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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)
)
Development of Competition and)
Diversity in Video Programming)
Distribution and Carriage)

MM Docket No. 92-265



REPLY COMMENTS OF
THE NATIONAL CABLE TELEVISION ASSOCIATION, INC.

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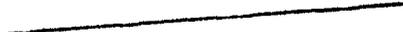


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The National Cable Television Association, Inc. ("NCTA") hereby submits its reply comments in the above-captioned proceeding.

INTRODUCTION AND SUMMARY

In adopting Section 19 of the Cable Television Consumer Protection and Competition Act of 1992 (the "Act"), Congress recognized that certain types of conduct by cable programmers that are owned or controlled by cable operators can, in some circumstances, have anticompetitive purposes and effects in the provision of video programming by multichannel distributors. Specifically, Congress found that "[v]ertically integrated program suppliers ... have the incentive and ability to favor their affiliated cable operators over nonaffiliated cable operators and programming distributors using other

technologies."^{1/} And it provided a new remedy for multichannel video programming distributors who are disadvantaged by anticompetitive conduct by vertically integrated programmers who act on such incentives.

Not surprisingly, many multichannel video programming distributors urge the Commission to interpret the new provisions not as a remedy for anticompetitive conduct by vertically integrated programmers, but as a mandate to force programmers to make their services available to all distributors at the same price and on the same terms and conditions, even where this is not in the pro-competitive interest of the programmers or of consumers. Courts applying the antitrust laws have resoundingly rejected the notion that exclusive contracts and differential rates, terms and conditions are uniformly or even presumptively anticompetitive. Indeed, they have indicated that, more often than not, such practices promote competition.

But the direct broadcast satellite (DBS), multichannel multipoint distribution service (MMDS) and satellite master antenna television (SMATV) operators argue strenuously that antitrust analysis should be avoided when applying this provision. From their standpoint, what matters is not whether, in any particular case, exclusivity or differential pricing has an anticompetitive impact -- or even any adverse impact at all -- on the viability of a particular competitor. The purpose of the

1/ Act, Sec. 2(a)(5).

Act, they contend, is "to 'jump start' competition"^{2/} -- to force programmers to deal with all multichannel distributors and to do so on terms and conditions that might, in many cases, result in less efficient distribution and development of programming than might otherwise be the case.

Thus, DirecTv -- a subsidiary of Hughes Communications, Inc., which intends next year to launch a DBS service -- claims that the Commission should "not become embroiled in a reexamination of the programming market under traditional antitrust principles,"^{3/} because

Congress made a conscious decision to sacrifice, if necessary, some of the potential short-term efficiencies of a highly integrated cable industry in favor of promoting the long-term efficiencies of more viable competitors and more consumer choices in the video programming market.^{4/}

As we demonstrated in our initial comments, Congress made no such decision. If Congress had reached that conclusion, the statute would have plainly and unequivocally banned all exclusive contracts and price differentials. But the Act does not do that.

Section 628 reflects a clear concern on the part of Congress that vertically integrated programmers might in some circumstances, engage in certain conduct -- in particular, exclusivity and discriminatory prices, terms and conditions --

2/ DirecTv Comments at 4.

3/ Id. at ii.

4/ Id. at 5.

for the purpose not of competing more efficiently in the provision of programming but of unfairly favoring their affiliated cable operators. And Section 628 reflects a concern that the antitrust laws may not be wholly effective in preventing such conduct -- not because they do not prohibit what Congress sought to prohibit, but because, as the Wireless Cable Association contends, "the cost in money and time of antitrust litigation" may be prohibitive, especially for new services.^{5/}

But Section 628 also reflects Congress' determination not to prohibit conduct undertaken for legitimate, efficient and pro-competitive reasons. The Act generally prohibits only conduct that is "unfair" and that has the purpose or effect of "hinder[ing] significantly or . . . prevent[ing] any multichannel video programming distributor from providing satellite cable programming or satellite broadcast programming to subscribers or consumers."^{6/} It requires that the Commission prohibit certain discriminatory conduct with regard to prices, terms and conditions -- but only where that conduct cannot be justified as pro-competitive under several enumerated criteria. It requires that the Commission treat exclusive contracts as a form of unfair conduct -- but only if such contracts are determined not to be in

5/ See, e.g., Report of the Senate Committee on Commerce, Science and Transportation, S.Rep. No. 102-92, 102d Cong., 1st Sess. 28-29 (1991) ("Senate Report") ("[S]tart-up companies, in effect, might be denied relief in light of the prohibitive cost of pursuing an antitrust suit.")

