

concern only in connection with monopolization or attempted monopolization, which violates Section 2 of the Sherman Act.¹³⁵

In evaluating such claims, federal courts have always required a showing of more than price-cutting. The courts look for some characteristic about the price-cutting that renders it socially harmful. While federal antitrust law has defined predatory pricing as “pricing below an appropriate measure of cost for the purpose of eliminating competitors in the short run and reducing competition in the long run,”¹³⁶ it has declined to determine what is the “appropriate measure of cost.”¹³⁷ Rather than establish a formula for the appropriate measure of cost, federal courts have focused on one or more of three separate factors in evaluating a predatory pricing claim: (1) price-cost analysis; (2) predatory intent; and (3) likelihood of recoupment.¹³⁸ NCTA urges the Commission to adopt a standard for determining whether a complainant has made a threshold showing of predatory pricing that is objective, administratively feasible to process and oversee, while recognizing that a cable operator’s commercially sensitive cost information must not be made available to competitors.

NCTA supports the Commission’s adoption of the discovery procedures set forth in the rules for the adjudication of program access complaints in the context of predatory pricing

¹³⁵ 15 U.S.C. §2. See, e.g., United States v. Grinnell Corp., 384 U.S. 563, 570-71 (1966); Abcor v. AM Intern., Inc., 916 F.2d 924, 926 (4th Cir. 1990).

¹³⁶ Cargill, Inc. v. Monfort of Colorado, Inc., 479 U.S. 104, 117 (1986).

¹³⁷ See, e.g., Atlantic Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 341 n.10 (1990); Cargill, 479 U.S. at 117-18 n.12.

¹³⁸ See, ABA Antitrust Law Developments (Third), Vol. I at 227; Areeda & Turner, Predatory Pricing and Related Practices Under Section 2 of the Sherman Act, 88 Harv. L. Rev. 697 (1975).

complaints.¹³⁹ NCTA believes that those discovery procedures are adequate for the purpose of investigating predatory pricing allegations which have been found to satisfy the prima facie showing threshold. However, NCTA urges the Commission to adopt a rule providing for the confidential treatment of a cable operator's cost information where submission of such information is required upon a finding that a prima facie showing of predatory pricing has been established. NCTA also proposes the imposition of sanctions to discourage filing of frivolous predatory pricing complaints.¹⁴⁰

V. TECHNICAL STANDARDS

The 1996 Act amended Section 624(e) of the Communications Act to limit the ability of local franchising authorities to regulate in the areas of cable operator technical standards, scrambling and other signal transmission technologies, and subscriber equipment.

Section 301(e) of the 1996 Act amended Section 624 by deleting the language which permitted an LFA to assume the authority to enforce the Commission's technical standards, and allowed an LFA to apply to the Commission for a waiver to impose standards that were more stringent than the standards prescribed by the Commission. In place of the deleted language, Congress substituted the following:

No State or franchising authority may prohibit, condition or restrict a cable system's use of any type of subscriber equipment or any transmission technology.¹⁴¹

¹³⁹ See 47 C.F.R. §§ 76.1003(g), (j).

¹⁴⁰ See *Id.* § 76.1003(q) (frivolous program access complaints subject to appropriate sanctions.)

¹⁴¹ 47 U.S.C. § 624(e).

The legislative history of this change demonstrates an unambiguous intent to preclude local regulatory involvement in the areas of technical standards, customer equipment and transmission technologies as a matter of national communications policy.¹⁴²

In amending Section 624 of the Communications Act, Congress limited the authority of local franchising authorities over technical standards and related issues in three specific ways. First, LFAs have no authority to require, as part of the franchising process, provisions that allow them to enforce any technical standards applicable to cable television systems that are adopted by the FCC. Second, LFAs can no longer obtain a waiver from the Commission giving them authority to impose or enforce technical standards that are more stringent than the FCC's standards. Third, no State or LFA may interfere with a cable operator's right to deploy any subscriber equipment or transmission technology that it deems appropriate, including scrambling or other forms of encryption.

In its Notice, the Commission has implemented two of these three specific amendments. Specifically, the Commission has eliminated Note 6 to Section 76.605 of its rules, which permitted a franchising authority to apply to the FCC for a waiver to impose technical standards that are more stringent than the standards prescribed by the Commission. The Commission has also inserted the new language that was added to Section 624(e) prohibiting States and LFAs from interfering with the subscriber equipment or transmission technology decisions made by the cable operator.¹⁴³ The Commission has not, however, implemented the third specific change

¹⁴² House Report at 110.

¹⁴³ Notice at ¶ 42.

mandated by Congress, *i.e.*, eliminating day-to-day LFA oversight and enforcement of technical standards compliance issues.

