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Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C.

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

MM Docket No. 92-265

REPLY COMMENTS  
OF UNITED VIDEO, INC.

United Video, Inc.  
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Tulsa, OK 74145

February 16, 1993

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## SUMMARY

As the Commission has recognized in the Notice of Proposed Rule Making, the statute was intended to encourage program distribution to consumers and not to benefit the private interests of any particular distributor. Thus it is critical that the Commission adopt its proposal to require complainants to establish a prima facie case, supported by detailed affidavits and specific factual evidence. The complainant must meet the statutory purpose of demonstrating unjustified discrimination which "hinders significantly" program distribution to consumers. Facilities-based operators (cable, SMATV and MMDS) and HSD distributors represent distinct classes of service which are totally different and do not lend themselves to simplistic pricing comparisons. In addition, volume discounts are essential and encourage wider program distribution to the public. Throughout this proceeding the Commission should follow the wording and intent of Section 628 which emphasizes that the only statutory prohibition relates to unfair or deceptive practices "the purpose or effect of which is to hinder significantly . . . providing . . . programming to subscribers or consumers".

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OF UNITED VIDEO, INC.

United Video, Inc. submits the following reply in response to the comments filed by various parties in the program access rulemaking proceeding. Many of the parties supported positions taken by United Video in this proceeding. These reply comments are limited to arguments raised in the comments by several parties advocating an interpretation of the program access provisions of Section 628 of the 1992 Cable Act that are inconsistent with the statute and would seriously disrupt program distribution to consumers.

The Notice of Proposed Rulemaking. In this proceeding the Commission has sought to evaluate virtually every aspect of the issues relating to the program access provisions of Section 628 of the 1992 Cable Act. Contrary to the totally unsupported accusations made against the Commission in the

comments of NRTC and others, the Commission's approach has been entirely consistent with the meaning of the statute and the intent of Congress. The Commission has attempted to "rely on the marketplace to the maximum extent feasible to achieve the goal of increasing the availability of programming to consumers". The issues raised in the NPRM indicate that the FCC has identified the most significant characteristics of the satellite programming marketplace. This is not special interest legislation intended to guarantee any distributor a large profit margin, but only to prevent actions which significantly hinder program distribution to the consumer. The Commission's approach in this rulemaking has recognized thus far that this statute was intended to benefit the public interest (i.e., the consumer) and not the private business interest of NRTC or any other party.

Terminology. This complex proceeding has become even more complicated because of the use of inconsistent terminology and undefined terms in various comments. In this reply as in United Video's original comments, the term "distributor" refers only to a person or organization that sells to home satellite dish (HSD) consumers the satellite programming services provided by others. The term "facilities-based operator" refers collectively to cable, SMATV and MMDS systems carrying United Video's superstation programming to consumers. The facilities-based operators provide unduplicated communications facilities and

services that add value to the program distribution chain to the consumer. Non-facilities-based HSD distributors provide virtually no facilities, however, some choose to duplicate back office and other services<sup>1/</sup> which add nothing of value to the consumer that is not available from the satellite broadcast program vendor. The basic distinctions between facilities-based operators and non-facilities-based distributors are essential in addressing the various issues in this proceeding.

Complaint Must Establish a Prima Facie Case. In its comments United Video and other parties emphasize the importance of requiring complainants alleging unlawful conduct under Section 628 to establish a prima facie case. As indicated in its title, the "Cable Television Consumer Protection Act of 1992" was adopted by Congress for the benefit of consumers and is not intended to regulate practices which have no impact on consumers. The consumer is the barometer for the establishment of a prima facie case. As suggested in the NPRM, the requirement for a prima facie case involves not merely making allegations which are then presumed to be true, but rather making allegations which are in fact supported by detailed affidavits and specific factual

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<sup>1/</sup> None of the HSD distributors have any transmission facilities for delivery of programming and only a very few even have a back office for sales and customer authorizations. Most HSD distributors are merely sales agents selling subscriptions to superstation programming and often have no other contact with the consumer after the initial sale.

evidence. Complaints which contain only general and unsupported allegations should be dismissed.

The prima facie case must meet the statutory purpose of demonstrating unjustified discrimination which "hinders significantly" program distribution to consumers. This requires evaluation of the alleged discrimination in the context of the relevant marketplace. Any significant hinderance of program distribution will be evident in that marketplace. Thus the complainant must establish not only that program distribution has been impaired, but that the complainant has actively marketed its services. The complaint should, at a minimum, contain the following in order to establish a prima facie case:

1. A complete statement by the complainant of specific unfair or discriminatory actions of the program vendor and evidence to support those allegations.
2. Specific evidence demonstrating that the effect of the program vendor's actions is to significantly hinder program distribution in the marketplace, including the following:
  - a. A description by the complainant of the geographic boundaries (the market) in which the alleged discrimination occurred.
  - b. A list provided by the complainant of all programming services available in any part of the geographical boundaries of the relevant market.
  - c. Current prices and penetration figures (number of customers) for these programming services, as well as the

penetration rates for each of the three preceding years. In the event that penetration figures are unavailable for these services, the FCC should make available a means of obtaining such figures from the television services, at the expense of the complainant.

