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SUNSHINE PERIOD

APR 19 1993

WJB-TV FT. PIERCE LIMITED PARTNERSHIP

FCC - MAIL ROOM

8423 S. US #1

Port St. Lucie, FL 34985

KENNETH E. HALL
General Manager

Area Code 407
Telephone 871-1688
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April 16, 1993

VIA FEDERAL EXPRESS

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Ms. Donna R. Searcy
Secretary
Federal Communication Commission
1919 M Street, N.W. Room 222
Washington, D.C. 20554

APR 19 1993

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

RE: Notification of Permitted Written Ex Parte
Presentation - MM Docket No. 92-265

Dear Ms. Searcy:

WJB-TV Ft. Pierce Limited Partnership ("WJB"), pursuant to Section 1.1206(a)(1) of the Commission's Rules, hereby submits an original and one copy of this memorandum and attachment regarding a permitted written ex parte presentation to the Commission staff regarding MM Docket No. 92-265.

On April 16, 1993, the undersigned submitted a letter to certain staff of the Common Carrier Bureau, Mass Media Bureau, and Office of General Counsel, including Mr. Bill Johnson, Ms. Alexandra Wilson, Ms. Diane Hofbauer, Ms. Rosalie Chiara, and Mr. Jim Coltharp. The letter responds to a letter submitted on March 10, 1993 to the same individuals by The Sunshine Network, regarding the Reply Comments of WJB in response to the Notice of Proposed Rulemaking in Docket No. 92-263. Two copies of WJB's letter are enclosed.

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List A B C D E

Ms. Donna R. Searcy
April 16, 1993
Page 2

If you have any questions about this matter, please
contact the undersigned.

Sincerely,

**WJB-TV FT. PIERCE LIMITED PARTNERSHIP
d/b/a COASTAL WIRELESS CABLE TELEVISION**

BY: Kenneth E. Hall
Kenneth E. Hall

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

WJB-TV FT. PIERCE LIMITED PARTNERSHIP

**8423 S. US #1
Port St. Lucie, FL 34985**

KENNETH E. HALL
General Manager

Area Code 407
Telephone 871-1688
Teletypewriter 871-0155

April 16, 1993

VIA FEDERAL EXPRESS

**Federal Communication Commission
1919 M Street, N.W. Room 222
Washington, D.C. 20554**

**RE: Docket 92-265, Notice of Proposed Rulemaking;
(Development of Competition and Diversity in Video
Programming Distribution and Carriage Issues)**

Gentlemen:

This letter is submitted in response to a letter addressed to you dated March 10, 1993 by the Sunshine Network, Inc. That letter asserts that WJB-TV Ft. Pierce Limited Partnership¹ ("Coastal" or "WJB") misstated a fact concerning Sunshine in its reply comments to Docket 92-265. Specifically, the letter disagrees with our statement in footnote 5 on page 8 that we have been denied access to Sunshine's programming and that we understand that other wireless cable operators have similarly been denied access.

Last spring, when Coastal initiated its service, our representative contacted Sunshine on at least two (2) occasions in an attempt to purchase programming for our system. At that time, Sunshine expressed no interest in contracting with us; they never offered us a contract, never discussed contract prices or terms with us, and never indicated that in fact they would even sell their service to us. That response, as well as our conversations with others in our business, led us to conclude that Sunshine was not interested in making its programming available to us.

¹ Pursuant to a Certificate of Assumed Name filed with the Florida Secretary of State, WJB-TV Ft. Pierce Limited Partnership does business under the name "Coastal Wireless Cable Television". This fact is a matter of public record and no effort has been made to hide or disguise that fact.

(continued...)

Admittedly, Sunshine never specifically stated that they would not sell their programming to us. Moreover, we do not have any written communication wherein we specifically requested Sunshine programming, although we did make such requests orally on more than one occasion.

Several weeks ago, while I was out-of-town on other business, I spoke with another representative of Sunshine and indicated my disappointment at not being able to purchase its programming. The representative stated that the company's policy had "changed", and that, in fact, negotiations were in process with another wireless operator. This was the first indication that we had that Sunshine might be willing to sell its programming to us.

