

The public-interest exception recognizes that exclusive programming-distribution agreements can be beneficial. The benefits of such agreements were documented at length in the NTIA's analysis of vertical integration in the cable industry. 35/ The report emphasized that exclusive agreements are legitimate business practices that benefit both programming vendors and cable operators. 36/ Exclusive arrangements eliminate the free-rider problem. 37/ And, exclusive arrangements guarantee the uniqueness of the operator's programming and thereby distinguish cable from other video distribution media. 38/

Section 628(c)(4) specifies five factors that the Commission must consider in making the public-interest determination. These factors are:

(a) "the effect . . . on the development of competition in local and national multichannel video programming distribution markets";

(b) "the effect . . . on competition from multichannel video programming distribution technologies other than cable";

35/ See 1988 NTIA Report 90-92.

36/ See id. at 104-06.

37/ See id. at 105.

38/ Id.

(c) "the effect . . . on the attraction of capital investment in the production and distribution of new satellite cable programming";

(d) "the effect . . . on diversity of programming in the multichannel video programming distribution market"; and

(e) "the duration of the exclusive contract".

The Commission asks commenters whether a rule could be established in advance saying that, in certain specific instances, exclusive agreements are presumptively permissible. NPRM ¶ 36. TWE agrees that this is a sound and practical approach, although TWE believes that it would be even better if the Commission promulgated a rule identifying circumstances in which exclusive agreements are per se valid.

The Commission suggests that exclusive agreements offered by new programming services should be permitted. NPRM ¶ 36. TWE agrees. Exclusive agreements for new programming services have proven an important tool in successfully launching new programming services. Thus, such agreements have a beneficial effect on "the attraction of capital investment in the production and distribution of new satellite cable programming", § 628(c)(4)(C), and on "diversity of programming in the multichannel video programming distribution market", § 628(c)(4)(D). Moreover, for the reasons set out above, see supra p. 12, such

agreements have no detrimental effect either on the "development of competition in local and national multichannel video programming markets", § 628(c)(4)(A), or on "competition from multichannel video programming distribution technologies other than cable", § 628(c)(4)(B). However, TWE submits that the Commission should consider such exclusive agreements valid if their term does not exceed ten years. A promise of exclusivity for less than ten years may not be sufficiently valuable to distributors to persuade them to carry a new service.

C. Enforcement.

The Commission proposes a complaint process in which a defendant would not be able to file a separate motion to dismiss or for summary judgment, and would instead be required to include such motions in the answer.

NPRM ¶ 39. TWE doubts that this procedural abbreviation would yield much expedition, and believes that it may result in unfairness to defendants if the time to answer is short. A 20-day answer period, as suggested by the Commission, NPRM ¶ 40, may be too brief for a defendant fully to explore its defenses, especially in the months and perhaps years immediately following promulgation of the Commission's rules. Thus, TWE suggests that the Commission should allow a programming vendor at least 30 days to file an answer.

The Commission asks commenters to suggest an appropriate standard by which it could determine whether a complainant has made out a prima facie case. NPRM ¶ 42. TWE understands the Commission to propose that any complainant that succeeds in making out a prima facie case becomes entitled to discovery. TWE submits that, in crafting an appropriate standard for determining whether a complainant has made out a prima facie case, the Commission should keep in mind the potential for abuse of its discovery procedures for "fishing expeditions". Accordingly, a complainant should be required to come forward with more than mere allegations or hunches. Indeed, for this reason, the Commission should require any complaint to be verified and accompanied by affidavit or documentary evidence.

The Commission asks whether it should establish one single prima facie standard or separate standards depending on the unfair practice alleged. NPRM ¶ 42. TWE submits that, with respect to the distributor's burden under the "hinder significantly" requirement, there is no need for separate standards. In all cases, the Commission should require a complainant to show by affidavit or documentary evidence that the unfair practice of which it complains endangers its viability as a competitor.

However, with respect to the "unfair practice" requirement, different standards are in order. In the case of an undue-influence claim, the Commission should require, at a minimum, affidavit or documentary evidence showing that a communication from a cable operator to a programming vendor occurred. In the case of a discrimination claim, the Commission should require, at a minimum, affidavit or documentary evidence showing that the defendant extended a competitor of the complainant more favorable terms. In the case of an exclusive-arrangement claim, the Commission should require, at a minimum, affidavit or documentary evidence showing the existence of the exclusive arrangement.

The Commission asks how much discovery it should permit as of right. NPRM ¶ 45. TWE submits that the Commission should never permit a complainant any discovery as of right, and should instead require a complaint to show a particular need for discovery. Moreover, to limit the number of discovery disputes and to prevent fishing expeditions, TWE submits that discovery orders should specify permitted discovery requests.

The Commission seeks comment on remedies for violations. NPRM ¶ 49. TWE recognizes that § 628(e)(2) gives the Commission the power not only to set prices, terms and conditions, but also to order forfeitures. However, TWE

submits that the Commission should reserve that remedy for extraordinary cases, such as wilful or repeated violations.

