

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

FEB 16 1993

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FEDERAL COMMUNICATIONS COMMISSION
COMMUNICATIONS SECTION

MM Docket No. 92-265

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)

REPLY COMMENTS OF DIRECTV, INC.

Gary M. Epstein
Karen Brinkmann
LATHAM & WATKINS
Suite 1300
1001 Pennsylvania Ave., N.W.
Washington, D.C. 20004
(202) 637-2200

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SUMMARY

DirecTv, Inc. filed extensive Comments concerning the interpretation of Section 19 of the 1992 Cable Act and the Commission's proposed rules thereunder on January 23, 1993.

DirecTv's Comments already respond to many of the arguments raised by the other commenting parties in this proceeding. In this Reply, DirecTv addresses the cable industry's attempt to rewrite the statute, and specifically their argument that no complaints may be brought under 1992 Cable Act unless "harm to competition" can be shown. The statute was deliberately crafted to ensure that potential competitors to entrenched cable system operators are able to obtain access to cable programming on nondiscriminatory terms. The statute just does not require that the Commission find "harm to competition" before it can grant relief, and such a requirement cannot be implied into the statute, as the cable industry advocates. The idea of limiting the scope of the program access provisions to situations where "harm to competition" can be proven was debated and rejected in Congress. The result was the adoption of the program access provisions to be codified at Section 628 of the Communications Act, and the plain language of that section sets forth all of the prerequisites for relief.

In these Reply Comments DirecTv also makes specific suggestions concerning the interpretation of the nondiscrimination provisions of Section 628(c)(2)(B). The Commission should adhere to the language and intent of the statute and construe narrowly any exemptions for vertically integrated programmers' offering different prices or other terms to different MVPDs.

Finally, DirecTv proposes a specific model for handling complaints under the statute. DirecTv suggests a two-step pleading cycle with expedited discovery of contracts and other relevant information in the possession of the vertically integrated programmers and cable operators, which will be fair to both aggrieved MVPDs and programmers without unduly taxing Commission resources.

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REPLY COMMENTS OF DIRECTV, INC.

DirecTv, Inc. ("DirecTv") submits these Reply Comments in response to the Commission's Notice of Proposed Rule Making in the above-captioned proceeding, FCC 92-543, released December 24, 1992 (the "NPRM"), concerning implementation of the access to programming provisions of the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992) (the "1992 Cable Act").

I. INTRODUCTION

DirecTv submitted extensive comments concerning the interpretation of Section 19 of the 1992 Cable Act and the Commission's proposed rules. DirecTv already has addressed many of the issues raised by the other commenting parties in this proceeding and will not reargue them here. Instead, DirecTv has two goals in these Reply Comments. The first is to demonstrate that the cable industry's comments are an attempt to revise the statute and try to reopen a debate that was concluded on the floor of the House of Representatives over six months ago. Both the plain meaning of the statute and its legislative history make it clear that Congress did not pass the 1992 Cable Act merely to make the FCC an enforcement forum for the Sherman Act. Rather, the 1992 Cable Act provides a means to ensure that competitors to existing cable systems obtain

access to programming on non-discriminatory terms and conditions. DirecTv's second goal is to propose necessary and sufficient complaint procedures for the Commission to enforce the statute. Such procedures are of central importance in achieving the statute's objectives.

II. THE CABLE INDUSTRY'S ATTEMPT TO REWRITE HISTORY MUST BE REJECTED.

In its Comments, DirecTv discussed the purposes of the 1992 Cable Act, the Congressional findings that led to its adoption, and the way in which the structure of Section 19 directly reflects this legislative context. Because Congress found that lack of access to programming is an impediment to the development of competition in the video distribution market, which ultimately harms consumers, the statute was deliberately crafted to ensure that potential competitors to entrenched cable system operators are able to obtain access to cable programming on nondiscriminatory terms. DirecTv also pointed out that in adopting rules to implement the provisions of Section 19, the Commission need only adhere to the plain language of the statute.

In particular, no requirement that the Commission find "harm to competition" can be read into the statute; Congress has already made that finding. Congress first adopted a general prohibition on "unfair methods of competition or unfair or deceptive acts or practices" the purpose or effect of which is to significantly hinder any multichannel video programming distributor ("MVPD") from providing cable programming to subscribers (Section 628(b)). It then gave the Commission unequivocal directions to adopt and enforce, at a minimum, regulations that will prevent (1) undue influence by a cable operator over its affiliated programming vendor's decision to sell programming to an unaffiliated MVPD (Section 628(c)(2)(A)), (2) a vertically integrated programmer from offering programming to different MVPDs on discriminatory terms (Section 628(c)(2)(B)), and (3) exclusive contracts between cable operators and any vertically

integrated programmers (except in limited circumstances) (Sections 628(c)(2)(C) and (D)). The Commission is charged with enforcing all of these prohibitions.

Nothing in any of these provisions of the 1992 Cable Act allows -- much less requires -- that the Commission make findings about harm to competition, or lack of competition in the video market, as suggested by a number of the cable multiple system operators ("MSOs") and vertically integrated programmers who commented in this proceeding. In fact, the opposite is true. The statutory language clearly establishes that the acts and practices described above simply must be prohibited by the Commission; nowhere does it provide for a market analysis of the kind urged by the MSOs.^{1/} Moreover, this precise question was the subject of debate in Congress during the legislative drafting process. The result of that debate was the rejection of an antitrust-type statute requiring proof of harm to competition, and the adoption of the program access provisions to be codified at Section 628 of the Communications Act. The suggestion by some parties that this subject is still open to debate must be firmly rejected.

The plain language of the Statute, reinforced by its legislative history, is unequivocal and conclusive. The "program access" provisions were introduced as an amendment to the then pending House bill (H.R. 4850) by Representative Tauzin on July 23, 1992 substantially in the form now contained in Section 19 of the 1992 Cable Act.^{2/} On the same day,

^{1/} E.g., Comments of Time Warner Entertainment Company, L.P. at 5 & 9-11; Comments of Tele-Communications, Inc. ("TCI") at 5-6 (in order to constitute a violation of Section 628, conduct must hinder significantly or prevent "competition in the marketplace"); Comments of Liberty Media Corporation at 5 ("actual injury or conduct which necessarily would result in injury to competition in providing satellite programming to consumers must be an essential element of the Commission's implementing regulations and a prerequisite of any complaint alleging a violation of Section 628").

^{2/} As adopted by the Conference Committee, Section 628 contained some modifications of the language originally proposed by Representative Tauzin, but these changes further strengthened the program access provisions. For example, a modification was inserted in the "sunset" provision concerning exclusive contracts in cabled areas (Sec. 628 (c)(5)) to provide that if the Commission finds that the Section 628(c)(2)(D) prohibition against such contracts continues to be necessary to protect competition and diversity in the video distribution market, the prohibition of Section 628(c)(2)(D) will not sunset at the end of ten years.

Representative Manton offered an amendment in the nature of a substitute for the Tauzin amendment. The Manton substitute contained no statutory prohibition against hindering MVPDs from obtaining programming comparable to Section 628(b). Rather, it would have required the Commission to adopt regulations to prohibit a vertically-integrated programming vendor^{3/} from refusing to deal with a competing MVPD *if such refusal to deal was found to unreasonably restrain competition*. The Manton amendment thus would have established a far more lenient standard -- permitting price discrimination and prohibiting only certain "refusals to deal" -- and also imposed a much heavier burden of proof than was ultimately adopted by Congress. Under the Manton substitute, an exclusive arrangement between a cable operator and a commonly controlled programmer would be prohibited only if had the effect of unreasonably restraining competition. This approach was rejected by Congress on July 23, 1992, and the Tauzin amendment, which contained no requirement that MVPDs prove restraint of competition, was adopted. The floor debate concerning the Tauzin amendment and the Manton substitute is reprinted in its entirety from the Congressional Record and attached as an Appendix to this pleading, along with a side-by-side comparison of the two amendments.

