

Before the
Federal Communications Commission
Washington, D.C. 20554

RECEIVED

FEB 16 1993

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

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 Programming)
Distribution and Carriage)

Reply Comments of Turner Broadcasting System, Inc.

OF COUNSEL:

Bertram W. Carp
Turner Broadcasting System, Inc.
820 First Street, N.E.
Washington, D.C. 20004
202/898-7670

Bruce D. Sokler
Lisa W. Schoenthaler
Mintz, Levin, Cohn, Ferris,
Glovsky and Popeo, P.C.
701 Pennsylvania Avenue, N.W.
Suite 900
Washington, D.C. 20004
202/434-7300

February 16, 1993

D14022.1

No. of Copies rec'd
List A B C D E

A 9

**Before the
Federal Communications Commission
Washington, D.C. 20554**

RECEIVED

FEB 16 1993

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

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 Programming)	
Distribution and Carriage)	

Reply Comments of Turner Broadcasting System, Inc.

Turner Broadcasting System, Inc. ("TBS"), by its attorneys, hereby submits reply comments on the FCC's Notice of Proposed Rulemaking ("NPRM") concerning the adoption of program access rules to implement Sections 628 and 616 of the Cable Television Consumer Protection and Competition Act of 1992 (the "1992 Cable Act").

I. The Commission Should Adhere to Its Conclusion That Section 628 Should Be Prospectively Applied to New Transactions So As Not to Affect Existing Contracts

TBS submits these reply comments in large measure to re-emphasize the significance of applying any pricing policies or restrictions the Commission develops to implement the anti-discrimination rules prospectively to only new transactions so as not to affect contracts existing at the effective date of these rules. NPRM at ¶ 27. Indeed, as recognized by a great number

of commenters,^{1/} any other approach would wreak havoc on the programming and distribution industries, contravene settled principles of statutory construction, and conflict with the policy of enhancing diversity underlying the 1992 Cable Act.

As TBS and other programmers have demonstrated, existing contracts between programmers and their affiliates came about after hard bargaining and good faith, time-consuming negotiations.^{2/} Variances in pricing and other terms resulted from each customer's unique circumstances and priorities. It would now be near impossible to reconstruct these negotiations at this time in an attempt to explain or justify these variances. Moreover, as the comments submitted to the Commission indicate, programmers have relied and continue to rely on the revenue that their affiliation agreements generate in making decisions regarding their investments in existing and future programming.^{3/} To abrogate or open all of a programmer's existing carriage contracts would impair the major assets of the programmer, hobbling its ability to continue to improve existing programming and create new programming. Such a result is contrary to the policies of enhancing diversity underlying the program access provisions and the 1992 Cable Act generally. For the same reasons, those previously negotiated contracts cannot be utilized as the baseline by which to judge whether prospective conduct is discriminatory.

^{1/}See, e.g., Comments of International Family Entertainment, Inc. at 10-11; Comments of Affiliated Regional Communications, Ltd. at 18-19; Comments of Liberty Media Corporation at 51-54; Comments of Viacom International Inc. at 28-34; Comments of NCTA at 34-37; Comments of Time-Warner Entertainment Company, L.P. at 31-35; Comments of Rainbow Programming Holdings, Inc. at 17-18; Comments of United Video, Inc. at 32-36.

^{2/}See e.g., Comments of Affiliated Regional Communications at 17-18; Comments of International Family Entertainment at 11.

^{3/}See, e.g., Comments of E! Entertainment Television, Inc. at 10-11; Comments of Viacom International Inc. at 33-34.

As numerous commenters indicated, any other result would run counter to fundamental principles of statutory interpretation.^{4/} The Supreme Court has instructed that congressional enactments must not be construed to apply retroactively, and that, absent evidence of contrary congressional intent, a grant of rulemaking power must not be construed to encompass the power to promulgate retroactively applicable rules. See Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 208 (1988). Nothing in the anti-discrimination provisions of Section 628 indicates that Congress intended that the Commission adopt retroactive regulations. Similarly, nothing in the legislative history establishes such an intent.^{5/}

II. The Comments Support Adoption of A Presumption that Exclusive Contracts Entered Into For the Purpose of Launching a New Program Service are In the Public Interest

TBS reiterates its support of the Commission's proposal to establish a rule presuming that exclusive distribution contracts for new program services are in the public interest. NPRM at ¶ 36. As the Commission and numerous programmers and distributors have recognized,

^{4/}See, e.g., Comments of Time Warner Entertainment Company, L.P. at 32-33; Comments of Viacom International Inc. at 29-34.

