91. US West states that exclusivity for new services should be permitted, but should be limited to two years.[323] APPA agrees that if a new service is going to succeed, "this should occur well within two years" and exclusivity should not be permitted beyond that.[324] Continental responds that two years for a new service is not nearly long enough, and that at least a seven year startup period is necessary to give the service time to take root and give the distributor the necessary incentive to market the service.[325] Turner agrees that two years is insufficient, and compares this proposal to limiting patent protection to two years.[326] Viacom suggests that a reasonable duration for exclusive contracts for new services is ten years.[327] Time Warner agrees that a promise of exclusivity for any period less than ten years may not be sufficiently valuable to distributors to persuade them to carry a new service.[328] NCTA states that the Commission should rule that exclusive contracts of any duration entered into during the first two years of the programmer's existence are presumptively in the public interest.[329] SBCA urges the Commission to adopt a "liberal" period of exclusivity, arguing that it is not possible to determine at this time the exact period of time needed or the degree of flexibility.[330] In addition, some commenters argue that exclusivity should be permitted to introduce existing services to new markets.[331]

## IV. Enforcement

### A. Process

92. Several commenters support the use of the Section 208 (formal common carrier) complaint process.[332] Others encourage alternative dispute resolution (ADR) as a means of resolving disputes.[333] They argue that ADR is strictly voluntary and note that the parties can agree on any process that will

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323 See U.S. West at 9.

324 See APPA at 21.

325 See Continental at 21-22.

326 See Turner at 7.

327 See Viacom at 37.

328 See Time Warner at 45.

329 See NCTA Reply at 44.

330 See SBCA Reply at 14.

331 See Liberty Media at 50; ARC at 17; Cablevision Reply at 5.

332 See, e.g., Superstar at 65; TCI at 37.

333 See, e.g., Attorneys General at 14; APPA at 26.

assist in resolution of the dispute, including discovery.[334] Discovery suggests that ADR should be voluntary because in some cases, settlement is not realistic.[335] SBCA submits that if both parties do not agree to ADR, the FCC could make a determination through the use of ALJs or through the use of a set group of designated FCC staff members.[336] Landmark does not support the use of ADR as a means to resolve Section 628 complaints because it may have the potential of encouraging frivolous claims which can result in significant costs and be particularly harmful for new services.[337]

**93.** With respect to timing, ACC advocates that disputes should be resolved within 60 days of the filing of a complaint.[338] Several commenters assert that the proposed 20 day period for an answer is inadequate for a defendant.[339] TCI contends that it is unrealistic and unfair to suppose that the defendant could marshall and present not only a denial but affidavits and evidence as to all material allegations of the complaint without discovery and in only twenty days.[340] Time Warner suggests the Commission should allow at least 30 days to file an answer.[341]

**94.** In addition, EMI suggests that grievance procedures be limited to expedited "paper hearings" with limited pleadings and discovery and should only be permitted after a status conference has been conducted to determine if sufficient facts have been alleged to allow the complaint to go forward.[342] CCWCO and CableAmerica believe that once the complaint is reviewed to determine if a prima facie case has been established, a status conference should be held to determine if the parties can resolve the matter privately.[343] CableAmerica proposes that the status conference must be held within 45 days after a complaint is filed.[344]

**95.** Several commenters complain that the process should not be as

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334 See Attorneys General at 15.

335 See Discovery at 31.

336 See SBCA Reply at 13.

337 See Landmark Reply at 16.

338 See ACC at 12.

339 See, e.g., Liberty Media at 59-60; Time Warner at 45; TCI at 41.

340 See TCI at 41.

341 See Time Warner at 45.

342 See EMI at 13.

343 See CCWCO at 4; CableAmerica at 40.

344 See CableAmerica at 40.

complicated as proposed by the Commission.[345] Bell Atlantic complains that cable companies seek to thwart Congressional objectives by placing insurmountable procedural barriers in the path of challenges to unfair practices.[346] Liberty Cable states that non-cable MVPDs do not have the time and resources to engage in protracted litigation before the Commission during which they have to present detailed evidence.[347] USTA states that the FCC should not cast an effective veto over the program access provisions by adopting rules that gut the law.[348] APPA alleges that commenters who suggest that the FCC's proposals are inadequate and that recommend procedures which would liken complaint proceedings to full-blown civil trials should be viewed with great skepticism, noting that they appear to be motivated by a desire to make the complaint process as time-consuming, expensive and unattractive as possible for complainants.[349] TCI advocates a complex process, arguing that conventional pleading practices and trial type hearings before an ALJ will be required in most program access disputes. TCI believes that the existence or nonexistence of a challenged act or practice is only the tip of the iceberg; the real issue is likely not to be whether something happened but what difference it makes to actual and potential competition in a properly defined market.[350]

**96.** With respect to pleadings, APPA states that limiting pleadings to a single complaint and a single response is feasible, so long as these documents are understood to be vehicles to define and narrow issues and not necessarily to resolve them where discovery, a hearing, a right to confront and cross-examine witnesses, and findings of fact and conclusions of law may be necessary.[351] ACC states that only limited discovery and no dispositive motions should be allowed.[352] However, Liberty Media states that the FCC should permit the filing of pre-answer motions for a more definite statement and strongly recommends that the Commission permit motions for summary judgment at any time.[353] Time Warner argues that not permitting the filing of separate motions to dismiss or for summary judgment would not yield much expedition. APPA suggests that a written reply would enhance rather than inhibit the FCC's

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345 See, e.g., Bell Atlantic Reply at 20; USTA at 7; Liberty Cable at 20.