Thus, the cable MSOs are simply wrong when they interpret the prohibition against unfair or deceptive practices under Section 628(b) as requiring the aggrieved MVPD to show not only that its own ability to provide programming is hindered significantly, but also that the practice "would hinder significantly the provision of programming by any MVPD." E.g.,

^{3/} The Manton substitute would have applied only to programming vendors that control, are controlled by, or are under common control with cable operators. By contrast, the language of the statute as adopted applies to any satellite programming vendor in which a cable operator has an "attributable interest" (Sec. 628(b) and 628(c)(2)(A), (B) (C) and (D)). Thus, the argument made by Continental Cablevision, Discovery and NCTA that "attributable interests" should be interpreted to mean "controlling" interests of 51% or more must be rejected, just as the Manton substitute was rejected on the floor of the House. See DirecTv's Comments at 12-15 for a discussion of the proper scope of "attributable interest" under Section 628.

Comments of Time Warner at 11.^{4/} Time Warner advocated this position when it supported the Manton amendment, and it was rejected by Congress. Similarly, Section 628(b) simply does not require an aggrieved MVPD to show, as the MSOs suggest, that the practice complained of prevents or significantly hinders the MVPD from delivering any programming at all to subscribers. Comments of NCTA at 9; Comments of Time Warner at 9-10. Time Warner argues that a MVPD must show that the practice of a particular cable operator or programmer "destroyed [the MVPD's] viability as a competitor." Comments of Time Warner at n. 8.^{5/} This is wholly inconsistent with the language of the statute and its legislative history, which seek to encourage access to cable programming by competing MVPDs, not just to prevent the "destruction" of

^{4/} Without explanation or citation, Time Warner argues that "an unfair practice is unlawful only if the unfair practice would ... endanger the competitive viability of a well-run distributor." Id. at 10-11. What the hypothetical "well-run distributor" would look like, and how the Commission would recognize it, Time Warner does not explain; nor does the MSO offer any justification for its reading the word "any" as meaning "all" in interpreting the language of Section 628(b). By reading that provision as requiring proof that a practice hinders the provision of programming by all MVPDs, "not just the complainant," Time Warner conveniently rewrites the statute and creates an interpretation that cannot be applied even within Section 19. For example, Section 628(c)(2)(A) would, under Time Warner's analysis, require proof of undue influence by a cable operator over the decision of an affiliated programming vendor to sell programming to all MVPDs -- presumably, then, if the cable operator unduly or improperly influenced the decision of the programmer to sell to only some MVPDs, there would be no violation of the statute. This butchering of the plain language of Section 628 is patently absurd and finds no support in any of the legislative history (nor does Time Warner offer any). The statute targets the cable industry's bottleneck on programming by giving individual MVPDs the right to obtain cable programming on non-discriminatory terms. It is clear that some MVPDs (*i.e.*, the cable systems) do have access to this programming. The statute simply does not require proof that the entire multichannel distribution industry be unable to obtain programming before a programmer be required to make it available on non-discriminatory terms.

^{5/} Time Warner's position appears extreme, but is merely illustrative of the cable industry's erroneous views of this statute. Other cable industry giants have taken a similar stance in their comments. *E.g.*, Comments of TCI at 5-6 (revising the prohibition contained in Section 628(b) against practices that significantly hinder or prevent MVPDs from providing programming to subscribers and stating that Section 628(b) prohibits only practices that significantly hinder or prevent "competition in the marketplace"). See also Comments of NCTA at 40 (stating that certain exclusive contracts for non-cabled areas clearly prohibited by Section 628(b)(2)(C) should nevertheless be grandfathered unless they "also inflict significant competitive injury"); Comments of Cablevision Industries et al. at 17 (certain exclusive contracts "are not anti-competitive and should, therefore, be grandfathered").

MVPDs. See Comments of DirecTv at 3-5, 7, 9-11. In short, this statute is not merely a mechanism to enforce existing antitrust laws and preserve a competitive marketplace. On the contrary, this statute acknowledges that there is no competitive marketplace for cable programming distribution, and takes specific, targeted steps to enable such a marketplace to come into being for the first time.

III. THE COMMISSION MUST ADOPT ADEQUATE PROCEDURES TO ENFORCE SECTION 628'S PROGRAM ACCESS PROVISIONS.

In its Comments, DirecTv addressed the challenge of enforcing the provisions of Section 628, which targets behavior by cable operators and vertically integrated cable programmers that will often (if not always) be beyond the eyes and ears of the aggrieved MVPD. DirecTv pointed out the critical importance of burden-shifting as the Commission evaluates complaints under Section 628, and requested that the Commission make the complainant's burden of proof relatively light in order that the party in possession of the relevant evidence -- the cable operator or programmer that is the subject of the complaint -- will be obliged to produce the evidence reasonably necessary for the Commission to decide whether a violation of the statute has been committed. See Comments of DirecTv at 19.

These Reply Comments focus on two specific aspects of this enforcement issue. The first is the special enforcement problems that arise under Section 628(c)(2)(B) of the Act, the prohibition against discriminatory prices, terms and conditions. The second is a proposal for a specific expedited procedure for processing complaints brought under Section 628 that will ensure fair treatment of both aggrieved MVPDs and programmers without unduly taxing Commission resources.

A. Substantive Criteria for Determining Unlawful Discrimination

Under Section 628(c)(2)(B), the Commission must prohibit discrimination by a vertically integrated programmer in the price, terms and conditions of sale or delivery of cable programming among or between MVPDs. However, the Commission's regulations should not, according to the statute, prohibit vertically integrated programmers from (i) imposing reasonable requirements for creditworthiness, offering of service, and financial standards and standards regarding character and technical quality; (ii) establishing different terms which take into account actual and reasonable differences in the cost of creating, selling, delivering or transmitting the programming; (iii) establishing different terms which take into account economies of scale, cost savings, or other direct and legitimate economic benefits reasonably attributable to the number of the MVPD's subscribers; or (iv) entering into exclusive contracts if such contracts are permitted under Section 628(c)(2)(D).

The statute makes clear that the kinds of terms (and differences in terms) of programming contracts that are exempt from the general prohibition against discrimination are narrow, specific and few in number. Moreover, Congress intended those terms and conditions to be lawful if and only if they are applied by the programmer in a nondiscriminatory manner -- that is, only if the same terms are offered to all MVPDs, even if they use different technologies.

As noted in DirecTv's Comments, differences in the terms of programming agreements offered by vertically integrated programmers to different MVPDs are to be presumed unlawful under Section 628(c)(2)(B) unless they fall into one of the four narrowly-tailored exemptions listed above. Because Congress provided these specific exemptions, the Commission may not look outside the language of these provisions to consider whether a discriminatory term is otherwise lawful under Section 628(c)(2)(B); if it is not clearly permitted under one of these exemptions, it is unlawful. The rules adopted by the Commission, therefore, should mirror the

language of Section 628(c)(2)(B) including the exemptions in subsections (B)(i) through (iv).⁶ However, the Commission still must determine whether a particular term or condition is covered under one of the exemptions. DirecTv suggests the following comments and guidelines for deciding whether certain terms and conditions are permissible under the statute.

A programmer often requires a MVPD to meet a minimum credit rating or establish its financial stability as a condition of carriage of the programmer's video services. In addition, a programmer often requires that a MVPD show it is capable of delivering a signal of a certain technical quality. These requirements related to the financial and technical capabilities of the MVPD are not permitted under Section 628(c)(2)(B)(i) as long as they are imposed upon all MVPDs requesting carriage of the programmer's product and enforced in an even-handed way. Of course, it would be unacceptable discrimination if a programmer waived a creditworthiness requirement because a MVPD was affiliated with the programmer. It also would be unlawful for a programmer to require that a MVPD's signal be delivered by wire into the home, as this would obviously preclude every satellite or microwave-based MVPD from obtaining the programming. However, requiring a particular credit rating or signal quality that could be measured by objective standards would be acceptable, if applied to all MVPDs, and would not constitute unlawful discrimination under Section 628(c)(2)(B).

Programmers often structure carriage agreements to promote a relatively unknown service by "packaging" it with an established service -- a goal not antithetical to the 1992 Cable Act. Under the "offering of service" language of Section 628(c)(2)(B)(i), DirecTv believes it would be lawful for a programmer to differentiate between MVPDs based on their willingness to purchase a group of services specified by the programmer (giving a reduced rate on a particular

⁶ Of course, contractual terms and practices not expressly prohibited under Section 628(c)(2)(A)-(D) of the statute may still be prohibited under Section 628(b). The Commission's rules, therefore, should contain a general Section 628(b) prohibition against acts or practices that hinder an MVPD's ability to obtain programming, as well as the specific prohibitions against undue influence, discrimination, and exclusive contracts under Section 628(c) of the Act.

program service if it is purchased in conjunction with other services, for example). The duration of the contract that the MVPD is willing to enter into may also merit different treatment that is justifiable under the statute. These terms can be found to be lawful bases for programmers to distinguish between MVPDs because, like creditworthiness, they relate to the convenience to the programmer of dealing with MVPDs, provided of course that they are offered to all MVPDs regardless of whether they are affiliated with the programmer or make use of a particular technology. They must be provider-neutral and technology-neutral.

