receiving dish, so that each operator can reprocess and retransmit the signal to its subscribers. For example, one dish may ultimately serve tens of thousands of subscribers using the FBO's own physical plant. United Video transmits the signals via domestic communications satellite to the FBO's receiving equipment and facilities. The only manner in which superstation signals can be delivered to subscribers is through a cable operator's facilities. A cable operator receives the signal, reprocesses it, and retransmits it to each cable subscriber directly as part of a package. Because each FBO has the sole discretion to determine what Superstations (if any) go into the FBO's package, United Video's marketing and advertising in the cable market more frequently is confined to these FBOs and not the consumers.

United Video also needs to maintain a "back office" operation to handle cable operator distribution agreements, service, marketing and sales. United Video receives 750 calls per week regarding such items as signal quality, contract renewal and technical issues. Superstar receives more than 21,000 calls each week for the HSD operations from consumers and distributors concerning everything from ordering subscriptions and requesting technical information, to asking simple programming questions.

Unlike the HSD market, cable operators also must substitute programming because of syndicated exclusivity ("Syndex") requirements, which will vary depending on the superstation signal involved and the local broadcasters' demands. Cable operators are required to delete or substitute programming for which syndicated exclusivity protection is claimed by a local broadcast station. This program deletion or substitution requires a complex series of program changes. In addition, and as mentioned previously, cable operators, unlike HSD distributors, pay all royalties and copyright fees necessary to obtain the copyright license due under 17 U.S.C. § 111, and are required to indemnify United Video for any failure to comply with such laws or make the required payments. Any cable operator carrying more than two superstations must pay substantial additional copyright fees, thus creating significant competition among the superstation programmers to fill these first two cable system slots.

The characteristics of the HSD and FBO markets thus comprise three distinct and unlike services for (1) FBOs, (2) HSD distributors and (3) HSD owners. FBOs, HSD users and HSD distributors <u>cannot</u> make their decisions about service solely on the basis of price. These customers cannot legally or technically switch between the services regardless of price relationships; the non-price factors differentiating the services are not artificially imposed by the satellite carriers, but, in fact, satisfy different communications requirements and reflect differences in facilities and consumers' receiving equipment. Accordingly, the Commission should recognize clearly the differences in these markets, and distributors, and not impose any uniformity of treatment or otherwise unitize prices to these dissimilar markets.

5. HSD and Cable Consumer Pricing

Despite the different characteristics in the markets for HSD and cable programming, consumer prices in these markets can be compared to determine if in fact any of the programmers' acts or practices generally have resulted in denying consumer access to programming by way of alternative technologies or made price too high so as to stifle growth.

Attached is a chart (Exhibit 7) demonstrating that the rapid growth of the HSD market undercuts any notion that pricing has impeded the market's development. This growth has been steady since 1987, and is projected to increase substantially now that Video Cipher II Plus scrambling technology has been widely deployed.

Moreover, in 1991, Superstar conducted a survey to determine the average cable basic pricing comparing that pricing to Superstar's "Superview" package.[17/] This survey of 100 cable

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17/ At the time "Superview" included seven superstations (WGN, WPIX, KTVT, KTLA, WTBS, WWOR, and WSBK) and twelve other programming services, including the Family Channel, the Weather Channel, USA Network, Lifetime, TNN, CNN, Headline News, Country Music Television, Arts and Entertainment, Discovery Channel, BRAVO, and Prime Network Sports.

companies shows that the average price of basic cable to be $19.47 per month. The effective monthly rate for the Superview package was $14.92 a month, or $4.55 a month less than the average cable price.[18/] The sole and inevitable conclusion from this data is that program pricing in the HSD market has had a positive impact on subscriber rates and consumer growth. Most, if any, of the resistance to growth in the HSD market has been due to the initial high cost of installing a satellite dish with a decoder, piracy, and aesthetic and zoning problems concerning the placement of satellite dishes in urban areas. As dish prices have fallen, and new DBS direct broadcast satellite services promise the use of smaller, less expensive dishes, it is reasonable to predict that the rapid growth in the HSD market will continue unimpeded.

