before June 1, 1990, but that is renewed or extended after the date of enactment of this section shall not be exempt under paragraph (1).

"(i) Definitions.--As used in this section:

"(1) The term 'satellite cable programming' has the meaning provided under section 705 of this Act, except that such term does not include satellite broadcast programming.

"(2) The term 'satellite cable programming vendor' means a person engaged in the production, creation, or wholesale distribution for sale of satellite cable programming, but does not include a satellite broadcast programming vendor.

"(3) The term 'satellite broadcast programming' means broadcast video programming when such programming is retransmitted by satellite and the entity retransmitting such programming is not the broadcaster or an entity performing such retransmission on behalf of and with the specific consent of the broadcaster.

"(4) The term 'satellite broadcast programming vendor' means a fixed service satellite carrier that provides service pursuant to section 119 of title 17, United States Code, with respect to satellite broadcast programming.".

APPENDIX B: List of Commenters in MM Docket No. 92-265

Initial Comments

1. Advanced Communications Corp.
2. Affiliated Regional Communications, Ltd.
3. American Public Power Association
4. Ameritech OPerating Companies
5. Arts & Entertainment Network
6. Attorneys General of Texas, Maryland, Ohio, and Pennsylvania
7. Bell Atlantic and Pacific Companies
8. BellSouth Telecommunications, Inc.
9. CableAmerica Corporation
10. Coalition of Concerned Wireless Cable Operators
11. Coalition of Small System Operators
12. Community Antenna Television Association
13. Consumer Satellite Systems, Inc.
14. Continental Cablevision, Inc.
15. DirecTv, Inc.
16. Discovery Communications, Inc.
17. E! Entertainment Television, Inc.
18. EMI Communications Corp.
19. Group W Satellite Communications
20. International Family Entertainment, Inc.
21. Landmark Communications, Inc.
22. Liberty Cable Company, Inc.
23. Liberty Media Corp.
24. Lifetime Television
25. Madison Communications, Inc.
26. Motion Picture Association of America, Inc.
27. National Cable Television Association, Inc.
28. National Private Cable Association et al.
29. National Rural Telecommunications Cooperative and the Consumer Federation of America
30. National Satellite Programming Network, Inc.
31. National Telephone Cooperative Association
32. NYNEX Telephone Companies
33. Primetime 24
34. Rainbow Programming Holdings, Inc.
35. Rochester Telephone Corporation
36. Superstar Connection
37. Tele-Communications, Inc.
38. Telecommunications Research and Action Center & the Washington Area Citizens Coalition Interested in Viewers' Constitutional Rights
39. Time Warner Entertainment Company, L.P.
40. Turner Broadcasting System, Inc.
41. United States Satellite Broadcasting Company, Inc.
42. United States Telephone Association
43. United Video, Inc.
44. U.S. West Communications, Inc.
45. Viacom International, Inc.
46. WJB-TV Ft. Pierce Ltd. Partnership

47. Wireless Cable Association International, Inc.

Reply Comments

1. Advanced Communications Corp.
2. American Public Power Association
3. Bell Atlantic
4. Cablevision Industries Corp./Comcast Cable Communications
5. Community Antenna Television Association
6. Consumer Satellite Systems, Inc.
7. Cross Country Telecommunications, Inc.
8. Directv, Inc.
9. Discovery Communications, Inc.
10. EMI Communications Corp.
11. ESPN
12. GTE Service Corporation
13. International Family Entertainment, Inc.
14. Landmark Communications, Inc.
15. Liberty Cable Company, Inc.
16. Liberty Media Corp.
17. City of Manitowoc, WI
18. Motion Picture Association of America, Inc.
19. National Association of Telecommunications Officers and Advisors/National League of Cities/United States Conference of Mayors/National Association of Counties
20. National Cable Television Association, Inc.
21. National Rural Telecommunications Cooperative/Consumer Federation of America
22. National Satellite Programming Network
23. People's Cable
24. People's Choice TV Partners
25. Prime Ticket Network
26. Provo Cable Company
27. Sammons Communications, Inc.
28. Satellite Broadcasting and Communications Association of America
29. Souris River Telecommunications Cooperative
30. Southland Cablevision, Inc.
31. Superstar Connection
32. Tele-Communications, Inc.
33. Time Warner Entertainment Company, L.P.
34. Times Mirror Cable Television
35. Turner Broadcasting System, Inc.
36. United States Telephone Association
37. United Video, Inc.
38. U.S. West Communications, Inc.
39. Viacom International, Inc.
40. WJB-TV Fort Pierce, L.P.
41. Wireless Cable Association International, Inc.

APPENDIX C SUMMARY OF COMMENTS

Outline

I. General Program Access Issues
   A. Scope of Section 628
   B. Harm
   C. Undue Influence

II. Discrimination
   A. Definition of Discrimination
   B. Vertical Integration as Standard to Determine Discrimination
   C. Options Proposed in the Notice Regarding Discrimination
   D. Justifying Factors for Price Differences Under Section 628
   E. Other Pricing Factors Suggested by Comments
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III. Exclusive Contracts
   A. Section 628(c)(2)(C)
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IV. Enforcement
   A. Process
   B. Burden of Proof
   C. Discovery
   D. Remedies
   E. Frivolous Complaints
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V. Application of Anti-Discrimination Provisions to Existing Contracts

VI. Other Issues
   A. Data Collection
   B. Annual Report
   C. Geographic Areas

I. General Program Access Issues

A. Scope of Section 628

1. General Comments

1. Commenters are divided as to whether the *Notice* properly characterized the provisions of Section 628 of the 1992 Act. A number of commenters assert that the *Notice* accurately reflected Congressional intent with respect to the parties and practices to be covered by the statute and

correctly identified all relevant issues.[1] For example, APPA submits that the Notice "is an extraordinarily comprehensive and thoughtful document that identifies the key relevant issues and reduces numerous highly complex issues to manageable proportions."[2] Other commenters, however, contend that the Notice failed to acknowledge the findings of Congress with respect to discrimination in program distribution by the cable industry, and that the Notice evidenced the Commission's intention to go beyond the authority granted it by Congress in the 1992 Act.[3] For example, CableAmerica argues that the Notice proposed "to introduce unauthorized and unwarranted complexities" into Section 628.[4] Manitowoc contends that the Notice proposed rules that would "leave essentially unchanged the anticompetitive cable industry practices Congress intended to eradicate."[5] NRTC asserts that the Notice was "inconsistent with clear Congressional intent, contrary to the plain language of the statute, and incompatible with the public interest."[6] WCA submits that while Section 628 is not particularly clear and poses the Commission with a difficult task, the Commission "seems so preoccupied with resolving every real or imagined issue... that it has lost sight of Congress' fundamental goal...."[7]

2. Vertical Integration

2. A number of commenters contend that Section 628 applies only to vertically integrated programming distributors and vendors.[8] For example, A&E contends that it is clear from Section 628, from the overall statutory framework of the 1992 Cable Act, and from the Act's legislative history that the program access provisions of Section 628 were not intended to apply to cable operators that are not vertically integrated. A&E submits that if Congress had intended Section 628 to reach all cable operators, the minimum specified regulations of paragraph (c) would not contain recurring references to vertically integrated operators. While NCTA submits that certain unilateral, unfair conduct by a cable operator that inflicts serious competitive injury on a multichannel distributor is within the ambit of Section

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1 See, e.g., APPA at 6; NCTA at 4; NCTA Reply at 7; Superstar Reply at 1-2; UVI Reply at 1-2; Viacom Reply at 2.

