product that is more valuable than, or different from, the product the programming vendor sells to other distributors. For example, a programming vendor may enter into an exclusive agreement with a particular distributor (clearly, § 628 permits some such agreements). Or, a distributor may desire indemnities, warranties, or representations in which other distributors have no interest. Similarly, a programming vendor may offer a distributor's subscribers services that other distributors' subscribers do not enjoy. 16/ In these cases, the programming vendor sells the distributor a more valuable service, and the

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16/ For example, HSD subscribers to HBO's services enjoy benefits that cable subscribers do not enjoy. Once HBO activates an HSD owner's descrambler, an HSD subscriber can access all the different time-zone and multiplexed versions of HBO's services. (There are five versions of the HBO Service: HBO East, HBO West, HBO 2 East, HBO 2 West, and HBO 3. There are three Cinemax versions: Cinemax East, Cinemax West, and Cinemax 2.) Most cable subscribers do not have access to all these versions.

In addition, HSD subscribers to HBO's services have the option of having their descrambler activated in such a way as to block out programming based on its MPAA rating. (Thus, parents can prevent their children from seeing movies rated, say, "PG-13" or higher.) Cable subscribers do not have this option.

Finally, for a short period of time after HSD subscribers tune in to the HBO Service or Cinemax, an on-screen caption box appears displaying program information, including the name of the program they are watching and the time remaining until the next program. Cable subscribers do not receive such on-screen program information.

Commission should therefore permit the programming vendor to charge a higher price for it.

Similarly, distributors with different marketing abilities are not "similarly situated". Rather than spending their marketing dollars on their own marketing projects, programming vendors sometimes give special marketing incentives 17/ to certain affiliates that are more knowledgeable about local market conditions than a national programming vendor could be, and that are particularly able at marketing. Section 628 in no way can be read to proscribe differential treatment of distributors with different marketing abilities, and the Commission should therefore allow it.

(b) The Exceptions of § 628(c)(2)(B)(i)-(iv).

The Commission invites comment on the proper interpretation of the factors justifying differentials in prices, terms and conditions set out in § 628(c)(2)(B)(i)-(iv). NPRM ¶ 17. TWE submits in general that subsection (i) specifies certain contract terms on which a programming vendor may insist to allow for specific characteristics of a

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17/ These incentives can take various different forms. HBO, for example, has sometimes provided direct funding for specific marketing projects of certain affiliates. In other cases, HBO has allowed affiliates for a certain short period of time to retain any growth in subscription fees, thus allowing the affiliate to keep the first few months' worth of subscription fees of any additional subscribers.

distributor; subsection (ii) addresses differentials in prices, terms and conditions that reflect actual differences in cost; subsection (iii) addresses differentials in prices, terms and conditions that, although not reflecting actual differences in cost, are reasonably related to differences in the size of a distributor's subscriber base; and subsection (iv) pertains to exclusive arrangements.

(i) Subsection (i).

With respect to the term "character" in § 628(c)(2)(B)(i), TWE notes that HBO has had experiences in the past with certain distributors (both cable and MDS) that underreported the number of subscribers to the HBO Service they served. 18/ Underreporting is a way of stealing subscription fees, and the Commission should permit a programming vendor to take appropriate action to prevent it. When a distributor that a programming vendor believes has previously underreported seeks a new affiliation agreement,

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18/ For example, in 1991, it was discovered that a cable operator in Ft. Smith, Arkansas, for many years had maintained two sets of records: one artificially deflated set for purposes of reporting to HBO and other programming vendors; and one accurate set for internal purposes. After the scheme was discovered, a number of the cable operator's officers were convicted on felony charges in state court. In addition, HBO brought a civil action that was ultimately settled in return for a $1 million payment to HBO.

the programming vendor should be allowed to impose different terms upon that distributor. 19/

With respect to the term "technical quality" used in § 628(c)(2)(B)(i), TWE notes that it is HBO's experience that, if subscribers receive a poor signal, they blame not only their distributor, but also the programming vendor. Thus, if, for example, an MMDS operator fails to provide its subscribers with a clear picture for the HBO Service, this failure tends to harm the reputation of not only the MMDS operator, but also of the reputation of HBO. Mindful of this reality, HBO's affiliation agreements impose technical standards. TWE submits that, in light of the "technical quality" language in § 628(c)(2)(B)(i), the Commission should permit such terms.

