

of ownership for the purposes of its various broadcast multiple ownership and crossownership rules. Those standards generally treat five percent voting stock ownership as an "attributable interest."

While some commenting parties agree that the broadcast standards would be reasonable,^{36/} most parties argue either that a five percent standard is far too high, or that it is far too low. Those who argue that it is too high -- principally, alternative multichannel providers -- argue that the one percent standard that used to apply to the restrictions on telephone company ownership of cable systems in their telephone service areas is most appropriate. Thus, the Wireless Cable Association asserts that

[h]istorically, the cable industry has argued that if a gateway provider has more than 1% attributable interest in a video program supplier, there will be an incentive to engage in anticompetitive conduct. Indeed, the National Cable Television Association presently has pending before the Commission a petition urging the Commission to reinstate the former rules governing telephone company interests in video programmers, arguing that "[a]llowing telcos to own any additional interest [beyond that permitted under former Notes 1 and 2] would clearly give them incentives to favor those providers over other programmers." Certainly, if the cable industry believes the position it is espousing in CC Docket No. 87-266, it cannot disagree with WCA's view that allowing a cable operator to have an interest in excess of that permissible under Notes 1 and 2 constitutes an attributable interest that triggers

36/ See, e.g., Consumer Satellite Systems Comments at 13.

Section 628.^{37/}

For reasons that we explained in our initial comments,^{38/} however, the analogy between the prohibitions of Section 628 and the cable-telco crossownership rule is completely misconceived. The key is how ownership affects incentives for behavior and by whom. The concern underlying the cable-telco crossownership prohibition is not that a telephone company that owns an interest in a cable system will influence that system or give the system incentives to discriminate against the telephone company's competitor. Rather, by owning an interest in a cable system, the telephone company will have an incentive to act itself in an anticompetitive manner -- to use its own facilities to discriminate against its affiliated cable system's competitors.

The concern underlying Section 628, in contrast, is that a cable operator that owns a programmer will cause that programmer, not itself, to act in an anticompetitive manner. As the Competitive Cable Association recognizes, in this case "'attributable interest' has to do with control"^{39/} -- control of the programmer. In other words, the cable operator must have sufficient control over the programmer to cause it to suffer a

37/ Wireless Cable Association Comments at 27, citing NCTA Petition for Reconsideration, CC Docket No. 87-266, at 13 n.22 (Oct. 9, 1992). See also NRTC/CFA Comments at 25-26.

38/ See NCTA Comments at 16-19.

39/ Competitive Cable Association Comments at 5 (emphasis added).

direct loss of revenues by restricting sales to unaffiliated distributors.

Such control would require far more than the ownership interest required to give a telephone company an incentive to use its facilities to discriminate in favor of an affiliated cable system. And, as we showed, it would require far more than the ownership interest required to exert any influence over a broadcaster's programming. Actual voting control (50 percent ownership), or some evidence of working control, should be required before a cable operator is deemed to have an attributable interest in a programmer for purposes of Section 628.

II. DISCRIMINATION IN PROGRAM DISTRIBUTION

In our initial comments, we discussed at length the manner in which the Commission should determine whether particular complaints of discrimination in program distribution are prohibited by Section 628. We noted that, first of all, the Commission needed to ascertain that a difference in price, terms or conditions really existed -- that, taken as a whole, the prices, terms and conditions offered by a programmer to two different distributors were not comparable. And we agreed with the Commission that, in addition to determining whether a particular differential is justified under the criteria set forth in Section 628(c)(2)(B), the Commission must also determine whether or not the alleged discrimination has the exclusionary

purpose or effect of significantly hindering a competitor of the programmer's commonly owned cable operator.

A number of commenting parties -- mostly alternative multichannel providers -- disagree with the latter point. They argue that there is no requirement of significant hindrance with respect either to price discrimination or exclusive contracts. We have already discussed and refuted those arguments in Part I.A.

We also argued in our initial comments that the Commission should adopt a zone of presumptively reasonable price differences, but that it should reject standards drawn from common carrier law, the Robinson-Patman Act or other statutes and should simply apply the statutory criteria on a case-by-case basis to determine whether particular differential prices, terms and conditions are justified. And we maintained that, in any event, the price discrimination prohibition will be unworkable unless it is only applied prospectively. Not all parties agree on these points, and we revisit them briefly in this section.

