

by the receiving party to further its competitive business activities, to lobby Congress, or to initiate rulemaking proceedings at the Commission. Finally, the confidentiality order should permit parties to redact proprietary information in any publicly available filing, prohibit parties receiving proprietary information from including that information in the publicly available version of any filing, and provide for removal of any such information erroneously included by an opposing party.

4. Sanctions For Frivolous Complaints
Should Include The Attorneys' Fees
And Costs Of Respondent.

The Commission proposes "to assess monetary forfeitures for frivolous complaints" and seeks comment on other penalties to be assessed in such cases. NOPR at ¶53. In addition to forfeitures, the Commission should sanction parties filing frivolous complaints by requiring those parties to pay the reasonable attorneys' fees and costs of the respondent to the complaint.

The provisions of Fed. R. Civ. P. 11 include appropriate standards for assessing such sanctions. The rule states in part that an attorney's signature certifies that, "after reasonable inquiry," the pleading is:

well grounded in fact and is warranted by existing law or good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose....

Fed. R. Civ. P. 11.²⁰ Rule 11 provides for an objective standard for evaluating the reasonableness of an attorney's conduct and mandates the imposition of sanctions if the Rule is violated. The Rule does not prohibit only intentional misconduct. Inexperience, incompetence, willfulness or deliberate choice may all contribute to a violation. Moreover, the purposes of Rule 11 include not only compensating the victims of the Rule 11 violation, but also punishing litigation abuse, streamlining court dockets and facilitating court management.²¹ Thus, Rule 11 standards are consistent with the Commission's objective of discouraging frivolous complaints through appropriate sanctions.

VI. The Prohibition Of Coercion Under Section 616 Does Not Preclude Discussion Of Financial Interests And Exclusivity.

Section 616 requires the Commission to adopt regulations "governing program carriage agreements and related practices" between multichannel video programming distributors and

²⁰ See also D.C. Code of Professional Responsibility DR 7-102(A) (1983); D.C. Rules of Professional Conduct Rules 3.1, 3.3 (1990).

²¹ See In re Kunstler, 914 F.2d 505, 522-23 (4th Cir. 1990), cert. denied, 111 S. Ct. 1607 (1991). Likewise, imposition of discovery sanctions similar to those enumerated in Fed. R. Civ. P. 37 would deter abusive objections or evasive answers and unnecessary motions to compel. See supra at 63-64.

"video programming vendors."²² Specifically, the Commission is directed to adopt regulations to prevent cable operators or other multichannel video programming distributors from: (1) "requiring a financial interest in a program service" or "coercing a video programming vendor to provide" exclusive rights as a condition of carriage; (2) "retaliating against" a programming vendor refusing to provide exclusivity; and (3) unreasonably restraining "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 [programming] vendors." Section 616(a)(1)-(3). The Commission seeks comment on "how best to implement those provisions." NOPR at ¶56.

Although the Commission is required to adopt regulations prohibiting multichannel video programming distributors from "requiring" or "coercing" financial interests or exclusivity arrangements from programming vendors "as a condition of carriage," the statute does not prohibit distributors from obtaining such financial interests or, subject to the provisions of Section 628, exclusive rights. Indeed, as set forth supra at 47-50, the Commission previously has identified the potential benefits of exclusivity. Likewise, the Commission has recognized that prior cable operator investments in new

²² A "video programming vendor" is defined as any person "engaged in the production, creation or wholesale distribution of video programming for sale." Section 616(b).

and existing services have expanded and preserved programming diversity. See Report to Congress, 5 FCC Rcd. 4962, 5008-10 (1990).

Because such financial interests and exclusive rights not only are permissible commercial issues for negotiation, but also may offer public interest benefits, the Commission should narrowly draw its regulations to avoid preempting discussion of such issues during the normal course of program development and carriage negotiations. Instead, the Commission should consider complaints of coercion only where a distributor allegedly has exerted pressure on the programmer beyond mere negotiations. For example, the Commission's rules should address concerted action among distributors and threats of external pressure (e.g. threats to drop or reposition a vendor's other programming) to extract prohibited concessions from programmers. A distributor's unilateral decision not to carry a service in and of itself provides no evidence of coercion or retaliation. See, e.g., Monsanto v. Spray-Rite Serv. Corp., 465 U.S. 752, 760 (1984).

In all proceedings under Section 616, the Commission should require direct evidence of the alleged discrimination, coercion or retaliation.²³ Absent this threshold requirement,

²³ Discrimination for purposes of Section 616 should take into account the channel occupancy limits to be established by the Commission pursuant to Section 11 of the 1992 Cable Act. Thus, a cable operator's compliance with the applicable channel occupancy limits should be an absolute defense to any

every program vendor denied carriage by a multichannel video programming distributor will claim that it is the victim of discrimination, coercion or retaliation.

Conclusion

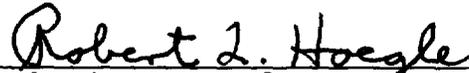
Notwithstanding the Commission's preference for broadly applicable rules and Liberty's desire for definitive guidelines to facilitate compliance with the statute, the numerous differences among programming services, distribution technologies and operations, marketing methods, customer needs, and competitive conditions preclude a single "bright line" standard of discrimination. Liberty respectfully submits that the Commission narrowly target its rules to the prohibited conduct and harm identified by Congress -- unfair and discriminatory acts or practices which cause competitive injury by significantly impeding the distribution of programming. Rules which fail to recognize these differences

claim by an unaffiliated programming vendor that it was denied carriage in favor of programming in which the cable operator holds an attributable interest.

or do not narrowly implement the prohibition in Section 628
will stifle competition and decrease diversity.

January 25, 1993

Respectfully submitted,



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