(A) the effect of such exclusive contract on the development of competition in local and national multichannel video programming distribution markets;
(B) the effect of such exclusive contract on competition from multichannel video programming distribution technologies other than cable;
(C) the effect of such exclusive contract on the attraction of capital investment in the production and distribution of new satellite cable programming;
(D) the effect of such exclusive contract on diversity of programming in the multichannel video programming distribution market; and
(E) the duration of the exclusive contract.

63. We note that exclusivity under this provision is not prohibited. As a general matter, the public interest in exclusivity in the sale of entertainment programming is widely recognized. Indeed, elsewhere in the 1992 Cable Act, in the context of the broadcast station-cable system relationship, specific steps have been taken to protect exclusive rights. In the unique situation presented here, however, it is clear that exclusivity is not favored. Congress has clearly placed a higher value on new competitive entry than on the continuation of exclusive distribution practices that impede this entry. In its 1990 Cable Report, the Commission itself articulated this balance as follows: "While we agree with the cable commenters that the Commission should and does generally support exclusivity rights, we believe that the public interest in developing competition to the local cable operator justifies temporary, limited and targeted intervention to ensure that alternative multichannel program providers have fair and equitable access to programming."[77] Moreover, as stated by one of the authors of Section 628, "exclusive programming that is not designed to kill the competition is still permitted." (emphasis added)[78] Cable systems have generally developed without effective competition and it is recognized that if "facilities-based"[79] competition is to develop, access to programming is an essential prerequisite. We thus believe and find it entirely consistent with the objectives of the Act that, while exclusivity may be shown to be in the public interest in certain circumstances, the burden must be on the party seeking exclusivity to demonstrate persuasively that it is justified.

64. Public Interest Standard. As for the appropriate standard to be

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[77] 1990 Cable Report, 5 FCC Rcd at 5031.

[78] Congressional Record, July 23, 1992 at 6534 (Statement of Representative Tauzin).

[79] "Facilities-based competition" is a term used in the legislative history of the Act to emphasize that program competition can only become possible if alternative facilities to deliver programming to subscribers are first created. The focus in the 1992 Cable Act is on assuring that facilities-based competition develops. See, e.g., Conference Report at 93 ("The conferees intend that the Commission shall encourage arrangements which promote the development of new technologies providing facilities-based competition to cable ....").

applied when making this public interest determination, we do not believe that it is necessary or consistent with the statutory language to articulate a single standard in this proceeding that can govern the public interest assessment generally. We note that the §628(c)(4) factors are sufficiently broad to incorporate many of the proposed standards that have been suggested. However, we believe, at least at the outset, that it is more consistent with the statute to require individual, case-by-case determinations using the five statutory criteria specified. This flexible approach will permit us to evaluate and weigh each factor within a specific fact situation. We emphasize, moreover, that we believe that the statute requires that the burden be placed on the proponent of exclusivity to demonstrate that exclusivity is in the public interest.

65. Many commenters urged us to particularize in advance, by rule if possible, specific situations in which it could be established that an exclusive contract would be in the public interest. For example, many commenters argue that exclusivity is essential for the development, promotion and launch of new programming services. One commenter suggests that exclusivity should be prohibited only if it deprives an MVPD of a vital program service necessary to its competitive survival;[80] another suggests that exclusivity should be permitted if "substitute" programming is available;[81] another suggests that a party seeking to enforce cable-only exclusivity must make a positive showing that such exclusivity will not preclude effective competition.[82] Particularly with respect to new programming, we recognize that there may well be circumstances in which exclusivity could be shown to meet the public interest test, especially when the launch of local origination programming is involved that may rely heavily on exclusivity to generate financial support due to its more limited appeal to a specific regional market.[83] The record is insufficient, however, on this point, or with respect to the other suggestions received, to support a general finding or to identify appropriate general limitations on, for example, such factors as the permissible duration of exclusivity.[84] Thus, we will handle such exclusivity proposals on a case-by-case basis in order to tailor the scope of any specific

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[80] TCI at 28.

[81] Discovery at 26-27.

[82] Attorneys General at 13.

[83] For example, it is possible that local or regional news channels could be economically infeasible absent an exclusivity agreement.

[84] For example, the record reflects wide disagreement on the appropriate duration of such exclusivity, with proposals ranging from two to seven years, ten years, and even longer. None of the commenters expressing a view, however, supports its proposal with any empirical evidence or concrete support to justify its conclusion. While we sought comment on whether any additional considerations were relevant to the public interest determination, the commenters did not suggest anything that is not already well within the scope of the statutory factors.

exclusivity terms granted to ensure compliance with the statutory public interest standard.

66. Approval of Contracts. We proposed in the Notice, for administrative reasons, to enforce Section 628(c)(2)(D) solely through the complaint process.[85] After reviewing the record, however, we no longer believe that such an approach would be consistent with the objectives of the Act. Section 628(c)(2)(D) states on its face that exclusive contracts in served areas are prohibited unless the Commission finds that exclusivity is in the public interest. Thus, as many commenters observed, the statute itself requires that the Commission make an affirmative finding that a specific exclusive contract meets the statutory public interest standard before the contract can be enforced.

67. Thus, we will require any vertically integrated programmer or any cable operator seeking to execute an exclusive contract to seek and obtain our public interest judgment before doing so. This may be accomplished through the submission of a petition containing those portions of the programming contract relevant to exclusivity to the Commission for approval, along with a statement setting forth the petitioner's reasons that support a finding that the contract meets the public interest test that addresses each of the five criteria outlined in Section 628(c)(4).[86] The petition will be placed on public notice for 30 days, and any MVPD that actually or potentially competes with the cable operator may file an opposition,[87] arguing that under the statutory criteria, exclusivity in this case is not in the public interest.[88] If a formal opposition is filed, the ex parte rules governing restricted proceedings will

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[85] See Notice at 202.

[86] The portions of the contract that we consider relevant to exclusivity would include any description of the programming service, the extent and duration of exclusivity, and any other terms or provisions directly related to exclusivity or that would support the public interest finding with respect to any of the factors set forth in Section 628(c)(4).

[87] In view of the underlying purpose of Section 628 -- to promote a competitive multichannel video marketplace -- we believe parties with sufficient standing to challenge an exclusive arrangement will be those alternative distributors that provide actual or potential competition in any area covered by the program contract. A similar analysis will be applied when evaluating discrimination complaints. See discussion of complaint process for discrimination, infra.

[88] To determine whether a challenging MVPD actually or potentially competes with the cable operator in question, we will employ the same competition standard used for purposes of discrimination complaints. See discussion of complaint process for discrimination, infra. If, however, a programming vendor seeks a general ruling in favor of exclusivity (i.e., for development and launch of a new programming service) and does not specifically identify markets in its petition for which exclusivity is sought, then any MVPD will be considered to be a "potential" competitor entitled to challenge the petition.

be applied.[89] The petitioner will have ten days to respond, and the Commission will rule on the petition.[90] If the Commission determines that the petitioner has appropriately addressed the statutory criteria and made a persuasive public interest showing, it will issue an order granting the petition and approving the contract. Until any order is issued granting the petition, the exclusivity may not be enforced.