In late February or early March, 1993, we began negotiating a carriage agreement with Sunshine. We reached an agreement on all material terms of a contract, including the price. At Sunshine's instruction, we executed the programming contract sent to us without modification and returned it to them. We purchased new equipment which Sunshine advised us to purchase, printed schedule line-up cards that included Sunshine's service, and told our customers that we would be offering Sunshine's service beginning on April 1.

Late on the afternoon of March 31, the day before the service was to commence, Mr. Mark Windus of Coastal's Ft. Pierce office received a conference call from two attorneys representing Sunshine and two officials of the network. The crux of the call was that Sunshine would not provide the service because of an "exclusivity" provision in Sunshine's contract with a wired cable competitor whom, we believe, serves the same market as we serve in Ft. Pierce, Florida.

We believed, based on all of the information available to us, that all of the statements made in our reply comments were true at the time that they were made. We have since learned that Sunshine does purport to offer access to its programming to wireless operators, and, in fact, Sunshine continues to indicate to us that it wishes to provide its programming to us and will do so if the FCC preempts, in the above-captioned rulemaking proceeding, exclusive contract provisions. Nevertheless, for whatever reason, we still are unable to purchase Sunshine's programming today.

It is appropriate that this issue would arise in the course of this particular docket, in which the Commission is to address the anti-competitive effects of exclusive contracts.

(continued...)

Indeed, one would be hard-pressed to find a better example of how such contracts restrict competition. Furthermore, it should be apparent from this episode that merely purporting to offer services to all video providers is of little practical consequence in the face of exclusive contracts. We, as a competitor to cable, are left in the same position via the exclusivity provision in an existing contract that we would have been in had there been an outright refusal to sell.

We have had and still have an interest in transmitting Sunshine's programming. We wish to do business with Sunshine and not be adversaries with them or any other company. We hope that their response to our statement in our reply comments in Docket 92-265 indicates a willingness to offer all video providers their service on a fair, non-discriminatory, and non-exclusive basis. Also, based upon their statements to us, we believe that Sunshine fully intends to make its programming available to Coastal, but believes it must wait until the text of the FCC rules have been issued and are made effective.²

Attached hereto as an exhibit is a copy of Mr. Braverman's letter to our office on behalf of Sunshine Network. This letter is self explanatory. We have been advised that Sunshine requested that the wired cable competitor release or waive the exclusive contract provision in the contract between the two companies and that the wired cable competitor refused to release the exclusive contract provision. Importantly, this situation speaks volumes about the need for the Commission to preempt exclusive contract provisions in existing contracts and prohibit such clauses in future contracts. Moreover, we believe that the Commission should clarify that exclusive contracts were prohibited by The Cable Television Consumer Protection and Competition Act of 1992 which became effective in early December 1992.

We have also enclosed a copy of our initial comments to the FCC in the above docket. The positions advanced therein regarding preempting exclusive contract provisions should be reviewed again in light of the current situation with Sunshine and

² Coastal believes that exclusive contracts were prohibited by Section 19 of The Cable Television Consumer Protection and Competition Act of 1992 which became effective on December 4, 1992 and that therefore Sunshine does not need to wait until the FCC rules are issued to avoid an exclusive contract provision and make its programming available to Coastal.

(continued...)

Federal Communications Commission
April 16, 1993
Page 4

the adverse impact on competition which results from exclusive contract provisions.

If you have any questions about this matter, please contact the undersigned.

Sincerely,

**WJB-TV FT. PIERCE LIMITED PARTNERSHIP
d/b/a COASTAL WIRELESS CABLE TELEVISION**

BY: *Kenneth E. Hall*
Kenneth E. Hall
General Manager

KEH/jpd
Enclosures

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COLE RAYWID BRAVERMAN

F-776 T-266 P-002

MAR 31 '93 17:17

COLE, RAYWID & BRAVERMAN

ATTORNEYS AT LAW

SECOND FLOOR

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WASHINGTON, D. C. 20006-3458

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March 31, 1993

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 THERESA A. ZETTERBERG
 STEPHEN L. KADLER
 JOHN DAVIDSON THOMAS
 TIMOTHY R. FURR
 MARIA T. BROWNE
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ALAN RAYWID
(1930-1991)

CABLE ADDRESS
"CRAB"

TELECOPIER
(202) 482-0067

COLE RAYWID BRAVERMAN

F-776 T-266 P-003

MAR 31 '93 17:17

COLE, RAYWID & BRAVERMAN

We thank you for your cooperation and patience in this matter.

