

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

RECEIVED

FEB 16 1993

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of:)
)
Development of Competition and)
Diversity in Video Programming)
Distribution and Carriage)

MM Docket No. 92-265 ✓

**REPLY COMMENTS
OF THE
UNITED STATES TELEPHONE ASSOCIATION**

The United States Telephone Association (USTA) respectfully submits these Reply Comments on the Commission's Notice of Proposed Rulemaking in this proceeding (NPRM), released December 24, 1992. USTA submitted comments on January 25, 1993, along with many other interested parties.

The program access provisions in section 628 and related sections of the 1992 law were not the product of obscure committee amendments. The Commission should recognize the thrust of the statute is actually a positive one - to expand programming distribution with an affirmative "duty to deal" by programmers in ways that won't adversely affect other levels of the video marketplace.¹ Refusals to deal are the most extreme form of discrimination against new entrants. Section 628 should be given a construction that will have the practical effect of enabling

¹See NPRM at ¶34.

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

04/10

all multichannel video programming distributors (MCVPDs) to compete with essential video programming products.

I. CABLE INTERESTS SHOULD NOT BE ALLOWED TO GUT THE STATUTE.

The larger cable operators, particularly those who are heavily involved in affiliated programming ventures, have used their comments to urge the Commission to emasculate the statute. The individual practices identified in the 1992 statute, the legislative history, and the record that has been developed by this Commission in relevant proceedings over the past five years, would be validated by one or more of the cable operators' comments.²

However, many commenters, including CATA, the second largest association of cable operators - an association that is made up predominantly of small cable operators unaffiliated with programming interests - have made clear to the Commission that it will not serve the public interest to buy the larger cable operators' latest "deal" while current program distribution practices continue to exert their unique leverage.³ (The

²See, e.g., Comments of Continental Cablevision, at 8, 10-20, 22 (give extensive exclusivity to new ventures (regardless of age of programming)); Viacom at 28; NCTA at 9, 26-31; TCI at 5, 32-34 (seeks acceptance of: any tying arrangements absent proof of forcing, any harm not proved "significant", all past contracts and continuing practices, and any use of undue influence and coercion absent explicit threats.) See also EMI at 1-2; United Video at 28-36; Affiliated Regional Communications at 2-5; Viacom at 10, 28; Group W at 9.

³See CATA at 2, 5-6 and 7.

Commission should be aware that, unlike CATA, NCTA is made up of more than cable operators. NCTA claims among its members programming interests as well, certainly making for internal interaction with unique competitive ramifications.)

Many commenters identified specific experiences that they, their members or their constituents have had in their business activities, and their disadvantageous position vis-a-vis incumbent programmer-cable relationships. Liberty Cable describes the implicit and explicit discrimination it has experienced in obtaining programming.⁴ Similar problems were identified by:

National Satellite Programming Network
Competitive Cable Association
WJB-TV
Consumer Satellite Systems
Wireless Cable Association⁵
NTCA⁶
Attorneys General of Texas, et.al.
Cable America Corporation,⁷ and
National Private Cable Association (NPCA).⁸

⁴Liberty Cable at 1-4.

⁵WCA at 2 ("(T)here is not a single wireless cable system operating today that is not being denied access to popular video programming networks or paying discriminatory prices for at least some of the programming that is being made available.")

⁶NTCA at 4 (points to 460% price difference identified in Commission Docket Nos. 89-600 and 89-88.)

⁷Cable America at 1-5 (predatory pricing litigation; it paid more at wholesale level than customers paid retail for HBO.)

⁸NPCA at 5-13 (specific examples of TCI discrimination against MaxTel, Pacific Cablevision.)

II. THE COMMISSION SHOULD RECOGNIZE WHAT CONGRESS INTENDED.

The 1992 statute includes provisions that can begin to address the distribution problems with programming if the Commission is faithful to Congressional intent. To do that, however, the Commission should carefully assess the comments, because many point out areas within the NPRM where the Commission's interpretation of the statute is at odds with the statute's plain terms and with Congressional intent.⁹ TRAC explains how important this issue was to Congress by pointing to the floor debate during enactment.¹⁰ For example, unlike the Commission's tentative view, it is not enough, for the purposes of avoiding access responsibilities in this proceeding, that a rebuffed MCVPD have access to any programming.

The claims regarding the "uniqueness" or "essentiality" of programming act as a double-edged sword. While it may help a cable operator establish an identity or market niche, practices that occur with respect to that programming can exert leverage that has anticompetitive impacts.

A significant number of commenters make strong cases that the Commission should adopt a rule that provides at minimum for clear guidance that section 628(c) includes a general prohibition on exclusive contracts, and that additional practices, required

⁹See, e.g., TRAC at 1-3; NPCA at 2.

