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

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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 TIME WARNER ENTERTAINMENT COMPANY, L.P.

February 16, 1993

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List of Abbreviations

Each of the following abbreviations refers to initial comments filed in response to the Commission's NPRM:

ACC	Advanced Communication Corporation
AGs	Attorneys General of Texas, Maryland, Ohio, and Pennsylvania
APPA	American Public Power Association
CATA	Community Antenna Television Association
CCA	Competitive Cable Association
CCWCO	Coalition of Concerned Wireless Cable Operators
CSSI	Consumer Satellite Systems, Inc. d/b/a National Programming Service
CSSO	Coalition of Small System Operators
DirecTV	DirecTV, Inc.
Liberty Cable	Liberty Cable Company, Inc.
MPAA	Motion Picture Association of America, Inc.
NPCA	National Private Cable Association, MaxTel Associates Limited Partnership, MSE Cable Systems, and Pacific Cablevision
NRTC	National Rural Telecommunications Cooperative and the Consumer Federation of America
NSPN	National Satellite Programming Network, Inc.
NYNEX	Nynex Telephone Companies
Turner	Turner Broadcasting System, Inc.
TWE	Time Warner Entertainment Company, L.P.
WCA	Wireless Cable Association International, Inc.

Summary

TWE submits that the Commission should promulgate regulations that:

- permit programming vendors to extend volume discounts even where such discounts are not cost justified;
- require a distributor in any given complaint proceeding to show that (1) the defendant programming vendor committed an unfair practice; and (2) the unfair practice impairs the complainant's competitive viability;
- recognize that the word "purpose" in § 628(b) indicates that, under certain circumstances, a complainant can satisfy the competitive-injury requirement by showing that harm is imminent, not that a complainant can satisfy that requirement by showing that the defendant had a subjective intent to injure;
- require a distributor in any given complaint proceeding to show that the cable operator that the programming vendor favored through the practice complained of holds an attributable interest in the defendant programming vendor;
- recognize that the unqualified use of the word "cable operator" in § 628(b) does not indicate that the Commission should prohibit unfair practices regardless of whether they result from vertical-integration-related incentives;
- do not apply at all to small cable operators that do not compete with a vertically integrated cable operator;
- require an HSD packager to show that the unfair practice of which it complains jeopardizes its competitive viability in the entire geographic market in which it provides service;
- do not go beyond the rules that § 628(c)(2) requires;

- do not forbid a vertically integrated programming vendor's unilateral refusal to sell to a distributor;

- do not require programming vendors to file their rate cards with the Commission;

- establish "reasonable regions" within which price differentials are presumed permissible;

- do not adopt § 202(a) of the Communications Act as a model for evaluating price differentials;

- do not allow a distributor to (1) complain of discrimination if its own contract precedes the effective date of the Commission's rules; <u>or</u> (2) point to contracts that were entered into more than three months before the distributor's own contract to establish a price differential;

- define the word "area" in § 628(c)(2)(C) and (D) as encompassing the entire territory of a political subdivision having the authority to franchise;

- recognize that even if § 628(c)(2)(C) proscribes an exclusive contract, a complaining distributor must still show competitive injury;

- permit programming vendors to use subdistribution arrangements;

- assess the validity of an exclusive contract in an area served by cable through the complaint process;

- permit new programming services to offer exclusive contracts lasting up to ten years;

- delay the rulemaking under § 616 until after the rulemaking under § 628 is completed, but, in any event, refrain from writing overly detailed rules under § 616.

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Preliminary Statement

TWE submits these reply comments in response to comments responding to the Commission's Notice of Proposed Rulemaking ("NPRM") adopted December 10, 1992, and released December 24, 1992, regarding its rule-making responsibilities under §§ 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act"), which add §§ 616 and 628, respectively, to the Communications Act of 1934, 47 U.S.C. §§ 536, 548. 1/

1/ Many commenters have referred to TWE and its divisions with less than complete accuracy, but TWE will not swell the record before the Commission by rebutting each and every misstatement. TWE feels compelled, however, to respond to a few of the more outrageous statements. TWE's responses are set forth in Appendix 1.

TWE is the plaintiff in a lawsuit pending in federal district court in Washington, D.C., in which it takes the position that § 19 and other provisions of the 1992 Cable Act violate its rights under the First Amendment to the United States Constitution. See Time Warner Entertainment Company, L.P. v. FCC, Civil Action No. 92-2494 (D.D.C., filed Nov. 5, 1992). TWE submits these comments without prejudice to its claims and arguments in that lawsuit.