Sincerely,

Burt A. Braverman

Burt A. Braverman

cc: David Gluck, Esquire
Mr. David Almstead

Before the
FEDERAL COMMUNICATIONS COMMISSION

Washington, DC 20554

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APR 19 1993

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In the Matter of)
)
Implementation of Sections 12 and)
19 of the Cable Television)
Protection and Competition Act)
of 1992)
)
Development of Competition and)
Diversity in Video Programming)
Distribution and Carriage)
)

MM Docket No. 92-265

**COMMENTS OF WJB-TV
FT. PIERCE LIMITED PARTNERSHIP**

**Kenneth E. Hall
General Manager
8423 South U.S. #1
Port St. Lucie, FL 34985
(407) 871-1688**

January 25, 1993

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OFFICE OF THE SECRETARY

Before the
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Washington, DC 20554

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of 1992)
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Development of Competition and)
Diversity in Video Programming)
Distribution and Carriage)
)

MM Docket No. 92-265

COMMENTS OF WJB-TV FT. PIERCE LIMITED PARTNERSHIP

1 In its Notice of Proposed Rulemaking ("Notice") in MM
2 Docket No. 92-265 released December 24, 1992, the Commission
3 requested comments on a variety of issues relating to the
4 relationships between video programming distributors and the
5 vendors of the programming that they distribute. WJB-TV Ft. Pierce
6 Limited Partnership ("WJB") hereby files its initial comments in
7 response to the Notice.

8 WJB is the operator of a wireless cable television system
9 in Ft. Pierce, Florida. Although it has been in operation for less
10 than a year, the system already has over 3,000 customers. Like
11 many wireless cable operators, it competes for the majority of its
12 subscribers with an entrenched cable operator which has served the
13 area for many years.

14 WJB's experience indicates that in order for an
15 alternative provider of video services to compete with an

1 entrenched cable system, it must offer substantially all of the
2 channels of programming that viewers desire to watch; the inability
3 or failure to provide even a few "key" channels can be harmful to
4 a competitive effort. This is especially true in the wireless
5 cable industry, where limited spectrum allocation restricts the
6 number of channels that can be offered; with fewer available
7 channels, those that are offered must be the most desirable ones.

8 In most cases, the entrenched cable system and its
9 competitor desire to carry the same channels. To the extent that
10 the two systems are able to carry the same programming under the
11 same terms and conditions, they can compete on a level playing
12 field. This situation ensures that consumers enjoy all of the
13 benefits of a competitive market.

14 Unfortunately, the playing field for alternative video
15 providers is not always level. In many instances, alternative
16 providers such as WJB are simply refused access to the most
17 desirable programming. In other cases, the services are offered,
18 but under prices, terms and conditions that are much less favorable
19 than those offered to cable companies. There situations
20 substantially impede the ability of alternative providers such as
21 WJB to compete in the marketplace and deny consumers the benefits
22 of this competition. Consequently, the situations outlined above
23 illustrate the need for Sections 12 and 19 of the Cable Television
24 Consumer Protection and Competition Act of 1992 (the "1992 Cable
25 Act") and for this proceeding.

1 **I. INTRODUCTION**

2 The Notice asks for comments on a large number of issues.
3 In the interests of time and space, WJB will limit its initial
4 comments to certain key issues that are the most pressing to its
5 interests. It reserves the right, however, to respond to
6 additional issues, if necessary, in its reply comments.

7
8 **II. PROGRAMMING ACCESS**

9 Section 19 of the 1992 Cable Act added an important new
10 provision to the Communications Act of 1934, namely, Section 628.
11 This provision, contained in part (b) to the section, provides:

12 "It shall be unlawful for a cable operator, a satellite
13 cable programming vendor in which a cable operator has an
14 attributable interest, or a satellite broadcast
15 programming vendor to engage in unfair methods of
16 competition or unfair or deceptive acts or practices, the
17 purpose or effect of which is to hinder significantly or
18 to prevent any multichannel video programming distributor
19 from providing satellite cable programming or satellite
20 broadcast programming to subscribers or consumers.

