with industry-wide influences that can occur even in the absence of a vertical relationship in a complainant's specific market. Indeed, in the *First Report and Order*, the Commission recognized that there could be incentives to act anticompetitively even in non-vertically integrated markets, if the goal of the behavior is to prevent or hinder the development of competition anywhere. Further, in the *First Report and Order*, we cautioned against failing "to sufficiently consider the historical allegations of discrimination on which Congress based its decisions to enact Section 628" and against assuming "that the behavior of a non-integrated entity is inherently justifiable."[126]

IV. COMPETITIVE HARM OR HINDRANCE TO ACCESS AS AN ELEMENT OF RULES

57. Section 628(b) provides that:

> It shall be 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 unfair methods of competition or unfair or deceptive acts or practices, the purpose or effect of which is to hinder significantly or to prevent any multichannel video programming distributor from providing satellite cable programming or satellite broadcast programming to subscribers or consumers.[127]

Section 628(c) requires the Commission to adopt regulations proscribing particular specified conduct, specifically to:

> (A) establish safeguards to prevent a cable operator which has an attributable interest in a satellite cable programming vendor or a satellite broadcast programming vendor from unduly or improperly influencing the decision of such vendor to sell, or the prices, terms, and conditions of sale of, satellite cable programming or satellite broadcast programming to any unaffiliated multichannel video programming distributor;
>
> (B) prohibit discrimination by a satellite cable programming vendor in which a cable operator has an attributable interest or by a satellite broadcast programming vendor in the prices, terms, and conditions of sale and delivery of satellite cable programming or satellite broadcast programming among or between cable systems, or other multichannel video programming distributors, or their agents or buying groups; ...

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[126] *First Report and Order*, 8 FCC Rcd at 3405.

[127] 47 U.S.C. § 548(b).

(C) 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 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; and

(D) with respect to distribution to persons in areas served by a cable operator, prohibit exclusive contracts for satellite cable programming or satellite broadcast programming between a cable operator and 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, unless the Commission determines (in accordance with paragraph (4)) that such contract is in the public interest.[128]

58. In the *First Report and Order*, the Commission determined that "parties bringing a complaint under Section 628(b) must demonstrate how the allegedly unfair practice has hampered or prevented the distribution of programming."[129] However, with respect to complaints brought pursuant to Section 628(c), we determined that:

> the legislative history indicates that Congress did not intend to place a threshold burden on aggrieved MVPDs to show either specific or generalized harm to competition in those circumstances specifically prescribed in subsection (c). . . Rather, we believe that if behavior meets the definitions of the activities proscribed in subsection (c), such practices are implicitly harmful.[130]

59. Liberty Media requested reconsideration of the Commission's determination that a showing of harm is not required for violations of Section 628(c).[131] Liberty Media argued that Section 628(d) establishes a uniform standing requirement for all program access complaints, under which a complainant must show an injury-in-fact to bring a complaint for

[128] 47 U.S.C. 548(c).

[129] *First Report and Order*, 8 FCC Rcd at 3374.

[130] *Id.* at 3377

[131] Liberty Media Petition at 3-8.

a violation of both Section 628(b) and the rules adopted pursuant to 628(c).[132] Liberty Media argued that the language of 628(d) requires the "aggrieved" complainant to show harm.[133] Superstar supported Liberty Media's petition contending that a party commencing an administrative proceeding must suffer injury protected by the statute. Superstar stated that the injury is the result of preventing access to programming and that, where there is no showing of harm, the complainant has no standing.[134]

60. Several oppositions were filed against Liberty Media's interpretation of Section 628(d).[135] For example, GTE contended that administrative agencies are not bound by judicial rules of standing in determining what parties to admit to adjudicatory or rulemaking proceedings.[136] DirecTV contended that Liberty Media's argument that the term "aggrieved MVPD" in Section 628(d) imposed a "uniform 'injury-in-fact'" standing requirement for adjudication of complaints under Sections 628(b) and 628(c) is incorrect.[137] DirecTv argued that Section 628(d) does not address the circumstance under which a complainant is required to show an injury, while Section 628(c) does enumerate *per se* violations where Congress presumed injury.[138] WCA argued that neither the language in Section 628(d), nor the legislative history, support establishing a "uniform standing requirement" or mandated a complainant to establish an inability to compete.

61. Liberty Media responded that, under the canons of statutory interpretation, the Commission should interpret the words in 628(d) by taking their ordinary meaning[139] and that

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[132] *Id.* at 5. Section 628(d) provides that "any 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." 47 U.S.C. § 548(d).

[133] *Id.* at 8.

[134] Superstar Opposition at 15.

[135] DirecTV Opposition at 4; Bell Atlantic Opposition at 7; GTE Opposition at 8; WCA Opposition at 12.

[136] *Id.* (citing Wright, Miller & Cooper, Federal Practice and Procedure: Jurisdiction and Related Matters § 3531.13 and California Assn. of Physically Handicapped, Inc. v. FCC, 778 F.2d 823, 826 (D.C. Cir. 1985)).

[137] DirecTv Opposition at 4.

[138] *Id.*

[139] Liberty Media Reply at 4 n. 2 (citing *Perrin v. United States,* 444 U.S. 37, 42 (1979)).

the ordinary meaning of 628(d) is that a complainant must be aggrieved by conduct alleged to violate Section 628(b) or Section 628 (c).[140]

62. *Discussion*. We affirm our prior determination that there is no requirement to show harm in a complaint alleging violations of conduct prohibited under Section 628(c). Instead, Congress presumed that the conduct enumerated in Section 628(c) injured competition. The Commission finds that Liberty Media's interpretation of Section 628(d) is without merit, especially in the context of the statutory language in the 1992 Cable Act. The 1992 Cable Act does not impose a standing requirement on a complainant analogous to that required to appear before Article III courts. Indeed, various courts have held that Article III standing restrictions do not apply to proceedings before administrative agencies.[141] Courts also have held that "the Commission may choose to allow persons without Article III 'standing' to participate in FCC proceedings .... "[142] Moreover, Section 628(d) provides for adjudication before the Commission of a complaint brought by a MVPD aggrieved by an alleged violation of 628(b) or 628(c), and does not address the substantive requirements for each offense. Rather, whether an MVPD has been aggrieved by a violation of Section 628(b) or (c) turns on the substantive requirements contained in those sections and the Commission's rules.

