

W. JAMES MacNAUGHTON, ESQ.
Attorney at Law
90 Woodbridge Center Drive • Suite 610
Woodbridge, New Jersey 07095

Phone (908) 634-3700
Fax (908) 634-7499

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February 12, 1993

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FCC MAIL ROOM

FEDERAL EXPRESS

Office of the Secretary
Federal Communications Commission
1919 "M" Street, N.W.
Washington, D. C. 20554

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

Dear Sirs:

Enclosed for filing in this action please find an original and ten (10) copies of the Reply Comments of National Satellite Programming Network, Inc. Would you please distribute a personal copy of the Comments to each Commissioner. Please mark one copy "filed" and return it to me in the enclosed envelope.

Sincerely,


W. James MacNaughton

WJM:lw
Enclosures
cc: R. L. Vogelsang

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BEFORE THE FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

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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 :
----- X

MM Docket No. 92-265

REPLY COMMENTS OF NATIONAL SATELLITE PROGRAMMING NETWORK, INC.

W. JAMES MacNAUGHTON, ESQ.
90 Woodbridge Center Drive,
Suite 610
Woodbridge, New Jersey 07095
(908) 634-3700
Attorney for National Satellite
Programming Network, Inc.

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FEDERAL COMMUNICATIONS COMMISSION
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I. The Buying Group—Not Its Individual Members—Should Be Responsible For Programming Fees

National Satellite Programming Network, Inc. ("NSPN") submits these comments in reply to the comments of Time Warner Entertainment Company, L.P. ("Time Warner"), Viacom International Inc. ("Viacom") and various other programmers. These programmers ask for "unitary treatment" of a "buying group" before the group can obtain protection under § 628. Unitary treatment means that all members of the group must have a common marketing program and joint and several liability for programming fees, technical performance and signal security. See, e.g. Time Warner Comments at pp. 30-31 and Viacom Comments at pp. 26-28. These are unrealistic and unattainable conditions.

NSPN is a corporation and guarantees payment of programming fees. The additional joint and several liability of NSPN members for those fees is unnecessary. If NSPN members were required to assume joint and several liability along with NSPN for programming fees, then NSPN would not have members and simply cease to exist.

A programmer can legitimately expect to be paid for a certain number of subscribers if it grants a discount based on that number. That expectation can be fulfilled if the "agent or buying group," such as NSPN, is a corporate entity and becomes a party to the programming agreement. If the purchasing agent is a legal entity in its own right and has the financial responsibility of a comparable sized cable company (which NSPN has), then there is no

reason why the programmer should discriminate in price or other financial security conditions, e.g. letters of credit.

II. Agents and Buying Groups Do Not Have To Become Cable MSOs

Nothing in the legislative history even remotely suggests that "agents or buying groups" have to transmogrify themselves into cable MSOs before they become entitled to the protection of § 628. Yet the programmers want agents and buying groups to become cable MSOs when they propose that all of the members of a buying group become collectively responsible for marketing and technical performance.¹

If NSPN is made aware that any individual member has a problem with technical performance or signal security, it works with that member to resolve the problem. But neither NSPN nor its other members can or should be expected to assume legal responsibility for any one individual member's technical problems as a condition for NSPN becoming an "agent or buying group" under § 628. The programmers have not shown why NSPN's assumption of such responsibility would reduce their costs or otherwise justify discriminatory pricing.

It is also unrealistic to expect NSPN and its members to adopt uniform marketing programs or strategies as a condition for NSPN obtaining the protection of § 628. Each of NSPN's nine

¹ United Video even suggests that NSPN should become a "buying group" only if it owns 50% or more of each of its members. This is absurd, unnecessary and a clear effort to subvert the purpose of the statute.

hundred plus (900+) members make their own marketing decisions. It is unworkable for NSPN to direct or control that process. It has been NSPN's experience that when it develops a good marketing strategy, many of its members enthusiastically adopt the strategy because it makes sense—not because it is dictated by NSPN. NSPN is certain that if it received the same level of marketing support from the programmers as a large cable MSO, NSPN members would flock to voluntarily implement the NSPN marketing strategy based on that support.

The programmers have not shown how disparate marketing strategies among buying group members actually increase their costs. Accordingly, a uniform marketing requirement for buying group members serves no purpose other than to eliminate "agents and buying groups" from the protection of § 628.

III. The Programmers Propose the Evisceration of §§ 616 and 628

NSPN totally disagrees with the approach for implementing §§ 616 and 628 proposed by the programmers. The programmers' "interpretations" of §§ 616 and 628 are a skillful exercise in sophistry by highly paid lawyers designed to perpetuate discrimination and exclusionary programming practices. Adopting their suggestions will ensure that the status quo will continue and that alternative technologies and their buying groups will not be able to obtain the programming they need at non-discriminatory prices, terms and conditions.

Congress made clear that the discrimination against alternative technologies in the availability and pricing of programming has to stop. The Commission should implement that intent and outlaw facilities-based discrimination and exclusivity for all programming. The Commission should make the programmers and cable operators—not the victims of their discrimination—carry the burden of proving that facilities-based discrimination and exclusivity actually promotes effective competition. The alternative technology competitors should not have to prove yet again to the Commission that the programmers' practices have stifled competition.