- d. Proof that the complainant has actively marketed services within the geographical area, including copies of ads, proof of expenditures, descriptions of office or sales facilities.

Once this information is complete, the Commission should examine it to make a determination if the complainant has established a prima facie case which would warrant further proceedings.

While most commenters favor requiring complainants to establish a prima facie case with penalties for frivolous complaints, a few commenters argue against any standards for complaint procedures. NRTC even asserts that the Commission should actually "encourage" complaints and that a complaint should not be considered frivolous if there is any difference at all in price, terms or conditions of service. Such an approach is preposterous. The exorbitant costs to defend such frivolous allegations would ultimately be paid by consumers.

The Commission will be literally flooded with complaints unless the complainant is required to establish a prima facie case demonstrating harm and accompanied by sufficient factual substantiation which addresses all of the provisions of

Section 628. The complexity of the program distribution system and the diversity of entities and services accounts for the multitude of prices, terms and contracts. Unless strict standards for complainants are established, when a party wants to contract for satellite programming, the filing of an FCC complaint will become the first step in any program affiliation contract negotiation. The mere filing of such complaints will be used to obtain unwarranted price concessions from satellite programming vendors. The filing of unjustified and unsupported complaints will not only unnecessarily burden the Commission's resources, but will result in higher costs for satellite programming vendors and ultimately, higher prices for consumers.

Burden of Proof. Some commenters suggest that if there is any price differential then the burden of proof should shift to the program vendor. This approach of "guilty until proven innocent" is inconsistent with the statute which specifically provides that programming vendors shall not be prohibited from charging different prices in various circumstances.

Section 628(b)(2)(B) states that a satellite "programming vendor shall not be prohibited from . . . establishing different prices, terms and conditions" to take into account various enumerated conditions. It is inconceivable that anyone would reasonably argue that a price difference is a per se violation when the statute specifically authorizes price differences. What possible

rationale can there be for shifting the burden of proof from the complainant to the defendant? That approach totally ignores the due process of proving a party guilty. As in other legal proceedings, the burden of proof must remain on the complainant.

Differences in Cable and HSD Markets. Satellite broadcast programming vendors provide services for facilities-based operators which are distinctly different from those provided to HSD consumers. One cannot compare the operations of facilities-based operators (cable, SMATV and MMDS) to non-facilities-based distributors in the HSD market. Such HSD distributors add no unique facilities to the process of providing superstations to the ultimate consumer. A satellite broadcast programming vendor cannot deliver directly to a facilities-based operator's customers facilities-based operator maintains facilities and services necessary for delivery of the signal to consumers. On the other hand, an HSD distributor functions more as a sales agent than as a vital link in the delivery chain. Even the largest HSD distributors do nothing more than act as programming sales agents with duplicative "back office" operations for subscriber authorizations.

Because of these basic differences between the services provided by a satellite broadcast programming vendor to serve facilities-based operators and HSD consumers, there are

significant differences in the costs necessary to provide satellite programming to these discrete classes of service (see Exhibit 1). Non-facilities-based HSD distributors have no costs other than sales, unless they elect to duplicate the operations provided by satellite broadcast programming vendors.

The unique costs to the satellite broadcast programming vendor of providing services to cable and HSD markets are so distinctly different that valid price comparisons cannot be made between the two classes of service. While there are some common costs providing these two different classes of service, there are equally significant costs unique to each class of service. For the HSD market, those unique costs must be allocated across a customer base of less than 1 million. The unique costs of serving facilities-based operators are spread over more than 30 million customers -- a multiple of more than 30 to 1. Thus when rates are compared on a per subscriber basis, the rates for HSD must, by virtue of the multiple, be considerably higher than the rates for facilities-based operators.

The attempts by several commenters to compare per-subscriber pricing in the cable and HSD markets are not only inappropriate, they are also incorrect. While United Video pricing for facilities-based operators is expressed on a per household basis, it is subject to a minimum amount per headend

receiving location. Considering this minimum, pricing for facilities-based operators is actually several times higher than pricing to HSD distributors. Those complaining of price discrimination conveniently fail to mention this minimum. If the minimum were applied to the HSD market, it would increase rates three-fold. Again, the facilities-based operator and HSD classes of service are totally different and do not lend themselves to simplistic pricing comparisons.