C. Issues Applicable to Both Served and Unserved Areas

68. One area of concern referenced in our Notice that is applicable to exclusive contracts for served and unserved areas alike relates to so-called subdistribution agreements. While one commenter argued the benefits and efficiencies of subdistribution agreements,[91] as we noted in our 1990 Cable Report, we are concerned that a distributor's access to programming may be impaired through the use of such agreements.[92] We note that granting subdistribution rights can be a legitimate practice for a programming vendor, but we believe that we must address any incentives for a subdistributor to refuse to sell to a competing MVPD that may be inherent in such rights. Thus, we will adopt appropriate safeguards to limit the potential for anticompetitive behavior. In particular, we will prohibit specific terms in subdistribution agreements, as suggested by the commenters, that we believe are unreasonably restrictive or are not adequately related to the subdistribution itself.[93]

69. Thus, our rules will prohibit a subdistributor from tying programming rights to other, unrelated, programming. We will also prohibit a subdistributor from requiring an MVPD to provide access to private property in conjunction with receiving access to programming. In addition, a subdistributor may not charge more for programming than the vendor itself would have been permitted to charge under the anti-discrimination provisions we also adopt today. Finally, a subdistributor will be required to respond to a request for programming within 15 days of the request. If the subdistributor refuses to sell to an MVPD, the MVPD must be able to negotiate directly with the vendor.

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[89] See 47 C.F.R. §§ 1.1200-1.1204, 1.1208.

[90] The burden of proof in this process remains on the party seeking approval of an exclusive arrangement.

[91] See Time Warner at 38-40.

[92] See 1990 Cable Report, 5 FCC Rcd at 5021. Such subdistribution agreements are generally between a programming vendor and a franchised cable operator, through which a MVPD competitor is required to purchase the vendor's programming from the franchised operator because the vendor had sold it the subdistribution rights related to its franchise area.

[93] See, e.g., NPCA at 19-20. We note that, pursuant to the requirements of Section 628(c)(2)(C), these restrictions apply only to subdistribution agreements between vertically integrated satellite cable and satellite broadcast programming vendors and cable operators.

70. With respect to time-delay requirements,[94] we disagree with those commenters who argue that they should be prohibited outright.[95] So long as such arrangements are available at the voluntary option of the MVPD regarding its own purchase and use of programming and do not become a de facto substitute for any impermissible exclusivity, we believe that they may legitimately be used to enable programming to be distributed to more viewers through additional MVPDs. If, for example, an MVPD does not want to pay the premium price for particular programming that its competitor has paid, but would rather negotiate a lower price in exchange for a reasonable time-delay limitation, we see no reason to prohibit such a transaction.[96]

D. Complaint and Enforcement Procedures

1. In General

71. Section 628(d) provides that any MVPD aggrieved by conduct it alleges to violate Sections 628(b) or (c) may commence an adjudicatory proceeding at the Commission. We thus proposed in the Notice to establish a single complaint process to govern any complaint brought under Section 628. Several commenters support the use of a complaint process derived from the Section 208 common carrier and Section 315(b) lowest unit charge complaint processes, with alternative dispute resolution (ADR) available on a voluntary basis. In addition, the commenters address the development of complaint procedures at length, offering proposals that vary widely with respect to the degree of complexity of the proceeding and the number and types of pleadings that should be allowed.[97]

72. Given the complexity of the issues involved in each type of behavior addressed by Section 628, we believe that the best approach is to describe the enforcement procedures individually, following the substantive discussion of each practice governed by this Report. Thus, we will establish herein complaint procedures for MVPDs aggrieved by alleged violations of the regulations we have set forth to implement the statutory prohibitions against exclusivity. The appropriate procedures for discrimination, undue influence and unfair practices complaints will be discussed in the relevant section below. There are, however, issues that apply generally to all complaint cases filed under Section 628.

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[94] A time-delay requirement is a requirement that a particular distributor cannot air certain programming until a specified time after it has been aired by another distributor.

[95] See, e.g., CCWCO at 4.

[96] See, e.g., Discovery at 28.

[97] In general, cable commenters suggest a more complex process with a full complement of pleadings that more closely resembles civil litigation. In contrast, alternative multichannel program distributors tend to favor a simpler process with limited pleadings that will be resolved expeditiously.

73. First, we have determined that the record does not support either the establishment of any general criteria that can be used to standardize or abbreviate our analysis of whether a complainant has made a prima facie case, or the use of any sales volume or penetration benchmarks.[98] Second, the ex parte rules governing restricted proceedings will apply to any proceeding initiated by a complainant alleging a violation of any provision of the program access rules.[99] Third, with respect to appropriate remedies, the statute provides a broad grant of authority to the Commission to fashion remedies for Section 628 violations that include all remedies available under Title V of the Communications Act, as well as the ability to establish prices, terms and conditions for the sale of programming to aggrieved multichannel distributors.[100] Thus, we believe that the only practical approach is to develop remedies on a case-by-case basis, in the context of specific facts.

74. In addition, in order to file a complaint under any provision of Section 628, we will require that the complainant first notify the vendor or cable operator of its belief that a violation of our rules has occurred, providing sufficient specificity so that the vendor or cable operator can determine the precise nature of the dispute. If the parties cannot resolve the dispute, the complainant may file a complaint with the Commission along with evidence (an affidavit or copy of a certified letter) that the required notice has been given.[101] Failure to include such evidence shall result in immediate dismissal of the complaint.

75. Similarly, we seek to dispose of as many complaint cases as possible on the basis of a complaint, answer and reply. Discovery will not be permitted as a matter of right, but on a case-by-case basis as deemed necessary by the Commission staff reviewing the complaint. We will require that any complaint

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[98] These proposals were discussed in the Notice, and received little support from the commenters. See Notice at 202. For example, Cable America maintains that considerations such as the penetration level of particular programming is inappropriate if used to justify a vendor in discriminating against one particular distributor as long as it did not discriminate against all distributors. CableAmerica at 41. In addition, Superstar and UVI believe that it is impossible to set effective benchmarks accurately reflecting the vast differences in business operations of the various programming vendors and the very different markets they serve, especially since many technical factors can affect penetration levels. See Superstar at 66; UVI at 39.

[99] See 47 C.F.R. §§ 1.1200-1.1204, 1.1208.

[100] See Section 628(e) of the 1992 Cable Act.

[101] At this time, rather than establishing a specific time period for the parties to attempt to resolve the dispute before an aggrieved MVPD may file a complaint, we will allow the aggrieved MVPD to determine the appropriate duration of negotiations. At a minimum, however, the MVPD must provide the potential defendant ten (10) days to respond to the notice, and allow a reasonable time thereafter for negotiations.

filed pursuant to Section 628 must be filed within one year of the date on which one of the following occurs: (a) the vendor enters into a contract with the complainant, which the complainant alleges to violate Section 628; (b) the vendor offers to sell programming to the complainant pursuant to terms that the complainant alleges to violate Section 628; (c) the complainant notifies a vendor that it intends to file a complaint based on a request to purchase or negotiate to purchase the vendor's programming, or a request to amend an existing contract pertaining to such programming to bring the existing contract into compliance with the new program access requirements adopted herein, that has been denied or unacknowledged allegedly in violation of Section 628.