346 See Bell Atlantic Reply at 20.

347 See Liberty Cable at 20.

348 See USTA Reply at 7.

349 See APPA at 13.

350 See TCI at 39.

351 See APPA at 26.

352 See ACC at 12.

353 See Liberty Media at 61-62.

ability to frame the issues.[354] Liberty Media and CCWCO support the Commission's proposal to eliminate replies to answers.[355]

97. With respect to standing, Landmark believes that only MVPDs can bring Section 628 complaints and that the Commission should not permit subscribers to file complaints because subscribers do not have standing. It contends that subscriber standing has the potential to overwhelm the Commission's resources.[356] Conversely, NYNEX believes that the FCC's rules should clarify that complaints may be brought by any person aggrieved by conduct violating these sections of the Act and the right to bring a complaint must not be limited to MVPDs or video programming vendors.[357]

## B. Burden of Proof

98. Commenters disagree on how much information should be submitted to the Commission and who should file that information. Bell Atlantic advocates requiring distributors to publicly disclose, through informational filings with the FCC, the rates, terms and conditions under which they obtain programming.[358] CCWCO advocates requiring vendors to file such data with the Commission.[359] DirecTv would exclude excessive public disclosure of confidential business information, and states that most of the relevant factual information is in the possession of the distributor or vendor rather than the aggrieved MVPD.[360] CATA and WJB similarly argue that the information lies with the vendor, and that the burden of producing evidence showing the reasonableness of various prices, terms and conditions should be on the party in possession of relevant facts.[361]

99. Liberty Media advocates that each factual allegation in a complaint be supported by affidavits or relevant documents.[362] APPA believes that requiring a complainant to support its allegations with detailed evidence is feasible only if the FCC establishes an effective mechanism outside the complaint process through which purchasers can gather relevant information about their vendors' practices. If no such mechanism exists, APPA argues,

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354 See APPA at 27.

355 See Liberty Media at 61; CCWCO at 4.

356 See Landmark at 17.

357 See NYNEX at 15-16.

358 See Bell Atlantic at 10.

359 See CCWCO at 5.

360 See DirecTv Reply at 11.

361 See CATA at 8; WJB at 17; WJB Reply at 13.

362 See Liberty Media at 59.

complainants should be afforded an opportunity to engage in discovery before the FCC.[363] The Attorneys General assert that the complainant should have the benefit of discovery before he is required to establish a prima facie case.[364] USTA adds that specific allegations of misconduct and detailed explanations of a violation tend to be well concealed and may not come to light absent opportunities for disclosure and discovery.[365] WCA states that an aggrieved wireless cable operator will have little information available to it prior to the initiation of discovery. Thus, WCA argues that the threshold for a prima facie case must be established at a relatively low level.[366] WJB states that a complainant should only be required to establish a reasonable basis for believing that discrimination has occurred; by necessity, the burden of disproving discrimination should rest with the vendor, the only party privy to the relevant information.[367]

100. Various commenters offer specific proposals with respect to the appropriate allocation of the burden of proof in the Section 628 complaint process.[368] DirecTv proposes a specific model for handling complaints and suggests a two-step pleading cycle with expedited discovery of contracts and other relevant information in the possession of the vertically integrated programmers and cable operators. It submits that a complaint under any provision of Section 628 should be sufficient if made on an affidavit by an officer of the MVPD and that a complaint adequately establishes a prima facie case under Section 628(c)(2)(B) if it alleges: (a) that a programming vendor offers a particular programming service for sale to other MVPDs; (b) that the complainant is a MVPD that is technically and financially capable of delivering the programming to subscribers; (c) that the complainant has made a bona fide attempt to negotiate with the programmer; (d) that the programming vendor has discriminated in the prices, terms or conditions of sale or delivery of its programming among or between the complainant and one or more cable operators or other MVPDs; (e) that the programming vendor is either a "satellite cable programming vendor in which a cable operator has an attributable interest" or a "satellite broadcast programming vendor," as defined in the Act and the Commission's rules; and (f) that the programming in question is either "satellite cable programming" or "satellite broadcast programming" as defined in the Act.[369] DirecTv advocates that upon filing a complaint, the burden should shift immediately to the vendor or distributor that is the subject of

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363 See APPA at 27.

364 See Attorneys General at 13.

365 See USTA at 14.

366 See WCA at 44.

367 See WJB Reply at 13.

368 See, e.g., Attorneys General at 14; CableAmerica at 41; DirecTv Reply at 12; SBCA Reply at 12.

369 See DirecTv Reply at 12.

the complaint to show that the allegations contained in the complaint are untrue.[370]

101. CableAmerica suggests that a Section 628(c) complainant may still be required to make out a prima facie case that a vertically integrated satellite cable programming vendor has entered into a programming contract that discriminates against the complainant operator in price, terms, or conditions of sale or delivery (Section 628(c)(2)(B)), or affords a competing programming distributor exclusive rights to a programming service (Section 628(c)(2)(D)). In a Section 628(b) proceeding, CableAmerica submits, the operator would have to make out a prima facie case that such a vendor was engaging in unfair competition or unfair or deceptive acts or practices and, unless the complainant alleged an anticompetitive purpose, the complainant would also have to establish a prima facie case that the practice prevented or significantly hindered the operator in providing programming to its customers. CableAmerica advocates that the burden of proof should be placed on the respondent, the party that entered into the discriminatory or exclusive contract, and which is therefore in a better position to present any justifications for its conduct.[371]

102. SBCA submits that the complainant first has to establish that it has standing, that there is evidence of a differential in price, terms or conditions, and that all other requirements of the Act and the FCC's rules are met. The defendant then has the opportunity to refute any or all of this evidence. In the second phase, SBCA would have the Commission instruct the parties to attempt to negotiate a settlement within 20 days. If the first two phases do not work, the complaint would proceed to adjudication and the burden would then shift to the defendant programmer to justify a legitimate basis for the differential shown. If the programmer offers a legitimate justification, the burden shifts back to the complainant to show that the proffered justification is either a pretext or is inadequate to justify the differential treatment.[372]

103. Attorneys General support the Commission's model in the Notice and state that a complainant must provide substantial evidence that (1) the competitor has been denied programming; (2) the competitor has complied with or offered to comply with reasonable requests from the programmer; (3) the price or other terms of the programming available to the competitor are different from those offered to the cable operator; and (4) the programming contract contains anticompetitive terms which have the "effect" of significantly hindering or preventing programming availability. The burden of producing legitimate business reasons for denying access to the desired programming would then shift to the programmer.[373]

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370 Id. at 13.

