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

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

COMMENTS OF DISCOVERY COMMUNICATIONS, INC.

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List A B C D E

TABLE OF CONTENTS

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COMMENTS OF DISCOVERY COMMUNICATIONS, INC.

I. INTRODUCTION

Discovery Communications, Inc. ("Discovery") submits these comments in response to the Notice of Proposed Rule Making in the above-referenced proceeding. Discovery has a vital interest in this proceeding. It is owned by three cable multi-system operators, and it owns and operates The Discovery Channel and The Learning Channel. Both channels provide programming to cable operators and other multichannel video distributors on a nondiscriminatory basis.

The Discovery Channel was founded in 1985 to reach an audience not adequately served by existing over-the-air broadcasters. The Discovery Channel features nonfiction documentaries about science, nature, technology, human events, and history. The Discovery Channel now reaches about 59 million subscribers and is one of the most enjoyed and appreciated cable networks in the country.

Discovery acquired The Learning Channel in 1991 and is continuing to upgrade its programming. It features educational programs on subjects such as history, science, archeology, and anthropology for viewers of all ages. It also provides six hours of commercial-free educational programming for preschoolers every weekday morning. Discovery's mission for both channels is to use the power of television to educate and entertain viewers.

Discovery has challenged the constitutionality of various provisions of the Cable Television Consumer Protection and Compliance Act of 1992 ("the Cable Act"), including section 19. Section 19 is unconstitutional on its face. It singles out for disfavored treatment programmers affiliated with cable operators, but not for anyone else. For other economic entities, the presumption works in the opposite direction: they may freely engage in differential pricing or exclusivity arrangements, subject to challenge by a claimant who can prove injury to competition.

To the extent that section 19 of the Cable Act imposes strictures on vertically integrated entities beyond those imposed by generally applicable antitrust laws, that extra burden is an unconstitutional targeting of a protected medium of expression.[1/] Discovery submits these comments without prejudice

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1/ See Riley v. National Federation of the Blind of N.C., 487 U.S. 781 (1988) (despite finding of widespread fraud, government cannot impose special burdens beyond laws of general applicability on fees and disclosures of charity fundraisers); Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue, 460 U.S. 575 (1983) (even where content

Continued

to its facial constitutional challenge of section 19 of the Cable Act. The possibility that the Commission may adopt regulations does not interdict a facial challenge to the constitutionality of the underlying statute.2/

II. **SUMMARY**

In drafting regulations, the Commission should keep five principles in mind. First, the Commission should rely on the marketplace to the greatest extent possible. Second, the Commission's regulations should recognize marketplace realities. Third, the regulations should be targeted at anticompetitive conduct imposed on programmers by cable operator owners and should not seek to restruture the market or discourage vertical integration. Fourth, the regulations should seek to minimize regulatory burdens on the Commission and on the industry. Fifth, the Commission should focus on conduct that threatens significant competitive injury.

Consistent with these basic principles, "attributable interest" should be defined to mean control, since only a cable operator who actually controls a programmer can force it to engage in conduct against its interests. Similarly, the Commission's regulations should proscribe price discrimination

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discrimination is not at issue, government cannot target media with a tax that is not generally applicable); Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974) (benign goal of "diversity" cannot justify compelling newspapers to publish replies to its editorials).

2/ See Nixon v. Administrator of General Services Administration, 433 U.S. 425, 439 (1977).

and exclusive dealing only when they threaten to injure competition.

To ease the Commission's regulatory burden and to allow for efficient planning by industry members, the Commission should establish safe-harbors whenever possible. In particular, the Commission should provide that programmers who in fact do a substantial amount of business with alternative technology distributors are exempt from the proscriptions of the Cable Act no matter who owns them. Similarly, to the extent that a practice is routinely engaged in by nonintegrated programmers, it should be presumed to fall outside the prohibitions of section 19 of the Cable Act.

III. GUIDING STATUTORY AND POLICY PRINCIPLES

In adopting regulations for Section 19 of the Cable Act, Discovery believes that the Commission must consider the following guiding principles if its rules are to produce an effective regulatory scheme consistent with Congress' goals and with the public interest: (1) Reliance on the marketplace to the greatest extent possible; (2) Recognition of marketplace realities; (3) Targeting anticompetitive conduct imposed on vertically integrated programmers by their MSO owners; (4) Limiting the regulatory burden on both the Commission and the regulated; and (5) Proscribing only conduct that injures competition.

