differences militate against a common attribution standard regardless of the Commission's experience with that standard.

The broadcast attribution standards implement Section 73.3555 of the Commission's Rules, which governs horizontal ownership of television distribution facilities. Neither that rule nor the broadcast attribution standard bears any relationship to the common ownership of television stations and programming services. Aside from the policy differences underlying Section 628 and the broadcast multiple ownership rules, as described in Liberty's initial comments at 12-14, the horizontal broadcast attribution standard has not been used to regulate vertical broadcast relationships and is ill-suited for addressing vertical relationships under Section 628.

The five percent attribution standard used in Section 63.54 of the Commission's Rules, the cable/telco cross-ownership rule, is equally inapplicable here, and the Commission should reject the self-serving arguments of telcos seeking to increase their stake in programming services. Section 613(b) of the Communications Act prohibits telcos from providing video programming to subscribers in their telephone service areas, either directly or "through an affiliate <u>owned</u> by, operated by, controlled by, or under common control with"

the telco (emphasis added).[13] There is no similar statutory prohibition on ownership by cable operators in programming services. On the contrary, Congress and the Commission have recognized that such vertical integration by cable operators poses substantial public interest benefits. See, e.g., Report to Congress, 5 FCC Rcd. at 4972; House Report at 41. For telcos to suggest that a common attribution standard should apply "throughout the industry" when Congress prohibited telcos from holding an ownership interest in programming but recognized substantial public interest benefits from similar cable ownership is disingenuous at best.

Several commenters advocate attribution standards even more restrictive than the broadcast standard. See, e.g., APPA Comments at 9 (any ownership "above a de minimis level" should be attributable); Comments of the Competitive Cable Association ("CCA") at 6 (attributable interests should include any "substantial financial support" by a cable operator or any "competitive situation" in which the operator of the cable system is owned "by any of the top 100 MSOs"); Small System Coalition Comments at 3-4 (advocating elimination of

[13] The telcos are permitted to hold a five percent ownership interest in programmers only because the Commission has determined that such ownership levels do not constitute prohibited "ownership" under the statute. See Telephone Company-Cable Television Cross-Ownership Rules (Second Report and Order), 7 FCC Rcd. 5781, 5799 (1992) (permitting "greater telephone company ownership relationships [up to 5%] with providers of video programming as long as the ownership relationship does not constitute ownership and/or control").

single majority shareholder and limited partnership exceptions under the broadcast standard for purposes of Section 628). These proposals lack any principled basis.

In fact, the commenters admit that their overly restrictive attribution proposals are intended only to further their financial self-interest by extending the scope of the statute to include independent programmers as well as cable-affiliated programmers. See, e.g., CCA Comments at 6-7 (CCA's proposed attribution standard "would eliminate the illogic of sorting out the ESPN's, for example, from the TNT's"); APPA Comments at 10 (attribution standard should "be as small as possible" and should apply where "the degree of vertical integration is slight or perhaps even non-existent"); Comments of Coalition of Concerned Wireless Cable Operators ("Wireless Coalition") at 2 (whether a cable operator has an attributable interest in a program supplier should be "immaterial").

Indeed, recognizing that such proposals are inconsistent with Section 628, some commenters simply try to rewrite the statutory language. For example, Bell Atlantic argues that the Commission must apply an attribution standard to cable operators stricter than the telco standard because "the 1992 Act bars cable operators from exercising 'influence' over a programmer, whereas its cable telco rules bar only 'ownership or control.'" Comments of Bell Atlantic and the

Pacific Companies ("Bell Atlantic") at 4 n.8. Rather, Section 628(c)(2)(A) prohibits only the exercise of undue or improper influence by a cable operator which has an attributable interest in a satellite cable programming vendor in that vendor's "decision...to sell, or the prices, terms, and conditions of sale of" its programming to unaffiliated distributors. Bell Atlantic's tortured reading of Section 628 to prohibit any "influence" by a cable operator effectively would bar that operator from owning voting stock in a programmer, a result clearly not intended by Congress.