371 See CableAmerica at 40-41.

372 See SBCA at 8-12.

373 See Attorneys General at 14.

104. United Video strongly supports the burden of proof remaining on the complainant. It also argues that the effect of a satellite broadcast program vendor's pricing must be examined from the perspective of an adverse effect on consumers before any case can be made for discrimination. United Video supports the Commission's decision to require the complainant to initially establish a prima facie case before any complaint proceeding is initiated and argues that the complaint should give specific evidence demonstrating that the effect of the program vendor's actions is to significantly hinder program distribution in the marketplace, including (1) a description of the geographical boundaries in which the discrimination occurred; (2) a list of all television services available in any part of the geographical boundary; (3) current prices and penetration figures; and (4) proof that the complainant has actively marketed services within the area. It asserts that the Commission will be flooded with complaints unless the complainant is required to establish a prima facie case demonstrating harm and accompanied by sufficient factual substantiation which addresses all of the provisions of Section 628.[374]

105. CCWCO state that the complaint should be required to include specific factual evidence supported by affidavits from knowledgeable persons.[375] Time Warner agrees that any complaint should be verified and accompanied by affidavit or documentary evidence.[376] NYNEX urges a minimal burden on complainants which would not require complainants to establish a prima facie case.[377] CCWCO submits that the FCC should establish a presumption of discrimination where programming has been denied outright to a wireless cable operator or where the wireless cable operator is paying a higher fee for the programming than other similar-sized operators.[378] Bell Atlantic suggests when a complainant makes a prima facie showing of disparate treatment, the burden should rest with the cable operator to prove a legitimate reason for the disparate treatment. It should be enough for a MVPD to show, for example, that it has had difficulty obtaining programming acquired by another MVPD or that the rates or terms that a programmer has offered appear to be less favorable than those extended to competitors.[379] NRTC, WCA and ACC believe the FCC has suggested unrealistic burdens for distributors filing discrimination complaints.[380]

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374 See UVI at 36-39; UVI Reply at 4-6.

375 See CCWCO at 4.

376 Time Warner at 46-47.

377 See NYNEX at 14.

378 See CCWCO at 4.

379 See Bell Atlantic at 9; Bell Atlantic Reply at 19.

380 See NRTC at 30; WCA at 44; ACC at 9.

106. Rainbow suggests that a complainant should be required to establish both prongs of the statutory test, and a programmer should be able to rebut a prima facie case based on documentary evidence alone.[381] APPA, however, argues that a complainant should not be required to prove harm once he has established that the respondent has engaged in prohibited conduct.[382] ACC, CATA and NRTC state that once a verified discrimination complaint is filed and the distributor has established the existence of discriminatory prices, terms or conditions, then the burden of proof shifts to the vendor to justify, by clear and convincing evidence, that any discriminatory conduct or terms are justified since vendors will possess any relevant documents.[383]

107. None of the commenters supported the use of benchmarks or presumptions based on penetration levels. WJB states that establishing a presumption based on penetration levels may be unwise.[384] CableAmerica maintains that considerations such as whether other cable operators are offering the subject programming, or what the penetration level is for that programming are inappropriate because they would justify a vendor in discriminating against one programming distributor so long as it did not discriminate against all, or denying programming to some customers as long as it did not deny it to all.[385] Superstar and UV believe that it is impossible to set effective benchmarks accurately reflecting the vast differences in business operations of the various programming vendors and the very different markets they serve.[386] Superstar further believes that many technical factors impact penetration levels and it would not be fair or wise to establish an absolute rule concerning penetration.[387] Liberty Media states that the creation of a presumption that the complainant has stated a prima facie case under Section 628, based on penetration rights or sales volumes ratios is arbitrary and unreasonable.[388]

C. Discovery

108. CableAmerica urges the Commission to expedite the discovery process and be guided by the recent amendments to the Federal Rules of Civil

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381 See Rainbow at 18.

382 See APPA at 27.

383 See ACC at 12; CATA at 7; NRTC at 30.

384 See WJB at 18.

385 See CableAmerica at 41.

386 See Superstar at 66; UVI at 39.

387 See Superstar at 67.

388 See Liberty Media at 56.

Procedure (FRCP).[389] Liberty Media suggests that the number and scope of discovery disputes could be substantially reduced through the adoption of regulations similar to FRCP Rule 37(a)(4). Under that rule, the party or attorney whose conduct necessitated the filing of a motion to compel pays the reasonable expenses and attorneys fees of the prevailing party unless the court finds that the losing party's position was substantially justified.[390] U.S. West suggests that the FCC should allow pre-complaint discovery similar to that allowed under FRCP Rule 27(a). This would allow parties alleging misconduct to determine whether there is any basis for a complaint in those cases where video programming is provided under unique contracts rather than standard pricing matrices.[391]

109. Rainbow states that absent extraordinary circumstances, a complainant should not be able to engage in discovery to establish its _prima facie_ case. Instead, discovery should be limited to evidence necessary to meet the complainant's burden of persuasion and evidence to rebut the complainant's _prima facie_ case. Rainbow asserts that the complainant should be obligated to demonstrate the need for evidence claimed by a vendor to be confidential or proprietary.[392] Time Warner thinks discovery should not be permitted as a right, but that the Commission should instead require a complainant to show a particular need for discovery.[393] Liberty Media believes that the Commission should set appropriate limits on discovery and limit initial discovery to a specified number of interrogatories.[394]

110. TCI believes that the defendant is unlikely to be able to respond to allegations about the effects of its acts or practices without full inquiry into effects of those practices on the complainant. It argues that discovery is necessary to address the issue of marketplace effect. TCI submits that the Commission should require that the taking of any discovery by any party in a program access proceeding is explicitly conditioned upon that party's submitting in advance to the jurisdiction of the FCC and the U.S. District Court for the District of Columbia for the enforcement (by injunction and monetary sanction) of any protective order entered by the FCC in the proceeding.[395] CableAmerica agrees with the FCC's proposal regarding the issuance of protective orders and argues that the Commission should provide for appeals challenging redactions on information not relevant to a complaint to

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389 _See_ CableAmerica at 42.

390 _See_ Liberty Media at 63.

391 _See_ U.S. West at 16.

392 _See_ Rainbow at 19.

393 _See_ Time Warner at 47.

394 _See_ Liberty Media at 63.