D. Other Programming-Distribution Issues.

1. Geographical Limitations.

The Commission inquires how it should implement § 628(c)(3)(A). NPRM ¶ 50. That provision says:

"GEOGRAPHIC LIMITATIONS. -- Nothing in this section shall require any person who is engaged in the national or regional distribution of video programming to make such programming available in any geographic area beyond which such programming has been authorized or licensed for distribution."

628(c)(3)(A). It is not immediately clear whether "any person who is engaged in the national or regional distribution of video programming" refers to a programming vendor or a distributor. The bill passed by the Senate contained an exemption similar to that quoted above.

However, it was preceded by:

"For purposes of this section, any video programmer who licenses video programming for distribution to more than one cable community shall be considered a regional distributor of video programming."

S. 12, § 640(f) (emphasis added). Accordingly, TWE believes the exemption refers to programming vendors, not to distributors.

In contracts with fight promoters for the right to televise a professional boxing match, HBO often promises that the bout will not be televised in the area where it is

staged. (Otherwise, boxing fans might stay home and watch the bout on the HBO Service instead of coming to the stadium to see it live.) HBO's contracts with affiliates usually permit HBO to require that the affiliate black out the bout in the area where it takes place (or, indeed, in any area in for which HBO has not obtained exhibition rights). TWE does not believe that this practice violates § 628, statutory exceptions aside. ^{39/} However, in the event that the Commission were to disagree with that assessment, TWE submits that the geographical-limitations provision specifically excepts this practice from the scope of § 628.

2. Frivolous Complaints.

Section 628(f)(3) requires the Commission to "provide for penalties to be assessed against any person filing a frivolous complaint pursuant to this section". The Commission asks what should constitute a frivolous complaint and what guidelines it should use in setting penalties. NPRM ¶ 53. TWE notes that the quoted language is mandatory so that the Commission must sanction any party who files a frivolous complaint. TWE proposes that the Commission

^{39/} Because HBO insists on terms and conditions requiring black outs equally with respect to all affiliates, TWE does not believe that this gives rise to "discrimination". Moreover, because HBO implements black outs across distribution technologies, TWE fails to see how black outs could cause competitive injury to any one distributor.

should consider any complaint that fails to make a prima facie showing to be frivolous. Alternatively, TWE proposes that the Commission adopt the standard of Rule 11 of the Federal Rules of Civil Procedure, which empowers federal courts to sanction litigants for filing a paper that is not "well grounded in fact and . . . warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law" or that is "interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation".

As to the appropriate amount of a sanction, TWE believes the forfeiture should at least equal the expenses incurred as a result of the frivolous complaint. The sanction should include the expenses, including a reasonable attorney's fee, incurred by the party opposing the frivolous complaint, as well as the expenses incurred by the Commission in the process of investigating the complaint.

II. PROGRAM-CARRIAGE AGREEMENT ISSUES

Section 616 requires the Commission to promulgate regulations regarding program-carriage agreements between multichannel video programming distributors and video programming vendors. Under § 616(a), the regulations must:

(a) "include provisions designed to prevent a cable operator or other multichannel distributor from requiring a financial interest in a program service as

a condition for carriage on one or more of such operator's systems";

(b) "include provisions designed to prohibit a cable operator or other multichannel video programming distributor from coercing a video programming vendor to provide, and from retaliating against such a vendor for failing to provide, exclusive rights against other multichannel video programming distributors as a condition of carriage"; and

(c) "contain provisions designed to prevent a multichannel video programming distributor from engaging in conduct the effect of which is to unreasonably restrain the ability of an unaffiliated video programming vendor to compete fairly by discriminating in video programming distribution on the basis of affiliation or nonaffiliation of vendors in the selection, terms, or conditions for carriage".

Under § 628(c)(1) the Commission must prescribe regulations within 180 days of enactment of the 1992 Cable Act (that is, before April 4, 1993), but under § 616(a), it need not prescribe regulations until "[w]ithin one year after the enactment" of the Act (that is, before October 5, 1993). While TWE recognizes that §§ 628 and 616 raise issues that are somewhat similar, it submits that there is no reason to proceed under § 616 with the break-neck speed required under § 628, and that the Commission should therefore stay its rulemaking under § 616 until after it has completed its rulemaking under § 628. However, TWE reserves the right to respond to comments from others in its reply comments.

Conclusion

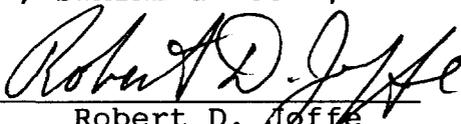
TWE submits that the Commission should generally interpret § 628 in light of Congress's concern with vertical integration. Moreover, the Commission should adopt rules that minimize the burden on its own resources and disruption to the industry.

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Respectfully submitted,

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