2. Exclusivity Complaint Cases

76. Complaint. When filing an exclusivity complaint, the burden of proof is on the complainant MVPD to make a *prima facie* showing that it has attempted to obtain programming for distribution into a specified area, and that it has been unable to obtain such programming due to a prohibited exclusive arrangement (either directly or through a subdistribution arrangement that violates our rules) between a vertically integrated programming vendor or satellite broadcast programming vendor and a cable operator. The complaint must identify both the programmer and cable operator who are parties to the alleged prohibited agreement. The complaint must be supported by documentary evidence of the violation, or an affidavit (signed by an officer of the complaining MVPD) setting forth the basis for the complainant's allegations. The complainant must also demonstrate that the relevant vertically integrated programming vendor meets the attribution standards adopted herein. The complainant must also establish that it has attempted to purchase the relevant programming and has been refused or unanswered. In addition, the complainant must establish that it can or does serve the area specified in the complaint, and must provide some evidence, either documentary or an affidavit setting forth the basis for complainant's belief, that the alleged prohibited exclusive arrangement governs such area. Finally, the complaint should specify the relief requested.

77. Answer. The defendant vendor or cable operator will be given thirty (30) days to file an answer refuting the complainant's allegations. If the defendant is the vendor, or a cable operator selling the programming pursuant to a subdistribution agreement, the answer should include the defendant's reasons for refusing to sell the subject programming to the complainant. In addition, the defendant will be permitted to submit its programming contracts, along with a certification that it has submitted or fully described all relevant contracts (written and oral), that relate to the area specified in the complaint. The written contracts will then be subjected to an *in camera* inspection by the Commission and the complainant (pursuant to a protective order) to determine whether they contain provisions relating to exclusivity. If there are no contracts or agreements relating to the specified area between the vendor and cable operator identified in the complaint, the defendant will so certify. The burden will be on the defendant to establish that it does not have prohibited exclusivity arrangements governing the area specified in the complaint.

78. Any contracts or proprietary information submitted by a vendor with its

answer may be submitted pursuant to a request for confidentiality.[102] The complainant will be granted access to any such contracts or proprietary information provided it agrees to abide by the terms of a protective order that limits access to such information and limits the purposes for which any information obtained through the Section 628 complaint process may be used.[103]

79. Reply. The complainant will be given twenty (20) days to file any necessary reply to the arguments and/or defenses contained in the defendant's answer. The complainant will not be permitted to submit new evidence or allegations in its reply. The reply must be limited to responding to the answer to the complaint.

80. Staff Determination. Upon the close of the pleading cycle, Commission

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[102] See Section 0.459 of the Commission's Rules.

[103] The complainant will be required to take reasonable steps to prevent unauthorized access to protected documents and information. Access will be limited to the individual complainant, the attorneys listed with the Commission as the representatives of the complainant, their staffs and any expert advisors or analysts. The complainant is responsible for informing anyone with access to protected information that the documents or information contained therein may not be disclosed to anyone or any entity other than the Commission. The vendor may require the complainant to disclose in writing the names of all persons who have access to documents and written information subject to the protective order. The information contained in any proprietary materials may not be disclosed to any person not authorized to receive such information, and may not be used in any activity or function other than the prosecution or defense of the case before the Commission. Each individual who is provided access to the information by the opposing party shall sign a notarized statement, or shall certify under penalty of perjury, that the individual has personally reviewed the Commission's regulations and understands the limitations they impose upon the signing party. No copies of proprietary materials may be made except copies to be used by authorized persons. Each party will be required to maintain a log recording the number of copies made of all proprietary information and the persons to whom the copies were provided. Upon termination of the proceeding, all originals and reproductions of any proprietary materials, along with the log recording persons who received copies of such materials, will be provided to the producing party. Upon final termination of the proceeding, any notes or other work product derived in whole or in part from the proprietary materials of an opposing or third party shall be destroyed. The parties may agree to additional reasonable measures to protect the confidentiality of information as the circumstances may require. Such agreement should be confirmed in writing and filed with the Commission. Any failure to abide by the terms of the protective order may result in the imposition of sanctions, including dismissal of the complaint, or censure, suspension or disbarment of the attorneys involved. See Section 1.24 of the Commission's Rules.

staff will review the complaint, answer and reply.[104] If the record does not support complainant's allegations that a prohibited exclusive arrangement exists between a vertically integrated programming vendor and a cable operator that governs the specified area to which complainant seeks to deliver the subject programming, the complaint will be dismissed. Thus, if the defendant has submitted its contracts to the Commission and complainant, and such contracts do not include provisions relating to exclusivity, the complainant will not make a prima facie case unless, in its complaint, it has provided other evidence to support its claim that an exclusive arrangement nonetheless exists.

81. If the staff determines that a prohibited exclusive arrangement does exist, it will order relief and impose sanctions as it deems appropriate. With respect to remedies, if we find that a vertically integrated programming vendor has entered into a prohibited exclusive arrangement with any cable operator, we believe that such determination will render the exclusivity unenforceable. Thus, we may order the vendor to make its programming available to the complainant on the same terms and conditions, and at a non-discriminatory rate, as given to the cable operator. In addition, we may impose sanctions available under Title V of the Communications Act. We do not believe, however, that the 1992 Cable Act grants the Commission the authority to assess damages against the programmer or cable operator. In the unusual circumstance that an exclusivity complaint cannot be resolved on the basis of the pleadings, the staff shall have the authority to order any necessary discovery pursuant to the procedures outlined below for discrimination complaints.[105] Interlocutory applications for review shall be permitted only after the staff has ruled on the merits.[106] Either party may file an application for review directly to the Commission of any staff decision on the merits.

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[104] Additional pleadings will not be considered, except in extraordinary circumstances or unless requested by the staff. We intend to keep pleadings to a minimum to comply with the statutory directive for an expedited adjudicatory process.

[105] See discussion of complaint and enforcement procedures regarding price discrimination, infra. Confidential or proprietary information exchanged during discovery will be subject to the same type of protective order discussed above. Finally, extremely complex cases may be referred to an ALJ for an evidentiary hearing. The ALJ's decision on the merits may be appealed directly to the Commission.

[106] With respect to review of interlocutory matters, the procedural rules adopted herein for Section 628 complaints will be modeled after the rules governing interlocutory review in adjudicatory hearings before administrative law judges. See, e.g., 47 C.F.R. §§ 1.291-1.298, 1.301.

VII. PROHIBITIONS AGAINST DISCRIMINATION

Background

82. Section 628(c)(2)(B) requires the Commission to:

> prohibit discrimination by a satellite cable programming vendor in which a cable operator has an attributable interest or by a satellite broadcast programming vendor in the prices, terms, and conditions of sale or delivery of satellite cable programming or satellite broadcast programming among or between cable systems, cable operators, or other multichannel video programming distributors, or their agents or buying groups; except that such a satellite cable programming vendor in which a cable operator has an attributable interest or such a satellite broadcast programming vendor shall not be prohibited from --
>
> (i) imposing reasonable requirements for creditworthiness, offering of service, and financial stability and standards regarding character and technical quality;
> (ii) establishing different prices, terms, and conditions to take into account actual and reasonable differences in the cost of creation, sale, delivery, or transmission of satellite cable programming or satellite broadcast programming;
> (iii) establishing different prices, terms, and conditions which take into account economies of scale, cost savings, or other direct and legitimate economic benefits reasonably attributable to the number of subscribers served by the distributor; or
> (iv) entering into an exclusive contract that is permitted under subparagraph (D).