2 APPA at 6.

3 See, e.g., ACC Reply at 2; CableAmerica at 10-11; CSS Reply at 2; DirecTV at 7-8; Manitowoc Reply at 2; NPCA at 20-22; NRTC at 9 & 33-34; NRTC Reply at 2; NTCA at 3; TRAC at 2-3; USTA at 4-5; WCA at 2-3.

4 CableAmerica at 10.

5 Manitowoc Reply at 2.

6 NRTC at 9.

7 WCA at 3.

8 See, e.g., A&E at 2-4; CableAmerica at 11-12; ESPN Reply at 1-4; Landmark at 9; NCTA at 11; NCTA Reply at 16-17; Time Warner at 3-8.

628, regardless of vertical integration, it asserts that the statute should not be read to restrict relationships between cable operators and non-vertically integrated programmers. Time Warner contends that the Commission should not hold the conduct of a programming vendor to be an unfair practice unless the programming vendor acts on incentives resulting from it being vertically integrated with a cable operator.

3. Other commenters assert that while Section 628 applies only to vertically integrated programmers, it applies to all cable operators, regardless of whether they are vertically integrated.[9] For example, APPA submits that the omission of the term "attributable interest" in Section 628(b) when referring to a cable operator is not only clear and unambiguous, but is particularly conspicuous when contrasted with the express inclusion of that term in the same sentence when referring to satellite cable programmers. WJB contends that the references to vertically integrated programmers in Section 628(c) are merely examples of some of the types of conduct that are to be covered and do not imply that the statute covers only vertically integrated cable operators. The Attorneys General believe that, in addition to self-serving conduct by a cable operator, the rules should focus on conduct intended to benefit the cable industry at the expense of other distribution technologies. Time Warner takes issue with this reading of the statute, and argues that the unqualified mention of the word "cable operator" in Section 628(b) could be of consequence only if the Commission were to adopt rules that go beyond those required under Section 628(c)(2), which it believes would be inappropriate.[10]

4. With respect to satellite broadcast programming vendors, some commenters suggest that Section 628 only applies to vertically integrated vendors, although the statute does not so specify.[11] Other parties, however, submit that the statute applies to all satellite broadcast programming vendors.[12]

5. In addition, some commenters argue that an entity should only be subject to the provisions of Section 628 in those markets in which it is vertically integrated (i.e., operates a cable system that purchases programming from its affiliated cable operator).[13] For example, TCI argues that a vertically integrated programmer has neither the incentive nor the ability to

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[9] See, e.g., APPA at 7-8; Attorneys General at 4-5; Bell Atlantic Reply at 3-5; CCWCO at 2; NSPN Reply at 4-5; NYNEX at 6; USSBC at 2; U.S. West at 5-6; U.S. West Reply at 3; WJB at 5-6; WJB Reply at 4.

[10] See Time Warner Reply at 5-6.

[11] See, e.g., Continental at 8-10; Primetime 24 at 4-6; Superstar at 5-7; UVI at 13-15.

[12] See, e.g., GTE Reply at 5-6; WJB Reply at 4; DirecTv at 10 n.13.

[13] See TCI at 10-11; Time Warner at 7-8; Viacom at 10-12; Discovery at 20; Landmark at 9; NCTA at 11.

favor a cable operator with which it has no ownership interest. Time Warner asserts that a programming vendor has an incentive to sell as much programming as possible in locations where it is not vertically integrated. Viacom argues that a vertically integrated entity has no incentive to favor one competitor over another in areas where it does not have an interest in both sides of the transaction. In opposition, APPA submits that size and market power alone can give cable operators enormous clout over programming vendors, without regard to whether vertical integration exists in any particular local market.[14] Similarly, Bell Atlantic argues that the fact that a vertically integrated company does not have an affiliated cable operator in a particular locality does not mean that it cannot restrict the availability of programming in that area.[15] WCA agrees, arguing that such a limitation was not intended by Congress.[16]

3. Attribution of Ownership Interests

6. Commenters generally advocating a five percent attribution threshold[17] note that the Commission has developed precedent interpreting and implementing the five percent standard, since that standard is currently applicable to the Commission's broadcast multiple ownership rules, the video dialtone rules and the cable/network cross-ownership rule, and they submit that Section 628 and these existing Commission rules have similar purposes. Some commenters suggesting a five percent standard additionally advocate further safeguards. For example, DirecTV suggests that the Section 628 standard should also deem attributable debt interests that are convertible to five percent or more voting equity, a common officer or director or any interests that include a right to elect an officer or director, all general partnership interests, and limited partnership interests of five percent or more.[18] The Competitive Cable Association submits that the definition of an attributable interest should account for common officers or directors or substantial financial support, and should include a situation where one of the local cable operations in a competitive situation is owned or controlled by any of the top 100 MSOs (or, alternatively, any MSO that has access to 50,000 or more subscribers nationwide).[19]

7. Commenters supporting a threshold lower than five percent include

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[14] See APPA at 11; APPA Reply at 6-8.

[15] See Bell Atlantic Reply at 6-7.

[16] See WCA at 30-34.

[17] See ACC at 4-5; ACC Reply at 4; Ameritech at 5-6; BellSouth at 11-12; CableAmerica at 13; CSS at 13; CSS Reply at 5; DirecTV at 14; Liberty Cable at 26; NCTA at 2; Turner at 14-15.

[18] See DirecTv at 14.

[19] See Competitive Cable Association at 5-6; contra Landmark Reply at 13-14.

