

says that "[i]n determining whether an exclusive contract is in the public interest for purposes of paragraph (2) (D)", the Commission must consider five listed factors. Nothing in this language says when the Commission must determine whether an exclusive contract is in the public interest. If one adds that a preclearance regime would require the Commission to devote a good part of its staff to preclearance functions, it becomes difficult to believe that Congress intended such an odd system.

Some commenters have said, however, that, unless the Commission adopts a preclearance regime, an affected distributor may never know that an exclusive contract is the reason for a programming vendor's refusal to sell. See, e.g., DIRECTV at 29; WCA at 41. This argument is specious. If a programming vendor cannot sell to a distributor because of contractual obligations, it can be counted on to say so. Indeed, not one commenter is able to point to any instance of unexplained stonewalling.

Numerous commenters have taken issue with the Commission's sensible suggestion that exclusive contracts for new programming services should be presumed to be in the public interest for a certain period of time. See, e.g., WCA at 41. In particular, these commenters have taken issue with the proposition that exclusive contracts are essential

for a new service to become established. TWE submits that the evidence supporting that proposition is overwhelming. Indeed, the case of TNT establishes this proposition beyond any doubt. See generally Turner at 7. It would have been incumbent upon commenters doubting this evidence to come forward with specific evidence or argument to the contrary. None having been shown, the Commission may safely assume that exclusive contracts are essential to the launch of new services. 14/

## II. PROGRAM-CARRIAGE AGREEMENT ISSUES

The MPAA has suggested that § 616 does not require the Commission to issue rules that forbid any specific kinds of conduct, and that the best that can be hoped for is a rule that closely tracks the statutory language with perhaps some examples of prohibited conduct in notes to the rules. MPAA at 6-7. TWE continues to believe that there is no need for the Commission to issue rules under § 616 at this time, see TWE at 50-51, but agrees that the MPAA's approach is generally the right one. However, TWE cautions that there is no indication that Congress intended to forbid

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14/ TWE continues to believe, however, that the 2-year safe-harbor period that the Commission has suggested would be insufficient to persuade many distributors to carry a new service, and that a 10-year safe-harbor period is appropriate. See TWE at 45.

distributors altogether from taking a financial interest in a programming vendor, entering into an exclusive contract, or refusing to carry an unaffiliated programming vendor. Rather, the statutory language makes clear that these acts are to be unlawful only if they are a condition for carriage, coercive, or discriminatory, respectively.

Conclusion

TWE submits that, at a minimum, the Commission should (1) require a complainant in any proceeding under § 628 to show that the defendant programming vendor committed an unfair practice and that this unfair practice jeopardizes the complainant's competitive viability; (2) 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; (3) permit volume discounts even if they are not cost justified; and (4) 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.

February 16, 1993

Respectfully submitted,

CRAVATH, SWAINE & MOORE,

by Robert D. Joffe /hjb  
Robert D. Joffe

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## Appendix

- Liberty Cable alleges that TWE has acted unfairly in withholding from it Court TV. Liberty Cable at 21-22. It has made these same claims before the New York City Department of Telecommunications and Energy ("DTE"), which has rejected them at every turn of the road. Rather than rehearse the minutiae of the issues before the DTE, TWE respectfully refers the Commission to two letters from the DTE rejecting Liberty Cable's allegations, which TWE attaches to these papers as Exhibits 1 and 2.
- NSPN alleges that, in the early 1980s, HBO and Showtime engaged in a "boycott" of the SMATV industry "instigated by the franchised cable operators who feared competition from SMATV companies". NSPN at 1. TWE categorically denies that HBO ever banded together with any programming vendor or cable operator to "boycott" any SMATV operator. At the time, HBO unilaterally refused to sell to SMATV operators because of legitimate concerns relating to auditing and piracy. It changed that policy as soon as it felt that those concerns had been adequately addressed. Thus, in 1985, HBO started selling to SMATV multiple-system operators (including Telesat and Maxtel) and authorized cable operators to subdistribute to SMATV operators within their franchise areas. HBO has been selling to NSPN (a SMATV wholesaler) since 1990.