B. As Previously Recognized By NTIA, Control Is The Appropriate Standard.

Proponents of overly restrictive attribution standards ignore the fundamental purpose of Section 628 and the numerous behavioral protections afforded by Congress. The attribution standards should address the limited potential for harm perceived by Congress where a cable operator has "the incentive and ability" to induce its affiliated programmer to discriminate against competing distribution media. Even where a cable operator may have the incentive, it does not have the ability to force that result where it holds only a minority interest in the programmer:

> [T]o the extent vertical integration gives a cable operator the incentive to withhold an affiliated program service from a competing video distribution media...the operator will be unable to act on that incentive (in the absence of collusion) unless his ownership interest in the service confers control.

U.S. Department of Commerce Video Program Distribution and Cable Television: Current Policy Issues and Recommendations (NTIA Report 88-233, June 1988) ("NTIA Study") at 89 n.286.

The additional protections afforded under Section 628(c)(2)(A) -- which proponents of more restrictive attribution standards completely ignore -- underscore the propriety of a control standard. Pursuant to that provision, a cable operator holding a minority interest in a satellite cable programming vendor is prohibited from using its ownership to "unduly or improperly influence" that programmer's decision to sell its programming, including decisions relating to the price, terms and conditions of sale, to unaffiliated distributors. Thus, while a cable operator which holds a minority interest in a programmer may exercise that level of influence commensurate with its voting rights under Section 628(c)(2)(A), it cannot thereby control the programmer's decision to sell to a competing distributor.

Finally, there are a variety of other practical and legal impediments which prevent a cable operator with a minority interest in a programmer from forcing the programmer to discriminate in its favor on the basis of its ownership interest, even where the cable operator is represented on the programmer's board of directors. See, e.g., Comments of Rainbow Programming Holdings, Inc. ("Rainbow") at 15 (where the economic interest of other shareholders "lies in maximizing dis-

tribution...an operator that attempted to inhibit the sale of programming would run the risk of breaching its fiduciary responsibilities.") The comments of Discovery Communications, Inc. ("Discovery") confirm that such extrinsic factors are effective in preventing cable operators with equity interests in a programming service from extracting unduly preferential treatment from the programmer:

> Despite the[ir] ownership interests...the cable operators who have invested in the Discovery Channel receive no preference from either The Discovery Channel or The Learning Channel....The Discovery Channel currently provides programming to approximately 75% of the alternative technology market and has received awards citing Discovery's cooperation with alternative technology distributors.

Discovery Comments at 8-9.[14] In short, "only a cable operator who actually controls a programmer can force it to engage in conduct against its interests." Discovery Comments at 3.

III. Section 628 Does Not Require Uniform Programming Prices, Terms And Conditions.

In their attempt to expand profit margins, various distribution media seek to eliminate any programmer discretion in or negotiation of the prices, terms and conditions for the sale of its programming. See, e.g., ACC Comments at 11 ("contracts will be essentially uniform with respect to terms and

[14] Discovery also confirms that neither The Discovery Channel nor The Learning Channel has "obtained preferential treatment from Discovery's cable operator owners" in terms of higher carriage levels or favorable channel positions. Id. at 9.

conditions"). Consequently, numerous commenters claim that any difference in the prices, terms or conditions offered to any other customer is per se discriminatory. Each apparently seeks a statutory entitlement to the lowest price offered to any distributor regardless of the differences among them or the services provided. See, e.g., DirecTV Comments at 15 ("Therefore, if the price charged to DirecTV is higher than the price charged by the vendor to its affiliate cable system anywhere in the United States, it should be actionable under Section 628(c)(2)(B)"). Some commenters even go so far as to argue that it is irrelevant whether the services at issue are "like." NRTC Comments at 20.