18/ Exhibit 6. The cable price was determined from a random survey of 100 cable companies. Cable companies in large metropolitan areas made up 43% of the sample, while medium and small markets made up 36% and 21% respectively. It also is interesting to note that the various ala carte prices for premium services like HBO, Cinemax and Disney are on average $1.63 a month to $2.30 a month cheaper to the consumer through Superstar than they are over cable. The current "Superview" package includes five superstations and 17 programming services (the five additional ones being ESPN, CNBC, the Nashville Network, Cartoon Network and Comedy Channel) for $17.95/month, still $1.62 less than the cable price.

C. Prior FCC Analyses

The Commission already has devoted substantial effort to analyzing claims of discrimination in program pricing. One HSD distributor also commenced a complaint proceeding following two FCC inquiries into the possibility of discrimination by satellite carriers against HSD distributors.

The first Inquiry[19/] was conducted by the Commission at the direction of Congress in its Satellite Home Viewer Act of 1988.[20/] In the congressional hearings, concern was expressed that satellite carriers might be "discriminating" against HSD distributors; thus Congress provided that the FCC would issue a report on this issue.[21/] In the first Inquiry, the Commission applied the "discrimination" standard contained in Section 202(a) of the Communications Act, 47 U.S.C. §202(a) in its effort to assess whether unlawful discrimination existed in the HSD industry.[22/]

19/ In the Matter of Inquiry Into the Existence of Discrimination in the Provision of Superstation and Network Station Programming, 4 F.C.C. Rcd. 3883 (1989)("Notice of Inquiry").

20/ Pub. L. No. 100-667, 102 Stat. 3935 (1988), amending 17 U.S.C. § 101 et. seq. ("SHVA"). The majority of SHVA appears in 17 U.S.C. § 119.

21/ 47 U.S.C. § 713.

22/ SHVA itself simply provides that the HSD compulsory license is unavailable "if the satellite carrier unlawfully discriminates against a distributor". 17 U.S.C. § 119(a)(6). No

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After review of the comments submitted in that proceeding, and utilizing the discrimination standard found at Section 202 of the Communications Act, 47 U.S.C. § 202, the Commission found no evidence of discrimination. In particular, the Commission found that satellite-delivered television programming is widely available to home earth station users from a variety of sources, including satellite carriers and distributors and that no general pattern of unlawful discrimination by satellite carriers vis-a-vis distributors could be found. However, there was some evidence of higher rates for programming charged to home dish distributors than charged to cable operators.[23/]

Although the general question of discrimination within the HSD industry was resolved in the First Report, the Commission, largely at the urging of one HSD distributor, issued a

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further definition of discrimination was contained in SHVA, but Congress indicated in the report accompanying SHVA that the Commission was to be limited to issues within its jurisdiction and expertise. H.R. Rep. No. 100-887, Part 2, 100th Cong., 2d Sess. 22 (1988).

23/ One HSD distributor initially complained that the cable operators were exerting "undue influence" on the satellite carriers to engage in this discrimination to squelch competition. No evidence of such influence or conspiracy and no diminishment of competition ever was provided to the Commission. It is interesting to note that, notwithstanding the absence of any such evidence or finding by the Commission in any proceeding, Congress inserted language in § 628 devoted to prohibiting "undue influence." See infra, Part III. (A).

Further Notice of Inquiry,[24/] in order to determine whether there was unjustified discrimination by satellite carriers as between the HSD industry and the cable industry. Once again using the framework of Section 202(a) of the Communications Act, the Commission explored the questions of whether (a) service to the HSD market was "like" service to the cable market, (b) prices charged HSD distributors were higher than those charged cable operators, and (c) there were cost, or other factors, that justified the higher prices claimed to have been charged. Significantly, only one distributor, out of more than 1,000 actively marketing Superstar's services at the time, submitted comments on the issues raised by the Further Notice.[25/]

In its Second Report, the Commission explained that any determination as to whether two services are "like" services must utilize the "functional equivalency test".[26/] That test examines whether there is any material difference in a functional respect between the two services based on the perception of the customer. The test also looks at differences in objective technical matters. Thus, two services are not "like" services if customers do not perceive them to be alike or if they have differing technical and operational features.[27/]

24/ Further Notice, 5 F.C.C. Rcd. 3760 (1990).