Similarly, it is HBO's experience that when a distributor offers subscribers poor service, this tends to damage the reputation of not only the distributor, but also of HBO. Section 628(c)(2)(B)(i) expressly provides that programming vendors may impose "reasonable requirements for . . . offering of service". Accordingly, TWE submits that the Commission should permit a programming vendor to demand

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19/ In such a case, HBO may (if it decides to deal with the distributor at all) seek a letter of credit or deposit, audit more frequently, or require the distributor to use a third-party billing and reporting service (or any combination of these things).

reasonable assurances that protect it from injury to its reputation because of an affiliate's poor service.

The Commission asks how it should define the terms "creditworthiness" and "financial stability" in § 628(c)(2)(B)(i). NPRM ¶ 17. TWE submits that creditworthiness should have its everyday meaning, reflecting the likelihood that a programming vendor will receive timely payment. In assessing this likelihood, a programming vendor should be permitted to take into account not only a distributor's payment history and commercially available credit information (or lack thereof), but also the value of a distributor's assets that would offer recourse in the case of a default. Where, considering these factors, a programming vendor concludes that it is uncertain of receiving timely payment, it should be permitted to require adequate assurances (e.g., prepayment, guarantees, collateral, etc.).

The Commission suggests that there may exist situations in which a distributor is not creditworthy but nevertheless financially stable. NPRM ¶ 17. TWE agrees that such situations may exist, but doubts that this should make a difference. Section 628(c)(2)(B)(i) by its terms permits programming vendors to impose reasonable requirements with respect to <u>either</u> creditworthiness <u>or</u> financial stability.

(ii) <u>Subsection (ii).</u>

TWE submits that the term "cost of sale" permits a programming vendor to allow for differences in transaction costs. If a programming vendor deals with a distributor that has many subscribers, transaction costs (consisting of time spent negotiating, legal costs, billing, etc.) are lower per subscriber than if a distributor has few subscribers. TWE submits that subsection (ii) permits a programming vendor to pass on these "actual" cost savings by charging the distributor that has many subscribers a commensurately lower price. 20/

The term "cost of sale" should further include a programming vendor's costs in marketing its product to subscribers. Marketing costs money. Both the programming vendor and the distributor have an interest in marketing, because both benefit if a larger number of consumers subscribe to cable, watch basic services, and add pay services. Accordingly, distributors commonly perform a certain amount of marketing tasks for a programming vendor. Where a distributor engages in marketing efforts, a

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20/ Subsection (iii), TWE submits, permits a programming vendor to extend volume discounts even where not justified by actual cost differences. <u>See</u> <u>infra</u> p. 27.

programming vendor need not spend as much on marketing. To the extent that the programming vendor's "cost of sale" will be lower, the Commission should permit the programming vendor to charge the distributor a lower price. 21/ By the same token, the Commission should permit a programming vendor to charge a higher price to a distributor that is unwilling to perform marketing tasks.

The Commission asks how "delivery of an encrypted signal to individual home satellite dish (HSD) subscribers may be more expensive . . . than delivery to the head end of a cable system". NPRM ¶ 17. At the risk of stating the obvious, TWE points out that § 628 does not protect individual HSD owners. Section 628(c)(2)(B) and § 628(b) each protect only "multichannel video programming

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21/ Looking at the same issue from the distributor's side, if a distributor performs marketing tasks, its costs will be higher. The Commission should allow a programming vendor to make allowance for differences in cost not only on the programming vendor's part, but also on the distributor's part.