ACC, APPA, Cross Country, NRTC, NYNEX and WCA.[20] These commenters contend that a five percent shareholder could represent a significant interest, particularly in a large, publicly-held corporation. They also assert that the cable industry is highly concentrated and that, as a result, vertically integrated cable operators have incentives to unduly influence programmers. For example, WCA advocates a one percent threshold for corporations with more than 50 shareholders. Bell Atlantic suggests that an attribution rule stricter than the five percent cable/telco cross-ownership standard might be appropriate for cable operators because the 1992 Act bars cable operators from exercising "influence" over a programmer, whereas the cable/telco rules bar only "ownership or control."[21] Similarly, while CSS supports a five percent threshold, it submits that Congress may have intended to have any level of ownership interest by a cable operator, no matter how small, be sufficient to trigger the statute.[22] NRTC likewise advocates a strict attribution standard, but urges the Commission to determine the scope and implementation of any standard before that standard is adopted.[23]

8. Several commenters propose that the attribution benchmark should be higher than five percent. They contend that cable operators' investment has been instrumental in the development of programming services. For example, Cablevision/Comcast/Cox suggests an attribution standard of 10 to 20 percent.[24] Small System Operators advocates a 20 percent equity ownership standard. IFE suggests a threshold of 25 percent of voting power, but submits that a cable operator should be permitted to rebut the 25 percent threshold if it can show that (1) the program vendor has a single majority shareholder that is not a cable company; or (2) the programmer has a set of related or affiliated shareholders with majority voting power, none of which are cable companies (e.g., two 30 percent shareholders that are parent and subsidiary corporations); or (3) that the cable company shareholder has no representative on the programmer's board of directors; or (4) that other circumstances indicate that the cable company operator stockholder is not in a position to implement business practices by the cable programmer that could have anticompetitive effects on consumers.[25]

9. Of the commenters proposing a higher threshold, a number of cable interests seek a standard based on majority control of an affiliated programmer. These commenters contend that a cable operator would have to control a programmer in order to force it to incur the significant losses that

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20 See ACC Reply at 4; APPA at 9; Cross Country Reply at 10-11; NRTC at 25-26; NRTC Reply at 31-32; NYNEX at 7-8; WCA at 24-28.

21 See Bell Atlantic at 4 n.8.

22 See CSS at 5.

23 See NRTC at 25-26.

24 See Cablevision/Comcast Reply at 19-21.

25 See IFE at 3-6.

would result from restricting its sales to other distributors. For example, Discovery urges the Commission to define an attributable interest as either holding 50 percent or more of the outstanding voting securities or having the contractual power to designate 50 percent or more of the board of directors.[26] NCTA argues that at a minimum, actual voting control (50 percent ownership) or some evidence of working control should be required before a cable operator is deemed to have an attributable interest in a programmer for purposes of Section 628.[27] UVI similarly contends that the attribution should be at least 51 percent, or should focus on the contractual degree of control necessary to dominate corporate decisionmaking.[28] In opposition, a number of commenters point out that although cable interests seek a 50 percent attribution standard in this context, they considered a five percent standard too high in the video dialtone proceeding.[29] Further, these commenters contend, Congress rejected an attribution standard based on control when it rejected the Manton amendment to the 1992 Act.[30]

10. A few commenters urge the Commission to adopt behavioral guidelines rather than an attribution threshold, arguing that a numerical standard does not necessarily portend a cable operator's ability to influence the decisions of the programmer. For example, Continental submits that the Commission should consider a showing by the cable operator that it does not exercise sufficient control to exert improper influence in the decisions of the affiliated programmer.[31] Liberty Media argues that absent the kinds of factors considered with respect to unauthorized transfers of control (e.g., control over station finances, personnel and programming), a cable operator's interest in a programmer should not be deemed cognizable.[32] Discovery suggests that if an attributable interest is defined as something less than 50 percent control, the regulations might exempt programmers that reach more than 50 percent of subscribers to alternative technologies and companies that do not own or produce programming but merely provide a conduit for programming distribution.[33] TRAC and USSB also advocate adoption of a behavioral test, contending that a cable system could affect the business practices of a

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26 See Discovery Comments at 16-18; Discovery Reply at 3-5.

27 See NCTA Comments at 15-19; NCTA Reply at 24-25.

28 See UVI at 12-13.

29 See, e.g., DirecTv at 13 n.18; Manitowoc Reply at 17-18; NRTC at 25-26; WCA at 26-27.

30 See DirecTV Reply at 4 n.3; WCA Reply at 6-8.

31 See Continental at 7-8.

32 See Liberty Media at 17-18.

33 See Discovery at 16-18.

programmer with a small percentage of voting ownership.[34] TRAC suggests that the Commission consider voting rights, options exercisable under coercive terms, convertible debt, and other factors.

11. In addition, a number of commenters propose exceptions to whatever attribution rule is adopted. For example, E! suggests a safe harbor exception for start-up program services or other program vendors with less than 50 percent national penetration.[35] Group W proposes that cable operators that serve less than one percent of all cable households nationwide should be exempt from the attribution benchmark.[36] Similarly, Landmark and Turner argue that relatively small MSOs should be exempt from the attribution rule.[37] Landmark also argues that the Commission should exempt vertically integrated programmers for which there are close substitutes, those that are in their start-up or developmental stage, and those that, by virtue of low penetration, can be presumed not to be competitively necessary for any multichannel video programming distributor.[38] Rainbow suggests a cable operator should be exempt from attribution if it serves fewer than 10 percent of all cable subscribers nationwide and an unaffiliated non-cable entity holds at least a 20 percent ownership interest its affiliated programmer.[39] Lifetime and Viacom suggest that a cable operator should be exempt from attribution if it accounts for a minimal number of the affiliated programmer's subscribers; Lifetime proposes five percent or less, and Viacom proposes less than five percent.[40] Viacom submits that programmers that rely on unaffiliated distributors for 95 percent of their subscriber base have no incentive to distort their operations so as to bring about the anti-competitive results that Congress sought to deter.

12. Regardless of what attribution standard is ultimately adopted, commenters are divided on whether that standard should incorporate a single majority shareholder rule similar to that included in the broadcast multiple ownership rules. ACC, Ameritech, NRTC and Small System Operators submit that the single majority shareholder rule should not be applicable.[41] These

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34 See TRAC at 4; USSB at 2-3.

35 See E! at 6-7.

36 See Group W at 6-7.

37 See Landmark Reply at 14-15; Turner at 15, n.17.

38 See Landmark at 20-27. Landmark further submits that the Senate Report indicates that The Weather Channel, which is owned by Landmark, is not a vertically integrated company for purposes of the program access provision. Id. at 20 (citing Senate Report at 25).

39 See Rainbow at 12-16.

40 See Lifetime at 11-12; Viacom at 3-10.

41 See ACC Reply at 4; Ameritech at 5-6; NRTC at 31-32; Small System Operators at 3.

commenters submit that the single majority shareholder exemption is not appropriate because minority stockholders may have significant influence over a programmer's decisions even if they do not technically control that programmer. On the other hand, BellSouth, Continental, IFE, Liberty Media, Lifetime and Turner believe that the Commission should apply the single majority shareholder rule in this context.[42] Lifetime submits that the Commission has recognized the significance of a majority shareholder in other situations; for example, a "substantial" transfer is one in which a voting interest of 50 percent or more passes to a new party.