Volume Discounts. While many commenters in this proceeding support the use of legitimate volume discounts for service to the cable industry, several cable operators who do not receive the discounts opposes them. Volume discounts are market driven and were not established by United Video or other satellite programming vendors for their own economic benefit. Volume discounts are a standard practice in many industries, including communications. Such discounts are clearly permissible under Section 628.

Volume discounts are absolutely essential to the survival of satellite broadcast programming vendors, due to the fact that there are absolutely no restrictions on competitive entry into satellite transmission of superstations. Without volume discounting, any large multiple system operator ("MSO") would make the business decision that it would be less costly for it to

uplink a particular superstation than to obtain the signal from United Video or from another satellite broadcast programming vendor. If the MSO were to uplink the superstation for its own cable systems, it would undoubtedly offer the service to other cable operators, thus syphoning off more customers from United Video. If large customers were to establish their own satellite distribution facilities, the price to all of the remaining United Video customers would have to increase to meet revenue requirements.

The actual volume discounts for all basic programming services do not significantly decrease a facilities-based operator's total costs. Programming costs represent only one element of the total costs necessary for facilities-based operators to deliver programming to consumers (see Exhibit 2). In fact, programming costs represent less than 40% of a facilities-based operator's total costs. Thus, these discounts are de minimus when compared to the total costs of the facilities-based operator. As shown in Exhibit 2, even volume discounts totalling as much as 40% represent only a 5% difference in an operator's total monthly cost. Accordingly, volume discounts for superstations do not hinder program distribution to consumers and thus cannot be considered a violation of the statute under any circumstances.

Buying Groups. A satellite programming vendor's contracting decision regarding buying groups should fall within such vendor's sole discretion, and the Commission should not adopt extensive regulations in this area. As emphasized in the comments of United Video and a number of other parties, unless the Commission enforces strict ownership limitations on buying groups they will undermine the entire rate structure for satellite programming without offering any corresponding benefit to consumers.

Section 628 Prohibition. Section 628(b) prohibits only conduct that is both unfair and also "hinders significantly" delivery of programming to consumers. Most commenters and the Commission concur in this interpretation of the wording and plain meaning of the statute. However, several commenters have attempted to read out of the statute the entire portion of 628(b) which emphasizes that the only statutory prohibition relates to unfair or deceptive practices "the purpose or effect of which is to hinder significantly . . . providing . . . programming to subscribers or consumers". There can be no per se violation of the statute for unjustified discrimination or any other unfair practice, unless it hinders program distribution to the public. Accordingly, any claims or regulations under the statute must consider both the actions of the program supplier and the impact on consumers. Any complainant under the regulations arising from the Act must necessarily demonstrate the merits of a prima facie case by showing such adverse impact on consumers.

Section 202(a) Standard for Analysis of Price

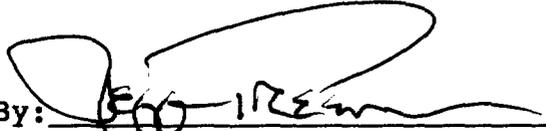
Differentials. United Video and a number of other parties support use of the Section 202(a) standard which prohibits common carriers from engaging in unjust or unreasonable discrimination in the provision of like communications services. While some parties suggest other standards mentioned in the NPRM, some parties such as DirecTv oppose use of the 202(a) analysis, stating: "While this [202(a)] test most closely approximates the analysis that Congress intended, it adds an unnecessary layer of complexity to a Section 628(c)(2)B) analysis, because it requires the Commission to determine whether these services offered by a programmer to different MVPDs are 'like' services." However, the analysis used in cases under Section 202(a) directly reflects the statutory provisions of Section 628(c)(2)(B)(i)-(iii) which list the factors a programming vendor may utilize in establishing different prices for different classes of service and different circumstances. These are precisely the factors the Commission has traditionally considered under 202(a) in cases determining whether a carrier has engaged in "unjust or unreasonable discrimination". In any comparison, if the services are "like" the costs and other factors will be similar, which would warrant a reasonable comparison of rates. On the other hand, if the services are different, the rates will be different, which is fully consistent with the requirements of Section 628.

\* \* \* \* \*

The program access provisions of Section 628 of the Cable Television Consumer Protection and Competition Act of 1992 were intended to prevent acts or practices which would hinder significantly the provision of satellite programming "to subscribers or consumers". Section 628 was not intended to benefit any particular distributor or to enable a distributor to realize even higher profit levels. The statute established a broad framework of policies for satellite program distribution and left it to the Commission to implement the statute and make it work in the real world.