A. **The Commission Should Rely On The Marketplace To The Greatest Extent Possible.**

The Act provides, "it is the policy of the Congress. . .to rely on the marketplace, to the maximum extent feasible, to achieve. . .availability to the public of a diversity of views and information." Cable Act § 2(b)(2). Therefore, the Commission rules should therefore intercede only when necessary to remove or prevent impediments to competition that threaten to deprive consumers of the advantages of diverse programs.

Congress wisely incorporated a policy of reliance on the marketplace in the Cable Act. The unfettered market has in the past few years contributed significantly to the founding and growth of the numerous cable program services that are now available to consumers. No one disputes the inherent diversity of cable program services available, and the Commission should be wary of regulations designed to compel more diversity. Well-intended regulations in the past have undermined the creative force of the marketplace. Even the most benign government intention to foster "diversity" may fail to achieve what market freedom could achieve. Diversity will continue to emerge if the marketplace continues to offer economic opportunities to investors.

In adopting rules in this proceeding, the Commission should be vigilant to preserve the gains achieved by market freedom, which include vertical integration. The Commission should avoid any regulatory burdens that discourage vertical integration or investment by cable operators in new programming, which could undermine current market vitality. The legislative history of the programming diversity provisions embodied in Section 19 of the Cable Act reflects a congressional concern about individual abuses of "market power" by cable operators "vis-a-vis video programmers and consumers", not a desire to restructure the current market. Cable Act § 19(b)(5).

In sum, instead of attempting to override normal market dynamics, the Commission's regulations should be narrowly tailored to proscribe specific, potentially anticompetitive practices that threaten the competitive operation of the marketplace.

B. The Commission Must Recognize Marketplace Realities

To be faithful to the Congressional policy of relying on the marketplace, the Commission's regulations must take cognizance of the realities of the marketplace, which include (a) the importance of vertical integration to the development of new and diverse programming, (b) programmers' reliance on advertising revenues, and the relation between those revenues and the number of a programmer's subscribers, (c) the marketplace necessity of charging fair rates, and (d) the role of localized decision-making by cable systems in choosing programming.

1. The Importance of Vertical Integration

Cable operator ownership of program services has increased the quality and quantity of programming services available to the viewing public. For example, TNT, CNN, The Discovery Channel, C-SPAN and E probably would not exist any longer but for their cable operator investors. The Commission's Notice correctly recognizes, as should its regulations, that "[v]ertical integration . . . contributes to an enriched quality of existing programming services, given that a cable operator has a strong incentive to increase its penetration by making the programming that it offers more attractive to potential subscribers." Notice ¶ 7. The benefits secured by vertical integration include: (1) promoting the introduction of new services by providing needed capital; and (2) stimulating the production of new original programming enhancing diversity. See 1990 FCC Rept. at 5008-10, ¶¶ 82-86.

The Discovery Channel's own experience illustrates the benefits of vertical integration. Although The Discovery Channel is now the fifth largest cable network, available to 97% of households wired for cable television, it initially experienced hard times. Its founder and Chairman, John Hendricks, described by Business Week as "the conscience of cable TV," had difficulty finding investors and had to mortgage his own house for start-up capital. After making more than 400 presentations, he persuaded approximately 30 individuals and several venture capital firms to invest a total of $5 million (far short of the $25 million which was needed for sustained operations), and the channel was launched in June 1985. By the end of that year it had run out of money. Companies such as Coca-Cola and Disney were approached for funding, but showed no interest. The Chronicle Publishing Corp. tentatively agreed but then backed away from making a $6 million investment which would have given it control of 40% of the company.

The Discovery Channel survived only because, when no one else was willing to fund the channel, Tele-Communications Inc. ("TCI") agreed to invest in the channel to encourage the development of original programs for cable television.3/ Three other cable companies, Cox Communications, NuChannels Corp. and United Cable Television Corp. also invested in Discovery at the same time.

Given the demonstrable advantages of vertical integration, the Commission should not equate vertical integration with anticompetitive conduct. Nor should the Commission assume that vertical integration results in programmer favoritism toward its owners.