Under Sections 628(c)(2)(B)(ii) and (iii), programmers may offer different prices (or other terms) in their contracts with various MVPDs if the differences are cost-based. Thus, DirecTv believes it would be legitimate to charge one MVPD a higher price for programming than it charged another MVPD if it actually cost the programmer more to delivering its programming to the first MVPD. Similarly, the per-subscriber rate charged by the programmer may be based on the number of subscribers served by the MVPD under Section 628(c)(2)(B)(iii), because the programmer achieves economies of scale by reaching the widest audience possible through a particular MVPD.⁷

In general, in evaluating claims of discrimination under Section 628(c)(2)(B), the Commission must be mindful that even a seemingly legitimate business reason for granting a favorable rate (such as the duration of the contract or the service package purchased) is only lawful under the statute if it is offered to all MVPDs, and if the discount or other preference

⁷ However, a cable MSO that owns interests in multiple MVPDs should not be permitted to benefit from such economies by aggregating the subscribers to its various services to gain a competitive price advantage over a MVPD that does not own multiple systems across multiple technologies. For example, a MSO that owns part of a direct broadcast satellite (DBS) system in addition to various cable systems should not be given a competitive advantage over another DBS provider based on an aggregation of the MSO's subscribers to its various cable systems with its DBS subscribers. To permit a price difference on such a basis would be to pervert the purpose of Section 628(c)(2)(B), which is designed to enable competing MVPDs to compete with the entrenched cable system operator in spite of the latter's historic monopoly -- not to reward the cable MSOs for their market dominance.

given is based on an MVPD's meeting objective criteria. A programmer cannot simply give a discount to a cable operator because it is a cable operator, even for "introductory" or "promotional" purposes.^{8/} The different terms must be not only made available to all MVPDs but its implementation by the programmer must be susceptible of evaluation by the Commission, to determine whether the basis on which MVPDs are distinguished from one another complies with the statute. Thus, if a programmer refuses to sell to a MVPD, or charges it a surcharge, because of the MVPD's poor service quality, the programmer must be required to state on what bases the quality is evaluated, and the Commission must be able to evaluate on such bases whether there is a quality difference justifying discriminatory treatment of this MVPD. If the programmer treats all MVPDs even-handedly, and one MVPD complies with the terms of the programmer's offer while another does not, then and only then does a programmer have a lawful basis for offering different terms and conditions to different MVPDs.

B. A Suggested Procedural Approach

DirecTv advocated in its Comments that the Commission adopt an expedited procedure for evaluating all complaints under Section 628 because the express purpose of the statutory provision is to make cable programming available to all MVPDs and to encourage the growth of competing video distribution outlets. DirecTv believes that most aggrieved MVPDs will not seek a lengthy Commission adjudication but rather speedy relief in negotiating programming carriage agreements so they can compete in the fast-changing video marketplace.^{9/} Therefore, DirecTv supported the Commission's proposal for a proceeding on written pleadings within a

^{8/} See Comments of Discovery Communications, Inc. at 22.

^{9/} The cable industry continues to demonstrate its intransigence by proposing procedures that will consume unreasonable amounts of time and resources, notwithstanding the express statutory requirement that the Commission's regulations "provide for an expedited review of any complaint made pursuant to this section" (Section 628(f)(1)). See, e.g., Comments of TCI at 40-43.

truncated time frame.^{10/} DirecTv also proposed that the Commission allow complaints to be filed on affidavit only, and require that the programmer (or cable operator) that is the subject of the complaint produce evidence to rebut the allegations. DirecTv also suggested that Commission allow limited discovery of the defendant's contracts and business practices appropriate to the defenses raised. Comments of DirecTv at 29-31. DirecTv has reviewed the procedural proposals submitted in the other comments and now offers the following, more specific suggestions.

As a general matter, the procedures adopted by the Commission must be quick, and must be fair to the aggrieved MVPD. The Commission obviously cannot require MVPDs to meet an impossible burden of proof such that no complaint could ever be brought under this statute. To this end, the Commission must acknowledge the fact that most of the relevant factual information in Section 628 disputes (copies of programming contracts, evidence of understandings and arrangements between cable operators and vertically integrated programmers) will be in the possession of the cable operator or programmer, and not the aggrieved MVPD. On the other hand, the procedures adopted by the Commission must be fair to cable operators and programmers -- DirecTv does not advocate requiring excessive public disclosure of confidential business information by these companies. In addition, these procedures should, where possible, be designed to minimize the burden on the Commission. This is not to say that the Commission won't bear some burden -- it has been given a mandate by Congress to enforce Section 628. Nevertheless, DirecTv believes that an expedited procedure with minimal involvement by Commission staff at the early stages will serve the interest of all parties, including the Commission.

DirecTv continues to believe that, as a starting point, the procedures for evaluating political candidates' complaints under the "lowest unit charge" and "comparable use" provisions of

^{10/} However, DirecTv recommended that the Commission leave open the possibility of a trial-type hearing for cases where substantial issues of fact cannot be determined on the pleadings. Comments of DirecTv at 29.

Section 315(b) of the Communications Act provide a useful model for the procedures to be adopted under Section 628. See NPRM at ¶ 39. In the Section 315(b) area, a prima facie case is established by "a simple recitation of a sequence of events showing that, if all allegations are accepted as true and all inferences are drawn in the complainant's favor, the complaint would reasonably lie." Exclusive Jurisdiction With Respect to Potential Violations of the Lowest Unit Charge Requirements of Section 315(b) of the Communications Act, 6 FCC Rcd. 7511, 7513 (1991) (Declaratory Ruling), recon. denied, 57 Fed. Reg. 27,367 (June 19, 1992) (hereinafter "Declaratory Ruling").

DirecTV's specific recommendation is as follows: A complaint under any provision of Section 628 should be sufficient if made on an affidavit by an officer of the MVPD. A complaint will be deemed adequate to establish a prima facie case under Section 628(c)(2)(B) if it alleges: (a) that a programming vendor offers a particular programming service for sale to other MVPDs; (b) that the complainant is a MVPD that is technically and financially capable of delivering the programming to subscribers; (c) that the complainant has made a bona fide attempt to negotiate with the programmer; (d) that the programming vendor has discriminated in the prices, terms or conditions of sale or delivery of its programming among or between the complainant and one or more cable operators or other MVPDs; (e) that the programming vendor is either a "satellite cable programming vendor in which a cable operator has an attributable interest" or a "satellite broadcast programming vendor," as defined in the Act and the Commission's rules; and (f) that the programming in question is either "satellite cable programming" or "satellite broadcast programming" as defined in the Act.¹¹⁷

¹¹⁷ Analogously, a complaint under Section 628(c)(2)(C) or (D) need only allege that an exclusive contract exists between a cable operator and a vertically integrated satellite cable programming vendor or satellite broadcast programming vendor. Other complaints brought under Section 628(b), should allege (a) that the complainant is a MVPD and (b) that (i) a cable operator, or (ii) a satellite cable programmer in which a cable operator has an attributable interest, or (iii) a satellite broadcast programmer, has engaged in unfair or deceptive acts or practices, and (c) the purpose or effect of such acts or practices is to hinder significantly or

The complaint should be certified by an officer of the complainant. Although complainants should be encouraged to submit any factual evidence at their disposal in support of these allegations, a discrimination complaint should not be found deficient for lack of specific documentation concerning discrimination in price or other terms or conditions (nor should an exclusive contract complaint be found deficient for failure to include a copy of the contract). No additional factual basis for the complaint should be required, other than as set forth above. This is because, unlike the political broadcast area, the complainant in a Section 628 case usually will not have knowledge of the terms of a programmer's contracts with other MVPDs, nor is there "general industry data" on the rates charged by the programmer. In the political broadcast context, complainants have access to the rates charged by a broadcast station through a number of sources, including the station's published rate cards, its local public records file (for political rates), and generally available industry data such as "SQAD" and "SCOOP" which reveals the average advertising rates charged by broadcast stations in a particular market during a specified time period. The Commission has approved the use of such data to establish a prima facie case under Section 315(b). See Lawton Chiles et al., 7 FCC Rcd. 6661, 6662-63 (1992); Declaratory Ruling, supra, 6 FCC Rcd. at 7521, n.47. Cable programmers have neither a published "rate card" nor a "public file" from which an MVPD could view the contracts or determine the rates charged to its competitors. Moreover, unlike the broadcast industry, there are no published "SQAD" or "SCOOP" numbers for the cable programming industry, so a MVPD could not even develop a reasonable estimate of what the programmer's "composite" rate would be, based on generally available industry data.