The statute clearly permits this reading, and the legislative history supports it. During the debate on the President's veto of the bill, Senator Kerry asked Senator Inouye, a sponsor of the legislation, whether "the cost of creation, sale, delivery or transmission of programming refers to costs incurred at the multichannel video programming distributor's level as well as at the program vendor's level". 138 Cong. Rec. S16,671 (daily ed. October 5, 1992) (statement of Sen. Kerry) (emphasis added). Senator Inouye indicated that it did. *Id.* (statement of Senator Inouye).

distributors", and there can be no argument that an individual HSD subscriber is such a distributor. See 1992 Cable Act § 2(c)(6), 47 U.S.C. § 522(12). Accordingly, TWE understands the Commission's question to be relevant only with respect to obligations that § 628 might impose on a programming vendor in dealing with a TVRO satellite program distributor or packager (who is a "multichannel video programming distributor", see id.). 22/

If it were not for HSDs, there would be less of a need for programming vendors to scramble signals because there would be much less of a risk of piracy. Since 1984, HBO has invested over $11 million in scrambling equipment. Moreover, since January 1, 1993, HBO has started to transmit the multiplexed versions of its services by compressed digital signal. Some cable headends now have the expensive equipment necessary to descramble this signal, but HSD

22/ In the event that the Commission somehow were to rule that § 628 does protect individual HSD owners, TWE notes that selling to individual HSD owners is more costly than selling to a cable operator. Cable operators provide a range of retailing services that a programming vendor has to provide itself when it sells to HSDs. Selling to HSDs makes it necessary that the programming vendor have skilled operators on staff to answer phone calls from HSD subscribers and to switch service on and off. HBO spent between $16 and $17 million on this in 1992. Moreover, HBO spent about $4.5 million on marketing aimed at HSD owners in 1992. These expenses are costs of "sale, delivery, or transmission", § 628(c)(2)(B)(ii), and the Commission should permit a programming vendor to charge HSD owners for them.

owners do not. Exclusively for their benefit, HBO has chosen to continue to transmit an analog signal of the multiplexed versions of its services, which is costing HBO approximately $3 million a year.

HBO incurs these costs solely for the benefit of HSD owners, and it would be unfair to ask cable subscribers in effect to subsidize HSD owners by contributing to these costs. TWE submits that it should be permitted to recoup these costs by requiring HSD packagers to pay a higher price, and that this merely takes account of the "cost of . . . delivery, or transmission" to HSD owners. 23/

Moreover, it is more expensive for a programming vendor to deliver programming to HSDs than to cable headends. To gain access to the subscribers that a particular cable system has to offer (possibly tens of thousands), a programming vendor needs to activate merely one descrambler. When delivering programming to HSDs, on the other hand, a programming vendor must activate one descrambler for each individual subscriber, which is

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23/ Notwithstanding its efforts at securing its signals, HBO continues to lose a significant amount of revenue because of signal piracy by dishonest HSD owners that purchase illegal descrambling devices on the black market. Just like it would be unfair to require cable subscribers to subsidize scrambling equipment primarily benefiting HSD subscribers, it would be unfair to require cable subscribers to make up for revenues lost due to piracy that is incident to selling to HSD owners.

expensive in terms of activation, reactivation and deactivation time spent by skilled operators. TWE submits that this additional cost, too, is part of the "cost of . . . delivery, or transmission" to HSD owners.

(iii) Subsection (iii).

The Commission asks to what extent it should consider "economies of scale and economic benefits reasonably attributable to size . . . beyond volume discounts". NPRM ¶ 17. TWE submits that the purpose of subsection (iii) is to permit volume discounts that a programming vendor cannot justify on the basis of specific cost differences. Under any other reading, subsection (iii) is superfluous because price differentials that are justified by actual cost differences are already permitted under subsection (ii).

A distributor serving a greater number of subscribers can offer a programming vendor something that a distributor serving a smaller number of subscribers cannot: access to a sizeable subscriber base. This yields "direct and legitimate economic benefits reasonably attributable to the number of subscribers served by the distributor", § 628(c)(2)(B)(iii), and a programming vendor should be allowed to reward large distributors for providing these benefits by selling to them at a lower rate.

(c) Systems of Adjudication.

The Commission proposes four mechanisms for separating the wheat (justified price differentials) from the chaff (discrimination) in the complaint process. TWE submits that the first option that the Commission proposes, in which prices within a certain "reasonable region" are presumed reasonable, NPRM ¶ 20, is preferable. Price differentials can be the result of many different legitimate grounds, as the exceptions of § 628(c)(2)(B) recognize.

