PROGRAMMING ACCESS AND OTHER COMPETITION REGULATIONS OF THE NEW CABLE TELEVISION LAW AND THE PRIMESTAR DECREES: A GUIDED TOUR THROUGH THE MAZE

DAVID J. SAYLOR

I. INTRODUCTION

Nineteen ninety-three was a year of dramatic developments in competition policy for cable television and other forms of multichannel video transmission. To implement the 1992 Cable Act,[1] the Federal Communications Commission ("FCC") promulgated regulations governing, among other things, programming access, carriage, and ownership limits. Additionally, federal and state antitrust authorities obtained court approval for consent decrees that will regulate certain competitive practices of several of the largest cable operators and programmers and their jointly controlled direct-to-home satellite television venture, Primestar.[2]

Despite the importance of these developments, neither the Cable Act nor the Primestar decrees immunize the multichannel television industry from periodic antitrust scrutiny. Consequently, federal and state antitrust laws remain fully applicable to the competitive practices of all multichannel providers and their program suppliers and distributors. Competition policy for multichannel television will continue to evolve as the FCC refines and enforces its regulations and the antitrust authorities interpret their decrees and pursue case-by-case investigations.

This article will first examine the provisions of the 1992 legislation that regulate the *behavior* of programming vendors, cable operators, and other multichannel distributors. As explained below, one overriding purpose of this extraordinarily detailed conduct regulation is to aid multichannel distributors (especially satellite and microwave competitors of cable systems) in obtaining pro-

---

[1] Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 [hereinafter 1992 Cable Act] amending Title VI, as added by the Cable Communications Policy Act of 1984, Pub. L. No. 98-549, 98 Stat. 2779 [hereinafter 1984 Cable Act], of the Communications Act of 1934, ch. 652, 48 Stat. 1064 [hereinafter Communications Act] codified as amended at 47 U.S.C. §§ 521-59 (1992 & Supp. 1993).

[2] United States v. Primestar Partners, L.P., No. 93 Civ. 3919 (S.D.N.Y. filed June 9, 1993); New York v. Primestar Partners, L.P., No. 93 Civ. 3868 (S.D.N.Y. filed June 9, 1993) and consolidated actions.

gramming at fair prices and on nondiscriminatory terms. The legislative assumption, of course, is that more vigorous competition at the retail distribution level will redound to the benefit of consumers.

Specifically, this article will focus first on two important sections of the Communications Act added in the Cable Act of 1992. Probably the most important of the two provisions is Section 628, the unfairness and programming access provision.[3] That Section grants the FCC broad authority to prohibit "unfair" practices in the licensing of programming by vendors to multichannel distributors. Section 628 requires the FCC, at a minimum, to prohibit certain exclusive distributorships, vendor discrimination among distributors, and undue distributor influence over vendors, whenever there is some significant vertical integration between the vendor and a cable operator.

The other important new provision is Section 616, which authorizes FCC regulation of the behavior of multichannel distributors in negotiating carriage agreements with vendors, including vendors that are not vertically integrated with cable operators.[4] The provision regulates how far distributors may go in negotiating for financial interests and exclusive distribution rights in programming and in favoring vertically integrated vendors.

Next, the article examines what might be called *structural* changes imposed by the 1992 legislation in order to promote competition and diversity. These include: (1) a national ceiling on the number of subscribers any one cable company may serve; (2) a limit on the number of channels a vertically integrated cable operator may devote to its affiliated vendor's programming; (3) amendments to the 1984 legislation requiring cable operators to lease channel capacity to unaffiliated commercial programmers, and (4) restrictions on cross-ownership between cable operators and certain rival distribution technologies.

The last part of the article will examine the federal and state Primestar antitrust decrees. The decrees overlay the 1992 legislation by creating a complex layer of program licensing restrictions and obligations applicable to seven of the largest cable television operators, including several that are also major programming vendors. The intended purpose of these often overlapping Primestar decrees is to encourage the development of more vigorous compe-

---

[3] Communications Act § 628, 47 U.S.C. § 548.