Upon the filing of a complaint that meets the requirements set forth above, the burden should shift immediately to the programmer or cable operator that is the subject of the

prevent the MVPD from providing a cable programming service to its subscribers, and (d) such programming is either "satellite cable programming" or "satellite broadcast programming" within the meaning of the Act.

complaint to show that the allegations contained in the complaint are untrue, for example, that the terms offered to the complainant are not discriminatory or that they are justified under the permitted statutory exemptions of subsections 628(c)(2)(B)(i)-(iv). If the defendant does not deny any of the allegations made in the complaint, the Commission should find a violation of the statute and the proceeding should be at an end. If the defendant denies some or all of the allegations, it should be subject to a limited form of discovery to assist the Commission in evaluating its defenses.

To abbreviate the total processing time of Section 628 claims and reduce the burden on the defendant and the Commission, DirecTv suggests that discovery in Section 628 cases take place simultaneously with the filing of the answer to the complaint, in the form of a simple questionnaire that the defendant must complete and submit to the Commission and the complainant. This questionnaire would act as a standardized form of written interrogatory for all complaints under Section 628 and would evoke the information necessary for resolution of the dispute from the party that has the information: the programmer or cable operator that is the subject of the complaint. DirecTv suggests that, for discrimination complaints under Section 628(c)(2)(B), the following questions be asked:^{12/}

1. What is your per subscriber rate for each programming service or package of services which is the subject of this complaint? (Give the range of rates, if you have more than one rate. Provide your "rate card" if you have one.)
2. What discounts, bonuses, rebates, and other monetary adjustments to the rates described in Question (1) have you given to any MVPD agreeing to carry such programming? State the justification for any such adjustment.
3. What non-monetary bonuses or incentives (such as special marketing allowances, free use of equipment, etc.) have you given to any MVPD agreeing to carry the programming?

^{12/} For complaints under Section 628(b) and (c)(2)(A), the questions should be geared to the cable operator's relationship with affiliated programmers. For complaints under Section 628(c)(2)(C) and (D), the questionnaire should simply ask whether exclusive contracts exist and, if so, require that they be provided to the Commission.

4. What monetary premiums have you charged, and what non-monetary penalties have you imposed, on any MVPD agreeing to carry the programming? State the reason for such premium or penalty.
5. Describe any free or reduced rate programming arrangements you have entered into for promotional purposes, and any other special arrangements not described in response to Questions (1) through (4).
6. List any other terms, conditions, agreements or understandings which relate to the price, availability, and delivery of your service to cable systems and other MVPDs (including most-favored-customer clauses, technology-based terms or requirements, special marketing arrangements, special payment terms, etc.).
7. Calculate your net effective per subscriber rate, taking into account all of the above, for the programming services which are the subject of the complaint.
8. Certify that the foregoing is complete and accurate.

The filing of this information with the Commission would conclude the written record on which a decision would be made in most cases. Upon receipt of the completed questionnaire and answer, if any, from the defendant programmer,^{13/} the Commission would review the complaint and the information provided by the defendant and determine whether a violation of the statute has occurred.^{14/} If there is no response, the Commission must find a violation. If there is a response, the Commission must determine whether a violation has occurred and issue a written decision stating the basis for its findings. As discussed above, if the Commission finds that the programmer differentiates in price or other terms or conditions of sale or delivery of programming between the complainant and other MVPDs, it must find unlawful

^{13/} An "answer" to the complaint would be purely optional, provided the defendant supplied the completed questionnaire to the Commission. Failure to answer the questions contained on this questionnaire would constitute an admission of a violation of the statute.

^{14/} DirecTv supports the adoption of a policy disfavoring the filing of replies and other additional pleadings following the filing of the questionnaire and answer, unless the party filing such pleading "has demonstrated that the information presented is new and vital to the resolution of the complaint, and could not have been included in the original complaint [or answer] because the facts were previously unknown or unavailable to the [filing party], and could not have been discovered through reasonable efforts." Lawton Chiles, supra 7 FCC Rcd. at 6661, n.3.

discrimination under Section 628(c)(2)(B) unless the price or other term or condition is justified under one of the specific exemptions listed in Section 628(c)(2)(B)(i)-(iv). If it determines that there has been a violation, it must order an appropriate remedy (at a minimum, ordering the programmer to offer the same terms and conditions to the complainant as are offered to other MVPDs).^{15/}

DirecTv believes that these abbreviated procedures will result in the fair hearing of complaints under Section 628(c)(2)(B) without excessively burdening the Commission's resources or those of MVPDs and programmers. DirecTv notes that the Commission retains the flexibility under the Act to alter its procedural rules if the Commission later determines that a more elaborate process is necessary to achieve the purposes of the statute.

Finally, the Commission should rely, at least initially, on its existing abuse of process rules to deal with "frivolous" complaints. As noted in DirecTv's Comments, the Commission would defeat the statute's purpose if it enacts rules to implement the statute but simultaneously discourages the filing of complaints by promulgating harsh "frivolous complaint" rules. Most MVPDs want only to obtain programming and compete in the marketplace. If, in the future, the Commission finds that its processes are being overwhelmed by non-substantive complaints, the Commission has an array of remedies already contained in the rules with which to deal with such abuses. In the meantime, however, the Commission should be extremely cautious about adopting penalties for complaints which are made in good faith based on the only information available to the complainant.

IV. CONCLUSION

For the foregoing reasons, DirecTv urges the Commission to tailor its substantive rules to the precise language of the 1992 Cable Act, and not rewrite what Congress has written.

^{15/} Of course, if the Commission finds no violation, and that the rate proposed to be charged by the programmer is not unlawful, the MVPD may then purchase the programming from the programmer at that rate.

On the procedural side, DirecTv strongly supports expedited processing of claims under Section 628 that is fair to programmers that are the subject of complaints and also serves the statutory goals of Section 628.

Respectfully submitted,

DIRECTV, INC.

By:



Gary M. Epstein
Karen Brinkmann

LATHAM & WATKINS
Suite 1300
1001 Pennsylvania Ave., N.W.
Washington, D.C. 20004
(202) 637-2200

Its Attorneys

February 16, 1993

REPLY COMMENTS OF DIRECTV, INC.

APPENDIX

CABLE PROGRAMMING ACCESS

TAUZIN AMENDMENT TO H.R.4850

STATUTORY PROHIBITION. Prohibits a cable operator or a programming vendor affiliated with a cable operator from engaging in unfair methods of competition or unfair or deceptive acts, the purpose or effect of which is to hinder significantly or to prevent a distribution competitor from providing programming to consumers.

REGULATION. At a minimum, requires the Commission to establish safeguards to prevent a cable operator affiliated with a programming vendor from unduly or improperly influencing a vendor's decision to sell to a competing distributor, or the price, terms and conditions of the sale; and to prohibit discrimination by a programming vendor affiliated with a cable operator in the price, terms and conditions of the sale of programming to a distribution competitor, except for reasonable cost-related factors.

PROHIBITION OF EXCLUSIVE CONTRACTS. The Commission is directed to prohibit any arrangement between a cable operator and a programming vendor, including exclusive contracts, which would prevent a distribution competitor from providing programming to persons unserved by a cable operator.

In addition, exclusive contracts between a cable operator and an affiliated programming vendor are prohibited in those areas served by a cable operator unless the Commission determines such a contract to be in the public interest. Specific factors regarding competition and diversity are to be considered by the Commission in making this determination. The prohibition sunsets after ten years.