^{5/}The fact that Congress grandfathered certain exclusive contracts, see Section 628(h), does not indicate that Congress also intended to retroactively apply the anti-discrimination provisions as some have argued. See, e.g., Comments of The Wireless Cable Association International, Inc. at 28-29; Comments of CableAmerica Corporation at 36-37. In fact, where Congress wanted to abrogate existing contracts, it did so explicitly, as when it stated that the Section 628(h) grandfather clause would not apply in non-cabled areas. Given the fundamental canons of statutory construction that apply in such circumstances, it is therefore surprising that anyone would be "flabbergasted" by the NPRM's proposal to prospectively apply these provisions. See Comments of the Wireless Cable Association at 28.

exclusive distribution rights are essential to the launch and promotion of new services and to the goal of achieving program diversity. Id.^{6/}

As a variety of commenters noted, exclusive agreements constitute a powerful tool which programmers may use to encourage investment in and carriage of new services.^{7/} Such agreements serve as an inducement to cable operators to engage in the promotional activities and marketing plans that are essential to the introduction of new services.^{8/} The ability to offer exclusivity makes the launch of new program services feasible, which, consequently, increases program diversity.

TBS urges the Commission, as we did in our initial comments, not to limit the permissible duration of such contracts to two years. See NPRM at ¶ 36. A contract of such a short duration would provide the distributor with an insufficient incentive to undertake the risks

^{6/}See, e.g., Comments of Affiliated Regional Communications at 15-18; Comments of Tele-Communications, Inc. at 23-30; Comments of Continental Cablevision, Inc. at 21-23; see also United Video, Inc. v. FCC, 890 F.2d 1173, 1181 (D.C. Cir. 1989) (prohibiting exclusive agreements results in a reduction of diversity); Amendment of Parts 73 and 76 of the Commission's Rules Relating to Program Exclusivity in the Cable and Broadcast Industries, 3 FCC Rcd 5299, 5309 (1988) (noting that the lack of syndicated exclusivity reduced programming supply); Continental TV, Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 55-56 (1977), on remand, 461 F. Supp. 1046 (N.D. Cal. 1978), aff'd, 694 F.2d 1132 (9th Cir. 1982) (a principal benefit of exclusivity is that it induces the distributor to promote fully the programming to which it has exclusive rights, chiefly by preventing its potential distribution rivals from "free-riding" on its promotional efforts); U.S. Department of Commerce, Video Program Distribution and Cable Television: Current Policy Issues and Recommendations, NTIA Report 88-233, at 109-10 (1988) ("Both buyer and seller can benefit from the availability and enforceability of exclusive rights").

^{7/}See, e.g., Comments of Time Warner Entertainment Company, L.P. at 44, Comments of Liberty Media Corporation at 47-48; Joint Comments of Cablevision Industries Corp., Comcast Cable Communications, Inc., Cox Cable Communications at 15; Comments of Tele-Communications, Inc. at 23-30.

^{8/}See, e.g., Comments of Liberty Media Corporation at 47-48.

inherent in carrying a fledgling service. Similarly, contracts of such a short duration would provide little if any incentive to aggressively promote and market the product since other distributors would soon have the opportunity to "free-ride" off of whatever efforts the distributor may have made. The Commission itself has recognized this "free rider" problem.^{2/}

As we stated earlier, TBS's strategic decision to offer exclusivity for TNT enabled that service to get off the ground. The offering of exclusive arrangements induced cable operators to commit to undertake the risks inherent in launching this then-new and unproven service. If TBS had been unable to use "exclusivity" as a tool to launch TNT, or if the duration of such exclusivity had been limited to two, five, seven or even ten years, it is doubtful that TNT would have succeeded.