NSPN further seems to suggest that HBO maintains a discriminatory SMATV wholesale rate card that is in all instances less favorable than the cable rate card. NSPN at 14-15. It is true that HBO maintains separate rate cards for cable operators and for SMATV wholesalers, but there is a good reason

for that. Except in the case of the largest SMATV multiple-system operators (e.g., Telesat and Maxtel), who can deal with HBO directly, HBO allows SMATV operators to buy HBO's programming services in two ways: from a local franchised cable operator or from a SMATV wholesaler. The rate card for SMATV wholesalers is a flat rate, determined without reference to retail rates, because wholesalers do not set retail rates. The cable rate card, on the other hand, varies depending upon the retail rate charged by the cable operator to its cable subscribers. As a matter of administrative convenience, HBO charges subdistributing cable operators the same rate for SMATV subscribers as it charges them for cable subscribers.

- WCA alleges that HBO "initially refused to enter into arrangements with wireless cable operators despite offers of significant financial guarantees and other inducements". WCA at 16. This is not true. HBO has been dealing with MDS operators since the mid-1970s. By the mid-1980s, however, a number of MDS operators had become insolvent, often leaving HBO unable to collect substantial debts. In light of its experiences with MDS operators, HBO took a cautious attitude towards MMDS operators when they first started service, requiring a comprehensive business plan; financial soundness backed by adequate capitalization; and letters of credit to secure outstanding balances. HBO uses these neutral criteria simply to ensure payment, and certainly not to protect cable operators with which it is vertically integrated. Indeed, HBO deals with MMDS operators that compete with TWE-owned cable operators in at least half a dozen cities.

Next, WCA alleges that "CableMaxx, which provides a wireless cable service in uncabled areas surrounding Austin, Texas, was initially unable to secure access to . . . HBO [and] Cinemax . . . , despite offering to post letters of credit equal to several months expected billings". WCA at 16. This is not true, either. CableMaxx submitted a business plan to HBO in October, 1989. After due scrutiny of the plan and negotiations, HBO and CableMaxx signed an agreement in June, 1990. CableMaxx launched in July, 1990, and has been carrying HBO ever since.

Finally, WCA alleges that "People's Choice TV Partners . . . reported difficulty securing wireless cable affiliation agreements with HBO [and] Cinemax . . .". WCA at 17. HBO started selling to People's Choice at the time it commenced service. People's Choice recently confirmed to HBO that it never experienced any of the "difficulty" that WCA alleges it did.





THE CITY OF NEW YORK  
DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY  
75 Park Place, 6th Floor  
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William F. Squadron  
Commissioner

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September 8, 1992

Mr. Peter Price, President  
Liberty Cable Television  
30 Rockefeller Plaza, Suite 3026  
New York, New York 10020

Dear Mr. Price:

This letter addresses matters raised by Liberty Cable Television's letters to the Department of Telecommunications and Energy ("DTE") dated June 26, 1992 and July 7, 1992, as well as your letter to Attorney General Robert Abrams dated June 16, 1992.

June 26, 1992 Letter

The June 26 letter raises several concerns regarding the ongoing disputes between Liberty Cable Television ("Liberty") on the one hand, and Manhattan Cable Television, Inc. ("MCTV") and Paragon Cable Manhattan ("Paragon") on the other, at several buildings in Manhattan.

A. 420 East 51st Street

Despite the efforts of both this agency and the New York State Commission on Cable Television ("CCT") to reach an accord between the building owner and MCTV that would permit MCTV to fulfill its obligation to upgrade its cable television facilities at 420 East 51st Street, the parties have not reached agreement. The matter is now before the courts (Manhattan Cable Television, Inc. v. 51st Beekman Corp., Supreme Court of the State of New York, New York County, Index No. 92-16790).