IV. § 628(b) Applies To All Cable Operators

The programmers argue that § 628 applies only to vertically integrated programmers. From this proposition, the programmers then argue that the discriminatory and exclusive programming practices of non-vertically integrated programmers are the standard against which "unfair" practices should be measured. The Commission should reject this cramped interpretation and its absurd result.

§ 628(b) expressly applies to all "cable operators," not just cable operators who own programming services. Congress was well aware of how to describe "a cable operator which has an attributable interest" in a programmer when it so desired. See § 628(c)(2)(a). Congress did not use that description in § 628(b).

A "cable operator" is "engaged" in the practices outlawed by § 628(b) where it receives the benefits of those illegal activities—regardless of who owns the programmer giving the benefits. Congress did not intend to create two separate and distinct classes of programming practices—one legal and the other illegal—based solely on the ownership of the programmer.²

It is even more absurd to suggest that the vertically integrated programmer should be allowed to discriminate because a non-affiliated programmer does so as a "legitimate" business practice. Facilities-based discrimination and exclusivity began in the early 1980's when SMATV and MDS companies first emerged as competitors to franchised cable operators. The first practitioners of these anti-competitive activities were vertically integrated programmers such as HBO and Showtime. The non-affiliated programmers followed the lead of these premium services and soon facilities-based discrimination and exclusivity were an integral part of all programmer marketing programs. In each instance, the programmer, regardless of affiliation, succumbed to the presence of entrenched cable operators to hobble the alternative technology competitors.

If the practice of non-affiliated programmers are exempt from § 628(b), then the pressure by cable operators on non-affiliated programmers to discriminate against non-cable MVPDs will

² Both the House and Senate reports show a congressional intent to outlaw programming discrimination and exclusivity by cable operators who have both horizontal and vertical control of the market. There is no indication from either the House or Senate reports to exempt non-affiliated programmers from § 628(b).

not stop. To make matters worse, vertically integrated programmers will point to the facilities-based discrimination and exclusivity of the non-affiliated programmers as "proof" that the practices are "legitimate." By exempting the practices of non-affiliated programmers from § 628(b), the programmers are proposing a giant exception which will swallow the rule. The Commission should not allow congressional intent to be so blatantly subverted. The Commission should make clear that any cable operator who receives the benefits of facilities-based discrimination or exclusivity is engaged in an unfair practice under § 628(b), regardless of the ownership of the programmer.

**V. Facilities-Based Discrimination
Exclusivity Should Be Banned
Immediately**

The programmers propose that the Commission's rules implementing §§ 616 and 628 be "prospective," i.e. apply only to future, not current contracts. Programmer contracts are typically three to five years in duration and some go for ten years.

Virtually all programmer agreements allow the programmer to change pricing on short notice. Programmers can therefore readily and immediately change their pricing to eliminate facilities-based discrimination in pricing without breaching their current agreements.

Virtually all programmer contracts require the parties to comply with applicable law. The programmers therefore cannot be held liable for breaching an exclusive contract if the exclusivity

is illegal. Accordingly, there is no cogent reason why the Commission should apply a ban on facilities-based discrimination and exclusivity "prospectively."

**VI. §§ 616 and 628 Are Intended To
Protect Consumers—Not Programmers**

Viacom frankly admits that it engages in price discrimination against non-cable multichannel video programming distributors ("MVPDs") because entrenched cable monopolies control access to consumers. See Viacom Comments at pp. 56-57. Viacom acknowledges that non-cable MVPDs can operate more efficiently than cable MVPDs and even sell programming at lower retail prices notwithstanding higher wholesale prices for programming.³ Viacom Comments at pp. 50-56. However, Viacom argues that it should be allowed to continue discrimination so it does not "subsidize" non-cable MVPDs. Viacom Comments at p. 57.

Viacom misses the point. §§ 616 and 628 were enacted to protect consumers—not programmers. If, as Viacom admits, non-cable MVPDs can operate more efficiently than cable MVPDs, then the financial benefits of that efficiency should flow to consumers in the form of lower prices. But consumers do not get lower prices because facilities-based price discrimination by Viacom and other

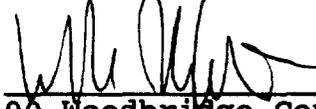
³ Viacom complains about the bad debt and administrative burdens of dealing with non-cable MVPDs. Viacom Comments at pp. 44-50. Viacom could eliminate all of those problems if it gave NSPN and other purchasing agents the favorable large cable MSO rate card. NSPN already assumes the bad debt and administrative burden of dealing with non-cable MVPDs for Viacom programming and could assume even more if only NSPN could buy Viacom programming at non-discriminatory rates.

programmers means non-cable MVPDs pay more for programming and are thus unable to reduce their prices. The programmers benefit from facilities-based discrimination because they get more money from non-cable MVPDs. But, Congress intended consumers to benefit from real competition. The Commission should make that intention a reality and ban facilities-based discrimination and exclusivity.

Respectfully submitted,

**NATIONAL SATELLITE PROGRAMMING
NETWORK, INC.**

BY: **W. JAMES MacNAUGHTON, ESQ.**



90 Woodbridge Center Drive,
Suite 610
Woodbridge, New Jersey 07095
(908) 634-3700
ATTORNEY FOR NATIONAL SATELLITE
PROGRAMMING NETWORK, INC.

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