discrimination and to bring their existing agreements into compliance with the new rules.5/

12. Some programmers already have indicated to NRTC that they do not intend to comply with the Commission's new requirements. NRTC submits that there is no public policy rationale at this point to allow them to continue these discriminatory practices with impunity. They must be subject to damages in appropriate cases.

13. In NRTC's case, some programmers routinely charge NRTC 700% to 800% more for programming than a similarly situated cable operator. Typically, NRTC has been required to pay on average some 460% more than small cable companies are required to pay for the identical programming. The pricing disparity between NRTC and small cable companies for NRTC's 18 channel Basic Plus Service, for example, has ranged from a low of 233% to a high of 780%. In dollars and cents, this means that NRTC has been required to pay more than $10.00 at wholesale for 18 channels while a small cable operator serving the same or fewer subscribers would pay less than $2.25 for the same 18 channels. For 75,000 HSD

5/ The new rules were adopted on April 1, 1993, and become effective on July 16, 1993. Existing contracts must be brought into compliance with the new requirements by November 15, 1993.

subscribers, NRTC's damages for this pricing discrimination will continue to run more than $150,000 per month. This type of discrimination is unfair to rural consumers. It thwarts competition. And it is now contrary to the Cable Act.

14. Additionally, the prosecution of complaint cases at the Commission may require an MVPD to expend considerable funds for attorney fees. As in common carrier discrimination cases under Title II of the Communications Act, these fees and other necessary expenses should be recoverable by the successful complainant in Program Access discrimination cases. 47 U.S.C. 206.

15. Programmers should be encouraged -- not discouraged -- by the Commission's regulatory structure to terminate these types of discriminatory pricing practices. The possibility of an award of damages and counsel fees will provide the appropriate incentive.

16. NRTC urges the Commission to reconsider its decision not to issue an award of damages and attorney fees in appropriate cases for violation of the Program Access requirements. As in common carrier discrimination cases, damages should be recoverable for a period of two years from

the time the cause of action accrues.[6] Alternatively, the Commission at least should award damages from the date the Complaint is filed with the Commission.

B. The Commission Should Not Unduly Limit the Scope of the Prohibition Contained in Section 628(c)(2)(C) of the Cable Act Regarding Practices that Prevent an MVPD from Obtaining Programming in Areas Not Served by a Cable Operator.

17. Section 628(b) of the Cable Act contains broad prohibitions making it unlawful for a cable operator, a satellite cable programming vendor in which a cable operator has an attributable interest, or a satellite broadcast programming vendor to engage in certain acts. Section 628(c) specifies the minimum content of the regulations to be promulgated by the Commission to proscribe those acts. Section 628(c)(2)(C) provides that these regulations shall, *inter alia*:

> prohibit practices, understandings, arrangements, and activities, including exclusive contracts for satellite cable programming or satellite broadcast programming between a cable operator and a satellite cable programming vendor or satellite broadcast programming vendor, that prevent a multichannel video programming distributor from obtaining such programming from any satellite

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6/ *See*, 47 U.S.C. 415.

> 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 the date of enactment of this section.

18. In its First Report and Order, however, the Commission restricted the application of Section 628(c)(2)(C) to "cable operators." Section 76.102(c)(1) of the Commission's rules now states that:

> **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. (Emphasis added).

19. Congress did not intend Section 628(c)(2)(C) to apply only to conduct by a cable operator. The express purpose of Section 628 is to increase competition, diversity and the availability of programming to persons in rural and other areas not currently able to receive such programming. 47 U.S.C. 548(a). Activities by entities who are subject to

the prohibitions of the Cable Act, but who are not cable operators, could thwart this Congressional purpose. By enacting the broad language of Sections 628(b) and (c)(2)(C), Congress expressed its concern regarding conduct by <u>any</u> cable operator, satellite cable programming vendor in which a cable operator has an attributable interest, or satellite broadcast programming vendor that prevents an MVPD from obtaining programming from a vertically-integrated program vendor for distribution to persons in areas not served by a cable operator.