V. CONFIDENTIALITY

63. *Background*. In the *First Report and Order*, the Commission established complaint procedures for MVPDs aggrieved by alleged violations of Section 628. In order to minimize the number of complaints brought before the Commission,[143] and to encourage parties to attempt "to resolve the dispute without involving the Commission"[144] the

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[140] *Id.* at 3.

[141] *Gardner v. FCC*, 530 F.2d 1086, 1090-91 (D.C. Cir. 1976); *Koniag, Inc., Village of Uyak v. Andrus*, 580 F.2d 601, 605-608 (D.C. Cir.), *cert denied* 439 U.S. 1052 (1978); *Ecee Inc. v. FERC*, 645 F.2d 339, 349-350 (5th Cir. 1981); *American Trucking Assns. v. ICC*, 673 F.2d 82, 85 n. 4 (5th Cir. 1982) , *cert denied* 460 U.S. 1022 (1983); *Ingalls Shipbuilding Division v. White*, 681 F.2d 275, 280-288, *rehearing denied* 690 F.2d 905 (5th Cir. 1982); *California Assn of the Physically Handicapped, Inc. v. FCC*, 778 F.2d 823, 826 (1985 D.C. Cir.); *City of St. Louis v. Department of Transportation*, 936 F.2d 1528, 1532 (8th Cir. 1991).

[142] *California Association of the Physically Handicapped, Inc. v. FCC*, 778 F.2d 823, 826 n.8 (1985 D.C. Cir.).

[143] *First Report and Order*, 8 FCC Rcd at 3389, 3416 & 3424.

[144] *Id.* at 3416.

Commission promulgated Section 76.1003(a),[145] which requires any aggrieved MVPD intending to file a complaint under this section to "first notify the potential defendant cable operator, and/or the potential defendant satellite cable programming vendor or satellite broadcast programming vendor, that it intends to file a complaint with the Commission based on actions alleged to violate one or more of the provisions contained in Sections 76.1001 or 76.1002." In addition, Section 76.1003(a) requires that "the potential complainant must allow a minimum of ten (10) days for the potential defendant(s) to respond before filing a complaint with the Commission."[146]

64. In the *First Report and Order*, the Commission also determined that programming vendors submitting contracts or other proprietary information in response to complaints under § 76.1003 should be able to request confidentiality to prevent widespread access to the information.[147] The Commission stated that the complainant will be granted access to such contracts or proprietary information "provided it agrees to abide by the terms of a protective order that limits access to such information and limits the purposes for which any information obtained through the Section 628 complaint process may be used."[148] Section 76.1003(h)[149] sets forth the confidentiality protection for proprietary information and provides that:

> (1) Any materials generated or provided by a party in the course of adjudicating a program access complaint under this provision may be designated as proprietary by that party if the party believes in good faith that the materials fall within an exemption to disclosure contained in the Freedom of Information Act (FOIA), 5 U.S.C. § 552(b) ... .

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145 47 C.F.R. §76.1003(a).

146 Id.

147 See *First Report and Order*, 8 FCC Rcd at 3391 n.103, 3419.

148 *Id.* In the *First Report and Order*, the Commission established requirements that the complainant "take reasonable steps to prevent unauthorized access to protected documents and information [and] to limit access to the individual complainant, the attorneys listed with the Commission as the representatives of the complainant, their staffs and any expert advisors or analysts." *Id.* at 3391 n. 103. The Commission further set forth procedures for insuring that the information is available only to those specified individuals and is used solely for purposes related to the complaint. The Commission stated that "any failure to abide by the terms of the protective order may result in the imposition of sanctions, including dismissal of the complaint, or censure, suspension or disbarment of the attorneys involved." *Id.*

149 47 C.F.R. §76.1003(h).

(2) Materials marked as proprietary may be disclosed solely to the following persons, only for use in prosecuting or defending a party to the complaint action, and only to the extent necessary to assist in the prosecution or defense of the case:

(i) Counsel of record representing the parties in the complaint action and any support personnel employed by such attorneys;

(ii) Officers or employees of the opposing party who are named by the opposing party as being directly involved in the prosecution or defense of the case;

(iii) Consultants or expert witnesses retained by the parties;

(iv) The Commission and its staff; and

(v) Court reporters and stenographers in accordance with the terms and conditions of this section.[150]

Thus, § 76.1003(h) governs material and information produced after a program access complaint is filed, and does not govern material or information exchanged between the parties during the pre-complaint period required under §76.1003(a).

65. *Pre-Complaint Confidentiality*. Liberty Media petitioned the Commission to extend the protections available for proprietary information under §§ 76.1003(h) and (i) to information and contracts provided to an opposing party by a programming vendor during the pre-complaint notice and negotiation period, "[i]n order to facilitate the exchange of information to promote pre-complaint resolution of disputes."[151] Liberty Media contended that the Commission inadvertently undermined pre-complaint resolutions of disputes by not extending the rules' protection of confidential materials to pre-complaint submissions.[152] No party opposed Liberty Media's petition on this issue.

66. *Discussion*. We grant Liberty Media's petition on this issue, and we amend the rules specifically to extend the confidentiality protections for proprietary information contained in §§ 76.1003(h) and (i) to proprietary information exchanged among parties during the pre-complaint negotiation period required under § 76.1003(a). The pre-complaint notification requirement furthers the Congressional policy of relying on the marketplace to

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[150] Similar confidentiality protection is afforded to proprietary information exchanged during discovery or contained in briefs filed with the Commission. *See* § 76.1003(i).

[151] Liberty Media's Petition at 14.

