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

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

REPLY COMMENTS

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REPLY COMMENTS

The Wireless Cable Association International, Inc. ("WCA"), by its attorneys and pursuant to Section 1.415 of the Commission's Rules,[1] hereby replies to certain of the initial comments filed by cable operators and vertically-integrated programmers in response to the *Notice of Proposed Rule Making ("NPRM")* commencing the captioned proceeding.[2]

I. Introduction And Summary.

The fundamental premise of the Cable Television Consumer Protection and Competition Act of 1992 (the "1992 Cable Act")[3] is that competition, rather than regulation, is the preferable mechanism for protecting consumers from the abuses they

[1] 47 C.F.R. § 1.415 (1992).

[2] *Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992,* MM Docket No. 92-265, FCC 92-543 (rel. Dec. 24, 1992) [hereinafter cited as "*NPRM*"].

[3] Pub. L. No. 102-385, 102 Stat. 1460 (1992).

have suffered at the hands of the cable monopoly.[4] In passing the 1992 Cable Act, Congress recognized that in order to effectively compete all multichannel video programming distributors ("MVPDs") must have a full and fair opportunity to distribute the programming services that consumers demand.[5] On a record demonstrating beyond peradventure that the cable monopoly has abused its leverage over programming vendors to frustrate efforts by non-cable MVPDs to secure programming on equitable terms, Congress passed Section 628 "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 communications technologies."[6]

Section 628 is, in the words of its author, "the heart and soul" of the 1992 Cable Act.[7] How the Commission implements Section 628, more than any other provision, will determine whether the pro-competitive goals behind the 1992 Cable Act are achieved.

[4]*See, e.g.*, 1992 Cable Act, at § 3(a); S.R. No. 102-92, 102d Cong., 1st Sess., at 1, 12, 18 [hereinafter cited as "Senate Report"].

[5]*See, e.g.* Senate Report, *supra* note 4, at 24-29; H.R. No. 102-628, 102d Cong., 2d Sess., at 41-43 (1992) [hereinafter cited as "House Report"].

[6]47 U.S.C. § 548(a).

[7]138 Cong. Rec. H6533 (daily ed. July 23, 1992)(statement of Rep. Tauzin).

The cable industry fought hard, and not always with candor,[8] to avoid passage of the 1992 Cable Act. The program access provisions, in particular, were unsuccessfully targeted for defeat by the cable lobby.[9] Having lost the battle before Congress to retain its unfettered power over the programming community, the cable monopoly is now attempting to win the war before the Commission by reasserting the very excuses for misconduct that Congress rejected.

In developing rules to implement Section 628, the Commission must not lose sight of the congressional intent behind Section 628 -- to assure that non-cable MVPDs will have the programming they need in order to bring the benefits of competition to consumers. The cable interests advance such cramped interpretations of virtually every phrase of Section 628 that, if adopted by the Commission, the "heart and soul" of the 1992 Cable Act would be transmogrified into a paper tiger. The bottom line is this -- if the Commission adopts the restrictive readings of Section 628 being pressed upon it by

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[8] *See, e.g.* 138 Cong. Rec. H8656 (daily ed. Sept. 17, 1992)(statement of Rep. Eckart)("The fact of the matter is that there is a disturbing trend here of disinformation and misinformation about this bill and what it will cost"); *id.* at H8671 (statement of Rep. Markey)("For the cable industry to be arguing now, at this late moment, with their crocodile tears that they are concerned about the consumers of this country, is to engage in the most disingenuous of arguments."); *id.* at H8677 (statement of Rep. Fields)("In all my years of serving in Congress, I have never, ever seen such a calculated and deliberate effort to distort any single issue"); *id.* (statement of Rep. Cooper)("We have witnessed one of the most unscrupulous lobbying campaigns of modern times. Every cable customer has gotten a misleading flier, and there have been countless cable ads that are terribly misleading."); *id.* at H8680 (statement of Rep. AuCoin)("[cable's] slick ad campaign played fast and loose with the facts and with the truth").

[9] *See, e.g.* 138 Cong. Rec. S724 (daily ed. Jan. 31, 1992)(statement of Sen. Gorton); 138 Cong. Rec. H6533-35 (daily ed. July 23, 1992)(statement of Rep. Tauzin).

cable, no MVPD would ever be able to secure meaningful relief from the Commission. WCA submits that Congress did not struggle for five years to develop program access legislation, did not reject amendments designed by the cable industry to gut program access, and did not overwhelmingly override a presidential veto only to have the Commission render the program access provisions of the 1992 Cable Act superfluous.

