burden of proof on the complainant.[142] NCTA also states that nothing in the 1992 Cable Act suggests that, as a general matter, all differentials should be presumed either to be unlawful or to be one of the four permissible types. Indeed, according to NCTA, it is most likely that program vendors will sell services at different prices to different distributors for wholly legitimate reasons.

2. Section 202 of the Communications Act

40. A number of commenters support the use of Section 202 of the Communications Act as a standard to determine discrimination, stating that a reasonable differential can only be determined in the context of a specific case, and that a 202 type standard is better adapted to price discrimination on services and fairer to litigants than the other models. In such instances, complainants would demonstrate a violation where a defendant has discriminated unreasonably in providing like services, with the burden shifting to the defendant to justify the difference where the defendant controls the relevant information.[143] Superstar supports use of 202 standard, which would permit complaints only where services are like and unjust discrimination has occurred.[144] Similarly, UVI supports use of 202 standard, as the analysis used under this standard directly reflects the statutory provisions of 628(c)(2)(B)(i)-(iii).[145] WCA states that a 202 type standard is the most applicable starting point, and ACC and Bell Atlantic support incorporating the common carrier standard under which it is unlawful to engage in "unjust or unreasonable discrimination" "in the provision of "like" services or to give any unreasonable preference or advantage to any person.[146]

41. Other commenters suggest using a standard similar to Section 202

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142 See NCTA Reply at 29-30. NCTA states that complainant would have to show all elements of the discriminatory practice, including that a differential exists and that it doesn't fit into one of the four types permissible under 628(c)(2)(B)(i)-(iv). At most, the Commission might give a vendor the burden of coming forward with an explanation of why the differential is justified under one of the four criteria. If so, the burden of persuasion would then shift back to the complainant to prove that the programmer's justification is not supportable. With very large differentials, the burden of persuasion could be shifted to the programmer; and de minimis differentials would relieve the programmer from the burden of coming forward with a justification. Yet, in all cases, the complainant bears the burden of demonstrating that the conduct has the purpose or effect of preventing or significantly hindering it from competing.

143 See NYNEX at 14.

144 Superstar makes the argument that service to HSD distributors is not "like" service to other distributors.

145 See UVI at 12.

146 See ACC at 9-10; Bell Atlantic at 6-7.

with some modifications or reservations. DirecTv states that although Section 202 most closely approximates what Congress intended, the standard nevertheless adds a layer of complexity by requiring the Commission to determine whether the service offered by a program vendor to different distributors are "like" services. DirecTv claims that Congress has determined that, for the purposes of enforcing 628's anti-discrimination prohibition, all cable programming services are "like" services.[147] The second part of the Section 202 analysis, allowing a cost-based analysis of price differentials, is consistent with the defenses allowed by Congress for price discrimination: (c)(2)(B)(ii) allows programmers to use different prices, terms and conditions for actual and reasonable differences in the costs of creation, sale, delivery, or transmission; and (c)(2)(B)(iii) allows programmers to set different prices/terms/conditions which take into account economies of scale, cost savings, or other economic benefits reasonably attributable to the number of subscribers served by the distributor. However, this option falls short in that while the statutory exemptions focus on the direct costs of the programmer associated with providing the service to different distributors, there are other narrowly defined, objective factors such as volume discounts based on the number of subscribers served by the distributor that are also justifiable under the statute (that are not cost-based).[148]

42. USTA supports use of variation of 202 because it offers more flexibility, and could encompass aspects of antitrust standards. They argue that differing prices for the same or functionally equivalent programming would automatically raise a question of reasonableness and burden must shift to programmer to justify. Moreover, USTA believes that the burden should be heavier than under 202 because there is no opportunity to review tariffs, and enforcement is strictly through complaint process. They claim that the mere presence of other programming cannot be expected to minimize risk of discrimination as it would in Title II context where pure transport options exist, and a distributor may not be able to duplicate programming option. Therefore, USTA contends that the Commission must actively seek information necessary to assure that contracts are based on neutral, rational factors. U.S. West also supports a standard similar to Section 202 in combination with a reasonable region for price differences. They argue that the other options are untested in this marketplace and could add uncertainty; precedents and experience can provide certainty and predictability. Conversely, the Commission has experience in applying the 202 standard to vendors in the context of filing tariffs, and more recently in discrimination inquiry regarding satellite retransmission of "superstations" and network programming.[149] US West also claims that programmers should not be allowed to avoid likeness by unreasonable bundling or packaging video programming. If likeness is found and prices and terms and conditions differ, it would be sufficient to establish discrimination. According to US West, unlawful discrimination would also depend on whether differences related to justifying

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147 See DirecTv at 23.

148 Id. at 24.

149 See Second Report in Gen. Docket No. 89-88, 6 FCC Rcd 3312 (1991).

factors. Furthermore, they claim that program vendors should be encouraged to develop pricing matrices reflecting differences in the presence of justifying factors, and that complaints should be dismissed in the absence of a showing that terms of pricing matrix are unreasonable.[150] ACC supports the use of Section 202 standard with Commission specifically defining cable, DBS, wireless cable, MMDS and perhaps others as "like" services to prevent the argument that certain services are not like.

43. Several commenters rejected Section 202 as an appropriate standard because, for example, Section 202 is based on statutory definitions. Furthermore, they claim that it is unnecessary to determine "likeness" as because <u>all</u> discrimination is unlawful.[151] TCI and NCTA state that Congress didn't intend to import common carrier concepts into the video programming business, and Time Warner asserts that the only virtue of using Section 202 as a model is that the FCC is familiar with applying this standard.[152] NRTC addresses the question of like services and states that the Commission could easily find that HSD and non-HSD distribution services are "like services", and any differences in services do not appear to be material functional differences from the customer's perspective, such that Congress created one class of MVPD entitled to protection from discrimination. In this regard, NRTC claims that the definition of a "distributor" includes, but is not limited to, a cable operator, an MMDS service, a DBS service and a HSD satellite program distributor.[153]

3. Antitrust Standards

44. We also proposed to apply price discrimination aspects of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act.[154] Most commenters oppose the proposal to base the implementing rules for Section 628 on antitrust standards.[155] Although NCTA agrees that the Robinson-Patman Act is similar to

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150 <u>See</u> U.S. West at 13.

151 <u>See</u> NRTC at 21.

152 <u>See</u> Time Warner at 14; TCI at 18; NCTA at 31; <u>accord</u> ACC at 9-10; Bell Atlantic at 6-7; NYNEX at 11; WCA at 39.

153 <u>See</u> NRTC at 26-29.