[152] *Id.* at 13.

achieve the goals of the 1992 Cable Act.[153] The Commission believes that failure to extend confidentiality protections to documents exchanged during the pre-complaint stage merely will encourage parties to delay exchanging pertinent information until a complaint is filed, rendering the pre-complaint notice period less meaningful. The Commission believes that extending the confidentiality protection during the pre-complaint period may encourage parties to engage in an exchange of information and further the Commission's stated purpose of having the parties resolve disputes without involving the Commission.

67. *Persons Authorized To Have Access to Confidential Materials.* Viacom and Discovery petitioned the Commission "to take further steps to ensure that complainants are not able to use the complaint process to gain access to confidential information."[154] Specifically, Viacom and Discovery contended that, upon proper justification or good cause shown, a programming vendor should be allowed to preclude the complainant from viewing confidential or proprietary information[155] and that access to such information should be limited to the complainant's outside attorneys and the Commission's staff. Viacom and Discovery recognized that complainants must have access to information sufficient to establish its case, but contended that the complaint process should not enable complainants to gain an unfair advantage in future business dealings with the defendant.[156]

68. Superstar filed comments and noted that a number of the complaining distributors under the program access rules also are the competitors of the same programming vendors from which they purchase their programming and, thus, much of the programming vendors' financial information is sensitive and must not be disclosed to complaining distributors.[157] Superstar contended that "production of confidential business information should be limited to only the attorneys of the complainant, and not to anyone in the business organization of the complainant, even those 'participating' in the complaint proceeding."[158] In contrast to Viacom and Discovery, Superstar did not condition this restriction upon a proper justification or good cause showing.

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[153] 1992 Cable Act § 2(b)(2).

[154] Discovery Petition at 7-8; Viacom Petition at 14-15.

[155] Viacom Petition at 15; Discovery Petition at 7.

[156] *Id.*

[157] Superstar Opposition at 17. To support its position, Superstar notes that NRTC sought disclosure, under the Freedom of Information Act, of every term and condition of every programming contract involving Superstar as well as financial information. NRTC's request was denied by the Commission. *Id.* at 17-18.

[158] *Id.*

69. DirecTV opposed Viacom and Discovery's petitions. DirecTV stated that Discovery's proposal "goes too far" because "[a] complainant's attorneys may not possess the requisite expertise or industry knowledge to make informed judgments as to what information is relevant or important in sifting through documentation provided by programming vendors in the discovery process. It is therefore vital that some corporate representative of the complainant be permitted access to such information." DirecTV stated that the Commission's "detailed and reasonable method of affording protection to proprietary material in those circumstances where programmers request confidentiality" is sufficient protection.[159]

70. Discovery responded to DirecTV's opposition, rejecting the suggestion that a complainant's personnel must have access to sensitive information because counsel may not have the expertise or industry knowledge to make informed judgments as to what is relevant or important. Discovery contended that "[t]here simply is no reason to assume that a company's counsel is unable to grasp the knowledge necessary to build a case on behalf of his or her client".[160] Discovery also stated that, under its proposal, the Commission will have the ability to review the disputed documents, *in camera*, and thus the decision maker will have the benefit of the information sought by the complainant.[161]

71. *Discussion.* We have determined to grant, in part, the petitions of Viacom and Discovery on this issue. The Commission agrees that, due to the competitively sensitive nature of some information, there may be situations where it is necessary to restrict access to a party's proprietary information to a smaller group of individuals than currently provided under the rules. That is, there may be situations where such information is protected from disclosure to a competitor's business personnel. However, the proposed restriction to limit access solely to outside counsel for the complainant and the Commission staff may result in unfairness to a company relying on its in-house staff (including in-house counsel) to resolve the complaint and has the potential for abuse and for hindering the complaint process. The Commission thus will amend Section 76.1003(h)(3) to provide that the Commission will entertain, subject to a proper showing a party's request to further restrict access to proprietary information as specified by the party. The opposing party will have an opportunity to respond to such requests.

VI. COST JUSTIFICATION

72. *Background.* Section 628(c)(2)(B) of the 1992 Cable Act requires the Commission to promulgate regulations that:

> prohibit discrimination by a satellite cable programming vendor in which a cable

[159] DirecTV Opposition at 14.

[160] Discovery Reply at 9.

[161] Id.

operator has an attributable interest or by a satellite broadcast programming vendor in the prices, terms and conditions of sale or delivery of satellite cable programming or satellite broadcast programming among or between cable systems, cable operators, or other multichannel video programming distributors or their agents or buying groups.[162]

Under Section 628(c)(2)(B)(ii) of the 1992 Cable Act, however, it is acceptable to establish "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."[163]

73. The *First Report and Order* stated that "[w]e will generally permit vendors to employ legitimate discounts associated with the factors specified in Section 628(c)(2)(B), provided that similar terms are standardly available to various distributors." The Commission adopted definitions and guidelines for the factors involving, generally, (i) cost differences at the wholesale level among distributors, (ii) volume differences, (iii) creditworthiness and financial stability, and (iv) differences in "offering of service".[164] In connection with cost differences at the wholesale level among distributors, the Commission noted that:

> the record in this proceeding supports the preliminary conclusion in the *Notice* that service to HSD [home satellite dish] distributors may be more costly than service to others using different delivery systems such as cable operators, as additional costs are often incurred for advertising expenses, copyright fees, customer service, DBS Authorization Center charges and signal security.[165]

Accordingly, the Commission stated that its regulations would allow vendors to base programming prices on legitimate cost factors. The Commission noted, however, that vendors "will incur the risk and burden of showing that the cost factors they claim cause a price differential are legitimate and are not designed to conceal prohibited discrimination."[166]

74. In addition, the Commission assessed the scope of the "cost" justification under the 1992 Cable Act, and examined whether "a vendor may take into account those cost differences incurred by distributors in providing service to subscribers -- cost differences at the retail level -- when justifying price differences for programming as charged to

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[162] 47 U.S.C. § 548(c)(2)(B).

[163] 47 U.S.C. § 548(c)(2)(B)(ii).

[164] *First Report and Order*, 8 FCC Rcd at 3405.

[165] *Id.* at 3406.