GRANDFATHER OF EXCLUSIVE CONTRACTS. Exclusive contracts entered into on or before June 1, 1990 are not subject to the prohibition on exclusive contracts, except with regard to the distribution of programming to persons in areas unserved by cable operators. Renewals and extensions to the grandfathered exclusive contracts made after enactment of this section are not permitted the exemption.

PROCEEDINGS. An aggrieved multichannel video programming distributor may commence an adjudicatory proceeding at the Commission for a violation of either the statute or the regulations promulgated under the statute.

REMEDIES. In addition to remedies provided under Section V or any other provision of the Communications Act of 1934, applicable state and federal antitrust laws, and any other remedy deemed appropriate by the Commission, the FCC has the authority to establish the price, terms and conditions of the sale of programming to an aggrieved distributor.

MANTON SUBSTITUTE TO TAUZIN AMENDMENT TO H.R. 4850

STATUTORY PROHIBITION. No statutory prohibition.

REGULATION. Requires the Commission to prescribe regulations to prohibit a programming vendor that controls, is controlled by, or is under common control with a cable operator from refusing to deal with any distribution competitor with respect to programming if such a refusal unreasonably restrains competition.

Prohibits unreasonable discriminatory pricing for sale of programming to C-band satellite program distribution services.

Regulation sunsets nine years after date of enactment or at such earlier date as the Commission determines that a competitive national video marketplace exists.

EXCLUSIVE CONTRACTS. Entering into or abiding by the terms of an exclusive contract that does not have the effect of unreasonably restraining competition is not considered to be an unreasonable refusal to deal.

GRANDFATHER OF EXCLUSIVE CONTRACTS.

Exclusive contracts entered into on or before June 1, 1990, their renewal, or extension are not affected by enactment even if such a contract has the effect of unreasonably restraining competition.

PROCEEDINGS. An aggrieved multichannel video system operator may begin an adjudicatory proceeding at the Commission for violations of the regulations promulgated under the section.

REMEDIES. The Commission has the authority to order appropriate remedies, including the power to set the price, terms and conditions of the sale of programming to an aggrieved distributor.

Andrews (ME)
Andrews (NJ)
Andrews (TX)
Annunzio
Applegate
Archer
Armey
Aspin
Atkins
AuCoin
Bacchus
Baker
Ballenger
Barnard
Barrrett
Barton
Bellinson
Bennett
Bentley
Berman
Bevill
Billirakis
Blackwell
Bliley
Boehliert
Boehner
Bentler
Borsari
Boucher
Boxer
Brewster
Brooks
Broomfield
Browder
Brown
Bruce
Bryant
Bunning
Burton
Bustamante
Byron
Callahan
Camp
Campbell (CA)
Campbell (CO)
Cardin
Carper
Carr
Chandler
Chapman
Clay
Clement
Clinger
Coble
Coleman (MO)
Coleman (TX)
Collins (IL)
Collins (MI)
Combest
Condit
Conyers
Cooper
Costello
Cox (CA)
Cox (IL)
Coyne
Cramer
Crane
Cunningham
Dannemeyer
Darden
Davis
de la Garza
DeFazio
DeLauro
DeLay
Dellums
Derrick
Dickinson
Dicks
Dingell
Dixon
Donnelly
Dooley
Doolittle
Dorgan (ND)
Dornan (CA)
Downey
Dreier
Duncan
Durrin
Early
Eckart
Edwards (CA)
Edwards (OK)
Edwards (TX)
Emerson
Engel
English

Erdreich
Espy
Evans
Ewing
Fascell
Fawell
Fazio
Fields
Fish
Flake
Foglietta
Ford (MI)
Ford (TN)
Frank (MA)
Franks (CT)
Gallegly
Gallo
Gaydos
Gedjenson
Gekas
Geren
Gibbons
Gilchrest
Gillmor
Gillman
Gingrich
Glickman
Gonzales
Goodling
Gordon
Gooss
Gradison
Grandy
Green
Guarini
Gunderson
Hall (OH)
Hall (TX)
Hamilton
Hammerschmidt
Hatchcock
Harris
Hastert
Hayes (IL)
Hayes (LA)
Hefner
Henry
Hergert
Hertel
Hoagland
Hobson
Hochbrunn
Hollaway
Hopkins
Horn
Horton
Houghton
Hoyer
Hubbard
Huckaby
Hughes
Hutto
Ihofs
Ireland
Jacobus
James
Jefferson
Jenkins
Johnson (OT)
Johnson (SD)
Johnson (TX)
Johnston
Jones (NC)
Jonts
Kanjorski
Kaptur
Kasich
Kennedy
Kennelly
Kildee
Kloczka
Klug
Kolbe
Kopetski
Kostmayer
Kyl
LaFalce
Lagomarsino
Lancaster
Lantos
LaRocco
Leach
Lehman (CA)
Lent
Levin (MI)
Lewis (CA)
Lewis (FL)
Lewis (GA)
Lightfoot

Lipinski
Livingston
Lloyd
Long
Lowey (NY)
Luken
Macchley
Manton
Markey
Marlenee
Martin
Martinez
Matsui
Mavroules
Marshall
McCandless
McCloskey
McCollum
McCree
McCurdy
McDade
McDermott
McFwen
McGrath
McHugh
McMillan (NO)
McMillan (MD)
McNulty
Meyers
Mfume
Michel
Miller (CA)
Miller (OH)
Miller (WA)
Mineta
Mink
Moakley
Mollinari
Mollohan
Montgomery
Moody
Moorhead
Moran
Morella
Morrison
Mrasek
Murphy
Murtha
Myers
Nagle
Natcher
Neal (MA)
Neal (NC)
Nichols
Nowak
Nussle
Oaker
Oberstar
Obey
Olin
Oliver
Ortiz
Orton
Owens (NY)
Owens (UT)
Orley
Packard
Pallone
Panetta
Parker
Pastor
Patterson
Raxon
Payne (NJ)
Payne (VA)
Pease
Pelosi
Penny
Perkins
Peterson (MN)
Petri
Pickett
Pickle
Porter
Poshars
Price
Pursell
Quillen
Rahall
Ramstad
Ravenel
Reed
Regula
Rhodes
Richardson
Ridge
Riggs
Rinaldo
Ritter

Roberts
Roe
Roemer
Rohrabacher
Roh-lahtinen
Rose
Rostenkowski
Roth
Roukema
Rowland
Roybal
Russo
Sabo
Sanders
Santorum
Sarpalius
Savage
Sawyer
Saxton
Schaefer
Scheuer
Schiff
Schroeder
Schulze
Schumer
Sensenbrenner
Serrano
Sharp
Shaw
Shays
Shuster
Sikorski

Sizak
Skaggs
Skeen
Skelton
Slattery
Slaughter
Smith (FL)
Smith (IA)
Smith (NJ)
Smith (OR)
Smith (TX)
Snowe
Solars
Solomon
Spence
Spratt
Staggers
Stallings
Stark
Stearns
Stenholm
Stokes
Stump
Stupak
Sundquist
Sweet
Swift
Synar
Tanner
Tausin
Taylor (MS)
Taylor (NO)
Thomas (CA)
Thornton

Torres
Torricelli
Towns
Traffant
Unsold
Upton
Valentine
Vander Jagt
Vento
Visclosky
Volkmann
Vucanovich
Walker
Walsh
Walters
Wayman
Weber
Wells
Weldon
Wheat
Whitten
Williams
Wise
Wolf
Wolpe
Wyden
Wyllie
Yatron
Young (AK)
Young (FL)
Zellmer
Zimmer

NOES—2

NOT VOTING—23

Hefley
Anthony
Batesman
Bereuter
Bilbray
Coughlin
Dwyer
Dymally
Feighan
Frost
Gephardt

Hunter
Hansen
Hatcher
Hyde
Jones (GA)
Kolter
Laughlin
Lehman (FL)
Levine (CA)
Lowery (CA)
Peterson (FL)

Rangel
Ray
Tallon
Thomas (GA)
Thomas (WY)
Trazier
Washington
Wilson
Yates

□ 1930

So the amendments en bloc were agreed to.
The result of the vote was announced as above recorded.

AMENDMENT OFFERED BY MR. TAUZIN

Mr. TAUZIN. Mr. Chairman, I offer an amendment.

The CHAIRMAN. The Clerk will designate the amendment.

