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February 15, 1993

VIA FEDERAL EXPRESS

Ms. Donna R. Searcy, Secretary  
Federal Communications Commission  
1919 M Street, NW  
Washington, DC 20554

RE: MM Docket No: 92-265

Dear Ms. Searcy:

Enclosed for filing are the original and nine (9) copies of the Reply Comments of WJB-TV Ft. Pierce Limited Partnership which are submitted in response to MM Docket No. 92-265.

If you have any questions or need additional informaiton, please advise.

Very truly yours,

WJB-TV Limited Partnership

BY: Kenneth E. Hall  
Kenneth E. Hall  
General Manager

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In the Matter of )  
)  
Implementation of Section 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

*Handwritten notes:*  
10/10/92  
10/10/92

**REPLY COMMENTS OF WJB-TV  
FT. PIERCE LIMITED PARTNERSHIP**

WJB-TV Ft. Pierce Limited Partnership ("WJB") hereby files its reply comments to the Notice of Proposed Rulemaking ("Notice") in MM Docket 92-263 released on December 24, 1992. The Notice addresses several issues arising under sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992 (the "1992 Cable Act").

**INTRODUCTION**

This proceeding is obviously of interest to many parties. By WJB's count, 49 parties filed initial comments totaling over one thousand pages. This fact is a testimony to the critical importance of programming to the success of video providers. Indeed, quality programming is probably more important to this success than the number of channels, the quality of service, or even the price which a video provider can offer to its subscribers.

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The comments discuss a variety of issues, many of which are only tangentially related to the subject matter of this proceeding. Rather than addressing each of these, WJB will focus on several key concepts contained in the Notice and will address the initial comments directed to these concepts.

### A. Congressional Intent

Unfortunately, many commenters simply ignored the clear Congressional intent behind Sections 12 and 19 - that of promoting competition in the video marketplace.<sup>1</sup> That intent is reflected throughout the 1992 Cable Act, from its title (the "Cable Television Consumer Protection and Competition Act of 1992") to its "findings" (Section 2) and "statement of policy" (Section 3). Overall, it is clear that Congress sought to promote competition in the video marketplace.

It is equally clear that Congress understood that effective competition cannot exist without fair and equal access to programming. For example, Section 19, which addresses programming access and is the subject of the Notice, is entitled "Development of Competition and Diversity in Video Programming Distribution." In addition, the very first articulated "purpose" of this section

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<sup>1</sup> The Notice specifically requested comments on the Congressional intent behind this sections. See Paragraph 6 of the Notice.

is to promote competition.<sup>2</sup> Therefore, it is undeniable that Congress understood the importance of programming to the development of competition when it enacted these sections.

Therefore, sections 12 and 19 must be read in conjunction with the competition objective. The attempts by several commenters to limit the scope and coverage of these sections, and thus to restrain competition in the marketplace, are clearly inconsistent with the intent and directives of Congress on this issue.

## **B. Scope of Section 628**

Several commenters assert that the protections of Section 628 (Section 19 of the 1992 Cable Act) should be limited to those situations in which a cable operator is "vertically integrated" with the programmer at issue. However, a fair review of Section 628 indicates that Congress did not intend such a narrow reading of that section.

Section 628(b) clearly states that its prohibitions apply to three groups, specifically:

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<sup>2</sup> Subsection (a) specifically provides:

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 and satellite broadcast programming to persons in rural and other areas not currently able to receive such programming, and to spur the development of communication technologies.

1. cable operators
2. satellite cable programming vendors in which a cable operator has an attributable interest
3. satellite broadcast programming vendors

Clearly, nothing in this section requires a cable operator (or a satellite broadcast programming vendor) to be "vertically integrated" in order to be subject to its coverage. Such a reading is wholly inconsistent with the Congressional objectives of both Section 628 and the 1992 Cable Act, including the promotion of competition. Congress intended to remove all artificial and unnecessary restrictions on competition in the video marketplace, without regard to whether the offending conduct resulted from "vertical integration".

Several commenters place emphasis on the fact that Sections 628(c)(2)(A), (B), (C), and (D) refer to situations in which the cable operator and the programmer are affiliated. However, these provisions are not intended to be exhaustive of the conduct prohibited by subsection (b); instead, they simply provide examples of some of the types of conduct that are to be covered by regulations. This interpretation is clear from the title to subsection (c), "Minimum Contents of Regulations." From the plain language of Subsection (b), it is apparent that Section 628 is to be read broadly to reach all cable operators.

### C. Attributable Ownership Interest

The Notice proposes to establish a five-percent threshold for determining if an entity is vertically integrated. See Paragraph 9 of the Notice. It then asks whether "an attribution benchmark by itself [will] be sufficient to determine whether an entity actually controls another entity, or should the Commission establish behavioral guidelines to determine control irrespective of the attribution threshold?" This is a critical question, and predictably, it drew numerous comments.