The Commission has sought comment on the overall scope and meaning of new Section 624(e) of the Communications Act. Specifically, the Commission notes that Congress did not expressly amend Sections 626 or 621 of the Communications Act, which allow LFAs to consider signal quality and an operator's technical qualifications in awarding or renewing a franchise to provide cable service.¹⁴⁴ The Commission appears to seek further confirmation that Congress intended to entirely preclude local regulation and enforcement of technical standards. Deletion of the language in Section 624(e), which formerly expressly granted LFAs such enforcement powers, is the best confirmation of the legislative goal to entirely preclude LFA involvement in the establishment or day-to-day enforcement of technical standards applicable to cable television systems. No other congressional action was required.

The Commission has requested comment on how Congress' amendment to Section 624(e) affects the LFA's power to take into consideration technical standards issues in granting a franchise pursuant to Section 621 of the Communications Act, transferring a franchise pursuant to Section 617 of the Communications Act, and granting a franchise renewal pursuant to Section 626 of the Communications Act.¹⁴⁵

As the Notice recognizes, Section 621 of the Communications Act provides that in awarding a franchise, a franchising authority "may require adequate assurance that the cable

¹⁴⁴ Id. at ¶ 104.

¹⁴⁵ Id. at ¶ 104.

operator has the...technical...qualifications to provide cable service.”¹⁴⁶ However, this language speaks only to the relevant lines of inquiry which a franchising authority can undertake in deciding whether or to whom a franchise should be awarded; it does not in any way authorize LFAs to engage in day-to-day technical standards enforcement. Section 617 of the Communications Act, which deals with franchise transfers, contains no similar language, but instead authorizes the FCC to delineate by regulation the lines of inquiry which are appropriate for an LFA to examine in connection with a franchise transfer.¹⁴⁷ The amendments to Section 624(e) allow LFAs to continue to undertake such inquiries to determine an applicant’s technical qualifications, but they also make clear that LFAs may no longer engage in the day-to-day enforcement of cable technical standards in any way.

Similarly, nothing in Section 626, which governs franchise renewals, gives the LFAs the authority to adopt their own technical standards or enforce existing FCC technical standards as part of their local regulatory jurisdiction. Section 626 merely allows an LFA to consider the adequacy of the cable operator’s signal quality as one of several factors in determining whether the operator’s past service has been adequate to meet community needs. To this end, during the renewal process, a local franchising authority may take into account any determinations that have been made by the FCC regarding whether or not the cable operator has complied with FCC technical standards in judging the adequacy of the cable operator’s services. In the past, those determinations may have been made by either the FCC or by the LFA under Section 624(e). As

¹⁴⁶ *Id.*, citing Communications Act, § 621(a)(4)(C).

¹⁴⁷ 47 U.S.C. § 537.

a result of the amendments made by the 1996 Act, the FCC alone has the authority to make these determinations.

One cannot infer that because Congress did not choose to amend Section 626, it intended to limit the reach of its amendments to Section 624(e) and allow LFAs to continue to enforce FCC mandated technical standards. The Commission itself notes that the ability of an LFA to specify criteria, such as a system upgrade, upon which a franchise renewal proposal will be based is expressly made “subject to Section 624” of the Communications Act.¹⁴⁸ There simply was no need for Congress to make any separate amendment to the existing language of Section 626 in order to implement the changes made in Section 624(e). Section 626, by its own express terms, is subject to all limitations contained in Section 624, including the amendments to Section 624(e) embodied in the 1996 Act.

VI. CABLE OPERATOR REFUSAL TO CARRY CERTAIN PROGRAMMING

The Commission’s proposed definition of “nudity,”¹⁴⁹ as used in Sections 506(a) and (b) of the 1996 Act (relating to cable operator refusal to carry programming that contains nudity on public and leased access channels) appears reasonable. Under that test, consistent with the Supreme Court’s ruling in Erznoznik v. City of Jacksonville,¹⁵⁰ only sexually explicit nudity which is obscene or indecent would be proscribed. However, the Commission should further clarify that a good faith judgment by a cable operator that certain programming is obscene or indecent is presumptively valid. Such a good faith standard is necessary in order to prevent

¹⁴⁸ Notice at ¶ 104, citing Communications Act, § 626(b)(2).

¹⁴⁹ Notice at ¶ 111.

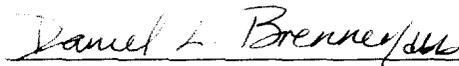
¹⁵⁰ 422 US 205, 95 S.Ct. 2278 (1975).

cable operators from being exposed to lawsuits by disgruntled programmers when the operators exercise the editorial judgment returned to them by Sections 506(a) and (b) of the 1996 Act, and to avoid the chilling effect that would certainly occur without such a standard.

CONCLUSION

For the foregoing reasons, the Commission should adopt rules consistent with these comments.

Respectfully submitted,



Daniel L. Brenner
Neal M. Goldberg
Diane B. Burstein
1724 Massachusetts Avenue, N.W.
Washington, D.C. 20036

Counsel for the National Cable
Television Association, Inc.

Lisa W. Schoenthaler
Director and Counsel
Office of Small System Operators

Of Counsel
Charles S. Walsh
Arthur H. Harding
Fleischman & Walsh, L.L.P.
1400 Sixteenth Street, N.W.
Washington, D.C. 20036

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