It is DTE's policy not to intervene in judicial proceedings involving building access issues under Section 828 of the New York State Executive Law unless the proceeding involves a unique question of law or an issue which may affect the rights of the

City of New York. We find no such issue in this proceeding. Moreover, we have examined the actions taken by MCTV with regard to this building and have concluded that those actions do not constitute a franchise violation.

B. 1675 York Avenue

Liberty claims that on or about June 18, 1992, Paragon sent a letter to all residents of this building which "...falsely accused Liberty and the owner of the building of forcing all of the tenants to take and pay for Liberty's service whether they wanted it or not."

As you know, this agency takes no position as to which cable television service residents choose. Our staff is available and prepared to explain all differences between franchised and non-franchised cable services to the residents of 1675 York Avenue, just as we have provided such explanations to the many building representatives, managing agents and individuals whom Liberty has referred here in the past.

It appears that this allegation, like many others raised by Liberty (and in some cases by MCTV and/or Paragon), reflects a disagreement between competitors as to whether or not certain statements or representations are false or misleading. There is no relevant provision of the City's franchise agreements which specifically addresses such matters. The City takes no position and offers no opinion as to whether such actions are in violation of applicable law.

This agency does not believe therefore, that Liberty's claims of "false accusations" and "harassment" by Paragon at 1675 York Avenue implicate conduct governed by the franchise agreement. Nonetheless, we are willing to review both the June 18 Paragon letter and Liberty's contract with 1675 York Avenue if you would consider such review material. If so, please supply us with copies of both documents.

C. 51 East 90th Street

Liberty claims that, "We were recently advised that a Board member has been told by a Paragon representative that Liberty was bribing co-op Board members to sign contracts with Liberty."

This undocumented assertion also appears to arise in the context of the competitive marketplace. The City does not find that any franchise provision applies.

D. 10 Gracie Square

With regard to this building, your letter claims that "Liberty was unable to obtain a contract ... because Paragon provided a custom and 'special' installation at the building at the direction of a partner of a prominent New York law firm which

represents Time Warner."

The location 10 Gracie Square is not within the franchise area of Paragon. Service to this building is provided by MCTV. Moreover, the upgraded wiring of the building was accomplished by the "bundle up" method of exterior wiring which is common in the industry. Such a wiring method complies with City wiring standards and in no way constitutes a franchise violation.

#### July 7, 1992 Letter

The July 7, 1992 letter states that residents of 10 West 66th Street continue to be billed by MCTV for services no longer provided. By letter dated July 9, 1992, this agency advised the 10 West 66th Street Corporation of both the procedure for terminating cable television service and the rights afforded subscribers under the MCTV franchise with the City of New York. (See copy attached).

In addition, the agency has resolved several individual cases at 10 West 66th Street regarding billing disputes. On the evening of August 10, 1992 agency representatives, including Assistant Commissioner Eileen Huggard, visited 10 West 66th Street and met with numerous building residents regarding their billing disputes. Because the facts in each case differ, each complaint must be handled individually and may take some time. Nevertheless, we are confident that all disputes will be resolved.

The remaining issues raised in Liberty's July 7th letter appear to concern the lawsuit filed by the building against MCTV. This agency is aware of the ongoing dispute between the building and MCTV, but the facts as alleged do not constitute a franchise violation.

#### June 16, 1992 Letter

Liberty's June 16, 1992 letter to Attorney General Abrams does not seek any specific action by this agency. Nevertheless, we are investigating the allegations regarding the use of electricity in residential buildings by cable operators. (See attached letter to Richard Aurelio.) As you know, Mr. Aurelio has responded to our inquiry. We are evaluating his response.

In earlier correspondence, as well as in meetings, Liberty has asked us to consider whether the alleged misconduct by MCTV and Paragon, taken as a whole, constitutes anti-competitive behavior which would amount to a franchise violation. Specifically, Liberty has asserted that the overall pattern of conduct violates Section 3.8 of the agreements.