[4] *Id.* § 616.

tition against cable from other terrestrial and celestial multichannel video providers.

II. The Cable Act's Competition Regulations

A key premise of the 1992 Cable Act is that agency and judicial enforcement of communications, antitrust, and other laws has been inadequate to ensure a sufficiently diverse and competitive video marketplace. Congress found that the cable operator has "undue market power . . . as compared to that of consumers and video programmers."[5] It attributed that "power" to the fact that few cable operators face direct local competition from other cable operators or other multichannel distributors.

To protect consumers from cable operator "power," Congress authorized municipal regulation of "basic cable service," installation, and equipment rates as well as FCC regulation of "cable programming service" (i.e., all tiers or packages above "basic"), installation, and equipment rates.[6] Rate regulation is to continue unless and until the cable system faces "effective competition." Evidently on the theory that "effective competition" already exists for cable operators' "per channel" and "per program" offerings, rate regulation of those services is prohibited.

With respect to basic and higher-tier services, "effective competition" is present if: (1) the cable operator has subscriptions from fewer than thirty percent of franchise area households (presumably, but not necessarily, because the remaining households consider over-the-air broadcast and/or other video providers to be adequate alternatives); (2) a municipal government-operated "multichannel" distributor offers video to at least fifty percent of franchise area households; or (3) two or more other "multichannel" distributors each offer to at least fifty percent of the franchise area households programming "comparable" to the cable operators and together have at least fifteen percent of the area households as subscribers.[7]

The definition of "multichannel" distributor includes other cable operators, multichannel multipoint distribution service ("MMDS"), direct broadcast satellite ("DBS") service, and television receive-only ("TVRO") satellite program distributors, and any other person "who makes available for purchase by subscribers or

[5] 1992 Cable Act § 2(a)(2), 47 U.S.C. § 521 note.

[6] 1992 Cable Act § 3, 47 U.S.C. § 543.

[7] Communications Act § 623(l)(1).

customers, multiple channels of video programming."[8] Other provisions of the Act are designed to stimulate "effective competition" from such distributors so as to make rate regulation eventually unnecessary.

The Cable Act further delineates the nature of cable operators' "undue market power" *vis-a-vis* video programmers. By increasing its penetration to sixty-plus percent of all TV households, cable has become "a dominant nationwide video medium."[9] As more cable systems have come under the ownership of large multiple system operators ("MSOs"), the industry supposedly has become "highly concentrated."[10] One "potential" effect of high concentration, according to Congress, is to increase "barriers to entry for new programmers,"[11] including presumably entrants that might supply programming not only to cable operators but also to cable's retail competitors. Meanwhile, partial or complete vertical integration through common ownership of cable operators and their programming suppliers, Congress found, would further raise those entry barriers because "cable operators have the incentive and ability to favor their affiliated programmers" in deciding carriage terms.[12] Additionally, Congress believed that cable operators' vertical integration into programming could raise entry barriers for alternative retail distributors. It said: "Vertically integrated program suppliers also have the incentive and ability to favor their affiliated cable operators over nonaffiliated cable operators and programming distributors using other technologies."[13]

Not only did Congress believe that cable operators might use their "market power" to favor cable-owned programmers over independents, but Congress was especially concerned that cable operators would disadvantage broadcasters in carriage determinations. Congress found that cable operators and commercial broadcasters are "increasingly" horizontal competitors for the sale of advertising time and that proportionately more advertising revenues are being reallocated from broadcast channels to cable operators' other channels as cable increases its television household penetration. This growing competitive rivalry, Congress felt, created "an economic incentive for cable systems to terminate the

[8] *Id.* § 602(12).

[9] 1992 Cable Act § 2(a)(3), 47 U.S.C. § 521 note.

[10] *Id.* § 2(a)(4), 47 U.S.C. § 521 note. The industry is *not* highly concentrated within the terms of the Justice Department/FTC Horizontal Merger Guidelines. *See* 4 Trade Reg. Rep. (CCH) ¶ 13,104 (April 2, 1992).