395 _See_ TCI at 42-43.

the ALJ and/or the Commission on an case-by-case basis.[396] DirecTv proposes that discovery be in the form of a questionnaire that the defendant must complete and submit to the FCC and the complainant. This questionnaire would act as a standardized form of written interrogatories for all complaints under Section 628 and would evoke the information necessary for resolution of the dispute from the defendant programmer or cable operator, who has the information.[397]

D. Remedies

111. Liberty Media states that any remedial action which mandates the sale of specific programming to a specific distributor and establishes the prices, terms and conditions of that sale, is particularly suspect under the Constitution and is contrary to the Commission's prior recommendations to Congress.[398] Rainbow advocates that absent evidence of bad faith or a history of violations of the Act, the FCC should ordinarily remand the matter to the parties for renegotiation rather than expend the significant administrative resources that would be necessary for the agency to establish new terms.[399]

112. Superstar and UVI agree that Section 628(e)(1) is sufficient and there is no need for an award of damages; if damages are awarded, they should be only for profits lost to the "favored" distributor.[400] TCI and Time Warner also oppose imposing fines for Section 628 violations unless the conduct complained of is willful and repeated.[401] DirecTv agrees that while the imposition of forfeitures should be an option for egregious violations, the ultimate remedy will always be to ensure that the programming is available to MVPDs on non-discriminatory terms. DirecTv concludes that the most common remedy will be for the FCC to order a programmer to provide programming to the complainant on the same terms and conditions as other MVPDs enjoy.[402] ACC suggests the assessment of treble damages against those found to have engaged in discriminatory or anticompetitive conduct by unlawfully restricting access to programming.[403] CableAmerica suggests that four remedies in addition to those in the Notice would be appropriate: (1) orders to void unjustified exclusive contracts; (2) civil penalties; (3) money damages, where unfair, deceptive, or discriminatory acts or practices, or exclusive contracts, have

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396 See CableAmerica at 42.

397 See DirecTv at 14.

398 See Liberty Media at 56.

399 See Rainbow at 19.

400 See Superstar at 67; UVI at 40.

401 See TCI at 43; Time Warner at 43.

402 See DirecTv at 31.

403 See ACC at 11.

injured a complainant; and (4) attorneys fees and costs.[404]

E. Frivolous Complaints

113. Commenting programmers agree that it is important to provide penalties against parties filing frivolous complaints.[405] The consensus among programming vendors is that FRCP Rule 11 provides an appropriate model for assessing such sanctions; Rule 11 states that all allegations must be well grounded in fact and the complaining party must have a reasonable basis for making the statements. They argue that sanctions against a frivolous complainant should include attorney's fees and costs to respondent, as well as fines imposed by the Commission to account for the resources expended on administering the process. They also contend that a minimum forfeiture should be set sufficiently high to discourage frivolous complaints.[406]

114. Conversely, several parties, including NRTC and DirecTv, believe that the Commission should tread lightly so as not to deter legitimate complaints. These parties assert that a complaint based on an actual difference in price, terms, or conditions is by definition not frivolous.[407] DirecTv suggests the Commission rely on its existing abuse of process rules to deal with "frivolous" complaints.[408] In reply, United Video recommends that complaints which contain only general and unsupported allegations should be dismissed.[409]

V. Application of Anti-Discrimination Provisions to Existing Contracts

115. Most commenters opposing application of the regulations developed under Section 628 to existing contracts relied upon Bowen v. Georgetown University Hospital, 488 U.S. 204, 208 (1988), arguing that such application would have an impermissible "retroactive" effect.[410] In Bowen, the Supreme

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404 See CableAmerica at 42-43.

405 See E! at 11; Liberty Media at 65; Superstar at 67; UVI at 41.

406 See, e.g., EMI at 13.

407 See NRTC at 31-32; DirecTv at 31-32.

408 See DirecTv Reply at 16.

409 See UVI Reply at 5.

410 See Landmark at 10-11; Rainbow at 17-18; Superstar at 62-64; TCI at 16-18; TWE at 33-34; UVI at 32-34; Viacom at 29-30; Landmark Reply at 8 n.15; Liberty Media Reply at 33; TBS Reply at 3; TCI Reply at 12-13 & nn. 19-20; Time Warner Reply at 15. Some commenters cited other cases in support of the argument that congressional intent is the arbiter for retroactive application of statutes. See, e.g., Superstar at 62-64; TCI at 16-18; UVI at 32-34 (citing Kaiser Aluminum & Chem. Corp. v. Bonjorno, 494 U.S. 827, 836-37 (1990)),

Court held that agencies may not apply federal legislation retroactively unless Congressional intent to do so is clear: "congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result." Id. Therefore, according to commenters such as Landmark, the Commission cannot apply the provisions of Section 628 retroactively because we "note[d] that the statute is silent concerning enforcement of anti-discrimination rules with respect to existing contracts."[411] Others argue that there is nothing in the legislative history to indicate that Congress intended the Commission to abrogate existing program distribution agreements or to adopt retroactive regulations.[412]

**116.** A number of programmers comment that, even if the Commission concludes that it has authority to adopt regulations that would affect existing contracts, such action would be unwise.[413] Liberty Media stresses that virtually every programmer has asserted that they have entered into costly programming contracts based on the revenues they expect to receive from existing affiliation agreements, and that forced premature renegotiation of affiliation agreements may preclude programmers from honoring their commitments to program suppliers.[414] Viacom states that "[a] high degree of certainty is needed during the remaining terms of existing affiliation agreements ... to attract capital or to justify a large expense in the acquisition of programming and the development of a program service ..."[415] In addition, commenters contend that the existing contracts were the result of extensive negotiations and that reconstruction of the bargaining history and marketplace conditions present at the time they were negotiated would be a difficult if not impossible task.[416] For example, IFE argues that prices and related terms in many of its contracts were negotiated quid pro quo for various other contractual

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Superstar at 62-64; TCI at 16-18 (citing Wagner Seed Co., Inc. v. Bush, 946 F.2d 918, 924 (D.C. Cir. 1991)).

411 See Landmark at 10-11 (quoting Notice, 8 FCC Rcd. at 201).

412 See TCI at 16-18; Time Warner at 32-34; UVI at 35; Viacom at 29-30; Time Warner Reply at 15.

413 Additionally, the programmers also contend that if the Commission determines that it has the authority to apply Section 628 to existing contracts, the language in Sections 628(b) and 628(c)(2)(B) address discrimination in contracting, not in the performance of pre-existing contracts, thus placing distributors who contracted before the effective date of the rules outside the scope of section 628. See Time Warner at 33-34; Liberty Media Reply at 33; Time Warner Reply at 16.

