

JUN 10 1993

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Before the
Federal Communications Commission
Washington, D.C. 20554

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

MM Docket
No. 92-265

PETITION OF
TIME WARNER ENTERTAINMENT COMPANY, L.P.,
FOR RECONSIDERATION

June 10, 1993

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Summary of Argument

Time Warner Entertainment Company, L.P. ("TWE"), herein invites the Commission to reconsider its "program-access" rules. TWE argues as follows:

- The rules regarding subdistribution arrangements, as currently written, could be read to regulate nonexclusive subdistribution arrangements. Such arrangements cannot inhibit access to programming because a distributor can always circumvent any restrictions imposed by the subdistributor by purchasing the same programming elsewhere. Indeed, regulating nonexclusive arrangements may block rather than promote access to programming. The Commission should therefore clarify that its rules apply to exclusive subdistribution arrangements only.
- If, before the effective date of the rules, a programming vendor entered into a contract with distributor A at a low price, and with competing distributor B at a higher price, the Order would seem to permit distributor B now to abandon its contract and demand a lower price, but does not appear to give the programming vendor the right now to abandon its contract with distributor A. Because this is fundamentally unfair, the Commission, upon reconsideration, should rule that its discrimination rules do not apply to existing contracts.
- A distributor proceeding against a cable-programming vendor under subsection (c) should be required to show that that vendor is vertically integrated with the cable operator with which the complainant competes. Without such a limitation, the rules without any reason discriminate against vertically integrated--and in favor of independent--programming vendors, and are therefore arbitrary and capricious and violative of equal protection.

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Preliminary Statement

On April 30, 1993, the Commission released its First Report and Order ("the Order") in this rulemaking proceeding, promulgating rules implementing and interpreting § 19 of the Cable Television Consumer Protection and Competition Act of 1992 ("the 1992 Cable Act"). Cable Act of 1992--Program Distribution and Carriage Agreements, 58 Fed. Reg. 27658 (May 11, 1993). Time Warner Entertainment Company, L.P. ("TWE"), participated in this rulemaking proceeding by submitting comments and reply comments. Pursuant to 47 U.S.C. § 405 and 47 C.F.R. § 1.429, TWE now invites the Commission to reconsider or clarify its conclusions with respect to three issues: (1) whether the

Commission's rules should regulate nonexclusive subdistribution arrangements; (2) whether the discrimination rules should apply to existing contracts; and (3) whether a complainant proceeding under subsection (c) must show that the defendant cable-programming vendor is vertically integrated with the cable operator with which the complainant competes.