Despite the ownership interests of the cable operators, the cable operators who have invested in The Discovery Channel receive no preference from either The Discovery Channel or The Learning Channel. The Discovery Channel has no exclusive contracts with any of its cable operator investors. Both channels provide programming to all willing buyers. The

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3/ This Commission has noted that "on several occasions, MSO investment has enabled a programming service to remain in operation when it otherwise would have been forced to discontinue its programming" and that "vertical integration by MSOs with significant subscribership has contributed to program diversity by providing financial support for faltering program services." 1990 FCC Rpt. at 5009, ¶ 83 (citing as examples The Discovery Channel and TCI's financial backing of Black Entertainment Television).

Discovery Channel currently provides programming to approximately 75% of the alternative technology market, and has received awards citing Discovery's cooperation with alternative technology distributors.4/

Nor have The Discovery Channel and The Learning Channel obtained preferential treatment from Discovery's cable operator owners. The Learning Channel reaches less than 25% of both TCI's and Newhouse's subscriber base, and just over one half of Cox's.5/ And The Discovery Channel, despite its national distribution to almost 59 million subscribers, is only now being added by a premier TCI cable system in Westchester County, New York, a cable system viewed as critically important by programmers because so many major advertising executives live in its franchise area.

Moreover, neither The Discovery Channel nor The Learning Channel get more favorable channel positions on systems owned by their owners. As the Commission knows, channel positioning is a crucial factor in garnering new viewers.

4/ For example, the Wireless Cable Association named Discovery "Programmer of the Year" in 1991.

5/ TCI has a subscriber base of 13 million, of which The Learning Channel reaches only 3.2 million. Cox has a subscriber base of 1.7 million of which 997,000 subscribe to The Learning Channel. Newhouse has a subscriber base of 1.2 million, out of which 271,000 subscribe to The Learning Channel.

2. Advertising Revenues are Crucial to Programmers' Success.

Programmers need advertising revenue to succeed. The cost of programming is too expensive for programmers to rely on affiliate fees alone.

The amount of advertising revenue is directly related to the size of a program service's subscriber base. Until a program service reaches a critical mass of viewers, approximately 12 to 14 million, Nielsen will not meter the service and advertisers thus will not purchase time on the service. Advertisers have many other options, and many advertisers have significantly higher viewer thresholds than Neilsen's before they will purchase time on a program service.

Because of the desire to obtain advertising revenue, all programmers offer volume discounts to cable systems. Generally, programmer's rates to a program distributor go down as the number of distributor subscribers taking the programming service goes up.

To get to that critical mass of subscribers, The Discovery Channel initially provided its programming at no cost to cable operators who were willing to carry it. Although these nonpaying systems later became paying systems, Discovery could not subject these systems to the rate increases which will be necessary to have prices reflect market power. Although there have been significant rate increases, those original Discovery customers still receive below market rates. As further discussed later, the Commission regulations should account for this historical market reality.

To maximize its advertising revenues, Discovery sells to all interested customers, including alternative technology distributors. As noted above, the Discovery Channel now reaches approximately 75% of the subscribers who use alternative technologies. Discovery also routinely attends trade shows for alternative technology distributors and aggressively seeks new ways to increase its subscriber base.[6/]

3. To Succeed in the Marketplace, Programmers Must Provide Fair Terms.

To be able to market its service successfully, a cable programmer must be perceived throughout the industry as having fair prices and terms. Discovery does not in any way give preferential treatment to its owners, because to do so would not be in Discovery's best interest. Its decisions are made on the basis of what is best for The Discovery Channel and The Learning Channel as programmers. If Discovery's (or any other programmer's) pricing and other contract terms were perceived in the industry as favoring its owners, it could deter potential cable system customers from carrying its services, a consequence, which given the need for broad distribution, few cable programmers could afford.

Discovery cannot rely solely on its owners' subscribers for its subscriber base. If it did, then The Discovery Channel's

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6/ Among the alternative technology trade shows that Discovery attends are the National Private Cable Show, the National Wireless Cable Show, and national and regional meetings of the SCBA.

subscription base would go from 59 million to approximately 16 million subscribers, assuming all of its owners' subscribers took The Discovery Channel. Neither The Discovery Channel nor The Learning Channel would survive if they were captive to Discovery's cable company investors.