13. Commenters also disagree as to whether the Section 628 attribution rule should include other factors considered in conjunction with the broadcast attribution rule. For example, Continental argues that the rules should exempt situations where the cable operator holds limited partnership interests, non-voting stock or other interests not deemed attributable under the broadcast attribution rule.[43] CableAmerica contends, however, that no provisions of the broadcast rule other than the five percent attribution standard should apply.[44] In addition, while Liberty Media asserts that the Section 628 rule should include the broadcast limited partnership insulation criteria,[45] DirecTv suggests that the rule should instead exempt limited partnership interests of less than five percent.[46] Further, a number of commenters suggest that relationships involving common officers and directors should be attributable,[47] although Lifetime argues that its proposed exception should operate regardless of whether a cable operator with a minority share in a programmer has a common officer or director with that programmer.[48]

B. Harm

14. Commenters supporting the approach suggested in the Notice generally contend that Section 628 only prohibits conduct that is both "unfair" and causes "harm."[49] Under this interpretation, subsection 628(b) establishes

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42 See BellSouth at 12 n.17; Continental at 7; IFE at 5-6; Liberty Media at 17-18; Lifetime at 8-11; Turner at 14-15.

43 See Continental at 7-8.

44 See CableAmerica at 13.

45 See Liberty Media at 17-18.

46 See DirecTv at 14.

47 See Small System Operators at 3; Competitive Cable Association at 6-7; DirecTv at 14; IFE at 5-6; WCA at 24-28.

48 See Lifetime at 8-11.

49 See Discovery at 18-19; E! at 5; Group W at 9; Landmark at 5; Liberty Media at 5-6; NCTA at 7; Rainbow at 5 n.9; Superstar at 33; TCI at 5; TBS at 17; UVI at 16; Cablevision Reply at 2-3; Discovery Reply at 6; Liberty Media

a "threshold showing" that aggrieved distributors must meet before the prohibitions in subsection 628(c) become applicable.[50] For example, NCTA argues that if a programmer sells programming at price differentials that would be considered unfair conduct under subsection 628(c)(2)(B), and the price differences cannot be justified under one of the four exceptions enumerated in subparagraphs (i) through (iv), the programmer's conduct should not be prohibited in any particular case unless an aggrieved distributor can demonstrate that this conduct has significantly hindered its ability to compete.[51] Similarly, Liberty Media argues that Congress imposed an injury-in-fact requirement on any party alleging a violation of 628(c), and would not have imposed this requirement if it had determined that a programmer's conduct necessarily caused competitive injury. It contends that if Congress had determined that practices in subsections 628(c)(2)(A) through (D) cause "competitive harm," then it would not have instructed the Commission regarding the public interest factors enumerated 628(c)(4)(A) through (D).[52]

15. With respect to the degree of injury a distributor must show, a number of commenters propose that the unfair practice complained of must have sufficiently hindered the distributor's ability to provide comparable programming so that its ability to compete is substantially impaired.[53] Discovery argues that an MVPD should not be allowed to file a complaint against a vertically integrated programmer on the grounds that it has been significantly hindered in delivering that particular programmer's programming: "[r]ather, the unfair or deceptive practice complained of must have sufficiently hindered the distributor's delivery of comparable programming so that the distributor's ability to compete in the marketplace for the distribution of programming is substantially impaired."[54] Similarly, Liberty Media suggests that when a complainant receives programming at less favorable prices, terms or conditions than does another distributor, the complainant must show that the disparity is reflected in the favored distributor's retail pricing and that the complainant therefore is not able to compete effectively with the favored distributor in selling programming to consumers.[55] Other commenters propose requiring complainants to make additional demonstrations

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Reply at 4; Viacom Reply at 8.

50 See Landmark at 5; Liberty Media at 6; NCTA at 7-8; Rainbow at 5; Superstar at 37; Liberty Media Reply at 5; Viacom Reply at 8.

51 See NCTA at 8. NCTA further states that this analysis should apply for any of the activities prohibited under subsection 628(c)(2).

52 See Liberty Media Reply at 5-6.

53 See Discovery at 19; Group W at 8-9; NCTA at 9-10; TCI at 30; Time Warner at 9-11; UVI at 18; Discovery Reply at 5; Liberty Media Reply at 36-39; Viacom Reply at 10.

54 Discovery Reply at 5.

55 See Liberty Media at 5-6.

concerning the extent to which they have been "harmed significantly" by a programmer's conduct. For example, Time Warner contends that the appropriate standard for measuring harm is not whether a particular distributor can show that the unfair practice jeopardized its competitive viability, but whether the distributor can show that the practice would jeopardize any well-run distributor.[56] Viacom states that focusing on harm to competition rather than on a particular competitor will preclude a potential complainant from obtaining individual economic gain without any benefit to competition or consumers.[57]

16. In addition, many cable operators and programmers support geographic and vertical integration restrictions on the scope of potential violations of Section 628, asserting that there can be anticompetitive harm only where a vertically integrated cable programmer charges discriminatory prices to different system operators in the same area.[58] Similarly, several commenters propose that only conduct by vertically integrated programmers that favors their commonly-owned operators should be deemed unfair.[59] Finally, several commenters argue that since Congress contemplated that harm was caused primarily by vertically integrated entities, any conduct, pricing mechanism, or other term or condition imposed by non-vertically integrated entities should be exempted from the scope of regulations, as well as any conduct by vertically integrated entities that is similar to that of non-vertically integrated entities.[60]

17. In contrast, numerous commenters strongly disagree with these interpretations and contend that there is no requirement in the statute that the Commission impose a threshold showing of harm to competition.[61] In addition, some of these commenters argue that requiring complainants to meet a threshold showing of harm in subsection 628(c) where none was intended as far as exclusive contracts and discriminatory practices are concerned would undermine the goals Congress sought to achieve in implementing these provisions.[62] Commenters submit that subsection 628(b) broadly states congressional intent to prohibit practices by video programming vendors that

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56 See Time Warner at 11.

57 Viacom Reply at 12.

58 See Discovery at 20; E! at 6; IFE at 8; Liberty Media at 5-7; Primetime 24 at 9, TCI at 10; Time Warner at 7 n.5, 11; Turner at 17; Viacom at 11.

59 See NCTA at 13; Superstar at 33 n.30; TCI at 8.

60 See Superstar at 33 n.30; UVI at 16.

61 See APPA at 13-14; CableAmerica at 14-15; Small System Operators at 7; CSS at 14; Liberty Cable at 18; NPCA at 23; NRTC at 13; ACC Reply at 5; APPA Reply at 6-7; CSS Reply at 3; Cross Country Reply at 8; DirecTv Reply at 2-3; NRTC Reply at 17; U.S West Reply at 3; WCA Reply at 9-10.