21
22 The Notice asks for comments on a variety of issues regarding this
23 provision. WJB will address in order those matters on which it
24 wishes to comment.

25
26 **A. Congressional Intent**

27 The Notice first asks for comments regarding a "correct
28 understanding of the Congressional objectives of the new Section."
29 See Paragraph 6 of the Notice. This is a critical issue;
30 understanding the purpose and objective of Section 628 is critical

1 to understanding and interpreting all of the other issues addressed
2 in the Notice.

3 In this regard, Section 628(a) provides:

4 The purpose of this section is to promote the public
5 interest, convenience and necessity by increasing
6 competition and diversity in the multichannel video
7 programming market, to increase the availability of
8 satellite cable programming and satellite broadcast
9 programming to persons in rural and other areas not
10 currently able to receive such programming, and to spur
11 the development of communication technologies.
12

13 The very first articulated purpose of Section 19 is to
14 promote competition in the video marketplace.¹ Indeed, this is one
15 of the principal purposes of the 1992 Cable Act. See Section 2(b)
16 of the 1992 Cable Act. The word "competition" is even included in
17 the name of the new law, the "Cable Competition and Consumer
18 Protection Act of 1992." Therefore, in interpreting Section 628,
19 it is important to bear in mind that one of the overriding
20 objectives of this section and the 1992 Cable Act in general is to
21 promote competition.

22 The Notice asserts that common ownership of cable systems
23 and programming suppliers can produce some limited benefit to the
24 public, such as by encouraging cable operators to invest in
25 programmers. See Paragraph 7 of the Notice. However, in WJB's
26 experience, cable ownership of program vendors has in some cases
27 resulted in exclusive contracts, discriminatory terms, and other

28 ¹ The other articulated objectives of Section 628, to "increase
29 the availability of ... programming to persons in rural areas not

1 anti-competitive activities. These actions impede the ability of
2 alternative providers to compete with cable. When desired channels
3 are only available on one system, customers have no choice but to
4 procure their video services from that system. Under these
5 circumstances, realistic competition is severely restricted. This
6 is clearly inconsistent with Section 628 and the 1992 Cable Act,
7 which seek to promote competition. Thus, whatever public benefits
8 may arise from common ownership of cable and programmers, this
9 situation, if not carefully regulated, may also produce the
10 undesired result of diminishing competition and consumer choice in
11 the marketplace.

12
13 **B. Scope of Section 628**

14 The Notice also asks for comments as to whether the
15 protections of Section 628 should be limited to those situations in
16 which a cable operator is "vertically integrated" with the
17 programmer at issue. A fair reading of Section 628 indicates that
18 Congress did not limit Section 628 to vertically integrated cable
19 operators.

20 Section 628(b) clearly states that its prohibitions apply
21 to three groups, specifically:

- 22 1. cable operators
- 23 2. satellite cable programming vendors in which a
24 cable operator has an attributable interest
- 25 26 3. satellite broadcast programming vendors

27 Clearly, nothing in this section requires a cable
28 operator to be "vertically integrated" in order to be subject to

1 its coverage. Such a reading is wholly inconsistent with the
2 Congressional objectives of both Section 628 and the 1992 Cable
3 Act, including the promotion of competition. Congress intended to
4 remove all artificial and unnecessary restrictions on competition
5 in the video marketplace, without regard to whether the offending
6 conduct resulted from "vertical integration". In this sense, both
7 vertically-integrated and non-integrated firms should be expected
8 to function the same (See Paragraph 8 of the Notice); neither
9 should be allowed to unduly restrict competition in violation of
10 the clear Congressional objectives of the 1992 Cable Act.

11 The Notice recognizes that Sections 628(c)(2)(A), (B),
12 (C), and (D) refer to situations in which the cable operator and
13 the programmer are affiliated. However, these provisions are not
14 intended to be exhaustive of the conduct prohibited by subsection
15 (b); they simply provide examples of some of the types of conduct
16 that are to be covered by regulations. This interpretation is
17 clear from the title to subsection (c), "Minimum Contents of
18 Regulations." From the plain language of Subsection (b), it is
19 apparent that Section 628 is to be read broadly to reach all cable
20 operators.