A. The Commission Should Adopt a Zone of Presumptively Valid Price Differences.

In its Notice, the Commission proposed that it establish a "reasonable region of price differentials."^{40/} Price differences within this established region would be presumed to be reasonable

40/ Notice, para. 20.

and justified; differences of a larger magnitude would be presumed to be discriminatory and unjustified. In either case, the presumption would be rebuttable.

This reasonable effort by the Commission to tailor its own administrative burdens and the burdens of complaining parties and programmers by reducing the number of frivolous complaints and defenses has been roundly criticized by the alternative multichannel providers. For example, DirecTv argues that

[t]he creation of such a "safe harbor" is directly contrary to the specific test for acceptable price differences set forth in Section 628(c)(2)(B)(ii). In that provision, Congress provided the Commission with detailed guidance on the factors which can justify a price difference; it would render that provision meaningless if the Commission created a "safe harbor" for discriminatory pricing which would not have to be justified under Section 628(c)(2)(B)(ii).^{41/}

NRTC and CFA similarly complain that

[t]his approach ignores the clear Congressional directive to the FCC to prohibit discrimination in price, terms and conditions. Instead, it implies that a 'little' discrimination is acceptable. There is no basis in the statute for this approach.^{42/}

These parties miss the point of the Commission's proposal. The proposed zone of reasonableness would not establish a "safe harbor" of lawfulness -- nor would it establish that

41/ DirecTv Comments at 21 (emphasis added).

42/ NRTC/CFA Comments at 19. See also Wireless Cable Association Comments at 37-38.

differentials outside the zone are unlawful -- without regard to the statutory criteria. It would simply determine where the burden of proof lies. And, notwithstanding the assertions of the Wireless Cable Association to the contrary, Congress has not "already undertaken that task."^{43/} Nothing in the Act indicates the extent to which the complaining multichannel video program distributor must prove that a differential is unlawful or the programmer must prove that it is not.

According to the Wireless Cable Association,

Section 628(c)(2)(B) prohibits any discrimination unless the programmer can demonstrate that it is justified under Sections 628(c)(2)(B)(i)-(iv). The rebuttal [sic] presumption established by Congress is^{44/} that any discrimination is unlawful.

The Act, however, does not require that a programmer "demonstrate" that its conduct is "justified" under Sections 628(c)(2)(B)(i)-(iv). It simply provides that programmers "shall not be prohibited from"^{45/} establishing differential prices, terms and conditions of the sort set forth in Sections 628(c)(2)(B)(i)-(iv). There is nothing in the Act that suggests that, as a general matter, all differentials should be presumed either to be unlawful or to be one of the four permissible types.

43/ Wireless Cable Association Comments at 37.

44/ Id. (emphasis added).

45/ Section 628(c)(2)(B).

Indeed, if there were to be such a general presumption, it might be more reasonable to presume that all differentials were justified and to place the burden of proof, in all cases, on the complaining party. As Turner Broadcasting System, Inc. points out,

the plain language of the Act permits programmers to fairly differentiate prices, terms and conditions among distributors based on the costs of creation, rate, delivery, or transmission of programming as well as on the basis of economies of scale, cost savings, or other "direct and legitimate benefits reasonably attributable to the number of subscribers served by the distributor."^{46/}

Since, as Turner explains, "[c]able program networks set prices in negotiations with potential delivery systems,"^{47/} and they are allowed to take into account these differences in costs and economic benefit, it is most likely that program networks will sell at different prices to different distributors for wholly legitimate reasons.^{48/}

Thus, if the Commission were not to establish presumptively reasonable and unreasonable price differentials, it would be most rational and wholly legitimate to require the complaining parties to establish all elements of the alleged offense -- that a

46/ Turner Broadcasting System, Inc. Comments at 9-10 (emphasis added).

47/ Id. at 10.

48/ For an explanation of the different costs and economic benefits of selling to different delivery systems, see id. at 10-12.

differential exists and that the differential is not of the type that is explicitly permissible under Sections 628(c)(2)(B)(i)-(iv). At most, the Commission might place upon the programmer the burden of coming forward with an explanation of why the differential is permissible under one of the four criteria. But once this burden has been met, the burden of persuasion -- the burden of proving that the asserted justification is not supportable -- should shift back to the complainant.