154 These statutes prohibit any person engaged in commerce from discriminating "in price between different purchasers of commodities of like grade or quality...where the effect of such discrimination may be to substantially lessen competition or tend to create a monopoly in any line of commerce." <u>See</u> Clayton Act (1914), 15 U.S.C. §§ 12 <u>et seq.</u>, 44; Robinson-Patman Act (1936), 15 U.S.C. §§ 13, 13a, 13b, 21a.

155 TCI expresses general problems with applying a standard based on the Robinson-Patman Act, recommending that the Commission should neither (i) adopt secondary-line injury cases as a model, nor (ii) use precedent from <u>Morton Salt</u> to punish programmers for entering into long-term contracts. They state that

Section 628 in some respects, they believe that the antitrust statute differs in its underlying purposes as well as in the criteria for determining whether differentials are justifiable.[156] Several parties, including alternative MVPDs, argue that Congress intended that the 1992 Cable Act should provide a remedy that goes beyond the price discrimination provisions in antitrust law.[157] In particular, these parties claim that under Section 628(c)(2)(B), discriminatory terms are presumed unlawful unless justified under one of the four exemptions, while under the Robinson-Patman Act, price discrimination is prohibited only where its effect may "substantially lessen competition." The commenters also doubt that antitrust analysis, as applied to goods or commodities under Robinson-Patman cases, could extend to services. Superstar observes that the market for video programming services is extremely competitive, such that applying an onerous standard based on antitrust principles would harm satellite broadcast programming vendors due to the ease of entry in the market, thus distinguishing the programming context from Robinson-Patman cases.[158] The Attorneys General state that the "meeting competition" defense developed in the Robinson-Patman context makes little sense in this context where one programming service is not necessarily perceived as a substitute for another. As a result, programming vendors use price discrimination to prevent competing distributors of "cable" programming from offering a comparable product at a comparable price rather than to gain an advantage against sellers of similar products.[159]

4. Price Comparisons as Applied in Other Regulations

45. In the NPRM, we also sought comment on the applicability of principles for price comparison from other areas of federal regulation, including the "anti-dumping" standards of the International Trade Administration. DirecTv stated that this option is undesirable because (1) it is normally applied where prices are artificially lowered for competitive advantage, whereas alternative distributors competing with cable are subjected to artificially high prices, and (2) this type of analysis is cumbersome to apply, typically involving calculations concerning global and national markets and valuations of barriers to trade.[160] Several other commenters, including NCTA, NRTC, and WCA, also object to applying the anti-dumping analysis because the policy contexts of communications and international trade are too different, although WCA concedes that the model could offer helpful

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the Commission could use cases where, given a large number of sellers, competitive harm is not shown merely because one competitor receives a more favorable price. See TCI at 15.

156 See NCTA at 25; NCTA Reply at 31.

157 See, e.g., DirecTv at 22; WCA at 38-39; NRTC at 22.

158 See Superstar at 58-60.

159 See Attorneys General at 11.

160 See DirecTv at 22.

analogies.[161]

D. Justifying Factors for Price Differences Specified Under Section 628

46. Certain MVPDs caution that the Commission shouldn't allow consideration of justifying factors to undermine prohibition of discrimination and thwart enforcement efforts. Instead, they claim that the Commission should abide by legislative intent and not allow loopholes or excuses.[162] Unless the vendor can specifically demonstrate some added cost associated with delivery of a program, these parties argue that multichannel distributors should have access at the same price.[163]

47. SCP vendors assert that the comments establish there are many reasonable grounds for price differentials based on delivery systems based on (1) programmer's costs in selling and marketing its services to distributors with different number of subscribers or which use different technologies, (2) the value distributors can confer upon programmers by providing large numbers of subscribers over which programming costs can be amortized, and (3) the distributor's role in marketing an promoting the service.[164] ARC states that clearly justifiable differences that fairly may be reflected in prices, terms and conditions include: advertisers refusal to include HSD subscribers in total viewership for purposes of calculating advertising payments; large-volume distributors cost less to service and provide additional economic benefits through increased advertising revenues and widespread promotion and recognition of a service; programming services face different competition conditions with different distributors and in different geographic regions.[165] Prime Ticket describes pricing practices unique to sports programmers and states that it uses volume discount and price differentials based on geographic locations.[166]

1. Cost differences

48. SCP and SBP vendors assert that they incur greater costs with

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161 See NRTC at 23; DirecTv at 22; WCA at 39; NCTA Reply at 32-33.

162 See NTCA at 3-4.

163 See ACC at 8 (stating that no actual expense difference exists to justify price difference between cable and DBS).

164 See Turner Reply at 7 (citing Viacom at 18).

165 See ARC at 15.

166 Prime Ticket's programming consists of professional and college sports teams from the Los Angeles area that it contends are not as valuable outside Los Angeles. It submits that the lowest contract price within Los Angeles County is twice as high as the highest price outside California. Prime Ticket states that it cannot price the same and cover the cost of the rights fees it has to pay. It asserts that a single rate would not work, and would be either too high to attract customers in outer markets or too low to cover costs.

service to certain MVPDs, especially with respect to HSD distributors, and that Section 628 allows for recognition of these costs in different pricing practices. EMI stresses that the Commission must permit a vendor's prices or terms to reflect the varying costs of providing the service and the value of a distributor's commitment to a programming service[167] as well as numerous factors, not limited to those set out in the statute, such as copyright royalty payments to the U.S. Copyright Office, which it does not incur in its cable business. Accordingly, EMI states that these costs must be allocated fairly to HSD customers, not cable or MMDS customers.[168] Superstar states that it is difficult to identify all appropriate cost and economic benefit factors, which may preclude an objective standard for discrimination if the Commission seeks to avoid restricting normal business processes. Superstar claims that actual and reasonable cost differences include more marketing costs that benefit all distributors by encouraging consumer awareness and desire for programming. Superstar also points out that the differences include (1) more and different back office costs involving thousands of operations, consumer problems, and 24-hour customer service, (2) different operations conducted through GI's DBS Center including maintaining ports and connections, and (3) piracy costs. They also observe that costs may vary from distributor to distributor, or vendor to vendor, and are not susceptible to mathematical precision.[169] Therefore, Superstar believes that the Commission should allow vendors to exercise reasonable business judgments and only allow complaints against those practices that cause significant harm or those that could be independently considered unfair.