The exclusivity that TBS offered on TNT had value, value reflected in the price TBS was able to charge for TNT and the financial penalty associated with the elimination of any exclusivity. The Commission should realize that eliminating TBS's ability to offer TNT on an exclusive basis will necessarily hinder TNT's competitive position with services such as ESPN and USA, who would remain free to employ such a strategy (ESPN already does). The Commission should at this time take steps to ensure that the public interest in diversity of programming in the video distribution market is not disserved by limiting the ability of programmers to offer exclusive arrangements, since such a limitation will surely serve as a disincentive to take on the risks inherent in developing and launching new services.

^{2/}See In the Matter of Competition, Rate Deregulation and the Commission's Policies Relating to the Provision of Cable Television Service, 5 FCC Rcd 4962, 5009-10 (1990).

III. The Commission Should Permit Programming Vendors to Establish Justifiable Price Differentials Among Different Delivery Systems

Contrary to the views expressed by some, the plain language of Section 628 does not mandate an approach under which the complainant need only demonstrate a price differential in order to make its prima facie case.^{10/} Rather, the plain language of Section 628 supports adoption of a presumption that reasonable price differentials among different delivery systems should be deemed justifiable unless the complainant can demonstrate that the differential results in "harm" by "significantly hinder[ing] or preventing the multichannel video programming distributor from providing satellite cable programming . . . to subscribers or consumers." Section 628(b). Section 628 neither requires uniform pricing to all customers nor even that a programmer deal with all potential customers.

As we stated in our initial comments, Section 628 supports the incorporation of such a presumption, since the plain language of the Act permits programmers to fairly differentiate prices, terms and conditions among distributors based not only on the costs of creation, sale, delivery, or transmission of programming,^{11/} but also on the basis of economies of scale, cost

^{10/}See, e.g., Comments of the National Rural Telecommunications Cooperative and the Consumer Federation of America at 15 ("NRTC Comments").

^{11/}Section 628(c)(2)(B)(ii). See also S. Rep. No. 92, 102d Cong., 2d Sess. 28 (1992) ("The Committee recognizes that distributors may undertake different levels of promotion, marketing, billing, and collection, and other efforts that are of value to video programmers, and that these are legitimate business considerations in establishing rates, terms, and conditions with multichannel video distributors. The Committee intends that video programmers have flexibility in negotiating price, terms, and conditions for distribution, so long as the price, terms, and conditions allow competition to flourish."). The colloquy between Senators Inouye and Kerrey, moreover, suggests that Congress intended these provisions to also permit program vendors to consider the costs of sale, delivery and transmission at the distributor level in setting their prices, terms and conditions. See 138 Cong. Rec. S16,671 (daily ed. Oct. 5, 1992).

savings, or other "direct and legitimate economic benefits reasonably attributable to the number of subscribers served by the distributor."^{12/} These statutory recognitions should permit programmers to establish prices which may differ between different types of delivery systems.

The comments submitted to the Commission in this proceeding establish that there are many reasonable grounds for price differentials among delivery systems. These variances exist as a result, inter alia, of differences in (1) a programmer's costs in selling and marketing its services to distributors with different numbers of subscribers or which use different technologies for delivering programming to consumers; (2) the value distributors can confer upon programmers by providing access to a large number of subscribers over which programming costs can be amortized;^{13/} and (3) the distributor's role in marketing and promoting the service. Simply put, and as noted in TBS's initial comments, satellite dish distributors do not provide TBS with the subscriber and advertising base necessary to support TBS's program services, while cable operators can. Similarly, SMATV and MMDS operators typically have far fewer subscribers than that which cable systems typically provide; resulting in higher administrative costs and lower penetration rates than for cable.^{14/}

^{12/}Section 628(c)(2)(B)(iii).

^{13/}See Comments of Viacom International Inc. at 18 n.12.

^{14/}The statute also requires the Commission to adopt rules which permit reasonable price differentials among the same types of delivery systems, although some would have it otherwise. The Cable Antenna Television Association ("CATA") urges the Commission in its comments to reform the allegedly "super-competitive" prices charged by major cable programmers to small cable operators, and specifically complains about carriage incentives contained in certain agreements entered into with these operators, including those contained in certain TBS program service agreements. See Comments of CATA at 2, 4-6. As an initial matter, the mere fact that some cable operators pay less for certain TBS program services than others, depending on how many TBS services they carry, does not establish "discrimination" under Section 628, (continued...)