25/ Second Report, 6 F.C.C Rcd. 3312, 3313 (1991).

26/ Second Report ¶ 10.

27/ Id. This test follows the decisions of the Commission and the courts interpreting Section 202(a).

The Commission then reviewed, but refused to accept, the argument that these were like services. Rather, the Commission's analysis under the "functional equivalency test" demonstrated that "substantial questions" were raised as to whether "like" services were involved. The Commission noted differences in copyright clearances and payments and differences in manner of scrambling and descrambling which tend to indicate that these were not like services. In the final analysis, however, the Commission decided to leave resolution of this issue to the pending complaints, which were filed after the comment period but before the issuance of the Second Report.[28/]

D. NRTC's Complaint Proceeding

After the closing of the comment period for the Further Notice, but prior to the release of the Second Report, NRTC filed complaints against three satellite carriers, including United Video, alleging "price discrimination" in violation of 47 U.S.C. § 202.[29/] The carriers answered, denying liability and

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28/ Id., ¶ 28.

29/ National Rural Telecommunications Cooperative ("NRTC") is a national telecommunications organization owned and controlled by a number of rural electric cooperatives and rural telephone systems located across the country. NRTC functions as a conduit through which it acts as a clearinghouse for its member cooperatives, who individually market programming services to individual HSD users. NRTC member cooperatives presently distribute "Rural TV" programming

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contending, inter alia, based on the language of, and precedent interpreting Section 202, that the Commission lacks jurisdiction over the subject matter of the complaints. Section 202(a) provides, in pertinent part:

> It shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with like communication service . . . . (emphasis supplied).

As set forth in their Answers, discovery responses, affidavits and briefs submitted in the complaint proceeding, United Video and Superstar did not provide a "common carrier" service with respect to the HSD services alleged to be provided in a discriminatory manner, and even if the Commission had jurisdiction over private carrier services, the services provided to FBOs on the one hand, and to HSD distributors such as NRTC on the other, were not "like" services, as noted by the Commission in its Second Report.

[Footnote Continued]

services to more than 50,000 HSD subscribers. "Rural TV" consists of more than 40 superstations, network stations, and sports, music and other premium channels. NRTC includes Superstar's superstation programming in its package, for which NRTC pays a discounted HSD distributor rate. Nonetheless, NRTC's complaint alleged that the rates it paid for Superstar's programming were discriminatory.

NRTC realized that its complaint was not well-founded, withdrew it, and then proceeded to lobby Congress for provisions in the 1992 Cable Bill to suit the business objectives it failed to secure through its Commission litigation. While some legislators agreed to add superstation programmers into the statute, solely at NRTC's behest, it is clear that the purpose and objective of Section 628 is directed at cable programmers, not superstation programming vendors. Indeed, United Video and Superstar Connection have done far more than NRTC or any other programming vendor or distributor to create and promote the HSD market and make programming available to all technologies.

Far from causing any harm, United Video and Superstar have provided unprecedented opportunities to its distributors in developing and expanding markets for HSD programming. It is surprising that any attention at all was directed to the superstation programmers, and the Commission has noted the functional differences between superstation programmers and cable, as well as between HSD distributors and cable operators. These distinctions must survive in any implementing regulations.

III. SECTION 628 PROSCRIBES ONLY UNFAIR CONDUCT WHICH CAUSES SIGNIFICANT HARM

At the outset, the Commission seeks comment on the proper interpretation of the substantive provisions in Section 628(b) which prohibit satellite broadcast programming vendors from engaging in "unfair methods of competition or unfair or deceptive acts or practices" the purpose or effect of which is to "hinder significantly" or "prevent" delivery of programming to consumers. Section 628(b); NPRM ¶ 6. As the Commission correctly noted, the Act provides that the Commission prohibit by regulation "particular conduct" that is both "unfair" and "harmful." Accordingly, any specific conduct which is prohibited by regulation must both be unfair and cause "significant harm".

