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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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In the Matter of	)	
	)	
Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992	)	MM Docket No. 92-265
	)	
Development of Competition and Diversity in Video Distribution and Carriage	)	

OPPOSITION TO
PETITIONS FOR RECONSIDERATION

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EXECUTIVE SUMMARY

In the *First Report and Order* (the *"FR&O"*), the Commission developed rules to implement Section 628 of the 1992 Cable Act -- to assure that non-cable multichannel video programming distributors ("MVPDs") will have the programming they need in order to bring the benefits of competition to consumers.

As it did in the *FR&O*, the Commission should again reject TWE's contention that Section 628(b) and (c) could only be invoked against a cable programming vendor when the beneficiary of that programmer's conduct was a cable operator that had an attributable interest in the programmer. Although TWE's claims that programming vendors would not have the incentive to engage in the prohibited practices in markets where they are not vertically integrated, the legislative history demonstrates Congress' concern that vertically integrated vendors may control programming access in areas without a commonly owned distributor. The record before Congress and the Commission established that a vertically integrated programmer could discriminate against non-cable MVPDs serving markets unserved by affiliated cable operators.

The Commission should also again reject Viacom's call for an attribution rule that would exempt programmers whose aggregate subscriber base from its affiliated cable owners represents less than 5 percent of its total subscribership. The economic analysis submitted by Viacom to support its request is based on a series of flawed assumptions.

Liberty Media urges the Commission to revise its new rules so that no matter how odious the conduct of a vertically integrated programmer, every claim for relief under Section 628(c) must demonstrate that the complainant MVPD has suffered "harm." There is absolutely nothing in Section 628 or its legislative history to suggest that Congress intended to limit the reach of Section 628(c) in this manner. Congress has found that conduct specified in Section 628(c) is actionable regardless of whether it precludes competition, and relief is always warranted. It is not for the Commission to revisit Congress' determination in that regard.

The Commission should also reject TWE's allegations that "as a policy matter and to save its rules from Constitutional infirmity, the Commission should decide upon reconsideration that its discrimination rules do not apply to existing contracts." Grandfathering all existing contracts would be contrary to the express directive of the 1992 Cable Act.

Viacom and Discovery urge the Commission to rule that "[a]ny distributor seeking to alter the terms of an existing contract based upon a claim under Section 628(c) should be required to demonstrate that the price, terms, or conditions of its affiliation agreement are such that the "purpose or effect" is to significantly hinder the distributor's ability to compete in the marketplace." As the Commission found in the *FR&O*, Congress intended for the Commission to exempt only a narrow class of agreements from Section 628(c).

Liberty Media vigorously urged the Commission to adopt various attribution standards such that a programmer effectively would be exempt from program access regulations unless the programmer is under the "control" of a single cable operator. In the *FR&O* the Commission soundly rejected that approach. The legislative history of Section 628 makes it clear that Congress did not intend for "attribution interests" to be synonymous with "control." The rejection of a "control" standard is not only mandated by the legislative history of Section 628, but is also good public policy.

Discovery and BET argue on reconsideration that the Commission should exempt from the new programming access rules educational or instructional programming. However, the Commission lacks authority to establish special rules along the lines that BET and Discovery propose. There is no indication, in Section 628 or its legislative history, that Congress intended for the Commission to establish special program access rules for educational services or those that are minority owned. Moreover, BET's and Discovery's request is inconsistent with the goal of promoting an increased diversity of programming available to the public.

Finally, Viacom advances on reconsideration the notion that programmers should be permitted to charge wireless cable operators more because wireless cable systems can be constructed and operated at a lower cost than traditional coaxial cable systems. Once again, Viacom relies on the colloquy between Senator Inouye and Senator Kerrey. Absent far more than this ambiguous colloquy, the Commission cannot lawfully ascribe to Congress a desire to permit programmers to recapture the cost savings of new technologies through their higher rates and deny consumers the benefits of those rates.

The Commission in its *FR&O* achieved Congress' expectations and it should therefore retain the rules adopted in the *FR&O* to assure operators of wireless cable and other alternative distribution systems access to the cable programming subscribers demand on fair and reasonable terms.