The text of the amendment is as follows:

Amendment offered by Mr. TAUZIN:
Page 65, after line 11, insert the following new section (and redesignate the succeeding sections accordingly):

SEC. 11. DEVELOPMENT OF COMPETITION AND DIVERSITY IN VIDEO PROGRAMMING DISTRIBUTION.

Part III of title VI of the Communications Act of 1934 is amended by inserting after section 627 (47 U.S.C. 547) the following new section:

SEC. 628. DEVELOPMENT OF COMPETITION AND DIVERSITY IN VIDEO PROGRAMMING DISTRIBUTION.

"(a) PURPOSE.—The purpose of this section is to promote the public interest, convenience, and necessity by increasing competition and diversity in the multichannel video programming market, to increase the availability of satellite cable programming to persons in rural and other areas not currently able to receive such service, and to spur the development of communications technologies.

"(b) PROHIBITION.—It shall be unlawful for a cable operator or a satellite cable programming vendor in which a cable operator has an attributable interest in violation of any regulation prescribed under subsection (c) to engage in unfair methods of competition or

unfair or deceptive acts or practices, the purpose or effect of which is to hinder significantly or to prevent any multichannel video programming distributor from providing satellite cable programming to subscribers or consumers.

"(c) REGULATIONS REQUIRED.—

"(1) PROCEEDING REQUIRED.—Within 180 days after the enactment of this Act, the Commission shall, in order to promote the public interest, convenience, and necessity by increasing competition and diversity in the multichannel video programming market and continuing development of communications technologies, prescribe regulations to specify the conduct that is prohibited by subsection (b).

"(2) MINIMUM CONTENTS OF REGULATIONS.—

The regulations to be promulgated under this section shall—
"(A) establish effective safeguards to prevent a cable operator which has an attributable interest in a satellite cable programming vendor from unduly or improperly influencing the decision of such vendor to sell, or the price, terms, and conditions of sale of, satellite cable programming to any unaffiliated multichannel video programming distributor;

"(B) prohibit discrimination by a satellite cable programming vendor in which a cable operator has an attributable interest in the price, terms, and conditions in the sale or delivery of satellite cable programming among or between cable systems, cable operators, or their agents or buying groups, or other multichannel video programming distributors; except that such a satellite cable programming vendor in which a cable operator has an attributable interest shall not be prohibited from—
"(i) imposing reasonable requirements for creditworthiness, offering of service, and financial stability and standards regarding character and technical quality;

"(ii) establishing different prices, terms, and conditions to take into account actual and reasonable differences in the cost of creation, sale, delivery, or transmission of satellite cable programming;

"(iii) establishing different price, terms, and conditions which take into account reasonable volume discounts based on the number of subscribers served by the distributor; or
"(iv) entering into an exclusive contract that is permitted under subparagraph (D);

"(C) prohibit practices, understandings, arrangements, or activities, including exclusive contracts for satellite cable programming between a cable operator and a cable satellite programming between a cable operator and a cable satellite programming vendor, which 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; and

"(D) with respect to distribution to persons in areas served by a cable operator, prohibit exclusive contracts for satellite cable programming between a cable operator and a satellite cable programming vendor in which a cable operator has an attributable interest, unless the Commission determines (in accordance with paragraph (4)) that such contract is in the public interest.

"(3) 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. Nothing in this section shall apply

to the signal of any broadcast affiliate of a national television network or other television signal that is retransmitted by satellite, and shall not apply to any internal satellite communication of any broadcast network or cable network, except that satellite broadcast programming shall be subject to the requirements of this section.

"(4) PUBLIC INTEREST DETERMINATIONS ON EXCLUSIVE CONTRACTS.—In determining whether an exclusive contract is in the public interest for purposes of paragraph (2)(D), the Commission shall consider each of the following factors with respect to the effect of such contract on the distribution of video programming in areas that are served by a cable operator:

"(A) the effect of such exclusive contract on the development of competition in local and national multichannel video programming distribution markets;

"(B) the effect of such exclusive contract on competition from multichannel video programming distribution technologies other than cable;

"(C) the effect of such exclusive contract on the attraction of capital investment in the production and distribution of new satellite cable programming;

"(D) the effect of such exclusive contract on diversity of programming in the multichannel video programming distribution market; and

"(E) the duration of the exclusive contract.

"(6) SUNSET PROVISION.—The prohibition required by paragraph (2)(D) shall cease to be effective 10 years after the date of enactment of this Act.

"(d) ADJUDICATORY PROCEEDING.—Any multichannel video programming distributor aggrieved by conduct that it alleges constitutes a violation of this section, or the implementing regulations of the Commission under this section, may commence an adjudicatory proceeding at the Commission.

"(e) REMEDIES FOR VIOLATIONS.—

"(1) REMEDIES AUTHORIZED.—Upon completion of such adjudicatory proceeding, the Commission shall have the power to order appropriate remedies, including, if necessary, the power to establish price, terms, and conditions of sale of programming to the aggrieved multichannel video programming distributor.

"(2) ADDITIONAL REMEDIES.—The remedies provided in paragraph (1) are in addition to and not in lieu of the remedies available under title V or any other provision of this Act.

"(f) PROCEDURES.—The Commission shall prescribe regulations to implement this section. The Commission's regulations shall—

"(1) provide for an expedited review of any complaints made pursuant to this section;

"(2) establish procedures for the Commission to collect such data, including the right to obtain copies of all contracts and documents reflecting arrangements and understandings alleged to violate this section, as the Commission requires to carry out this section; and

"(3) provide for any penalties to be assessed against any person filing a frivolous complaint pursuant to this section.

"(g) REPORTS.—The Commission shall, beginning not later than 18 months after promulgation of the regulations required by subsection (c), annually report to Congress on the status of competition in the market for the delivery of video programming.

"(h) EXEMPTIONS FOR PRIOR CONTRACTS.—

"(1) IN GENERAL.—Nothing in this section shall affect any contract that grants exclusive distribution rights to any person with respect to satellite cable programming and that was entered into on or before June 1, 1990, except that the provisions of subsection

(c)(2)(C) shall apply for distribution to persons in areas not served by a cable operator.

"(2) LIMITATION ON RENEWALS.—A contract that was entered into on or before June 1, 1990, but that is renewed or extended after the date of enactment of this section shall not be exempt under paragraph (1) of this subsection.

"(1) APPLICABILITY OF ANTITRUST LAWS; NO ANTITRUST IMMUNITY.—Nothing in this section shall be construed to alter or restrict in any manner the applicability of any Federal or State antitrust law.

"(j) DEFINITIONS.—As used in this section:

"(1) The term 'satellite cable programming vendor' means a person engaged in the production, creation, or wholesale distribution of a satellite cable programming service for sale.

"(2) The terms 'cable system', 'multichannel video programming distributor', and 'video programming' have the meanings provided under section 602 of this Act.

"(3) The term 'satellite cable programming' has the meaning provided under section 706 of the Act.

"(4) The term 'satellite broadcast programming' means broadcast programming, other than programming of an affiliate of a national network, when such programming is retransmitted by satellite and the entity retransmitting such programming is not the broadcaster or an entity performing such retransmission on behalf of and with the specific consent of the broadcaster."

Mr. MANTON. Mr. Chairman, I rise in opposition to the Tauzin amendment and I seek the 15 minutes provided in the rule.

The CHAIRMAN. Pursuant to the rule, the time will be equally divided 15 minutes each.

AMENDMENT OFFERED BY MR. MANTON AS A SUBSTITUTE FOR THE AMENDMENT OFFERED BY MR. TAUZIN

Mr. MANTON. Mr. Chairman, I offer an amendment as a substitute for the amendment.

The CHAIRMAN. The Clerk will designate the amendment offered as a substitute for the amendment.

The text of the amendment offered as a substitute for the amendment is as follows:

Amendment offered by Mr. MANTON as a substitute for the amendment offered by Mr. TAUZIN: In lieu of the matter proposed to be inserted by the amendment of the Gentleman from Louisiana insert the following:

SEC. 11. COMPETITION AND TECHNOLOGICAL DEVELOPMENT.

(a) PROHIBITION ON UNREASONABLE REFUSALS TO DEAL.—Part III of title VI of the Communications Act of 1934 is amended by inserting after section 627 (47 U.S.C. 547) the following new section:

"SEC. 628. PROGRAMMING ACCESS TO PROMOTE COMPETITION AND CONTINUING TECHNOLOGICAL DEVELOPMENT.