Thus, The Discovery Channel offers the same rate cards to cable operators, SMATV, and MMDS systems who initially licensed The Discovery Channel at the same time. Although Discovery charges higher rates to TVROs, the higher rates are primarily a function of added costs, including tier-bit and scrambling-feed costs, and are no higher than rates charged to TVROs by other comparable nonintegrated programmers.

4. Cable Systems Make Programming Decisions at the Local Level.

For the most part, each local cable operator makes carriage decisions with respect to its own system, even when it is part of a large MSO. As a practical matter, the vast majority of MSO owners do not dictate programming to their local cable system manager. For this reason, cable programmers such as Discovery have regional offices and make regular and frequent local sales calls on cable systems.

Because MSO owners do not dictate program choices, The Learning Channel still is not carried on most of the cable systems owned by TCI and Newhouse, even though those companies have an ownership interest in The Learning Channel. See page ____, supra.

The absence of centralized decision-making by cable operators substantially reduces the risk that cable operators will attempt to abuse any ownership interest in programmers. Accordingly, the Commission safely can tailor its regulations to specific instances of abusive conduct.

C. The Commission's Rules Should Target Anticompetitive Conduct Imposed On Programmers By Their MSO Owners.

The Cable Act reflects a concern that cable operators with ownership interests in programmers might abusively exercise "undue market power vis-a-vis video programmers and consumers." Cable Act §2(b)(5). Specifically, Congress was concerned that cable operators who owned programmers would cause those programmers to act in ways that would benefit their owners rather than the programmer, such as refusing to sell programming to alternative technology distributors or engaging in justified price discrimination favoring the cable operator owners. Accordingly, in drafting regulations the Commission should seek to identify such abuses by looking for conduct that is both anticompetitive and aberrational to programmers owned by cable operators.

Thus, conduct that is common to both integrated and nonintegrated programmers, such as volume discounts, should not concern the Commission. There is no suggestion in the Act or its legislative history that Congress intended that integrated programmers act differently than nonintegrated ones.

D. <u>The Commission's Rules Should Limit The Regulatory Burden On The Commission And The Industry.</u>

In drafting regulations the Commission should also minimize the regulatory burden on both the Commission and the cable industry. If the Commission construes its mandate too broadly and attempts to regulate all aspects of cable programmer behavior that could affect the availability of programming to alternative technologies, the Commission could easily become enmeshed in a costly and ultimately counter-productive task. To avoid such a result, the Commission's regulations should focus on true abuses of vertical relationships that threaten significant injury to consumers, as will be further discussed in the next section.

Moreover, to ease the burden on regulated programmers and allow for reliable business planning, the Commission regulations should provide for safe-harbors wherever possible. Congress' desire for programming diversity would be frustrated if overbroad regulations paralyzed creativity among cable programmers. Programmers such as Discovery who are acting in their own best interest -- no matter who their owners may be -- should not be subjected to constricting regulatory burdens and uncertainty.

E. <u>The Commission Should Focus On Conduct That Threatens Significant Injury To Competition.</u>

As its name indicates, the Cable Television Consumer Protection and Competition Act of 1992 was enacted to prevent conduct that could injure <u>consumers</u>. Thus, in drafting regulations the Commission should attempt to distinguish between conduct that could harm viewers and conduct that does not have that potential. The latter conduct should not be interfered with in deference to Congress' express preference to rely on the marketplace to the greatest extent possible. Cable Act § 2(b)(2).

Consumer injury is not threatened every time any noncable multichannel video programming distributor cannot obtain its first choice of programming. The competitive process necessarily hurts individual competitors as programmers express a normal preference for the most efficient means of distribution. The possibility of consumer injury arises only if alternative technology distributors or other multichannel video programming distributors cannot obtain sufficient programming to provide competition to entrenched cable operators in markets where there is no effective competition. The Commission's regulations should focus on that concern.