For one thing, no two contracts are the same. As the Commission recognizes, NPRM ¶ 17, different programming vendors and distributors place differing importance on different terms in contract negotiations, especially in a competitive marketplace. Different terms have consequences for pricing, and the Act permits programming vendors to charge different prices to take certain different terms into account. See supra pp. 17-19. For another thing, no two distributors are the same (in their marketing skills and otherwise), and the Act permits programming vendors to charge different prices to take certain differences between distributors into account. It would be impossible to assign a value to different terms and characteristics and establish a "fair" price for each contract. It is much preferable to assume that price differentials that fall within a certain "reasonable region" or "band" are the result of permissible distinctions. If a contract's price is within that band, any price differentials are likely justifiable. And, even if they are not, the resulting "discrimination" is likely to be so slight as to make it unlikely that a complainant could meet the hinder-significantly requirement. Moreover, this approach is relatively easy for the Commission to administer.

However, gains from this approach could be easily lost if a distributor were permitted to try to rebut the presumption of reasonableness by asking the Commission to put each affiliation contract under a microscope and compare it to contracts with other distributors. The benefits of this approach would be few, and would come at enormous expense to the Commission and its staff (to say nothing of programming vendors). Accordingly, TWE submits that the Commission should establish a band in which price differentials are *per se* lawful. Instead of two bands (rebuttably reasonable, rebuttably unreasonable), then, there should be three (*irrebuttably reasonable*, rebuttably reasonable, rebuttably unreasonable).

The Commission invites comment "on an appropriate method for determining the parameters for the 'reasonable region'". NPRM ¶ 20. TWE submits that, at least for pay services, the Commission should use a band in which rates of 15% above or below the band's midpoint are irrebuttably presumed to be reasonable. In the overwhelming majority of cases, a 15% rate differential will merely reflect grounds that § 628 recognizes as permissible. 24/ Accordingly, contracts within that band do not merit the Commission's attention.

(d) Buying Groups.

The Commission asks whether it should require buying groups to agree to treatment as a single entity to qualify for benefits under § 628. NPRM ¶ 26. TWE submits that the Commission should do so. 25/ Programming vendors often charge buying groups a higher price than they charge single systems serving the same number of subscribers because buying groups usually do not create the same

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24/ A plus-or-minus-15% price range is not unusual in the pay-services industry. It is customary for vendors of pay services to maintain rate cards under which the rate charged to a particular affiliate turns on three variables: the price the affiliate charges to its subscribers; the number of subscribers the affiliate serves; and the ratio of the affiliate's pay to basic subscribers. The rate card that HBO maintains for the HBO Service yields a price range in which the maximum and minimum rate each differ roughly 15% from the midpoint of the range.

25/ In TWE's reading of § 628, groups comprised of individual cable operators will rarely be able to show a violation of § 628, because they almost never (except for the occasional overbuilder) operate systems that directly compete with a cable operator in which the defendant programming vendor has an attributable interest.

opportunities for cost savings. Common sense dictates that, if a buying group wishes to be treated like a single entity, it must behave like one. At a minimum, a group should agree to be liable for the debts of any member; each member should agree to be liable for the debts of the group and each other member; each member should guarantee the technical performance and signal security of each other member; and a group should show that it can provide the same efficiencies that would be present in dealing with one entity. One contract, rather than several; no need for greater marketing support; the ability to make collective distribution and marketing decisions for all members of the group--these are the kinds of efficiencies buying groups should be required to provide.

(e) Retroactivity.

The Commission seeks information on the current duration of existing programming contracts. NPRM ¶ 27. Although some of HBO's affiliation agreements have a duration of only three years, the average contract runs for five years. 26/ However, HBO sometimes enters into affiliation agreements with a duration of as many as 10 years. Roughly a third of all present subscribers to the

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26/ Generally, HBO's affiliation agreements provide for automatic renewal if neither party cancels.

HBO Service are served pursuant to affiliation agreements that run until 1998 or longer.