20. Thus, the prohibition contained in Section 628(c)(2)(C) governs "practices, understandings, arrangements, and activities" by: (i) cable operators, (ii) satellite cable programming vendors in which a cable operator has an attributable interest, and (iii) satellite broadcast programming vendors. The phrase between the two commas in Section 628(c)(2)(C) (<u>i.e.</u>, ", including exclusive contracts for satellite cable programming or satellite broadcast programming between a cable operator and a satellite cable programming vendor or satellite broadcast programming vendor,") is only one example of the type of conduct that is prohibited. It is an illustrative example, not an all-inclusive prohibition within the statute.

Clearly, Section 628(c)(2)(C) is not limited in scope solely to conduct by cable operators.

21. Restricting the application of Section 628(c)(2)(C) only to conduct by cable operators will create a massive regulatory "loophole." It will allow exclusive contracts and other practices, understandings, arrangements and activities by vertically-integrated satellite cable programming vendors and by satellite broadcast programming vendors that will block other MVPDs from obtaining programming. This will stifle competition and diversity in the multichannel video programming market. The Commission should not allow programming vendors to select such "favored" MVPDs to the exclusion of others. This type of activity represents a "bottleneck" restricting competition and diversity in the rural markets. It is specifically prohibited by Section 628(c)(2)(C) but would be permissible under Section 76.1002(c)(1) of the Commission's new rules, because it does not involve a "cable operator."

22. For example, the Department of Justice and the offices of various state Attorneys General announced yesterday their settlement of antitrust charges against

several of the nation's largest cable companies.7/ According to Maryland Attorney General J. Joseph Curran, a company called "Primestar" was formed by these cable companies to acquire transmission rights on a satellite that would permit technologically advanced direct satellite-to-home service. After acquiring these rights, Curran said the cable companies conspired to block development of this new technology as a competitive force by offering only programming that did not compete with cable.

23. The programming vendors selling to Primestar or to another chosen MVPD should not be permitted to block the distribution of programming to other potential competitors. As vertically-integrated satellite cable programming vendors, they are prohibited from preventing other MVPDs

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7/ See, attached News Release from the Office of the Attorney General of Maryland, entitled "Curran Announces Historic Antitrust Settlement with Major Cable Companies," dated June 9, 1993 (Exhibit A hereto), Department of Justice News Release entitled "Justice Department Files Antitrust Suit and Proposed Consent Decree Against Primestar Group for Anticompetitive Practices," dated June 9, 1993 (Exhibit B hereto), and article from the Washington Post, entitled "Cable Firms Open Up to Competitors," dated June 9, 1993 (Exhibit C hereto). The full text of these settlements is not yet available.

from obtaining programming under Section 628(c)(2)(C) of the statute. Under Section 76.1002(c)(1) of the Commission's rules, however, they would appear to be exempt because they are not "cable operators."

24. In light of the above, NRTC requests that the Commission amend Section 76.1002(c)(1) of its rules to read as follows:

> **Unserved Areas.** No cable operator, satellite cable programming vendor in which a cable operator has an attributable interest, or satellite broadcast programming vendor shall engage in any practice, understanding, arrangement, or activity that prevents a multichannel video programming distributor from obtaining satellite cable programming or satellite broadcast 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. Such prohibition shall include but not be limited to exclusive contracts for satellite cable programming or satellite broadcast programming between a cable operator and a satellite cable programming vendor or satellite broadcast programming vendor.

C. The Commission Should Not Pre-Judge Questions Regarding the Cost "Justification" for Satellite Broadcast Programming Vendors' Discriminatory Prices Against Home Satellite Dish Distributors.

25. The Commission's First Report and Order contains a number of statements regarding the apparent costs involved in HSD distribution. For instance, the Commission expressed its belief that services provided to HSD distributors may be more costly than services to other distributors. The Commission pointed to additional costs such as advertising expenses, copyright fees, customer service, DBS Authorization Center charges and signal security. The Commission also indicated that these cost differences are particularly evident when providing program distribution services to HSD distributors who do not provide a "complete distribution path" to individual subscribers. (Paragraph 106).