49. UVI offers detailed information regarding cost differences in providing satellite broadcast programming to cable operators as opposed to the HSD market. Satellite broadcast programming vendors (SBPV) provide services for facilities-based operators (FBOs), including cable, SMATV and MMDS, which are distinctly different from those services provided to HSD consumers through non-facilities-based distributors because FBOs maintain facilities and services necessary to deliver signal to consumers.[170] On the other hand, the HSD distributor functions more as a sales agent than as a vital link in the delivery chain. UVI argues that the fundamental differences between the services provided by a SBPV to serve FBOs and HSD consumers mean that there are significant differences in the costs to provide services.[171] Furthermore, the unique costs of providing services to HSD market must be allocated across a customer base of one million, while the unique costs of providing services to FBOs is spread out a customer base of 30 million, such that on a per

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167 See EMI at 3.

168 Id. at 4-5.

169 See Superstar at 49-50; see also Discovery at 23.

170 See UVI Reply at 7.

171 Id. at 8.

subscriber basis, the rates for HSDs are higher than for FBOs.[172]

50. Time Warner asserts that regulations should allow for differences in transaction costs, and programmers costs in marketing the product to subscribers; some distributors perform more for the programmer than others and this should be reflected in price.[173] Similarly, Turner offers evidence to justify a 780% price differential (between cable and TVRO) cited by NRTC on the grounds that the distributors involved are fundamentally different.[174] For instance, Turner must go through a cable operator to reach cable customers while it is able to sell directly to TVRO households, and could reach all of NRTC's customers without NRTC's service. Turner continues that there is no economic reason to sell programming to a cable operator and HSD distributor at the same price, because HSD distributors act solely as middlemen, do not build physical pants to increase penetration rates, do not help create a mass audience which advances advertising objectives, do not commit resources to marketing, and involve higher administrative costs, incidence of signal theft, and maintenance cost.[175] Time Warner states that the law does not protect individual HSD subscribers, only distributors, although selling to individual HSD owners is more costly. For instance, HBO has chosen to transmit an analog signal which is able to be unscrambled by less expensive decoders on HSD systems instead of a compressed digital signal, although some cable headends may not have digital capability either, which costs HBO $3 million annually. Furthermore, HBO activates a cable descrambler once for many subscribers, but each individual HSD must be separately addressed.[176] SBCA, an organization representing programmers and distributors, agrees that service to MVPDs, particularly the HSD market, results in different costs.[177]

51. Some alternative MVPDs argue that there are no differences in the costs of serving them as opposed to other distributors. For example, NSPN states that the Commission should not allow geographic exceptions and that there is no reason for cost differences to serve different areas of country.[178] CSS argues that the application of permitted priced differentials in the case of NPS should not result in any significant pricing differences between NPS and a cable operator, SMATV provider or wireless cable operator of similar size. No cost based differentials are justified between NPS and a comparably sized

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172 Id. at 9.

173 See Time Warner at 23.

174 Cf. NRTC at 4-5.

175 See Turner at 10; Turner Reply at 8; see also Liberty Media at 37.

176 See Time Warner at 24-27.

177 See SBCA Reply at 6.

178 See NSPN at 9 n.6.

cable system.[179] However, the costs of serving NPS by a programmer is, in many cases for many programmers, equal to or possibly less than the costs associated with serving an MSO of equal or lesser size. Likewise, Souris River suggests that price differences between HSD and cable are unjustified and that it costs no more to serve rural HSDs than urban cable.[180]

52. Programmers urge that the Commission consider costs incurred by distributors at the retail level in serving subscribers in determining an appropriate price. EMI wants the Commission to establish that vendors may legitimately recognize the added value certain distributors add to a programming distribution arrangement. For example, certain types of distributors, such as cable and MMDS operators, incur significant costs to create and maintain delivery systems.[181] EMI states that the legislative history supports that price differentials may be justified by costs associated at both the program vendor's level and at the distributor's level.[182] Similarly, Viacom states that the colloquy between Senators Kerry and Inouye supports the fact that because these costs can be considered, it is clear that the intent of Congress was to protect competition and not particular competitors.[183] Viacom also claims that non-cable distributors have lower costs per subscriber to deliver to the home and may undercut cable's retail price regardless of the price for programming.[184]

53. WCA opposes the arguments to consider retail costs of distributors on the grounds that there is no support in Section 628 for this position, nor do the 3 committee reports in legislative history, but rather that the advocates of this argument rely only on a colloquy between Senators Inouye and Kerry.[185] WCA asserts that this colloquy is ambiguous, and permitting programmers to charge higher fees to distribution technologies with lower costs will discourage development of new, low cost technologies, counter to congressional goals, "in promoting a diversity of views provided through

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179 See CSS at 16.

180 See Souris River at 2.

181 See EMI at 6.

182 Id. at 10; see also Rainbow at 7, Liberty Media at 25-26.

183 See Viacom at 16. Cross County attacks as inadequate Viacom's assertion of a cable competitor's lower cost structure. Viacom counts franchise fees but not channel lease fees for wireless, says that lower costs are not a reason to charge more. It asserts that wireless does have somewhat lower fixed costs but it can't withstand indefinitely discrimination. Cross Country Reply at 5 n.3.

184 Id. at 52; see also Discovery at 24.

185 See WCA Reply at 20.

multiple technology media".[186] WCA argues that wireless technology can offer lower rates to subscribers because of its more efficient distribution technology. Similarly, Bell Atlantic states that a buyers' costs should only be relevant if they have demonstrable impact on sellers' costs.[187]

2. Volume

54. In general, programmers strongly support the allowance of price discounts based on subscriber volume.[188] Rainbow states that its price may depend on relative efficiencies of the distributor, and that price is a function of a distributor's penetration in market and the number of subscribers that actually take the service (HSD rates reflect vastly lower penetration).[189] Commercial-free programming services place a higher value on cable distribution, arguing that cable provides access to more households at a lower transaction cost.[190] According to TCI, discounts based on the number of subscribers are permissible and longstanding business practices that Congress intended to allow. TCI asserts that volume discounts bring economic benefit to advertiser supported programmers, and can increase diversity of programming and channel capacity and can lower consumer rates.[191] Turner states that an HSD distributor like NRTC provides 62,000 CNN customers out of 92 million TV homes nationwide, and is not as critical as a cable operator which provides 62,000 customers in a city with 90,000 TV homes.[192] Turner also states that the Commission should adopt a presumption that volume discounts within a certain range are legitimate; it asserts that an upper limit of 20% would be reasonable.[193]

55. Small System Operators submits that eliminating volume discounts would not serve to reduce programming costs for small operators, but would only raise costs for larger ones. Through a system of rebates or other practices, they submit, it is likely that volume discounts for large operators would continue to exist.[194] CATA states that programmers may have very legitimate bases for volume discounts, especially with advertiser supported programming. CATA asserts that a guarantee of a minimum number of subscribers may mean the

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186 Id. at 23, n. 51.