The "significant" harm Congress envisioned was the favoritism vertically integrated entities could employ to protect their own affiliates while restraining competition from non-affiliated distributors. NPRM ¶ 7. Because of Section 628's intended objectives, it must be assumed that any conduct by "non-vertically integrated" entities would not be presumed harmful. Accordingly, any practice, pricing mechanism, or other term or condition which does not result in any favoritism to affiliated FBOs, should be presumed unharmful and outside the statute. Similarly, an act or practice utilized by non-vertically integrated entities would be presumed to be unharmful (because no favoritism can occur), such that conduct performed by both vertically integrated and non-vertically integrated programming vendors should be exempted.30/ The Commission may also seek to

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30/ The Commission also sought comment on what "threshold" ownership interests would be considered attributable for

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collect data from non-vertically integrated programmers to evaluate the types of pricing and practices used for purposes of exempting such conduct from the regulations for vertically integrated entities.

In specific response to the Commission's questions in NPRM ¶¶ 8 & 9, the Commission should also apply the provisions of § 628 to superstation programmers who have more than a certain number of affiliated cable subscribers. Using a de minimis approach would allow, for example, exemptions for programmers with less than 300,000 cable subscribers. Additionally, the Commission should use a test for exempting larger superstation and other programmers where the total number of affiliated cable subscribers is less than the number of subscribers served by competing technologies. This would demonstrate an absence of "favoritism".

Section 628's general prohibitions on conduct are somewhat problematic. The concepts of "unfair competition" and

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determining whether or not a vendor is vertically integrated. NPRM ¶ 9. Because a programming vendor would not be able to "favor" a minority owner's affiliates, attribution should occur only at the level of control (51%) needed to dominate corporate decision-making. Otherwise, the Commission would be condemning all investments made by any cable interests in any programming vendor without any evidence that such minority interests determine the programming vendor's business operations.

"unfair or deceptive business practices" do not readily apply to the conduct of programming vendors.[31/] Accordingly, only conduct which in the general sense is "unfair," or more precisely, "unreasonable," should be actionable. This would be true to the stated congressional purpose because the statute does not condemn "unfair" acts which are significantly harmful and also condones "fair" acts which _do_ cause significant harm. Competition _is_, in that sense, harmful to some distributors. There will always be winners and losers in the never-ending quest for market share, but this works to the benefit of consumers by eliminating inefficient distributors.

> There is a difference between injuring competition and injuring, or even forcing into bankruptcy, a competitor. Inefficient competitors can be driven out of a market by normal price competition; yet, this competition benefits consumers by lowering the price and raising the quality of services and products available to them.

Private Line Rate Structure and Volume Discount Practices, 97 FCC2d 923, 945 (1984). Accordingly, with competition as the ultimate desired effect of the statute, price competition should be expressly allowed. Indeed, the mere existence of different

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31/ For example, the traditional claims of unfair competition relate to essentially misappropriation or unauthorized use of business information. _See_ 1 J. Thomas McCarthy, _McCarthy on Trademarks and Unfair Competition_, § 1.04 (1992 Ed.). Similarly, "unfair or deceptive acts or practices" terminology is used in many consumer protection statutes, and is not necessarily appropriate for analyzing contractual relations between business entities. _See_, _e.g._, 15 U.S.C. § 45.

prices, terms or conditions would not be determinative of a violation of the statute; rather, it would only be the effect of the price, terms and conditions on competition that would govern whether such differential treatment is prohibited.

This is a sensible result because existing antitrust laws strongly encourage price competition. Price competition is and should be encouraged:

> To hold that the antitrust laws protect competitors from the loss of profits due to such price competition, would in effect, render illegal any decision by a firm to cut prices in order to increase market share. The antitrust laws require no such perverse result for '[i]t is in the interest of competition to permit dominant firms to engage in vigorous competition, including price competition.'

Cargill, Inc. v. Monfort of Colorado, Inc., 479 U.S. 104, 116 (1986) quoting Arthur S. Langenderfer, Inc. v. S.E. Johnson Co., 729 F.2d 1050, 1057 (6th Cir.), cert. denied, 469 U.S. 1036 (1984). Price competition is the essence of pro-competitive conduct and any law that would flatly disallow pricing differentials also would ban conduct that benefits consumers.