"(a) UNREASONABLE REFUSALS TO DEAL PROHIBITED.—Within 180 days after the date of enactment of the Cable Television Consumer Protection and Competition Act of 1990, the Commission shall, in order to promote competition and diversity in the multichannel video programming market and continuing development of communications technologies, prescribe regulations to prohibit any video programming vendor that controls, is controlled by, or is under common control with a multichannel video system operator and that engages in the regional or national distribution of video programming from refusing to deal with any multichannel video system operator with re-

spect to the provision of video programming if such refusal would unreasonably restrain competition. Entering into or abiding by the terms of an exclusive contract that does not have the effect of unreasonably restraining competition shall not be considered an unreasonable refusal to deal. Nothing contained in this subsection shall require any person who licenses video programming for distribution to make such programming available in any geographic area beyond which such programming has been authorized or licensed for distribution.

"(b) REMEDIES FOR VIOLATIONS.—Any multichannel video system operator aggrieved by conduct that it alleges constitutes a violation of the regulations prescribed under this section may commence an adjudicatory proceeding at the Commission. Upon completion of such proceeding, the Commission shall have the power to order appropriate remedies, including, if necessary, the power to establish price, terms, and conditions of sale of programming to the aggrieved multichannel video system operator.

"(c) PROCEDURES.—The Commission shall prescribe regulations to implement this section. The Commission's regulations shall—

"(1) provide for an expedited review of any complaints made pursuant to this section;

"(2) establish procedures for the Commission to collect such data as the Commission requires to carry out this section with respect to exclusive contracts or other practices and their effects on competitors, competition, or the video programming distribution market or on the development of new video distribution technologies; and

"(3) provide for penalties to be assessed against any person filing a frivolous complaint pursuant to this section.

"(d) SUNSET.—The regulations prescribed under subsection (a)(1) of this section shall cease to be effective 9 years after the date of enactment of the Cable Television Consumer Protection and Competition Act of 1992, or on such earlier date as the Commission determines that a competitive national market for the delivery of video programming exists. Such regulations shall cease to be effective for any local market on such earlier date as the Commission determines that a competitive market for the delivery of such programming exists in such local market.

"(e) REPORTS.—The Commission shall, beginning not later than 18 months after promulgation of the regulations required by subsection (a), annually report to Congress on the status of competition in the market for the delivery of video programming.

"(f) EXEMPTIONS FOR PRIOR CONTRACTS.—Nothing in this section shall affect any contract (or renewal or extension of any contract) that grants exclusive distribution rights to any person with respect to video programming and that was entered into on or before June 1, 1990.

"(g) DEFINITIONS.—

"(1) The term 'multichannel video system operator' includes an operator of any cable system, multichannel multipoint distribution service, direct broadcast satellite distribution service, television receive-only satellite distribution service, or other comparable system for the distribution of video programming.

"(2) The term 'video programming vendor'—

"(A) means any person who licenses video programming for distribution by any multichannel video system operator;

"(B) includes satellite delivered video programming networks and other programming networks and services;

"(C) does not include a network or service distributing video programming intended for broadcast by a television station affiliated with a broadcasting network; and

"(D) does not include a network or service distributing video programming that is carried as a secondary transmission of a signal broadcast by a television station.

"(3) The terms 'cable system' and 'video programming' have the meanings provided by section 602 of this Act."

(b) MARKETING OF CERTAIN SATELLITE COMMUNICATIONS.—

(1) FINDINGS.—The Congress finds that—

(A) many satellite-delivered programming services have unnecessarily restricted options for consumers wishing to choose between competing television programming distributors;

(B) presently 3,000,000 Americans own C-band home satellite television systems and the number is growing at a rate of 350,000 to 400,000 each year;

(C) there is disparity in wholesale pricing between programming services offered to cable operators and to satellite programming distributors;

(D) independent, noncable third-party packaging of C-band direct broadcast satellite delivered programming will encourage the availability of programming to C-band direct broadcast home satellite television systems; and

(E) in order to promote the development of direct-to-home satellite service, Congress must act to ensure that video programming vendors provide access on fair and non-discriminatory terms.

(2) AMENDMENTS.—Section 705 of the Communications Act of 1934 (47 U.S.C. 605) is amended—

(1) by striking subsection (f) as added by section 204 of the Satellite Home Viewer Act of 1988;

(2) by striking "subsection (d)" each place it appears in subsections (d)(6) and (e)(3)(A) and inserting "subsection (f)";

(3) by redesignating subsections (c) through (g) as subsections (d) through (h), respectively;

(4) by inserting after subsection (b) the following new subsection:

"(c)(1) Any person who encrypts any satellite delivered programming shall—

"(A) make such programming available for private viewing by home satellite antenna users;

"(B) when making such programming available through any other person for distribution through any medium, establish reasonable and nondiscriminatory financial, character, technical, and service criteria and requirements under which noncable distributors shall qualify to distribute such programming for private viewing by home satellite antenna users; and

"(C) when making such programming available through any other person for distribution through any medium, establish by the effective date of this subparagraph or January 1, 1992, whichever is later, price, terms, and conditions for the wholesale distribution of such programming which do not discriminate between the distribution of such programming to distributors for cable television subscribers and distributors to home satellite antenna users, nor among different distributors to home satellite antenna users, except that this subparagraph shall not prohibit rate differentials which are—

"(i) attributable to actual and reasonable differences in the costs of the creation, sale, delivery, or transmission of such programming as between different delivery media;

"(ii) attributable to reasonable volume discounts; or

"(iii) attributable to bona fide agreements for the distribution of such programming which were in effect prior to the enactment date of this subparagraph.

"(2) Where a person who encrypts satellite delivered programming has established a

separate subsidiary for distribution to satellite antenna users, such person shall not be required to establish or license any entity on the same terms and conditions as such separate subsidiary; except that for purposes of any claim of discrimination under this section, a party aggrieved may, as evidence of discrimination, compare the prices, terms, and conditions established by the person who encrypts.

"(3) Nothing contained in this subsection shall require any person who encrypts satellite delivered programming to authorize or license any distributor for a secondary satellite retransmission of such programming, but, if any person who encrypts satellite delivered programming authorizes or licenses such a distributor, such person shall, consistent with the provisions of paragraph (1)(B) and (1)(C), establish criteria to qualify to distribute such programming through such secondary satellite retransmissions, and further establish nondiscriminatory price, terms, and conditions for such distribution. Nothing contained in this subsection shall require any person who encrypts satellite delivered programming to make such programming available in any geographic area beyond which such programming has been authorized or licensed for distribution.

"(4) Any person aggrieved by any violation of paragraph (1)(A) of this subsection may bring a civil action in a United States district court or in any other court of competent jurisdiction. Such court may grant temporary and final injunctions or other equitable relief on such terms as it may deem reasonable and appropriate to prevent or restrain such violations.

"(5) Any person aggrieved by any violation of paragraph (1)(B), (1)(C), or (2) of this subsection may bring a civil action in the United States district court or other court of competent jurisdiction. Such court may grant temporary and final injunctions on such terms as it may deem reasonable and appropriate to prevent or restrain such violations; and (i) direct the recovery of damages to a prevailing plaintiff, including actual damages, or statutory damages for all violations in a sum of not more than \$500,000, as the court considers just; and (ii) direct the recovery of full costs, including reasonable attorney's fees, to a prevailing party.

"(6) As used in this subsection—

"(A) the term 'satellite delivered programming' means video programming transmitted by a domestic C-band direct broadcast communications satellite intended for reception by cable television systems or home satellite antenna users and does not include any satellite communication of any broadcaster or broadcast network;

"(B) the term 'home satellite antenna users' means individuals who own or operate C-band direct broadcast satellite television receive-only equipment for the reception of satellite delivered programming for viewing in such individual's single family dwelling unit; and

"(C) the term 'person who encrypts' means the party who holds the rights to the satellite delivered programming or who establishes the prices, terms, and conditions for the wholesale distribution thereof.

"(7) This subsection shall cease to be effective 7 years after the date of enactment of this subsection.";

(5) in subsection (h) (as redesignated) by striking ", based on the information gathered from the inquiry required by subsection (f).";

(3) EFFECTIVE DATE.—The amendments made by paragraph (2) of this subsection shall take effect 90 days after the date of enactment of this Act.