The initial comments filed by the cable lobby present an Alice in Wonderland vision of the 1992 Cable Act and the marketplace distortions Congress sought to address; they bear only the slightest relationship to reality. Many of the positions advanced by cable are the same old wine, only in different bottles -- self-serving interpretations of Section 628 that WCA predicted and discussed in its initial comments. In the interests of brevity, those issues will not be addressed in detail here. For example, WCA will not repeat its demonstration that the Commission must establish procedures to determine in advance whether a proposed exclusive contract is in the public interest, rather than merely rely on complaint procedures.[10] Nor will WCA again establish that Congress intended for the anti-discrimination rules mandated by Section 628 to be applied to existing contracts except for those few existing contracts that were specifically grandfathered.[11]

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[10]*See* Comments of Wireless Cable Ass'n Int'l, MM Docket No. 92-265, at 40-44 (filed Jan. 25, 1993)[hereinafter cited as "WCA Comments"].

[11]*See id.* at 28-30. Along similar lines, WCA should note its strong opposition to the suggestion by Cablevision Industries Corp., *et al,* that certain exclusive contracts entered into between June 1, 1990 and the effective date of the 1992 Cable Act should be grandfathered. *See* Comments of Cablevision Industries Corp., *et al*, MM Docket No. 92-265, at 17 (filed Jan. 25, 1993)[hereinafter cited as "Cablevision Comments"]. Suffice it

(continued...)

WCA will refrain from repeating its showing that any rules establishing the threshold standard for making a *prima facie* case and granting discovery rights must reflect the practical difficulties aggrieved parties will face during the initial stages of a complaint proceeding.[12] And, WCA will rest on its prior demonstration that the adoption of a "safe harbor" for price discrimination would be contrary to the statutory scheme.[13] Rather, in the pages that follow, WCA will address the more outrageous positions being advanced by the cable industry that were not fully discussed in WCA's initial comments.

II. Discussion.

A. Congress Did Not Intend For the Phrase "Attributable Interest" To Limit The Reach Of Section 628(b) To Only Programmers Actually Controlled By A Cable Operator.

By their terms, Sections 628(b) and (c) of the 1992 Cable Act apply to satellite cable programming vendors "in which a cable operator has an attributable interest."[14] As WCA stressed in its initial comments, the establishment of the threshold at which a cable operator's ownership interest in a programmer will be considered attributable for purposes of Section 628 is critical.[15] WCA's view, simply stated, is that unless sufficiently broad,

[11](...continued)
to say that had Congress intended to grandfather all contracts pre-dating the passage of the 1992 Cable Act, it would not have expressly established June 1, 1990 as the cut-off date for grandfathering. *See* 47 U.S.C. § 548(h).

[12]*See id.* at 44-45.

[13]*See id.* at 37.

[14]47 U.S.C. §§ 548(b), (c).

[15]*See* WCA Comments, *supra* note 10, at 22-28. *See also NPRM, supra* note 2, at ¶ 9.

the attribution standard could prevent the Commission from even considering activity by vertically-integrated programmers designed to thwart competition.

Given cable's herculean efforts before Congress to derail program access legislation in the first place, it is not surprising that virtually every cable operator commenting in response to the *NPRM* has asserted that Section 628 should only apply to those programmers that are legally controlled by a cable operator.[16] The legislative history of Section 628 makes clear, however, that Congress did not intend for "attributable interest" to be synonymous with "control."

What the cable interests conveniently ignore is that Congress expressly considered, and overwhelmingly rejected, a program access amendment that would have only been applicable to programmers actually controlled by a cable operator.[17] Recall that Section 628 originated with H. Amdt. 743, an amendment to H.R. 4850 offered on the floor of the House by Rep. Tauzin. A substitute amendment, H. Amdt. 744, was offered at the same time by Rep. Manton. Rep. Tauzin's explanation of the differences between his amendment and that of Rep. Manton speaks volumes:

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[16]*See e.g.* Comments of Continental Cablevision, Inc., MM Docket No. 92-265, at 5-8 (filed Jan. 25, 1993)[hereinafter cited as "Continental Comments"]; Comments of Liberty Media Corp., MM Docket No. 92-265, at 11-18 (filed Jan. 25, 1993)[hereinafter cited as "Liberty Media Comments"]; Comments of United Video, Inc., MM Docket No. 92-265, at 12-14 (filed Jan. 25, 1993)[hereinafter cited as "United Video Comments"].