Still other commenters suggest that the Commission treat vertically integrated programmers as though they were dominant common carriers. Thus, commenters urge that such programmers be required to file tariffs or what are euphemistically termed "pricing matrices" and to develop a publicly available data base of the prices, terms and conditions offered by all programmers to all of their customers. Bell Atlantic Comments at 10; Comments of U.S. West Communications, Inc. ("U.S. West") at 13-14. Instead of fostering competition, these approaches would hinder it. Vertically integrated programmers now compete against each other and other programmers for carriage on cable, MMDS and SMATV systems. Although commenters may question the different pricing levels at which

such programmers compete, they have recognized that "all the programmers appear to be quite competitive with each other" for a given distribution medium. NSPN Comments at 14. Tariff requirements would eliminate the flexibility required to respond in a competitive marketplace.

Clearly, an interpretation of Section 628 requiring uniformity among prices, terms and conditions is directly contrary to the language of Section 628(b) and to its legislative history. Under Section 628(b), only "unfair methods of competition or unfair or deceptive acts or practices" having the purpose or effect specified therein are prohibited. In explaining the purpose of Section 628, Congressman Tauzin, its author, stated that "[p]rices need to be comparable and fair" -- not uniform without regard to obvious differences. 138 Cong. Rec. H6534 (daily ed. July 23, 1992). "Discrimination" requires more than mere differences. As recognized by the United States Telephone Association ("USTA"), "the concept of 'discrimination' is not easily susceptible to a specific definition or exhaustive description." USTA Comments at 8. This is particularly true where there are "nearly infinite gradations of benefits and concessions bargained for by the parties." Comments of Viacom International, Inc. ("Viacom") at 17.

A. The Commission Should Confirm That Certain Kinds Of Justifiable Differences Are Not Discriminatory.

Liberty, as well as other programmers and commenters having programming interests, has identified a number of differences among services, customers and commercial practices which plainly justify differences in the prices, terms and conditions offered by programmers. Although Liberty does not believe that any existing statutory scheme provides a completely adequate framework for implementing Section 628, certain fundamental principles common to each of the statutes identified by the Commission provide basic building blocks upon which the Commission can fashion a new standard, taking into account the unique qualities of programming. Thus, Liberty maintains that differences among services and their value, distribution media customers, and the methods by which distributors market such services all provide justifiable bases for differences among prices, terms and conditions.

In this proceeding, Liberty and other commenters have identified numerous differences, including the following, which justify fair differentials:

Differences In Services And Value

- Programmers provide the complete distribution path to each HSD owner while they depend on the distribution plant of cable, SMATV and MMDS operators to reach viewers. Comments of EMI Communications Corp. ("EMI") at 6-8; Comments of Superstar Connection ("Superstar") at 12-13; Comments of United Video, Inc. at 7-8 and Exhibits 1-5.

- Cable and SMATV operators provide more secure distribution systems which minimize piracy and maximize programmer revenues. S. Besen, S. Brenner and J. Woodbury, "Exclusivity And Differential Pricing For Cable Program Services" ("Besen Report"), attached to the Comments of Tele-Communications, Inc. ("TCI"), at 20-23; EMI Comments at 5; Rainbow Comments at 7; Viacom Comments at 49.

- The actual programming content of a given programming service may differ between HSD owners and cable, SMATV and MMDS viewers. Comments of Affiliated Regional Communications, Ltd. ("ARC") at 6-7; Comments of Time Warner Entertainment Company, L.P. ("Time Warner") at 18.

- Separate authorization procedures and equipment are used for HSD owners as distinguished from cable, SMATV and MMDS operators. ARC Comments at 5-6; EMI Comments at 5; Liberty Comments at 28-30; Superstar Comments at 15-17; Time Warner Comments at 24-27.

- The program service received by HSD owners has program and other visual messages and audio quality unavailable to cable, SMATV and MMDS viewers. Liberty Comments at 30; Time Warner Comments at 18 n.16.

- Satellite broadcasters provide licensed programming to HSD owners for which those broadcasters pay the copyright fees, and transmission services to cable, SMATV and MMDS operators for which the operators pay copyright fees. EMI Comments at 7; Liberty Comments at 31-32; Rainbow Comments at 7-8; Superstar Comments at 11-12, 24.