As a result, the express wording of the statute would allow for "unfair" practices that do not significantly harm or prevent distributors from providing programming to consumers and also would allow for the "fair" practices that in fact may hinder or prevent programming distributors from distributing programming to consumers. Because price differentials by themselves are not unfair and differences in treatment -- as well as discrimination -- is not inherently "unfair", this conduct should not be prohibited outright. Moreover, this analysis is significant, as noted by the Commission, where unfair discriminatory conduct may harm a competitor but does not significantly harm competition in multichannel video programming distribution. NPRM ¶ 10. This is also true to Congress' purpose of increasing the availability of programming to rural areas and other areas not currently served by multichannel video program distributors and also in assisting the development of competing technologies. If these objectives are being met, the fact that one particular video programming distributor is not as happy with the terms and conditions of one component of its programming package is of no statutory or regulatory significance.

Accordingly, the threshold requirement would dictate an analysis demonstrating that the challenged practice is both (i) unreasonable and (ii) a significant hindrance to the distributor. This "hindrance" could not be significant if there is sufficient quantity of programming available to consumers in the relevant market from other multichannel distributors. This approach would prevent the distributor who has refused to invest sufficient resources in marketing or facilities from utilizing this statute to extract price concessions.

It also is important to categorize the "harm" in geographic terms. The Commission sought comment on what geographic market would be relevant to determining whether prohibited behavior causes "significant" harm. NPRM ¶ 11. Many FBOs and HSD distributors operate only in local markets. These entities would be hard-pressed to argue that the price in another market would harm them in program distribution in their own market. Thus, the local market at issue must be defined in geographic terms. Competing distributors alleging price differentials must show both their intent <u>and</u> resultant inability to serve the allegedly "favored" distributor's customers.[32/]

Where a distributor serves a national customer base (which is generally only possible in the HSD markets) the harm must be shown to exist where the allegedly disfavored distributor has attempted, but failed, in selling to the allegedly "favored" distributor's customers <u>solely because of the disfavored distributor's exposure to the different terms and conditions</u>.[33/] For example, cable operator X in Wichita receives superstation

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<u>32</u>/ This equipment is important because the failure to serve consumers, even in the local market, could be the result of poor marketing or technical incompatibility. Congress surely did not intend to subsidize inefficient competitors.

<u>33</u>/ If a distributor has confined its marketing efforts to a particular <u>segment</u> of a local market, that distributor should not be able to complain that it has been "unable" to sell to others in that market due to any program pricing issues.

programming for 10 cents per subscriber. HSD distributor Y, located in Minneapolis advertises in satellite publications and other special interest publications. HSD distributor Y complains that the prices he pays for programming are too high. HSD distributor Y only could state a claim if it is shown that (1) Y has attempted and failed in serving consumers in X's market, and (2) the consumers sought to be served would have been willing and able to purchase Y's service if Y had not been subject to different terms and conditions. This second phase of the test would account for physical differences between and among FBOs and HSD distributors.

For example, a cable distributor in Wichita faces much different marketing and distribution considerations than does the HSD distributor in Minneapolis. Moreover, video program consumers in Wichita may or may not have access to facilities allowing them to accept service from the Minneapolis distributor. The Commission cannot allow any presumption that the failure of those Wichita consumers to want the allegedly "disfavored" distributor's services is solely due to the prices that the distributor must pay for programming, especially if the equipment is unavailable, or the consumers do not wish to purchase satellite-dish receiving equipment. Unless "harm" is circumscribed in this precise manner, distributors will be able to run roughshod over programming vendors, alleging that any and all differences in terms, conditions, and prices have caused actionable harm, when in fact the ability of the distributor or FBO to sell to the consumers has not been affected in the least.

These concepts are essentially borne out in the Commission's acknowledgment of Congress' intent to rely on the marketplace to the maximum extent feasible. NPRM ¶ 12; 1992 Cable Act § 2(b)(2). The Commission has already agreed with this conclusion when, in the context of reviewing prior claims of discrimination, the Commission found that price regulation would be less effective than "assuring entry by new competitors." Second Scrambling Report, 3 FCC Rcd. at 1209, ¶ 61. Because deregulatory initiatives at the Commission over the years have made entry into the satellite broadcast programming distribution service quite easy, id. at ¶ 35, and because the Commission has embarked on a clearly charted path of eliminating unnecessary and potentially harmful regulation of fully competitive markets to create significant benefits for consumers, In re Competition in the Interexchange Marketplace, 5 FCC Rcd. 2627, 2649, ¶ 188 (1988), it would make more economic sense, and conserve more valuable resources, for only those truly harmful practices that actually have restricted consumer availability to be actionable, rather than all conceivable differences in treatment that could be alleged by any number of FBOs or distributors.