[17]It is well-recognized that "[o]ne of the most readily available extrinsic aids to the interpretation of statutes is the action of the legislature on amendments which are proposed to be made during the course of consideration in the legislature." 2A Sutherland Stat. Const. § 48.18 (5th Ed.).

> Why is our amendment preferable to the amendment of the gentleman from New York. . . . I have called [the Manton substitute] an amendment drafted for and by the cable industry. . . . It is weaker . . . in terms of who it covers, because it sets a new legal standard of what companies are covered, . . . 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.[18]

Rep. Tauzin's amendment -- an amendment which repudiated cable operator control as the benchmark for determining which programmers would be subject to program access restrictions -- was overwhelmingly adopted by a 338-68 recorded vote in the House, while the Manton amendment was rejected. Rep. Tauzin's approach was subsequently incorporated into the 1992 Cable Act by the conference committee.[19]

The rejection of a "control" standard is not only mandated by the legislative history of Section 628, it is good public policy. The record before Congress and the Commission firmly establishes that programmers not under the control of a single cable operator are as prone to anticompetitive abuse as those that are controlled by a single cable operator. Indeed, the most important programming service not currently available to wireless cable, Turner Network Television, is owned by a company that is clearly dominated by a group of cable multiple system operators, even though no one operator exercises absolute control. That is not an uncommon corporate structure -- many programming services are owned by several cable MSOs, including many of the highest rated programming services.

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[18] 138 Cong. Rec. at H 6534 (daily ed. July 23, 1992)(statement of Rep. Tauzin).

[19] *See* H.R. Rep. No. 862, 102d Cong., 2d Sess. at 93 (1992)[hereinafter cited as "Conference Report"].

The need for an attribution standard not limited to control is established by the willingness of cable operators to work in concert with one another. History has shown that cable's behavior fits the classic definition of a cartel -- the members of the cartel consistently work to undermine competitive technologies wherever located (even if not in their short-term economic interests) because it is in all of their long-term interests for cable to be perceived as the only viable multichannel video distribution technology.[20] That programmers not controlled by a single cable MSO have nonetheless discriminated against alternative technologies (as well as smaller cable systems) is testament to the tremendous leverage that the MSO owners have over their holdings, regardless of whether they exercise legal control. It would be sheer folly for the Commission to excuse from scrutiny under Section 628 the activities of programmers that are not legally controlled by a single cable operator, for the market power of the cable MSOs manifests itself even in the absence of legal ownership.

[20]For this reason, the Commission should reject the assertion by Discovery Communications, Inc. ("Discovery") that the interests of independently owned cable companies should not be aggregated unless there is an agreement between them to act as a group. Comments of Discovery Communications, Inc., MM Docket No. 92-265, at 17 (filed Jan. 25, 1993)[hereinafter cited as "Discovery Comments"]. Even without an express agreement between them, cable operators will act to deter the emergence of alternative distribution technologies because it is in their long term best interests to do so.

B. Congress Has Determined That Conduct Undertaken With The "Purpose" of Significantly Hindering Competition Is Actionable Regardless of The Consequences Of That Conduct, And The Commission Cannot Impose Upon Complainants The Burden Of Demonstrating Actual Harm.

A constant refrain from the cable industry is that no matter how odious the conduct of a vertically-integrated programmer, every claim for relief under Section 628 must demonstrate that the complainant MVPD has suffered "harm." For example, National Cable Television Association ("NCTA") proclaims that "even if the conduct [complained of] is determined to be unjustified and unfair, it is not prohibited by Section 628(b) unless it also prevents or significantly hinders a multichannel video programming distributor from providing programming to subscribers or consumers."[21] Simply put, there is absolutely nothing in Section 628 or its legislative history to suggest that Congress intended to limit the reach of its non-discrimination provisions in this manner.[22]

Those who advocate the imposition of an actual harm standard conveniently ignore that such an approach cannot be squared with the statutory scheme. By its very terms, Section 628(b) is inconsistent with the notion that a demonstration of actual harm is required. Section 628(b) specifically provides that "[i]t shall be unlawful . . . to engage

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[21]Comments of Nat'l Cable Television Ass'n, MM Docket No. 92-265, at 7 (filed Jan. 25, 1993)[hereinafter cited as "NCTA Comments"]; *See also* Comments of Turner Broadcasting System, Inc., MM Docket No. 92-265, at 9 (filed Jan. 25, 1993)[hereinafter cited as "TBS Comments"]; Discovery Comments, *supra* note 20, at 17.