187 Bell Atlantic at 6.

188 See E! at 9; ESPN at 5; Discovery at 21; Landmark at 18.

189 See Rainbow at 8.

190 See Superstar at 51.

191 See TCI at 18-19.

192 See Turner at 11.

193 Id. at 13.

194 See Small Systems Operators at 9.

difference between getting and losing an account.[195] UVI contends that without volume discounts, any large MSO could uplink a particular superstation rather than obtain the signal from UVI or another vendor.[196] UVI further argues that volume discounts do not significantly decrease a facilities based operator's total costs, as programming costs represent 36% of such an operator's total monthly costs. UVI submits that volume discounts for superstations do not hinder program distribution to consumers and thus cannot be considered a violation of the statute.[197]

56. In a study appended to the comments of TCI, Charles River Associates opposes a blanket prohibition on the use of volume discounts. Charles River submits that transaction and selling costs per subscriber are likely to be lower when a program service can deal with, for example, a single MSO that represents 10 million subscribers rather than 10 distributors, each of whom can deliver 1 million subscribers, or 40 operators with 250,000 subscribers each. Moreover, Charles River argues, a large MSO will incur some of the cost of communicating with individual systems that the program service itself must bear when dealing with small systems. Charles River asserts that volume discounts can promote the efficient distribution of programming, enabling large MSOs to supply their subscribers with more services or to set lower prices, causing more consumers to subscribe to services carried by the multichannel distributor. Further, Charles River contends, lower programming costs may increase the channel capacity that a cable system chooses to provide, and may contribute to the viability of some programming services due to increased distribution. In addition, Charles River notes that it should not be presumed that lower fees based on cost efficiencies are available to only one distributor in a market. Charles River asserts that the competitive edge gained by a low-cost supplier is the incentive the market uses to encourage all firms to adopt techniques and procedures that reduce costs, to the benefit of consumers.[198]

57. E! contends that the statute recognizes the legitimacy of some price differences attributable to the number of subscribers, and submits that it experiences economies of scale when dealing with large distributors as opposed to small distributors, and cable as opposed to non-cable distributors[199]. Superstar states that absent evidence that a vendor is using different prices to deny access, the Commission should presume that negotiated prices reflect relative direct and legitimate economic benefits attributable to the number of subscribers served. It asserts that economies of scale are difficult to measure at different levels of subscribership. It also contends that quantification may change with the economy, interest rates, availability

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195 See CATA Reply at 2

196 See UVI Reply at 9.

197 Id. at 10.

198 Charles River Study at 6-10.

199 See E! at 8-9.

of capital, and other factors, and that the extent may change with growth of markets, presence of competing programming and success of programming sold.[200]

58. Viacom states that volume discounts are not uniform for each technology because cable can deliver vastly more customers.[201] Viacom further cites additional expenses associated with noncable distributors; they argue, for example, that SMATV subscribers are more susceptible to churn because they live in apartments. Liberty Media suggests that the Commission should generally identify those kinds of "economic benefits" that would justify discounted rates.[202] Bell Atlantic agrees that economies of scale have to be cost justified, citing the legislative history where the current exception replaced language allowing for straight volume discounts.[203]

59. Many vendors assert that their volume discounts are not discriminatory because they are offered to all distributors. NSPN cautions, however, that artificially high subscriber counts can be used to qualify for volume discounts, and urges the Commission to set meaningful levels.[204] CSS does not take issue with the ability of a programmer to offer reasonable, cost based volume discounts, but it urges the Commission to establish rules and remedies to permit a competitive MVPD to demonstrate that there are no justifiable differences between itself and a cable system or SMATV operator of a comparable size.[205] TCI states that the Commission should prohibit price differences between technologies based solely on the technology and unrelated to cost and other legitimate factors (e.g., signal security, financial stability).[206]

60. On the other hand, CableAmerica contends that volume discounts are unfair to smaller systems.[207] CableAmerica asserts that Congress chose not to give programming vendors total discretion in granting volume discounts to larger operators, and argues that there is little economic basis for volume discounts.[208] CSS urges that the rules should not permit any volume discounts based upon subscribers obtained through a different delivery medium unless it can be shown by clear evidence that the subscriber base in one delivery medium

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200 See Superstar at 50; see also Time Warner at 23-27, Viacom at 16.

201 See Viacom at 41.

202 See Liberty Media at 21.

203 See Bell Atlantic at 7.

204 See NSPN at 14.

205 See CSS at 17.

206 See TCI at 22.

207 See CableAmerica at 7-8.

208 Id. at 27-28.

provides direct cost savings in the provision of programming for another delivery technology. It submits that such an additional subscriber base may be accounted for by the cost and term advantages afforded to cable providers during the past several years.[209] DirecTv states that vendors should not be allowed to aggregate subscribers across technologies -- i.e., an MSO with DBS interests should not be allowed to combine to obtain greater volume discounts.[210]

3. Creditworthiness

61. ACC states that vertically integrated program vendors cannot be allowed to unilaterally determine the creditworthiness of a potential multichannel competitor. Rather, where questions of creditworthiness are raised, the Commission could permit program vendors to require multichannel distributors to provide some reasonable evidence of an ability to pay.[211] DirecTv states that the statute allows financial stability conditions as long as they are imposed evenhandedly on all MVPDs.[212] Liberty Media asserts that additional financial requirements should be permitted for distributors which: have a poor credit history, have a poor history of customer service and satisfaction, and employ new distribution technologies, the quality of which is unproven.[213] People's Cable, which operates a cable system and a wireless cable system, describes how some programmers charged higher rates and demanded additional credit guarantees for programming to be sold on the wireless system despite the fact that both systems were operated by the same company.[214] Superstar submits that a vendor should be permitted to take into account payment history, commercially available credit information, the value of a distributor's assets, and additional assurances if it is uncertain that it will receive timely payment.[215] Viacom states that there is a greater financial risk with alternate distribution technologies.[216]

4. Offering of Service

62. Commenters discuss a variety of other factors related to offering of service that might affect the price of programming. For example, Continental suggested that the following factors have a material impact on the

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209 See CSS at 11.