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The Wireless Cable Association International, Inc. ("WCA"), by its attorneys and pursuant to Section 1.106(g) of the Commission's Rules, hereby submits its opposition to certain of the arguments advanced in petitions filed by cable operators and vertically integrated programmers seeking reconsideration of the *First Report and Order* ("*FR&O*") in the captioned proceeding.[1]

I. INTRODUCTION AND SUMMARY.

The fundamental premise of the Cable Television Consumer Protection and Competition Act of 1992 (the "1992 Cable Act") is that competition, rather than regulation, is the preferable mechanism for protecting consumers from the abuses they have suffered at the hands of the cable monopoly.[2] In passing the 1992 Cable Act Congress recognized that

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[1] *Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992,* MM Docket No. 92-265, 8 FCC Rcd. 3359 (1993) [hereinafter cited as "*FR&O*"]

[2] *See, e.g.*, 1992 Cable Act, at § 3(a); S.R. No. 102-92, 102d Cong., 1st Sess., at 1, 12, 18 [hereinafter cited as "Senate Report"].

in order to effectively compete, all multichannel video programming distributors ("MVPDs") must have a full and fair opportunity to distribute the programming services that consumers demand.[3] On a record demonstrating beyond peradventure that the cable monopoly had abused its leverage over programming vendors to frustrate efforts by non-cable MVPDs to cramped interpretations of Section 628 -- interpretations that would have eviscerated Section 628 had they been adopted.

Time Warner Entertainment Company, L.P. ("TWE"), Liberty Media Corp. ("Liberty Media"), Viacom International, Inc. ("Viacom"), Discovery Communications, Inc. ("Discovery") and Black Entertainment Television, Inc. ("BET") -- all of which are cable operators or vertically integrated programmers -- have petitioned the Commission to make material changes in the rules and policies adopted in the *FR&O*.[6] As will be discussed below, many of the positions advanced in their petitions are the same old wine in different bottles -- which were rejected in the *FR&O* because their adoption would undercut the Commission's efforts to promote competition in the multichannel video marketplace. Others are novel arguments but without a scintilla of support in the 1992 Cable Act.

II. DISCUSSION.

A. The Commission Has Properly Concluded That Any Multichannel Video Programming Distributor Aggrieved By A Programmer's Violation Of Section 628 Has A Cause of Action, Even If It Does Not Directly Compete Against A Cable Operator With An Attributable Interest In The Programmer.

Sections 628(b) and (c) of the 1992 Cable Act apply to satellite cable programming vendors "in which a cable operator has an attributable interest."[7] TWE contended in its comments that Sections 628(b) and (c) could only be invoked against a cable programming

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[6]The National Rural Telecommunications Cooperative ("NRTC"), among others, also petitioned the Commission to reconsider certain aspects of the *FR&O*. *See* Petition of National Rural Telecommunications Cooperative, MM Docket No. 92-265 (filed Jun. 10, 1993). WCA endorses the suggestions advanced by NRTC in its filing and urges the Commission to amend its rules to implement the changes suggested by NRTC.

[7]47 U.S.C. §§ 548(b), (c).

vendor when the beneficiary of that programmer's conduct was a cable operator that had an attributable interest in the programmer, reasoning that Congress only intended for the Commission to bar actions driven by incentives resulting from vertical integration.[8] However, the *FR&O* soundly rejects TWE's contention, concluding that:

> Regarding the geographic considerations for vertical integration, we believe that the scope of the rules should not be limited to situations where a satellite cable programming vendor is vertically integrated with a distributor within a particular market. Instead, in order to file a complaint under Section 628, a complainant need only show that the programmer is vertically integrated as a general matter. Although some parties claim that programming vendors would not have the incentive to engage in the prohibited practices in markets where they are not vertically integrated, we believe that the legislative history demonstrates Congress' concern that vertically integrated vendors may control programming access in areas without a commonly owned distributor.[9]

[redacted]