WJB believes that Section 628 was intended to reach "unfair methods of competition" and "unfair or deceptive acts or practices" by any cable operator or vendor, not just those who share a certain percentage of ownership. Again, since one of the primary objectives of both Section 628 and the 1992 Cable Act is to promote competition, contrary activities by any party should be prohibited.

WJB recognizes that cable companies and vendors that are jointly owned are the most likely to engage in anti-competitive activities. It is obvious that these parties will have the ability, and often the motivation, to engage in activities that violate Section 628.

It is also possible that cable companies, regardless of their ownership interests, can unduly influence a vendor's marketing decisions. Congress has recognized that the cable industry has become highly concentrated. See Section 2(a)(4) of the 1992 Cable Act. Consequently, a few companies now own a large percentage of all of the cable systems throughout the country. As

a result, these companies have acquired a large degree of market power, leverage, and influence, based largely upon their size and status. Even if these companies do not actually own a vendor, they may have the power to influence its decisions. Indeed, in some cases, they apparently do exercise such power.<sup>3</sup> For this reason, any definition of "attributable interest" should take into account the amount of influence, leverage, or control that an operator may possess over a vendor, regardless of its ownership interests.

#### **D. Prohibited Conduct**

The Notice asked for comments on the types of practices which are to be prohibited under 628. Like many commenters, it unfortunately appears to read Section 628 as applying only to conduct that is either "unfair", "deceptive" or "discriminatory," and then only when "the purpose or effect ... is to hinder significantly or to prevent" the distributor from providing programming to consumers. WJB disagrees with this interpretation of Section 628.

Section 628, by its express language, applies to two types of conduct, specifically:

1. "unfair methods of competition"

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<sup>3</sup> See, e.g., Comments of Liberty Cable Company, Inc. ("Liberty"); Comments of National Private Cable Association ("NPCA"); Comments of Wireless Cable Association International, Inc. ("WCA").

2. "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 or satellite broadcast programming to subscribers or consumers."

In the case of unfair competition, Section 628 does not require the showing of any "purpose" or "effect." If a tactic is unfair and anti-competitive, it is prohibited. If it is "unfair" or "deceptive" but not anti-competitive, the additional showing is required. This interpretation is not only logical, but it is wholly consistent with the objective of Section 628, that of promoting competition. If a practice hinders competition, it should be prohibited.

Several commenters discussed the level of "harm" that they contend an aggrieved party must demonstrate under this Section. However, the statute does not require that harm actually occur; instead, it refers to conduct which has the "purpose" of hindering competition, as well as that which has the "effect" of doing so. Thus, even if no harm arises, conduct which is intended or designed (i.e., has the "purpose") to hinder competition is prohibited by the plain language of Section 628. A showing of actual harm is not required.

In a related vein, the Notice specifically asked commenters to discuss specific examples of discriminatory pricing and exclusive dealing in which they were victimized. Several commenters did so.<sup>4</sup>

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<sup>4</sup> See, e.g., Comments of Liberty; Comments of NPCA, Comments of WCA.

WJB, like these commenters, believes that it too has been the victim of discriminatory practices. But, unfortunately, there is no possible way to verify these suspicions without knowing what similarly-situated cable companies are being charged for the same services.<sup>5</sup> Because this information is currently unavailable to WJB, it cannot in good faith provide concrete examples of discriminatory pricing affecting its operation.

WJB's inability to make this showing demonstrates the real problem. For the Commission's rules to have any real effect, all contracts and price schedules will have to be made available. Otherwise, it will be impossible for a victim to state a claim, no matter how egregious the discrimination. In the meantime, the Commission should recognize that the inability to cite concrete examples does not mean that the problem does not exist.

#### **E. Promulgation of Regulations Under Section 628**

Section 628(c)(1) directs the Commission to promulgate regulations for the purpose of "increasing competition and diversity in the multichannel video market and the continuing development of communications technologies." Section 628(c)(2) then provides several obvious examples of the types of activities that Congress intended to curtail.

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<sup>5</sup> WJB does know now, however, that it has been denied access to Turner Network Television ("TNT") and the Sunshine Network, which apparently are not offered to any wireless cable operators.

The Notice asks whether Congress intended for the Commission to regulate any activities beyond those specifically identified in Section 628(c). See footnote 32 to the Notice. Despite some comments to the contrary, the answer is clearly that it did. First, Section 628(c)(2) is entitled "Minimum Contents of Regulations"; the use of the word "minimum" indicates that the examples provided were not intended by Congress to be an exhaustive listing. Furthermore, the language of Section 628(b) specifically makes references to "cable operators" and "unfair methods of competition", clearly covering conduct beyond those cited as examples in Section 628(c).