- Increased advertising revenues are available from concentrated local distribution through cable that are unavailable from sporadic pockets of SMATV or widely dispersed HSD distribution. Comments of Cablevision Industries Corporation, Comcast Cable Communications, Inc. and Cox Cable Communications ("Cablevision") at 11-12; TCI Comments at 21; Viacom Comments at 42-43, 46-47.

- Regional sports programming services generally have decreasing value to viewers and distribution media as the distance from the "home" of the featured teams increases. ARC Comments at 8-12.

Different Classes of Customers

- Cable operators invest substantially more in distribution plant and promotion (which benefits programmers through increased security, picture quality, and penetration) than HSD "distributors," MMDS or SMATV operators. Cablevision Comments at 11; Comments of Continental Cablevision, Inc. ("Continental") at 13-14; EMI Comments at 2, 6.

- Cable, MMDS and SMATV operators incur binding commitments for the term of a carriage agreement in contrast to brokers or "distributors." Liberty Comments at 36.

- Because a programmer's revenues depend not only on price, but also the multiple of subscribers, distribution media which carry its service on basic, tiers, or a la carte are not similarly situated. Continental Comments at 20-21; Discovery Comments at 10-11; Viacom Comments at 44; Comments of Landmark Communications, Inc. ("Landmark") at 19.

- Customers with either a poor or no credit history and performance record present different commercial risks than more established and stable customers. Besen Report at 20-23; EMI Comments at 6-7; Time Warner Comments at 20-23; Viacom Comments at 47-49.

- Cable, SMATV and MMDS MSOs which commit a high proportion of their systems present higher revenue opportunities to programmers than MSOs which are unwilling to so commit their systems. Comments of E! Entertainment Television, Inc. ("E! Entertainment") at 9-10; Comments of International Family Entertainment, Inc. ("Family") at 9; see Landmark Comments at 19; TCI Comments at 21.

- Distribution media which accept the risk of and promote a new programming service may be entitled to different prices, terms and conditions (i.e. introductory discounts) than subsequent purchasers of a then-accepted programming service. Besen Report at 12-16; Cablevision Comments at 12-13; Continental Comments at 13-14; Discovery Comments at 10, 22; E! Entertainment Comments at 4-5.

Differences in Meeting Competition

- Programming may have different value in different geographic areas and face different competition for carriage. ARC Comments at 8-12; Continental Comments at 15-16; Discovery Comments at 9; Landmark Comments at 19.

Liberty respectfully submits that the Commission's Rules should recognize that the kinds of differences described above justify differences in the prices, terms and conditions of programming.[15] Because of such justifiable differences, Liberty believes that it is difficult to determine the boundaries of "reasonable regions" of price differentials and to define them appropriately. "Regions" which do not adequately reflect such differences and expressly recognize volume discounts (discussed infra at 29-32) will likely be arbitrary and capricious. Nonetheless, if the Commission determines to adopt such "reasonable regions," Liberty suggests that at least two regions are necessary -- one for HSD "distributors" and another for cable, SMATV and MMDS operators which provide

[15] As numerous commenters have suggested, differences in prices, terms and conditions which meet or parallel those offered by unaffiliated programmers should be presumed to be fair under Section 628. See, e.g., TCI Comments at 11-12; Time Warner Comments at 8-9; Landmark Comments at 9-10.

distribution systems. Further, each region must be sufficiently large to encompass these kinds of differences.[16] Otherwise, reasonable and justified price differences may be attacked as discriminatory.

B. Volume Discounts Are Not Discriminatory And Present Additional "Legitimate Economic Benefits" And Cost Savings.

At the outset, Liberty believes that uniform volume discounts available to all customers -- treating affiliated and unaffiliated customers the same -- are not discriminatory. As set forth in Liberty's Comments at 37-38, the Commission has recognized in other contexts that a volume discount "available to anyone who might find it useful" is not discriminatory. The Commission also has recognized that generally available volume discounts constitute "legitimate sales practices." Tempo Satellite, Inc., 7 FCC Rcd. 2728, 2731 n.22 (1992); see Report to Congress, 5 FCC Rcd. at 5032. Indeed, competing distribution media commenters agree that volume discounts are not discriminatory. See NPCA Comments at 15 ("as long as all such terms apply universally to all MVPD's"); NSPN Comments at 13.