TWE fails to cite to a single reference in either Section 628 or the legislative history of the 1992 Cable Act to support its contention that the Commission may only regulate activities stemming from vertical integration, because none exist. The plain language of Sections 628(b) and (c) speaks with crystalline clarity -- so long as a cable operator has an attributable interest in a programming vendor, that programmer is subject to Section 628 wherever it does business. If Congress had intended to restrict the mandate of Section 628 to those markets where the programmer is vertically integrated with the cable operator, it would have done so explicitly. Congress did not do so because the record before it was replete with evidence of misconduct by vertically integrated programmers against non-cable MVPDs, even where the programmer was not vertically integrated with a cable system serving the market in issue.[12] As the Commission recognized in adopting the *FR&O*, Congress was motivated to regulate program access as much out of concerns caused by horizontal concentration and local monopoly as by vertical integration.[13]

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[12]*See, e.g.* Senate Report, *supra* note 2, at 24. *See also* Comments of Wireless Cable Ass'n Int'l, MM Docket No. 92-265, at 4 n.8, 10-19, 33-34 (filed Jan 25, 1993)[hereinafter cited as "WCA Comments"]; Pearce and Whitaker, *Video Programming Availability and Consumer Choice*, at 12 (Information Age Economics 1990); *Competition, Rate Deregulation and the Commission's Policies Relating to the Provisions of Cable Television Service*, 5 FCC Rcd 4962, 5021-26 (1990)[hereinafter cited as "*FCC Report*"].

[13]*See FR&O, supra* note 1, 8 FCC Rcd at 3365-66. Congress' failure to specifically limit the geographic scope of Section 628 is particularly telling given the Commission's 1990 *Report* to Congress on the status of competition in the video marketplace. In that *Report*, the Commission specifically proposed that program access rights be limited to those markets where the local cable operator has a cognizable interest in the programmer refusing to deal with alternative technologies. *See FCC Report, supra* note 12, 5 FCC Rcd at 5031-32. Given the numerous references to the *Report* in the legislative history of the 1992 Cable Act, Congress must be presumed to have been aware of the Commission's proposal, and to have rejected it.

That the record before Congress established that a vertically integrated programmer would discriminate against non-cable MVPDs serving markets unserved by affiliated cable

The Commission's approach adopted in the *FR&O* "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."[16] Imposition of a geographic market limitation would not have accomplished Congress' intended purpose of assuring alternative multichannel service providers access to the programming services necessary to compete. On the basis of the voluminous evidence in the record concerning the harm befalling consumers as a result of the local cable monopoly, Congress has expressly determined and adopted legislation to promote competitive alternatives to cable to assure emerging technologies fair access to the *full* complement of programming services necessary to compete. Adoption of TWE's proposal at best would provide any given new entrant into the marketplace with assured access to perhaps a few programming services, but would *never* assure fair access to *all* the services needed to compete.

In short, TWE has failed to establish any reason for the Commission to abandon the well-reasoned approach adopted in the *FR&O*. The language of Section 628, along with the record before Congress and the Commission, provide ample justification for the Commission's interpretation of Sections 628(b) and (c).

B. Viacom's Proposed *De Minimis* Exception To Section 628 Should Be Rejected Again.

In the *FR&O*, the Commission rejected Viacom's call for an attribution rule that would exempt programmers whose aggregate subscriber base from its affiliated cable owners

[16] *FR&O, supra* note 1, 8 FCC Rcd at 3363.

represents less than five percent of its total subscribership.[17] In doing so, the Commission found that "the record does not provide sufficient data to support a definitive point at which the incentives for such vendors to favor their affiliated customers differ from other vertically integrated programming vendors."[18] While the Commission opened the door to revisiting this issue in the future, it warned proponents that they must "provide information regarding the incentives and past conduct of vendors with de minimis vertical interests."[19] While Viacom has now petitioned the Commission to reconsider, its showing falls far short of that required by the Commission.