In the NPRM, the Commission also seeks "detailed allegations or evidence" regarding unfair practices in order to assist in prescribing regulations governing particular conduct. In the discrimination inquiry previously discussed, the Commission noted prior allegations resulting in a conclusion that "prices charged by some carriers to home satellite dish distributors as compared to the prices charged to cable companies and other customers . . . were not justified by the cost of providing service." NPRM ¶ 31 citing Second Report, 6 FCC Rcd. 3312, 3317, 3321 (1991). The Commission should be wary of adopting any standard that allows for only cost-justified price differentials. Differences in operations and marketing strategies are critical to the survival of competing technologies. Difficult issues of cost allocation, calculations of marginal costs, and risk premiums are essential given that additional costs are clearly implicated in serving the HSD market. Because superstation programmers are non-dominant with respect to provision of their services, impermissible price discrimination simply is not possible. See Competitive Carrier Rulemaking, 95 FCC2d 554 (1983). Indeed, the fact that price differentials exist does not establish discrimination; rather, price differentials offered by superstation programmers lacking market power are indicative of competition not price discrimination. See Competitive Carrier Rulemaking, 85 FCC2d 1, 31, ¶ 89 (1980).

A. Specific Provisions For Implementing Regulations

Under the Act, the Commission must prescribe "minimum" regulations related to undue or improper influence in the determination to sell programming to unaffiliated distributors; (2) discrimination in prices or terms and conditions for the sale of programming and (3) contractual exclusivity between cable operators and programming vendors.[34]

1. "Undue Influence" And Programming Distribution

The Cable Act directs the Commission to proscribe conduct by vertically integrated programming vendors which may be characterized as "undue influence" by the cable operator upon a programming vendor's decisions in selling programming. This is an entirely subjective approach and "undue influence" in other circumstances has been found to be difficult to apply.

The concept of "undue influence" is not subject to simple or singular definition. The essence of the idea, however, stems from the existence of a very close relationship in which the subservient member of such relationship, is abused by the

34/ The Commission asked whether Congress intended for the Commission to regulate any additional "unfair" acts or practices beyond those specified in Section 628(c). NPRM ¶ 13, n.32. Because of the availability of the antitrust laws proscribing anti-competitive conduct no other conduct "favoring affiliates" is at issue in this proceeding.

other party to such relationship. One functional definition of undue influence, while arising specifically under the subject of contract law, but with applicability in this area is:

> If a party in whom another imposes confidence misuses that confidence to gain his own advantage while the other has been made to feel that the party in question will not act against his welfare, the transaction is the result of undue influence. The influence must be such that the victim acts in a way contrary to his own best interests and thus in a fashion in which he would not have operated but for the undue influence.

Williston on Contracts, § 1625 at 776-777 (3d Ed., 1970), quoted in Francois v. Francois, 599 F.2d 1286, 1292 (3d Cir. 1979)(emphasis added). Judging from the language of § 628(c)(2)(a), however, some distributors may not agree that this is an appropriate standard. It is, however, a starting point, that the Commission could utilize for analyzing whether a distributor cannot reasonably contract with a vendor where an "abuse of confidences" exists. Otherwise the standard is unworkable in the contracting situation as it would preclude the usual intra-corporate decision making process wherein individuals associated with the cable operator's business may review decisions regarding the programming vendor's business.[35/]

35/ The real problem is one more of tort or antitrust law. Where a third party "interferes" in a contractual relationship, or tortiously prevents one from forming a contract, an action already exists. Similarly, combinations restraining

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Thus, in order to establish "undue influence," while protecting reasonable refusals to deal, there must be some direct evidence of cable-operator coercion, or threat thereof, that is both anti-competitive and uneconomic in its intent and effect. In order to prevent claims arising under this section from being instituted for purposes of conducting a discovery "fishing" expedition, there must be some evidence independently in possession of the distributor tending to prove the existence of coercion or a threat. Otherwise, any distributor unhappy with contractual negotiations with the programming vendor simply could file a complaint alleging a violation of this section without additional protection or definitions.