Where differentials are unusually large, it might be reasonable to shift the burden of persuasion to the programmer. And where the differentials are so small as to be de minimis and almost certainly justifiable under one of the four criteria, it would be sensible to remove from the programmer even the burden of asserting its justification. Such an approach would discourage frivolous claims and defenses. But absent such zones of presumptive reasonableness and unreasonableness, the burden of proof that a differential constitutes unfair discrimination should rest on the complainant. And, of course, in all cases, the complainant bears the burden of demonstrating that the alleged conduct has the purpose or effect of preventing or significantly hindering it from competing.

B. The Commission Should Reject Standards From Other Statutes in Determining Whether Differential Prices, Terms and Conditions Are Permissible.

The Commission's proposal to import standards from common carrier law, the Robinson-Patman Act or the International Trade Administration's anti-dumping regulations has received little support from the commenting parties. These standards are generally designed to implement statutes and regulatory requirements that have purposes and provisions different from those of Section 628.

In our initial comments, we argued that

[d]etermining what sorts of differential prices, terms and conditions constitute unfair and unjustifiable conduct in the competitive video programming marketplace is quite different from determining what is unfair and unreasonable in the context of common carriage.^{49/}

NRTC and CFA state their objections to common carrier standards more bluntly: "The Section 202 model is wholly inappropriate under the Cable Act."^{50/}

We also argued that while the Robinson-Patman Act was, in some respects, similar to Section 628, "its underlying purposes are not identical of those of Section 628 -- nor are the criteria for determining whether differentials are justifiable."^{51/} While

49/ NCTA Comments at 24.

50/ NRTC/CFA Comments at 20. See also DirecTv Comments at 22-24.

51/ NCTA Comments at 25.

there is considerable disagreement as to how Section 628 should be applied, most parties agree that Robinson-Patman should not be the guiding light. The Attorneys General of Texas, Maryland, Ohio and Pennsylvania argue, for example, that "the Commission should not adopt the Robinson-Patman Act approach to discrimination" because "[d]octrines developed in the context of the sale of 'commodities' may not be appropriate to multichannel video programming."^{52/} The alternative multichannel video programming distributors also uniformly oppose the use of Robinson-Patman standards in enforcing Section 628.^{53/}

Finally, virtually all parties reject, to the extent that they understand them, the anti-dumping standards of the International Trade Administration. As NRTC and CFA state,

52/ Attorneys General of Texas, Maryland, Ohio and Pennsylvania Comments at 11.

53/ See, e.g., DirecTv Comments at 21-22; Wireless Cable Association Comments at 38-39; NRTC/CFA Comments at 22.

NRTC and CFA argue that "Robinson-Patman Act decisions regarding goods or commodities of 'like quality or service,' as well as prior antitrust decisions concerning predatory harm, are inapplicable." NRTC/CFA Comments at 22 (emphasis added). In our initial comments, however, we showed that, while Robinson-Patman standards should not be used to determine whether a particular differential was justified under the statutory criteria of Section 628. Robinson-Patman precedents may be useful in analyzing whether a particular differential can even conceivably have the purpose or effect of significantly hindering a competitor. See NCTA Comments at 28-33. The Wireless Cable Association, while rejecting Robinson-Patman standards, agrees that "certain antitrust principles may prove to be relevant as the Commission evaluates specific complaints on a case-by-case basis." Wireless Cable Association Comments at 39.

"[t]he Cable Act is not an 'anti-dumping' statute, and it is not dependent on constructions of the ITA."^{54/}

In sum, most parties agree with NCTA that "Section 628 has its own unique purpose and sets forth its own unique criteria for identifying justifiable and unjustifiable differentials."^{55/} As DirecTv states, "none of the models proposed by the Commission is appropriate in the context of this statute, and ... the correct model is contained in the statute itself."^{56/}

C. The Only Reasonable Way to Apply The Price Discrimination Provisions Is Prospectively.

In its Notice, the Commission proposed that the price discrimination provisions of Section 628 not be applied retroactively against existing contracts. Not only was this a wholly reasonable proposal, but, as NCTA showed,^{57/} any other approach would simply be unworkable. Turner Broadcasting System, Inc. agrees, stating that to require programmers to sell to all multichannel distributors at the lowest price negotiated in a pre-existing contract would "be a chaotic nightmare for all concerned ... and wreak economic havoc in the industry."^{58/}

54/ NRTC/CFA Comments at 23. See also DirecTv Comments at 22; Wireless Cable Association Comments at 39.

55/ NCTA Comments at 28-29.

56/ DirecTv Comments at 21.

57/ NCTA Comments at 34-37.