It is certainly interesting to note that while Viacom trumpets its willingness to deal with alternative technologies, it fails to mention its pricing policies.[20] That is not surprising, for Viacom has admitted that its pricing policies discriminate against non-cable MVPDs in comparison to cable operators.[21] Indeed, the FCC's 1990 *Report* reported that the top wireless cable rate for one Viacom service is 59.1% more than the top rate charged cable operators.[22] Thus, for all of the theoretical economic analysis supplied by Viacom suggesting that Viacom

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[17]*See FR&O, supra* note 1, 8 FCC Rcd at 3371 n. 19.

[18]*Id.*

[19]*Id.*

[20]*See* Petition of Viacom Int'l for Reconsideration and Clarification, MM Docket No. 92-265, at 7-8 (filed June 10, 1993)[hereinafter cited as "Viacom Petition"].

[21]*See* Comments of Viacom International, Inc., MM Docket No. 92-265, at 57 (filed Jan. 25, 1993).

[22]*See FCC Report, supra* note 12, 5 FCC Rcd at 5117.

has no incentive to discriminate against non-cable MVPDs, real world experience proves otherwise.

Additionally, the economic analysis prepared by the analysts, Crandall and Glassman, and submitted by Viacom to support its request is based on a series of flawed assumptions. For example, the analysis proclaims that "the denial of any one program service or group of program services to a non-cable distributor is unlikely to cause very many viewers to shift from the non-cable distributor to a cable system with access to that programming."[23] While that may be the case with some marginal program services, WCA's experience and the record before the Commission establish that some programming, particularly sports programming, is so popular that a substantial number of consumers will not subscribe to an MVPD without access to that programming.[24]

Also flawed is Crandall and Glassman's attempt to demonstrate the merit of Viacom's position by establishing the incentives of a vertically integrated programmer to discriminate, and then demonstrating that those incentives are lacking where the extent of vertical integration is *de minimis*. However, their list of incentives for discriminatory conduct is far from exhaustive; it assumes that the vertically integrated firm is merely interested in maximizing short term profits. As noted *supra*, a vertically integrated programmer might discriminate against an MVPD for a market unserved by its affiliated MVPD because that

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[23]Crandall and Glassman, "The Economic Case For A De Minimis Exemption From The Commission's Program Access Rules", at 8 (filed June 11, 1993).

[24]*See* Comments of Liberty Cable Company, Inc., MM Docket No. 92-265, at 11 (filed Jan. 25, 1993); Comments of The American Public Power Association, MM Docket No. 92-265, at 4-5 (filed Jan. 25, 1993); and Comments of CableAmerica Corporation, MM Docket No. 92-265, at 4-5 (filed Jan. 25, 1993).

MVPD intends to expand into the market in the future. Thus, regardless of the small size of Viacom's own subscriber base, Viacom has an incentive to refuse to deal with a wireless cable operator serving a market that, while today unserved by Viacom's cable system, could in the future be served by a Viacom-affiliated cable system, Direct Broadcast Satellite system, or other MVPD. The analysts, however, never address the incentive of Viacom to forego short term revenues on the programming side in order to promote a future distribution system.

In short, Viacom has failed to establish that a *de minimis* exception to Section 628 would advance the public interest. The record before the Commission establishes that even vertically integrated firms with small cable interests have not only the incentive and the ability, but actually do discriminate against non-cable MVPDs.

C. The Commission Has Properly Concluded That Complainants Under Section 628(c) Need Not Establish Actual "Harm."

Echoing comments that it and others in the cable industry filed in the initial round of this proceeding, Liberty Media urges the Commission on reconsideration to revise its new rules so that no matter how odious the conduct of a vertically integrated programmer, every claim for relief under Section 628(c) must demonstrate that the complainant MVPD has suffered "harm"[25] -- a phrase Liberty Media equates with an inability to compete with the favored distributor in selling programming to consumers.[26] Simply put, there is absolutely

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[25]*See* Petition of Liberty Media Corp. for Reconsideration, MM Docket No. 92-265, at 3-8 (filed June 10, 1993)[hereinafter cited as "Liberty Media Petition"].