I. PROGRAM-ACCESS ISSUES

Before responding to comments, TWE wishes to emphasize four points that it deems particularly important. First, the Commission should require any distributor filing a complaint under § 628(d), whether under any of the rules promulgated under § 628(c) or directly under § 628(b), to show that the unfair practice of which it complains caused it competitive injury. Second, the Commission should require a complainant in any proceeding under § 628 to show that the defendant programming vendor favored a cable operator with which it is vertically integrated. Third, the Commission should permit a programming vendor to extend volume discounts even if they are not justified by cost savings. Any other reading would make § 628(c)(2)(B)(iii) superfluous, because § 628(c)(2)(B)(ii) already allows costbased price differentials. See TWE at 27. Finally, the Commission should not allow a complainant in a proceeding under § 628(c)(2)(B) to complain of discrimination if its own contract precedes the effective date of the Commission's rules or to use as a reference point a contract that was not entered into roughly at the same time as the complainant's own contract.

A. General Program-Access Issues in § 628 of the Communications Act.

1. Structure of § 628(b).

Numerous commenters have taken issue with the Commission's tentative conclusion that the language of § 628(b) requires a showing of both (1) an unfair practice and (2) competitive injury. NPRM ¶ 10. These commenters have suggested that conduct described in § 628(c)(2) should be per se unlawful, without any showing of competitive harm. See, e.g., APPA at 12-16; CSSO at 6-7; DirecTV at 12; NPCA at 22-23; NRTC at 13; WCA 34-36.

These commenters, however, have overlooked the clear language of § 628(b), as well as that of § 628(c)(1). Section 628(b) sets out two requirements. There must be (1) "unfair methods of competition or unfair or deceptive acts", (2) "the purpose or effect of which is to hinder significantly . . . any . . . distributor from providing

. . . programming to subscribers or consumers". Section 628(c)(1) provides that the Commission has the power to issue regulations, but only "to specify particular conduct prohibited by subsection (b)". "Conduct" can never be "prohibited by subsection (b)", then, unless a complainant shows that it has the "purpose or effect . . . to hinder significantly". 2/

Some commenters have argued, however, that the word "purpose" in § 628(b) indicates that no actual injury is required, and that it suffices that the defendant has acted with an intent to injure. See, e.g., Liberty Cable at 19-20; NCPA at 24; WCA at 35. These commenters have ignored that § 628(b) speaks of unfair practices "the purpose . . . of which is", not programming vendors "the purpose of whom is". Thus, it is not the purpose of the programming vendor that counts, but the purpose of the unfair practice. TWE submits that an unfair practice has the purpose to inflict competitive injury if it is of a kind that experience has taught will likely have such an effect. Put differently, the statute is not so harsh as to require a complainant to

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2/ As Rep. Tauzin, one of the sponsors of the program-access portion of the 1992 Cable Act, put it: "Our amendment says that exclusive programming that is not designed to kill the competition is still permitted". 138 Cong. Rec. H6534 (daily ed. July 23, 1992) (remarks of Rep. Tauzin).

wait until it has been put out of business before it may sue, and the word "purpose" in § 628(b) merely establishes the common-sense proposition that there may be circumstances in which a complainant need not show that the unfair practice complained of has already had anticompetitive effect, and in which a complainant merely needs to show that such effect is imminent.

2. "Unfair Practices".

Some commenters have argued that the Commission should require that a defendant programming vendor merely be vertically integrated, and not that the defendant be integrated with a competitor of the complainant. See, e.g., AGs at 4-5; APPA at 10-11; Liberty Cable at 15; WCA at 30-31. 3/ Some commenters have pointed out that the provisions of § 628 merely require that "a" cable operator have an attributable interest in the defendant programming vendor, and they have argued that this means that it is not necessary that the particular cable operator that the defendant programming vendor favored through an unfair practice be the holder of that attributable interest. See, e.g., AGs at 4-5; APPA at 11; WCA at pp. 30-21.

3/ Some commenters go one step further yet, and say that the Commission should ban unfair practices even if engaged in by independent programmers. See, e.g., CSSI at 13; Liberty Cable at 5-6. Obviously, that approach lacks even arguable support in the statute.

