



Congressional intent in §§ 616 and 628. The Commission should not adopt the programmers' proposals.

2. The programmers want to maintain the status quo. The status quo is that Liberty pays higher prices for virtually all of its programming than a franchised cable operator with the same number of subscribers would pay for the same programming. Liberty is subject to additional discrimination, such as lack of marketing support. Liberty is unable to obtain some programming, such as Court TV controlled by Time Warner. Liberty has also, in the past, been unable to obtain programming because of exclusive agreements between Time Warner and non-vertically integrated programming services such as Madison Square Garden. None of this will change if the Commission adopts the programmers' proposals.

3. For example, Time Warner<sup>1/</sup> proposes that § 628 apply only to vertically integrated programmers. Congress did not intend to limit the application of § 628 in this manner. The legislative history clearly shows Congress was concerned about eliminating the "horizontal" market power of cable operators to influence non-affiliated national programmers in their dealings with non-cable MVPDs. See, Comments of Liberty Cable Company, Inc., dated January 25, 1993 at ¶ 11. If the Commission were to remove non-affiliated

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<sup>1/</sup> Liberty singles out Time Warner's proposal because Liberty competes head-to-head with the Time Warner cable companies in New York City. The proposals of other cable operators and programmers impose the same kind of obstacles to true relief as Time Warner.

programmers from the operation of § 628(b), then Liberty will continue to pay discriminatory and higher prices for programming services not owned by cable operators such as ESPN.

4. Time Warner then proposes that only the programming of a vertically integrated programmer/cable operator who conducts cable operations in Liberty's area of operation (New York City) is covered by § 628. Time Warner, in effect, proposes that Liberty's "rights" under § 628 should be limited to the programming services owned and controlled by Time Warner — Home Box Office ("HBO"), Cinemax, Court TV<sup>2/</sup> and the Comedy Channel — because Time Warner runs a cable system in New York City. Thus, Liberty would have no recourse for the discriminatory higher prices it pays for programming services, such as Showtime, MTV and VH-1, which are owned by Viacom, because Viacom does not conduct cable operations in New York City.

5. Time Warner then suggests that the "de minimus" programming services should be exempt from § 628 and cites, as examples, Cinemax, Court TV and the Comedy Channel. Thus, under the Time Warner proposal, the only programming service which would be covered by § 628 for Liberty's purposes would be HBO.

6. Once Time Warner has thus narrowed the scope of § 628, it really goes to work. For Liberty to obtain HBO at a non-discriminatory price, Time Warner proposes that Liberty show that

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<sup>2/</sup> Time Warner also proposes to exclude Court TV from the operation of § 628 for a period of ten (10) years which also happens to be the entire duration of the statutory prohibition on exclusive agreements.

the price discrimination in HBO, in and of itself, actually prevents Liberty from selling its entire program package to such an extent that Liberty is unable to compete in New York City. Liberty will also have to show that: (a) all non-cable MVPD competition, not just Liberty's competition, is injured (even though Liberty is Time Warner's only competitor); (b) Liberty is a well-run company; (c) the discrimination came about as a result of an actual conversation between HBO and the Time Warner cable operator in New York City; and, (d) HBO's higher price is not the result of its "independent self-interest."<sup>3/</sup> Liberty will have to set forth in documents and affidavits it has met all these conditions (without having conducted any discovery) and pay penalties and attorney's fees if it fails to make out a prima facie case.

7. Time Warner will be able to show that it charges "non-discriminatory" prices for HBO because other non-affiliated programmers such as ESPN also discriminate against Liberty. HBO will also be able to show that its discriminatory pricing is within a band of "irrebuttably reasonable" variation — up to thirty percent (30%) higher than what HBO charges to other cable operators of the same size. HBO will also be able to show that Liberty's "marketing abilities" justify higher prices. And, as icing on the cake, even if Liberty could show that the HBO programming practices were discriminatory, HBO would not have to change those practices until the expiration of the HBO contract several years from now.

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<sup>3/</sup> How any victim of discrimination could overcome this particular obstacle is a mystery because charging higher prices is always in the programmer's "independent self-interest."

8. Time Warner's proposals are absurd and clearly designed to completely frustrate the implementation of §§ 616 and 628.

9. Liberty, like other non-cable MVPDs, has been unable, for years, to buy the programming it needs at non-discriminatory prices. The only way Liberty is going to get access to the programming it needs at non-discriminatory prices is if the Commission immediately bans facilities-based discrimination and exclusivity.<sup>4/</sup> If the Commission is serious about implementing §§ 616 and 628, it should make Time Warner and the other programmers carry the burden of proving that their practices serve the public interest and promote effective competition. Liberty does not have the time or resources to engage in a lengthy adversarial proceeding with Time Warner or any other programmer to prove it is entitled to be treated fairly.

10. Congress and the Commission have both recognized for a long time that the cable programmers have engaged in exclusivity and facilities-based discrimination in a manner designed and intended to drive non-cable MVPDs out of the marketplace. Congress wants this practice outlawed and the Commission should implement that intent.

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<sup>4/</sup> Virtually all programmer agreements allow the programmer to change pricing on short notice and require the programmer to comply with applicable law. Programmers can therefore readily change their pricing to eliminate facilities-based discrimination in pricing. They also cannot be held liable for breaching an exclusive contract if the exclusivity is illegal.

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Dated: February 16, 1993