[26]Comments of Liberty Media Corp., MM Docket No. 92-265, at 6 (filed Jan. 25, 1993)[hereinafter cited as "Liberty Media Comments"].

nothing in Section 628 or its legislative history to suggest that Congress intended to limit the reach of Section 628(c) in this manner.[27]

In advocating the imposition of an actual harm standard, Liberty Media conveniently ignores that such an approach cannot be squared with the statutory scheme. Liberty Media contends that a threshold showing of an inability to compete for Section 628(c) actions is mandated by Section 628(b), which specifically provides that "[i]t shall be unlawful . . . to engage in unfair methods of competition or unfair or deceptive acts or practices, the purpose or effect of which is to hinder significantly or to prevent" an MVPD from competing. Undoubtedly, a complaint alleging a violation of the general prohibitions in subsection (b) must establish that the "purpose or effect" of the activity complained of was harmful. However, the Commission has correctly recognized that:

> the language in subsection (b) was not intended to impose an additional burden or threshold showing on complaints with respect to the activities specified in subsection (c). Rather, we believe that if behavior meets the definitions of the activities proscribed in subsection (c), such practices are implicitly harmful.[28]

Congress has already found that unless justified by the specific considerations it found relevant and enumerated in Section 628(c), conduct specified in Section 628(c) is actionable regardless of whether it precludes competition, and relief is always warranted.[29] Indeed, as

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[27]In fact, it is rare that discriminatory rates by any one programmer will alone jeopardize the prospects for competition; generally, it is the cumulative effects of discrimination by several programmers. But, in any event, every penny that must be paid to a programmer due to discrimination is a penny less in savings that an alternative service provider can pass along to subscribers in reduced rates.

[28]*FR&O, supra* note 1, 8 FCC Rcd at 3377.

[29]*See* WCA Comments, *supra* note 12, at 36.

the Commission recognized in the *FR&O*, Congress did not intend for the Commission to require those aggrieved by the conduct proscribed by Section 628(c) to demonstrate actual harm.[30] It is not for the Commission to revisit Congress' determination in that regard.

Liberty Media's reliance on Section 628(d) is particularly misplaced. Section 628(d) provides that "[a]ny multichannel video programming distributor aggrieved by conduct that it alleges constitutes a violation of subsection (b), or the regulations of the Commission under subsection (c), may commence an adjudicatory proceeding at the Commission." Neither that language, nor any portion of its legislative history, supports Liberty Media's assertion that Congress intended for Section 628(d) to establish a "uniform standing requirement" under Sections 628(b) and (c) -- much less one that mandates a complainant establish an inability to compete.[31] If anything, Section 628(d) reflects Congress' understanding that the standards imposed under Section 628(c) differed from those under Section 628(b), so that specific mention of both was called for. While WCA certainly agrees with Liberty Media that an MVPD must be "aggrieved" in order to secure relief under Section 628(c), that test is met when the MVPD is discriminated against or refused access to programming, regardless of whether the impact is so great that the aggrieved MVPD cannot effectively compete.

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[30]*See FR&O, supra* note 1, 8 FCC Rcd at 3377. The Commission has properly noted that the House's rejection of the Manton Amendment is consistent with its interpretation of Section 628(c). *See id.* While Liberty Media attempts to minimize the impact of the House's rejection of the Manton Amendment, the reply comments submitted by DirecTV, Inc. ("DirecTV") firmly establish its relevance. *See* Reply Comments of DirecTV, Inc., MM Docket No. 92-265, at 3-4 (filed Feb. 16, 1993). In the interest of brevity, WCA will incorporate DirecTV's showing by reference.

[31]*See* Liberty Media Petition, *supra* note 25, at 5-6.

D. The Commission Must Apply Section 628 To Existing Contracts Except For The Narrow Grandfathering Of Exclusive Contracts Covering Areas Actually Served By Cable.

With remarkable bravado, TWE also states that "as a policy matter and to save its rules from constitutional infirmity, the Commission should decide upon reconsideration that its discrimination rules do not apply to existing contracts."[32] Since TWE provides no discussion or legal citation whatsoever supporting its charge that the application of Section 628 to existing contracts is constitutionally infirm, WCA cannot respond to that charge. However, the Commission should note that the grandfathering of all existing contracts would be contrary to the express directive of the 1992 Cable Act.