[11] 1992 Cable Act § 2(a)(4), 47 U.S.C. § 521 note.

[12] *Id.* § 2(a)(5), 47 U.S.C. § 521 note.

[13] *Id.*

retransmission of the broadcast signal, refuse to carry new signals, or reposition a broadcast signal to a disadvantageous channel position."[14] Given the growing competition for advertising revenues and given broadcasters' and viewers' dependence on cable as a more efficient and feasible distribution/reception mechanism than antennas and input selector ("A/B") switches, Congress imposed elaborate mandatory carriage obligations. These "must carry" requirements, which apply to noncommercial and commercial local broadcast signals, are premised on promoting localism and diversity as well as "ensuring that local stations [are] protected from anticompetitive conduct by cable systems."[15]

While the Cable Act's must carry and rate regulatory provisions reflect in substantial part Congress's new video competition policy, this article will focus upon other aspects of that policy and the Primestar decrees. The article will consider access to programming by cable's multichannel competitors, programming networks' acquisition of channel capacity, and structural restrictions such as limits on horizontal concentration and vertical integration.

A. *Program Access*

A cardinal principle of federal and state antitrust law long has been that an individual supplier generally should be left free unilaterally to formulate its policy on whether and how to deal with prospective customers. This is known as the *Colgate* doctrine.[16] The antitrust laws may intervene, however, if the supplier colludes with other suppliers on a common distribution policy.[17] Antitrust law also places limits on the extent to which a supplier may consider the wishes of one or more distributors in determining not to sell on the same (or any) terms to additional groups of distributors.[18] Termination of, or refusal to deal with, one distributor in favor of another has provoked hundreds of antitrust cases.[19] In recent years, most such cases have been resolved in the supplier's favor on the ground that the supplier acted unilaterally in accordance with its own best judgment of what was in its business interest and not solely in response to complaints or pressure from one or

---

[14] *Id.* § 2(a)(15), 47 U.S.C. § 521 note.

[15] *Id.* § 2(a)(17), 47 U.S.C. § 521 note. The must carry rules survived the initial stage of a constitutional challenge. *See* Turner Broadcasting System, Inc. v. FCC, 819 F. Supp. 32 (D.D.C.), *prob. juris. noted*, 114 S. Ct. 38 (1993).

[16] *See* United States v. Colgate & Co., 250 U.S. 300 (1919).

[17] *See, e.g.*, Fashion Originators' Guild v. FTC, 312 U.S. 457 (1941).

[18] *See, e.g.*, United States v. General Motors Corp., 384 U.S. 127 (1966).

[19] *See, e.g.*, 1 ABA ANTITRUST SECTION, ANTITRUST LAW DEVELOPMENTS, 117-19 (3d ed. 1992).

more other distributors. Frequently, the supplier has shown that its actions were designed to encourage the favored distributor to promote the supplier's brand and to avoid other distributors' free-riding on the distributor's investments and promotional efforts. Commonly, the supplier has demonstrated legitimate concerns about inadequacies in the disfavored distributors' finances or operations.

Another important antitrust doctrine is that vertical nonprice restraints (i.e., between supplier and distributor) are not *per se* illegal but must be evaluated under the "rule of reason," with a full consideration of all the relevant facts and the probable economic effects in the relevant product and geographic market(s).[20] This is because vertical nonprice restraints typically stimulate interbrand competition which, in turn, significantly limits or prevents any increase in intrabrand market power.[21] Exclusive dealing is one such vertical nonprice restraint to be judged under the rule of reason.[22] An exclusive distributorship, which necessarily restricts the supplier's ability to deal with additional distributors, is a form of exclusive dealing. The award of an exclusive distributorship, and any corollary termination of (or refusal to deal with) other distributors, is usually found to be lawful under rule-of-reason analysis.[23]

In the cable TV field, Sherman Act litigation against programmers by rejected or disfavored multichannel distributors generally has been unsuccessful.[24] Collusion among cable networks or between a network and a preferred cable operator has been difficult to prove.[25] A programming vendor and a cable MSO under common majority ownership are, in the eyes of the antitrust laws, part of a single enterprise and legally incapable of constituting the two actors necessary for a conspiracy.[26] The same is also true for two programmers controlled by a common parent or for multiple cable operators controlled by the same ultimate entity. Monopolization

---

[20] *See, e.g.*, Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 49-59 (1977).