6/ Sec. 628(b).

the "public interest," under criteria that reflect the same sort of balancing of pro-competitive and anticompetitive effects that is typically conducted when applying the antitrust laws.

In other words, the Act provides DBS, MMDS, and other alternative multichannel video programming distributors the opportunity to demonstrate, in expedited Commission proceedings, that there is substance to their complaints. For years, these competitors have maintained that vertically integrated cable programmers have acted in an unfair, unjustified and anticompetitive manner, causing them substantial harm by refusing to deal with them on reasonable terms. Section 628 prohibits such conduct and provides a fast-track, quasi-administrative mechanism for obtaining relief.

But now the alternative distributors claim that Congress gave them more than an opportunity to prove that exclusive contracts and price discrimination are, in particular cases, unfair and harmful to their ability to compete. They contend that the Act constitutes a determination by Congress that such exclusive contracts and price discrimination generally are unfair and, in all cases, are harmful to their ability to compete. Thus, they claim that to demonstrate, even in truncated Commission proceedings, that they suffered substantial competitive injury from an exclusive contract or from

discriminatory prices would create an "almost insurmountable burden"^{7/} and is, in any event, not required by the Act.

And, although antitrust precedents and authorities suggest that many if not most exclusive contracts and price differentials are likely to be justified under the criteria of the Act, the alternative distributors argue that their complaints need only allege the existence of an exclusive contract or the slightest difference in prices, terms or conditions to establish a prima facie case and a presumption of unlawfulness.^{8/} Indeed, some of them would require vertically integrated programmers to submit all exclusive contracts to the Commission for prior approval, whether or not there is even a complaining party, much less a showing of harm!^{9/}

The National Rural Telecommunications Cooperative and the Consumer Federation of America ("NRTC/CFA") complain that

[r]ather than simply implementing the new statutory ban against discrimination, as directed by Congress, the Commission's Notice proposes as many 'loopholes' as is possible to justify discrimination^{10/} by the cable industry against other distributors.

7/ National Rural Telecommunications Cooperative and Consumer Federation of America ("NRTC/CFA") Comments at 13.

8/ See, e.g., id. at 15; Wireless Cable Association Comments at 37.

9/ See, e.g., DirecTv Comments at 28; Wireless Cable Association Comments at 43.

10/ NRTC/CFA Comments at ii.

But these "loopholes" simply reflect the difference between per se unlawfulness of all exclusivity and all discrimination, which the alternative distributors would have preferred, and the more limited prohibition that Congress actually enacted. As the United States Telephone Association candidly concedes, "[g]enerally, new section 628 does far less than most non-cable participants in the Commission's various recent cable proceedings recognize is necessary to make the cable market competitive."^{11/}

In seeking to implement the new remedies and prohibitions that the Act does require, the Commission has generally asked the right questions. The Commission is right to suggest that Section 628 is meant only to prohibit conduct of vertically integrated programmers. Only exclusionary conduct intended to favor a vertically integrated programmer's commonly owned cable operators should be prohibited. This means that where the alleged victim of discrimination or exclusivity does not compete with the programmer's affiliated cable operator, there is no cognizable harm. And where the allegedly anticompetitive conduct is no different from conduct of non-integrated programmers, it similarly should not be prohibited.

There is considerable disagreement among the commenting parties as to what level of ownership or control by a cable operator makes a programmer vertically integrated. In light of

^{11/} United States Telephone Association Comments at 3 (emphasis added).

the purposes of Section 628, actual voting control or some evidence of working control should be required.