This reading would make nonsense of the statute. Theoretically, it might be true that <u>any</u> programming vendor has an incentive to favor cable operators over alternative-technology distributors, because cable operators are generally a programming vendor's biggest customers. 4/ That incentive, however, has nothing to do with vertical integration: it is common to all programming vendors. If Congress wanted to prohibit programming vendors from acting on <u>that</u> incentive, Congress would not have limited the scope of the statute to vertically integrated programming vendors.

Some commenters have made much of the fact that § 628(b) speaks of "a cable operator" without the limiting vertical-integration language. <u>See, e.g.</u>, APPA at 7-8; NYNEX at 6; CCWCO at 2. This fact, they have said, means that the Commission should prohibit unfair practices regardless of whether they are a result of vertical-integration-related incentives.

It is difficult to see why the "cable operator" language in § 628(b) should make a difference. For one thing, the rules required under § 628(c)(2) impose

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4/ Some commenters have pointed out that there is evidence in the legislative record that programming vendors have acted on that incentive. <u>See, e.g.</u>, WCA at 33-34. This misses the point. The question now before the Commission is not what evidence was before Congress, but what Congress did about it.

obligations on a "cable operator" only if it is vertically integrated. 5/ Thus, the unqualified mention of the word "cable operator" in § 628(b) could make a difference only if the Commission were to adopt rules that go beyond those required under § 628(c)(2) and make those rules applicable to "cable operators", whether vertically integrated or not. As TWE discusses elsewhere, however, it would be premature for the Commission to go beyond the rules required by § 628(c)(2) at this time. See TWE at 13; infra pp. 9-12. For another thing, even if the Commission decided to go beyond the rules that § 628(c)(2) requires, the language of § 628(c)(1) makes clear that the Commission must identify unfair practices in light of the concerns underlying § 628, which, as TWE has shown in its initial comments, are limited to the effects of vertical integration, see TWE at 3-4. Accordingly, the Commission should not hold the conduct of a vertically integrated programming vendor to be an unfair practice unless the programming vendor acts on incentives resulting from its being vertically integrated with a particular cable operator.

5/ Section 628(c)(2)(A) requires a showing that the cable operator has an attributable interest in a programming vendor. Section 628(c)(2)(C) and (D) do impose obligations upon "a cable operator", but only if its conduct prevents another distributor from obtaining the programming of a programming vendor in which that cable operator has an attributable interest.

A few organizations representing small cable systems have alleged that they generally pay higher rates than MSOs, and have claimed that § 628 places significant restrictions upon such price differentials. See, e.g., CATA at 2; CSSO at 4. Apparently, these commenters have assumed that § 628 is a protectionist measure designed to protect small and perhaps less efficient cable operators. Nothing could be further from the truth. Congress enacted § 628 to prevent programming vendors from acting on incentives resulting from vertical integration to stifle competition with cable operators. See TWE at 7. Accordingly, unless a programming vendor is in a position to favor an affiliated cable operator, its actions cannot amount to unfair practices. Id. at 7, 30 n.25. TWE suspects that most of the small-system commenters do not compete with any cable operator, let alone one affiliated with any programming vendor. Under a proper reading of § 628, therefore, they should not be heard to complain.

3. "Hinder Significantly".

Some commenters that distribute to HSD owners have suggested that they should be permitted to satisfy the competitive-injury requirement if they can show that they compete anywhere in the United States with a cable operator that is integrated with the defendant programming vendor.

See, e.g., DirecTV at 15. They may well be right, because, in that situation, the defendant programming vendor can, at least in theory, have had an incentive to favor its affiliated cable operator. See TWE at 8 n.5. However, they must still show that the unfair act complained of jeopardizes their competitive viability in the market in which they are active. See id. at 11. If that is a national market, they must show that the defendant's unfair act jeopardizes their viability in that geographic market.

B. Specific Provisions of § 628.

Numerous commenters have taken the position that the Commission should regulate practices beyond those set forth in § 628(c)(2). See, e.g., DirecTV at 10-11; NRTC at 14; WCA at 21. TWE continues to believe that, even assuming that the Commission has the power to do so, the Commission should not now exercise that power. See TWE at 13. For one thing, the rules required under § 628(c)(2) at least have some basis in the factual record before Congress. No record currently exists showing the need for further rules, and it would be ill-advised to proceed without more fact-finding and a more specific notice of rule making. For another thing, even if a particular kind of conduct is not proscribed by any of the regulations required under § 628(c)(2), an aggrieved complainant can always seek to establish a violation of the general prohibition of § 628(b) in the complaint process. <u>See</u> § 628(d). Indeed, if a pressing need for additional rules appears in the complaint process, there will be time enough to issue such rules. In any event, the Commission has enough on its plate at this time, and it will be difficult enough properly to implement § 628(c)(2). The Commission is under no obligation to tackle all conceivable problems at the same time. <u>See</u> <u>National Assoc. of Broadcasters v. FCC</u>, 740 F.2d 1190, 1207-08 (D.C. Cir. 1984) (agency need not solve all problems in one rule making and may proceed one step at a time, addressing the most acute problems first).