26. The Commission concluded that the Program Access rules must allow for fundamental differences in pricing of satellite cable programming as opposed to satellite broadcast programming, because satellite broadcast programming vendors face a unique, artificial ceiling on program prices as well as comparative ease of entry barriers for potential competitors seeking to offer the same signal.

(Paragraph 100). The Commission indicated that vendors of such programming are constrained to set their prices below a potential competitor's cost of obtaining the signal directly from the satellite. If the vendor's price exceeds this cost, the potential competitor has an incentive to obtain the signal directly rather than to purchase it from the vendor. (Footnote 164).

27. NRTC urges the Commission not to pre-judge these and other related issues concerning the alleged costs incurred by satellite broadcast programming vendors ("satellite carriers") in providing service to HSD distributors. The fact of the matter is that the satellite carriers' blatant price discrimination against NRTC as an HSD distributor -- requiring payment of as much as 800% more than cable rates -- cannot be justified by any costs incurred by the carriers at the wholesale level.

28. Satellite carriers neither originate nor own these signals. They merely re-transmit them for HSD, cable, MMDS and SMATV distribution. The satellite carrier uplinks the same signal in the same scrambled format to the same satellite transponder for the HSD, cable, MMDS and SMATV wholesale distribution markets. From the satellite transponder, the scrambled signal is "handed-off" or down-

linked either to cable, SMATV or MMDS "head-ends" or to the premises of the HSD subscriber. Costs of satellite carriage to this point are exactly identical in all cases.

29. For the cable, MMDS and SMATV distributor, the satellite carrier directly authorizes descrambling of the satellite delivered signal to occur at the operator's head end. This authorization is transmitted from the carrier's uplink facility.

30. HSD distribution does require the satellite carrier to obtain a "tier bit" at the DBS Authorization Center. The cost of the tier bit is now $3,575 per month and one or more satellite services can be included on a single tier bit. Additionally, the satellite carrier is required to pay for an activation data link between the DBS Authorization Center and the satellite carrier's uplink facility at approximately $950 per month for communication and equipment costs.[8/] These are the only costs -- a DBS Authorization Center tier bit and an activation data link -- that are conceivably distinguishable in the wholesale delivery of the scrambled signal to HSD distributors versus

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8/ Communication and equipment costs consist of a $715 monthly fee by General Instrument for satellite datalink capacity plus $234 per month for equipment costs ($11,000 amortized over 5 years at 10%).

MMDS, SMATV and cable distributors, and they are de minimis when evaluated on a per subscriber basis.

31. Moreover, similar types of authorization and activation costs are also incurred by programmers in providing service to cable, SMATV and MMDS operators. These types of costs are already included in cable, SMATV and MMDS wholesale programming rates. It is grossly inappropriate, therefore, for a programmer simply to add the HSD tier bit and activation data link costs to their wholesale cable rates when "justifying" rates to an HSD distributor. Costs used by carriers to "justify" rates to HSD distributors must be incurred by the carriers in serving HSD distributors.

32. The adequacy of a particular satellite carrier's claimed cost "justification" for discrimination against a particular HSD distributor must be resolved case by case. Different carriers incur different costs in serving different distributors. Each carrier must be required to provide, as an affirmative defense to a complaint of discrimination, specific evidence of costs incurred by that particular carrier in serving that particular distributor in order to justify that carrier's discriminatory wholesale prices to that distributor.

33. NRTC disagrees strongly with the Commission's apparent conclusion in this proceeding that service to HSD distributors is more costly than service to others using different delivery technologies. NRTC urges the Commission to reconsider this issue and other related costing matters.[9] NRTC further urges the Commission not to foreclose in this proceeding a full explanation in subsequent complaint proceedings of the satellite carriers' claimed cost "justification" for their discriminatory prices.