Section 3.8 does not -- and was not intended to -- address issues of building access, false or misleading representations to consumers, billing and disconnection disputes between consumers

and the cable operator, or certain other matters raised in various Liberty complaints. While individual requirements, such as billing, may be covered by other specific franchise sections, neither Section 3.8 nor other provisions of the franchise agreement empowers the City to address, ab initio, omnibus antitrust or unfair competition claims. Other franchise provisions, however, permit the finding of a material breach upon a judicial determination of a violation of the antitrust laws.

Section 3.8, "Competition," prevents franchised cable operators and their affiliates from denying access to programming to competitors or potential competitors -- whether through an unreasonable refusal to deal, discrimination in price, terms or conditions of sale or an otherwise unreasonable denial. This section also permits the City to find a franchise violation in connection with access to programming without a prior judicial determination of a violation of anti-trust law; shifts the burden of proof to the franchisee in certain circumstances; and permits the City to bypass certain procedural steps in revoking a franchise after a final judicial determination of an antitrust law violation. Finally, the section establishes and defines a class of intended beneficiaries. As noted in previous correspondence, Section 3.8 is therefore relevant to Liberty's complaints regarding access to Court TV, the Olympic Triplecast or the manner in which Home Box Office ("HBO") or its affiliates conduct subscriber counts from HBO retailers such as Liberty.

The complaints of Liberty not addressed in this letter remain under review by the agency.

Sincerely,

*Bill Squadron/cc*  
Bill Squadron

cc: Richard Aurelio  
Members of NYC Congressional delegation  
Hon. William Finneran  
Hon. Alfred Sikes  
Lewis Finkelman

Exhibit 2



THE CITY OF NEW YORK  
DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY  
75 Park Place, 6th Floor  
New York, New York 10007

January 12, 1993

William F. Squadron  
Commissioner

Telephone: (212) 788-6540  
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Mr. Peter O. Price  
President  
Liberty Cable Company, Inc.  
30 Rockefeller Plaza  
Suite 3026  
New York, New York 10020

Dear Mr. Price:

This letter addresses your allegations that Time Warner Cable of New York City (formerly known as "Manhattan Cable Television, Inc.") and Paragon Cable Manhattan (hereinafter referred to as "the Companies") have violated the competition section of their respective franchise agreements with the City of New York. In support of its allegations, Liberty asserts that Time Warner executives "have repeatedly pressured" Court TV not to do business with Liberty.

Subsection 3.8.05 of the franchise agreements prohibits the Companies or their affiliates from engaging in practices which would unreasonably deny any competing cable service distributor access to a cable television service. Accordingly, the Department of Telecommunications and Energy ("DTE") has carefully investigated Liberty's allegations and has reviewed both the legal basis and factual circumstances set forth in Liberty's correspondence. In addition, DTE has received full cooperation from Time Warner and Court TV in obtaining the necessary information pertinent to its investigation. On the basis of that investigation and analysis, DTE has determined that the facts do not support a finding of a violation of Section 3.8.05 of the franchise agreements by the Companies for the following reasons:

Section 3.8, et seq. is intended to protect competition and redress anticompetitive effects of certain business practices in accordance with general antitrust law principles; this section is not intended to prohibit all restrictive business arrangements or exclusive distribution agreements.

In addressing Liberty's claims, DTE examined three issues: (1) the connection between Time Warner, the Companies and Court TV; (2) the actual distribution arrangement between the Companies

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and Court TV; and (3) the impact of the arrangement between the Companies and Court TV.

1. Time Warner/Court TV connection.

Time Warner owns direct interests in each of the Companies. Time Warner also owns controlling and partial interests in several cable television programming services, including Court TV. A Time Warner subsidiary owns a one-third interest in Court TV and another Time Warner subsidiary is the managing partner of Court TV.