HBO's affiliation agreements generally specify a rate per subscriber at the beginning of the contract term, and allow HBO to increase that rate whenever it raises its rates to the rest of the network, up to a certain maximum percentage per year. Accordingly, the price at which HBO sells to a distributor is sometimes governed by a contract entered into many years in advance. HBO relies on the revenue that long-term affiliation agreements generate when it negotiates its supply contracts with movie studios, which usually run for a period of up to five years.

The Commission asks, in effect, whether distributors that entered into contracts with programming vendors in the past should be permitted to complain of discrimination under § 628(c)(2)(B). NPRM ¶ 27. It is well established that, absent evidence of contrary intent, congressional enactments must not be construed to have retroactive application, see, e.g., Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 208 (1988); Bennett v. New Jersey, 470 U.S. 632, 639 (1985), and that, absent evidence of contrary congressional intent, a grant of rulemaking power must not be construed to encompass the power to promulgate retroactively applicable rules, Bowen, 488 U.S.

at 208. Nothing in § 628(c)(2)(B) indicates that Congress intended that the Commission promulgate retroactively applicable regulations. Similarly, nothing in the legislative history of that section evinces such an intent.

Quite the contrary, the language of § 628(c)(2)(B), properly read, prohibits a programming vendor from discriminating only <u>in the contracting</u> for the sale of programming services, not <u>in the delivery</u> of programming services under an existing contract. That subsection speaks of "discrimination . . . in the prices, terms, and conditions of sale or delivery of . . . programming". The words "terms" and "conditions" indicate that Congress focused on the practice of entering into contracts, rather than performing contracts.

The exceptions contained in § 628(c)(2)(B)(i)-(iv) further underscore this focus: Subsection (c)(2)(B)(i) speaks of "imposing reasonable requirements . . . and standards"; subsections (c)(2)(B)(ii) and (iii) use the same "prices, terms, and conditions" language as the body of subsection (c)(2)(B); and subsection (c)(2)(B)(iv) speaks of "entering into an exclusive contract". Consistent with this focus on contracting, rather than performing, the Commission would best effectuate Congress's intent if it interpreted § 628(c)(2)(B) as prohibiting a programming vendor only from discriminating in the contracting for the sale of programming services, not from discriminating in the performance of contracts entered into previously. 27/

The Commission also asks whether distributors should be permitted to base discrimination claims on comparisons with contracts that predate the Commission's rules. NPRM ¶ 27. If that were permitted, a programming vendor might be forced to sell to all distributors at the lowest price that it has charged any distributor in any contract entered into before, but covering the period after, the effective date of the Commission's regulations. Under such a regime, programming vendors would be faced with a dilemma between either selling to all distributors at a

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27/ The Commission asks whether it should subject contracts entered into before the effective date of the rules, but after the promulgation of its NPRM, to § 628(c)(2)(B). NPRM ¶ 27. It follows from TWE's reading of that section that the answer to this question is in the negative.

The Commission further asks whether it should establish a prospective deadline for compliance. NPRM ¶ 27. Again, it follows from TWE's reading of § 628(c)(2)(B) that it should not. However, in the event the Commission were to disagree, TWE proposes that, in recognition of the long duration of many programming contracts, the deadline should be set at least five years into the future. A shorter deadline would be especially unjust because some program-delivery contracts shift the brunt of the distributor's obligations to the second half of the contract term, by starting out with a low rate and permitting HBO relatively large increases. Abrogating such an agreement would permit the distributor to reap a windfall at the expense of the programming vendor.

ruinously low price, or breaching the low-priced contracts and paying (potentially ruinous) damages to injured affiliates. In either case, the consequences to programming vendors would be catastrophic. There is no evidence that Congress intended such a draconian result.

3. Exclusive Contracts.

Section 628 requires the Commission to promulgate different regulations concerning exclusive contracts depending upon whether an area is served by cable or not. Section 628(c)(2)(C) requires the Commission to:

> "prohibit practices, understandings, arrangements, and activities, including exclusive contracts . . . between a cable operator and a satellite cable 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 . . . for distribution to persons in areas not served by a cable operator as of the date of enactment of this section".