Significantly, the Cable Act draws its operative concepts of "unfair methods of competition" and "unfair or deceptive acts or practices" from identical language in Section 5 of the Federal Trade Commission Act. The Commission should similarly draw from the Federal Trade Commission's interpretation of these terms, which links them to injury to consumers. See Federal Trade Commission Statement of Policy on the Scope of Consumer Unfairness Jurisdiction, 4 Trade Reg. Rep. (CCH) ¶ 13,203 (evaluating "unfairness" in terms of "consumer injury") (1980); (FTC Policy Statement on Deception, 4 Trade Reg. Rep. (CCH) ¶ 13,205 (harm to consumers is required to establish deception)

(1983). Indeed, recent antitrust decisions stressing the paramount importance of maximizing consumer welfare, not just protecting competitors, serve as a useful guide to the Commission. See e.g., Reiter v. Sonotone Corp., 442 U.S. 330 (1979).

IV. APPLICATION OF THE PRINCIPLES

A. General Program Access Provisions

1. Definition of Attributable Interest

The Notice asks for comment on the definition of "attributable interest" for the purpose of determining whether a cable programmer is vertically integrated with a cable operator. Notice ¶ 9. As the Notice observes, Congress did not adopt the Senate version which would have used the attribution criteria for the broadcast industry set forth in 47 C.F.R. § 73.3555. At the outset, therefore, the Commission should reject that broadcast standard for "attributable interest", which in any event is far more inclusive than necessary to achieve Congress' intent when it passed the Cable Act.

The Commission should tailor the definition of "attributable interest" to Congress' concern that a cable operator might coerce a programmer to act in the cable operators' best interest rather than the programmer's best interest, thereby restricting the output of programming to consumers. To have the power to coerce, a cable operator must have the power to control. Thus, "attributable interest" should be defined as control.

The Commission should define control either as (i) holding 50% or more of the outstanding voting securities or (ii) having the contractual power to designate 50% or more of the directors of a corporation (or in the case of unincorporated entities, individuals exercising similar functions). This definition is based on the definition of "control" found in the FTC's Premerger Notification Rules (16 C.F.R. § 801.1(b)), which have proven to be a satisfactory, workable threshold for identifying transactions which have the potential to injure competition. 15 U.S.C. § 18(a).

In determining whether the control threshold is met, the interests of independently owned cable companies should not be aggregated unless there is an agreement between the companies effectively creating a common ownership group. Although a minority shareholder can exercise influence, it cannot coerce a cable programmer to act against its own best interests unless it actually can exercise control.

To the extent that "attributable interest" is defined as anything less than control, the regulations should adopt a behavioral test, which if satisfied, would exempt the programmer from the restrictions that would otherwise apply. For example, the regulations could provide that to the extent an integrated programmer does in fact reach more than 50% of subscribers to the alternative technology market, the programmer is exempt from Section 19 no matter what its ownership.

In order not to discourage investment in new distribution technologies which may be possible as the result of compressed digital technology, the regulations should expressly provide that companies that do not own or produce programming but merely provide a conduit for distribution of programming are not subject to Section 19 regardless of their ownership. Such companies do not fall within the Congressional concerns that lead to the passage of the Cable Act because they cannot preclude anyone from obtaining programming. Rather, they are examples of the technological innovation that Congress sought to encourage. Cable Act § 19(c)(4)(B).

2. The Showing of Harm Required to Show a Violation of Section 19.

The Commission's Notice asks whether "our regulations should only implicate practices that are both (i) "unfair," "deceptive," or "discriminatory," <u>and</u> (ii) "could significantly hinder multichannel video programming distributors from providing satellite programming to consumers." (Emphasis added.) The Notice states, "[This question] is particularly significant to the extent that conduct might be considered unfair or discriminatory from the vantage point of a particular competitor, yet does not significantly harm competition in multichannel video programming distribution." Notice ¶ 10.

As mentioned above, Congress' overriding intent was to benefit consumers. Accordingly, only "unfair" or "deceptive" practices that have the potential of injuring competition should be precluded by the Commission's regulations. As stated above, the Commission should not promulgate regulations mandating that every distributor always can obtain its first choice of programming.7/ Nor should the Commission's regulations permit every distributor who does not get what it wants from an integrated programmer to file a complaint claiming it is a victim of discrimination. Rather, the Commission should make sure that vertically integrated programmers do not arbitrarily foreclose alternative technologies from sufficient programming so that such technologies cannot compete in the marketplace. In pursuing that goal the Commission should recognize the marketplace reality that multichannel video programming distributors can, and a number do, survive without The Discovery Channel or The Learning Channel.

