate application of our forfeiture guidelines to Section 628 violations.[64]

D. Other Programming Distribution Issues

50. Limitations of Section 628. Section 628(c)(3)(A) of the 1992 Cable Act specifies that the program distribution rules do not require a national or regional distributor of video programming to make that programming available outside of the geographic area in which it is authorized or licensed to distribute such programming. We seek comment on implementation of this provision. What parameters should be established for determining whether a change in the geographic area in which an operator is authorized or licensed has occurred? In addition, Section 628(c)(3)(B)(i) provides that these carriage rules do not apply to the signal of a television network affiliate or other television signal that is retransmitted by satellite but that does not constitute "satellite broadcast programming" because it is retransmitted by the broadcaster or someone authorized by the broadcaster.[65] Similarly, Section 628(c)(3)(B)(ii) provides that these carriage rules do not apply to internal satellite communications of broadcast or cable networks that would not be considered "satellite broadcast programming." We seek comment on the appropriate interpretation of these provisions.

51. Data collection. Section 628(f)(2) directs the Commission to prescribe regulations to establish procedures for collecting necessary data, including the right to obtain copies of all contracts and documents reflecting arrangements and understandings that allegedly violate the provisions of Section 628. We believe that necessary data will include contracts or other documents that offer information on past practices, prices and conditions for program sales, levels of programming penetration, as well as evidence to justify permissible causes for price differentials. Accordingly, we seek comment on the type of data that may become necessary during the course of a Section 628 proceeding, and how we may obtain such information. Also, what if any additional procedures must be developed to protect proprietary information?

52. Annual Report to Congress. Section 628(g) directs the Commission, beginning no later than 18 months after promulgating the regulations, to provide an annual report to Congress on the state of competition for the delivery of video programming. It is our tentative view that the annual report should at least consist of an analysis of Section 628 complaints filed at the

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[64] See Policy Statement, Standards for Assessing Forfeitures, 6 FCC Rcd 4695 (1991), on recon., 7 FCC Rcd 5339 (1992), pet. for review pending sub nom. USTA v. FCC, No. 92-1321 (D.C. Cir. filed July 30, 1992).

[65] Section 628(i)(3) of the 1992 Act defines "satellite broadcast programming" as "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 broadcaster."

Commission and generally available industry information relating to the status of competition in the satellite cable and broadcast programming marketplace. We seek comment on this approach and the nature of any additional information that we could obtain to contribute to our report. In this regard, we emphasize that detailed information on pricing and sales of programming would enhance our ability to monitor changes in the programming marketplace. For example, we could survey the industry or require that parties submit information about (1) the number of independently owned cable operators and programming distributors; (2) the degree of vertical integration between cable operators and programming distributors; (3) the penetration or availability of programming to competing multichannel services; and (4) the levels of pricing differentials for programming, including the range and average of volume-related discounts and other permissible factors for differentials. In acquiring data on programming access, we ask commenters to consider the extent to which any of the information in our report to Congress might be similar to information collected for other proceedings related to the 1992 Act so that we could avoid duplicating such information. Moreover, we seek comment on the appropriate level of detailed information that is necessary to serve the Commission's interest without overburdening our own resources, as well as cable operators, programmers, and competing multichannel program distributors.

53. Frivolous Complaints. Section 628(f)(3) requires the Commission to provide for penalties to be assessed against any person filing a frivolous complaint regarding programming practices. We seek comment on implementation of this provision. We propose to assess monetary forfeitures for frivolous complaints, and we seek comment on the relationship between the penalties that Congress has indicated that we may assess under the Section 628 as well as the more general monetary forefeiture provisions of Section 503 of the Communications Act. Also, what factors should determine whether a complaint is frivolous? What guidelines should determine forfeiture amounts? Should the forfeiture amount be based on the resources expended by the Commission in considering the claim as well as by the party in defending against the claim?

IV. PROGRAM CARRIAGE AGREEMENT ISSUES

54. The provisions of the 1992 Cable Act discussed above primarily restrict the activities of programming vendors with respect to cable operators and other multichannel programming distributors. Section 12 of the 1992 Cable Act restricts the activities of cable operators and other multichannel programming distributors with respect to programming vendors. Section 12 amends the Communications Act by adding new Section 616, which addresses regulation of carriage agreements between multichannel video programming distributors and video program vendors.[66]

55. Section 616(a) directs the Commission to establish regulations that prevent multichannel programming distributors from entering into carriage

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[66] Section 12 of the 1992 Act adds new Section 616(b), which defines "video programming vendor" as "a person engaged in the production, creation, or wholesale distribution of video programming for sale."