III. CONCLUSION

WHEREFORE, THE PREMISES CONSIDERED, the National Rural Telecommunications Cooperative urges the Federal Communications Commission to act in accordance with these

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9/ For instance, the so-called "artificial ceiling" on program pricing by satellite carriers is statutorily irrelevant. Congress never intended to force distributors or others to become uplinkers in order to obtain fair pricing from satellite carriers. Moreover, any such "ceiling" is dependent upon numerous factors, including the number of subscribers served in any particular case. None of these types of issues can be resolved in the instant proceeding.

requests and to reconsider its First Report and Order in this proceeding as described above.

Respectfully submitted,

NATIONAL RURAL TELECOMMUNICATIONS COOPERATIVE

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FOR IMMEDIATE RELEASE
JUNE 9, 1993

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CURRAN ANNOUNCES HISTORIC ANTITRUST SETTLEMENT WITH MAJOR CABLE COMPANIES

The major U.S. cable television companies today agreed to historic changes in the cable television industry that will introduce real competition and curb these companies' monopoly over programming distribution, Attorney General J. Joseph Curran, Jr. has announced.

"It's been a long, hard settlement but the result is short and sweet," Curran said. "People buying cable are going to get a fairer price and more choices."

Because a few companies have controlled consumer access to cable, he explained, the prices for this service in the last five years have increased twice as fast as the average cost-of-living index.

Today's settlement is the culmination of a four-year-long investigation headed by Curran's Antitrust Division and attorneys general from six other states. The cable companies settling with Maryland and 38 states are several of the country's largest including Comcast, Continental Cablevision, Cox Enterprises, Newhouse, Tele-Communications, Time Warner, Time Warner Entertainment, Viacom, and Primestar Partners, a direct satellite-to-earth joint venture owned by these cable companies and others.

Tele-Communications, Comcast and Newhouse operate cable systems in Maryland. Tele-Communications operates in Maryland under its own name and under the name of its subsidiary, United Artists Cable.

According to Curran, the cable companies, acting on their own as well as in conspiracy with each other, took steps to ensure that companies using different technologies would not break cable television's market strangle hold on consumers. In most cases, he said, municipal governments grant a single franchise to a cable operator for that particular geographic area. However, alternative technologies exist that are capable of bypassing cable companies' wires and providing the same programming offered by cable companies without having to obtain a franchise. These technologies utilize direct satellite-to-earth broadcasts or microwave transmissions.

Curran alleged that the cable companies prevented other companies with alternative technologies from acquiring the programming they needed to compete effectively with cable operators.

"Programmers were wrongfully coerced into making these cable companies the exclusive carriers in a franchise area or, at least, made to sell their programs to potential competitors with alternative technologies at a more expensive rate than those given the cable companies", Curran said.

Curran also asserted that the cable companies formed Primestar to acquire transmission rights on a satellite that would permit technologically advanced direct satellite-to-home broadcasts. After acquiring these rights, Curran said, the companies conspired to block development of this new technology by offering only programming that did not compete with cable programming.

Under the terms of the settlement, the cable companies will not be permitted to have any agreements with programmers granting the cable companies the sole right to carry existing programming; moreover, they will be limited in acquiring exclusive carriage agreements for newly created programming. In addition, these cable companies will be prohibited from retaliating against any programmer for dealing with their competitors. Finally, programming owned or controlled by the companies must be made available to alternative technologies on competitive terms.

"Consumers who don't like their cable bills or the way they are treated by cable companies may soon have high tech alternatives," Curran said.

The defendants have also agreed to pay the states a total of $4.85 million in investigative costs and attorneys fees. Maryland's share of this money, over $600,000, will be paid into the State's General Fund. The states' lawsuit and the consent decree were filed with a federal court in New York City.

The Antitrust Division of the United States Department of Justice also filed a settlement today with the federal court in New York City. This settlement, which focuses more narrowly on the Primestar joint venture, marks the second time in less than three years that the states and the federal government have worked together to settle simultaneously an antitrust case of national importance. The last such case involved the settlement of a price-fixing case against Nintendo by the states and the Federal Trade Commission in April of 1991.

The states that worked with Maryland in the investigation and resolution of this case were Texas, California, Ohio, Pennsylvania, Massachusetts and New York. These lead states were joined in filing today by 32 states.