With respect to discrimination in price, terms and conditions, many parties agree with NCTA that neither common carrier law nor the Robinson-Patman Act provides the appropriate standards for determining whether a particular differential is or is not justified. The Commission simply should apply the criteria set forth in the Act on a case-by-case basis. And, if the prohibition is to be workable and not have chaotic results, it must be applied prospectively, and not to pre-existing contracts. In any event, discrimination is not prohibited unless it prevents or significantly hinders a multichannel video programming distributor in providing programming to subscribers. Antitrust principles and precedents can provide useful standards for determining, in any particular case, whether such harm is likely or even conceivable.

With respect to exclusive contracts, the Commission seeks standards for determining when such contracts are in the public interest. Antitrust precedents and standards reflect a balancing of the same sorts of competitive factors as those that the Commission is required by the Act to consider, and those precedents and standards should be applied by the Commission. Again, however, only exclusive contracts that have the purpose or effect of preventing or significantly hindering the ability of a multichannel distributor to compete are within the scope of the Act's prohibition.

I. THRESHOLD REQUIREMENTS: "EXCLUSIONARY" CONDUCT BY "VERTICALLY INTEGRATED" PROGRAMMERS

DirecTv accurately states that

Section 19 of the Act is directed primarily toward refusals to deal and other exclusionary behavior by cable operators and their vertically integrated programmers.^{12/}

Not all commenting parties understand the significance of Congress' intention to prohibit only behavior that is "exclusionary" and only conduct engaged in by vertically integrated programmers. Thus, some parties contend that exclusive contracts and discriminatory prices, terms and conditions may be per se unlawful under the Act, regardless of whether they have any exclusionary purpose or effect. And some parties argue that even exclusive contracts and discriminatory practices by programmers that are not vertically integrated are prohibited by the new Section 628.

The Commission has, however, read the statute correctly in suggesting that there are two threshold requirements that must be met before any exclusive contract, price discrimination or other conduct can be deemed to violate the Act. First, the conduct must, in fact, be exclusionary -- it must have the "purpose or effect of hinder[ing] significantly or prevent[ing] any multichannel video programming distributor from providing

12/ DirecTv Comments at 5-6 (emphasis added).

satellite cable programming or satellite broadcast programming to subscribers or consumers."^{13/} And, second, to the extent that the alleged exclusionary conduct involves a cable programmer, that programmer must be one "in which a cable operator has an attributable interest."^{14/}

A. The Conduct Must Have an Exclusionary Purpose or Effect.

Some alternative distributors dispute the Commission's finding that, in determining whether exclusive contracts or differential prices, terms and conditions are unlawful, it must in each case determine whether the conduct at issue has an exclusionary purpose or effect. They allege that no showing of harmful purpose or effect is necessary and that exclusive contracts and discriminatory prices, terms and conditions that cannot be justified under the statutory criteria are per se unlawful.

Thus, according to NRTC/CFA,

The statute does not require a distributor to demonstrate that discrimination has prevented or hindered significantly the distributor from providing programming to subscribers or consumers. . . . To the contrary, the statute makes it clear that -- at a minimum -- all discrimination must be prohibited by the Commission unless justified by the program vendor in a particular case under the specific exception

13/ Section 628(b).

14/ Id.

contained in Section 628(c)(2)(B)(i)-(iv).^{15/}

Similarly, the Wireless Cable Association argues that

[w]hile the Commission may require a complainant under subsection (b) to demonstrate that the purpose or effect of the action complained of is to hinder its competitive offering, the Commission cannot impose similar requirements on complainants under Section 628(c).^{16/}

The problem with this argument is that subsection (b) defines the elements of prohibited conduct, while subsection (c) merely directs the Commission to specify conduct that will, in certain circumstances, be prohibited by subsection (b). As we explained in our initial comments, Section 628(b) prohibits "unfair" conduct that has the purpose or effect of significantly hindering a distributor from competing. Section 628(c) directs the Commission to specify types of conduct that will be prohibited as "unfair," and it "provides criteria for determining, in particular cases, whether certain forms of conduct -- such as price differentials and exclusive contracts -- are to be deemed 'unfair' conduct."^{17/}

Section 628(c) thus constitutes a finding by Congress that, if price discrimination or an exclusive contract has an exclusionary purpose or effect, it must be prohibited unless it can be justified under one of the specified criteria. But it

15/ NRTC/CFA Comments at 16 (emphasis is original).