[166] *Id.*

distributors."[167] While the Commission recognized that costs incurred by some distributors when delivering their services to consumers may be lower than for others (e.g., HSD v. cable), the Commission determined that:

> it would be contrary to the purposes of the Act and disserve the public to allow vendors to charge higher prices based on this factor. In particular, we believe that such a result could artificially raise the retail price of programming and discourage the development of low-cost technologies contrary to the statute's goals. Moreover, contrary to the claims of some commenters that HSD distributors will simply retain any savings rather than pass them on to HSD users, we believe the HSD market is sufficiently competitive to ensure that savings will inure to the benefit of the public. Accordingly, we will generally reject a vendor's consideration of a distributor's costs in delivering service to subscribers. A vendor who can show that the lower price offered to the distributor will not result in lower prices to consumers because the distributor is simply retaining the potential cost savings in the form of higher profits, can justify a price differential based on retail costs.[168]

75. *Costs at the Retail Level.* Viacom petitioned the Commission to reconsider its decision and allow a programming vendor to consider differences in cost at the distributor's level. In support of its position, Viacom relied on a colloquy between Senators Kerry and Inouye regarding the costs that may be considered by vendors. According to Viacom, this colloquy made it clear that a distributor's costs can be considered in justifying the programming vendor's price differentials.[169]

76. Bell Atlantic and WCA opposed Viacom's petition on this issue. Bell Atlantic claimed that both the statutory language and common sense make it clear that a difference in the buyers' costs cannot justify a price differential unless such costs have a demonstrable

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[167] *Id.* at 3406.

[168] *Id.*

[169] Viacom Reply at 9-10. Viacom argued the following:

> Sen. Inouye, a principal sponsor of the 1992 Cable Act, answered in the affirmative Sen. Kerry's question, 'Am I correct in understanding that as used in subsection 2(B)(ii) the cost of creation, sale, delivery or transmission of programming refers to costs incurred at the multichannel video programming distributor's level as well as at the program vendor's level?'

In the *First Report and Order*, the Commission noted that the comments submitted were divided as to the appropriate interpretation of this colloquy. 8 FCC Rcd at 3406 n.177.

impact on the seller's costs.[170] Bell Atlantic and WCA also disagreed with Viacom that any weight should be given to the colloquy between Senators Kerry and Inouye.[171]

77. *Discussion*. We affirm our determination that vendors may not take into account cost differences in delivering service to subscribers when justifying price differences for programming charged to distributors.[172] We also affirm what we said in the *First Report and Order*, that it would be contrary to the purposes of the Act and disserve the public to allow vendors to charge higher prices based on a distributor's cost differences at the retail level. To do so could result in the artificial raising of retail prices for programming as well as discourage the development of low-cost technologies contrary to the goals of the Act.[173]

78. *Pre-judgment of HSD Cost Differentials.* NRTC claimed that the *First Report and Order* suggests that the Commission has pre-judged questions regarding possible cost justifications for pricing differentials in sales to HSD distributors. 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," and "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."[174] CFA supported NRTC's petition.

79. Superstar opposed NRTC's petition, contending that NRTC's petition merely is an attempt to eliminate cost-based differentials.[175] United Video stated that it supports the Commission's conclusion that in the pricing of video programming there are justifiable price differences among MVPDs, and that this finding is consistent with the 1992 Cable Act's

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170 Bell Atlantic Comments at 5-6.

171 *Id.* at 5. Bell Atlantic also contended that Viacom's reliance on the Senators' colloquy to support its position is misplaced, because, according to Bell Atlantic, courts hold that these "kinds of snippets from the legislative history are entitled to little weight." (citing *Weinberger v. Rossi*, 456 U.S. 25, 35 (1982); *RCA Global Communications, Inc. v. FCC*, 758 F.2d 722, 733 (D.C. Cir. 1985)); WCA Opposition at 23.

172 However, as we stated in the *First Report and Order*, a vendor who can show that the lower price offered to a distributor will not result in lower prices to consumers, because the distributor is simply retaining the potential cost savings in the form of higher profits, can justify a price differential based on retail cost. 8 FCC Rcd at 3407.

173 *First Report and Order*, 8 FCC Rcd at 3406.

174 NRTC Petition at 16-20.

175 Superstar Opposition at 8-12.

recognition that some price differentials are necessary.[176] Liberty Media also opposed the petition contending that the Commission's decision was based on statutory and marketplace realities.[177]

80. Time Warner contended that the Commission has not incorrectly prejudged the higher costs,[178] but in any event, NRTC's dispute with the Commission on this point is trivial because whether a particular HSD distributor has higher or lower costs associated with its distribution is a question that will be resolved during the complaint process.[179] NRTC replied that it agreed with Time Warner's statement and requested the Commission to clarify that cost justification issues are resolved at the time of the disposition of particular complaint proceedings.[180]

81. *Discussion*. The Commission rejects NRTC's contention that, in the *First Report and Order*, we prejudged the costs that vendors may incur in supplying programming to HSD distributors. Rather, in the *First Report and Order*, the Commission merely recognized that cost differentials can exist and may be used to justify a price differential. The Commission did not make any determinations regarding the magnitude or the effect of any such price differentials, and did not intend to draw conclusions as to their presence in particular markets. We do agree with Time Warner and NRTC that resolution of specific cost justifications must be addressed through the adjudicatory process.

VI. EFFECTIVE DATE/APPLICATION OF RULES

82. *Background*. In the *First Report and Order,* the Commission determined that the rules adopted under Section 628 apply prospectively to all existing contracts, whether the contracts were executed before or after the effective date of the rules.[181] The Commission

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[176] United Video's Opposition at 3.

[177] Liberty Media Opposition at 13.

[178] Time Warner Opposition at 8-9.

[179] Id. at 10.

[180] NRTC Reply at 9.