414 See Liberty Media Reply at 33-34; see also Viacom at 31; IFE at 11; E' at 10; Time Warner at 32.

415 Viacom at 31; see also NCTA at 34 n.59.

416 See ARC at 17-18; IFE at 11; TBS at 2-3; Liberty Media Reply at 34; TBS Reply at 2; Time Warner Reply at 16 n.9.

provisions, and that the Commission cannot simply reform price provisions without changing or subjecting to renegotiation or litigation many of the other provisions.[417] Some commenters further contend that the direct and indirect costs of requiring the simultaneous renegotiation of all pre-existing programming contracts would be potentially enormous and ultimately would lead to higher prices for consumers.[418]

117. These commenters also contend that a complainant should not be allowed to use a contract entered into before the Act or the effective date of the rules as a basis for determining whether a contract entered into after the Act violates Section 628.[419] Alternatively, several commenters submit that only contracts contemporaneously entered should be used for comparison.[420] Meanwhile, Viacom submits that the point of comparison for determining whether new contract rates offered to the complainant are reasonable should be the then effective rate paid by a competing competitor vertically integrated with the program service, even if that rate is the result of an agreement executed prior to the effective date of the rules.[421] Time Warner expresses concern that commenters proposing the use of pre-existing contracts as a baseline comparison for later contracts will create an impossible situation for programmers in that distributors that "got a bad deal" would be able to get out of their agreements to get the same rate as distributors that "got a good deal."[422] Commenters opposing retroactive application also suggest a number of timetables by which the new rules should become effective.[423]

118. In contrast, commenters in favor of application of the anti-discrimination provisions to existing contracts distinguish Bowen and argue that Congress was not silent on this issue. NRTC asserts that the cases on so-called "retroactivity" involved different types of obligations than are

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417 IFE at 4-5.

418 See, e.g., TBS at 4; Landmark Reply at 7; Liberty Media Reply at 34; NCTA Reply at 33; TCI Reply at 13-14; Time Warner Reply at 16 n.9.

419 See Landmark at 11; Rainbow at 17-18; Time Warner at 34; Viacom at 34-35; TBS Reply at 2.

420 See Landmark at 13; Time Warner Reply at 16.

421 See Viacom at 34-35.

422 See Time Warner Reply at 17.

423 See, e.g., Group W Satellite at 9 (three years after the effective date of the rules); Time Warner at 34 n.27 (five years); UVI at 36 (six months from the date of any non-appealable order concerning the constitutionality of Section 628 or the propriety of the Commission's regulations); Viacom at 29-30 (establish no date).

present here.[424] Similarly, US West claims that "[u]nlike Bowen the issue at hand does not deal with the 'recoupment' of previously paid sums but only deals with prospective events."[425] Moreover, to further diminish its impact, NRTC contends that there is a line of decisions under Bradley that conflict with Bowen.[426]

119. In any event, NRTC states that in Kaiser, the Supreme Court commented that "[w]e need not in this case, however, reconcile the two lines of precedent represented by Bradley and Georgetown [Bowen], because under either view, where the congressional intent is clear, it governs."[427] NRTC argues there is no evidence of congressional intent not to apply Section 628 to existing contracts; in fact, the language of Section 628 requires immediate effect -- otherwise "the specific grandfathering under Section 628(h) would have been moot and superfluous."[428] APPA argues that commenters' reliance on Bowen is misplaced because Congress made it clear that Section 628 applied to existing contracts with the limited exception set forth in Section 628(h)(1).[429] Moreover, APPA argues, in Section 628(h)(2), Congress withdrew even that exemption for contracts existing on June 1, 1990 that are renewed or extended after the date of enactment of 1992 Cable Act.[430] In sum, the commenters urging application of program access provisions to existing

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424 NRTC Reply at 20. NRTC cites Bowen (Secretary of Health and Human Services attempted to recoup money from Medicare service providers); Bradley v. School Board of Richmond, 416 U.S. 696 (1974) (effect of Education Amendments Act of 1972 on awarding of attorneys fees in desegregation cases); Kaiser (effect of amendment of postjudgment interest statute on verdict that was still on appeal).

425 See US West Reply at 5 n.10. Similarly, NRTC asserts that the statute does not comport with the traditional definition of a retroactive statute, which "takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to obligations or considerations already past." Nield v. District of Columbia, 110 F.2d 246, 254 (D.C. Cir. 1940) (quoting Society for Propagation of the Gospel v. Wheeler, Fed. Cas. No. 13156, 2 Gall. 105, 139 (C.C.D.N.H. 1814)).

426 See NRTC at 23 n.19. In this regard, we note that TCI acknowledges that the Supreme Court has not reconciled the holding in Bowen with other decisions that permit retroactive application of statutes. See TCI at 16-18 (citing Kaiser, 494 U.S. at 837; Bradley).

427 NRTC at 23-24 (quoting Kaiser, 110 S. Ct. at 1577).

428 NRTC Reply at 21.

429 In Section 628(h)(1), Congress expressly exempted from the scope of Section 628 exclusive distribution contracts in areas served by cable that were entered into before June 1, 1990.

430 See APPA Reply at 9-10.

contracts argue that Congress's failure to exempt contracts other than the narrowly tailored exemption in Section 628(h) for exclusive contracts mandates the conclusion that Congress intended to include all other contracts within coverage of the Act.[431]

120. In addition, GTE contends that the Commission's tentative decision not to apply the anti-discrimination requirements to existing contracts "may not achieve the results Congress envisioned from the requirements of Section 628 in a timely fashion given the long term nature of many programming agreements."[432] A number of commenters agree, several citing Time Warner's discussion of its HBO affiliation agreements. Time Warner reported that some of the agreements run for as little as 3 years, while the average term is 5, and there are some that are of 10 years' duration. Time Warner also states that a third of all present subscribers to the HBO service are through affiliation agreements that run until 1998 or longer.[433] US West responds that "[i]f HBO contracts are any indication of the length and scope of other video programming contracts, Commission adoption of a rule grandfathering existing contracts would preclude competition in many parts of the multichannel video programming market."[434] CSS argues that multichannel video program distributors that currently are operating under discriminatory rates will be at a disadvantage if they have to wait for those contracts to expire before they can achieve parity with competitive distributors.[435]

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431 See APPA at 10; WCA at 29; CableAmerica at 36; NRTC at 32; NYNEX at 12 n.30; USTA at 5-6; WCA at 29; Bell Atlantic Reply at 18 n.41; CSS Reply at 7; Cross Country Reply at 9-10; GTE Reply at 7; NRTC Reply at 18 & n.17. However, commenters opposing "retroactive" application assert that the grandfathering provision in Section 628(h) falls short of authorization to apply the anti-discrimination provisions retroactively (see Superstar at 64; TCI at 18; UVI at 34), and that where Congress wanted to abrogate existing contracts, it did so explicitly, citing Section 628(h)(2) (see Turner Reply at 3). Liberty Media and Time Warner contend that interpreting congressional silence as granting retroactive rulemaking authority to the Commission is counter to Bowen. See Liberty Media Reply at 33; Time Warner Reply at 15.