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[16] Separate regions should be expressed in specific dollar figures and/or percentages as appropriate. A safe harbor based only on percentages is unworkable when absolute prices are very low because a slight price difference at those levels produces a disproportionately high percentage difference. See Landmark Comments at 16-18; Liberty Comments at 45-47.

Clearly, volume discounts will be available to distribution media serving both large and small numbers of subscribers through cooperatives and other purchasing agents. As explained by NSPN, the "purchasing agent business is highly competitive:"

> In addition to NSPN, there are two other purchasing agents that cater primarily to SMATV companies. There is also a purchasing agent that caters only to small franchised cable operators known as the National Cable Television Cooperative. In addition, there are a number of purchasing agents that cater to the home satellite dish ("HSD") market.

NSPN Comments at 3-4. Thus, if the members of such cooperatives or "buying groups" are willing to accept "unitary treatment" (see Liberty Comments at 40-41), the benefits of volume discounts will be available.

Such volume discounts are plainly justified by "legitimate economic benefits" and expressly permitted under Section 628(c)(2)(B)(iii). For example, several programmers identify the substantial benefit of increased advertising revenue resulting from volume distribution:

> Reducing prices to maximize penetration results in economic benefits for these networks because their advertising revenue is dependent upon the number of viewers the network actually reaches and expects to reach by virtue of its affiliation with the distributor.

Comments of Turner Broadcasting System, Inc. ("Turner") at 13; see E! Entertainment Comments at 9 ("E! achieves genuine economic benefit in the form of incremental advertising revenue when it adds a sufficient number of subscribers"); Viacom

Comments at 42 ("MTVN receives real economic benefit in the form of incremental increased advertising revenue when it adds a sufficiently large number of subscribers"). For example, "[a]dvertising revenue comprises approximately 65% of MTV's and Nickelodeon's total revenue and 95% of VH-I's total revenue." Id. at 40.

In its initial comments at 44, Liberty also identified several other kinds of legitimate "economic benefits" justifying discounted volume rates. For example, large volume sales may increase the promotion and consumer recognition and acceptance of programming services. See Cablevision Comments at 12 ("a major MSO's commitment to carry a new programming service early in the service's roll-out can establish momentum and credibility"). Further, programmers may more easily obtain financing based on large volume contract commitments. Id. at 13.

Finally, contrary to the unsupported assertions of various commenters, there are obvious cost savings associated with large volume commitments. NSPN, a purchasing agent which receives volume discounts, identifies the "economic value" and cost savings to programmers of volume commitments:

> All programmers have large transaction costs in dealing with their MVPD customers. The programmer spends a large amount of time and overhead -- primarily salaries and rent -- to sell the programming service to a customer, to maintain an ongoing relationship with the customer and to bill and collect from the customer. And a large part of this time and overhead are spent without regard to the size of

> the customer. In the simplest of terms -- it takes as much time and overhead to make a ten minute phone call to an MSO with two million subscribers as it does to make the same phone call to a small MVPD with one hundred subscribers. Accordingly, it is much more efficient for a programmer to deal with a large MSO than with a small MVPD. Not surprisingly, many programmers offer volume discounts to large MSOs in recognition of these efficiencies.

NSPN Comments at 4. Although such cost savings are difficult to quantify specifically, they further support the conclusion that volume discounts are non-discriminatory.

IV. The Commission Should Apply Section 628 Only To New Contracts And Recognize The Public Interest Benefits Of Certain Types Of Exclusive Contracts.

The programming commenters make clear that application of rules adopted under Section 628 to invalidate pre-existing contracts would have potentially disastrous effects. Further, a number of programmers seek general guidance from the Commission on the issue of program exclusivity. The Commission's decision on either issue could adversely affect the availability of new or existing programming services, contrary to the intent of Congress.