21 WJB agrees with the Notice that all "satellite broadcast
22 programming vendors", regardless of affiliation, were meant to be
23 included within the coverage of Section 628. Id. As the Notice
24 states, subsection (b) does not require an "attributable interest"
25 when referring to those vendors. This same logic applies to cable
26 operators; as with satellite broadcast programming vendors, nothing

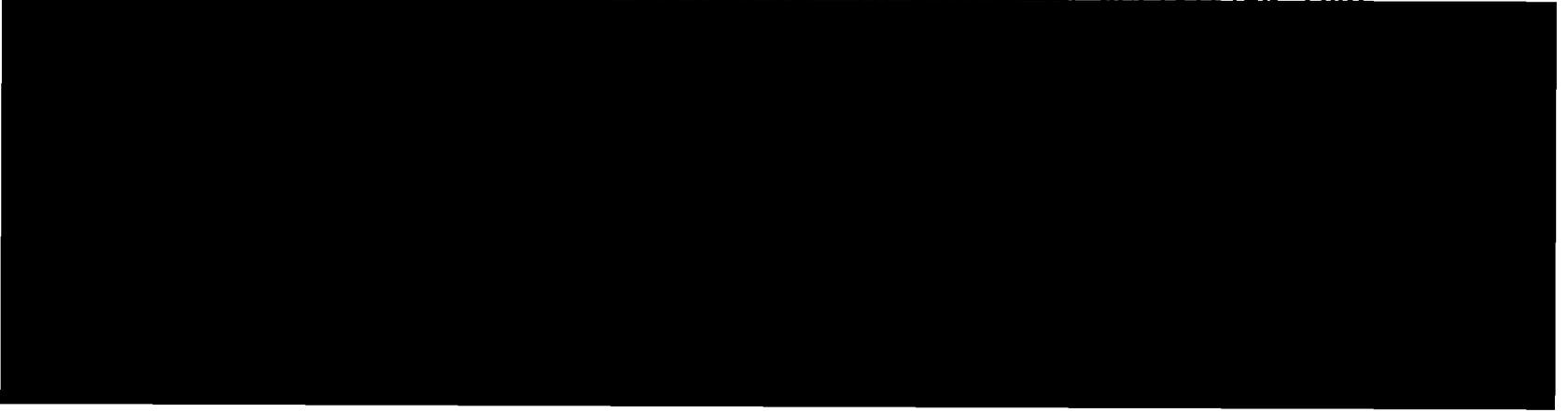
1 in Section 628 requires that cable operators have an "attributable
2 interest" in any other entity in order for the prohibitions of the
3 section to apply with full force.
4

5 **C. Attributable Ownership Interest**

6 The Notice proposes to establish a five-percent threshold
7 for determining if an entity is vertically integrated. See
8 Paragraph 9 of the Notice. It then asks whether "an attribution
9 benchmark by itself [will] be sufficient to determine whether an
10 entity actually controls another entity, or should the Commission
11 establish behavioral guidelines to determine control irrespective
12 of the attribution threshold?" It is on this question that WJB
13 wishes to comment.

14 WJB believes that Section 628 was intended to reach
15 "unfair methods of competition" and "unfair or deceptive acts or
16 practices" by any cable operator or vendor, not just those who
17 share a certain percentage of ownership. Again, since one of the
18 primary objectives of both Section 628 and the 1992 Cable Act is to
19 promote competition, contrary activities by any party should be
20 prohibited.

21 WJB recognizes that cable companies and vendors that are
22 jointly owned are the most likely to engage in anti-competitive
23 activities. It is obvious that these parties will have the
24 ability and often the motivation to engage in activities that



1 It is also possible that cable companies, regardless of
2 their ownership interests, can unduly influence a vendor's
3 marketing decisions. Congress has recognized that the cable
4 industry has become highly concentrated. See Section 2(a)(4) of
5 the 1992 Cable Act. Consequently, a few companies now own a large
6 percentage of all of the cable systems throughout the country. As
7 a result, these companies have acquired a large degree of market
8 power, leverage, and influence, based largely upon their size and
9 status. Even if these companies do not actually own a vendor, they
10 may have the power to influence its decisions. For this reason,
11 any definition of any "attributable interest" should take into
12 account the amount of influence, leverage, or control that an
13 operator may possess over a vendor, regardless of its ownership
14 interests.