58/ Turner Broadcasting System, Inc. Comments at 2.

As Viacom International Inc., which owns Showtime Networks Inc. ("SNI") and MTV Networks ("MTVN"), explains

a severe upheaval would result from the abrupt renegotiation of the myriad array of existing contractual relationships between program services, on the one hand, and cable and non-cable distributors, on the other, if the anti-discrimination rules were applied retroactively to existing affiliation agreements. SNI and MTVN 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. Among other things, this would run counter to the recognized Commission goals of promoting investment in programming and encouraging the diversification of programming services. A high degree of certainty is needed during the remaining terms of existing affiliation agreements. In order to attract capital or to justify a large expense in the acquisition of programming and the development of a program service, programmers in turn need assurance that their sources of revenue, i.e., their affiliation agreements, will continue until their respective negotiated termination dates and that the negotiated revenues under such agreements will be forthcoming throughout their terms.^{59/}

The alternative multichannel distributors are oblivious to these problems. Because the Act does not specifically state that the price discrimination provision should apply only prospectively, they are "flabbergasted"^{60/} that the Commission would even suggest it. They claim that Congress

59/ Viacom International Comments at 31 (emphasis added). See also Time Warner Entertainment Company Comments at 31-35; Liberty Media Corp. Comments at 51-52.

60/ Wireless Cable Association Comments at 28.

specifically considered the grandfathering issue and determined to grandfather only certain exclusive contracts in cabled areas. See 47 U.S.C. 548(h). All other contracts obviously were not grandfathered and must be brought into compliance with the new law.^{61/}

Congress dealt, in Section 628(h), with the issue of pre-existing exclusive contracts -- specifically with whether particular contracts are or are not subject to the provisions of Sections 628(c)(2)(C) and (D). The retroactivity issue with respect to price discrimination is, however, more complex than a simple "grandfathering" issue. Price discrimination, by definition, involves a comparison of two or more separate contracts. The issue is not whether allegedly discriminatory contractual terms entered into prior to the Act are "grandfathered" or whether they should simply be abrogated, as in the case of pre-existing exclusive contracts. The issue is whether it makes sense -- and whether the Act requires -- that the Commission require that the terms of all contracts entered into before and after the Act match the most favorable terms of any pre-existing contracts. Nothing in Section 628(h) speaks to that issue or precludes the Commission from rejecting such a requirement.

Indeed, given the effects that such a requirement would have on the programming industry, Congress could not have mandated it or have intended that the Commission, in its discretion, adopt

61/ NRTC/CFA Comments at 32. See also Wireless Cable Association Comments at 29.

it. The programmers' comments confirm our initial view that "[a]pplying the provisions of Section 628 retroactively would, in the worst case, drive programmers out of business and, in the best case, sharply curtail growth and investment in more and better programming."^{62/} These outcomes would be completely at odds with the purposes of the Act, which are to promote -- not curtail -- the availability to the public of diverse programming.^{63/}

The Commission should, accordingly, rule that the terms of any contracts entered into by a programmer after the effective date of the new rules must be non-discriminatory.

III. EXCLUSIVE CONTRACTS

Section 628(c)(2)(D) requires that the Commission's regulations prohibit exclusive contracts in areas served by a cable operator, "unless the Commission determines ... that such contract is in the public interest." Section 628(c)(4) provides several factors that the Commission must consider in making any such public interest determination. Section 628(d) specifies procedures for enforcing the prohibitions of Section 628 in complaint proceedings. And Section 628 sets forth remedies that are available "upon completion of such adjudicatory proceeding[s]."

62/ NCTA Comments at 36.

63/ See Act, Sec. 2(b)(1); id., 628(a).

Several commenting parties find, in these provisions, (1) a presumption that exclusive contracts are not in the public interest; (2) a requirement that every exclusive contract be submitted to the Commission for approval before it can take effect; and (3) a prohibition on any determination by the Commission that exclusive contracts entered into by new programming services are generally, and as a matter of rule, in the public interest. Nothing in the statute supports these conclusions.