[21] *See, e.g.*, Business Electronics Corp. v. Sharp Electronics Corp., 485 U.S. 717, 724-25 (1988).

[22] *See, e.g.*, *Continental T.V.*, 433 U.S. at 52-57; Tampa Electric Co. v. Nashville Coal Co., 365 U.S. 320, 334 (1961).

[23] *See, e.g.*, Ralph C. Wilson Indus. v. Chronicle Broadcasting Co., 794 F.2d 1359 (9th Cir. 1986).

[24] *See, e.g.*, TV Communications Network, Inc., v. Turner Network Television, Inc., 964 F.2d 1022 (10th Cir.), *cert. denied*, 113 S. Ct. 601 (1992); Futurevision Cable Systems of Wiggins, Inc. v. Multivision Cable TV Corp., 789 F. Supp. 760 (S.D. Miss. 1992); Nishimura v. Dolan, 599 F. Supp. 484 (E.D.N.Y. 1984).

[25] *See, e.g.*, cases cited *supra* note 24; *but see* Fort Wayne Telsat v. Entertainment & Sports Programming Network, 753 F. Supp. 109 (S.D.N.Y. 1990) (refusing to dismiss attempt to monopolize and monopolization claims).

[26] *See* Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752 (1984).

and attempt-to-monopolize cases against vertically integrated programmers and MSOs have typically foundered on questions of whether the relevant product and geographic market is far larger than a single programmer's particular network.[27] Additionally, the Robinson-Patman amendments to the Clayton Act, which limit suppliers' ability to discriminate among distributors, apply to "commodities" not services; TV programming is considered a "service."[28]

In the late 1980s and early 1990s, cable "overbuilders" (i.e., second-wired operators), MMDS "wireless cable" operators, and private or SMATV (satellite master antenna television) companies complained that private and government antitrust enforcement was too limited, complex, and slow to solve their program access problems. Budding DBS operators, fearful of similar problems, echoed the notion that the antitrust laws were ineffective. Congress responded in 1992 by passing, among other provisions, Section 628 of the amended Cable Act.[29] Section 628's express purposes are to "increas[e] competition and diversity in the multichannel video programming market," "increase the availability" of satellite programming in rural and other unserved areas, and "spur the development of communications technologies."[30] Unlike the Sherman and Clayton Acts' specific focus on promoting competition and economic efficiency, Section 628's policy goals also include media diversity, service universality, and technological development.[31] It is certainly conceivable that Congress believed that, in a given situation, strict economic efficiency might have to be sacrificed somewhat in the short run in order to achieve diversity, universal service, and technological progress. Of course, the contrary might be argued, i.e., that the promotion of competition, not particular competitors as such, is the best way of achieving the other congressional goals.

To accomplish Section 628(a)'s objectives, Section 628(b) sets forth an umbrella legal standard of fairness and nondeception that

---

[27] *See, e.g., TV Communications Network*, 964 F.2d at 1025-27.

[28] *See, e.g.*, Satellite Television & Associated Resources, Inc. v. Continental Cablevision of Virginia, Inc., 714 F.2d 351, 358 (4th Cir. 1983), *cert. denied*, 465 U.S. 1027 (1984); Gall v. Home Box Office, Inc., 1992-2 Trade Cas. (CCH) ¶ 69,949 (S.D.N.Y. 1992); TV Communications Network, Inc. v. ESPN, Inc., 767 F. Supp. 1062, 1075-76 (D. Colo. 1991); Rankin County Cablevision v. Pearl River Valley Water Supply District, 1988-2 Trade Cas. (CCH) ¶ 68,302 (S.D. Miss. 1988); H.R.M., Inc. v. Tele-Communications, Inc., 653 F. Supp. 645, 648 (D. Colo. 1987).