83. The Notice sought comment on how we should identify discriminatory practices and on whether there are any objective standards that we could use to distinguish prohibited discriminatory behavior -- with respect to pricing or other practices -- from permitted legitimate business behavior that may occur in the marketplace for video programming. We also sought comment on examples of sales practices for certain types of programming that may require a graduated pricing structure in order to facilitate broad distribution of that programming, as well as situations in which a requirement of uniform pricing could reduce the amount of programming available to subscribers. In addition, we sought comment on the appropriate showing that a complainant should have to make when alleging discriminatory conduct, any possible presumptions that we could incorporate to guide our analytical process, and a proposed approach for assessing whether a particular price differential is legitimate under the statute or discriminatory. In particular, we sought comment on how we should apply the factors set forth in the statute that can be used to justify price differentials, the types of data that we should require vendors to submit when relying on these factors to explain a price differential, and any measures that we could employ as proxies for permissible causes of price differentials. We also asked whether the statute permits us to consider other economic factors not mentioned in the statute as legitimate explanations for price differentials, particularly if use of these factors would arguably increase the availability of programming.

84. In distinguishing between justifiable and discriminatory price differences, we sought comment on four options that might be useful in guiding our analysis: (1) developing a specific allowance for a "reasonable" price differential; (2) using principles enunciated in Section 202 of the Communications Act; (3) drawing on antitrust standards; and (4) applying price comparisons used in other regulations, such as the "anti-dumping" analysis used in the context of international trade.[107] In addition, given that Section 628(c)(2)(B) applies to "agents" and "buying groups" of cable systems and other multichannel video distributors, we sought comment on how to define the class of entities covered by this provision, as well as on whether we should establish requirements that such "agents" or "groups" must meet in order to be able to prosecute a complaint under Section 628(c).

Comments

85. In general, most alternative MVPDs advocate Commission regulations that would enable them to establish a prima facie claim of discrimination based on a simple difference in price, terms or conditions for the provision of programming.[108] According to these distributors, the burden would then shift to the programming vendor to justify the different treatment based on costs or the other factors enumerated in the statute. They claim that such burden shifting is appropriate because a complaining distributor will not know the factors that underlie a particular price differential; this information would still remain in the vendor's possession. On the other hand, programming vendors advocate including additional elements as the standard for a prima facie case. For example, some recommend that the Commission require MVPDs to show (1) that any differentials are unjustified;[109] (2) some showing of harm to competition;[110] (3) a loss of specific subscribers to a competitor that received more favorable terms;[111] (4) that the competitor to whom they wish to be compared is a similarly situated entity; or (5) that the services offered are "like" services.[112]

86. Standards Proposed in the Notice. With respect to the proposed standards for identifying discriminatory conduct, some commenters object to using any of the standards, stating that Section 628 provides its own standard that should not be broadened or altered by the Commission.[113] Some commenters

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107 See Notice at 104.

108 See DirecTv at 21, NRTC at 15-16, CATA at 4, WJB at 13.

109 See, e.g., EMI at 4.

110 See, e.g., Viacom at 21-22, NCTA at 8.

111 See Viacom at 21-22.

112 See Liberty Media at 20-21, Superstar at 47; cf. NRTC 26-29.

113 See DirecTv at 20, NRTC Reply at 18.

assert that the Commission could apply any of the options, or some combination thereof, provided that the procompetitive purposes of the Act are fulfilled.[114] Many programming vendors and MSOs specifically support an allowance for a "reasonable" region of price differentials and recommend criteria for establishing its bounds.[115] By contrast, many parties object to allowing a "reasonable" range for price differentials, including: (i) MVPDs arguing that the standard would undermine the statute's intended result of making any price difference presumptively illegal;[116] and (ii) commenters with cable interests that believe the Commission could not set appropriate bounds given the diverse factors that cause price differentials.[117]

87. Several MVPDs and programming vendors support a standard based on Section 202 of the Communications Act, which prohibits discrimination by common carriers,[118] stating that such a standard (i) would most closely apply to multichannel video services, (ii) reflects the provisions of Section 628, and (iii) is familiar to the Commission.[119] Other commenters suggest modifying the Section 202 standard, particularly with respect to the methods the Commission has developed when applying that provision to analyze costs[120] and define

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[114] APPA at 22-25; see also Liberty Media at 42.

[115] For example, Time Warner suggests using three price categories, one for irrebuttably reasonable differences of plus or minus 15%, one for rebuttably reasonable differences and one for rebuttably unreasonable differences. Viacom supports a irrebuttable legal zone of 30% differences. See also TCI at 13, Landmark at 15, NCTA at 22-23, suggesting a region based on the conduct of nonvertically integrated programmers, and IFE at 10, suggesting a benchmark based on a significant percentage difference in subscribers' bills.

[116] See, e.g., DirecTv at 21, NRTC at 19, CableAmerica at 29, Bell Atlantic at 6-7, WCA at 47-48, APPA at 23-24.

[117] See Superstar at 53-54, Liberty Media at 45.

[118] 47 USC Section 202 (a) provides that "it shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with like communication service, directly or indirectly, by any means or device, or to make or give any undue or unreasonable preference or advantage to any particular person, class of persons, or locality, or to subject any particular person, class of persons, or locality to any undue or unreasonable prejudice or disadvantage."

[119] See Nynex at 11-12, Superstar at 56-57, WCA at 39, Bell Atlantic at 6-7, ACC at 9-10, and UVI at 12.

[120] DirecTv at 23.

"like" services.[121] Some parties oppose use of the standard because the Cable Act did not intend to import common carrier concepts into the video programming business;[122] they further claim that the "like" services issue is irrelevant because any form of discrimination is unlawful under Section 628.[123] Most commenters oppose using an antitrust standard to develop program access regulations on the grounds that (i) the Cable Act was intended to provide remedies beyond those available in antitrust cases;[124] (ii) antitrust analysis is related to the sale of goods or commodities and not services; and (iii) antitrust precedents do not readily apply to video programming where one service is not necessarily a substitute for another.[125] Regarding price comparisons used in other statutes, particularly in anti-dumping cases, virtually all parties state that these principles would not easily translate to markets where the allegedly "discriminatory" prices are artificially high rather than too low.[126]

88. Justifications Specified in the Statute. Commenters generally agree that program vendors may justify price differences for programming according to the factors enumerated in the statute. With respect to cost differences, most commenters state that the delivery of programming to certain types of MVPDs does impose greater costs on the vendor, particularly with respect to service to home satellite dish distributors.[127] This assertion is based on the alleged necessity of providing the complete distribution path to each dish owner as opposed to using the facilities of a cable, MMDS or SMATV operator,[128] as well as the higher advertising, customer service, scrambling and copyright costs incurred for HSD service.[129] As a related issue, commenters differ on whether we should permit a vendor to take into account cost differences at the retail level, or those differences in costs incurred by distributors in serving

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121 Id. See also ACC at 9-10, supporting the use of Section 202 with specific definitions of cable, DBS, wireless cable, MMDS and other technologies as "like" services to prevent the argument that certain services are not like.