62 See APPA at 16; CableAmerica at 14; NRTC at 13; DirecTv Reply at 3-4.

hinder the distribution of video programming. To effectuate this goal, they argue, Congress set forth in subsections 628(c)(2)(A)-(D) what the Commission's regulations, at a minimum, must prohibit. They argue that the proper reading of the statute provides that these practices, unless explicitly justified under the exceptions enumerated in subparagraphs (i) through (iv) of 628(c)(2)(B), are per se unlawful, and that no showing of harm is required.[63] DirecTv submits that this issue was specifically debated by Congress when drafting the program access provisions, and that the result was the rejection of a competing program access amendment to the 1992 Cable Act that was based on an antitrust analysis and that would have required a complainant to demonstrate proof of harm to competition. In addition, some commenters note that the approach suggested in the Notice ignores the fact that the Act allows for relief where conduct has the "purpose" of hindering or preventing a MVPD from providing programming, not just where it has that "effect."[64]

18. These commenters further criticize the cable industry's stance regarding the extent of harm an aggrieved distributor must show in order to make a complaint, arguing that the statute does not require a complainant to prove that a prohibited practice has the effect of causing significant harm to competition (rather than solely to the complainant), or that the viability of its operation must be threatened before the complainant may challenge a programmer's unfair practices.[65] In addition, DirecTv takes issue with Time Warner's argument that an unfair practice is unlawful only if it would endanger the competitive viability of a "well-run distributor," and its concept of what a "well-run distributor" should be, stating that any requirement that all distributors "be hindered" in effect rewrites the statute. DirecTv also complains that subsection 628(b) does not require an MVPD to show that the practice complained of prevents or hinders the MVPD from delivering "any programming at all" to subscribers.[66] Commenters further state that the argument that the statute simply prevents the "destruction" of an MVPD runs counter to the overall objective of the 1992 Cable Act because it would mean that a competitor could not make its case until it had been foreclosed from the market.[67]

19. Some commenters also argue that the local geographic market definition was not called for by the statute, and the Commission should not create any by regulation.[68] CableAmerica explains that a distributor, placed

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63 See APPA at 13-14; Cable America at 14-15; NRTC at 13; DirecTv Reply at 3-4; NRTC Reply at 17; U.S. West Reply at 3.

64 See Liberty Cable at 19; CSS Reply at 3.

65 See APPA at 16; CableAmerica at 16-17; CSS at 14-15; NPCA at 24 n.12; APPA Reply at 6-7; CSS Reply at 3; DirecTv Reply at 4-5; WCA Reply at 10.

66 See DirecTv at 4-5 & n.4.

67 See APPA at 16; DirecTv Reply at 4-5.

68 See CableAmerica at 20-21; DirecTv at 15; CSS Reply at 3.

at a competitive disadvantage with respect to a vertically integrated operator in one market, may be forced subsidize its losses in another market, thereby hindering its ability to provide services in the second market.[69] In addition, commenters argue that Congress banned vertically integrated programming vendors from engaging in conduct prohibited by Section 628 in any market, not just in those specific markets where they own systems.[70] Moreover, WCA states that Congress implicitly rejected the Commission's local market idea as it appeared in the 1990 Cable Report, which proposed that program access rights be limited to those markets where the local cable operator has a cognizable interest in the programmer that refuses to deal with alternative technologies.[71] Finally, several commenters express unfavorable views regarding the suggestion by a number of cable operators that practices by non-vertically integrated operators should be exempt from the scope of regulations adopted under Section 628 and that conduct by vertically integrated operators that is similar to that of non-vertically integrated entities should likewise be exempted from the rules.[72]

C. Undue Influence

20. Parties offer limited comment on the appropriate definition of "undue influence" pursuant to Section 628(c)(2)(A) of the statute. Some commenters propose that undue influence should be presumed if particular conduct is alleged. For example, DirecTv suggests that a prima facie case of undue influence is established if an operator can show that a vertically integrated programmer refuses to sell programming to an unaffiliated distributor that is creditworthy and technically capable of delivering the programming service, or offers programming on unreasonable terms.[73] WJB submits that undue influence should be inferred if price differentials are not reasonable and justifiable.[74] The Attorneys General offer examples of practices other than those specifically mentioned in the statute that constitute undue influence and should be proscribed, such as placing specific restrictions on an alternative distributor's ability to purchase programming from vendors not affiliated with the cable operator, requiring an alternative distributor sell programming in nonwired areas, imposing minimum subscriber levels on alternative distributors but not on cable operators, and restricting

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69 See CableAmerica at 21.

70 See Attorneys General at 4-5; CableAmerica at 21-22; WCA at 31-32; APPA Reply at 6-7; Bell Atlantic Reply at 6.

71 See WCA at 31-32.

72 See APPA Reply at 4; see also Bell Atlantic Reply at 5 (expressing concern that integrated entities could induce independent programmers to refuse to sell to distributors that use video dialtone to justify their own incentives for not dealing with video dialtone providers).

73 See DirecTv at 19-20.

74 See WJB at 13; WJB Reply at 10.

affiliated programmers from marketing to non-cable distributors in cabled areas.[75] In addition, Bell Atlantic contends that the Commission should prohibit any conduct that influences a programmer's decision to sell, to the detriment of a competing distributor.[76] CCWCO submits that rules must be crafted to ensure that no cable operator is permitted to establish any condition in its dealings with program suppliers that would have the effect of denying access to programming to a potential competitor in the market, with the exception of locally originated programming.[77]

21. Other commenters contend that the Commission should require specific proof that a cable operator has unduly influenced an affiliate programmer's decisionmaking. For example, Rainbow contends that the Commission should require proof that, but for the influence of the affiliated cable operator, the programming vendor would not have engaged in the same distribution practices.[78] Superstar and UVI submit that a claimant should be required to provide direct evidence of coercion or threat by a cable operator that is both anticompetitive and uneconomic in intent and effect.[79] TCI would require explicit threats or intimidation in order to show undue influence.[80] Time Warner submits that an undue influence complainant must prove that a communication from a cable operator to a programming vendor actually influenced the vendor's sales-related decision, and that the influence was improper. Time Warner submits that not every communication from a cable operator to a programming vendor comes within the purview of the statute, even if it influences the vendor's decision to sell or the terms at which it sells, and suggests that one way to determine if a communications is proper is to compare the vendor's ultimate sales decision with a similarly situated independent vendor.[81] Time Warner also observes that 628(c)(2)(A) will likely have little practical significant effect since discrimination by a vertically integrated programming vendor is already prohibited by 628(c)(2)(B).[82]

II. Discrimination

A. Definition of Discrimination — Standard for Prima Facie Claim

22. A number of multichannel video programming distributors (MVPDs)

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75 See Attorneys General at 9.