15
16 **D. Prohibited Conduct**

17 The Notice also asks for comments on the types of
18 practices which are to be prohibited under 628. Unfortunately, it
19 appears to read Section 628 as applying only to conduct that is
20 either "unfair", "deceptive" or "discriminatory," and then only
21 when "the purpose or effect ... is to hinder significantly or to
22 prevent" the distributor from providing programming to consumers.
23 WJB disagrees with this interpretation of Section 628.

24 WJB believes that Section 628, by its express language,
25 applies to two types of conduct, specifically:

- 26 1. "unfair methods of competition"

1 2. "unfair or deceptive acts or practices, the purpose
2 or effect of which is to hinder significantly or to
3 prevent any multichannel video programming
4 distributor from providing satellite cable
5 programming or satellite broadcast programming to
6 subscribers or consumers."

7
8 This interpretation is significant because in the case of
9 unfair competition, it does not require the showing of any
10 "purpose" or "effect." If a tactic is unfair and anti-competitive,
11 it is prohibited. If it is "unfair" or "deceptive" but not anti-
12 competitive, the additional showing is required. This
13 interpretation is not only logical, but it is wholly consistent
14 with the objective of Section 628, that of promoting competition.
15 If a practice hinders competition, it should be prohibited.

16 WJB is especially concerned about the efforts of "unfair
17 methods of competition." For instance, it is aware that a local
18 school board which holds an ITFS license recently issued a Request
19 for Proposal to interested parties regarding the use of its
20 channels. The local cable company responded by offering a generous
21 package that included allowing the School Board to retain exclusive
22 use of the channels, seven days a week, twenty-four hours per day.
23 While the cable company may be a generous benefactor to the local
24 educational community, one cannot ignore the fact that by denying
25 the use of those channels to a wireless operator, the company can
26 diffuse its only source of competition in the market.² Certainly,

27 ² Admittedly, this practice is probably not permitted under the
28 regulations and Orders of the Commission pertaining to ITFS usage.
29 Nevertheless, it is illustrative of the types of activities that
30 inhibit competition and need to be addressed by the Commission.

1 actions of this type are inconsistent with the policies of the 1992
2 Cable Act inasmuch as such actions harm competition.

3 The Notice also asks for comment on the "precise showing
4 of harm" that should be required under this Section. WJB notes
5 that the statute does not require that harm actually occur;
6 instead, it refers to conduct which has the "purpose" of hindering
7 competition, as well as that which has the "effect" of doing so.
8 Thus, even if no harm arises, conduct which is intended or designed
9 (i.e., has the "purpose") to hinder competition is prohibited by
10 the plain language of Section 628. A showing of actual harm is not
11 required.

12 The Notice also asks whether the prohibited conduct

1 "restrains" a video provider from providing programming to
2 customers. See footnote 26. WJB notes that Section 628(b) does
3 not actually require a restraint; a showing that an activity
4 "hinders significantly" a programmer's ability to provide
5 programming is sufficient.

6
7 **E. Promulgation of Regulation Under Section 628**

8 Section 628(c)(1) directs the Commission to promulgate
9 regulations for the purpose of "increasing competition and
10 diversity in the multichannel video market and the continuing
11 development of communications technologies." Section 628(c)(2)
12 then provides several obvious examples of the types of activities
13 that Congress intended to curtail.

14 The Notice asks whether Congress intended for the
15 Commission to regulate any activities beyond those specifically
16 identified in Section 628(c). See footnote 32 to the Notice. The
17 answer is yes. First, Section 628(c)(2) is entitled "Minimum
18 Contents of Regulations"; the use of the word "minimum" indicates
19 that the examples provided were not intended by Congress to be an
20 exhaustive listing. Furthermore, the language of Section 628(b)
21 specifically makes references to "cable operators" and "unfair
22 methods of competition", clearly covering conduct beyond those
23 cited as examples in Section 628(c).

24 The Notice also asks for guidance in enacting regulations
25 as to the specific conduct identified in Section 628(c)(2). See
26 Paragraph 13 to the Notice. Again, emphasizing that those

1 regulations are not exhaustive of the types of conduct prohibited
2 by Section 628, WJB submits the following comments.