A. Application Of The Rules To Pre-Existing Contracts Is Unauthorized And May Unduly Harm Programmers.

A number of commenters claim that the Commission should apply Section 628 retroactively to existing programming contracts. See, e.g., USTA Comments at 6 (all existing contracts should "be identified...placed on the public record...

and subject to a petition...that the contract be found unreasonable"); Wireless Cable Comments at 28-29; NRTC Comments at 32-33. They argue that, because Congress provided a specific "grandfather" date for exclusive contracts in Section 628(h)(1), its silence as to all other contracts grants retroactive rulemaking authority to the Commission. Wireless Cable Comments at 29; NRTC Comments at 32. Such arguments are contrary to the well-established principle that, in order to grant retroactive rulemaking authority, which is "disfavored," Congress must do so "in express terms." See, e.g., Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 208 (1988). Further, the language defining the Section 628(b) prohibition addresses entering contracts -- not performance under pre-existing contracts. See Time Warner Comments at 33-34.

Even if the Commission had the authority to adopt retroactive rules, the record before it makes clear that the invalidation of existing programming agreements would be a singularly unwise exercise of such authority. Virtually every programmer commenting in this proceeding has confirmed that:

> [They] have entered into costly programming contracts based on the revenues they legitimately expect to receive from their existing affiliation agreements. To force the premature renegotiation of such affiliation agreements may preclude programmers from honoring their commitments to program suppliers.

Viacom Comments at 31; see Family Comments at 11; E! Entertainment Comments at 10; Time Warner Comments at 32.

Further, attempting to reconstruct the bargaining history and marketplace conditions present at the time pre-existing contracts were negotiated would be a daunting and likely impossible task:

> Existing program contracts came about after hard bargaining and negotiations by both sides. Both sides sought the best deal and terms possible, and, at the time of the negotiations, different customers often would have different priorities which led to variances among the contracts we have with our customers. To attempt to resurrect the circumstances surrounding the negotiations to explain or justify all variances would be close to impossible. To immediately throw open all program networks' carriage contracts would cloud the major assets of a program network.

Turner Comments at 2-3. As Liberty noted in its initial comments at 53, programmers lack the resources required to renegotiate simultaneously their pre-existing contracts. See Turner Comments at 4 (would "create a logistical nightmare for a targeted class of programmers").

B. The Commission Should Find Certain Types Of Exclusive Contracts To Be In The Public Interest.

Both Congress and the Commission have recognized that launching a new programming service is a "risky venture." House Report at 41; Notice at ¶5. As Turner reminds both the Commission and commenters in this proceeding, its now highly successful TNT service was initially "greeted with extreme

skepticism." Turner Comments at 7. Consequently, Turner made the strategic decision to offer exclusive distribution rights to cable systems and to MSOs which signed up at least 75 percent of their subscribers during TNT's launch phase. Such exclusivity was not extorted from Turner, but rather offered as an inducement to cable operators to promote and market TNT. Id. at 8. Because Turner's strategy has worked and TNT has become a popular programming service, neither cable operators nor Turner should be penalized by eliminating the exclusivity which was at the heart of their initial mutual bargain.

The freely negotiated grant of exclusivity by a new programming service should be recognized as a legitimate means to induce distributors to promote and market that service, thereby fostering the Commission's goal of programming diversity. Likewise, the introduction of existing programming services to new geographic markets or to new technologies follows the same logic and offers the same benefits. Liberty respectfully submits that the Commission should expressly recognize that exclusivity is in the public interest under these circumstances.

Finally, even non-cable competing distribution media have recognized that the Commission should except local programming from the limitations on exclusivity. CCA Comments at 9 (representing alternative providers of video and audio services); Wireless Coalition Comments at 3. The exception

for locally originated programming furthers the Commission's recognized goal of localism and is consistent with the absence of any significant barriers to the development and provision of local programming by alternative distribution media. ARC Comments at 16-18.

V. As "Aggrieved" Parties, Complainants Must Demonstrate Injury In Fact Resulting From Conduct Proscribed By Section 628.