[181] *First Report and Order*, 8 FCC Rcd at 3414. To be consistent with cases that proscribe retroactive application of regulations, absent clear congressional intent, the Commission noted that:

> the anti-discrimination rules adopted will not affect prices paid for past video programming services or penalize vendors for practices preceding passage of the Act.

stated that Congress would not have expressly grandfathered only a narrow class of contracts in Section 628(h) if it had intended generally to exempt all existing contracts from the scope of the anti-discrimination requirements of Section 628.[182] In addition, the Commission noted that 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, the Commission stated that Congress intended that rules promulgated to implement Section 628 should be applied prospectively to existing contracts, except as specifically provided for in Section 628(h).[183] To avoid disruption to the market, parties were afforded 120 days after the effective date of the new rules to bring their agreements into compliance with § 76.1002(f),[184] which provides:

> All contracts [except those specifically grandfathered], related to the provision of satellite cable programming or satellite broadcast programming to any multichannel video programming distributor must be brought into compliance with the requirements specified in this subpart no later than November 15, 1993.[185]

83. *Application of the Discrimination Rules to Existing Contracts.* Time Warner and others petitioned the Commission to reconsider its decision to apply the discrimination rules under Section 628 to existing contracts. Time Warner argued that "it 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."[186]

84. Superstar likewise contended that the Commission should exempt existing contracts from the discrimination rules. Alternatively, Superstar argued that the Commission should confirm that discrimination claims under existing contracts only can be remedied by

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> The Commission will, however, apply the rules adopted under Section 628 prospectively to all existing contracts, whether they were executed before or after the effective date of the rules.

Id. at 3415.

[182] *Id.* at 3415.

[183] *Id.*

[184] *Id.*

[185] 47 C.F.R. § 76.1002(f).

[186] Time Warner Petition at 5.

amendment and not by monetary sanctions or damages.[187]

85. Various parties filed oppositions to Time Warner's petition. GTE stated that "Congress' choice of June 1990 as the statutory grandfathering date must be taken as strong indication that the legislators considered parties contracting thereafter about program access to be on sufficient notice that the pending bills could affect their bargains."[188] Bell Atlantic argued that if the Commission permitted cable-affiliated programming vendors to charge new MVPDs more for programming than these same programming vendors charge affiliated cable operators under existing contracts, it "would give cable-affiliated programmers a broad license to discriminate against competing multichannel distributors for years into the future -- the precise practice that Congress prohibited in the 1992 Cable Act."[189]

86. DirecTV also opposed Time Warner's position arguing that it "would create a huge 'loophole' in the Commission's rules and thereby perpetuate cable's monopoly stranglehold on multichannel subscription programming for the indefinite future."[190] CSS contended that the Commission acted properly in applying the rules to existing contracts and that to delay the application of the rules until existing contracts have expired would frustrate the congressional purpose and result in significant continued harm for alternative media distributors.[191] Finally, WCA stated that there is no support in the statute or legislative history for Time Warner's argument that all existing contracts are beyond the reach of Section 628.[192]

87. Time Warner replied[193] that the rule has a severe and unreasonable impact on programming vendors:

> a programming vendor that, upon launch, entered into a long-term affiliation agreement at a low price as an inducement to obtain carriage is deprived of the ability to capitalize upon increased demand for its product as an established service (when it

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187 Superstar's Opposition at 18-19.

188 GTE Opposition at 10-11.

189 Bell Atlantic Comments at 3; *see also* Bell Atlantic Reply at 2-3.

190 DirecTV's Opposition at 7.

191 CSS's Opposition at 2.

192 WCA Opposition at 13.

193 Time Warner Reply at 6.

can obtain carriage at a higher price.)[194]

88. *Discussion*. The Commission rejects Time Warner's petition and affirms its determination in the *First Report and Order* that the rules under Section 628 apply prospectively to existing contracts. Indeed, given the long-term nature of many programming agreements, Time Warner's position would delay for an unacceptable length of time the relief expected from the program access rules. As stated in the *First Report and Order*, "we believe that 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."[195]

VII. SUBDISTRIBUTION AGREEMENTS

89. *Background*. Subdistribution agreements are sales agreements that are "generally between a programming vendor and a franchised cable operator, through which a MVPD competitor is required to purchase the vendor's programming from the franchised operator because the vendor had sold it the subdistribution rights related to its franchise area."[196]

90. In the *First Report and Order*, the Commission restated its concern, previously noted in the 1990 Competition Report, that in either served or unserved areas a distributor's access to programming may be impaired through the use of subdistribution agreements.[197] While the Commission acknowledged that granting subdistribution rights can be a legitimate practice for a programming vendor, the Commission stated that "we must address any incentives for a subdistributor to refuse to sell to a competing MVPD that may be inherent in such rights."[198] Thus, the Commission adopted Section 76.1002(c)(3) as "appropriate safeguards to limit the potential for anticompetitive behavior":

> (3) *Specific arrangements: Subdistribution agreements.---(i) Unserved area.* No cable operator shall enter into any subdistribution agreement or arrangement for satellite cable programming or satellite broadcast programming with a satellite cable

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[194] Discovery and Viacom similarly sought to limit the application of the rules to existing contracts.

[195] *First Report and Order*, 8 Fcc Rcd at 3415.

[196] *See First Report and Order*, 8 FCC Rcd at 3387 n.92 (citing the 1990 Cable Report, 5 FCC Rcd at 5021).

[197] *Id.*

[198] *Id.* at 3387.

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.

91. *Nonexclusive Subdistribution Agreements in Served and Unserved Areas.* Time Warner petitioned the Commission to clarify that Section 76.1002(c)(3) applies only to exclusive arrangements.[199] Time Warner contended that this rule, which prohibits subdistribution arrangements in unserved areas, could be read to encompass both exclusive and nonexclusive subdistribution arrangements.[200] Time Warner stated that subdistribution

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[199] Time Warner's Petition at 2-5.

[200] *Id.* at 2.

agreements can have anticompetitive potential only if they are exclusive.[201] Time Warner contended that, by forbidding nonexclusive agreements for subdistribution in areas not served by a cable operator, the rule may have the effect of hindering rather than promoting access to programming, because subdistribution can be the most efficient way of selling programming to small distributors.[202] Finally, Time Warner stated that, from the *First Report and Order*, it does not appear that the Commission intended to regulate nonexclusive subdistribution arrangements. Time Warner noted that the *First Report and Order* only discussed concerns for exclusive arrangements in unserved areas.[203] Time Warner's petition on this issue is unopposed.