Numerous commenters have argued (or assumed) that the Commission should make it unlawful for a programming vendor to refuse to deal with a distributor. <u>See, e.g.</u>, CCWCO at 3; CCA at 8; DirecTV at 6, 11; Liberty Cable at 17; NRTC at 28. <u>6</u>/ They are mistaken. It is a well-established rule of law that a seller ordinarily has the

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<u>6</u>/ Some of these commenters concede that a local cable system should, under all circumstances, be permitted to withhold from its competitors locally generated programming like a local news channel (<u>e.g.</u>, New York 1). <u>See, e.g.</u>, CCA at 9. TWE agrees. Clearly, if cable operators would be required to turn over such programming to their competitors, they would be deprived of much of the incentive to create such programming. Moreover, it is difficult to see how a competitor could ever show that access to such programming is necessary to stay competitively viable.

right to refuse to deal with anyone with whom it for any reason does not wish to do business. See, e.g., Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 761 (1984); United States v. Colgate & Co., 250 U.S. 300, 307 (1919). Nothing in § 628 suggests that Congress intended in any way to change this rule with respect to programming vendors. Section 628(c)(2)(B) merely requires that the Commission "prohibit discrimination . . . in the prices, terms, and conditions of sale or delivery of . . . programming". Clearly, this prohibition does not attach until a programming vendor decides to sell first. Cf. Black Gold, Ltd. v. Rockwool Indus., Inc., 729 F.2d 676, 682-83 (10th Cir.), cert. denied, 469 U.S. 854 (1984) (refusal to deal not unlawful under Robinson-Patman Act); L & L Oil Co., Inc. v. Murphy Oil Corp., 674 F.2d 1113, 1120 (5th Cir. 1982) (same). Section 628(c)(2)(C) requires only that the Commission outlaw (to some extent) exclusive contracts. 7/ As TWE explained in its initial comments, see TWE at 38, the Commission is under no duty to regulate other "practices, understandings, arrangements, and activities" at this time.

7/ In the NPRM, the Commission asked whether § 628(c)(2)(C) "imposes any duty on a programmer to deal with non-affiliated programming distributors". See NPRM ¶ 34.

without a specific congressional directive, the Commission should not now undo a basic tenet of law.

Moreover, a regulation making it unlawful for a vendor to refuse to deal with a distributor might well violate the First Amendment, which does not tolerate government regulation that forces a First Amendment speaker to speak where it would have preferred to remain silent. See, e.g., Riley v. National Federation of the Blind of North Carolina, Inc., 487 U.S. 781, 795 (1988); Wooley v. Maynard, 430 U.S. 705, 716 (1977). It is well established that, where it has discretion in interpreting a statute, it is proper for the Commission to take into account whether one of the alternative interpretations before it would violate the Constitution. See, e.g., Branch v. FCC, 824 F.2d 37, 47 (D.C. Cir. 1987), cert. denied, 485 U.S. 959 (1988). Clearly, then, the Commission should not adopt a reading of § 628 that would create a duty to speak.

1. Discrimination.

Numerous commenters have suggested that programming vendors should be required to file their rate cards with the Commission. See, e.g., APPA at 22-23; CCWCO at 5; NPCA at 15-16. TWE submits that there is no reason for such an intrusive requirement. For one thing, such a regime would be reminiscent of a tariff system for common carriers. There is no reason to believe that Congress intended to treat programming vendors as common carriers--if Congress had intended that, it would have said so. For another thing, where necessary, complainants will have access to rate cards anyway through discovery in the complaint process. Thus, requiring programming vendors to file their rate cards with the Commission would merely generate unnecessary paperwork, both for programming vendors and for the Commission.