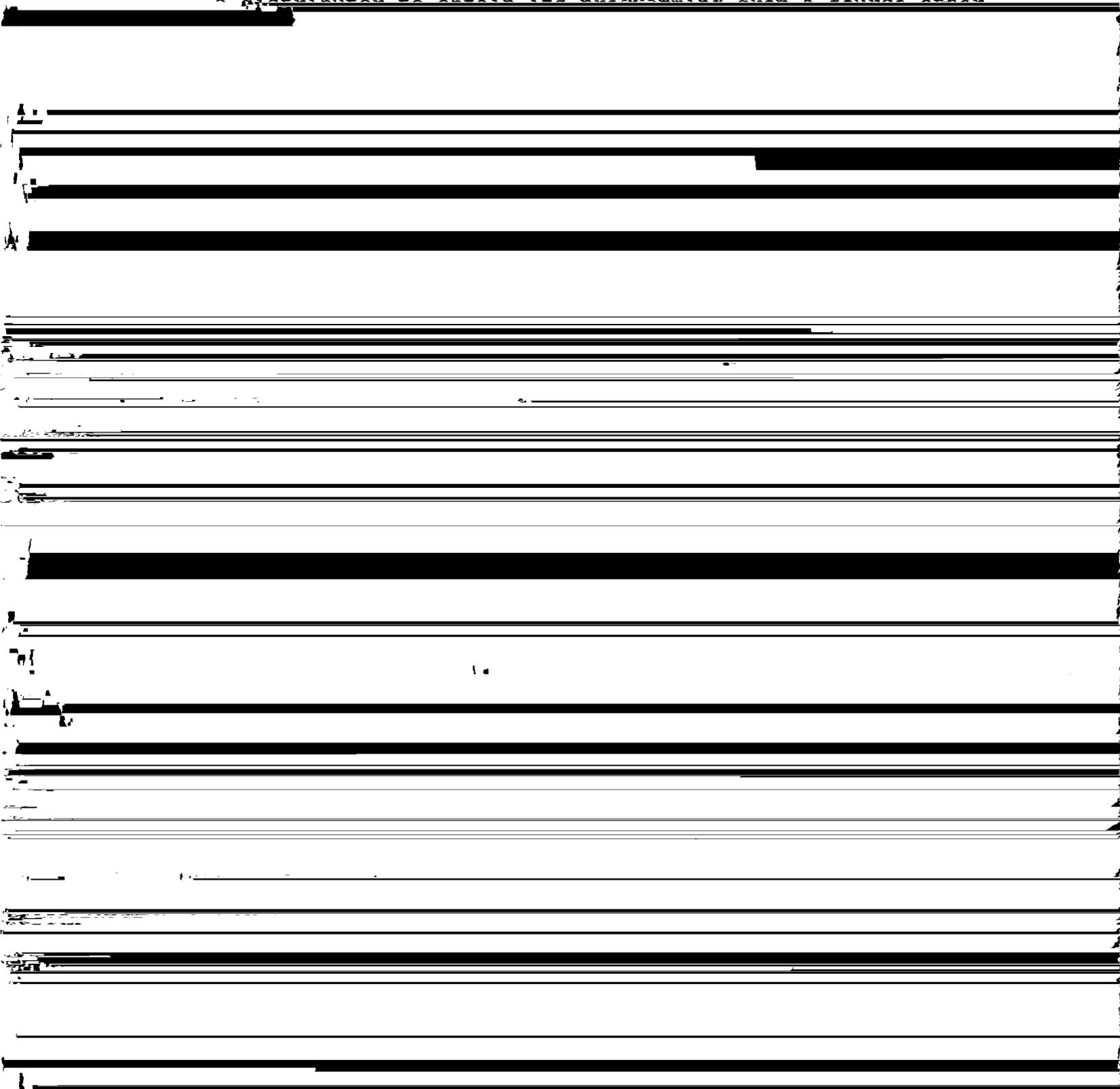
Argument

I. ONLY EXCLUSIVE SUBDISTRIBUTION ARRANGEMENTS SHOULD BE REGULATED.

New § 76.1002(c)(3) of title 47 of the Code of Federal Regulations prohibits arrangements between a cable-programming vendor and a cable operator for subdistribution in areas unserved by a cable operator, and places certain restrictions upon such arrangements for subdistribution in areas served by a cable operator. 1/ Section 76.1002(c)(3), by its terms, could be read to encompass both exclusive and nonexclusive subdistribution arrangements.

1/ Those restrictions are: (1) a subdistributor may not require a competing distributor to buy other programming or to give access to private property as a condition for access to programming; (2) a subdistributor may not charge a competing distributor more for programming than the programming vendor itself would have been permitted to charge; and (3) if a subdistributor denies a competing distributor's request for access to programming, the competing distributor must be permitted to negotiate directly with the programming vendor. § 76.1002(c)(3)(iii).

TWE submits that subdistribution agreements can have anticompetitive potential only if they are exclusive, that is to say, only if a programming vendor does not permit a distributor to obtain its programming from a source other



that it is not feasible to deal directly with such distributors. In such circumstances, a subdistributor may be the only available outlet of programming, and by forbidding subdistribution, the Commission's rules may destroy that outlet, and thus deprive viewers of access to such programming.