210 See DirecTv at 23.

211 See ACC at 7.

212 See DirecTv at 25.

213 See Liberty Media at 39; see also Time Warner at 20-23.

214 See People's Cable Reply at 2-3.

215 See Superstar at 47-48.

216 See Viacom at 17.

price: (1) the distributor's penetration levels for premium programming; (2) the marketing resources devoted to promotion of premium programming by the distributor; (3) the markets served by the distributor; (4) channel positioning; (5) the size of the distributor's subscriber base; (6) the addressability of the distributor's system; and (7) the retail price charged to the consumer.[217] Other commenters offered similar offering of service factors such as introductory terms and marketing support;[218] risk of taking a new service, differences in meeting competition, different value in geographic areas, different competition for carriage;[219] packagers of programs, contract duration;[220] appropriate commitment to marketing and distribution of service;[221] prepayment discounts, promotional programs;[222] discounts to distributors with lower retail costs;[223] and channel placement.[224]

63. Bell Atlantic cautions that the Commission should be careful in allowing differences based on marketing abilities or name recognition. It asserts that the cable operator can always claim name recognition over a new entrant, and that cable operators should not be entitled to credit for marketing performed greater than its actual costs.[225] DirecTv states that offering of service conditions must be technology neutral and available to all MVPDs.[226] Rainbow urges a broad construction of "offering of service" and asserts that the vendor needs to ensure that the distributor makes the appropriate commitment to marketing and distribution of service.[227]

64. Superstar states that it is impossible to quantify justification factors because they will vary from vendor to vendor. For example, Superstar argues, HSD distributors often collect yearly fees but pay the programmer monthly. It also asserts that programmers sell programming with conditions allowing for prepayment discounts, performance discounts and other bonuses tied to the conduct of a particular distributor. Therefore, Superstar argues that

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217 See Continental at 11-20.

218 See Turner at 11; Discovery at 22.

219 See Liberty Media at 35-37.

220 See DirecTv at 25.

221 See Rainbow at 9.

222 See Attorneys General at 10.

223 See People's Choice Reply at 2.

224 See E! at 9.

225 See Bell Atlantic at 7.

226 See DirecTv at 22.

227 See Rainbow at 10.

the only feasible discrimination standard would be an absolute price differential based on current practice.[228] Time Warner states that because HSDs can receive five versions of HBO, can block programming based or ratings and can get a menu displaying program information, the programmer should be allowed to charge a higher price.[229] Viacom states that pricing standards should allow for the different marketing abilities of distributors, asserting that factors that bear on negotiations include the distributor's subscriber base, a programmer's agreement to tailor incentives for that particular distributor to reach a certain number of subscribers, the distributor's number of current and anticipated subscribers to the service, the retail price set by the distributor, penetration of service, amount and type of marketing, channel position, agreements to launch the service in particular markets, timing of launches, duration of the agreement, the extent of available channel capacity, and revenue or subscriber guarantees.[230]

E. Other Pricing Factors Suggested by Comments

65. ARC asserts that concentric pricing of sports programming cannot be regarded as unfair or discriminatory because it promotes rather than hinders distribution and diversity. It also asserts that it may make price adjustments for cable, MMDS and SMATV operators in areas for which the service's distribution rights for one or more of the teams are restricted. It contends that price differentials resulting from such licensing restrictions are neither unfair nor deceptive and should not be considered discriminatory under Section 628.[231]

66. Charles River asserts that introductory discounts may also lead to pricing differences. Introductory discounts are the better prices and terms offered to distributors that commit to a new service before that service is introduced. These early signers are given a discount in exchange for bearing the risk of not being able to recover costs for launching the service or for launching a replacement service. They also bear the risk that the service will not be successful, causing distributors that sign later to pay less.[232] In addition, Charles River contends that non-uniform pricing schedules may cause pricing differences. By non-uniform pricing schedules, Charles River refers to pricing based on the fact that a program service incurs relatively low additional costs when more distributors carry its service, or when more subscribers to systems already carrying the service sign up. Charles River notes, for example, that if a program service has average costs per subscriber of 50 cents per month but the cost of being distributed to an additional

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228 See Superstar at 48-49.

229 See Time Warner at 26.

230 See Viacom at 45.

231 ARC at 10-14.

232 Charles River Study at 12-13. For a discussion of pricing dynamics in establishing introductory discounts, see id. at 14-16.

subscriber is only 1 cent, setting the price at a uniform 50 cents per subscriber might restrict distribution of the service in areas where its value to the system and to subscribers is less than 50 cents per subscriber but more than 1 cent. Charles River submits that there are many types of non-uniform schedules, but all are similar in that the amount by which the total license fee increases when one more subscriber receives the service is smaller than the average license fee paid per subscriber.[233] Further, Charles River contends that signal security issues, collection problems and the overall value of contract terms to individual distributors may cause pricing differentials.[234] On the other hand, WCA argues that programmer's standards relating to signal quality and piracy must be applied on technology-neutral basis.[235]

F. Buying Groups

67. Most commenters agree that buying groups perform a useful function and should receive the benefits of discounts based on subscriber volume. NSPN submits that a buying group offers more efficiencies, less overhead and more economic value to members, as well as a larger subscriber count and fiscal responsibility that programmers may require. It often acts as the direct licensee of a programmer and will absorb bad debt problems, and helps newer, smaller companies get started.[236] Discovery states that group-buying discounts are a form of volume discount expressly permitted by the Act.[237] CSSO argues that the Commission should not hinder the development of co-ops or buying groups for small operators and should not impose requirements or restrictions on buying groups because the impact of any such regulation would likely be disproportionately felt by small operators. It contends that small systems must be given the opportunity to purchase programming at a fair price and on equal ground with larger operators.[238] Conversely, NCTA states that Section 628 does not provide that buying groups can demand the same prices as other distributors, simply on the basis of the numbers of subscribers served, and argues that all the factors that justify differential prices among other distributors also apply to buying groups.[239]

68. Programming vendors supporting the concept of buying groups also assert that in order to receive benefits, such groups should agree to unitary treatment. For example, Time Warner would require that the group agree to be liable for the debts of any member, that each member agree to be liable for

233 Id. at 17-20.

234 Id. at 20-25.

235 See WCA Reply at 24.

236 See NSPN at 1-8.

237 See Discovery at 21.

238 See CSSO at 6.

239 See NCTA at 39.

the debts of the group and each other member, that each member guarantee the technical performance and signal security of each other member, and that the group show that it can provide the same efficiencies as and individual entity, i.e., ability to make collective distribution and marketing decisions for all members).[240] United Video states that uncontrolled buying groups would undermine the overall rate structure and reasonable volume discounts. It asserts that such groups should be permitted only where a single entity owns at least 51 percent of each member of the group, and that limits should be placed on the size of individual members and on the overall size of the group. United Video further argues that the group should be required to agree to unitary treatment, such as centralized billing, uniform contract provisions, joint and several liability and indemnification.[241] Viacom asserts that if a buying group actually performed the same functions and offered the same benefits as an MSO it would be entitled to comparable treatment.[242] Liberty Media states that in order to obtain the benefits of group purchases, members of buying groups also should be required to accept unitary treatment, i.e., the same non-price terms and conditions. Likewise, it argues, members of buying groups should be jointly and severally liable for the commitments of the group. Liberty Media submits that it does not appear necessary now to limit the size of individual entities participating in buying groups provided that the total number of subscribers represented by the group does not exceed whatever horizontal concentration limits are established by the Commission pursuant to Section 11 of the Cable Act.[243]