(a) <u>Systems of Adjudication.</u>

Numerous commenters have rejected the "reasonable region" approach that the Commission proposed in the NPRM. That approach, they have said, would permit a small amount of discrimination, which, they have said, § 628(c)(2)(B) does not tolerate. <u>See, e.g.</u>, DirecTV at 21; NRTC at 19; WCA at 37. These commenters have overlooked, however, that even if a complainant can show discrimination that would be an unfair practice under § 628(c)(2)(B), this fact alone does not entitle a complainant to relief. The complainant must still show competitive injury, which it will not be able to do unless the unfair practice of which it complains threatens its competitive viability. <u>See</u> TWE at 9-11. Where discrimination is <u>de minimis</u>, chances are remote that a complainant would be able to make such a showing. TWE submits, again, that it would be a waste of the Commission's resources to scrutinize closely such instances of de minimis discrimination. Accordingly, TWE continues to support the Commission's "reasonable region" proposal.

Some commenters have come out in favor of the Commission's second suggested option, that using § 202 of the Communications Act as a model. See, e.g., ACC at 9-10; Bell Atlantic at 6-7; NYNEX at 11-12; WCA 39. 8/ The only virtue to § 202 that these commenters have mentioned, however, is that the Commission is familiar with applying the § 202 standard. This alone is hardly a compelling reason for adopting this standard. Moreover, given the differences in the nature of businesses subject to common-carrier regulation on the one hand, and programming vendors on the other hand, it would make little sense to apply rules that were written for common carriers to programming vendors.

(b) Retroactivity.

Numerous commenters have taken the position that § 628 should be applied to all contracts now in existence, so that distributors that entered into long-term contracts with programming vendors before the effective date of the

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8/ Not one commenter has come out squarely in favor of Option 3 (Robinson-Patman Act model) or 4 (anti-dumping model).

Commission's rules should be permitted to walk away from those contracts and try to get a better deal. Most point for support to § 628(h), which provides for some retroactive effect with respect to the rules required under § 628(c)(2)(C) and (D). Apparently, these commenters reason that, because § 628(h) grandfathers some contracts, all other contracts must be considered not grandfathered (presumably under the maxim "expressio unius est exclusio alterius", under which the expression of one thing indicates the exclusion of another). See, e.g., APPA at 25; DirecTV 25-26; NRTC at 32; NYNEX at 12 n.30; WCA at 28-30.

These commenters stand the law on its head. It is well established that, absent express evidence of congressional intent to the contrary, enactments must not be applied retroactively. See, e.g., Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 208 (1988); Bennett v. New Jersey, 470 U.S. 632, 639 (1985). Section 628(h), far from limiting the retroactive reach of § 628, makes a limited exception to the general nonretroactivity rule for some exclusive arrangements (namely, those entered into after June 1, 1990, and those that prevent distribution in uncabled areas). If any implication is to be derived from § 628(h), it is that § 628 generally has no retroactive force.

In any event, the language of § 628(c)(2)(B) makes clear that it is concerned with discrimination in contracting, not in performing, thus placing distributors who contracted before the effective date of the Commission's regulations outside its scope. See TWE at 33-34. Moreover, a price differential between contracts not entered into roughly contemporaneously does not amount to "discrimination". Courts have long so held under the Robinson-Patman Act, see, e.g., M. C. Mfr. Co., Inc. v. Texas Foundries, Inc., 517 F.2d 1059, 1066 n.13 (5th Cir. 1975) ("The Robinson-Patman legality of price discrimination between contracts to purchase that contemplate contemporaneous delivery must be evaluated as of the dates the respective contracts were made"), cert. denied, 424 U.S. 968 (1976); Texas Gulf Sulphur Co. v. J. R. Simplot Co., 418 F.2d 793, 606 (5th Cir. 1969) (same), and there is no reason why that should be any different under § 628(c)(2)(B). 9/

Some commenters have gone even further, suggesting that, in trying to establish discrimination, distributors entering into a contract after the effective date of the

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9/ Moreover, permitting distributors that entered into long-term contracts with programming vendors before the effective date of the Commission's rules to complain of discrimination would be unworkable. Literally thousands of contracts would have to be renegotiated, which would in all likelihood take years.