Marylanders with questions about this case should call the Attorney General's Office at (410) 576-6954 or write to the Office of the Attorney General, Antitrust Division, 200 Saint Paul Place, Baltimore, Maryland 21202.

[END]

EXHIBIT B

Department of Justice

FOR IMMEDIATE RELEASE
WEDNESDAY, JUNE 9, 1993

AT
(202) 514-2007
TDD (202) 514-1888

JUSTICE DEPARTMENT FILES ANTITRUST SUIT AND PROPOSED CONSENT DECREE AGAINST PRIMESTAR GROUP FOR ANTICOMPETITIVE PRACTICES

WASHINGTON, D.C. -- The Department of Justice today filed a civil antitrust suit against Primestar Partners L.P., its 10 member companies and the parent companies of those members for restraining competition in the multichannel subscription television service by blocking other firms from entering the direct broadcast satellite (DBS) business. At the same time, the Department filed a proposed consent decree that, if approved by the court, would settle the suit.

The suit and proposed consent decree were filed in U.S. District Court in Manhattan, New York.

The complaint alleged that the defendants engaged in a continuing agreement, combination and conspiracy to restrain competition in multichannel subscription television service by forming Primestar Partner L.P. to block other firms from entering the DBS business in violation of Section 1 of the Sherman Act.

The complaint also alleged that the effect of the Primestar venture has been to delay, if not prevent, entry into the DBS business through an agreement to restrict access to programming

(MORE)

owned or controlled by the venture's partners to other companies that want to start a competing (DBS) service.

"Without adequate programming, a service competitive with existing cable monopolies can't get off the ground," said John W. Clark, Acting Assistant Attorney General of the Antitrust Division. "Primestar's formation made programming much more difficult to obtain, and deterred entry by others."

Primestar Partners L.P., based in Bala Cynwyd, Pennsylvania, is a joint venture partnership formed by some of the nation's largest cable television companies, some of which also are leading suppliers of video programming.

The defendant Primestar members and their principal offices are:

--ATC Satellite Inc., Stamford, Connecticut.

--Comcast DBS Inc., Philadelphia.

--Continental Satellite Co. Inc., Findlay, Ohio.

--Cox Satellite Inc., Atlanta.

--GE Americom Services Inc., Princeton, New Jersey.

--New Vision Satellite, East Syracuse, New York.

--TCI K-1 Inc., Denver.

--United Artists K-1 Investments Inc., Denver.

--Viacom K-Band Inc., New York City.

--Warner Cable SSD Inc., Stamford, Connecticut.

(MORE)

The complaint also named as defendants seven multiple cable system operators (MSOs) that are corporate parents of Primestar members:

--Tele-Communications Inc., Denver.

--Time Warner Inc., New York City.

--Continental Cablevision Inc., Boston.

--Comcast Corporation, Philadelphia.

--Cox Enterprises Inc., Atlanta.

--Newhouse Broadcasting Corporation, East Syracuse, New York.

--Viacom Inc., Dedham, Massachusetts.

GE American Communications Inc., a subsidiary of General Electric Co., with its principal office in Princeton, New Jersey, also is a defendant.

Primestar was formed in order to offer a multichannel subscription television service, called "Primestar," which is transmitted directly to consumers via a medium-power satellite owned by GE American Communications Inc. This type of service, commonly referred to as direct broadcast satellite, uses a relatively small home satellite dish that is less expensive to install than large home satellite dishes and is a potential substitute for cable television service.

The proposed consent decree would forbid the defendants from enforcing any provision of the Primestar partnership agreement that affects the availability, price, terms, or conditions of programming to any provider of multichannel subscription television.

It also would prohibit the defendants from agreeing to take any action against a person who provides programming to or invests in any provider of multichannel subscription television.

The proposed consent decree would also prohibit the MSO defendants from reaching agreements with each other that would affect the availability, price, terms or conditions on which programming could be made available to other providers of multichannel subscription television.

It would also prohibit the MSO defendants from entering into or renewing any agreements with specified programming services that contain exclusive distribution provisions.