Consistent with their commercial self-interests, various distribution media have urged the Commission to ignore the fundamental requirements that complainants have standing to pursue their claims and carry the burden of presenting a *prima facie* case and then proving it. Thus, Wireless Cable argues that:

> [A] complaint alleging violation of the non-discrimination provisions of Section 628(c)(2)(B) is sufficient if it is accompanied by evidence that reasonably suggests that the terms and conditions proffered by a programmer in which a cable operator has an attributable interest differ from those contained in any agreement that programmer has with any other multichannel video program distributor.

Wireless Cable Comments at 45; *see* NRTC Comments at 30; Comments of the Community Antenna Television Association at 6-7. This approach, which would permit parties to file complaints based on *any* "suggestion" of a difference with *any* other purchaser without showing any harm, would flood the Commission with unfounded complaints and provide distributors with a potent procedural weapon in any contract negotiations

-- a programmer's refusal to agree to their terms would yield an expensive complaint proceeding where all burdens are on that programmer.[17]

Clearly, this approach is contrary not only to the basic tenet of American jurisprudence that a plaintiff has the burden of stating and proving its case, but also to the requirement in Section 628(d) that complainants be "aggrieved" by violative conduct in order to commence an adjudicatory proceeding at the Commission. It is well established that:

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[17] To maximize their bargaining leverage, other parties have argued that the Commission should acknowledge a private right of action in federal courts for a violation of Section 628. See Liberty Cable Comments at 23. However, Congress specifically provided for adjudication of complaints before the Commission and directed the Commission to establish procedures governing such adjudicatory proceedings. See Sections 628(d)-(f). Congress would not have the Commission establish an "administrative procedure whose effectiveness Congress intended to be undermined willy-nilly through the institution of private lawsuits." D'Amato v. Wisconsin Gas Co., 760 F.2d 1474, 1482 (7th Cir. 1985); see also National R.R. Passenger Corp. v. National Ass'n of R.R. Passengers, 414 U.S. 453, 458 (1974) ("when legislation provides a particular remedy or remedies, courts should not expand the coverage of the statute to provide other remedies").

In any event, the doctrine of primary jurisdiction plainly precludes such alternative jurisdiction:

> The primary jurisdiction doctrine means that once an agency is set up and jurisdiction over cases conferred upon it, the agency is automatically vested with exclusive original jurisdiction over those cases. The courts are divested of whatever original jurisdiction they would otherwise possess; their function in the cases concerned is limited to judicial review.

B. Schwartz, Administrative Law §8.27 at 527 (1991).

> [A]n "aggrieved party" has standing to challenge administrative action only if the party has suffered "injury in fact" to an interest "arguably within the zone of interests" protected by the underlying statute.

Panhandle Producers & Royalty Owners Ass'n v. Economic Regulation Ass'n, 847 F.2d 1168, 1173 (5th Cir. 1988).[18] Here, Section 628(b) has identified the injury that complainants must plead and prove -- that the violative conduct "hinder(s) significantly" or "prevent(s)" the complainant from providing satellite cable or broadcast programming to viewers.

In order to prevent a flood of unsubstantiated and ill-founded complaints which will heavily burden the resources of both the Commission and programmers, the Commission must adopt rules requiring some minimal threshold showing for complaints under Section 628. Liberty respectfully submits that a prima facie showing of both unfair conduct and injury to competition should be required under Section 628(b). See Liberty Comments at 4-11. However, even proponents of an "injury to competitors" standard acknowledge that complainants should be required to provide "substantial evidence" showing that the contract prices or terms complained of "have the 'effect' of significantly hindering or preventing programming

[18] Section 628(e) also expressly limits relief to "aggrieved multichannel video programming provider[s]" -- i.e. those with interests in the "zone of protected interests." Purported third-party beneficiaries (see Comments of the Nynex Telephone Companies at 15-16) clearly have no standing to file or pursue any proceeding to obtain relief under Section 628.

availability."[19] Comments of the Attorneys General of Texas, Maryland, Ohio, and Pennsylvania at 14. Only then should a programmer be required to justify the specific differences between the price, terms and conditions offered to the complainant and its competitor.