[29] Section 628 was unsuccessfully challenged on First Amendment grounds in Daniels Cablevision, Inc. v. United States, 835 F. Supp. 1 (D.D.C. 1993), appeal docketed, Nos. 93-5290, -5349, -5350, -5351 (D.C. Cir., Dec. 2, 1993).

[30] Communications Act § 628(a).

[31] *Id.*

seems to be borrowed verbatim from Section 5 of the Federal Trade Commission Act ("FTCA").[32] Although FTCA § 5 applies to many businesses besides multichannel programming, it is worth noting that the Act's unfairness language has been judicially interpreted to include practices that are incipient competitive problems not yet rising to the level of actual trade restraints, monopolization, or a reasonably probable tendency toward monopolization or a lessening of competition.[33] Because of Section 628(a)'s goals of competition, diversity, universality, and technological progress, it seems clear that Section 628(b)'s unfairness standard is at least as elastic as the unfairness standard in FTCA § 5. Put another way, Section 628(b) may authorize government intervention to alter "unfair" balances in bargaining power even if those imbalances are not reflective of market, or monopoly, power.

Section 628(b) of the Communications Act makes it unlawful for vertically unintegrated and integrated cable operators, superstation (i.e., satellite-imported broadcast signal) vendors, and "satellite cable programming vendor[s] in which a cable operator has an attributable interest . . . 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 . . . programming to subscribers or consumers."[34]

Section 628(c) obligates the FCC to promulgate regulations in three specific areas of unfairness: (1) exclusive program distributorships; (2) discrimination by program vendors; and (3) undue or improper distributor influence upon program vendors.[35] Other practices may be regulated under the more general Section 628(b) unfairness standard. The FCC has determined that Section 628(c) complaints directed against exclusivity, discrimination, or undue influence need not show that the practice in question unreasonably restrains trade, harms competition generally, or injures specific competitors. The FCC said Congress has already determined that "there was sufficient potential for harm that [those] specified unfair practices should be prohibited."[36] In contrast, under Section

[32] 15 U.S.C. § 45 (1988).

[33] FTC v. Sperry & Hutchinson Co., 405 U.S. 233, 239 (1972).

[34] Communications Act § 628(b).

[35] *Id.* § 628(c).

[36] Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992—Development of Competition and Diversity in Video Programming Distribution and Carriage, *First Report & Order*, 8 F.C.C.R. ¶ 48, at 3359, 3377 (1993) [hereinafter *Program Access First Report & Order*] (petitions for reconsideration pending).

628(b)'s general unfairness standard, even those filed by entities with very small market shares, "will require the complainant to demonstrate that the purpose or effect of the conduct complained of was to 'hinder significantly or to prevent' an MVPD [i.e., a multichannel video programming distributor] from providing programming to subscribers or customers."[37]

1. Exclusive Distributors

The structure and much of the language of Section 628(c), as interpreted by the FCC, is rather hostile to exclusive distributorships. This hostility contrasts rather sharply with prior FCC and Executive Branch statements and with the general trend in communications law to view exclusivity as a common and generally procompetitive business practice.[38] Antitrust opinions also have tended to treat exclusive distributorships as benign devices for promoting interbrand competition through loyal, financially-secure distributors who are not faced with freeriding by other distributors.[39]

Section 628(c) applies only to cable nonbroadcast networks (called "satellite cable programming vendors") and fixed-service (as contrasted with direct broadcast service) satellite superstation carriers (called "satellite broadcast programming vendors").[40] Time Warner's HBO and Viacom's MTV are good examples of the former and United Video's WGN is a good example of the latter. Section 628 does not apply to national broadcast network (ABC, CBS, NBC, PBS, Fox) affiliate signals or to backhaul and other