16/ Wireless Cable Association Comments at iii.

17/ NCTA Comments at 7.

would be unreasonable to conclude that, as the Wireless Cable Association contends, Congress had also determined that, in every case, "unless justified by the specific considerations it found relevant, discrimination has either the purpose or effect of significantly hindering the emergence of competition."^{18/}

Such a determination by Congress would have been absurd. Consider, for example, the National Satellite Programming Network's assertion that it "currently offers fifty-nine (59) programming services (including HBO and Showtime) to over nine hundred (900) member companies."^{19/} If any one of those services -- especially one with relatively small viewership -- were to cease dealing with NSPN or charge NSPN slightly more than it charged cable systems or DBS operators, is it self-evident that such behavior would always have the purpose or effect of significantly hindering the emergence of competition?

Indeed, as the Wireless Cable Association concedes,

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.^{20/}

But where there is no evidence of discrimination or refusals to deal by multiple programmers and, in any event, no evidence of

18/ Wireless Cable Association Comments at 36. See also DirecTV Comments at 12.

19/ National Satellite Programming Network Comments at 2-3.

20/ Wireless Cable Association Comments at 35 n.68.

any effects, cumulative or otherwise, on a distributor's competitive viability, there is no reason -- and Congress did not intend -- to prohibit an individual instance of exclusivity or discrimination, even if the conduct cannot be justified under the statutory criteria.

The Wireless Cable Association also argues that, even if a single programmer's discriminatory conduct will rarely have anticompetitive effects,

every penny that must be paid to a programmer due to discrimination is a penny less in savings that an alternative service provider ^{21/}can pass along to subscribers in reduced rates.

But this is only relevant if enough pennies are paid to affect significantly the sales and competitive viability of the alternative service provider. Moreover, it is only relevant to the extent that the pennies that would be saved by the alternative service provider actually would be passed along to subscribers in reduced rates. In this respect, the record is full of allegations by alternative providers of differential rates both among such providers and between such providers and cable systems. But it is devoid of any evidence of the effects of such differences on the rates charged to subscribers -- any evidence, for example, that the pennies saved would, in fact, be passed on to subscribers by the Wireless Cable Association's members.

21/ Id. (emphasis added).

The Wireless Cable Association and NRTC/CFA argue, instead, that Congress simply determined that it was self-evident that, in every case, savings would be passed on to consumers and, in every case, exclusivity and discriminatory conduct that was not cost-justified would significantly hinder the ability of an alternative provider to compete. But those assumptions are not self-evident, and Congress made no finding that they were.

To the contrary, as other alternative providers concede, even the exclusivity and discriminatory conduct prohibited by Section 628(c) is only actionable where it is shown to have the purpose or effect of significantly hindering an alternative provider's ability to compete. Thus, Consumer Satellite Systems, Inc., which operates National Programming Service, "the largest independent packager of satellite television programming in the country," argues that

[i]n considering the element of harm, the Commission should look at both the MVPD ["multichannel video programming distributor"] and the consumer. When looking at the MVPD, the Commission should consider the entity's profitability, financial strength, and the size of its market share among other factors. It should then consider evidence of the adverse effect of price and term discrimination on all of those factors. If there has been a significant hinderance of the MVPD's development and operation, remedial actions should be available. When looking at the HSD consumer, the Commission should consider the comparative cost of cable service against the cost of HSD service. 22/

22/ Consumer Satellite Systems, Inc. Comments at 15 (emphasis added).

It is a separate question whether the burden of proof with respect to any "significant hindrance" should rest on the complainant or on the programmer. Thus, the American Public Power Association argues that "the Commission should, at the very least, adopt a rebut-table [sic] presumption that a claimant has been significantly injured if he establishes that he has been subjected to unfair, deceptive or discriminatory practices of the kind prohibited by Section 628. . . ."23/

Such a rebuttable presumption would, at least, acknowledge that significant competitive injury is an element of what is prohibited by the Act. It would, for example, enable programmers to demonstrate an absence of competitive injury, based on some of the indicia described in our initial comments. These criteria include whether (1) the alleged discrimination is between competing buyers in the same market; (2) the allegedly unfair conduct affects the alternative provider's retail price to subscribers; (3) the allegedly disfavored alternative providers have prospered; or (4) the programmer is but one of many competing programmers whose programming is available to alternative providers.24/

But there is no reason to shift from the complaining multichannel provider the burden of showing at least some competitive injury. The alternative provider has access to more

23/ American Public Power Association Comments at 17.