Facilities-based operators and non-facilities-based HSD distributors represent two totally different classes of service which do not lend themselves to simplistic pricing comparisons. Moreover, the duplication of existing services by HSD distributors should not serve as a basis for allegations of discriminatory rates. Finally, it is critical for the Commission to establish and strictly adhere to complaint criteria requiring establishment of a prima facie case with strong supporting evidence. If the complaint standards are too low, the defense by satellite programming vendors against frivolous claims will ultimately result in added cost to the consumer.

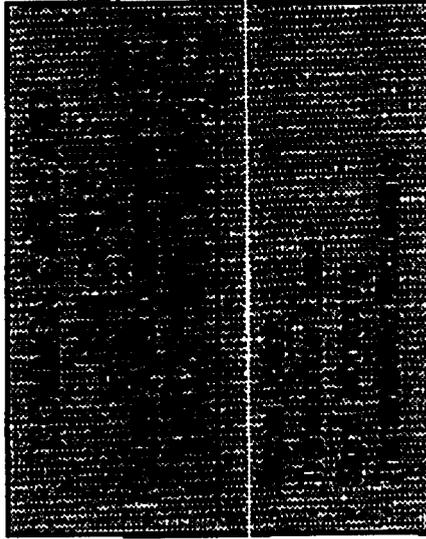
Respectfully submitted,  
UNITED VIDEO, INC.

By:   
Jeff Treeman  
President

February 16, 1993

# THE UNIQUE COSTS OF EACH CLASS OF SATELLITE BROADCAST PROGRAMMING VENDOR SERVICE EXCEED THE COMMON COSTS

- FBO\* SERVICE CLASS  
UNIQUE COSTS**
- Cable Encryption
  - Cable Decryption
  - Cable Authorization
  - Signal Authorization Process
  - Sales to Cable Consumers
  - Syndex Administration
  - Syndex Replacement Programs
  - Program Schedules & Listings
  - KVWV Compliance
  - Community Affairs Programs
  - Customer Billing & Collections
  - Customer Technical and Administrative Support
  - Policing Unauthorized Reception
  - On-screen Messaging



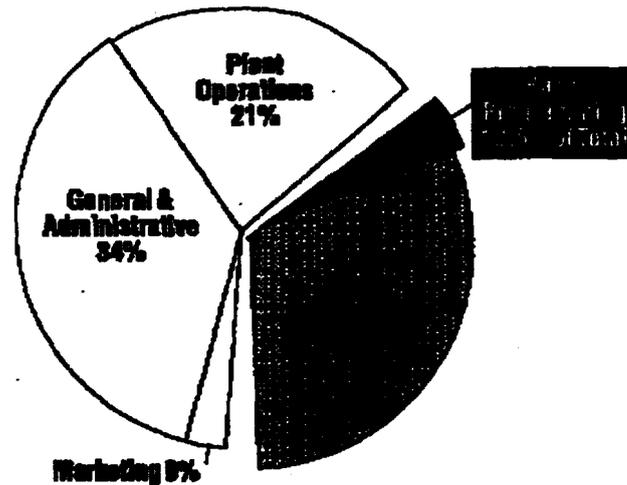
- HSD SERVICE CLASS  
UNIQUE COSTS**
- HSD Encryption
  - HSD Decryption
  - HSD Authorization
  - Signal Authorization Process
  - Sales to HSD Consumers
  - Distribution/Agent Sign-Up
  - Copyright Filing
  - DBS Center Fees
  - Customer Billing & Collections
  - Consumer Services for Distributors/Agents
  - Policing Unauthorized Reception
  - On-screen Messaging

	FBO	Common	HSD
Households Served	31,000,000	31,800,000	880,000
Cost Indexed To	11,000	10,000	15,000
Common Costs (Common Cost = 10,000)			
Indexed Cost Per HH Served	.0004	.0003	.019
Total Indexed Cost HH For Each Class	.0007	← Added →	.0193

# A 40% VOLUME DISCOUNT ON BASIC PROGRAMMING REPRESENTS ONLY A 5% DIFFERENCE IN TOTAL MONTHLY COSTS

Representative FBO Cost Profile Cost Per Household Per Month (Total cost = \$13.40)

	% Total Cost	\$	\$ With 40% Volume Discount	Difference in Total Monthly Cost
Plant Operations	21.0 %	\$ 2.81	\$ 2.81	
Marketing	9.0	1.21	1.21	
General and Administrative	34.0	4.56	4.56	
<b>Total</b>	<b>100.0 %</b>	<b>\$13.40</b>	<b>\$12.73</b>	<b>5%</b>



This cost profile consists of representative costs based on LHM analysis of data provided by the NCTA, Paul Kagan Associates and interviews with several facilities based operators. Factors including subscriber base, market penetration, technical upgrades, and licensee requirements may alter this profile.