According to Clark, the proposed consent decree would prevent the possible anticompetitive consequences of the Primestar venture, while still allowing Primestar to continue to provide DBS service to consumers.

The public can comment on the proposed consent decree within a 60-day comment period in compliance with the Antitrust Procedures and Penalties Act. Interested persons should write to Richard L. Rosen, Chief, Communications & Finance Section, Antitrust Division, Department of Justice, Room 8104, 555 4th Street, N.W. Washington, D.C. 20001.

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93-159

EXHIBIT C

Cable Firms Open Up to Competitors

Settlement With U.S., States May End Programming Monopoly

By Paul Farhi
Washington Post Staff Writer

State and federal authorities have settled a massive antitrust dispute with the nation's largest cable television companies, winning concessions that could help open the cable industry's virtual monopoly over TV subscribers to other forms of competition.

Attorneys general from more than 40 states will announce a settlement today with seven major cable companies following a nearly five-year probe by seven states, including Maryland, New York and California, sources close to the investigation said yesterday.

A separate though somewhat narrower agreement will be signed by the companies with the Justice Department, which conducted a parallel inquiry.

Investigators involved in the case said the settlement will ensure that satellite broadcasters, microwave-relay TV systems and others that have sought to compete against the cable industry will be able to buy programming owned or controlled by the cable industry.

These competitors have complained for years that the cable industry refused to sell them cable programming, such as CNN or MTV, or made it so expensive they couldn't be competitive. Without being able to air these networks, the competing services say they can't attract customers. Greater competition for cable companies presumably would lower consumers' monthly rates.

See CABLE, A12, Col. 4

CABLE, From A1

The settlement includes an agreement by the cable companies that they won't discriminate against a company offering a competing technology, and that they will sell cable-owned programs on "reasonable terms," said an attorney close to the cable companies. The cable firms also have agreed to reimburse the states $5 million for their investigative costs.

The agreement comes eight months after Congress passed legislation that contains language guaranteeing similar program availability to cable's competitors, prompting the cable industry attorney to play down the impact of the settlement.

But state officials said the specific rules providing that program access are still being considered by the Federal Communications Commission and face a broad legal challenge from the cable industry. By contrast, said the state officials, today's settlement will go into effect immediately and be binding in most of the nation.

"What we are going to see is the cable monopoly start to crumble, and consumers will start to see a real choice," a leading investigator said. "When your cable bill goes up $2 per month next year, you're going to be able to call up a [microwave-relay company] and see the same programming for less."

While generally pleased with the settlement, one microwave-relay TV operator said it was too long in coming. "The attorneys general have noodled this problem for four or five years," he said. "Because of the realities of cable's monopoly control, we have been kept from the market. . . . Well, better late than never. I think the end runs are over."

Microwave systems, sometimes known as "wireless cable," use a series of relay towers to send TV signals across town to a small dish at a customer's house. About 450,000 households subscribe to wireless systems.

Direct-broadcast systems (DBS) send TV signals down from a geostationary satellite to a dish antenna on a customer's house. The fledgling DBS field has long been considered a potentially formidable competitor to the cable industry but has never really gotten started. However, two companies, including one owned by Hughes Aircraft Co., are expected to launch systems within a year.

Seven major cable companies that provide service to nearly half of the nation's 57 million cable subscribers, virtually all of them operating in areas without a direct competitor, were the targets of state and federal investigations. The companies include the three largest system owners, Tele-Communications Inc., Time Warner Inc. and Continental Cablevision Inc.

In addition to owning numerous cable systems around the country, TCI owns a portion of such cable channels as Black Entertainment Television and the Discovery Channel, and Time Warner owns HBO. Both are part owners of Ted Turner's Turner Broadcasting System which owns CNN, TNT, Headline News and superstation WTBS.

The two probes centered on a partnership formed by the seven companies and a division of General Electric Co. called Primestar Partners Ltd. Philadelphia-based Primestar launched a direct-broadcast satellite TV service in 1990 that the cable giants said was designed to offer expanded TV service primarily in rural areas where cable TV is unavailable.