[37] *Id.* ¶ 49, at 3377-78. American Cable Co. v. TeleCable of Columbus, Inc., FCC File No. CSR-4198-P (third amended complaint filed Feb. 14, 1994) was initiated under Section 628(b) even though a key issue there relates to exclusivity, which is dealt with expressly in subsections (c)(2)(C) & (D), (c)(4), and (h). *American Cable* raises the question whether, under subsection (b), an incumbent cable operator may be held liable for: (1) refusing an overbuilder's request to waive charter affiliate exclusivity rights for satellite cable programming (Sci-Fi Channel and ESPN Sunday Night Football) supplied by vendors in which no cable operator then had an attributable interest, and (2) allegedly targeting homes in the overlap area with three-year discounted subscriber contracts so as to hinder the overbuilder's ability to provide programming.

[38] *See, e.g.*, Amendment of Parts 73 and 76 of the Commission's Rules Relating to Program Exclusivity in the Cable and Broadcast Industries, 3 F.C.C.R. 5299, 5309-10 (1988), *aff'd sub nom.* United Video, Inc. v. FCC, 890 F.2d 1173 (D.C. Cir. 1989); Letter from James F. Rill, Ass't Atty. Gen., and Robert A. Mosbacher, Sec'y of Commerce, to Sen. Ernest F. Hollings (March 13, 1991), *reprinted in Hearing on S. 12 Before Subcomm. on Communications, Senate Comm. on Commerce, Science & Transportation*, 102d Cong., 1st Sess. 456-57 (1991). ("[E]xclusive distribution arrangements are common in the entertainment industry and encourage the risk-taking needed to develop new programming.").

[39] *See, e.g.*, Crane & Shovel Sales Corp. v. Bucyrus-Erie Co., 854 F.2d 802, 808 (6th Cir. 1988).

[40] Communications Act § 628(c).

nonpublic feeds of cable and broadcast networks.[41] It also does not apply to programming that is originated at the cable system or imported by microwave without satellite involvement.[42] Section 628(c) divides its consideration of exclusive contracts into two categories: those "in areas not served by a cable operator [as of the date of enactment, October 5, 1992]" and those in areas served by cable at that time.[43]

a. *Areas Not Served by Cable*

The prohibition on exclusive distribution contracts in geographic areas unserved by cable prior to enactment pertains not only to contracts as such, but also to any "practices, understandings, arrangements, and activities" that prevent a multichannel distributor from obtaining the subject programming, or that result in *de facto* exclusivity.[44] The prohibition applies, however, only to vendors to which at least one cable operator has "an attributable interest." It does not apply to cable-independent vendors. For purposes of this prohibition and other aspects of the 1992 Cable Act, the FCC defines "attributable interest" very inclusively to encompass five percent or greater stock ownership interests (voting or nonvoting and regardless of whether another single shareholder has a majority voting interest), any officer or director position, any general partnership interest, or a limited partnership interest of five percent or more.[45]

The nonserved area exclusivity prohibition applies even if the cable operator that has the attributable interest is not a competitor of the distributor seeking the programming and itself does not have an exclusive arrangement with the programming vendor. On the other hand, the Section 628(c)(2)(C) prohibition does not apply to a programming vendor that is free of cable-attributable interests even if that vendor is owned by a noncable multichannel distributor that is actually benefiting from the exclusive contract and directly competes against the complaining distributor.

The Act's grandfathering of otherwise prohibited exclusive

---

41 *Id.* § 628(c)(2)(B).

42 The complaint in CableAmerica Corp. v. Times Mirror Cable Television, Inc., FCC File No. CSR-4024 (filed Aug. 10, 1993), presents the question whether a cable operator's locally produced sports programming comes under Section 628 simply by being included on a cable channel that also contains programming relayed to the cable headend by satellite.

43 Communications Act § 628(c)(2)(C).

44 *Program Access First Report & Order*, 8 F.C.C.R. ¶ 61, at 3383.