Once again, TWE fails to cite to a single reference in the 1992 Cable Act or its legislative history to support its implicit view that the Commission has authority to exclude all existing contracts from the reach of Section 628 -- because no such reference exists. There is absolutely nothing in the 1992 Cable Act or its legislative history to suggest that Congress intended to for the Commission to generally grandfather existing contracts from the reach of Section 628 and delay the consumer benefits Congress expects to flow from providing consumers a choice in MVPDs.

Indeed, as the *FR&O* acknowledges, just the opposite its true. In Section 628(h), Congress specifically exempted a narrow class of prior contracts from the reach of Section 628 -- those contracts granting exclusivity that were entered into prior to June 1, 1990 and apply to areas actually served by a cable operator. The Commission properly found in the

> Congress would not have expressly grandfathered only a narrow class of contracts in Section 628(h) had it intended to generally exempt all existing contracts from the scope of the anti-discrimination requirements of Section 628. Moreover, the long term nature of many programming agreements would delay for several years the uniform implementation of rules intended to prohibit discriminatory practices within the video programming distribution industry. Thus, we believe that Congress intended that rules promulgated to implement Section 628 should be applied prospectively to existing contracts, except as specifically provided for in subsection 628(h).[33]

In light of that finding, it defies logic for TWE to suggest that the Commission could, or should, grandfather all existing contracts.[34]

E. The Commission Must Reject Efforts To Impose An Actual Harm Standard To Discrimination Complaints Involving Existing Contracts.

Advancing virtually identical arguments, Viacom and Discovery urge the Commission to rule that "[a]ny distributor seeking to alter the terms of an existing contract based upon a claim under Section 628(c) should be required to demonstrate that the price, terms, or conditions of its affiliation agreement are such that the 'purpose or effect' is to significantly hinder the distributor's ability to compete in the marketplace."[35] To do so, however, would be inconsistent with the mandate of Congress.

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[33]*FR&O, supra* note 1, 8 FCC Rcd at 3415.

[34]TWE mis-states the impact of the rules implementing Section 628(c) when it asserts that "[i]t is fundamentally unfair now to force . . . a programming vendor to sell to all competing distributors at a price that the vendor, in its business judgment, decided in the past that it could offer to some but not all." TWE Petition, *supra* note 10, at 6. In fact, the Commission's implementing rules do not require TWE or any programmer to sell to all MVPDs on identical terms. Rather, Section 76.1002(b) permits programmers to charge different prices to different MVPDs, so long as the differences can be justified by valid considerations.

[35]Viacom Petition, *supra* note 20, at 17; Petition of Discovery Communications for Reconsideration and Clarification, MM Docket No. 92-265, at 9 (filed June 10, 1993)[hereinafter cited as "Discovery Petition"].

As the Commission found in the *FR&O* and as is discussed in detail above, Congress intended for the Commission to exempt only a narrow class of agreements from Section 628(c) -- exclusive agreements entered into prior to June 1, 1990.[36] Additionally, the Commission found in the *FR&O* which is discussed in detail above, Congress did not intend for an inability to effectively compete to be a predicate to an action under Section 628(c).[37] The proposal advanced by Viacom and Discovery simply cannot be squared with Congressional intent.

The Viacom/Discovery proposal is not only inconsistent with the 1992 Cable Act, but is also bad public policy. For example, Viacom contends that the Commission should treat existing contracts differently since "Viacom would incur very substantial administrative costs in the process of reviewing hundreds of existing agreements with distributors to examine the price and other terms of each of those contracts . . . ."[38] However, the purpose of Section 628 is not to avoid administrative burdens on vertically integrated programmers, it is to assure that MVPDs do not suffer unreasonable discrimination at the hands of such programmers. To require that MVPDs continue to pay discriminatory rates or suffer discriminatory terms and conditions so that Viacom can avoid reviewing its agreements would deny consumers the full benefit of competition. The Commission afforded Viacom and other programmers from the April 30, 1993 release date of the *FR&O* to November 15, 1993 to bring its existing contracts

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[36] *See supra* § II.D.