432 GTE Reply at 6.

433 See Time Warner at 31-32.

434 US West Reply at 5 n.11. See also Liberty Cable Reply at 4; GTE Reply at 7 (noting that the prohibition on cable exclusivity sunsets after ten years absent FCC rulemaking justifying continuation); NRTC at 23 n.18 (arguing that Congress did not assign the program access rulemaking a 180-day trigger date only to have the regulations lie dormant for 3-5 years or longer).

435 See CSS Comments at 7. CSS asserts that "[n]ew [multichannel video program distributors] will be able to enter the market, assert rights to nondiscriminatory rates under Section 628, and be placed in a position of significant competitive advantage. Similarly, cable affiliated home satellite dish packagers may be able to demand and receive rate adjustments, while independent packagers such as NPS are powerless to do otherwise." Id.

121. Commenters propose a variety of methods for bringing existing contracts into compliance with the program access provisions. A number of commenters urge that the statutory provisions should become effective immediately.[436] APPA suggests a reasonable grace period of two years, and further suggests that the Commission entertain programmers' claims of hardship on a case-by-case basis to avoid the marketplace chaos they claim will be inevitable.[437] Under DirecTv's complaint-based analysis, when a multichannel video program distributor that is not a party to a contract files a complaint alleging discrimination as compared to a party to such preexisting contract, the preexisting contract would not have to be altered as long as the same terms/conditions were made available to the complainant.[438] WCA contends that a wireless cable operator should be able to use a pre-existing contract with a cable operator to compare whether a future contract offered the wireless operator is discriminatory, and that the programmer should be required to justify a price differential.[439]

## VI. Other Issues

### A. Data Collection

122. Commenting programmers share the concern that distributors will be tempted to use the complaint process to acquire proprietary information that will result in a business advantage.[440] They submit that price is but one element in the negotiating process. The programmers argue that public disclosure of terms and conditions would lessen competition because programmers would know the details of each other's key competitive tools. Thus, the programmers ask for the inclusion of appropriate safeguards for proprietary information, including (1) strict limits on distribution and disclosure of the information produced in discovery; (2) permission to redact unrelated information; and (3) in camera inspection by Commission of proprietary information. Viacom suggests that the complainant's burden of proof should be one which can be met using information already in the public domain.[441] All commenters agree that the standard protective order is an advisable instrument to which all proprietary data should be subject. Proponents of liberal discovery, NRTC and NYNEX, point out that the "best evidence" is in the hands

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436 See NRTC at 32; WCA at 29-30 (would allow programmers a reasonable opportunity of 90 days after publication of the rules in the Federal Register to bring their existing agreements into compliance).

437 See APPA Reply at 10.

438 See DirecTv at 26 n.32; see also GTE Reply at 7.

439 See WCA at 29 n.61.

440 See E! at 12; Group W at 11; Superstar at 69; UVI at 41; Viacom at 23-24.

441 See Viacom at 23-24.

of the programmers, and is rarely available for view by the distributors.[442] Thus, in the interest of equity, they argue, the Commission should make proprietary information available to potential complainants.

## B. Annual Report

123. With respect to information to be provided for the Commission's annual report to Congress, Viacom argues that any sharing of sensitive competitive information would hurt competition and contradict fundamental antitrust principles. It contends that since the exchange of price information tends toward price uniformity, prices would likely be stabilized and other competitively important terms and conditions would quickly be neutralized to the detriment of distributors and, in turn, consumers.[443] On the other hand, NRTC suggests that the Commission require programmers to file annual "General Rate Structures" that include (1) the average monthly cable subscription rate; (2) the 20 highest and 20 lowest individual subscription rates; (3) a listing of volume discounts; and (4) a description of all specific adjustments to rates.[444]

## C. Geographic Areas

124. Group W and Time Warner agree with the Commission's interpretation that Section 628 does not require a national or regional distributor to make programming available outside of its geographic area of license.[445] Any complaints, they argue, should be limited to within the distributor's area of license. Time Warner believes that the geographic limitations exemption refers to programming vendors, not to distributors. Time Warner also submits that the practice of "blacking out" events in certain areas does not violate Section 628.[446] Other commenters are critical of the Commission's interpretation.[447] These parties argue that it is difficult to envision how the Commission can carry out its directive to extend programming if the applicability of Section 628 is limited to the geographic area of license. They contend that there is extensive evidence demonstrating the incentives for a programmer to act in an anti-competitive manner both within and beyond its geographic area of license.

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442 See NRTC Reply at 32; NYNEX at 16.

443 See Viacom Reply at 18-19.

444 See NRTC Reply at 33-34.

445 See Group W at 10; Time Warner at 48.

446 See Time Warner at 48.

447 See CSS Reply at 6; NRTC at 14 n.6.

## APPENDIX D: Final Regulatory Flexibility Analysis

Pursuant to the Regulatory Flexibility Act of 1980, the Commission's final analysis is as follows:

### I. Need and purpose of this action:

This action is taken to implement Section 19 of the Cable Television Consumer Protection and Competition Act of 1992.

### II. Summary of the issues raised by the public comments in response to the Initial Regulatory Flexibility Analysis:

There were no comments submitted in response to the Initial Regulatory Flexibility Analysis.

### III. Significant alternatives considered:

We have analyzed the comments submitted in light of our statutory directives and have formulated regulations which, to the extent possible, minimize the regulatory burden placed on entities covered by the program access provisions of the Cable Act. Different entities will be affected in different ways. Some programming vendors may be forced to alter their pricing policies or their contracting policies while other MVPDs, who are more likely to be small entities, may receive benefits in increased access to or lower prices for satellite cable or satellite broadcast programming.

### IV. Federal Rules which overlap, duplicate or conflict with these rules.

Sherman Act, Clayton Act and Robinson-Patman Act.

### V. Paperwork Reduction Act Statement

The proposal contained herein has been analyzed with respect to the Paperwork Reduction Act of 1980 and found to impose new and modified information collection requirements on the public. Implementation of any new or modified requirements will be subject to approval by the Office of Management and Budget as prescribed by the Act.

## APPENDIX E

Part 76 of Title 47 of the Code of Federal Regulations is amended as follows:

**PART 76 — CABLE TELEVISION SERVICE**

1. The authority citation for Part 76 is revised to read as follows:

Authority: 47 U.S.C. 152, 153, 154, 301, 303, 307, 308, 309, 532, 533, 535, 542, 543, 548, 552.