In only the most extreme circumstances should the Commission require a cable programmer to sell its programming when it otherwise would not. By analogy, under the antitrust laws, only a firm controlling an essential facility can be compelled to sell its product to everyone who desires it.8/

7/ When a multichannel video programming distributor is precluded from getting its first choice of programming, the result can be procompetitive if the distributor finds alternative programming which gives consumers greater choice.

8/ The standards for proving the existence of an essential facility under the antitrust laws are very strict. Four elements are required:

> "(1) control of the essential facility by a monopolist; (2) a competitor's inability practically or reasonably to duplicate the essential facility; (3) the denial of the use of the facility to a competitor;

Continued

3. The Geographic Market for Evaluating Harm to Competition.

The Commission questions what geographic market is relevant to determining whether there is anticompetitive injury. Notice ¶ 11. For some purposes the market should be local, for others it should be regarded as national.

For the purpose of determining whether a programmer is subject to section 19 of the Cable Act, the relevant market is the local market. In other words, a programmer should only be subject to the restrictions of section 19 in the local markets where a cable operator who has an attributable interest in the programmer actually operates.

For the purpose of determining whether an alternative technology distributor operating in a local market is significantly harmed if it is denied programming, the Commission should consider national, and in some cases, the international market for programming where appropriate.

B. Specific Provisions Of Section 19

1. The Meaning of Discrimination

The Commission asks commenters to identify "practices that we should consider discriminatory." Notice ¶ 15. As is clear from the Act, Congress did not intend to prohibit all price differences by programmers owned by cable operators. Section 19(c)(2)(B)(i)-(iv) expressly exempts price differences based on a number of factors, which we discuss below.

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and (4) the feasibility of providing the facility." MCI Communications Corp. v. AT&T, 708 F.2d 1081, 1132 (7th Cir.), *cert. denied*, 464 U.S. 891 (1983).

a. Price Differences Based on Economic Benefits

Section 19(c)(2)(B)(iii) expressly permits price differences based on "direct and legitimate economic benefits reasonably attributable to the number of subscribers served by the distributor." The Commission's regulation should specify that the following discounts are permitted: volume discounts, buying-group discounts, introductory and promotional discounts, and discounts reflecting nondiscriminatory historical price concessions motivated by a desire to obtain a sufficient number of subscribers to qualify for advertising revenue.

Volume Discounts. Volume discounts reflect the direct benefits that programmers receive from increased advertising revenue as their subscriber base increases. They therefore fall within the statutory exception. In any event, the volume discounts offered by Discovery are nondiscriminatory; they are offered to all customers. By analogy, Robinson-Patman Act precedents have consistently held that volume discounts "functionally available on an equal basis" to all customers are not discriminatory. Shreve Equip., Inc. v. Clay Equipment Corp., 650 F.2d 101, 105 (6th Cir.), cert. denied, 454 U.S. 897 (1981).

Group-Buying Discounts. Group buying discounts are a form of volume discount expressly permitted by the Act. The Discovery Channel has consistently done business with buying cooperatives, including The National Rural Telecommunications Cooperative, subject to the requirement that the cooperatives provide economic value beyond just obtaining discounts. For example, members of the cooperative should be jointly and severally liable on group contracts. The regulations should permit such reasonable requirements.

Introductory and Promotional Discounts. The Commission regulations should permit introductory and promotional discounts. Like volume discounts they are offered for the purpose of increasing subscribers and thereby attaining the economic benefit of increased advertising revenue.[9/] For administrative simplicity, the Commission's regulations should provide that any discount offered by a programmer in its early years of operation should be presumed to be introductory or promotional and thus not subject to the constraints of section 19.

Discounts Based on Nondiscriminatory Historical Conduct. The Commission's regulations should also permit discounts that reflect historical price concessions made on a nondiscriminatory basis to all entities who were then customers for the purpose of obtaining a sufficient customer base to qualify for and/or to increase advertising revenue. For example, early customers of The Discovery Channel receive a lower price today for the historical reasons explained above.

9/ Significantly, introductory and promotional discounts are considered lawful under the Robinson-Patman Act. *See Buffalo Courier-Express, Inc. v. Buffalo Evening News, Inc.*, 601 F.2d 48 (2d Cir. 1979).