122 See TCI at 14.

123 See NRTC at 21.

124 See, e.g., DirecTv at 22, WCA at 38-9, NRTC at 22.

125 See Attorneys General at 11.

126 See DirecTv at 22, NRTC at 23, NCTA Reply at 32-33, WCA at 39.

127 See EMI at 3, Superstar at 49, Turner at 10, Liberty Media at 37; cf. NSPN regarding SMATV operators and Souris River regarding HSD distributors.

128 See UVI at 7, Liberty Media at 37.

129 NRTC argues that cost issues will depend on unique facts and should be resolved on an ad hoc basis. See NRTC at 18.

subscribers, when justifying a price difference.[130] With respect to using volume-related factors for justifications, MVPDs stress that the Commission should only permit volume justifications that are applied without regard to the distribution technology.[131] Vendors assert that economies of scale are difficult to measure and urge that the implementing rules include a presumption that, in the absence of evidence that different prices are designed to deny access, negotiated programming prices reflect economic benefits attributable to the number of subscribers served by the distributor.[132] Regarding a vendor's use of price differentials to address concerns about creditworthiness and financial stability, commenters state that such terms should have a generally accepted meaning reflecting the likelihood that the programmer will receive timely payment.[133] Finally, commenters recommend that a variety of contract terms be allowed under the "offering of service" factor, including incentives for penetration to a greater number of subscribers or to individual systems for MSOs;[134] a distributor's commitment to marketing services;[135] the retail price charged to consumers;[136] the risk of supporting a new service;[137] contract duration;[138] and channel positioning or tier.[139] One commenter also cautions that it is difficult to quantify these "offering of service" factors because they vary from vendor to vendor.

89. Buying Groups. With respect to buying groups and agents, most commenters believe that buying groups perform a useful function and should receive the benefits of discounts based on subscriber volume. Programming vendors, however, assert that we should require such groups to agree to unitary

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130 See, e.g., Viacom at 16, Liberty Media at 37, and WCA Reply at 20.

131 See, e.g., ESPN at 5, TCI at 18-19, Small Systems Operators at 9.

132 See, e.g., Superstar at 51. Time Warner and Viacom also argue that volume discounts should not have to reflect specific costs justifications, with Bell Atlantic opposing this perspective.

133 Superstar at 51, Time Warner at 23-27. Viacom also offers statistics showing a greater bad debt problem with MMDS and SMATV operators than with cable customers. People's Cable, on the other hand, describes how some program vendors charged a higher rate and required greater credit guarantees for programming sold to their wireless cable system than to their cable system despite the fact they were both operated by the same company.

134 See Viacom Reply at 7.

135 See Continental at 11-20, Viacom at 41.

136 Id. Peoples Choice at 2, Time Warner at 26.

137 See Liberty Media at 35, Turner at 11, Discovery at 22, Viacom at 18.

138 See DirecTv at 25.

139 See Continental at 11-20.

treatment in order to prosecute a complaint under Section 628(c). In particular, they propose that we adopt requirements mandating agreements for joint and several liability by all members, guarantees for the technical performance and signal security of each member, and joint marketing strategies. NSPN, a buying group for SMATV operators, objects to these conditions, stating that they are unrealistic and unattainable because, for instance, the buying group as the contracting party should be responsible for payment rather than individual members.

90. Complaint Process. With respect to procedural issues, numerous commenters provide specific proposals for the allocation of burdens of proof and what should be required of a complainant to establish a prima facie case of discrimination. For example, SBCA advocates placing the initial burden of proof on the complainant to establish that it has standing, that there is evidence of a differential in price, terms or conditions and that all other requirements of the Act and FCC rules have been met. The defendant would have the opportunity to refute the complainant's allegations. SBCA then suggests that the Commission instruct the parties to negotiate a settlement within 20 days. If no agreement is reached, the complaint would move to adjudication and the burden of proof would shift to the programming vendor to justify the differential shown. If the differential is justified, the burden would shift back on the complainant to show that the proffered justification is either a pretext or is inadequate.[140]

91. DirecTv proposes a similar process, but includes a requirement that the complainant demonstrate in its complaint that it has previously made a bona fide attempt to negotiate with the programmer.[141] DirecTv further contends that a complaint filed under any provision of Section 628 should be deemed sufficient if supported by an affidavit by an officer of the complainant MVPD, and that once the complaint is filed, the burden of proof should shift immediately to the vendor or distributor to show that the allegations in the complaint are untrue.[142] Time Warner contends that any discrimination claim should be supported by an affidavit or other documentation showing that the defendant extended the competitor of the complainant more favorable terms.[143] CableAmerica adds that, in order to make a prima facie case, a complainant must also allege either an anticompetitive purpose, or must show that the alleged behavior prevented or significantly hindered the complainant from providing programming to its customers.[144] CableAmerica agrees, however, that the burden of proof should be on the defendant because it is in a better position to present any justifications for its conduct.[145]

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[140] See SBCA Reply at 8-12.

[141] See DirecTv Reply at 12-15.

[142] Id.

[143] Time Warner at 47. See also CCWCO at 4.

[144] CableAmerica at 41. See also Rainbow at 18, TCI at 39.

92. In contrast, UVI contends that the burden of proof should remain on the complainant and disagrees with commenters who assert that the burden of proof should shift to the vendor if there is any differential in price.[146] UVI also argues that the effect of a SBC vendor's pricing practice must be examined from the perspective of an adverse effect on consumers before any case can be made for discrimination, and that a complaint must provide specific evidence that the effect of the vendor's actions is to significantly hinder program distribution in the marketplace including (1) a description of the geographical boundaries in which the alleged discrimination occurred, (2) a list of all television services available in any part of the geographical boundary, (3) current program prices and penetration figures, and (4) proof that the complainant has actively marketed services within the area.[147]

93. Discovery. With respect to discovery, CableAmerica urges the FCC to expedite the discovery process, and to be guided by recent amendments to the federal rules of civil procedure (FRCP).[148] Liberty Media suggests that the number and scope of discovery disputes can be significantly reduced through adoption of a rule similar to FRCP Rule 37(a)(4), which requires the party necessitating the filing of a motion to compel to pay the reasonable expenses and attorneys fees of the prevailing party unless the court finds that the losing party's position was substantially justified.[149] DirecTv proposes that discovery be conducted in the form of a specific questionnaire that would include standardized interrogatories for all Section 628 complaints, that the vendor must complete and submit to the FCC and complainant.[150] U.S. West argues that the FCC should allow pre-complaint discovery similar to that allowed under FRCP Rule 27(a), to enable complainants to determine whether there is any basis for a complaint where unique contracts rather than standard pricing matrices are used.[151]

94. Rainbow, however, argues against pre-complaint discovery, and states that discovery should be limited to that necessary to meet the complainant's burden of proof or to rebut its prima facie case. Further, the complainant should be required to demonstrate the need for evidence claimed by a vendor to be confidential or proprietary.[152] Time Warner believes that discovery should

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[145] CableAmerica at 41. See also ACC at 12, CATA at 7, and NRTC at 30.