[22]In fact, it is rare that discriminatory rates by any one programmer will alone jeopardize the prospects for competition; generally, it is the cumulative effects of discrimination by several programmers. But, in any event, every penny that must be paid to a programmer due to discrimination is a penny less in savings that an alternative service provider can pass along to subscribers in reduced rates.

in unfair methods of competition or unfair or deceptive acts of practices, the purpose or effect of which is to hinder significantly or to prevent and [MVPD] . . . ."[23] Thus, a cause of action exists under Section 628 where a cable operator or programmer has taken action with the "purpose" of hindering an alternative service provider, even if the "effect" of such action fails to achieve its purpose. It plainly would be inconsistent with the very language of Section 628 for the Commission to require victims of unlawful conduct to demonstrate that significant actual harm resulted; no complainant under Section 628(b) must demonstrate harm if the conduct complained of was undertaken with the intention of hindering its offering of programming to subscribers.[24]

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[23] 47 U.S.C. § 548(b).

[24] NCTA further asserts that:

> [w]hat matters is not whether or not conduct of a particular vertically integrated programmer hinders or prevents a multichannel distributor from providing that programmer's programming to subscribers. What matters is whether the conduct significantly hinders or prevents the multichannel distributor from providing programming at all -- from operating in the marketplace as a distributor of video programming to subscribers.

NCTA Comments, *supra* note 21, at 9. Clearly, however, if the purpose of the discriminatory conduct by a programmer is to hamper the competitive viability of the non-cable MVPD, a violation of Section 628 exists. This is a critical point -- while the failure to secure any one service on fair terms and conditions is unlikely to be devastating, the cable industry knows full well that the cumulative effect of many discriminatory decisions can significantly hamper non-cable MVPDs. The Commission must not permit any programmer to hide behind the fact that a denial of its programming alone is not fatal. If it does, then Section 628 will be rendered meaningless as each programmer will be able to hide behind the anti-competitive decisions of the others.

The cable industry's claim that victims of discrimination are required to demonstrate significant harm, perhaps even to demonstrate that their viability is threatened, is particularly flawed as it relates to Section 628(c). Congress has already found that the imposition of discriminatory price, terms or conditions by a programmer in which a cable operator has an attributable interest is a *per se* violation of Section 628, unless justified under the factors enumerated in Sections 628(c)(2)(B)(i)-(iv). As WCA established in its initial comments, Congress essentially has found that unless justified by the specific considerations it found relevant and enumerated in Sections 628(c)(2)(B)(i)-(iv), discrimination has either the purpose or the effect of significantly hindering the emergence of competition and relief is warranted.[25] It is not for the Commission to revisit that determination.

C. The Commission Cannot Exempt Conduct From The Scope Of Section 628 Simply Because That Conduct Is Also Engaged In By Non-Integrated Programmers.

No doubt the most blatant distortion advanced by cable in its effort to minimize the impact of Section 628 is the proposition that Sections 628(b) and (c) are only aimed at abuses by programmers occasioned by vertical integration. Cable relies on that predicate to claim, among other things, that any business practice engaged in by a non-integrated programmer should be deemed exempt from the scope of Section 628,[26] and

[25] *See* WCA Comments, *supra* note 10, at 36.