For areas served by a cable operator, § 628(c)(2)(D) requires the Commission to prohibit exclusive contracts between a cable operator and a vertically integrated programming vendor, unless the Commission determines that such a contract is in the public interest.

The Commission invites comment on the proper definition of "areas served". NPRM ¶ 29. The Commission notes the following statement in the Conference Report:

> "For 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".

H.R. Conf. Rep. No. 862, 102d Cong., 2d Sess. 93 (1992). The Commission also notes that the Conference Report does not provide guidance with respect to the appropriate definition of the term "area". NPRM ¶ 29.

TWE proposes that an "area" should encompass the entire territory of a political subdivision that possesses the authority to enter into a franchising agreement with a cable operator. The statement quoted from the Conference Report above indicates that Congress intended to make the determination whether an area is served by cable a simple exercise. A bright-line rule following the boundaries of political subdivisions is consistent with this intent. Absent such a bright-line rule, the Commission might be faced with claims that small enclaves of homes in a franchised political subdivision in which a cable operator had not yet extended service are areas not served. Conceivably, the Commission could find itself determining whether a particular area is served on a house-by-house basis. 28/ TWE submits that there are better ways in which the Commission can better spend its resources.

(a) Section 628(c)(2)(C).

Section 628(c)(2)(C) prohibits "practices, understandings, arrangements, and activities, including exclusive contracts . . . that prevent a . . . distributor from obtaining . . . programming" from a vertically integrated programming vendor for distribution in areas not served by a cable operator. TWE believes that it is not common for a cable operator and a vertically integrated programming vendor to have an agreement or understanding that prevents distribution of programming in areas not served by cable. If a cable operator does not serve an area, it has no interest in preventing distributors that do serve that area from having access to programming.

The Commission observes that, unlike § 628(c)(2)(D), § 628(c)(2)(C) does not except from its prohibition exclusive contracts that the Commission determines to be in the public interest. NPRM ¶ 28. The Commission asks whether this distinction indicates that such exclusive arrangements are *per se* violations of the statute.

28/ Or, to be more precise, whether a particular area was served on October 5, 1992. Section 628(c)(2)(C) speaks of "areas not served by a cable operator as of the date of enactment of this section".

Id. TWE believes that, if an exclusive contract otherwise falls within the proscriptions of § 628(c)(2)(C), the language of the statute would seem to indicate that it is prohibited. For one thing, § 628(c)(2)(C) omits the "public interest" language of § 628(c)(2)(D). For another thing, § 628(c)(4) says that it provides public-interest criteria "for purposes of paragraph (2)(D)".

The Commission also asks whether it is significant that § 628(c)(2)(C) prohibits "practices, understandings, arrangements, and activities, including exclusive contracts", whereas § 628(c)(2)(D) prohibits only "exclusive contracts". NPRM ¶ 30. Assuming that the significance of this difference is that the Commission has the power under § 628(c)(2)(C) (which it lacks under § 628(c)(2)(D)) to regulate practices other than exclusive contracts, TWE submits that the Commission should not exercise it at this time. See supra p. 13.

In particular, there is no reason why the Commission should forbid subdistribution agreements. NPRM ¶ 32. In a subdistribution agreement, a programming vendor grants a distributor the right to subdistribute its programming to other distributors in a specified area. The Commission recognizes that only subdistribution agreements with cable operators raise concerns. See NPRM ¶ 32. Thus, there can be no argument that subdistribution agreements with entities other than cable operators should be prohibited. 29/

Moreover, § 628(c)(2)(C) comes into play only if an unfair practice prevents distribution of programming in uncabled areas. If a multichannel competitor is required to purchase programming from a local cable operator in a given franchise area, that area is necessarily "served by cable" and therefore not within the scope of § 628(c)(2)(C). In areas served by cable, § 628(c)(2)(D) prohibits only exclusive contracts, subject to the public interest criteria, but it does not prohibit other "practices, understandings, arrangements or activities". Accordingly, subdistribution agreements with cable operators could come within the scope of § 628(c)(2)(C) only if a multichannel competitor proposes to distribute programming in adjacent, uncabled, areas.