76 See Bell Atlantic at 5.

77 See CCWCO at 2-3.

78 See Rainbow at 12.

79 See Superstar at 42-44; UVI at 21.

80 See TCI at 36.

81 See Time Warner at 15-17, 17 n.15.

82 Id. at 14.

assert that they face great problems related to facilities-based discrimination. For instance, NRTC asserts that it is required to pay, on average, 460% more than a small cable system despite the fact that purchasing agents for alternate technologies offer program vendors the benefits of a large MSO.[83] To the extent that restricted availability of programming deters new distributors, commenters contend that the rules should preclude incumbent cable operators from exploiting their strategic dominance through affiliated programmers.[84] Also, small cable operators complain that the price, terms, and conditions imposed on multichannel video distributors who lack market power are often discriminatory and anti-competitive.[85] They argue that small operators need to acquire programming to meet the demands of their customers, and that failing to carry one of these programming services, or proposing to drop one, may generate intense pressure from the franchising authority. Small operators also assert that program services with market power are able to extract prices from the smaller operators that are higher than the competitive level, and are able to impose terms and conditions that add to the programmers' profit and increase price to consumers without concomitant economic benefit.[86]

23. Some MVPDs support a blanket prohibition on price differences in the sale or delivery of programming to multichannel service providers,[87] and some commenters call for a "bright line test" to identify prohibited practices.[88] Because of the harm caused to both consumers and competition through differential pricing, commenters argue that strict control over such discriminatory practices is in the public interest.[89] For example, Liberty Cable asserts that discrimination can be explicit, as with a special rate-card, but can also occur indirectly, and contends that the rules should provide that direct or indirect discrimination by programmers will be presumed illegal.[90]

24. Alternative MVPDs generally argue that to establish a prima facie claim under 628(c)(2)(B), a distributor should need only to allege a difference in price, terms, or conditions for the provision of programming.[91] They argue

83 See NSPN at 8-9; NRTC at 18; NTCA at 4; Liberty Cable at 6.

84 See USTA at 10.

85 See CATA at 4.

86 Id. at 4-5.

87 See, e.g., ACC at 6.

88 See, e.g., Liberty Cable at 4; MPAA at 14-15; DirecTv at 12; BellSouth at 7; U.S. West at 12; NRTC at 15-16; Pactel at 1-6; CableAmerica at 20-30; USTA Reply at 5.

89 See ACC at 6; CableAmerica at 8-9.

90 See Liberty Cable at 7-8.

91 See, e.g., DirecTv at 21; NRTC at 15-16; USSB at 3-4; Caribbean at 4.

that the burden then should shift to the programmer to provide accounting support to justify the different treatment based on costs or the other legitimate factors enumerated in the statute.[92] These commenters argue that the shifting of burdens is appropriate because any relevant information to justify a price differential would be within the possession of the programmer. Some commenters argue that the Commission's proposed allocation of burdens in enforcing and implementing the Act contravenes Congressional intent to promote competition, and that the Commission should not reexamine matters already addressed by Congress.[93] CATA submits that an aggrieved operator should be required to show that the discriminatory conditions exist or are contained in the operator's program affiliation agreement. When the complaint is filed, CATA argues, the program vendor should supply evidence that the price, terms and conditions at issue are either uniform for all multichannel program distributors or impose reasonable requirements for the factors that are explicitly permissible under the statue.[94] ACC states that the Commission should establish a high burden for cable operators to permit the use of a bulk discount and should strictly limit the amount or degree to which any cable operator may receive a discount.[95] Attorneys General assert that the Commission should mandate a pricing structure, applicable uniformly to all delivery systems, that reflects actual costs incurred by the programmer in providing programming to the various delivery systems, and they argue that factors such as discounts for prepayment or marketing allowances, should not be reflected in the pricing structure of programming sales.[96]

25. Programming vendors, on the other hand, advocate a stricter standard for identifying discrimination, and assert that the Commission should consider price differentials "discriminatory" only when the practices have a reasonable prospect of injuring competition; by definition, this construction would not include de minimis or temporary price differences. They argue that the Commission should not consider a high price harmful to competition if it is lower than the perceived market value of the programming based on objective third-party studies.[97] EMI asserts that forced uniform pricing for programming distributors will ultimately reduce the amount of satellite broadcast programming available to subscribers.[98] The vendors also claim that the program access aspects of the statute should not require that programmers deal

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[92] See USSB at 3-4.

[93] See TRAC at 1-2.

[94] See CATA at 6-7.

[95] See ACC at 9.

[96] See Attorneys General at 10.

[97] See Discovery at 23-25; Time Warner at 17-18.

[98] See EMI at 9-10.

with all potential customers.[99]

26. NCTA suggests that before deciding whether a particular difference in price or terms is unjustified and has significantly hindered a competitor, the Commission must first determine whether a difference really exists because certain prices, terms or conditions, though not identical, are actually comparable.[100] Some vendors also believe that price differences do not necessarily amount to price discrimination,[101] and that discrimination provisions will be hard to implement because of variations in markets and business from technology to technology and from distributor to distributor. These vendors contend that some practices may benefit competition,[102] and that the burden of proof should remain on the complainant. Furthermore, if other similarly situated distributors successfully sell programming in that market, price differences should be presumed not to cause harm. These vendors also claim that the presence of only a few HSD subscribers in urban areas should not determine whether HSD distributors are significantly hindered in such markets.[103] Viacom states that a distributor should be required to show a significant hindrance from providing programming to consumers. Otherwise, in the absence of such a showing, Viacom states that a distributor who suffers no competitive harm because it still possesses an ample supply of other programming to remain a viable competitor would be able to maintain a complaint.[104]

27. Program vendors propose similar tests to determine discrimination, all of which require more than showing just that a price difference exists, and generally involve aspects such as: (1) the programming vendor offered materially different prices, terms, or conditions to the complainant and other distributors; (2) the differences were not justifiable; and (3) the purpose or effect of was to significantly hinder or prevent distribution of programming to subscribers or consumers.[105] Viacom suggests that in order to establish a prima facie case, a complainant must show that it does or will actually compete for sale of programming with a cable system with an attributable interest in a program vendor, that it can identify subscribers it has lost to

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99 See Turner at 12, Liberty Media at 21.

100 See NCTA at 20.

101 See, e.g., Rainbow at 6; Superstar at 45; Turner at 12-13.

102 For example, ARC is concerned that overly restrictive regulations may inhibit the distribution of regional sports programming through concentric pricing, undermining not only the public interest in program diversity, but also the "substantial governmental interest" in the local origination of programming. ARC at 8-9.