[146] UVI Reply at 6.

[147] See UVI at 38-39; UVI Reply at 5.

[148] CableAmerica at 42.

[149] Liberty Media at 63.

[150] DirecTv Reply at 14.

[151] U.S. West at 16.

[152] Rainbow at 19.

not be permitted as a matter of right, but only upon a demonstration of particularized need.[153] Liberty Media suggests that the FCC should set limits on discovery, and that initial discovery should be limited to a specified number of interrogatories.[154] TCI believes that a defendant should be entitled to discovery to challenge the effects of alleged discriminatory behavior on the complainant.[155] Finally, several parties support the Commission's proposal regarding the issuance of protective orders for materials exchanged during discovery.[156]

Discussion

95. As a general matter, we believe that discrimination under Section 628(c) exists when the same or essentially the same programming service is sold to competing distributors at different prices or pursuant to different terms or conditions.[157] Such discrimination is prohibited if not justified under one or more of the specific factors enumerated in the statute.

A. Definitions of "Competing" and "Similarly-Situated" Distributors

96. "Competing" Distributors. Because Section 628 is intended to prevent and remedy anticompetitive conduct in the multichannel video marketplace, we believe that complaints of discriminatory conduct should logically involve competing distributors. Thus, when addressing a Section 628 complaint, we will require that a complainant demonstrate that it has been offered or is paying a higher price, or has received less favorable terms, than a competing distributor. In establishing that another distributor is a competitor for these purposes, we will require that there be some overlap in actual or proposed service area. Moreover, the geographic market for assessing whether distributors compete with each other (either actually or potentially) can be local, regional or national, depending on how the distributor buys and distributes programming. For example, certain locally-oriented distributors, such as cable, MMDS and SMATV operators, compete directly within a particular local market. Such distributors therefore will generally file discrimination complaints if another local distributor received a more favorable programming contract. With respect to nationally-oriented competitors that buy programming and serve subscribers beyond a local or regional market -- such as DBS and HSD distributors -- parties may make complaints based on comparisons between

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[153] Time Warner at 47.

[154] Liberty Media at 63.

[155] TCI at 42.

[156] See, e.g., CableAmerica at 42, TCI at 42-43.

[157] The statute and comments focus on price discrimination by a programming vendor in selling programming to distributors, although Section 628 also encompasses non-price forms of discrimination. Although the discussion that follows is also focused primarily on price discrimination, the principles set forth here will generally apply to non-price as well as price terms.

contracts of national competitors, provided that the complaint includes a justification for that comparison.[158]

97. We believe that this approach for defining the relevant geographic market for competing distributor is the most reasonable approach when analyzing discrimination complaints. Where local competition actually occurs, we should not permit a distributor alleging discrimination to draw comparisons to another distributor operating outside the bounds of that competition. Similarly, where national competition actually occurs, we should not constrain a complainant to drawing comparison to local or regional distributors.

98. "Similarly Situated" Distributors. In order to distinguish between legitimate practices and prohibited discriminatory conduct, we also believe that a discriminatory practice must involve the offering of the program service to similarly-situated distributors. Indeed, while a vendor may sell the same satellite programming service to various distributors, both the statute[159] and the record recognize that the prices, terms and conditions of the contracts will reflect the particular attributes of the distributor and its willingness to provide certain secondary services in return for receiving the programming service. We thus believe that in analyzing allegedly discriminatory conduct, we must consider not only whether the two distributors being compared are competitors, but also whether the differences in their programming contracts are justified under the statutory factors governing permissible price differentials.

99. Therefore, in evaluating a discrimination complaint, we believe that it will often be useful to conduct a two-step analysis. First, we will compare the difference in programming prices (or terms or conditions) paid by (or offered to) the complainant and the competing distributor. Second, we will allow the programmer to justify the difference under the statutory factors by either (i) submitting a showing that one or more of the factors is involved and the price differential reflecting those factors is reasonable, or (ii) submitting an alternative contract for a more reasonably comparable, or more "similarly situated", distributor.[160] Although such a contract will not

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[158] With respect to "buying groups" or agents representing multiple distributors, the comments support our proposal to require such entities and their members to agree to unitary treatment for many other relevant purposes, including billing and liability. In the context of defining "competing" distributors, our rules will require buying groups to draw initial comparisons for "competition" based on such unitary status, using a national or local relevant market depending upon whether their operations are fundamentally national or local. Accordingly, buying groups that are fundamentally local in operation must draw comparisons with respect to competitors that have some overlap in actual or proposed service area. Buying groups that are fundamentally national in operation may make initial comparisons with respect to vendors' contracts with a national competitor, provided that the complaint includes a justification for that comparison.

[159] See Section 628(c)(2)(B)(i)-(iv).

necessarily provide definitive evidence that the price difference can be explained under the statutory factors, we believe that it will often be useful in assessing whether the programmer has adequately explained the difference. For purposes of evaluating alternative contracts offered by programmers, we will define a distributor as "similarly situated" with respect to the complainant if it operates within a proximate geographic region, has roughly the same number of subscribers, and purchases a similar service, while also using the same distribution technology as the "competing" distributor with whom the complainant seeks to compare itself.[161] We emphasize that an analysis of "similarly situated" distributors may be useful in demonstrating that the vendor has offered comparable terms to distributors with similar attributes. However, additional evidence may be needed to establish that the magnitude of a price difference for a consistently applied term (such as a standard volume discount) is reasonably justified under the statute's permissible factors.[162]

100. We believe that this general approach toward identifying discriminatory

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[160] Of course, programmers will be free to provide other evidence, such as a rate card, in support of its case that the price difference can be explained under the statutory factors.

[161] We emphasize that any alternative contract submitted by a defendant programmer must involve a distributor that uses the same technology as the "competing" distributor identified by the complainant as the recipient of more favorable treatment. In this manner, we may properly compare the prices charged to each distributor in order to ensure that the price differential identified by the complainant does not occur as a result of a vendor's systematic discrimination against a particular technology relative to cable operators. Therefore, as an example, an MMDS operator may allege that it is paying a higher price for a programming service than a particular cable operator as a "competing" distributor. In response, the program vendor may seek to justify the price differential by submitting a contract with a "similarly-situated" cable operator -- i.e., one that is located in the same general region, serves a similar number of subscribers, and purchases a similar service or package as the MMDS operator. Of course, the price charged to the MMDS operator may legitimately reflect differences in costs incurred by the vendor in serving the MMDS operator as compared to cable operators, if those cost differences are adequately demonstrated, as well as other standardized, technology-neutral discounts or surcharges.