Commission's rules should be permitted to point to low-priced contracts that other distributors entered into before the effective date. See, e.g., DirecTV at 26 n.32; WCA at 29 n.61. This would truly be a "heads I win/tails you lose" world: Under the theory of these commenters, distributors that "got a bad deal" in the past should be permitted to walk away from it, everyone else should be entitled to the same rate as distributors that "got a good deal", while, presumably, a programming vendor would not be permitted to abrogate the contracts with the distributors that "got a good deal" unless it would be prepared to pay damages for breach. There is no evidence that Congress intended such an absurdly draconian result. Moreover, allowing distributors to use pre-effective-date contracts as a point of reference is just as much at odds with the general rule against retroactivity and the text of the statute as permitting distributors that entered into long-term contracts with programming vendors in the past to complain of discrimination. 10/

10/ This issue is, of course, not limited to the use of pre-effective-date contracts as a reference point. Surely the Commission should not permit distributors in the year 2000 to claim the benefit of rates prevailing in 1994. Section 628(c)(2)(B) requires the Commission to issue antidiscrimination rules, not a price freeze. To provide a meaningful comparison, a contract used as a reference point must be entered into roughly at the same time. TWE submits that the Commission should not permit a complainant to rely

2. Exclusive Contracts.

Some commenters have suggested that the Commission should go about determining what areas are cabled for purposes of § 628(c)(2)(C) and (D) on a home-by-home basis. See, e.g., DirecTV at 28; NPCA at 26; NRTC at 28. TWE submits that this proposal would truly lead to an administrative nightmare for all parties involved. For one thing, the Commission would have to waste its resources peering at plats and maps to determine which home can still be said to be served and which cannot. For another thing, such a system would leave the law unclear for all parties involved (distributors and programming vendors) until finally determined by the Commission. In contrast, TWE's suggestion to determine whether an area is served by cable per franchising jurisdiction, see TWE at 35-37, is very easy to implement, and therefore much preferable.

(a) Section 628(c)(2)(C).

Numerous commenters have taken the position that exclusive contracts falling within the scope of § 628(c)(2)(C) should be unlawful per se. See, e.g., APPA at 14; CCWCO at 4; NCPA at 25; NRTC at 28. These commenters have overlooked, however, that even if a practice is

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on contracts entered into more than three months before the complainant's own contract.

identified as unfair in one of the rules required under § 628(c)(2), it is not unlawful unless a complainant establishes that the practice causes it the competitive injury required under § 628(b). Hence, an exclusive contract preventing distribution of a particular service in an uncabled area can scarcely be said to be per se unlawful.

A few commenters (SMATV operators and wholesalers) have suggested that the Commission should prohibit or strictly regulate subdistribution arrangements (presumably under § 628(c)(2)(C), see NPRM ¶ 32). See, e.g., NPCA at 17-20; NSPN at 11. As TWE explained in its initial comments, see TWE at 39-40, subdistribution arrangements serve a legitimate business function and should therefore be permitted. Local cable operators are in a much better position than programming vendors to bill and audit SMATV operators, which is especially important because SMATV systems tend to be more vulnerable to piracy than cable systems. Moreover, a subdistribution arrangement permits a cable operator to account for a SMATV operator's "free riding", which the cable operator would be unable to do if the SMATV operator could deal directly with the programming vendor or through a buying group. 11/

11/ In any event, subdistribution arrangements surely cannot raise any concern if an alternative-technology distributor is free to buy from an entity other than the

(b) Section 628(c)(2)(D).

Numerous commenters have taken issue with the Commission's proposal to perform the public-interest review contemplated by § 628(c)(2)(D) in the complaint process, 12/ saying that this section requires that the Commission "preclear" all exclusive contracts instead. See, e.g., APPA at 19-21; BellSouth at 7-10; DirecTV at 28; WCA at 40-44. 13/ Section 628(c)(2)(D) provides that the Commission must prohibit an exclusive contract "unless the Commission determines . . . that such contract is in the public interest". Nothing in this language in any way suggests that this determination must precede the effective date of the contract--the language is entirely consistent with a determination in the complaint process. Nor does § 628(c)(4) require prior approval. That provision merely

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local franchised cable operator. HBO, for example, allows SMATV operators to choose whether to buy from the local franchised cable operator, from a SMATV wholesaler (e.g., NSPN), or, in the case of some SMATV multiple-system operators (e.g., Telesat and Maxtel), from HBO directly.

12/ This is putting it mildly. WCA tries to make the Commission see things its way by calling the Commission's proposals "totally unacceptable", and "particularly absurd". See WCA at 40, 41.

13/ A few commenters have gone so far as to suggest that the Commission should outlaw all exclusive contracts. See, e.g., Liberty Cable at 14; NSPN at 12. This suggestion is directly at odds with § 628(c)(2)(D), which clearly contemplates that many exclusive contracts will survive public-interest review.