2. Discrimination In Programming Distribution

Discrimination in programming distribution is perhaps the most difficult section of the statute to implement because the various markets and business strategies differ significantly from technology to technology and from distributor to distributor. The Commission seeks comment on objective standards that could be applied in order to assist it in distinguishing

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competition are already actionable under the Sherman Act. 15 U.S.C. § 1. Thus, the "undue influence" in Section 628 must refer to something more specific, such as "misuse of confidence".

discriminatory behavior from legitimate business behavior. This is a difficult task. Indeed, the vendor's pricing practices with respect to allowing volume discounts has been demonstrated to facilitate broad program distribution while other pricing practices would restrict it. For example, the Commission approved volume discounts where the incremental pricing was above marginal cost but below fully distributed costs ("FDC"), finding that such was clearly in the public's interest.

> ...[w]e find that requiring all private line and special access volume discounts to be justified by an FDC study does not promote the goals of the Communications Act. [] <u>Greater pricing flexibility in volume discounts may benefit large as well as small users, not injure competition, and not be discriminatory.</u> An integrated rate structure without customer or use restrictions would limit opportunities for discrimination, and thereby replace the need for detailed cost justification applying a particular pricing standard. In addition, competitive necessity may justify volume discounts when equal or lower priced alternatives are generally available to a carrier's customers.

<u>Private Line Rate Structure and Volume Discount Practices</u>, 92 FCC 2d 923, 948 (1984) (footnote omitted, emphasis added).

Because many of the practices sought to be prohibited may actually <u>benefit</u> competition and programming availability, the Commission rightly imposes the burden on a distributor filing a complaint to establish a <u>prima</u> <u>facie</u> case. Indeed, the burden of proving unreasonableness, or the anticompetitive effect of the conduct, should clearly remain on the complainant, as it has in traditional discrimination proceedings under the Communications

Act. See, e.g., In the Matter of AT&T, 4 FCC Rcd 2327, 2329 (1989); MCI Telecommunications Corp. v. AT&T, 85 FCC 2d 994, 999 (1981).

As set forth previously, the Commission must determine not only whether price differentials are "unfair" or "discriminatory", but if that particular practice or price differential itself has prevented or significantly hindered distributors from providing the programming to subscribers or consumers. This raises a number of causation issues. A distributor's own marketing strategies -- or failures -- may "significantly" hinder it in selling programming. If other similarly situated distributors are successful in selling programming in that market, price differentials should be presumed to be NOT causative of any harm. Similarly, because the Commission should not favor any particular technology, the mere fact that in urban areas there are very few HSD subscribers should not determine whether an HSD distributor is significantly hindered in distributing programming in that same market. While not asking the distributor to disprove the existence of market factors, there must be sufficient evidence alleged in a prima facie case that the challenged practice itself has caused the hindrance of sales. Accordingly, the distributor must show active marketing efforts by itself and also describe the successes or failures of other similarly situated distributors in that same market.

At a minimum, the Commission should not use this statute to force the higher costs of HSD receiving equipment on the programming vendors. Because it is undisputed that there are higher costs for HSD reception equipment than for cable subscribers, these costs should not be factored into any calculation seeking a lower programming rate, for HSD customers. Second Scrambling Report, 3 FCC Rcd. at 1207, ¶ 44 and n.21.

3. Specific And Justifiable Differentials

Section 628 expressly allows programming vendors to impose "reasonable" requirements, and thus utilize differing terms and conditions, to account for differences in (a) creditworthiness, (b) offering of service, (c) financial stability, (d) character and (e) technical quality. The Commission specifically has asked for suggestions on how to distinguish and quantify differentials allowing for these factors. NPRM at 17.

It is virtually impossible to quantify these items. The risk premiums that a particular vendor may apply in considering a distributor's technical expertise or stability will vary from programmer to programmer. Often distributors, acting as agents for the programming vendors, may, by virtue of their poor conduct, hurt the programming vendor's overall business by engaging in poor and inefficient practices in distributing the programming services.