24/ See NCTA Comments at 30-33.

evidence than the programmer regarding the competitive injury that it has suffered, and it should be required to come forward with some such evidence even to establish a prima facie case.

B. The Act Only Prohibits Conduct of Programmers That Are Vertically Integrated.

Although most commenting parties agree that Section 628 is directed principally at the conduct of vertically integrated programmers, some argue that the provision also bars exclusive contracts and discrimination involving non-integrated programmers. Moreover, not all parties agree with all the logical implications of the legislative focus on vertical integration. And there is some disagreement over the extent to which a programmer must be owned or controlled by a cable operator to be deemed vertically integrated.

1. Section 628 Only Applies to Vertically Integrated Programmers.

Section 628(b) prohibits conduct by only those cable programmers "in which a cable operator has an attributable interest," and Section 628(c) directs the Commission to prohibit certain exclusive contracts and discrimination only by programmers "in which a cable operator has an attributable interest." The American Public Power Association, however, contends that exclusive contracts between non-integrated programmers and cable operators can also be prohibited under Section 628. Its argument is that Section 628(b) applies not only to vertically integrated programmers but also to all cable

operators, whether vertically integrated or not, that engage in certain unfair conduct. Thus while only vertically integrated programmers are prohibited from entering into "unfair" exclusive contracts with cable operators, cable operators are prohibited from entering into such contracts with any programmers.^{25/}

This is an absurd reading of the Act, placing a two-way traffic sign at one end of a street and a one-way sign at the other end of the street. What would have been the point of specifically prohibiting unfair arrangements between vertically integrated programmers and cable operators, if unfair conduct between non-vertically integrated programmers and cable operators was also meant to be prohibited? As we explained in our initial comments, Congress may have meant, by including conduct by cable operators as well as by vertically integrated programmers within the prohibition of Section 628(b), to prohibit unilateral, unfair conduct by a cable operator that inflicts serious competitive injury on a multichannel competitor.^{26/} But Congress could not reasonably have meant to negate completely its determination, in the same provision, to include only the conduct of programmers that are vertically integrated.

25/ See APPA Comments at 6-9.

26/ See NCTA Comments at 11.

2. Only Conduct Resulting From the Unique Incentives of Vertically Integrated Programmers Should Be Deemed "Unfair."

Section 628 was intended to prevent vertically integrated programmers from acting on their unique incentives and abilities to favor their commonly owned cable operators. As we noted in our initial comments, it follows that only conduct related to these unique incentives and abilities should be deemed unfair. Specifically, conduct by a vertically integrated programmer that has no apparent favorable effect on the programmer's affiliated cable operator should not be prohibited by this provision. And conduct that is no different from that engaged in by non-integrated programmers also ought to be outside the scope of the prohibition.

a. Only Conduct That Favors Affiliated Cable Operators Should Be Prohibited.

As DirectTV points out, Section 628 is directed at unfair conduct "by cable operators and their vertically integrated programmers."^{27/} The target of the provision is conduct by vertically integrated programmers that are intended unfairly to favor the programmers' affiliated cable operators and inflict competitive harm on those operators' competitors.

^{27/} DirectTV Comments at 5-6 (emphasis added).

Nevertheless, the Wireless Cable Association contends that it would be "an unabashed abuse of discretion" for the Commission "to deny a multichannel video programming distributor that is aggrieved by a programmer violation of Section 628 a remedy unless that distributor directly competes against a cable operator with an attributable interest in the programmer."^{28/} They add that "the record before Congress was replete with uncontroverted evidence that vertically integrated programmers discriminate regardless of whether or not the potential competitor will directly compete against an affiliated entity."^{29/} Whatever allegations the Wireless Cable Association may have placed in the record, Congress made no such findings.