¹⁰TRAC at 2-3.

by law to be identified by the Commission, are unlawful.¹¹ The ban in sections 628(c)(2)(C) and (c)(2)(D) is viewed as per se.¹²

The cable operators themselves explain why a "bright line" is needed. Cablevision Industries, Comcast and Cox argue that the Commission can't micromanage the complex sales practices of vertically integrated programming interests. If the Commission issues a rule that is flimsy or ineffective, the rule will not do what Congress intended. If it issues a rule that is labyrinthine, affected interests will be thwarted by procedure, and again the rule will not do what Congress intended. The Commission should preclude discriminators from creating and using loopholes in the statute.¹³ The Commission should issue a strong rule prohibiting the exclusivity identified in the statute, because Congress concluded that it harms competition.

III. THE PROGRAM ACCESS SECTIONS CANNOT COVER CARRIERS' VIDEO DIAL TONE NETWORKS.

A separate issue addressed in the comments involves the application of the statute to various programming-related operations. It is apparent that section 628(b) applies to all

¹¹See Liberty Cable at 4 (need a "bright line"); MPAA at 14-15 (section 628 requires Commission specification of prohibited conduct); DirectTV at 12; BellSouth at 7; U S West at 12; NRTC/CFA at 15-16; Pactel at 1-6, citing Conference Report at 43, 92; Cable America at 20-30.

¹²APPA at 16; DirectTV at 12.

¹³NTCA at 3.

cable operators.¹⁴ Turner Broadcasting and others seek to validate different treatment of MCVPDs based on technology or other factors.¹⁵ It would have any of these differences be presumed valid.

As USTA explained in its comments, the statute is intended to promote competition. Section 628 should not be available to some technologies and not others if all are covered by the statutory program access provisions. A video dialtone network where the host exchange carrier cannot provide video programming itself cannot be classified as a MCVPD, but users of that network may be MCVPDs. Without access to programming, the video dialtone concept may be rendered meaningless or unable to provide competition.¹⁶

IV. COMPLAINT PROCEDURES AND BURDENS SHOULD BE CLEAR AND REFLECT CONGRESSIONAL INTENT.

Commenters do not support burdensome or complicated complaint or relief procedures.¹⁷ Nor do they accept burdens of proof on the wrong parties. Many conclude that the fact of exclusivity or discrimination is enough, and that no independent

¹⁴NYNEX Companies at 6; Cf. NPRM at ¶ 8.

¹⁵Turner at 8.

¹⁶Rochester Tel. Corp. at 2.

¹⁷ See Attorneys General of Texas, et.al. at 5, 13 (complaint process should not be burdensome; parties seeking to maintain and enforce their exclusive contracts must make positive showing of lawfulness); NPCA at 2 (notice places too great a burden on aggrieved competitors.)

demonstration of harm is required by the statute, and thus it should not be added by the Commission.¹⁸ Regulators should not impose burdens on MCVPDs seeking relief.¹⁹

It seems clear from the attitude displayed by incumbent cable operators in their comments, however, that the Commission will not have willing or cooperative respondents in complaint proceedings. The Commission will have to be firm. The framework the Commission puts in place can save or sink the statute and the Commission's interpretation of the statute. Today's deals and practices are not open to public view - they are secretive. Case-by-case adjudication involving new interpretative twists of ambiguous rules will not produce results. Clear guidelines and complaint rules that are designed to bring contrasting facts out into the light of day are essential.

USTA encourages the Commission to make a good faith effort to do what Congress expected. While there are court cases about this part of the statute that are pending, this Commission is not the judge of the value or validity of the program access provisions, and it should not cast an effective veto over the program access provisions by adopting rules that gut the law.

¹⁸NRTC/CFA at 10; APPA at 16; NTCA at 3; Coalition of Small System Operators at 6.

¹⁹Direct TV at iv.

The Commission's role is to implement the statute Congress has passed.

V. **THE COMMISSION SHOULD CONTINUE TO PROMOTE REPEAL OF 47 U.S.C. 533(b).**

Finally, the rationalizations for exclusivity and discriminatory practices offered by the vertically integrated cable operators demonstrate the practical difficulties of promoting competition by merely outlawing discrimination against new competitors with different technologies. If Section 628 cannot be made to work, as the cable operators suggest (and implicitly promise), then further reduction in barriers to entry is clearly merited. The Commission and the Congress will never bring the full benefits of video programming competition to consumers until all interested players can participate.²⁰ The Commission was correct in recommending to the Congress that 47 U.S.C. 533(b) be repealed, and that Title II exchange carriers be permitted to offer video programming in their telephone service areas.