[37] *See supra* § II.C.

[38] Viacom Petition, *supra* note 20, at 17.

into compliance. That transition period (which WCA frankly believes was too lengthy) certainly ameliorates any burden Section 628(c) imposes on vertically integrated programmers.

Similarly, there is no merit to the suggestions by Viacom and Discovery that existing agreements should be exempted because "[a]ny decrease in . . . projected revenues could cause the programmer to default on its obligations to program suppliers."[39] It is difficult to be exempt from program access regulation unless that programmer is under the "control" of a single cable operator.[41] In the *FR&O*, the Commission soundly rejected that approach on the grounds that "[t]he policy objective involved here, we believe, warrants a relatively inclusive attribution rule."[42]

First, the legislative history of Section 628 makes clear that Congress did not intend for "attributable interest" to be synonymous with "control." What Liberty Media ignores is that Congress expressly considered, and overwhelmingly rejected, a program access amendment that would have only been applicable to programmers actually controlled by a cable operator.[43] Recall that Section 628 originated with H. Amdt. 743, an amendment to H.R. 4850 offered on the floor of the House by Rep. Tauzin. A substitute amendment, H. Amdt. 744, was offered at the same time by Rep. Manton. Rep. Tauzin's explanation of the differences between his amendment and that of Rep. Manton speaks volumes:

> Why is our amendment preferable to the amendment of the gentleman from New York.. . . I have called [the Manton substitute] an amendment drafted for and by the cable industry. . . . It is weaker . . . in terms of who it covers, because it sets a new legal standard of what companies are covered, . . . <u>a standard of control rather than affiliation</u>, and it is much weaker in who it covers, so that more of the big companies can escape its coverage.[44]

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[41]*See* Liberty Media Comments, *supra* note 26, at 11-18; Reply Comments of Liberty Media Corp., MM Docket No. 92-265, at 15-20 (filed Feb. 16, 1993).

[42]*FR&O, supra* note 1, 8 FCC Rcd at 3370.

[43]It is well-recognized that "[o]ne of the most readily available extrinsic aids to the interpretation of statutes is the action of the legislature on amendments which are proposed to be made during the course of consideration in the legislature." 2A Sutherland Stat. Const. § 48.18 (5th Ed.).

[44]138 Cong. Rec. at H 6534 (daily ed. July 23, 1992)(statement of Rep. Tauzin).

Clearly, Congress knew that Rep. Tauzin's approach applied even when control was lacking. Rep. Tauzin's amendment -- an amendment which repudiated cable operator control as the benchmark for determining which programmers would be subject to program access restrictions -- was overwhelmingly adopted by a 338-68 recorded vote in the House, while the Manton amendment was rejected. Rep. Tauzin's approach was subsequently incorporated into the 1992 Cable Act by the conference committee.[45]

The rejection of a "control" standard is not only mandated by the legislative history of Section 628, but is also good public policy. In urging the Commission to revisit its newly-adopted attribution rules, Liberty Media contends that the Commission's standard "necessarily presumes, for example, that a cable operator holding a 5 percent non-voting interest in a programmer has the incentive and the ability to force that programmer to discriminate against competing multichannel video programming distributors regardless of third-party ownership or voting control of the programmer."[46] In so doing, Liberty Media misses the whole point of Section 628 -- Congress was not merely concerned with cable's direct control over programming. Section 2(a)(5) of the 1992 Cable Act makes it clear that Congress also sought to address inequities caused because "[v]ertically integrated program suppliers also have the incentive and ability to favor their affiliated cable operators over nonaffiliated cable operators and programming distributors using other technologies." The record before Congress and the Commission firmly establishes that programmers not under the control of a single cable operator are as prone to anticompetitive abuse as those that are controlled by a single cable

[45]*See* H.R. Rep. No. 862, 102d Cong., 2d Sess. at 93 (1992)[hereinafter cited as "Conference Report"].