45 *Id.* ¶ 31, at 3370.

contracts entered into on or before June 1, 1990[46] has no application to unserved areas. Additionally, the FCC Section 628(c)(4) power to legitimize certain exclusive contracts as "in the public interest" does not apply to exclusive contracts for areas not served by cable on October 5, 1992.

b. *Cable-Served Areas*

The restrictions on exclusivity in cable-served areas are comparable to the prohibitions in non-cabled areas in one key respect. They apply to satellite cable and broadcast programming vendors in which a cable operator (not necessarily the benefiting or competing cable operator) has an attributable interest. In certain other respects, however, the exclusivity restrictions in cable-served areas are less stringent than those for areas not served by cable when the 1992 Cable Act became law. First, exclusive contracts for satellite *cable* networks entered into on or before June 1, 1990, are grandfathered.[47] This exemption does not apply to extensions or renewals nor to satellite *broadcast* programming.[48] Second, the FCC has authority to approve post-June 1, 1990 exclusive contracts if found to be "in the public interest."[49] Third, the prohibition for cabled areas literally applies only to "exclusive contracts" and does not, at least expressly, invalidate practices that have the effect of *de facto* exclusivity. Fourth, the prohibition sunsets on October 4, 2002 unless the FCC affirmatively finds its continuation necessary.[50]

The FCC has decided that all exclusive contracts covered by the statutory prohibition are illegal absent prior agency approval; the agency will enforce the statute directly as well as through the complaint process.[51] In determining whether an exclusive contract is in the public interest and should be approved, the FCC must consider five factors:

> (A) the effect on competition in local and national multichannel distribution markets;
> (B) the effect on competition from noncable multichannel distribution technologies;
> (C) the effect on capital attraction for new satellite cable programming;

---

46 *See* Communications Act § 628(h).
47 *Id.* § 628(h)(i).
48 *Id.*
49 *Id.* § 628(c)(2)(D).
50 *Id.* § 628(c)(5).
51 *Program Access First Report & Order,* 8 F.C.C.R. ¶ 66, at 3386.

(D) the effect on programming diversity in the multichannel distribution market; and
(E) the contract's duration.[52]

To date, the FCC has refused to rebuttably or conclusively presume that any classes or types of exclusive contracts—including those for infant (or educationally-oriented or minority-controlled) programming services or those containing exclusivity terms of only one to two years' duration—are in the public interest under the five criteria. The FCC acknowledged that "the public interest in exclusivity in the sale of entertainment programming is widely recognized," but concluded that "exclusivity is not favored" when a cable operator has an attributable interest in the programming vendor.[53] The FCC said Congress had decided to "promote the development of new technologies providing facilities-based competition to cable" and "recognized that if 'facilities-based' competition is to develop, access to programming is an essential prerequisite."[54] Consequently, the FCC intends to rule only on a case-by-case basis.[55] The burden of proof is on the proponent of exclusivity who must timely initiate an FCC adjudicative proceeding. Any multichannel distributor that actually or potentially competes against the prospective exclusive distributor will have standing to participate in the FCC proceeding.[56] If a vertically integrated cable programming vendor seeks a general ruling in favor of exclusivity (*e.g.*, for launch of a new service), any multichannel distributor will have standing to participate.[57] So far, the FCC has resisted the establishment of safe harbors for proponents of exclusivity or general criteria that would standardize or abbreviate the analysis of when a complainant has made out a *prima facie* case against an alleged exclusive contract.[58]

---

52 Communications Act § 628(c)(4).

53 *Program Access First Report & Order*, 8 F.C.C.R. ¶ 63, at 3384.

54 *Id.* ¶ 63, at 3384 n.79.