A. There Is No Presumption That Exclusive Contracts Are Contrary to the Public Interest.

According to the Attorneys General of Texas, Maryland, Ohio and Pennsylvania,

[e]xclusives granted to cable operators in the areas they actually serve are presumed to be against the public interest, subject to refutation by the parties seeking to enforce them. The States urge that parties seeking to enforce cable-only exclusives must make a positive showing that the exclusive in question does not preclude effective competition between cable operators and other distributors of multichannel video programming.^{64/}

The Attorneys General are doubly wrong. First, nothing in the Act establishes or even indicates that exclusive contracts

64/ Attorneys General Comments at 13 (emphasis added). The Wireless Cable Association and DirecTv also suggest that exclusive contracts are presumed, under the Act, to be unlawful. See Wireless Cable Association Comments at 42-43; DirecTv Comments at 28 n.35.

should be "presumed to be against the public interest." Second, the Act does not require a positive showing that the contract does not preclude effective competition in the retail distribution market; it requires that the Commission balance the overall effects on competition, both among programmers and among retail distributors.

The Act requires the Commission to consider several factors in determining whether an exclusive contract is in the public interest. As those factors suggest, exclusive contracts can have pro-competitive effects that are in the public interest as well as anti-competitive effects that are not. As we showed in our initial comments, "the Commission is to conduct the same sort of balancing of pro-competitive and anticompetitive effects [or inter-brand and intra-brand competition] that has typically been applied to exclusive contracts and other vertical restraints by courts and economists in antitrust analysis."^{65/}

There is no presumption, in antitrust analysis, that an exclusive contract is contrary to the public interest. To the contrary, as we showed, antitrust precedents suggest that

so long as there is a competitive programming market and there is no concerted refusal on the part of programmers to deal with particular network distributors, an exclusive contract between a programmer and a cable operator is highly likely, on balance, to promote competition and serve the public interest.^{66/}

65/ NCTA Comments at 47-48.

66/ Id. at 48 (emphasis in original).

The comments make clear that there is, indeed, a competitive programming market and that most programming services are available to most distributors. Thus, the Wireless Cable Association reports that "[a]lthough TNT and many regional sports services remain holdouts, ... most of the other programming services now will do business with wireless cable."^{67/} Consumer Satellite Systems, Inc. identifies more than 40 satellite program services that are available to its customers.^{68/} National Satellite Programming Network, Inc. provides 59 programming services.^{69/}

The comments also show that exclusive contracts such as TNT's are not typically anticompetitive and do promote competition. Thus, Turner Broadcasting has explained that TNT's exclusivity "was not a one-way bargain 'extracted' by the cable operator"^{70/} but was "a powerful tool to make the launch of TNT financially feasible" and "to promote program diversity."^{71/}

Neither the Act nor the record therefore provides the Commission with any basis for presuming that an exclusive contract entered into by a vertically integrated programmer is

67/ Wireless Cable Association Comments at 17-18 (emphasis added).

68/ Consumer Satellite Systems, Inc. Comments, Appendix A.

69/ National Satellite Programming Network Comments at 2.

70/ Turner Broadcasting System, Inc. Comments at 8.

71/ Id. at 7, i.

not in the public interest. Nor should a programmer have the burden of proving that the contract does not preclude competition in the retail distribution market. The Commission should simply apply the statutory criteria in the case of a specific complaint, using antitrust precedents to balance the contract's effects on competition and the public interest.

B. The Act Does Not Require or Permit Prior Review of All Exclusive Contracts.

The Wireless Cable Association "suggests that any cable operator that enters into an exclusive contract be required to submit a request that the Commission find the agreement to be in the public interest."^{72/} According to the Wireless Cable Association, "it seems rather evident that Congress intended for the Commission to make such a determination with respect to each and every exclusive contract."^{73/}

To the contrary, it is evident from the statute that no such prior review is contemplated or permitted. The Act provides specific procedures for enforcing the prohibitions of Section 628. Those procedures contemplate enforcement in adjudicatory proceedings, initiated by complaints:

Any multichannel video programming distributor aggrieved by conduct that it alleges constitutes a violation of subsection (b) or the regulations of

72/ Wireless Cable Association Comments at 43.

73/ Id. at 40. See also DirecTV Comments at 28; American Public Power Association Comments at 20.

the Commission under subsection (c), may commence an adjudicatory proceeding at the Commission.^{74/}

The Commission is authorized to order remedies for such violations "upon completion of such adjudicatory proceeding[s]"^{75/} -- not upon completion of its own prior review of a contract.

Moreover, the Act does not authorize the Commission to require prior submission of all exclusive contracts. Section 628(f) directs the Commission to

establish procedures for the Commission to collect such data, including the right to obtain copies of all contracts and documents reflecting arrangements and understandings alleged to violate this section, as the Commission requires to carry out this section.^{76/}

Thus, only contracts and documents that are the subject of complaint proceedings under Section 628(d) may be compelled by the Commission to be submitted for review.