The Notice also asks for guidance in enacting regulations as to the specific conduct identified in Section 628(c)(2). See Paragraph 13 to the Notice. Again, emphasizing that those regulations are not exhaustive of the types of conduct prohibited by Section 628, WJB submits the following reply comments:

**1. Undue Influence**

Section 628(c)(2)(A) requires the Commission to issue regulations that would prohibit cable operators from "unduly or improperly influencing" the decisions of an affiliated vendor to sell to an unaffiliated distributor. Several commenters tried to define "undue influence" in such a restrictive manner that in practical terms, it could never arise.

Assuming that an affiliated and an unaffiliated programmer are alike in all other respects (i.e., creditworthiness,

system size, geographic location, etc.), there is no reason that a vendor should be allowed to discriminate between them. Even where minor differences in the purchasers exist and such differences affect the cost or risk of the transaction to the vendor, any price differential should be reasonable and explainable. In circumstances where this is not the case, an inference of improper influence should arise.

Several commenters would require aggrieved competitors to make elaborate, and often impossible showings, to demonstrate improper influence. However this burden should not be placed on the unaffiliated distributor. The distributor, because he is unaffiliated, will not generally know the alleged justification for the differential; in most cases he will not even know that he is being charged a price higher than that charged to his competition.

Instead, the only logical approach is to require a vendor that utilizes multiple pricing schemes to demonstrate that no "undue influence" exists. Again, the vendor is the only party that will be privy to that information.

## **2. Discrimination**

The same problem exists under the "discrimination," standard in Section 628(c)(2)(B), for which the Notice also solicits comments. An unaffiliated distributor simply will not know the alleged justification for any differential, much less whether "discrimination" exists. It is therefore impossible for it to make a prima facie case and unfair for it to be required to do

so. At most, a distributor should only be required to demonstrate that a differential exists (or reasonable grounds for so believing); the burden of justifying the differential should rest with the vendor, presumably the only party that can explain the rationale for the differential.

Some commenters envision a two-step evaluation for evaluating such claims, first focusing on whether the conduct is "discriminatory" and then assessing whether it has "prevented or hindered" competition. Again, WJB asserts that the second step, the requirement of actual harm, is not required by the statute; Section 628(b) only requires that the conduct have either the "purpose" or the "effect" of hindering competition. If a discriminatory purpose is present, the actual result is irrelevant.

Section 628 does allow vendors to maintain price differentials for certain specified legitimate reasons. However, basing prices on the technology utilized is not a legitimate reason.<sup>6</sup> This practice should not be allowed to continue.

The question of whether this regulation should be applied retroactively to existing contracts also drew considerable attention. The problem with a prospective approach is that most contracts will not be covered. Alternative providers such as WJB have invested millions of dollars into systems that finally provide consumers with the benefits of competition and a choice. Many of these investments were actually encouraged by Commission policies

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<sup>6</sup> See, e.g., Comments of NPCA; Comments of WCA; Comments of Liberty.

that expressed a desire to promote new technologies. For these investments to succeed, the enforcement of these regulations must begin immediately. To deny these investors, as well as the consuming public, with the immediate benefit of these regulations will be tantamount to denying the public the benefits of competition and to abandoning the encouragement of new technology.

### 3. Exclusive Contracts

On the subject of exclusive contracts, it is important that the term "exclusive contract" be defined broadly. WJB believes that if an affiliated vendor and an unaffiliated vendor are each offered contracts, but the unaffiliated version contains significant restrictions not found in the affiliated version, the affiliated vendor, in effect, has an exclusive contract. Thus, an exclusive contract can exist, even if the same services are offered to other parties.

Again, some commenters would place the burden of proving that an exclusive contract has been entered into upon the victim. However, an unaffiliated vendor will probably not have access to the documentary evidence needed to conclusively establish the existence of an exclusive contract. Thus, the required showing should be minimal, with the burden of disproving a violation placed on the vendor, who is the only party privy to the relevant information.

**F. Enforcement Issues**

WJB applauds the Commission in seeking to expedite claims under Section 628. See Paragraph 39 of the Notice. However, it is concerned by several comments relating to the manner in which such claims will be adjudicated.

First and foremost, a complainant probably can never make a prima facie showing of discrimination. Only the vendor in question will have knowledge of all of the relevant terms of each agreement. Therefore, vendors should be required to certify that they are in compliance with the law. Second, a complainant should only be required to establish a reasonable basis for believing that discrimination has occurred; by necessity, the burden of disproving discrimination should rest with the vendor, the only party privy to the relevant information.

**RESPECTFULLY SUBMITTED** this 15th day of February, 1993.

**WJB-TV FT. PIERCE LIMITED PARTNERSHIP**

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