69. NSPN opposes programmers' suggestions that members of a buying group must have a common marketing plan and joint and several liability for programming fees, technical performance and signal security before the group can obtain protection under 628.[244] It disagrees with programmers' arguments that all members of the group must have a common marketing program and joint and several liability for programming fees, technical performance and signal security. It contends that the buying group and not its individual members should be responsible for programming fees as a party to the contract. Further, NSPN contends that Section 628 and its legislative history do not require buying groups to become MSOs, and neither the group nor its members should have to assume legal responsibility for one individual member's technical problems. NSPN also claims that it is unrealistic to require uniform marketing strategies.[245]

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240 See Time Warner at 31.

241 See UVI at 29.

242 See Viacom at 27.

243 See Liberty Media at 40.

244 See NSPN at 1.

245 See NSPN at 14.

G. Non-Price Discrimination

70. MVPDs offer a variety of examples that they say should be included as discriminatory practices. NSPN argues that these include identifying non-cable providers as "special markets" and limiting ability of purchasing agents to serve special markets.[246] NSPN also contends that the regulations should outlaw "most favored nations" clauses and grandfathering because such provisions are not available to alternate providers.[247] CSS suggests a number of non-price-based practices that constitute unfair treatment, including restricting the contents of an MVPD's basic tier; requiring an MVPD to sell subscriptions only on an annual basis; refusing or unduly limiting MVPDs' tier bit access; and refusing to permit MVPDs to sell certain programs in cabled areas while permitting other cable affiliated HSD providers to provide such service.[248]

71. National CableSystems Associates notes that unaffiliated distributors sometimes have to obtain the programming of vertically integrated vendors through third party distributors that charge higher rates and exact more concessions than the vendors do themselves.[249] CableAmerica notes that some programming vendors support cut-rate promotions by favored cable operators, but that programmers often refuse to extend these same promotional opportunities to competing video distributors.[250]

72. CATA submits that examples of discriminatory terms and conditions that program services with predominant market shares impose on smaller operators include: program suppliers place conditions in their contracts that provide strong disincentives for an operator to carry less than the full panoply of their services; program suppliers heavily penalize operators that do not carry the service on the lowest tier of available programming; program suppliers force operators to pay for the service based on the total number of subscribers the operator has rather than the number of subscribers that receive a particular service; program suppliers require that operators carry their service only on VHF channels to the detriment of other services. CATA asserts that these discriminatory prices, terms and conditions may be necessary to promote diversity or may be justified by unique market considerations.[251]

73. Time Warner opposes commenters that argue the Commission should make it unlawful for a programming vendor to refuse to deal with an MVPD. Time Warner argues that a seller has the right to refuse to do business under

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246 Id. at 8.

247 Id.

248 See CSS at 15-16.

249 See National CableSystems Associates at 4.

250 See CableAmerica at 24.

251 See CATA at 5-6.

antitrust law, and contends that nothing in the statute requires such a rule. It also asserts that such a rule might violate the First Amendment.[252]

III. Exclusive Contracts

74. A number of commenters favor the continued use of exclusive contracts. Liberty Media urges the Commission to confirm that exclusivity is a legitimate means of competition.[253] NCTA contends that courts, economists and antitrust experts have recognized that most exclusive contracts promote competition and consumer welfare and thus promote the public interest. NCTA states that antitrust precedents provide the most relevant and well developed standards, and suggests that so long as there is a competitive market and there is no concerted refusal to deal with particular network distributors, an exclusive contract between a programmer and a cable operator is highly likely to promote competition and serve the public interest.[254] Citing the FCC's syndicated exclusivity rules, TCI contends that exclusivity encourages the creation and distribution of alternative programming, thereby increasing diversity.[255] TCI adds that a further benefit of exclusivity is that it prevents potential competing distributors from "free riding" on the promotional efforts of the first distributor.[256] Discovery Communications argues that those commenters calling for a rigid ban on exclusive programming arrangements have failed to refute that procompetitive benefits result from exclusive dealing, as the Commission itself has noted.[257]

75. Charles River asserts that exclusive contracts can produce substantial efficiencies that benefit consumers and argues that the Commission should limit such contracts only if there is demonstrable harm to cable viewers. Charles River notes that program services will sell the exclusives only if they are compensated for the net revenue they forego from other distributors by selling the exclusive. Charles River further submits that exclusive contracts are sometimes profitable due to factors such as decreased transaction costs and the avoidance of signal security and collection problems. Charles River also asserts that an exclusive contract means that fewer parties will be absorbing risk, and contends that exclusivity gives a distributor a greater incentive to promote the service and avoids the problem of other distributors "free riding" on one distributor's promotion of the service.[258]

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252 See Time Warner at 11.

253 See Liberty Media at 47.

254 See NTCA at 48.

255 See TCI at 25.

256 Id. at 24.

257 See Discovery Reply at 14.

258 Charles River Study at 26-39.

76. Conversely, U.S. West states that the Cable Act provisions indicate that Congress viewed exclusive contracts as barriers to entry and contrary to its competitive goals.[259] Others agree that Congress has determined that exclusive contracts harm competitors, and should only be allowed in limited circumstances.[260] For example, Provo Cable argues that all exclusive contracts should be eliminated.[261] City of Manitowoc adds that Congress has determined that exclusive contracts are generally harmful, and that competitors need not make any further showing of harm to bring a complaint before the FCC.[262]

A. Section 628(c)(2)(C)

77. Several commenters argue that because Section 628(c)(2)(C) does not include a public interest analysis, exclusive contracts with a cable operator in an unserved area are a per se violation of the Act.[263] Further, Direct TV argues that if an MVPD complains that it cannot obtain programming rights from a particular vendor, that vendor should be required to submit all of its contracts covering the affected area for FCC review to determine if any exclusive arrangements exist.[264] Other commenters argue that an exclusive contract in an unserved area is only unlawful if a complainant establishes that it has caused competitive harm to the complainant.[265] Cablevision argues that those who summarily conclude that Section 628(c) prohibits exclusivity in unserved areas have ignored the mandate of Section 628(b) to increase the availability of programming to those areas, and that programmers should be allowed to grant exclusive rights to any MVPD that is the first to provide video services to an unserved area.[266]

78. Several commenters also state that the "area served by a cable operator" should be wherever a cable system actually passes a home, or wherever a home can be connected to the cable system for a standard connect fee.[267] The Coalition of Concerned Wireless Operators believe that it should be defined as any area in which subscribers can be connected to either a wired or wireless

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259 See U.S. West at 8.