[26] *See* TBS Comments, *supra* note 21, at 16; NCTA Comments, *supra* note 21, at 12-13; Comments of Time Warner Entertainment Company, L.P., MM Docket No. 92-265, at 8 (filed Jan. 25, 1993)[hereinafter cited as "Time Warner Comments"]; Cablevision Comments, *supra* note 11, at 7; NCTA Comments, *supra* note 21, at 12-13.

that Section 628 only applies where the programmer discrimination complained of favors a cable operator vertically integrated with the programmer.[27]

The flaw in these arguments is that they are built on a false predicate -- that Congress was not concerned about the activities of non-integrated programmers. The legislative history of the 1992 Cable Act is replete with references to the market power that cable operators enjoy over programmers, regardless of vertical integration. The Senate Committee on Commerce, Science and Transportation (the "Senate Committee"), for example, acknowledged that:

> The Committee received much testimony about cable operators exercising their market power derived from their de facto exclusive franchises and lack of competition. This testimony provided evidence that programmers are sometimes required to give cable operators an exclusive right to carry the programming, a financial interest, or some other added consideration as a condition of carriage on the cable system. . . . Programmers either deal with the operators of such systems on their terms or fact the threat of not being carried in that market. The Committee believes this disrupts the crucial relationship between the content provider and the consumer.[28]

While noting that "these concerns are exacerbated by the increased vertical integration in the cable industry",[29] the Senate Committee "was sufficiently concerned about this problem that it adopted five provisions",[30] many of which are wholly unrelated to vertical integration.

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[27]*See* NCTA Comments, *supra* note 21, at 13-14.

[28]Senate Report, *supra* note 4, at 24.

[29]*Id.*

[30]*Id.* at 23.

Indeed, the comments submitted by Viacom International Inc. ("Viacom") establish that Congress was correct in recognizing the market power of the cable MSOs over programmers in which they do not hold a direct interest:

> [I]f a program service desired access to potential subscribers in a particular geographic area, it had no choice but to deal principally with a single cable operator. Not surprisingly, because they controlled access to consumers, cable systems typically obtained low rates in return for carriage of their agreement to push subscriber growth. <u>Notwithstanding the entry of new technologies, cable operators still control access to the overwhelming number of subscribers and use the bargaining power this creates to obtain low license fees from program services</u>.
>
> Consequently [Showtime's] cable license fees for its premium services and [MTV Networks]'s cable fees for its advertiser-supported services have been set at <u>artificially low levels</u>.[31]

While WCA disagrees with Viacom's implication that cable's market power justifies price discrimination, Viacom's candor in conceding that it is a victim of cable's leverage is telling.

In light of the concern that Congress expressed over the market power cable operators derive from their local monopoly, it is no accident that Sections 628(b) and (c) apply by their very terms to all cable operators, whether or not they are vertically integrated.[32] As even NCTA concedes "Section 628(b), in addition to prohibiting unfair conduct by vertically integrated <u>programmers</u>, also prohibits conduct <u>by</u> any <u>cable</u>

[31]Comments of Viacom International Inc., MM Docket No. 92-265, at 56-57 (filed Jan. 25, 1993)[hereinafter cited as "Viacom Comments"].

[32] *See* WCA Comments, *supra* note 10, at 23 n. 51.

operator, whether or not it is vertically integrated."[33] Where WCA parts company with NCTA is over NCTA's insupportable statement that Section 628 "cannot, however, be construed to restrict relationships between cable operators and non-vertically integrated programmers."[34] That simply is not true; Section 628(b) provides with crystalline clarity that it a cable operator engages in any "unfair" conduct with the "purpose or effect" of harming a competing MVPD, the aggrieved MVPD has a cause of action against the cable operator, even when that "unfair" conduct involves abusing its market power to extort anticompetitive conduct from a non-integrated programmer!

Obviously, by using the phrase "a satellite cable programming vendor in which a cable operator has an attributable interest", Congress sought to exclude from liability under Section 628 non-integrated programmers who may succumb to the market power of monopoly cable operators, but are not culpable. However, there is no evidence whatsoever that Congress intended to exempt from liability under Section 628 those cable operators who exercise their leverage over any program supplier (integrated or not), to the detriment of a competing MVPD As WCA demonstrated in its initial comments, had Congress intended to do so, it presumable would have attached to the phrase "cable operator" in Section 628(b) the same "attributable interest" limitation it used to limit those satellite cable programming vendors who can be held liable under the 1992 Cable Act.[35]

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[33]NCTA Comments, *supra* note 21, at 11 (emphasis in original).

[34]*Id.*

[35]*See* WCA Comments, *supra* note 10, at 30-34.

That Congress did not seek to regulate the non-integrated programmer victims hardly translates into the proposition that Congress was not troubled by the conduct that those victims engage in under duress. To the contrary, Congress barred the cable operator from forcing the programmer to act under duress.