[162] For example, the analysis of a price differential may consider the cost differences that a vendor experiences in selling programming to distributors using different technologies. Likewise, this analysis would likely consider certain distinctive terms of a programming contract, such as those issues enumerated under "creditworthiness" and "offering of service", infra. We would not include the consideration of cost differences or standardized discounts or surcharges under the analysis of similarly situated distributors, which will seek to establish an appropriate preliminary basis for price comparisons by focusing on the number of subscribers, region of operation, program package purchased, and distribution technologies for the identified parties.

conduct -- and our accompanying enforcement process -- fulfills the legislative requirement to specify particular conduct that is prohibited by Section 628(b) of the Act. Moreover, the regulations regarding discrimination carefully weigh the many facets of the 1992 Cable Act as balanced with the complex dynamics of the marketplace for satellite cable programming and satellite broadcast programming. We believe that these regulations will effectively prohibit discriminatory practices by programming vendors, while still following the statute's objectives to "rely on the marketplace, to the maximum extent feasible, to achieve greater availability" of the relevant programming.[163] In this regard, we believe that certain practices involving price differentials benefit the public by increasing the availability of programming -- as well as reducing the price of service -- to consumers. For instance, we conclude that our rules must allow for fundamental differences in pricing of satellite cable programming as opposed to satellite broadcast programming, because satellite broadcast programming vendors face a unique, artificial ceiling on program prices as well as comparative ease of entry barriers for potential competitors seeking to offer the same signal.[164] In addition, we also recognize that certain regional programming services use a form of graduated prices to promote broad distribution of the service into more distant communities.[165] We also believe that our regulations regarding discriminatory practices will satisfy the stated policy of Congress to "ensure that cable operators continue to expand, where economically justified, their capacity and the programs offered over their cable systems."[166] Furthermore, we believe that faithful implementation of the statute requires us to allow for differences based on the permissible factors enumerated in Section 628(c)(2)(B)(i)-(iv), as defined below, and that we must deny claims of discrimination resulting from factors that the 1992 Cable Act has established as entirely justified and reasonable. In establishing these implementing regulations, we also emphasize that it is essential to identify and preserve legitimate differences in pricing behavior so that programming vendors may continue to market their services creatively to all distribution technologies and achieve widespread availability and penetration to all subscribers. In this regard, we stress that our effort in this proceeding has been to "serve the congressional intent to prohibit unfair and anticompetitive actions without restraining the amount of multichannel programming available by precluding

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[163] See 1992 Cable Act, Section 2(b)(2).

[164] Given the virtual lack of entry barriers for potential competitors to satellite broadcast programming, vendors of such programming are constrained to set their prices below a potential competitor's cost of obtaining the signal directly from the satellite. If the vendor's price exceeds this cost, the potential competitor has an incentive to obtain the signal directly rather than purchase it from the vendor. See UVI at 6, Superstar at 6.

[165] We note that, subject to our provisions governing unfair and discriminatory practices, such "concentric pricing" of regional services is not per se discriminatory to the extent that the pricing graduations are technology neutral, and remain consistent within each price graduation.

[166] See 1992 Cable Act, Section 2(b)(3).

legitimate business practices common to a competitive marketplace."[167]

B. General Approaches to Identifying Prohibited and Permitted Discriminatory Conduct Proposed in the Notice

101. The Notice proposed several possible objective standards that might be used for separating prohibited discriminatory conduct from permitted actions. We also suggested that these standards would apply in the enforcement process for resolving particular complaints, thus assisting a complainant to establish a prima facie case of discriminatory conduct. We believe that the record shows that each proposed approach to price comparisons contains certain principles that could merit application in the particular context of multichannel video programming. At the same time, however, parties have underscored the conceptual weaknesses of each approach, so that a consensus for a particular proposed standard is lacking.[168] We thus conclude that none of the standards, applied independently, would provide the best or most comprehensive guide for our implementing regulations for Section 628(c)(2)(B).

102. The regulations we are adopting, therefore, are not based on any of the specific options proposed, but rather incorporate particular aspects of each standard that are applicable to the context of satellite cable and satellite broadcast programming. Regarding presumptions based on a "reasonable" range for differentials, we agree with commenters that such a "zone" is too difficult to construct so as to reflect and evaluate actual sales practices for multichannel programming, especially given the number of different factors operating in the video programming distribution market. Specific aspects of this option are useful, however, in applying the statute's justifying factors, as described below. Similarly, the definition of "discrimination" from Section 202 of the Communications Act provides some guidance when applied to the sale of communications services, but we believe that its focus on the behavior of regulated common carriers is inappropriate in the distinct context of programming vendors.[169] Also, while antitrust precedents and other regulatory approaches address related concepts that might be particularly useful in defining the permissible factors for differentials, directly importing these concepts into the Section 628 process risks confusing the two bodies of law involved, which address similar but not identical concerns.

103. We are also aware of the other recommended approaches for identifying discriminatory behavior presented in the record. In particular, certain alternative distributors claim that the existence of a price differential between two distributors, in effect, should constitute a per se violation of Section 628(c)(2)(B) and that Congress has already concluded that all

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[167] Notice at 194.

[168] The options for price comparisons proposed are discussed in greater detail, infra.

[169] The legal process model which we adopt to enforce these regulations relies heavily on our experience in processing of common carrier complaints pursuant to Section 208 for discrimination in violation of Section 202.

discrimination is unlawful under the 1992 Cable Act.[170] This approach is particularly promoted by parties who claim that we should treat distributors as a single class and who further dispute any vendor's ability to justify measurable price differences under the factors specified in the statute.[171] Although we agree that Section 628 clearly prohibits discriminatory conduct by programming vendors, the statute also explicitly allows for differentials resulting from the specific factors listed. Furthermore, as detailed below, the record reveals that distributors will have distinguishing attributes based upon the technology they employ, the number of subscribers they serve, and their ability and willingness to provide various secondary transactions and services to the vendor in exchange for programming. To the extent that these factors can be justified by the vendor on a case-by-case basis, we believe that our adopted approach will serve the public interest by prohibiting discriminatory behavior, promoting access to programming by all distributors, and increasing the amount of satellite cable and satellite broadcast programming to the public.

104. Finally, certain parties with interests in vertically integrated MSOs and programming vendors suggest that we should determine "discriminatory" pricing by comparing practices of vertically integrated entities with non-integrated vendors in order to satisfy the statute's apparent concern over the potentially adverse effects of vertical integration.[172] We reject this approach because it fails to sufficiently consider the historical allegations of discrimination on which Congress based its decisions to enact Section 628 and assumes that the behavior of a non-integrated entity is inherently justifiable. At the same time, we recognize that there may well be instances when evaluating particular complaints that the conduct of non-vertically integrated programming vendors will be informative, especially when particular discounts -- or magnitudes of discounts -- appear standard throughout the marketplace for programming.

C. Justifiable Price Differences

105. The legal process for resolving complaints will allow for justifiable differentials as specified in the statute. Under our general definitions of the four permissible factors, vendors will assume the responsibility of justifying the legitimacy of such factors in order to maintain the pricing differentials between distributors, as well as the magnitude of differences based on those factors. We will generally permit vendors to employ legitimate discounts associated with the factors specified in Section 628(c)(2)(B), provided that similar terms are standardly available to various distributors. Therefore, we adopt the following definitions and guidelines for the factors involving, in general terms: (i) cost differences at the wholesale level among distributors, (ii) volume differences, (iii) creditworthiness and financial stability, and (iv) differences in "offering of service".[173]

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[170] See, e.g., DirecTv at 21; NRTC at 15-16.

[171] See NRTC at 16.