260 See TRAC at 3; Manitowoc Reply at 4.

261 See Provo Cable Reply at 1.

262 See Manitowoc Reply at 13-14.

263 See Direct TV at 27; Attorneys General at 12; NPCA at 25; NRTC at 28; ACC Reply at 5.

264 See DirecTv at 28.

265 See Time Warner at 38; NCTA at 40.

266 See Cablevision Reply at 5.

267 See Direct TV at 28; Attorneys General at 12; NPCA at 26; NRTC at 28.

system.[268] The Attorneys General, however, state that because subsections 628(c)(2)(C) and (D) specify areas served or not served "by a cable operator," any analysis of areas served or not served by other types of distributors is irrelevant.[269] Time Warner argues that an "area" should encompass the entire territory of a political subdivision that possesses the authority to enter into a franchising agreement with a cable operator.[270] It further argues that a home-by-home analysis would lead to an administrative nightmare for all parties involved, and a bright line test is needed.[271] GTE, however, believes that unbuilt portions of franchise areas must be considered "not served," and that such a view will provide a slow building operator an incentive to complete franchise construction to gain the benefits of Section 628(c)(2)(D), or will provide overbuilders or other multichannel competitors with incentives to serve unserved areas unhindered by exclusive programming arrangements.[272]

79. Further, NYNEX believes that Section 628(c)(2)(C) imposes upon satellite broadcast programming vendors and vertically integrated satellite cable programming vendors a duty to deal with non-affiliated programming distributors.[273] Time Warner, however, contends that the statute does not impose such a duty, and that if Congress had intended to impose upon programmers a duty to deal, it would have done so explicitly.[274]

80. In addition, Discovery argues that regulations promulgated to implement Section 628(c) should apply not just to contracts specifically designated "exclusive," but to all contracts that "have the effect of an exclusive contract," such as a substantial rate differential that has the same effect as exclusivity.[275] Similarly, WJB contends that the Commission's regulations should define "exclusivity" sufficiently broadly to include a scenario in which a vendor offers a contract to both an affiliated and a non-affiliated MVPD, but the contract offered to the non-affiliated MVPD contains significant restrictions not contained in the contract offered to the affiliated MVPD, effectively giving the affiliated MVPD "exclusivity."[276] Time Warner suggests that the Commission should not, at this time, exercise its authority under Section 628(c)(2)(C) to regulate practices other than exclusive

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268 See CCWO at 4.

269 See Attorneys General at 12.

270 See Time Warner at 36-37.

271 See Time Warner Reply at 18.

272 See GTE Reply at 8.

273 See NYNEX at 13.

274 See Time Warner at 41-42.

275 See Discovery at 27.

276 See WJB at 16.

contracts.[277]

81. The Coalition of Concerned Wireless Cable Operators suggests that time-delay agreements and prohibitions against distributing programming within the service area of a wired cable operator should be prohibited.[278] Discovery, however, argues that vendors should be able to offer certain preferences such as time-delay provisions as an inducement for MVPDs to market the programming.[279]

82. With respect to subdistribution agreements, NPCA contends that franchised cable operators often exploit subdistribution rights to the detriment of SMATV operators by using the rights to restrict access or to impose unfair conditions on SMATV operators seeking program access. Thus, they argue, if the Commission does not prohibit the use of subdistribution agreements (as an "other practice" under Section 628(c)(2)(C)), it should impose restrictions on the provisions of such agreements. NPCA suggests that the Commission prohibit a subdistributor from tying programming rights to the purchase of other programming or to access rights to private property. It argues that other terms should be directly related to "subdistribution itself" and that rates should be regulated. NPCA further contends that cable subdistributors should be prevented from "stonewalling" by a requirement that they respond to a request for programming within a specified time period, such as 15 days. If the cable operator denies a request for subdistribution, NPCA argues, the MVPD should be permitted to purchase directly from the programmer.[280]

83. Time Warner argues that cable operators are ideally positioned to act as subdistributors because of their local presence and billing apparatus, and should be permitted to do so.[281] Moreover, Time Warner argues, a subdistributor can take into account "free riding" and piracy concerns within its own service area through its subdistribution rates.[282] Time Warner asserts that even if the Commission were to prohibit subdistribution agreements, it could only do so for unserved areas pursuant to Section 628(c)(2)(C), which does not include the public interest test.[283] Moreover, it submits, Section 628(c)(2)(C) requires that the practice "prevent" -- i.e. "make altogether impossible" -- a distributor from obtaining access to programming, not merely

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277 See Time Warner at 38.

278 See CCWO at 4.

279 See Discovery at 28.

280 See NPCA at 19-20.

281 See Time Warner at 40.

282 See Time Warner Reply at 19.

283 Id. at 39.

restrict or inhibit access.[284] NCTA agrees that practices that "merely restrict" access to programming, such as subdistribution or time-delay, are beyond the scope of Section 628(c)(2)(C). Bell Atlantic responds that there is no foundation in the statute for such an extreme construction.[285]

B. Section 628(c)(2)(D)

84. Many commenters argue that because the statute prohibits exclusive contracts unless the Commission determines that they are in the public interest, the statute requires that the Commission must review and approve all exclusive contracts before they can go into effect.[286] APPA argues that parties would have little incentive to refrain from exclusive contracts if they were subject only to a chance that affected parties might discover the exclusivity and would also be able to spend the time and resources necessary to eliminate them through the complaint process.[287] WCA suggests that all exclusive contracts should be filed at the Commission and placed on public notice for 30 days to allow for the filing of petitions to deny. If there are no petitions to deny, the contract is automatically approved. If there is a petition to deny, the Commission must evaluate the contract under the statutory criteria to determine whether it is in the public interest.[288]

85. Time Warner responds that nothing in the statute suggests that the public interest determination must precede the effective date of the contract.[289] With respect to the concern that MVPDs will not know whether an exclusive contracts exists, Time Warner further argues that if a programming vendor cannot sell to a distributor because of an exclusivity requirement, "it can be counted on to say so."[290] NCTA contends that the statute does not permit prior review, because the Commission is authorized only to order remedies for violations of Section 628 upon completion of an adjudicatory proceeding. Moreover, it argues, only documents that are the subject of a complaint may be compelled by the Commission to be submitted for review pursuant to Section 628(d).[291] Some commenters also contend that a filing or

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284 Id..