3
4 1. Undue Influence

5 Section 628(c)(2)(A) requires the Commission to issue
6 regulations that would prohibit cable operators from "unduly or
7 improperly influencing" the decisions of an affiliated vendor to
8 sell to an unaffiliated distributor. The Notice requests comment
9 on the definition of "undue influence" and on how to distinguish "a
10 cable operator's influence from a program vendor's independent
11 conduct." See Paragraph 14 of the Notice.

12 WJB believes that program vendors are rational business
13 people who, in a free and competitive market, would seek to
14 increase their sales volumes and maximize their profits whenever
15 possible. Assuming that an affiliated and an unaffiliated
16 programmer are alike in all other respects (i.e., creditworthiness,
17 system size, geographic location, etc.), there is no reason that a
18 vendor should or would discriminate between them. Even where minor
19 differences in the purchasers exist and such differences affect the
20 cost or risk of the transaction to the vendor, any price
21 differential should be reasonable and explainable. In
22 circumstances where this is not the case, an inference of improper
23 influence should arise.

24 The burden of demonstrating improper influence should not
25 be placed on the unaffiliated distributor. The distributor,
26 because he is unaffiliated, will not generally know the alleged

1 justification for the differential; at best, all that he will know
2 is that he is being charged a price higher than that charged to his
3 competition. Once he demonstrates that a differential exists (or
4 reasonable grounds for believing that a differential exists), the
5 burden should shift to the vendor to demonstrate that no "undue
6 influence" exists. Again, the vendor is the only party that will
7 be privy to that information.

8 9 2. Discrimination

10 The same problem exists under the "discrimination,"
11 standard in Section 628(c)(2)(B), for which the Notice also
12 solicits comments. An unaffiliated distributor simply will not
13 know the alleged justification for any differential, much less
14 whether "discrimination" exists. It is therefore impossible for it
15 to make a prima facie case and unfair for it to be required to do
16 so. See Paragraph 16 of the Notice. Instead, the distributor
17 should only be required to demonstrate that a differential exists
18 (or reasonable grounds for so believing); the burden of justifying
19 the differential should rest with the vendor, presumably the only
20 party that can explain the rationale for the differential.

21 The Notice proposes a two-step evaluation for evaluating
22 such claims, first focusing on whether the conduct is
23 "discriminatory" and then assessing whether it has "prevented or
24 hindered" competition. See Paragraph 16 of the Notice. Again, WJB
25 asserts that the second step, the requirement of actual harm, is
26 not required by the statute; Section 628(b) only requires that the

1 conduct have either the "purpose" or the "effect" of hindering
2 competition. If a discriminatory purpose is present, the actual
3 result is irrelevant.

4 Section 628 does allow vendors to maintain price
5 differentials for certain specified legitimate reasons. The Notice
6 seeks comment on this provision. See Paragraph 17 of the Notice.

7 WJB agrees that volume discounts, actual cost savings in
8 distribution and other legitimate and identifiable factors should
9 justify modest price differentials. However, WJB is concerned as
10 to how these factors might be interpreted by vendors, and thus
11 urges the Commission to carefully monitor this issue. For example,
12 might a vendor consider a cable operator more "creditworthy" than
13 a competitor merely because it has been in operation for a longer
14 period of time? If so, then this Section may be of little utility
15 to alternative video providers and to the objective of promoting
16 competition in the marketplace.

17 The Notice also asks whether the Commission can allow
18 discriminatory practices on the grounds that non-affiliated
19 programmers engage in the same practices. See Paragraph 25 of the
20 Notice. WJB vehemently disagrees with this proposal. First, WJB
21 does not believe that subsection (b) permits non-affiliated
22 entities to engage in unfair and discriminatory practices. In any
23 event, one of the primary purposes of Section 628 is to promote
24 competition. To allow one entity to undercut this objective merely
25 because another entity also does it is completely inconsistent with
26 this objective.

1 The Notice tentatively concludes that this regulation
2 should not be applied retroactively to existing contracts. See
3 Paragraph 27 of the Notice. Again, WJB disagrees with this
4 approach. Understandably, the Commission is reluctant to interfere
5 with existing contracts. As the Notice states, however, a
6 prospective approach may not achieve the results Congress