NRTC's assertion that it pays unfair and discriminatory prices of up to 780% more than a cable operator pays to obtain programming (NRTC Comments at 4-5) rings particularly hollow. To be sure, our prices to TVRO agents are different than to cable operators. As we explained in our initial comments, the businesses are different. We cannot reach a cable operator's customers without the cable operator. Since we sell directly ourselves to TVRO households, we can reach **all** of NRTC's customers even if NRTC did not exist. Under the current pricing structure in the TVRO market, we sell to NRTC at approximately \$1 a customer, leaving them a margin of \$1 a customer. All NRTC is doing is attempting to "game" the system to shrink our revenues while increasing our competitor's profit margins. Even an entity with market power, which TBS does not have, has no duty to assist its competitor. E.g., Olympia Equipment Leasing Co. v. Western Union Tel. Co., 797 F.2d 370 (7th Cir. 1986), cert. denied, 480 U.S. 934 (1987). No public or consumer benefit will necessarily result from a governmental-directed revenue transfer from TBS to NRTC. The actual facts regarding NRTC's special interest pleas should demonstrate to the Commission that programming vendors should be permitted to establish justifiable price differentials among different delivery systems.

CONCLUSION

TBS urges the Commission to adopt rules which further the purposes embodied in the 1992 Cable Act, without devastating the cable programming industry, which in the past decade

^{14/}(...continued)

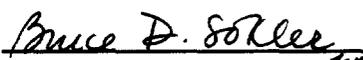
particularly given the fact that the terms and conditions complained of are offered not just to small cable operators, but to all of the cable operators that carry TBS's services. Moreover, the incentives complained of are the sort permitted under the statute since they take into account direct and legitimate economic benefits directly attributable to the number of subscribers served by TBS's distributors.

has greatly enhanced diversity in the video marketplace. Consistent with the 1992 Cable Act, the Commission can, and should, inter alia, adopt anti-discrimination rules which are prospective in effect, which permit reasonable volume discounts and justifiable pricing differentials among delivery systems, and which establish a presumption that exclusive contracts for new program services are in the public interest.

Respectfully submitted,

OF COUNSEL:

Bertram W. Carp
Turner Broadcasting System, Inc.
820 First Street, N.E.
Washington, D.C. 20004
202/898-7670



Bruce D. Sokler
Lisa W. Schoenthaler
Mintz, Levin, Cohn, Ferris,
Glovsky and Popeo, P.C.
701 Pennsylvania Avenue, N.W.
Suite 900
Washington, D.C. 20004
202/434-7300

February 16, 1993

D13763.1

CERTIFICATE OF SERVICE

This is to certify that I, Rowena Y. Holt, a secretary in the law offices of Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C., served a copy of the foregoing **Reply Comments of Turner Broadcasting System, Inc.** by first-class mail, postage prepaid, on the following:

Mark J. Palchick, Esq.
Baraff, Koerner, Olender & Hochberg, P.C.
5335 Wisconsin Avenue, N.W.
Suite 300
Washington, DC 20015-2003
Counsel for Community Antenna Television Association

John B. Richards, Esq.
Keller and Heckman
1001 G Street, N.W.
Suite 500 West
Washington, DC 20001
Counsel for National Rural Telecommunications Cooperative and
the Consumer Federation of America

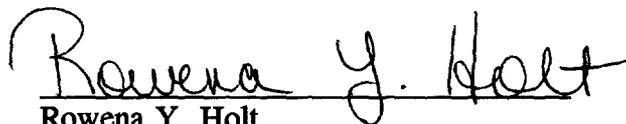
David Overlock Stewart, Esq.
Thomas B. Smith, Esq.
Ropes & Gray
1001 Pennsylvania Avenue, N.W.
Washington, DC 20004
Counsel for CableAmerica Corporation

Paul J. Sinderbrand, Esq.
Dawn G. Alexander, Esq.
Sinderbrand & Alexander
888 Sixteenth Street, N.W.
Suite 610
Washington, DC 20006-4103

Nicholas W. Allard, Esq.
1001 Pennsylvania Avenue, N.W.
Suite 1300
Washington, DC 20004

Counsel for The Wireless Cable Association International, Inc.

This 16th day of February, 1993.


Rowena Y. Holt

D14014.1