103 See Superstar at 44-46.

104 See Viacom at 13.

105 See EMI at 3-4, Viacom at 12-14, Turner at 9, ARC at 12.

another distributor because that other distributor received more favorable term and conditions, and that it will be significantly hindered or prevented from providing programming if it cannot obtain the challenged service on non-discriminatory terms.[106] Discovery suggests that to the extent that a price differential is presumed nondiscriminatory, the regulations should provide that this presumption can be overcome only if the complainant can show both significant injury to consumers, in terms of either higher rates or inability to view desired programs, and a price differential higher than prices charged to the complainant by similarly situated, non-integrated programmers. To the extent that a price differential is presumed discriminatory, Discovery argues, the program vendor should be able to rebut the presumption by showing either that at the time it charged the price it had justification for doing so, or that there has been no actual injury to competition.[107]

28. Liberty Media suggests that the Commission should base its standard of discrimination on principles common to other statutory schemes but should account for the unique characteristics of multichannel programming. Liberty Media submits that "discriminatory" conduct first requires that the services be "like,"[108] and that requiring uniform prices, terms and conditions or limiting price differentials only to cost differences would substantially reduce carriage of these networks on cable systems in outlying areas, and the would result in restricted quantities of programming at higher prices, to the detriment of consumers. Liberty Media contends, cable operators and HSD distributors are not similarly situated, as cable operators can commit their systems for a contract term while HSD or SMATV distributors seek conditions relieving them from contractual obligations when subscribers drop the distributor's service during the term of the contract. Liberty Media also submits that programmers may offer a different rate in exchange for certain carriage (i.e., basic tier) and other services.[109]

29. Superstar addresses issues related specifically to satellite broadcast programming vendors and states that because of the presence of competition and wide availability of superstation programming, there should be less stringent regulation of superstation distribution. If overcharging were occurring, Superstar argues, it would be met by other competitors coming into the market and cutting prices. Superstar submits that wide percentage price differences as alleged in the record correspond to relatively small actual differences in amounts paid. Superstar further asserts that the purpose of the Act is to protect competition, not competitors, and there is no legal basis to

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106 See Viacom at 21-22.

107 See Discovery at 25-26.

108 See Liberty Media at 20-21 (citing 47 U.S.C. Section 202(a) and AT&T Communications, 5 FCC Rcd. 298, 301 (1990)); but see NRTC at 26-29 (asserts that Congress created one class of MVPD entitled to protection from discrimination and arguments regarding likeness are attempts to avoid program access provisions of the statute).

109 See Liberty Media at 25-26.

give certain competitors a particular advantage to allow them to compete more effectively. Superstar contends that the additional facilities of packagers like NRTC are duplicative with respect to services provided by vendors, and that customers often call the satellite broadcast programming vendor instead of distributors for customer service. Superstar also argues that no superstation programmers have market power and there is no basis for the Commission to conclude that any price differentials for superstation programming are causing competitive harm.[110]

30. Some commenters assert that the Commission should require that each vendor annually file its standard rate card and that where price differences exist, the vendor must explain the difference.[111] Time Warner opposes a requirement for vendors to file their rate cards, arguing that there is no Congressional directive to treat programmers like common carriers, that complainants will still have access to rate cards through discovery, and that a filing requirement would generate unnecessary paperwork.[112]

B. Vertical Integration as Standard to Determine Discrimination

31. Commenters also differ regarding the suggestion in the Notice that the conduct of a non-vertically integrated programmer be used as a standard to determine whether a vertically integrated programmer was engaging in discriminatory practices. Some commenters assert that conduct by a vertically integrated programmer should not be deemed unfair if it is no different from the conduct, in comparable circumstances, of non-integrated programmers.[113] They argue that Section 628 does not deal with possible coercive practices of cable operators but with the anticompetitive incentives and abilities of vertically integrated programmers. Similarly, TCI asserts that if a particular practice of a vertically integrated company is common to non-vertically integrated companies it should be presumed to not violate Section 628.[114] Commenters also argue that price differences involving integrated programmers that are similar to those offered by nonintegrated programmers should be excluded from coverage.[115] Alternative MVPDs strongly object to such a standard, arguing that it would allow discriminatory practices prohibited by the statute.[116] They argue that the fact that such practices may be employed by non-integrated programmers is irrelevant to the legislative determination to

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110 See Superstar at 47.

111 See NPCA at 15-16; APPA at 22-23.

112 See Time Warner Reply at 12-13.

113 See NCTA at 20.

114 See TCI at 11.

115 See Discovery at 24; Rainbow at 8.

116 See, e.g., DirecTV at 25 n.31; WJB at 14; CableAmerica at 12; WCA Reply at 11.

bar their use by integrated entities.

C. Options Proposed in the Notice Regarding Discrimination

32. The Notice sought comment on four proposed options for developing standards to distinguish between justifiable and discriminatory price differences. Specifically, the Notice suggested the rules be based on (1) an allowance for a "reasonable" price differential; (2) Section 202 of the Communications Act; (3) antitrust standards from Section 2 of the Clayton Act, as amended by the Robinson-Patman Act; and (4) price comparisons as applied in other regulations, including those used in "anti-dumping" analysis. Although most comments focus on various aspects of the specific options, a few commenters offer general objections to all of the standards. Various alternative distributors argue that Congress clearly established justifiable causes for price differentials in Section 628(c)(2)(B)(i) through (iv), which the Commission should not attempt to broaden.[117] According to these parties, each of the options is inappropriate in the context of the statute, and the statute itself should serve as the appropriate model.[118]

33. NCTA states that none of the proposed options are within the objectives of Section 628. NCTA contends that cable operators, unlike most regulated common carriers, operate in a highly competitive marketplace. NCTA also argues that the Robinson-Patman Act's distinctly protectionist origin has often caused the statute to limit rather than promote competition, whereas Section 628 is intended to promote competition and prevent anticompetitive behavior. Further, NCTA asserts that the legislative history of Section 628 makes clear that differential prices can also be justified by differences in the buyers' costs of selling and delivering the programmer's product.[119] EMI believes that the four proposed options are unnecessary, because regulating the marketplace for satellite programming requires considerations of competition that are distinct from the arenas where each of the options apply. Instead, EMI recommends that unlawful discrimination should be deemed to exist if a programming vendor offers prices, terms, or conditions that are (1) materially different for different distributors, (2) unjustifiable, and (3) have the purpose or effect of significantly hindering or preventing the distribution of satellite programming to subscribers or consumers.[120] Rainbow contends that given the disadvantages of each option, the Commission should rely on case-by-case adjudication. Rainbow believes that an emerging standard would cause less disruption to the industry, and the Commission could gauge the import of its decisions more effectively because parties would be likely to place a disputed price or practice in the context of normal industry practices.[121]

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117 See, e.g., DirecTv at 20; NRTC Reply at 18.