92. *Discussion*. The Commission will grant, in part, Time Warner's petition. The Commission agrees with Time Warner that there is no need to prohibit all subdistribution arrangements in areas unserved by cable, as long as no cable operator has exclusive subdistribution rights in unserved areas and, thus, a MVPD would have a choice of outlets for its programming needs. Indeed, as the Commission noted in the *First Report and Order*, subdistribution arrangements in both served and unserved areas can be an efficient and beneficial tool for program distribution.[204] This position is reflected in Section 76.1002(c)(3)(ii) and (iii) which, as originally drafted, require, among other things, a programming vendor to negotiate directly with a distributor if a subdistributor in a served

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[201] *Id*. at 3. Time Warner gives the example of Home Box Office ("HBO") which has had a policy of authorizing cable operators to subdistribute its programming services to Satellite Master Antenna Television ("SMATV") operators within their franchise areas. According to Time Warner, HBO leaves SMATV operators free to obtain programming from alternative sources.

[202] *Id*. at 4.

[203] *Id*. at 4 (citing *First Report and Order*, 8 FCC Rcd at 3387, 3390). Time Warner proposes that, in order to clarify that Section 76.1002(c)(3) applies only to exclusive arrangements, the Commission could make the rules applicable to served areas also applicable to unserved areas. Those rules require a programming vendor to negotiate directly with a distributor if a subdistributor denies the distributor's request for access to programming. Time Warner proposes that Section 76.1002(c)(3)(i) could be deleted and the references to "served areas" in Section 76.1002(c)(3)(ii) and (iii) also could be deleted.

[204] *First Report and Order*, 8 FCC Rcd at 3387. Indeed in the *First Report and Order*, the Commission acknowledged that subdistribution agreements can be a legitimate practice for a programming vendor. We allowed such agreements to exist, subject to conditions which would limit anticompetitive behavior. The applicable paragraphs relating to both served and unserved areas come under the heading "Issues Applicable to Both Served and Unserved Areas," thus indicating that any limitations on subdistribution agreements should apply to both served and unserved areas.

area denies the distributor's request for access to programming. This requirement is intended to make all subdistribution agreements in served areas nonexclusive. Similarly, Section 76.1002(c)(3)(iii) should apply to subdistribution agreements in unserved areas. The Commission will therefore amend the implementing rules, as suggested by Time Warner, to clarify that nonexclusive subdistribution agreements in both served and unserved areas are treated consistently and subject to the protections provided by the requirements of Section 76.1002(c)(3)(iii).

VIII. *DE MINIMIS* PRICE DIFFERENTIAL/SIMILARLY SITUATED COMPARISON

93. *Background*. In the *First Report and Order*, the Commission discussed complaint and enforcement procedures regarding discrimination. The Commission determined that, in an effort to conserve Commission resources and avoid the need for discovery and protracted adjudication solely to resolve accounting issues, "in those cases in which the differential between the complainant's price and that of its competitor is equal to or less than five cents per subscriber or five percent, whichever is larger, we will not require the vendor to justify the magnitude of the differential so long as it provides sufficient reasons that are justified by the statutory factors for a difference in price."[205] In making this finding, the Commission assumed that, as long as a programming vendor identifies sufficient factors for legitimate price differentials, such small magnitudes are presumptively justifiable.

94. In the *First Report and Order*, the Commission further determined that, although an MVPD can bring a discrimination claim merely by demonstrating that another MVPD with which it does or proposes to compete has received more favorable terms from the vertically integrated programming vendor, the competing MVPD identified by the complainant may not be a proper point of comparison because of the presence of any one of a number of factors that the 1992 Cable Act recognizes as legitimate bases for price differentials. Thus, under the program access rules, a "discriminatory practice must involve the offering of the program service to similarly-situated distributors."[206] Therefore, in justifying the price, terms and conditions of a contract, a programming vendor may demonstrate that the proper comparison is between the complainant and a similarly-situated distributor, rather than the complainant and its competitor.[207]

95. The Commission promulgated § 76.1003(d)(6) which provides, in part:

(6) An answer to a discrimination complaint shall state the reasons for any

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[205] *Id.* at 3420.

[206] *Id.* at 3401.

[207] *Id.* at 3401-02.

differential in prices, terms or conditions between the complainant and its competitor, and shall specify the particular justification set forth in § 76.1002(b) relied upon in support of the differential.

. . .

(ii) In cases involving a price differential of less than or equal to five cents per subscriber or five percent, whichever is greater, the answer shall identify the differential as *de minimis* and state that the defendant is therefore not required to justify the magnitude of the differential.

(iii) If the defendant believes that the complainant and its competitor are not sufficiently similar, the answer shall set forth the reasons supporting this conclusion, and the defendant may submit an alternative contract for comparison with a similarly situated multichannel video programming distributor that uses the same distribution technology as the competitor selected for comparison by the complainant. The answer shall state the defendant's reasons for any differential between the prices, terms and conditions between the complainant and such similarly situated distributor, and shall specify the particular justifications in §76.1002(b) relied upon in support of the differential . . . .

96. *Similarly- Situated Price Comparisons.* Viacom requested clarification that, under Section 76.1003(d), once a programming vendor has demonstrated that the proper course is to compare the complainant with a "similarly-situated" distributor, the determination of whether the price differential is *de minimis* similarly should be made by comparing the price charged or offered to the complainant with the price charged to the similarly-situated distributor.[208] In response to Viacom's petition, DirecTV contended that "the Commission should be wary of taking any action that undercuts the touchstone of allowing alternative MVPDs fair access to programming at rates that are competitive to those offered to cable providers. To the extent that Viacom's proposal is contrary to this fundamental objective of the 1992 Cable Act, it must be rejected by the Commission."[209]

97. *Discussion.* We hereby grant Viacom's request, and clarify that, under Section 76.1003(d), once a programming vendor has persuaded the Commission that a "similarly-situated" competitor is the proper focus for comparison, the same rationale would apply with respect to making a determination as to whether the price differential is *de minimis*. That is, the price charged or offered to the complainant will be compared to the price charged to the similarly-situated distributor. As noted above, the rationale underlying the less onerous burden of proof for *de minimis* price differentials are administrative and

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[208] Viacom Petition at 10.