In any event, TWE submits that subdistribution agreements with cable operators should not be unlawful under any circumstances. Subdistribution agreements do not "prevent" a distributor from "obtaining" programming, as § 628(c)(2)(C) requires. To the contrary, they make

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29/ HBO, for example, has agreements with wholesalers that subdistribute programming to SMATV operators.

programming more readily available. And, subdistribution agreements generate efficiencies in that the subscriber base of small distributors (SMATV operators in particular) usually does not justify the transaction costs associated with direct affiliation. Moreover, subdistribution arrangements allow a cable operator to compensate itself for its competitors' "free riding" on its marketing efforts. 30/ Finally, cable operators are ideally positioned to act as subdistributors because of their local presence and billing apparatus. 31/

The Commission suggests that a practice can be unfair under § 628(c)(2)(C) if it restricts or inhibits a distributor in obtaining programming. NPRM ¶ 34. TWE submits that it is not enough that a practice merely restrict or inhibit access: Section 628(c)(2)(C) speaks only of practices that "prevent" a distributor from

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30/ Free riding occurs when a distributor (say, a SMATV operator) benefits from the promotional activities of another distributor (usually a cable operator) on behalf of a programming service, without engaging in such activities itself.

31/ Subdistribution is not the only method by which HSD owners can obtain programming from TWE. HSD owners can subscribe to the HBO Service and Cinemax by dealing directly with HBO or can subscribe through packagers. HBO also authorizes some HSD hardware dealers to sell subscriptions.

obtaining programming, and this language should be read literally. 32/

The "prevent . . . from obtaining such programming" requirement of § 628(c)(2)(C) differs from the "hinder significantly . . . from providing satellite cable programming" requirement of § 628(b). "Prevent" poses a more exacting test than "hinder significantly". "Prevent" means to make altogether impossible, whereas "hinder significantly" means to make more difficult. Congress used both terms in § 628(b), so it is clear that Congress knew the difference between the two. 33/

The Commission asks whether it should read § 628(c)(2)(C) to impose upon programming vendors a duty to sell to unaffiliated distributors in areas not served by

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32/ See, e.g., Chevron, U.S.A., Inc. v. National Resources Defense Council, Inc., 467 U.S. 837, 842-43 (1984) ("If the intent of Congress is clear, that is the end of the matter; for the . . . agency must give effect to the unambiguously expressed intent of Congress").

33/ The two requirements differ in another respect. Under the "hinder-significantly" requirement of § 628(b), a distributor must show that it is hindered significantly in providing any programming, that is, that the unfair act of which it complains jeopardizes its competitive viability. Under the "prevent" requirement of § 628(c)(2)(C), a complainant must merely show that it has been prevented from obtaining "such" programming, that is, the particular programming service marketed by the defendant. See supra note 8. Of course, like any other complainant under § 628, a § 628(c)(2)(C) complainant must still show that this prevention "hindered significantly" its providing any programming at all.

cable. NPRM ¶ 34. TWE submits that it should not. The language of this section says nothing about a duty to sell, and, if Congress had wished to impose a duty to sell, it would have known how to do it. An earlier House bill prohibited vertically integrated programming vendors from unreasonably refusing to deal with any multichannel distributors, see H.R. 4850, 102d Cong., 2d Sess. § 11(a)(1)(A) (1992), and expressly said that exclusive contracts denying distributors access to programming in rural areas not served by cable "shall be considered to be an unreasonable refusal to deal". Id. § 11(a)(1)(B)(3). That language does not appear in § 628(c)(2)(C), making clear that Congress did not intend to impose a duty to deal with distributors in uncabled areas. 34/

(b) Section 628(c)(2)(D).

TWE agrees with the Commission's proposal to enforce § 628(c)(2)(D) through the complaint process. NPRM ¶ 33. A prior-approval system would be unduly burdensome to the Commission and programming vendors.

34/ See, e.g., INS v. Cardoza-Fonseca, 480 U.S. 421, 442-43 (1987) ("Few principles of statutory construction are more compelling than the proposition that Congress does not intend sub silentio to enact statutory language that it has earlier discarded in favor of other language") (internal quotation marks omitted).