[46]Liberty Media Petition, *supra* note 25, at 8.

operator. Indeed, the most important programming service not currently available to wireless cable, Turner Network Television, is owned by a company that is clearly dominated by a group of cable multiple system operators ("MSOs"), even though no one operator exercises absolute control. Many programming services are owned by several cable MSOs, including many of the highest rated programming services.

The need for an attribution standard not limited to control is established by the willingness of cable operators to work in concert with one another. History has shown that cable's behavior fits the classic definition of a cartel -- the members of the cartel consistently work to undermine competitive technologies wherever located because it is in all of their long-term interests for cable to be perceived as the only viable multichannel video distribution technology. It would be sheer folly for the Commission to excuse from scrutiny under Section 628 the activities of programmers that are not legally controlled by a single cable operator, for the market power of the cable MSOs manifests itself even in the absence of legal of Section 628 is much less harsh. Section 628 generally does not impose a *per se* ban on any activity; rather, it merely launches an inquiry into the appropriateness of the programmer's treatment of an aggrieved MVPD. Thus, a more inclusive attribution standard will not prevent relationships that might otherwise serve the public interest, for the programmer can always justify such behavior. However, a broad standard such as the one adopted in the *FR&O* will assure a remedy where abuse occurs, and prevent the cable industry from artificially structuring relationships that comply with the letter, but not the spirit, of the Section 628 attribution standards.

2. Exemptions From The Attribution Rules For Educational And Minority Programming Would Be Inconsistent With Congressional Intent.

Although never mentioned in its formal comments or reply comments in this proceeding, Discovery argues on reconsideration that the Commission should exempt from the new program access rules educational or instructional programming.[48] Along similar lines, BET -- which did not even participate in the earlier phases of this proceeding -- urges the Commission to craft a special exemption for minority-owned cable programmers.[49] WCA urges the Commission to reject those requests -- they are wholly inconsistent with the purposes of Section 628.

At the outset, the Commission lacks authority to establish special rules along the lines that BET and Discovery propose. There is no indication in Section 628 or its legislative history that Congress intended for the Commission to establish special program access rules

[48]*See* Discovery Petition, *supra* note 35, at 2.

[49]Petition of Black Entertainment Television for Reconsideration, MM Docket No. 92-265, at 1 (filed June 10, 1993)[hereinafter cited as "BET Petition"].

for educational services or those that are minority owned. Indeed, it is ironic that both Discovery and BET cite to Section 9(c) of the 1992 Cable Act in support of their position, for Section 9(c) cuts just the other way. In Section 9(c), Congress expressly adopted special rules to permit cable operators to utilize certain channel capacity set aside for leased access for educational or minority programming. When Congress intended for educational or minority programming to be afforded special treatment, it so provided. Since Section 19 of the 1992 Cable Act provides no similar special treatment for educational or minority programming, obviously no special treatment was intended by Congress.

Moreover, subjecting BET and Discovery to the program access rules is fully consistent with the Congressional intent underlying Section 9(c) of the 1992 Cable Act. Like Section 19, Section 9(c) is designed to promote an increased diversity of programming available to the public.[50] The rules adopted in the *FR&O* serve Congress' goal well, for they assure that the subscribers to <u>all</u> MVPDs will have access to the programming Discovery and BET provide. There is no evidence in the record to suggest that requiring BET and Discovery to make their programming available on a non-discriminatory basis or to refrain from entering into exclusive contracts not found by the Commission to serve the public interest will jeopardize their services.[51] To the contrary, subjecting BET and Discovery to the

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[50]*See* Conference Report, *supra* note 45, at 79-80. Indeed, it is important to note that Section 9(c) does not permit a cable operator to substitute minority-owned or educational programming for leased access programming when that minority-owned or educational programming was being carried prior to July 1, 1990. That restriction was imposed to assure that minority or educational programming not be deleted. *See* Senate Report, *supra* note 2, at 121.

[51]While BET asserts that "BET needs the flexibility to deal with different program

(continued...)