Thus, it would be inconsistent with the very terms of Section 628 for the Commission to either exempt conduct engaged in by non-integrated programmers or limit Section 628 to those situations where the complainant MVPD competes directly against a cable operator with an attributable interest in the discriminating programmer. While non-integrated programmers are not subject to precisely the same pressures as those that are integrated, Congress recognized that they are subject to cable's market power nonetheless and carefully crafted Section 628 to provide aggrieved MVPDs with a cause of action against any cable operator engaged in unfair conduct.

D. The Commission Cannot, And Should Not, Grant New Programming Services Carte Blanche To Enter Into Exclusive Contracts.

Virtually without exception, the cable interests and vertically-integrated programmers parrot the shop-worn argument that new programming services should be given *carte blanche* to enter into exclusive agreements with monopoly cable systems for extended periods of time [36] because grants of exclusivity are "necessary" to secure carriage.[37]

As a matter of law the Commission is barred from adopting a blanket exception for new programming services. Section 628(c)(2)(D) expressly mandates a searching public interest inquiry, addressing all of the factors set forth by Congress in Section 628(c)(4),before the Commission can bless an exclusive contract. While any demonstrable "need" to grant exclusivity in exchange for carriage may be one element relevant for consideration, Congress has also mandated that the Commission evaluate the effect of exclusivity on the development of competition and the diversity of programming available in the marketplace.[38] Such an evaluation clearly requires a case by case analysis, for the impact of exclusivity will necessarily depend upon whether competitive MVPDs serve the market area covered by the proposed exclusive agreement, the nature of the programming

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[36]Indeed, NCTA and TBS go so far as to suggest that new programming services should be permitted to grant exclusivity for unlimited duration. *See* NCTA Comments, *supra* note 21, at 47 n. 52; TBS Comments, *supra* note 21, at 7.

[37]*See* Viacom Comments, *supra* note 31, at 36-37; Continental Comments, *supra* note 16, at 21-22; Liberty Media Comments, *supra* note 16, at 50; Cablevision Comments, *supra* note 11, at 15. Liberty Media also suggests that the Commission should permit grant a blanket authorization for established vertically-integrated programmers to offer exclusivity when cable service is introduced to a new area. *See* Liberty Media Comments, *supra* note 16, at 50. However, Liberty Media provides no explanation at all as to why permitting an existing service to grant exclusivity for currently unserved areas would benefit the public interest, and its proposal should be summarily rejected.

[38]47 U.S.C. §§ 548(c)(4)(A), (D).

involved, the presence of competitive providers of similar programming, and the importance of that programming to consumers.[39]

Even assuming for purposes of argument that the Commission has the legal authority to issue a blanket determination that exclusive contracts let by new programming services for limited duration are in the public interest, the record before it does not support such a determination. The factual predicate -- that exclusive rights are essential to the introduction of new services -- simply has not been substantiated by the comments. While the "need" for exclusivity has become a mantra chanted at every turn by the cable industry, there is not one shred of hard evidence in the record to support it. The Commission cannot merely accept self-serving statements from the cable interests and the programmers beholden to those interests to find that exclusivity is "necessary" to gain carriage.

The inability of the cable industry to make its case that permitting new services to grant exclusivity will serve the public interest is not surprising, for it is an argument built on a house of cards. Without exception, those advocating a blanket waiver for new services rely on the so-called "free rider" concern -- that cable operators will not actively market a new service without exclusivity, for fear that alternative service providers will

[39]Indeed, cable's embrace of an automatic approval for exclusive contracts offered by new services simply cannot be squared with the Commission's specific acknowledgement in its 1990 *Report* to Congress that exclusive agreements entered into by new programming services can impede competition in the local distribution marketplace. *See Competition, Rate Deregulation and the Commission's Policies Relating to the Provision of Cable Television Service*, 5 FCC Rcd 4962, 5032 n. 192 (1990).

not engage in similar promotional activities. Yet, there is no evidence in the record that non-cable MVPDs actually present a free rider problem. Indeed, logic dictates to the contrary. Because a non-cable MVPD is generally attempting to break into a market that is already dominated by an entrenched cable operator, the non-cable MVPD must market aggressively in order to overcome the public's impression that the franchised cable operator is the only source for multichannel video programming. Not surprisingly then, where wireless cable competes against franchised cable systems, the total number of subscribers to multichannel video services increases.[40] While wireless certainly takes some subscribers from the incumbent cable operator, it also substantially expands the market through its promotional efforts. One wonders how alternative technologies could achieve the "impressive results" in distributing the programming services noted by Viacom in its comments without aggressive marketing efforts.[41]