2. The heading in Subpart O is revised to read as follows:

**Subpart O — Competitive Access to Cable Programming**

3. Section 76.1000 is added to Subpart O to read as follows:

**§76.1000 Definitions**

As used in this subpart:

**(a) Area served by cable system.** The term "area served" by a cable system means an area actually passed by a cable system and which can be connected for a standard connection fee.

**(b) Attributable interest.** For purposes of determining whether a party has an "attributable interest" as used in this subpart, the definitions contained in the notes to §76.501 shall be used, provided, however that:

(1) The single majority shareholder provisions of Note 2(b) to §76.501 and the limited partner insulation provisions of Note 2(g) to §76.501 shall not apply; and

(2) The provisions of Note 2(a) to §76.501 regarding five (5) percent interests shall include all voting or nonvoting stock or limited partnership equity interests of five (5) percent or more.

**(c) Buying groups.** The term "buying group" or "agent," for purposes of the definition of a multichannel video programming distributor set forth in paragraph (e) of this section, means an entity representing the interests of more than one entity distributing multichannel video programming that:

(1) Agrees to be financially liable for any fees due pursuant to a satellite cable programming, or satellite broadcast programming, contract which it signs as a contracting party as a representative of its members or whose members, as contracting parties, agree to joint and several liability; and

(2) Agrees to uniform billing and standardized contract provisions for individual members; and

(3) Agrees either collectively or individually on reasonable technical quality standards for the individual members of the group.

**(d) Competing distributors.** The term "competing," as used with respect to competing multichannel video programming distributors, means distributors whose actual or proposed service areas overlap.

**(e) Multichannel video programming distributor.** The term "multichannel video programming distributor" means an entity engaged in the business of making available for purchase, by subscribers or customers, multiple channels of video programming. Such entities include, but are not limited to, a cable operator, a multichannel multipoint distribution service, a direct broadcast satellite service, a television receive-only satellite program distributor, and a satellite master antenna television system operator, as well as buying groups or agents of all such entities.

**(f) Satellite broadcast programming.** 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.

**(g) Satellite broadcast programming vendor.** 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.

**(h) Satellite cable programming.** The term "satellite cable programming" means video programming which is transmitted via satellite and which is primarily intended for direct receipt by cable operators for their retransmission to cable subscribers, except that such term does not include satellite broadcast programming.

**(i) Satellite cable programming vendor.** 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.

**(j) Similarly situated.** The term "similarly situated" means, for the purposes of evaluating alternative programming contracts offered by a defendant programming vendor, that an alternative multichannel video programming distributor has been identified by the defendant as being more properly compared to the complainant in order to determine whether a violation of §76.1002(b) has occurred. The analysis of whether an alternative multichannel video programming distributor is properly comparable to the complainant includes consideration of, but is not limited to, such factors as whether the alternative multichannel video programming distributor operates within a geographic region proximate to the complainant, has roughly the same number of subscribers as the complainant, and purchases a similar service as the complainant. Such alternative multichannel video programming distributor, however, must use the same distribution technology as the "competing" distributor with whom the complainant seeks to compare itself.

**(k) Subdistribution agreement.** The term "subdistribution agreement" means an arrangement by which a local cable operator is given the right by a satellite cable programming vendor or satellite broadcast programming vendor to distribute the vendor's programming to competing multichannel video programming distributors.

4. Section 76.1001 is added to Subpart O to read as follows:

**§76.1001 Unfair Practices Generally**

No cable operator, satellite cable programming vendor in which a cable operator has an attributable interest, or satellite broadcast programming vendor shall engage in unfair methods of competition or unfair or deceptive acts or practices, the purpose or effect of which is to hinder significantly or prevent any multichannel video programming distributor from providing satellite cable programming or satellite broadcast programming to subscribers or consumers.

5. Section 76.1002 is added to Subpart O to read as follows:

**§76.1002 Specific Unfair Practices Prohibited**

**(a) Undue or improper influence.** No cable operator that has an attributable interest in a satellite cable programming vendor or in a satellite broadcast programming vendor shall unduly or improperly influence the decision of such vendor to sell, or unduly or improperly influence such vendor's prices, terms, and conditions for the sale of, satellite cable programming or satellite broadcast programming to any unaffiliated multichannel video programming distributor.

**(b) Discrimination in prices, terms or conditions.** No satellite cable programming vendor in which a cable operator has an attributable interest, or satellite broadcast programming vendor, shall discriminate in the prices, terms, and conditions of sale or delivery of satellite cable programming or satellite broadcast programming among or between competing cable systems, competing cable operators, or any competing multichannel video programming distributors. Nothing in this subsection, however, shall preclude:

(1) The imposition of reasonable requirements for creditworthiness, offering of service, and financial stability and standards regarding character and technical quality;

**NOTE 1:** Vendors are permitted to create a distinct class or classes of service in pricing based on credit considerations or financial stability, although any such distinctions must be applied for reasons other than a multichannel video programming distributor's technology. Vendors are not permitted to manifest factors such as creditworthiness or financial stability in price differentials if such factors are already taken into account through different terms or conditions such as special credit requirements or payment guarantees.

**NOTE 2:** Vendors may establish price differentials based on factors related to offering of service, or differences related to the actual service exchanged between the vendor and the distributor, as manifested in standardly applied contract terms based on a distributor's particular characteristics or willingness to provide secondary services that are reflected as a discount or surcharge in the programming service's price. Such factors include, but are not limited to, penetration of programming to subscribers or to particular systems; retail price of programming to the consumer for pay services; amount and type of promotional or advertising services by a distributor; a distributor's purchase of programming in a package or a la carte; channel position; importance of location for non-volume reasons; prepayment discounts; contract duration; date of purchase, especially purchase of service at launch; meeting competition at the distributor level; and other legitimate factors as standardly applied in a technology neutral fashion.

**(2)** The establishment of different prices, terms, and conditions to take into account actual and reasonable differences in the cost of creation, sale, delivery, or transmission of satellite cable programming or satellite broadcast programming;

**NOTE:** Vendors may base price differentials, in whole or in part, on differences in the cost of delivering a programming service to particular distributors, such as differences in costs, or additional costs, incurred for advertising expenses, copyright fees, customer service, and signal security. Vendors may base price differentials on cost differences that occur within a given technology as well as between technologies. A price differential for a program service may not be based on a distributor's retail costs in delivering service to subscribers unless the program vendor can demonstrate that subscribers do not or will not benefit from the distributor's cost savings that result from a lower programming price.