The Commission does "not believe that it would be practical to require prior approval of exclusive arrangements." Programmers such as Discovery Communications, Inc., concur that such a requirement "would be unduly burdensome, both to the Commission and the programmer."^{77/} We agree -- but, in any

74/ Sec. 628(d).

75/ Sec. 628(e).

76/ Sec. 628(f)(1) (emphasis added).

77/ Discovery Communications, Inc. Comments at 28.

event, such prior review is neither contemplated nor permitted by the Act.

C. A "Safe Harbor" For New Programmers' Exclusive Contracts Is Reasonable and Within the Commission's Discretion.

In its Notice, the Commission recognized that

exclusive distribution rights are often given to encourage distributors to carry new program services. Such exclusive rights may well be essential to the introduction of new services and, thus, should be permitted to the extent^{78/} necessary to ensure continued program diversity.

The Commission, therefore, proposed establishing a rule making clear that certain exclusive contracts involving new program services would always be deemed in the public interest.

Some alternative distributors view such a rule as an "abuse of discretion under the statute."^{79/} Thus, DirecTv "opposes any blanket presumptions"^{80/} permitting certain exclusive contracts:

Congress has already determined that, although exclusive contracts may have some potential benefits in some circumstances, their detrimental impact on competition outweighs any such benefits, at least until competition has the opportunity to take a foothold. That is why the statute requires the Commission to make a public interest finding with respect to any contract that it exempts under Section 628(c)(2)(D).^{81/}

78/ Notice, para. 36.

79/ DirecTv Comments at 28 n.35.

80/ Id. at 28.

81/ Id. n.35 (emphasis added).

Congress, of course, made no such determination, and DirecTV cites no language to support its assertion. It specifically did not find that any detrimental impact that exclusivity may have on competition among retail distributors outweighs any pro-competitive benefits. That is precisely the determination that Congress left to the Commission. And there is no reason why, if the balance with respect to certain types of exclusive contracts is clear, the Commission may not make that determination by rule and avoid the unnecessary burdens and uncertainties of case-by-case determinations.

In this case, the Commission is right to suggest that the balance is clear. The benefits of exclusivity in launching new services is clear and, as discussed above, has been confirmed by the comments of Turner Broadcasting.^{82/} And, in a marketplace where 70 other programming services compete, mostly on a non-exclusive basis, it is difficult to discern any countervailing adverse effects of exclusivity on competition or the public interest.

While a rule permitting exclusive contracts with new programming services would, therefore, be wholly lawful and a good idea, Turner's comments also confirm that the rule should not be limited to contracts of less than two years' duration.^{83/} As Turner explains,

82/ See Part III.A., supra.

83/ See NCTA Comments at 47 n.52.

[a] contract of such a short duration would provide the distributor with little incentive to undertake the risks inherent in launching new programming and 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. It would be akin^{84/} to limiting patent protection to only two years.

Accordingly, the Commission should go forward with its proposal to adopt a rule permitting exclusive contracts with new programmers. But instead of adopting a safe harbor only for exclusivity of less than two years' duration, it should rule that exclusive contracts of any duration, entered into during the first two years of a programmer's existence, are presumptively in the public interest.

CONCLUSION

The Commission should adopt rules that prohibit exclusive contracts, price discrimination and other conduct between programmers and their distributors only where (1) the programmer is vertically integrated with a cable operator; (2) the conduct is "unfair"; and (3) the conduct prevents or substantially hinders a complaining multichannel distributor from providing

84/ Turner Broadcasting System, Inc. Comments at 7. As Turner points out, it offered exclusivity only to systems that signed up during the launch phase. But to induce those systems to sign up, the exclusivity was "permanent, so long as they remain customers." *Id.* at 8. There can be no reason to find such a launch strategy for a new, untested service to be anticompetitive. Program suppliers to competing technologies like DirecTv may choose the same launch strategy with respect to new program services.

video programming to subscribers. Those rules should recognize, as have Congress and the courts, that exclusive contracts and differential prices, terms and conditions are likely to have predominantly pro-competitive effects that serve the public interest -- and that nothing in the Act requires that such pro-competitive practices be prohibited or presumed unlawful.

Respectfully submitted,

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