The CHAIRMAN. The Chair announces that the time for the debate on both the amendment and the substitute will be fungible and that the gentleman from Louisiana [Mr. TAUZIN] will be recognized for 30 minutes, and the gentleman from New York [Mr. MANTON] will be recognized for 30 minutes.

Mr. MANTON. Mr. Chairman, I ask unanimous consent that I be permitted to yield 15 minutes to the gentleman from New Jersey [Mr. RINALDO] under these 2 amendments and that he be permitted to yield slots of time.

The CHAIRMAN. Is there objection to the request of the gentleman from New York?

There was no objection.

Mr. TAUZIN. Mr. Chairman, I yield myself such time as I may consume.

(Mr. TAUZIN asked and was given permission to revise and extend his remarks.)

Mr. TAUZIN. Mr. Chairman, we are about to debate what I believe and what many believe in this Chamber and certainly on the subcommittee and committee to be the heart and soul of this legislation. There are many on both sides of the aisle who have complained during this debate that regulation, reregulation of the cable industry was not the way to go, that the best way to go was to create competition for the cable industry in America.

I happen to believe that that is correct. I happen to believe that whatever regulation we include in this bill will only have a modest effect upon cable rates. In fact, I believe that the regulations contained in this bill will do little more than control, regulate upward the price of cable of Americans.

Very little in this cable bill will do anything to create competition and, thus, drive prices down, unless the Tauzin amendment is adopted.

The other body saw the wisdom of that argument by a vote of 73 to 14. They adopted a similar amendment to their cable bill.

The Tauzin amendment, very simply put, requires the cable monopoly to stop refusing to deal, to stop refusing to sell its products to other distributors of television programs.

In effect, this bill says to the cable industry, "You have to stop what you have been doing, and that is killing off your competition by denying it products."

It will do us little good to struggle with the C-band dish industry. It will do us little good to hope in vain for the advent of a DBS, direct broadcast satellite, industry or for the expansion of wireless cable in America as competition to this monopoly if none of it can get programming. Programming is the key.

Why did cable need network programming to get going? Why did cable need this Government to give it network programming free of charge to get going? Because without programming, cable could not get off the ground. Without programming, com-

petitors of cable are equally stymied and who is the big loser? The big loser is everyone in America who pays a cable bill.

Listen, election day is shortly coming. There is a cynicism in the land. There is a belief in America that this Congress can no longer deliver for the American people. There is a belief that we are beholden to special interests. There is a belief that the big cable monopolies in this country are going to run this House tonight, are going to force this House to adopt a sham amendment instead of the true consumer amendment.

The choices we will have tonight will be between the Tauzin amendment, which guarantees that the cable cannot refuse to deal, must deal in fair and equitable terms with others who distribute television programs, which will give to consumers choice in the marketplace and which will bring rates down.

The FCC recently did a study on 1989 and 1990 rates. Those of my colleagues watching this tonight in their offices, those in the Chamber, I hope they will pay attention to these charts. These charts illustrate what the FCC discovered.

What the FCC discovered is that in the few communities, 65 in America, where there is competition to cable, guess what happens? Rates fall dramatically.

In 1989, a 23.5-percent reduction; in 1990, a 34-percent reduction in rates were achieved in the communities that had competition. In 95 percent of the communities that did not have competition, rates went up 61 percent.

What does that mean to Americans? It means that everybody's cable bill could come down if the Tauzin amendment is adopted. It means if we refuse to adopt the Tauzin amendment, if we accept the sham Manton amendment drafted for and by the cable companies, rates will not only continue to go up but we will never see the benefit of reduced rates in American homes across this country.

Let me show my colleagues what it means in dollars. The next chart illustrates what America could be saving according to not my figures but the Federal Communications Commission of this administration. These are their numbers.

If America chose to adopt the Tauzin amendment in this House tonight, rather than to be beholden to the big few cable companies who run this show, Americans could have saved in 1989 some \$2.4 billion. Americans could have saved in 1990, \$4 billion. And the chart likely goes up.

We are not talking about peanuts here. We are talking about a major impact upon middle America. We cannot deliver a middle income tax cut this year, but we could give every American savings on his cable bill if we just had the decency to end this monopoly and to create some competition in television services.

How do we do it? We do it very simply. We prohibit the cable companies, those who control programming, from doing what they have been doing ever since we deregulated them.

Let me show my colleagues the graph and what they are currently doing to satellite services. In satellite services alone, we are not talking about what is happening in wireless services or what could happen in direct broadcast satellite. In C-band, that is a big dish industry alone, cable prices versus satellite dish prices are reflected on this chart. The average price per a subscriber for basic cable in the country is 17.34. Under this analysis, it is topped by 27.95 for a similar program package for those who dare to buy the dish, those who dare to buy some competitive system.

What does it mean? It means that cable is jacking the price upon its competitors so high that they can never get off the ground. In some cases they deny programs completely to those competitors to make sure they cannot sell a full package of services. So the hot shows are controlled by cable. The good shows, the good programs only come to you on the cable. And if you complain, you are told, like a constituent of mine in Homer, LA, recently, when she complained about having to buy a box and a controller, all of which she could have bought at Radio Shack very cheaply. Instead she had to rent it every month at 10 times its value from the cable company. She said, "Why do I have to do that?" She said, "They said 'That is our rule, ma'am.'"

She said, "What can I do about it?" They said, "you can move, if you don't like it. We are the only cable company in town."

I do not want her to have to move. And where would she move to except the 65 communities out of the 11,000 in America that have a little competition going on.

Folks, this is it in a nutshell. We either create competition for the American television viewing audience out there or we leave them strangled, in fact, raped by cable monopolies who can charge them what they want, force them to buy what they want in tiers they create and add to those services rental fees on equipment that could be easily purchased at Radio Shack, if we had the decency to think about the American consumer out there instead of big cable interests that control the situation.

It is this simple. There are only five big cable integrated companies that control it all. My amendment says to those big five, "You cannot refuse to deal anymore."

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You have to offer your programs to other competitors, and you cannot refuse to deal by saying 'We will only give it to you at a much higher price.' Prices need to be comparable and fair.

There is an argument against our amendment someone made. The argu-

ment is that we no longer allow for exclusive type programs that are important to people who develop a product. Not so. Read the DSG report on our bill. The DSG report clarifies it very well. It says and our amendment says that exclusive programming that is not designed to kill the competition is still permitted. The FCC can grant exclusive programming rights under our amendment.

Why is our amendment preferable to the amendment of the gentleman from New York [Mr. MANTON]? The gentleman from New York is offering a substitute amendment. I have called it an amendment drafted for and by the cable industry. Let me tell the Members why. It is weaker, it is weaker than the bill we passed 2 years ago. Not only is it weaker in terms of who it covers, because it sets a new legal standard on what companies are covered, a legal standard that will tie a company up in courts for years, a standard of control rather than affiliation, and it is much weaker in who it covers, so that more of the big companies can escape its coverage.

It also sets an almost impossible proposition for all the other competitors other than the C-band dish. What it says to them is that cable has to deal with you, but the terms and conditions can be as discriminatory as they want. They can say, in effect, law by Congress tells me I have to deal with you, but here is my deal. You either pay me 10 times what my program is worth to other cable systems, or you cannot have it. Under the Manton amendment that is the kind of effect it has.

Are we going to have any competition under those terms? I suggest that we will get more of the status quo. It is this simple. If we want to support the cable monopolies tonight, the gentleman from New York [Mr. MANTON] will give us the chance. The gentleman from New York [Mr. LEVY] will give us his chance with a substitute bill. If we want to stand for American consumers for a change, if we want to end this year of political cynicism out there, do something real for America. Give them a break on something critical in their lives, their television. Give them a break on what they pay for their cable rights and create for the millions of Americans who cannot get cable because they live in the hinterlands of our country, in the country lands, create for them a chance to get it from direct broadcast satellite, to get it from wireless cable, to get it from other systems that will come across as technology develops.

None of that will be possible unless we stand up tonight to the big interests out there. I know it is tough sometimes. It is an election year and they make contributions. They stand tall. However, I think it is time we stand tall. I think it is time the American public counts on us and we deliver.

Their cynicism is deep. We can either prove their cynicism tonight or we can