**(3)** The establishment of different prices, terms, and conditions which take into account economies of scale, cost savings, or other direct and legitimate economic benefits reasonably attributable to the number of subscribers served by the distributor; or

**NOTE:** Vendors may use volume-related justifications to establish price differentials to the extent that such justifications are made available to similarly situated distributors on a technology-neutral basis. When relying upon standardized volume-related factors that are made available to all multichannel video programming distributors using all technologies, the vendor may be required to demonstrate that such volume discounts are reasonably related to direct and legitimate economic benefits reasonably attributable to the number of subscribers served by the distributor if questions arise about the application of that discount. In such demonstrations, vendors will not be required to provide a strict cost justification for the structure of such standard volume-related factors, but may also identify non-cost economic benefits related to increased viewership.

**(4)** Entering into exclusive contracts in areas that are permitted under paragraphs (c)(2) and (c)(4) of this section.

**(c) Exclusive contracts and practices.**

**(1) Unserved areas.** No cable operator shall engage in any practice or activity or enter into any understanding or arrangement, including exclusive contracts, with a satellite cable programming vendor or satellite broadcast programming vendor for satellite cable programming or satellite broadcast programming that prevents a multichannel video programming distributor from obtaining such programming from any satellite cable programming vendor in which a cable operator has an attributable interest, or any satellite broadcast programming vendor in which a cable operator has an attributable interest for distribution to persons in areas not served by a cable operator as of October 5, 1992.

**(2) Served areas.** No cable operator shall enter into any exclusive contracts, or engage in any practice, activity or arrangement tantamount to an exclusive contract, for satellite cable programming or satellite broadcast programming with a satellite cable programming vendor in which a cable operator has an attributable interest or a satellite broadcast programming vendor in which a cable operator has an attributable interest, with respect to areas served by a cable operator, unless the Commission determines in accordance with paragraph (c)(4) of this section that such contract, practice, activity or arrangement is in the public interest.

(3) **Specific arrangements: subdistribution agreements.**

**(i) Unserved areas.** No cable operator shall enter into any subdistribution agreement or arrangement for satellite cable programming or satellite broadcast programming with a satellite cable programming vendor in which a cable operator has an attributable interest or a satellite broadcast programming vendor in which a cable operator has an attributable interest for distribution to persons in areas not served by a cable operator as of October 5, 1992.

**(ii) Served areas.** No cable operator shall enter into any subdistribution agreement or arrangement for satellite cable programming or satellite broadcast programming with a satellite cable programming vendor in which a cable operator has an attributable interest or a satellite broadcast programming vendor in which a cable operator has an attributable interest, with respect to areas served by a cable operator, unless such agreement or arrangement complies with the limitations set forth in paragraph (c)(3)(iii) of this section.

**(iii) Limitations on subdistribution agreements in served areas.** No cable operator engaged in subdistribution of satellite cable programming or satellite broadcast programming may require a competing multichannel video programming distributor to

**(A)** Purchase additional or unrelated programming as a condition of such subdistribution; or

**(B)** Provide access to private property in exchange for access to programming. In addition, a subdistributor may not charge a competing multichannel video programming distributor more for said programming than the satellite cable programming vendor or satellite broadcast programming vendor itself would be permitted to charge. Any cable operator acting as a subdistributor of satellite cable programming or satellite broadcast programming must respond to a request for access to such programming by a competing multichannel video programming distributor within fifteen (15) days of the request. If the request is denied, the competing multichannel video programming distributor must be permitted to negotiate directly with the satellite cable programming vendor or satellite broadcast programming vendor.

**(4) Public interest determination.** In determining whether an exclusive contract is in the public interest for purposes of paragraph (c)(2) of this section, the Commission will consider each of the following factors with respect to the effect of such contract on the distribution of video programming in areas that are served by a cable operator:

**(i)** The effect of such exclusive contract on the development of competition in local and national multichannel video programming distribution markets;

**(ii)** The effect of such exclusive contract on competition from multichannel video programming distribution technologies other than cable;

**(iii)** The effect of such exclusive contract on the attraction of capital investment in the production and distribution of new satellite cable programming;

**(iv)** The effect of such exclusive contract on diversity of programming in the multichannel video programming distribution market; and

**(v)** The duration of the exclusive contract.

**(5) Prior Commission approval required.** Any cable operator, satellite cable programming vendor in which a cable operator has an attributable interest, or satellite broadcast programming vendor in which a cable operator has an attributable interest seeking to enforce or enter into an exclusive contract in an area served by a cable operator must submit a "Petition for Exclusivity" to the Commission for approval.

**(i)** The petition for exclusivity shall contain those portions of the contract relevant to exclusivity, including:

**(A)** A description of the programming service;

**(B)** The extent and duration of exclusivity proposed; and

**(C)** Any other terms or provisions directly related to exclusivity or to any of the criteria set forth in paragraph (c)(4) of this section. The petition for exclusivity shall also include a statement setting forth the petitioner's reasons to support a finding that the contract is in the public interest, addressing each of the five factors set forth in paragraph (c)(4) of this section.

**(ii)** Any competing multichannel video programming distributor affected by the proposed exclusivity may file an opposition to the petition for exclusivity within thirty (30) days of the date on which the petition is placed on public notice, setting forth its reasons to support a finding that the contract is not in the public interest under the criteria set forth in paragraph (c)(4) of this section. Any such formal opposition must be served on petitioner on the same day on which it is filed with the Commission.

**(iii)** The petitioner may file a response within ten (10) days of receipt of any formal opposition. The Commission will then approve or deny the petition for exclusivity.

**(6) Sunset provision.** The prohibition of exclusive contracts set forth in paragraph (c)(2) of this section shall cease to be effective on October 5, 2002, unless the Commission finds, during a proceeding to be conducted during the year preceding such date, that said prohibition continues to be necessary to preserve and protect competition and diversity in the distribution of video programming.

**(d) Limitations.**

**(1) Geographic limitations.** Nothing in this section shall require any person who is engaged in the national or regional distribution of video programming to make such programming available in any geographic area beyond which such programming has been authorized or licensed for distribution.

**(2) Applicability to satellite retransmissions.** Nothing in this section shall apply:

**(i)** To the signal of any broadcast affiliate of a national television network or other television signal that is retransmitted by satellite but that is not satellite broadcast programming; or

**(ii)** To any internal satellite communication of any broadcast network or cable network that is not satellite broadcast