That the introduction of competition has demonstrably increased the number of consumers who subscribe to multichannel video services puts the lie to the free rider argument.[42] Moreover, if programmers were truly concerned that non-cable MVPDs were free riding on the promotional efforts of cable operators, there are other contractual mechanisms available for addressing that problem. For example, a programmer could

[40]*See, e.g.* Kerver, "Wireless Cable: Friend, or Foe?", *Cablevision*, at 21 (Oct. 5, 1992).

[41]Viacom Comments, *supra* note ?, at 9.

[42]"More Choice for Cable TV", *Business Week*, at 44 (May 13, 1991).

require all distributors to engage in a minimum amount of marketing of its service. Or, a programmer could grant reasonable discounts based on demonstrable success in marketing its service. So long as such approaches are adopted without the purpose or effect of hindering competition to cable, they would not be offensive to Section 628.[43] That vertically-integrated programmers constantly cite to free riding as justification for exclusivity, but refrain from utilizing other mechanisms to control free riding, certainly suggests that there is a motive for exclusivity other than eliminating free riders.

As WCA demonstrated in its initial comments, exclusive contracts in the cable area cannot be justified by the same sorts of efficiency considerations that have generally been cited in support of exclusivity. In passing Section 628, Congress was well aware that in markets where cable is the only MVPD, "[p]rogrammers either deal with operators of such systems on their terms or face the threat of not being carried in that market."[44] In other words, they are particularly prone to anticompetitive demands from the cable industry for exclusivity. It is axiomatic that exclusivity is contrary to the public interest when it is employed not to increase output, but to cartelize distribution. That is precisely what has happened in the cable industry; exclusivity has become a tool abused by cable to keep

[43]The Commission will have to assure, however, that marketing requirements are not adopted as a subterfuge for discriminating against emerging technologies. For example, a requirement that each competitor spend a given amount on marketing per subscriber would not be objectionable; a requirement that each competitor spend a set amount might be if that amount is so large that a new market entrant could not afford to make the necessary marketing expenditures.

[44]*See* Senate Report, *supra* note 4, at 24.

non-cable MVPDs out of the marketplace. As Judge Posner wrote in his classic analysis of exclusivity, to determine the impact of exclusivity one should:

> focus on the single question whether the restriction is intended to cartelize distribution or, on the contrary, to promote the manufacturer's own interests. <u>The goal is to isolate, and condemn, restrictions that are imposed nominally by the manufacturer, but are in fact desired for monopolistic purposes by dealers using the manufacturer as the enforcement agent.</u> [45]

That goal, however, will be difficult to achieve if the Commission adopts the types of presumptions bandied about by cable. Because aggrieved non-cable MVPDs will not be privy to the discussions that result in exclusivity, it will be virtually impossible for them to demonstrate that exclusivity was granted for an impermissible purpose. If Congress' restrictions on exclusivity are to have any meaning, the burden must be on any proponent of an exclusive contract to demonstrate to the Commission by clear and convincing evidence that exclusivity is necessary to advance the programmer's legitimate interests. Otherwise, the presumption should be that the exclusivity is being offered as a result of the market power of the cable operators for monopolistic purposes.

E. That Wireless Cable Systems Are Less Expensive To Construct And Operate Does Not Justify Programmers Charging Higher Rates.

In a transparent effort to justify the discriminatory pricing of programming sold to wireless cable operators, a few cable interests advance the bizarre notion that programmers should be permitted to charge wireless cable operators more because wireless cable systems can be constructed and operated at lower a cost than traditional coaxial cable

[45]Posner, "The Rule of Reason and the Economic Approach: Reflections on the *Sylvania* Decision", 45 U.Chi.L.R. 1, 17 (1977) (emphasis added).

systems. [46] Were the Commission to condone such conduct, however, it would be acting at cross-purposes with Congress.