What Congress found was only that "[v]ertically integrated program suppliers . . . have the incentive and ability to favor their affiliated cable operators over nonaffiliated cable operators and programming distributors using other technologies."^{30/} If vertically integrated programmers have some additional unique incentive to favor non-affiliated cable operators, neither Congress nor the Wireless Cable Association have identified what that might be. And if vertically integrated programmers have no such unique incentive and behave no differently from non-integrated programmers in their alleged

28/ Wireless Cable Association Comments at 30.

29/ Id. at 33 (emphasis added).

30/ Act, Sec. 2(a)(5).

discriminatory conduct, why would Congress have limited the prohibition to vertically integrated programmers?

DirectTv argues that if it, as a "national service provider," is "unable to obtain programming from a particular vendor, the provisions of Section 628 should apply to that vendor if it has an affiliated cable system anywhere in the United States."^{31/} To the extent that the vertically integrated programmer's conduct, in that case, would at least affect a competitor of the programmer's affiliated cable operator, it could at least conceivably reflect the sort of anticompetitive behavior at which Section 628 is directed. But where a programmer's conduct towards a particular distributor cannot conceivably result from anticompetitive incentives to favor affiliated cable operators over unaffiliated operators, the conduct should not be treated as having an exclusionary purpose or effect and should not be subject to Section 628's prohibition.

- b. Conduct By a Vertically Integrated Programmer Should Not be Deemed "Unfair" If It Is No Different From The Conduct, In Comparable Circumstances, Of Non-integrated Programmers.

Since Section 628 is directed at the unique anticompetitive incentives of vertically integrated programmers, we argued in our initial comments that "it should be a defense to any complaint brought under Section 628 that the allegedly unfair conduct of

31/ DirectTv Comments at 15.

the vertically integrated programmer was no different than the typical behavior of non-integrated programmers in similar circumstances."^{32/} Section 628 prohibits only "unfair" conduct, with reference to the supposed anticompetitive incentives of vertically integrated programmers. Where the conduct has no apparent relationship to vertical integration, it should not be deemed "unfair" for purposes of this provision.

Indeed, Consumer Satellite Systems suggests that most exclusivity and discriminatory prices, terms and conditions have nothing to do with the anticompetitive incentives that supposedly accompany vertical integration. It points out that "[i]n truth, ... ownership attribution in the programming vendor may not be the determinative factor in shaping a programmer's practices," and that "it is not vertical integration which causes discriminatory practices."^{33/}

Consumer Satellite Systems maintains that any "disparity of treatment" is, to some extent, simply the result of the "long standing vertical distribution relationship between the programmer and the cable distributor" and, to some extent, the result of "the market power of that distributor."^{34/} To the extent that Consumer Satellite Systems is alleging that cable operators unfairly coerce favorable treatment from unaffiliated

32/ NCTA Comments at 13 (emphasis in original).

33/ Consumer Satellite Systems Comments at 13.

34/ Id.

programmers, such conduct and such concerns are not the subject of Section 628 but of Section 616. That provision prohibits cable operators from coercing any programmers to grant exclusivity or from requiring a financial interest in a program service as a condition of carriage.^{35/}

Section 628, on the other hand, deals not with possible coercive practices of cable operators but with the anticompetitive incentives and abilities of vertically integrated programmers. To the extent that the conduct of a vertically integrated programmer does not significantly differ from that of a non-integrated programmer, there is no basis for assuming that those incentives and abilities are at work -- and no basis for prohibiting the conduct as having an exclusionary purpose or effect under Section 628.

3. An "Attributable Interest" Requires Actual Voting or Working Control.

Section 628 specifically applies to programmers "in which a cable operator has an attributable interest," but leaves to the Commission the task of defining what constitutes an "attributable interest." In its Notice, the Commission proposed that it simply import the same standards that it uses to determine attribution

35/ Section 616 does not prohibit the coercion by cable operators of discriminatory prices, terms and conditions from programmers -- presumably because Congress viewed such discrimination, outside the context of vertically integrated programmers and cable operators, as not especially problematic.