Respectfully submitted,

UNITED STATES TELEPHONE ASSOCIATION

BY

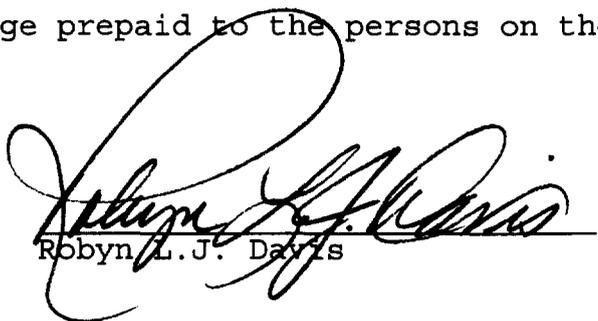

Martin T. McCue
Vice President & General Counsel
U.S. Telephone Association
900 19th St., NW Suite 800
Washington, DC 20006-2105
(202) 835-3114

February 16, 1993

²⁰See Ameritech Operating Companies at 2.

CERTIFICATE OF SERVICE

I, Robyn L.J. Davis, do certify that on February 16, 1993 copies of the foregoing Reply Comments of the United States Telephone Association were either hand-delivered, or deposited in the U.S. Mail, first-class, postage prepaid to the persons on the attached service list.


Robyn L.J. Davis

*Sol Schildhouse
Farrow, Schildhouse & Wilson
1400 16th Street, NW
Suite 501
Washington, DC 20036*

*Ted Coombes
American Public Power Association
2301 M Street, NW
Washington, DC 20037*

*Alan I. Robbins
James Baller
Mary Ann Hammett
Baller Hammett
1225 Eye Street, NW
Washington, DC 20005*

*Andrew Jay Schwartzman
Gigi B. Sohn
Media Access Project
2000 M Street, NW
Washington, DC 20036*

*Gardner F. Gillespie
Jacqueline P. Cleary
Hogan & Hartson
555 13th Street, NW
Washington, DC 20004*

*Mark J. Palchick
Baraff, Koerner, Olender & Hochberg,
P.C.
5335 Wisconsin Avenue, NW
Suite 300
Washington, DC 20015*

*Mary McDermott
Shelley E. Harms
NYNEX
120 Bloomingdale Road
White Plains, NY 10605*

*Paul J. Sinderbrand
Dawn G. Alexander
Sinderbrand & Alexander
888 16th Street, NW
Suite 610
Washington, DC 20006*

*Nicholas W. Allard
The Wireless Cable Association
International, Inc.
1001 Pennsylvania Avenue, NW
Suite 1300
Washington, DC 20004*

*Daniel L. Brenner
Michael S. Schooler
National Cable Television Association
1724 Massachusetts Avenue, NW
Washington, DC 20036*

*Bertram W. Carp
Turner Broadcasting System, Inc.
820 First Street, NE
Washington, DC 20004*

*Bruce D. Sokler
Lisa W. Schoenthaler
Mintz, Levin, Cohn, Ferris,
Glovsky and Popeo, P.C.
701 Pennsylvania Avenue, NW
Suite 900
Washington, DC 20004*

*Jane Cottrell
G. Todd Hardy
Group W. Satellite Communications
250 Harbor Drive
Stamford, CT 06904*

*Steve Hildebrandt
Mark Melnick
Group W. Satellite Communications
250 Harbor Drive
Stamford, CT 06904*

*W. James MacNaughton
Liberty Cable Company, Inc.
90 Woodbridge Center Drive
Suite 610
Woodbridge, NJ 07095*

*Henry M. Rivera
Ginsburg, Feldman and Bress, Chtd.
1250 Connecticut Avenue, NW
Suite 800
Washington, DC 20036*

*Robert D. Joffe
Cravath, Swaine & Moore
Worldwide Plaza
825 Eighth Avenue
New York, NY 10019*

*Garret G. Rasmussen
Patton, Boggs & Blow
2550 M Street, NW
Washington, DC 20037*

*Louis A. Isakoff
International Family Entertainment,
Inc.
1000 Centerville Turnpike
Virginia Beach, VA 23463*

*David Overlock Steward
Thomas B. Smith
Ropes & Gray
10001 Pennsylvania Avenue, NW
Washington, DC 20004*

*Brenda L. Fox
David J. Wittenstein
Michael J. Pierce
Dow, Lohnes & Albertson
1255 23rd Street, NW
Suite 500
Washington, DC 20037*

Robert J. Sachs
Howard B. Homonoff
Continental Cablevision
Pilot House, Lewis Wharf
Boston, MA 02110

Kenneth Logan
Joseph Tringali
Simpson Thacher & Bartlett
425 Lexington Avenue
New York, NY 10017

Kenneth E. Hall
WJB-TV Limited Partnership
8423 S. US #1
Port St. Lucie, FL 34985

Mark C. Ellison
Hardy & Ellison, P.C.
9306 Old Keene Mill Road
Burke, VA 22015

Gary M. Epstein
Karen Brinkmann
Latham & Watkins
1001 Pennsylvania Avenue, NW
Suite 1300
Washington, DC 20004