Those seeking to justify price discrimination based on wireless' cost efficiencies contend that by authorizing the Commission "to take into account actual and reasonable difference in the cost of creation, sale, delivery, or transmission" of programming,[47] Congress intended for costs of distribution from the wireless operator to subscribers to be considered. Tacitly acknowledging that their position is unsupported by any language in Section 628 or the three committee reports in the legislative history, the advocates of this argument are left to rely on an obscure colloquy between Senator Inouye and Senator Kerrey (one of the most staunch opponents of program access legislation). In so doing, however, they do violence to:

> the doctrine that debates in Congress are not appropriate sources of information from which to discover the meaning of a statute passed by that body . . .. The reason is that it is impossible to determine with certainty what construction was put upon an act by the members of a legislative body that passed it, by resorting to the speeches of individual members thereof. Those who did not speak may not have agreed with those who did . . ..

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[46] *See* TBS Comments, *supra* note 21, at 10 n. 12; Liberty Media Comments, *supra* note 16, at 10; Viacom Comments, *supra* note 31, at 15-16, 50. While it is certainly true that mature wireless cable systems are more cost effective than coaxial cable systems, the Commission should note that Viacom has grossly exaggerated the cost differential between wireless cable and franchised cable by admittedly omitting the costs associated with leasing channel capacity. *See id.* at 52 n. *. Those costs are substantial (often representing more than 10% of gross revenues). In addition, Viacom seriously underestimates the cost of wireless cable converter boxes (which, unlike cable converters, must include channel-mapping technology) and transmission facilities.

[47] 47 U.S.C. § 548(c)(2)(B)(ii).

United States v. Trans-Missouri Freight Ass'n 166 U.S. 290, 318 (1897).

That doctrine is particularly apt here, for the colloquy relied upon is at best ambiguous. Senator Kerrey did not ask whether a programmer could charge higher prices to a distributor for no other reason than the distributor uses a more cost-effective distribution technology. Senator Kerrey merely inquired "Am I correct in understanding that as used in subsection 2(B)(ii) the cost of creation, sale, delivery or transmission of programming refers to costs incurred at the multichannel video programming distributor's level as well as at the program vendor's level?' and Senator Inouye answered "That is correct." [48] Is it clear that Senator Inouye intended his response to mean that programmers could charge cost-efficient distribution technologies more for programming than they charge coaxial cable? Certainly not. His response can as easily be interpreted as saying that programmers should be permitted to charge the more cost-efficient distribution technologies less so that programming costs remain a constant proportion of operating expenses. Or, Senator Inouye may merely have meant that the costs of transmitting the programming to the multichannel video programming distributor can be considered. In short, Senator Inouye's terse response proves little. It is a classic example of why statements made in floor debate are discounted because "in the course of oral argument on the Senate floor, the choice of words by a Senator is not always accurate or exact."[49]

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[48]138 Cong. Record S16671 (Oct. 5, 1992).

[49]*In re Carlson*, 292 F. Supp. 778, 783 (CD Cal. 1968).

Particularly given the lack of any persuasive evidence that the Congress intended to permit programmers to charge higher fees to more cost-efficient distribution technologies, adoption of a policy permitting higher prices to more efficient technologies would be contrary to the public interest. Such a notion is passing strange, akin to saying that Exxon should charge the owner of a fuel-efficient sub-compact automobile more per gallon than it charges the owner of a gas guzzler. The effort by vertically-integrated programmers to impose a cost penalty on more efficient technologies is particularly revealing as to their true motivation -- to protect their cable MSO owners from competition. Certainly, the proposition that programmers should be able to charge higher fees to more cost-efficient technologies cannot be squared with the express purpose of Section 628 -- "to spur the development of communications technologies."[50] The Conference Report accompanying the 1992 Cable Act expressly stated that:

> [T}he conferees expect the Commission to address and resolve the problems of unreasonable cable industry practices, including restricting the availability of programming and charging discriminatory prices to non-cable technologies. The conferees intend that the Commission shall encourage arrangements which promote the development of new technologies providing facilities-based competition to cable and extending programming to areas not served by cable.[51]

Permitting programmers to charge higher fees to distribution technologies with lower costs will be an obvious disincentive to the development of new, low-cost technologies. And,

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[50]47 U.S.C. § 543 (a).

[51]H.R. 102-862, 102d Cong., 2d Sess., *reprinted at* Cong. Rec. H8308, H8332 (Sept. 14, 1992).