But several state investigators believed that Primestar was actually designed by the cable industry to preempt competition in the DBS field.

By using their control over programming and their deep pockets, the companies hoped to in effect scare off would-be DBS companies, state attorneys said. "It was clear all along to us that if they couldn't kill [DBS], they wanted to co-opt it," said one source.

An attorney close to Primestar disputed this, saying Primestar never received its programming exclusively from the cable companies and that such programming was available to competitors all along.

"In our view, the contents of this settlement differ relatively little, if at all, from the [new] cable law and actual business practices," the attorney said. "If the states want to codify it this way and it makes them comfortable, then that's fine with us."

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	)	MM Docket No. 92-265
	)	
Development of Competition and Diversity in Video Programming Distribution and Carriage	)	

To: The Commission

REPLY OF THE
NATIONAL RURAL TELECOMMUNICATIONS COOPERATIVE

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Dated: July 28, 1993

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BEFORE THE

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	)	
Development of Competition and Diversity in Video Programming Distribution and Carriage	)	

REPLY OF THE NATIONAL RURAL TELECOMMUNICATIONS COOPERATIVE

Pursuant to Section 1.429 of the Rules and Regulations of the Federal Communications Commission ("Commission"), the National Rural Telecommunications Cooperative ("NRTC") hereby submits this Reply to the Oppositions filed in response to NRTC's Petition for Reconsideration ("Petition") of the First Report and Order ("Program Access Decision") adopted in the above-captioned proceeding on April 1, 1993.[1]

I. REPLY

A. The Statutory Ban Against Exclusive Arrangements in Rural Areas Applies to Vertically-Integrated Cable Programmers, as well as to Cable Operators.

1. Section 76.1002(c)(1) of the Commission's Rules, which was adopted by the Commission to implement Section 628(c)(2)(C) of the Cable Act, prohibits

[1] 58 Fed. Reg. 27658 (May 11, 1993).

certain practices by a cable operator that prevent a distributor from obtaining programming for distribution to persons in areas not served by a cable operator.[2] Under the adopted rule, an exclusive arrangement between a vertically integrated cable programmer and a distributor that is not a cable operator is permissible.

2. In its Petition, NRTC pointed out that Section 76.1002(c)(1) of the rules does not reflect the broad scope of the prohibition contained in Section 628(c)(2)(C) of the Cable Act. Section 628(c)(2)(C) on its face does not proscribe conduct only by cable operators. Rather, it prohibits all "practices, understandings, arrangements, and activities. . . that prevent a multi-channel video programming distributor from obtaining such programming. . . for distribution to persons in areas not served by a cable operator. . .". 47 U.S.C. 547(c)(2)(C).[3]

3. NRTC urged the Commission to expand the scope of Section 76.1002(c)(1) to reflect the broad language of the statute. In their Oppositions to NRTC's Petition, USSB, Viacom, Time Warner, Discovery and Liberty Media support a very limited interpretation of Section 628(c)(2)(C), largely

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[2] NRTC's constituency resides primarily in rural areas which are generally unserved by cable.

[3] This straightforward statutory language is controlling and would supersede any conflicting legislative history. See, Chevron U.S.A. v. National Resources Defense Council, Inc., 467 U.S. 837 (1984). In this instance, however, there is no compelling legislative history to the contrary. The parties in Opposition merely point to language recognizing, as NRTC does, that exclusive contracts between a cable operator and a programming vendor must be prohibited. HR Conf. Rep. No. 102-862 102d Cong., 2nd Sess. at 92 (1992); See, e.g., Opposition of USSB, pp. 7-8; Opposition of Viacom, pp. 5-6. Nothing in the Conference Report states that Congress intended to prohibit only exclusive arrangements between cable operators and programmers. As the Supreme Court has noted, ". . .the language of a statute - particularly language expressly granting an agency broad authority - is not to be regarded as modified by examples set forth in the legislative history." Pension Benefit Guaranty Corp. v. LTV Corp., 110 S.Ct. 2668, 2677 (1990).