Jeff Treeman
United Video, Inc.
3801 S. Sheridan Road
Tulsa, OK 74145

James T. Hannon
U S West Communications Inc.
1020 19th Street, NW
Suite 700
Washington, DC 20036

Frank W. Lloyd
Keith A. Barritt
Mintz, Levin, Cohn, Ferris, Glovsky
and Popeo, P.C.
701 Pennsylvania Avenue, NW
Suite 900
Washington, DC 20004

Robert L. Hoegle
Timothy J. Fitzgibbon
Carter, Ledyard & Milburn
1350 I Street, NW
Suite 870
Washington, DC 20005

Donna Coleman Gregg
Wiley, Rein & Fielding
1776 K Street, NW
Washington, DC 20006

Robert J. Rini
Stephen E. Coran
Steven A. Lancellotta
Rini & Coran, P.C.
1350 Connecticut Avenue, NW
Suite 900
Washington, DC 20036

Robert L. James
John D. Seiver
John Davidson Thomas
Cole, Raywid & Braverman
1919 Pennsylvania Avenue, NW
Suite 200
Washington, DC 20006

David Cosson
L. Marie Guillory
National Telephone Cooperative Assn.
2626 Pennsylvania Avenue, NW
Washington, DC 20037

Mark L. Evans
Alan I. Horowitz
Anthony F. Shelley
Miller & Chevalier
655 15th Street, NW
Washington, DC 20005

Richard E. Wiley
Lawrence W. Secrest, III
Philip V. Permut
Wayne D. Johnsen
Wiley, Rein & Fielding
1776 K Street, NW
Washington, DC 20006

Marvin Rosenberg
Fletcher, Heald & Hildreth
1225 Connecticut Avenue, NW
Suite 400
Washington, DC 20036

Christopher B. Fager
E! Entertainment Television, Inc.
5670 Wilshire Blvd.
Los Angeles, CA 90036

G. Todd Hardy
Hardy & Ellison, P.C.
9306 Old Keene Mill Road
Burke, VA 22015

David B. Gluck
Mark R. Boyes
Affiliated Regional Communications, Inc.
600 Las Colinas Blvd.
Suite 2200
Irving, TX 75039

William B. Barfield
Thompson T. Rawls II
BellSouth
1155 Peachtree Street, NE
Atlanta, GA 30367

Floyd S. Keene
Pamela J. Andrews
Ameritech Operating Cos.
2000 West Ameritech Center Drive
Room 4H74
Hoffman Estates, IL 60196

*Josephine S. Trubek
Rochester Telephone Co.
180 South Clinton Avenue
Rochester, NY 14646*

*Richard S. Rodin
Hogan & Hartson
555 13th Street, NW
Washington, DC 20004*

*Fritz E. Attaway
Frances Seghers
Motion Picture Assn. of America
1600 Eye Street, NW
Washington, DC 20006*

*Margaret L. Tobey
Michael D. Berg
Michael S. Ray
Akin, Gump, Strauss, Hauer &
Feld, L.L.P.
1333 New Hampshire Avenue, NW
Washington, DC 20036*

*Brenda L. Fox
Dow, Lohnes & Albertson
1255 23rd Street, NW
Suite 500
Washington, DC 20037*

*Will Pryor
Mary F. Keller
Thomas P. Perkins, Jr.
Patricia Ana Garcia-Escobedo
Texas Attorney General's Office
P.O. Box 12548
Austin, TX 78711*

*J. Joseph Curran, Jr.
Ellen S. Cooper
Alan Barr
Meredyth A. Smith
200 St. Paul Place
19th Floor
Baltimore, MD 21202*

*Lee Fisher
Robert O. Driscoll, Jr.
65 East State Street, Suite 708
Columbus, OH 43266*

*Ernest D. Preate, Jr.
Thomas L. Welch
David R. Weyl
1435 Strawberry Square
Harrisburg, PA 17120*

*Howard J. Symons
Gregory A. Lewis
Mintz, Levin, Cohn, Ferris,
Glovsky and Popeo, P.C.
701 Pennsylvania Avenue, NW
Suite 900
Washington, DC 20004*

*Charles S. Walsh
Seth A. Davidson
Fleischman and Walsh
1400 16th Street, NW
Suite 600
Washington, DC 20036*

*Deborah C. Costlow
Thomas C. Power
Winston & Strawn
1400 L Street, NW
Suite 700
Washington, DC 20005*

*B.R. Phillips III
John B. Richards
Keller and Heckman
1001 G Street, NW
Suite 500 West
Washington, DC 20001*

*Lifetime Television
36-12 35th Avenue
Astoria, NY 11106*

*Michael H. Hammer
Brian Conboy
Willkie Farr & Gallagher
Three Lafayette Centre
1155 21st Street, NW
Suite 600
Washington, DC 20036*