This is all the more unfortunate because, from the context of the entire Order, it does not appear that the Commission consciously intended to regulate nonexclusive subdistribution arrangements. The Order's discussion of subdistribution arrangements can be found under the heading "Limitations on Exclusive Contracting", Order p. 20; the Order refers to subdistribution arrangements as an "area or concern . . . that is applicable to exclusive contracts for served and unserved areas alike", Order ¶ 68; the concerns discussed in ¶¶ 68 and 69 of the Order simply have no relevance to nonexclusive subdistribution arrangements; the Order elsewhere speaks of "a prohibited exclusive arrangement (either directly or through a subdistribution arrangement that violates our rules)", Order ¶ 76, and mentions "a cable operator selling . . . programming pursuant to a subdistribution agreement" as a potential defendant in an exclusivity complaint case, Order ¶ 77; and

§ 76.1002(c)(3) is listed under the caption "Exclusive contracts and practices".

TWE urges the Commission to make explicit that § 76.1002(c)(3) applies only to exclusive arrangements. One way of accomplishing this would be to make the rules applicable to served areas applicable to unserved areas as well. Those rules require a programming vendor to negotiate directly with a distributor if a subdistributor denies the distributor's request for access to programming, thus in effect making all subdistribution agreements nonexclusive. § 76.1002(c)(3)(iii). Extending those rules to unserved areas could be accomplished simply by deleting § 76.1002(c)(3)(i) and the references to "served areas" in § 76.1002(c)(3)(ii) and (iii).

II. THE COMMISSION'S DISCRIMINATION RULES SHOULD NOT APPLY TO EXISTING CONTRACTS.

The Order states that the rules adopted pursuant to § 19 apply "to all existing contracts, whether they were executed before or after the effective date of the rules". Order ¶ 120; see also § 76.1002(f) (requiring all contracts that are not grandfathered to be "brought into compliance" by November 15, 1993). If, then, before the effective date of the rules, a programming vendor entered into a contract with distributor A at a low price, and with competing

III. A SHOWING OF VERTICAL INTEGRATION IN THE SPECIFIC AREA AT ISSUE SHOULD BE AN ELEMENT OF A CLAIM UNDER SUBSECTION (c).

In the NPRM, the Commission asked whether the prohibitions of § 19 should be limited to "local markets where an entity is in fact vertically integrated, i.e., where it holds an attributable interest in the local cable system". NPRM ¶ 11. In its comments, TWE proposed that the prohibitions of § 19 should be so limited, TWE 7; TWE Reply 6, because vertically integrated programming vendors can have the "incentive and ability to favor their affiliated cable operators over nonaffiliated cable operators and programming distributors using other technologies", 1992 Cable Act § 2(a)(5), only where they in fact have an interest in a local cable operator.

The Order, however, rejects this limitation, requiring a complainant to show merely that a programming vendor is vertically integrated with a cable operator, and does not require a showing that the vendor is vertically integrated with the cable operator with which the complainant competes. Order ¶¶ 11, 30. The Order states that "this approach is most consistent with congressional intent and best addresses Congress' apparent concern with industry-wide influences that can occur even in the absence of a vertical relationship in the complainant's market",

Order ¶ 11. and that "the legislative history demonstrates

programming vendors (whether vertically integrated or independent) have that incentive. 3/

The Commission cannot have it both ways: Having decided to make its rules applicable only to vertically integrated firms on the ground that Congress was concerned with practices pursued only by vertically integrated firms, NPRM ¶ 8; Order ¶¶ 24, 28, the Commission cannot now go beyond that rationale and regulate conduct that has nothing to do with vertical integration. At a minimum, the Order should explain why identical conduct is somehow more worthy

~~of regulation if engaged in by vertically integrated firms~~

protection muster even if reviewed under a rational-basis standard. 4/

4/ TWE submits that, because the rules seriously burden cable-programming vendors' ability to engage in constitutionally protected speech, the applicable standard of review is strict scrutiny. Failing even under rational-basis scrutiny, the rules certainly cannot survive strict scrutiny.

Conclusion

Upon reconsideration, the Commission should clarify that its subdistribution rules apply only to exclusive subdistribution agreements; that its discrimination rules do not apply to existing contracts; and that a complainant in a proceeding under subsection (c) against a cable-programming vendor must show that the vendor holds an interest in the cable operator with which the complainant competes.

June 10, 1993

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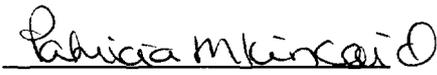
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