[172] See Notice at 195; NCTA at 20.

106. Cost Justifications. Section 628(c)(2)(B)(ii) allows a vendor to establish different prices, terms, and conditions to take into account actual and reasonable differences in the cost of creation, sale, delivery, or transmission of satellite cable programming or satellite broadcast programming. We agree with those commenters suggesting that the record in this proceeding supports the preliminary conclusion in the Notice that service to HSD distributors may be more costly than service to others using different delivery systems such as cable operators,[174] as additional costs are often incurred for advertising expenses, copyright fees, customer service, DBS Authorization Center charges and signal security. The record indicates that these cost differences are particularly evident when providing program services to HSD distributors who do not provide a complete distribution path to individual subscribers.[175] We also recognize that cost differences may occur within a given technology as well as between technologies.[176] Therefore, the adopted regulations will allow vendors to base programming prices on legitimate cost factors. Vendors will not have to use a uniform rate card, although they will incur the risk and burden of showing that the cost factors they claim cause a price differential are legitimate and are not designed to conceal prohibited discrimination.

107. The record also raises the issue of whether a vendor may take into account those cost differences incurred by distributors in providing service to subscribers -- cost differences at the retail level -- when justifying price differences for programming as charged to distributors.[177] Although we recognize that costs incurred by some distributors when delivering their services to consumers may be lower than for others (e.g., HSD vs. cable), we believe that it would be contrary to the purposes of the Act and disserve the public to allow vendors to charge higher prices based on this factor. In particular, we believe that such a result could artificially raise the retail price of programming and discourage the development of low-cost technologies contrary to the statute's goals.[178] Moreover, contrary to the claims of some

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[173] We note that Section 628 (c)(2)(B) also permits a programming vendor to make allowances for differences in "character" and "technical quality" in establishing prices for various distributors. Due to the nature of these considerations, we believe that these aspects are most appropriately considered on a case-by-case basis.

[174] Notice at 198; See SBCA Reply at 6; UVI at 7-10; Time Warner at 24-27; Superstar 53-54.

[175] See Superstar at 53-54; UVI at 7-10; Liberty Media at 37; Turner at 10.

[176] See EMI at 3.

[177] See Congressional Record, October 5, 1992 at S16671, Colloquy between Senators Kerrey and Inouye. We note that the comments are divided as to the appropriate interpretation of this colloquy. Compare Viacom at 16; UVI at 23; NRTC at 19.

commenters that HSD distributors will simply retain any savings rather than pass them on to HSD users, we believe the HSD market is sufficiently competitive to ensure that savings will inure to the benefit of the public. Accordingly, we will generally reject a vendor's consideration of a distributor's costs in delivering service to subscribers. A vendor who can show that the lower price offered to the distributor will not result in lower prices to consumers because the distributor is simply retaining the potential cost savings in the form of higher profits, can justify a price differential based on retail costs.

108. Volume Justifications. As a second consideration, Section 628(c)(2)(B)(iii) permits a vendor to establish different prices, terms, and conditions that take into account economies of scale, cost savings, or other direct and legitimate benefits reasonably attributable to the number of subscribers served by the distributor. The record in this proceeding indicates that volume-related information is often available on some rate cards through "volume discounts" based upon a distributor's number of subscribers. We observe, however, that the statute speaks of "economies of scale, cost savings, or other direct and legitimate economic benefits reasonably attributable to the number of subscribers" rather than simple volume discounts.[179] As possible standards related to volume, we could establish rules to require that rate cards reflect economies due to volume differences between distributors or adopt the recommendations of certain alternative distributors to permit only cost-based volume discounts.[180] Alternatively, other parties have argued that in addition to cost economies, a larger number of subscribers confers direct non-cost "economic benefits" by delivering more viewers, thus increasing revenue from advertising more than proportionally, and providing a larger base for amortizing the costs of the programming service.[181] We believe that this interpretation most closely follows the language of Section 628 regarding "direct and legitimate economic benefits", which distinguishes "volume differences" from the "cost differences" considered in the first permissible factor.[182] Therefore, we will permit vendors to establish pricing schedules

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[178] See WCA Reply at 23.

[179] We note that the language of the original House amendment regarding program access issues permitted vendors to "take into account volume discounts". See Congressional Record, July 23, 1992, at H6531. Alternatively, the Senate Bill, Section 640(b)(3), focused solely on economies of scale and cost savings.

[180] See, e.g., NRTC at 25; and DirecTv at 23.

[181] For example, we note that Turner argues that not only do volume discounts exist for many American products, but such pricing factors are especially justifiable for a cable program network that requires mass penetration in order to capture advertising revenues. See, e.g., Turner at 12; Viacom at 40; Liberty Media at 40; Discovery at 21; NCTA at 38.

[182] On this issue, antitrust precedent under Robinson-Patman Act is instructive in showing the difficulty of demonstrating a pure cost

based on volume-related factors reflecting direct economic benefits to the extent that such pricing schedules are standardly available to similarly situated distributors. We believe that this approach to implementing Section 628(c)(2)(B)(iii) will simplify the accounting aspects of volume issues, while allowing for reasonable and legitimate price variances within the cable industry as well as between technologies. In addition, an allowance for standard or generally available volume discounts across technologies may alleviate the need to regulate the number of rate cards or matrices necessary to account for different services, especially to the extent that volume discounts have previously differed across technologies. As a procedural matter, when relying upon standard volume-related factors that are available to all MVPDs using all technologies, the vendor may be required to demonstrate that such volume discounts are reasonably related to "direct and legitimate economic benefits reasonably attributable to the number of subscribers served by the distributor" if unique questions arise about the application of that discount.[183] As stated earlier, we will not require the vendor to provide a strict cost justification for the structure of such standard volume factors, but will also recognize non-cost economic benefits related to increased viewership as identified by the vendor.

109. Justifications based on creditworthiness, offering of service, and financial stability and standards regarding character and technical standard. As provided in the statute,[184] our adopted regulations also will allow programming vendors to take into account a distributor or customer's creditworthiness or financial stability when it negotiates a price for a programming service. Although many commenting parties indicate that this factor is not typically manifested in price differentials but rather through other sorts of credit or payment guarantees,[185] vendors will have the right to consider this factor in developing pricing policies.[186] In doing so, vendors are permitted to create a distinct class or classes of service in pricing to reflect concerns about credit considerations or financial stability. However, any distinctions based on considerations of creditworthiness must be applied on a technology neutral basis. Although we note Viacom's statement that certain types of distribution systems have created greater "bad debt" problems, we also seek to avoid situations where individual distributors are forced to pay higher programming prices, without regard to their own creditworthiness, solely due to

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justification for volume discounts, which has effectively precluded certain uses of volume discounts and is apparently contrary to the intent of Section 628. See Federal Trade Commission v. Morton Salt Co., 334 U.S. 37 (1948).

[183] See Section 628(c)(2)(B)(iii).

[184] Section 628 (c)(2)(B)(i).

[185] See discussion regarding unfair practices, infra.

[186] We emphasize, however, that we will not permit vendors to manifest factors such as creditworthiness or financial stability in price differentials if such factors are already taken into account through different terms or conditions such as special credit requirements or payment guarantees.