[209] DirecTV Opposition at 12.

related to "efforts to conserve Commission resources and avoid the need for discovery and protracted adjudication aimed solely at resolution of accounting issues."[210]

IX. BUYING GROUPS

98. *Background.* Section 628(c)(2)(B) of the 1992 Cable Act sets forth factors upon which a vertically integrated programming vendor may justify differences in the prices, terms and conditions of sale or delivery of programming to cable operators, MVPDs or their agents, or buying groups.[211] Section 628(c)(2)(B)(iii) states that these entities are not prohibited from:

> establishing 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. . . .[212]

99. In the *First Report and Order*, the Commission noted that buying groups can offer some economies of scale or other efficiencies to programming vendors which would justify price discounts under the statute. However, the Commission stated that "in order to benefit from treatment as a single entity for purposes of subscriber volume, a buying group should offer vendors similar advantages or benefits as a single purchaser, including for example, some assurance of satisfactory financial and technical performance."[213] Accordingly, the Commission adopted regulations that included, among other things, requirements that a buying group seeking unitary treatment from a programming vendor must agree to be financially responsible for any fees due under a contract to which it is a party.[214] In addition, the Commission required that, if individual members are contracting parties, each member must agree to joint and several liability for commitments of the group.[215]

100. These requirements were promulgated in Section 76.1000(c), which defines buying groups as follows:

> Buying groups. The term "buying group" or "agent" . . . means an

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[210] *First Report and Order*, 8 FCC Rcd at 3420.

[211] 47 U.S.C. § 548(c)(2)(B).

[212] 47 U.S.C. § 548(c)(2)(B)(iii).

[213] *First Report and Order*, 8 FCC Rcd at 3411.

[214] *First Report and Order*, 8 FCC Rcd at 3412.

[215] *Id.* at 3412.

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 . . . .

101. Liberty Media argued that the definition of "buying group" in Section 76.1000(c) offers little or no assurance that such buying group is capable of satisfying its financial obligations.[216] Liberty Media argued that Section 76.1000(c)(1) provides that the members of a buying group may, "as contracting parties, agree to joint and several liability" in any contract between the buying group and a programming vendor. Liberty Media argued that the definition, however, "also permits the buying group to agree 'to be liable for any fees due pursuant to a . . . contract which it signs as a contracting party as a representative of its members' ".[217] According to Liberty Media, there is no incentive for members of a buying group to agree to joint and several liability when they can shift all liability to the corporate entity acting as the buying group.[218] Liberty Media stated that programming vendors should be permitted to require the members of such buying group(s) to guarantee payment or to agree to joint and several liability.[219] Liberty Media's petition was unopposed.

102. United Video contended that it is critical for the Commission to re-evaluate its treatment of buying groups and "to set strict standards for such groups in order to prevent the formation of sham buying groups that will undermine the entire rate structures of satellite programming vendors."[220] United Video stated that it supports the position that "buying groups must be able to demonstrate at the time service is requested that they are capable of satisfying the group's financial obligations by permitting the satellite programming vendors to require the group members to guarantee payment or to agree to joint and several liability. At a minimum, the Commission should require that buying groups document to the satellite programming vendors at the time service is requested that they comply with all of the

[216] Liberty Media Petition at 14.

[217] *Id.* at 15.

[218] *Id.*

[219] *Id.*

[220] United Video Opposition at 7.

standards set forth in Section 76.1000(c) of the Commission's rules."[221]

103. *Discussion*. In the *First Report and Order*, the Commission recognized that programming vendors may have legitimate concerns about the creditworthiness or financial stability of their customers. We stated that vendors are permitted to create a distinct class or classes of service in pricing to reflect these concerns; however, any distinctions based on considerations of creditworthiness must be applied on a technology-neutral basis.[222] With respect to the creditworthiness or financial stability of buying groups, we reject petitioner's request that we require the individual members to agree to joint and several liability for the entire commitment of the group. We believe that such a requirement might, as a practical matter, prevent small MVPDs from establishing buying groups at all. Accordingly, we will affirm Section 76.1000(c) as adopted. However, to address the concerns raised by the petitioning parties, we will clarify that, in those situations where a seller has reasonable doubts about the financial stability and responsibility of the buying group, it may insist on appropriate assurances of creditworthiness. Buying groups could satisfy this burden through various measures, such as requiring each individual member of the group to guarantee to the group its pro rata share of the fees due under a programming contract.

X. COMPETING DISTRIBUTORS

104. *Background*. Section 628(c)(2)(B) of the 1992 Cable Act requires the Commission to adopt regulations which prohibit discrimination in the prices, terms, and conditions of sale or delivery of programming.[223] In the *First Report and Order*, the

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[221] United Video Opposition at 7-8 (original emphasis deleted; new emphasis added).

[222] *First Report and Order*, 8 FCC Rcd at 3408.