Because most of the distribution media commenters seek to impose virtually all burdens on programmers, few commented upon the procedural issues raised by the Commission. Liberty respectfully submits that the Commission must draw an appropriate balance between expediting the complaint proceedings as required by Congress and ensuring a procedurally fair result. To the extent that any commenters addressed these issues, they generally share Liberty's concerns regarding the procedural alternatives available to respondents and the timing thereof, reasonable limitations of discovery,[20] the protection of confidentiality for sensitive business informa-

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[19] This element of Section 628 is similar to the requirement that an antitrust plaintiff prove not only injury, but also "antitrust injury, which is to say injury of the type the antitrust laws were intended to prevent." Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489 (1977); see also Illinois Bell Tel. Co. v. American Tel. & Tel. Co., 4 FCC Rcd. 5268, 5271 n.13, recon. denied, 4 FCC Rcd. 7759 (1989) (complainant must demonstrate not "how much better off the complainant would be today if it had paid a lower rate," but rather "how much worse off it is because others have paid less").

[20] It is obvious that some prospective distributors view the Commission's complaint process as a means to launch a fishing expedition into the confidential business affairs of programmers. See U.S. West Comments at 16; USTA Comments at 14; DirecTV Comments at 30 n.39.

tion, and appropriate sanctions for discovery abuse and frivolous complaints. See Time Warner Comments at 45-48 and 49-50; Superstar Comments at 65-66.

VI. The Commission's Rules Implementing Section 616 Should Not Stifle Programming Negotiations And Investment.

Over forty commenters, including numerous industry trade associations and coalitions representing scores of other entities, filed comments in this proceeding. However, not one programmer claimed that it had been the victim of the discrimination, coercion or retaliation to which Section 616 is directed. In short, the potential harm envisioned by Congress has not materialized.

In contrast, the Commission has recognized that vertical integration by cable operators has "brought substantial benefits to American consumers." Report to Congress, 5 FCC Rcd. at 4972. Cable operator investment has not been forced upon programmers in exchange for carriage -- entrepreneurial programmers have sought both investment and carriage. For example, after making over 400 presentations and obtaining only 20 percent of the needed investment, The Discovery Channel nevertheless launched and then "ran out of money." Discovery Comments at 7. Only investments and carriage by cable operators saved this now acclaimed service. Id. at 8.

The Commission's Rules must make clear that cable operators may negotiate with existing or prospective programmers regarding programming investments and carriage:

> [T]he Commission should clearly limit any Rules and Regulations adopted pursuant to Section 616 to acts that are coercive or unreasonable. Thus, in arms-length negotiations, a cable operator or multichannel video program provider should be permitted to bargain for and to obtain a financial interest in a programming service or exclusivity....

Comments of United States Satellite Broadcasting Co., Inc. at 4-5. As Liberty suggested in its initial comments, the Commission's Rules should be limited to "threats of external pressure," "concerted action" or similar coercive conduct as distinguished from mere negotiations.[21] Liberty Comments at 68. Financial interests and exclusivity permitted under Section 628 not only are permissible commercial issues for

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[21] Liberty generally agrees with the Motion Picture Association of America, Inc. ("MPAA") that the determination of prohibited conduct under Section 616 generally is "fact-specific." MPAA Comments at 6-7. However, Liberty does not believe that the "indicators" of potentially coercive activity suggested by MPAA provide reliable indicia of prohibited conduct. For example, MPAA suggests that the "[r]efusal to carry a service on terms and conditions equivalent to what is reasonable and standard in the industry for comparable programming" is one indicator of potential coercion. Id. at 7. However, even if the Commission could determine which services were "comparable," a cable operator may justifiably determine that another service duplicating an already carried service has less value or is of minimal interest to subscribers. Likewise, many of the other "indicators" and "criteria" offered by MPAA at 7-11 are not reliable indicia of "coercive" or discriminatory conduct and may be explained by any variety of legitimate business considerations.