DTE does not find that Time Warner's interest in Court TV itself violates antitrust law or the franchise agreement. DTE found no evidence of misuse of Time Warner's interests in programming services in a general effort to deprive Liberty of desirable programming. In fact, DTE found that Liberty currently carries other programming services in which Time Warner owns either a controlling or partial interest, including HBO, CNN, TNT...

2. Court TV's exclusive arrangement with Time Warner.

Court TV is a relatively new special interest cable television service which relies on fees from advertisers as well as cable operators. Its service was formally launched July 1, 1991 with commitments from cable operators totalling access to nearly 5.4 million subscribers nationally. Court TV states that it needs access to 15 million subscribers nationally to attract advertisers. According to Court TV, it currently has access to seven million subscribers nationally and it seeks to reach an additional 19 million subscribers by 1995 from commitments obtained from multiple system operators with substantial national subscriber bases.

According to Court TV and Time Warner, consistent with its efforts to accomplish its subscriber goal, Court TV offered Time Warner exclusivity to induce Time Warner to commit to carrying the channel over all its systems, thereby strengthening its position with advertisers. Time Warner agreed to an exclusive arrangement with Court TV to distribute the channel over all its cable systems including those operated by the Companies. Time Warner launched Court TV under the exclusivity terms negotiated by Court TV and has been carrying the channel on a month-to-month basis pending a final written affiliation agreement.

The Time Warner/Court TV arrangement is a vertical, non-price exclusive agreement. Under antitrust law principles, vertical arrangements allocating exclusive territorial

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distribution are not prohibited unless such arrangements lack any legitimate business justification or impose an unreasonably anticompetitive foreclosure of product to competitors. Court TV states that it needs access to at least fifteen million subscribers nationally to attract advertisers to support its service, and that its success at obtaining commitments from cable operators with substantial numbers of subscribers nationally is essential to its success. In order to secure these commitments, Court TV has offered cable operators, including Time Warner, exclusive rights to carry the new service in the geographic areas which their systems serve. Such arrangements are consistent with industry practice, particularly where a new program service is involved.

DTE is satisfied that the exclusive arrangement between Court TV and Time Warner was born of the legitimate business needs of Court TV and does not impose an unreasonable foreclosure of programming. As far as DTE has been able to ascertain, the Court TV arrangement is the only exclusive cable television service arrangement Time Warner currently holds against Liberty. Thus DTE concludes that this arrangement is not an unreasonable vertical territorial restriction, and not a violation of the franchise agreement.

### 3. The impact of the arrangement on Liberty.

DTE considered whether the exclusivity arrangement between Time Warner and Court TV has the effect of unreasonably suppressing competition. Antitrust law requires that restraint of trade or unfair competition must occur in a relevant market. The relevant market is the market in which Liberty competes, i.e., cable television service distribution.

Liberty serves approximately 7,000 subscribers in several buildings in the New York City Market and by its own claims is successfully competing with the Companies in this market. Liberty's success appears to be the result of providing several channels of cable services (including several cable services which the Companies carry and cable services in which Time Warner owns an interest) at a competitive price. DTE does not find that Court TV is essential to Liberty or any other multichannel distributor's ability to compete in New York City. Thus, DTE concludes that Liberty has not presented sufficient factual circumstances to support its claim of competitive harm because of its inability to receive Court TV.

Accordingly, the facts do not support Liberty's allegations that the Companies have violated the Competition section of their respective franchises. Liberty has not demonstrated that Time

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Warner's exclusivity arrangement with Court TV has impaired competition in the market. DTE finds that the limitation on access to Court TV does not meet the threshold standards for restraint of trade. Since the factual circumstances are insufficient to sustain Liberty's allegations, DTE concludes that the exclusivity arrangement between Time Warner and Court TV does not constitute a violation of the franchise.

Notwithstanding the above investigation and analysis, if you maintain that Time Warner's conduct is in violation of the Competition provisions of the franchise and state or federal antitrust laws, Section 3.8.06 of the franchise agreements and the related antitrust laws provide you with adequate independent remedies.

Sincerely,



Bill Squadron