[223] 47 U.S.C. § 548(c)(2)(B). Section 628(c)(2)(B) provides that the Commission shall "prohibit discrimination by a satellite cable programming vendor in which a cable operator has an attributable interest or by a satellite broadcast programming vendor in the prices, terms, and conditions of sale and delivery of satellite cable programming or satellite broadcast programming among or between cable systems, or other multichannel video programming distributors, or their agents or buying groups; except that such satellite cable programming vendor in which a cable operator has an attributable interest or such a satellite broadcast programming vendor shall not be prohibited from---

> (i) imposing reasonable requirements for creditworthiness, offering of service, and financial stability and standards regarding character and technical quality;
>
> (ii) establishing 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;

Commission determined that, "when addressing a Section 628 complaint, we will require a complainant to demonstrate that it has been offered or is paying a higher price, or has received less favorable terms, than a competing distributor."[224] We also stated that:

> in establishing that another distributor is a competitor for these purposes, we will require that there be some overlap in actual or proposed service area. Moreover, the geographic market for assessing whether distributors compete with each other (actually or potentially) can be local, regional or national, depending on how the distributor buys and distributes programming.[225]

105. Viacom and Discovery petitioned the Commission to require cable operators bringing complaints of discrimination to show a substantial (at least 50%) overlap with the service area of a competing MVPD.[226] Viacom and Discovery argued that Congress determined "that distributors using alternative technologies may have been subject to certain practices designed to limit their ability to compete with cable operators;"[227] and that the Commission propounded an expansive definition of "competing distributor" to make it easier for alternative technology distributors to bring complaints of discrimination.[228] Petitioners argued that the Commission's broad definition of competing distributor should not be available to cable operators. Viacom and Discovery further argued that to do so "would allow a cable operator who has entered into an agreement with a programming vendor on an arms-length basis and then found that a neighboring cable operator has been able to negotiate more favorable terms, to get out from under its bargain merely by "overbuilding"...a small portion of that neighboring system and bringing a complaint under the rules ... the complainant cable operator would be able to obtain terms that it was unable to negotiate in the open marketplace."[229]

> (iii) establishing 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 a distributor; or
>
> (iv) entering into an exclusive contract that is permitted under subparagraph (D).

[224] *First Report and Order*, 8 FCC Rcd at 3400.

[225] *Id.* at 3400

[226] Discovery Petition at 6; Viacom Petition at 12

[227] Discovery Petition at 4-5; Viacom Petition at 11.

[228] Discovery Petition at 5; Viacom Petition at 11.

[229] Discovery Petition at 5-6; Viacom Petition at 11-12.

106. PrimeTime 24 Joint Venture ("PrimeTime") supported the petitions filed by Viacom and Discovery and requested that the Commission clarify the definition of competing distributor for both non-cable and cable distributors.[230] PrimeTime 24 argued that the danger of misapplication also could apply to comparisons involving non-cable distributors.[231] Landmark also supported clarification of the Commission's definition of competing distributor and suggested that any distributor seeking to file a complaint must demonstrate a substantial (at least 50%) overlap.[232] No oppositions were filed to these petitions.

107. *Discussion*. The Commission does not find that a change in the definition of a competing distributor is necessary or justified. The program access provisions of the 1992 Cable Act were intended to protect the nascent development of competition to incumbent cable operators. As noted in the *First Report and Order*, the legislative history recounts the difficulties encountered by non-cable distributors. However, Congress did not differentiate among the technologies used by competitors in the program access provisions, but rather sought "to promote the public interest, convenience, and necessity by increasing competition and diversity in the multichannel video programming market."[233] Petitioners' concern that cable operators will avoid their contractual obligations by bringing a price discrimination complaint without actually competing can be addressed in the adjudicatory process. Moreover, the statute and the Commission's rules allow a defendant programming vendor to substitute another distributor, with attributes similar to the complainant, for a comparison to justify its contract terms.[234] Thus, where the substitution shows that there is no price differential between competitors for the programming vendor's service, the cable operator will not be able to renege on its contractual obligations.

108. Moreover, as the responses to Viacom's and Discovery's petitions illustrate, the concern of misapplication raised in the petitions is not limited to cable distributors alone. Thus, the Commission would not be justified in limiting the requirement for a substantial overlap between competing distributors to cable operators' complaints. The Commission believes that to restrict an MVPD's ability to bring a complaint by requiring a substantial overlap is contrary to the intention of the program access provisions.

XI. CLARIFYING THE FIRST REPORT AND ORDER

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[230] PrimeTime 24 Comments at 2.

[231] *Id.* at 3.

[232] Landmark Reply at 10.

[233] Communications Act § 628(a), 47 U.S.C. §548(a).

[234] *First Report and Order*, 8 FCC Rcd at 3401. *See also* Section IV.E. *supra*.

109. On our own motion, we take the opportunity in this Order to emphasize certain procedural requirements under the program access rules and clarify the discussion of those requirements in the *First Report and Order*.[235] The Commission initially notes that the actual rules that set forth the procedural requirements for program access complaints are clear that they apply both to Section 628(b) and Section 628(c) cases.[236] However, these procedural requirements are not consistently discussed throughout the text of the *First Report and Order*. The Commission emphasizes here that these procedural requirements are applicable to every type of program access complaint.

110. For example, the *First Report and Order* discusses the requirement set forth in the rules that prior to filing a complaint, the complainant must notify the opposing party of its intention to file a complaint.[237] This pre-complaint notice provision is applicable to all program access complaints. Similarly, the *First Report and Order* discusses the one year "statute of limitations" within which to bring complaints. [238] This one year limit is applicable to all types of program access complaints. In addition, the *First Report and Order* discusses the contents of program access complaints and states that they must specify the relief requested.[239] This requirement is applicable to all program access complaints.

XII. REGULATORY FLEXIBILITY ACT ANALYSIS

111. Pursuant to the Regulatory Flexibility Act of 1980, 5 U.S.C. Sections 601-602, the Commission's final analysis is as follows:

112. Need and purpose of this action: This action is taken to address petitions for reconsideration of the program access rules adopted by the Commission to implement Section 19 of the Cable Television Consumer Protection and Competition Act of 1992 (the 1992 Cable Act).

113. 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

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[235] *See* 47 C.F.R. §1.108.

[236] 47 C.F.R. § 76.1003(a)-(s).

[237] *See First Report and Order*, 8 FCC Rcd at 3416, 3422, 3424. In addition, the general Complaint and Enforcement Procedures contain a notice requirement provision. *Id.* at 3389.

[238] *Id.* at ¶¶ 3416, 3422, 3425. There also is a one year statute of limitations set out in the general Complaint and Enforcement Procedures. *Id.* at 3389.

[239] *Id.* at 3389, 3422, 3425.