118 See DirecTv at 21.

119 See NCTA at 23-27.

120 See EMI at 4.

121 See Rainbow at 11 n.20.

34. Conversely, APPA believes that any of the Commission's four options would work, provided that the final regulations fully reflect the pro-competitive purposes of the Act, avoid imposing inappropriate burdens of proving injury on claimants, and provide a mechanism to ensure that all concerned parties have access to sufficient information regarding prices and terms.[122] Liberty Media similarly states that each of the statutory schemes to which the Commission has referred for guidance allows for price adjustments to meet competition.[123]

1. Allowance for a "Reasonable" Price Differential

35. Many commenters support the proposal of the Notice to allow for a presumption of "reasonable" price differentials because of the pricing flexibility that is necessary for vendors to sell programming, especially in terms of cost, volume, and manner of carriage or marketing differences, as demonstrated by a broad range of industry sales practices.[124] Many satellite programming vendors and MSOs argue that Section 628(c)(2)(B)(i) through (iv) explicitly permits vendors to allow for certain differences among distributors differentials in establishing programming contracts. Time Warner claims that it is impossible for the Commission to assign values to different contractual terms or to establish fair prices for each contract, and that a "reasonable region" could result from the statute's permissible pricing distinctions.[125] Viacom asserts that if the Commission requires uniform pricing within or across distribution technologies and makes information regarding such pricing levels available to the public, the implementing rules would clearly eliminate price and non-price competition for programming, contrary to the objectives of the 1992 Cable Act.[126] NCTA adds that without an established region for "reasonable" pricing differences, the Commission will face an unrealistic burden of adjudicating complaints seeking identical rates.[127] As a result, NCTA and Time Warner agree that it is unnecessary for the Commission to determine whether comparatively small differentials are "unfair", "unjustified", or "discriminatory", because a price differential falling within the "reasonable" region is probably justifiable by a vendor, and unjustifiable differentials are likely to be so slight that a complainant could not demonstrate that the higher price caused a significant hindrance.[128]

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122 See APPA at 22-25.

123 See Liberty Media at 42.

124 See, e.g., Time Warner at 28, UVI at 23, Viacom at 19, TCI at 13, NCTA at 23, ARC at 14, Landmark at 15.

125 See Time Warner at 28.

126 See Viacom at 17-18.

127 See NCTA at 22.

128 See NCTA at 22; Time Warner at 28.

36. Commenters that support the proposal allowing for a "reasonable" region of price differentials also recommend various criteria for establishing its bounds. For instance, Time Warner recommends using three bands for price differentials that would allow for irrebuttably reasonable differences of plus or minus 15% or less, a larger region for rebuttably reasonable differences, with a provision for rebuttably unreasonable differences of greater magnitudes.[129] Viacom also supports a zone of 30% variances for an irrebuttable presumption of legality in order to prevent excessive time spent in resolving complaints.[130] TCI, Landmark, and NCTA suggest using the pricing behavior of non-vertically integrated programmers as a model for a region of reasonable pricing behavior, because the 1992 Cable Act's purpose was to prevent vertically integrated programmers from acting on their incentive to favor affiliated cable operators.[131] Finally, IFE believes that the Commission should use a benchmark based on a significant percentage different in subscribers' bills.[132]

37. By contrast, numerous commenters object to the option allowing for a "reasonable" region for price differentials. Alternative distributors, including DirecTv, NRTC, and CableAmerica, with support from Bell Atlantic claim that the option would ignore that any price differential -- or a difference in terms -- is presumptively unlawful under the 628(c)(2)(B)(ii), such that a "reasonable price differential" is contrary to the specific provisions in the statute.[133] Similarly, WCA believes that the Commission could not develop a "reasonable" region that would rationally relate to facts in a given case. Therefore, the proposed option would have a chilling effect on distributors by shifting an unrealistic burden to complainants; cable operators would pressure programmers to discriminate to as far as the bounds of the "reasonable" region and program vendors still attempt to satisfy their largest customers.[134] APPA argues that the Commission should consider using a "zone of reasonableness" only as last resort, and instead should require

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129 See Time Warner at 29-30. As a justification, Time Warner claims that a 15% pricing differential is not unusual in pay services. Also, their "rate cards" that establish differentials for a distributor's retail price charged to subscribers, total number of subscribers, and ratio of subscribers for pay to basic services demonstrate maximum and minimum rates that vary roughly 15% from the midpoint.

130 See Viacom at 19.

131 Landmark states that the Commission could create a range based on an absolute price differentials or percentage differences, although a percentage calculation may produce anomalous results at comparatively small absolute amounts. See Landmark at 15; see also TCI at 13; NCTA at 22-23.

132 See IFE at 10.

133 See DirecTv at 21; NRTC at 19; CableAmerica at 29.

134 See WCA at 37-38.

programmers to publish prices for their services in order to facilitate availability to all distributors.[135]

38. Several commenters with cable interests also oppose the option for a "reasonable" region due to the difficulty of accommodating the distinct pricing considerations by various vendors among various distributors.[136] For instance, Superstar observes that the Commission would have difficulty determining appropriate bounds for a "reasonable" region due to divergent consequences of absolute and percentage-based differentials. They continue that although the option could eliminate many frivolous complaints, the process of using the presumptions associated with the "reasonable" regions would remain too time consuming for the Commission and participating parties.[137] Liberty Media claims that this proposed approach could become arbitrary and capricious, while dampening price competition among programmers. Nonetheless, if the Commission determines to pursue a "reasonable" region, multiple alternative regions of broad price differentials would become necessary to encompass the basic differences among various distributor technologies.[138]

39. In response, Time Warner questions arguments raised by parties opposing the "reasonable region", because even those complainants who could show price differences that might be construed as an "unfair practice" under 628(c)(2)(B) would still need to show some competitive injury, which is arguably impossible.[139] Viacom recommends a "zone of reasonableness" based on the numerous and legitimate factors for permissible price differentials recognized in Section 628, which would preclude obstructive discrimination claims based on differences the Act considers reasonable.[140] NCTA observes that DirecTv and NRTC oppose the "reasonable" region because it would establish a "safe harbor" for discrimination contrary to the statute, but NCTA argues that the proposed zone would only determine where the burden of proof lies, which the Act does not establish.[141] Without establishing presumptively reasonable and unreasonable price differentials, NCTA argues it would be more reasonable to presume that all differentials were justified and place the

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135 See APPA at 23-24. In reply, Liberty Cable opposes a 30% range of reasonableness as too broad. See Liberty Cable Reply at 4.

136 See, e.g., Superstar at 53-54; Liberty Media at 45.

137 See Superstar at 53-54.

138 See Liberty Media at 46.

139 See Time Warner Reply at 9-11.

140 See Viacom Reply at 7. Viacom also recognizes the concerns raised by Landmark regarding the difficulties caused by a percentage based "reasonable" region, and agrees that, where appropriate, the Commission should adopt a "zone" bounded by absolute dollar terms.

141 See NCTA Reply at 28.