285 See Bell Atlantic Reply at 7-8.

286 See Bell South at 7; Bell Atlantic at 7; WCA at 43; DirecTV at 28; APPA at 19; TRAC at 4; Manitowoc Reply at 8; People's Choice Reply at 5-6.

287 See APPA at 19-20.

288 See WCA at 43.

289 See Time Warner Reply at 20.

290 Id. at 21.

291 See NCTA Reply at 41.

prior approval requirement would be unduly burdensome on the Commission.[292] BellSouth responds that the "evils that the statute is designed to prevent" outweigh any regulatory burden.[293] Cablevision asserts that commenters proposing "this form of micro-management are betting on extensive delays, expense and uncertainty to destroy what the Cable Act did not intend to eliminate."[294]

86. Discovery suggests that programmers should only be required to inform the Commission of the existence of an exclusive contract if a "significant complaint is made."[295] U.S. West contends that a program vendor should be required to reveal the existence of an exclusive contract for a given area upon request by an interested party, and should be required to disclose the parties, the execution date, the effective date, the term (length), the programming covered, the geographic coverage, and any prohibitions or restrictions on sales or relationships with third parties.[296]

87. Commenters suggest various approaches for determining whether an exclusive contract is in the public interest. Direct TV argues that the Commission should adopt a "hard look" approach with a presumption that exclusive contracts are harmful.[297] U.S. West agrees that the Commission should adopt a presumption that exclusive contracts are contrary to the public interest.[298] Manitowoc argues that the burden of proof should always rest on the proponent of exclusivity.[299] CableAmerica states that the Commission may not consider anything other than the four factors listed in the statute to make the public interest determination.[300] USSB states that it would be premature to identify "other factors" for the public interest evaluation.[301] The Attorneys General argue that parties seeking to enforce an exclusive contract must make a positive showing that such exclusivity does not preclude effective competition between cable operators and other MVPDs.[302] NCTA responds that

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292 See Discovery at 28; NCTA Reply at 41.

293 BellSouth at 10.

294 Cablevision Reply at 5.

295 Discovery at 28.

296 See U.S. West at 10-11.

297 See DirecTv at 27.

298 See U.S. West Reply at 6.

299 See Manitowoc Reply at 8.

300 See CableAmerica at 37.

301 See USSB at 4.

302 See Attorneys General at 13.

nothing in the statute requires a positive showing that an exclusive contract does not preclude effective competition in the retail distribution market.[303] Liberty Cable contends that a "presumption of illegality" for exclusive contracts is the most effective means of prohibiting a cable operator from "coercing" such agreements from a vendor.[304] Even if effective competition exists, the cable operator must show that exclusivity will ensure that such effective competition will continue for the life of the arrangement.[305] TRAC contends that the determination must be made on a case-by-case basis, and that no blanket presumptions can be made.[306]

88. Continental argues that the prohibition against exclusive contracts must be read in conjunction with Congress' focus on coercion in Section 616(a)(2), and that "where neither party has coerced the other" into entering an exclusive contract, there should be a presumption that the contract "merely reflects the free market incentives inherent in exclusive distribution arrangements" and is in the public interest.[307] Discovery argues that there should be a presumption that exclusive contracts are permitted where they have no adverse effect on competition, i.e., whenever there is sufficient alternative programming available.[308] Other commenters agree that exclusive contracts should be permitted when comparable alternative programming exists.[309] TCI contends that exclusive contracts should only be prohibited when they deprive a distributor of a "vital product." If alternatives exist, TCI argues, then "absent truly unique circumstances" a particular program service cannot be deemed "vital" to the distributor.[310] CableAmerica suggests that a grant of exclusivity in exchange for favorable channel position might be permissible if it were for a limited duration.[311] Liberty Media suggests that exclusivity be permitted for vendors providing local programming.[312] Some commenters suggest that exclusivity should be permitted to meet a competitor's offer of exclusivity to another distributor in the same geographical area.[313]

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303 See NCTA Reply at 41-42.

304 See Liberty Cable at 15.

305 Id. at 16.

306 See TRAC at 4.

307 See Continental at 23-24.

308 See Discovery at 26-27.

309 See Liberty Media at 50; Times Mirror Reply at 5.

310 TCI at 28.

311 See CableAmerica at 38.

312 See Liberty Media at 50.

313 See ARC at 16; Liberty Media at 50.

89. In addition, numerous commenters argue that exclusivity should be permitted to develop and launch new programming services.[314] Indeed, several argue that not allowing such exclusivity will decrease diversity by eliminating a necessary incentive to invest in new programming.[315] NSPN responds that the argument that exclusivity is necessary to launch a new service is "total nonsense," and that the only rationale for exclusivity is to "protect a franchised cable company from competition."[316] CableAmerica agrees that exclusivity is not necessary for new services, because a new service needs to build an audience and should be distributed as widely as possible.[317] WCA states that the argument that exclusivity is mandatory for new services has "never been substantiated," and the burden should be on the proponent of exclusivity to show that it will increase revenues for the new service.[318] Turner responds that commenters doubting that exclusivity is essential to launch a new service should have provided specific evidence or arguments to the contrary. Turner submits that no such showing was made, and that the Commission "may safely assume that exclusive contracts are essential to launch new services."[319]

90. WCA contends that Section 628(c)(2)(D) requires a case-by-case public interest analysis for all permissible exclusive contracts, and that the Commission does not have the authority to issue a blanket presumption for new services. Even if it the Commission had the authority to determine that a class of contracts could be presumed to be in the public interest, WCA argues, the record does not support such a presumption for new services.[320] Other commenters agree that a blanket presumption or exemption for new services should not be permitted.[321] NYNEX states that if the Commission does establish such an exemption or presumption, it should carefully define what qualifies as a "new programming service," and any such presumption should not permit exclusivity for more than one year.[322]

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314 See Liberty Media at 50; Time Warner at 44; Continental at 21; Turner at 5-6; ARC at 16; Viacom at 36; US West at 8-9; TCI at 28; SBCA Reply at 14, NCTA Reply at 4.

315 See Liberty Media at 49-50; Turner at 7; ARC at 17.

316 NSPN at 12.

317 See CableAmerica at 38.

318 See WCA at 41.

319 Turner Reply at 4.

320 See WCA Reply at 16-17.

321 See DirecTV at 28; TRAC at 4; Consumer Satellite Systems Reply at 7.

322 See NYNEX at 13-14.