55 *See, e.g.*, petitions for approval of exclusivity, New England Cable News, FCC File No. CSR-4190-P (filed Jan. 12, 1994)(exclusivity allegedly needed to double cable homes served, thus enabling satellite regional news/public affairs channel to break even); Time Warner, FCC File No. CSR-4231-P (refiled March 14, 1994)(Court TV). An SMATV operator complained to the FCC regarding the post-June 1, 1990 but pre-1992 Cable Act exclusivity arrangement in the Time Warner matter with respect to Manhattan, N.Y. where the operator competes with a Time Warner cable subsidiary. *See* Liberty Cable Co. v. Courtroom Television Network, FCC File No. CSR-4188-P (complaint filed December 9, 1993).

56 *Program Access First Report & Order*, 8 F.C.C.R. ¶ 67, at 3386 n.87.

57 *Id.* ¶ 67, at 3386 n.88.

58 *Id.* ¶ 73, at 3389.

c. *Subdistribution Agreements and Time Delay Requirements*

Pursuant to its general authority under Section 628(c)(1) to define unfair acts, practices, and methods of competition, and its express Section 628(c)(2)(C) authority in unserved areas to prohibit practices that fall short of contractual exclusivity, the FCC has considered two practices—subdistribution agreements and time-delay requirements—for possible regulation. The Commission has promulgated a rule to regulate agreements between a cable operator and a satellite broadcast or cable programming vendor in which a cable operator has an attributable interest where the agreement accords the contracting cable operator the initial or exclusive right to subdistribute the programming through other multichannel distributors (*e.g.*, SMATV).[59] Such agreements are flatly prohibited with respect to areas that were unserved by cable on October 5, 1992. In cable-served areas the agreement is permissible only if the cable operator does not require the competing 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."[60] In addition, the agreement must permit the competing distributor to negotiate directly with the vendor if the subdistribution request is denied, and the cable operator must respond to the initial request within fifteen days.[61] It is noteworthy that the limitations on subdistribution agreements in unserved and served areas only apply if *a* cable operator (not necessarily *the* cable operator affected) has an attributable interest in the programming vendor.[62]

The FCC also considered whether to prohibit outright any requirement that a particular distributor not televise certain programming until a specified time after airing by another distributor. Because such time-delay agreements might enable a competing distributor to acquire the programming at a discount, the FCC has allowed such arrangements so long as they are "voluntary" on the part of the distributor agreeing to the delay and are not a "*de facto* substitute for any impermissible exclusivity."[63]

d. *FCC Complaint Proceedings*

Before filing a formal FCC complaint directed against alleged

59 47 C.F.R. § 76.1002(c)(3) (1993).
60 47 C.F.R. §§ 76.1002(c)(3)(ii)-(iii). The cable operator also may not change its multichannel competitor more than the vendor itself could change. *Id.*
61 *Id.*
62 47 C.F.R. §§ 76.1002(c)(3)(i)-(ii).
63 *Id.*; *see also Program Access First Report & Order*, 8 F.C.C.R. ¶ 70, at 3388.

exclusivity, a multichannel distributor must notify the prospective defendant vendor or cable operator with sufficient specificity regarding the problem, and allow ten days for response and a reasonable time thereafter for negotiations.[64] To initiate a formal complaint proceeding regarding exclusivity, the complaining multichannel distributor has the burden of pleading and documenting a *prima facie* case, *i.e.*, that "the complainant can or does serve the area" encompassed by the alleged exclusivity, that the complainant competes with the cable operator customer of the defendant vendor, that a cable operator has an attributable interest in the vendor, that the complainant "has attempted to purchase the relevant programming [from the defendant vendor] and has been refused or unanswered," and that there is reason to believe the vendor's action is due to an impermissible exclusivity agreement.[65] The complaint must be filed within one year after the allegedly impermissible exclusive contract is entered into (or the vendor offers the complainant programming pursuant to allegedly illegal terms) or within one year after the complainant notifies the vendor of its intent to file an FCC complaint for refusing to deal.[66]

The defendant's answer must provide the reasons for the refusal, a copy of the relevant programming contracts, and a certification that all relevant written contracts are submitted and all relevant oral contracts fully described.[67] The defendant has the burden of establishing that it does not have prohibited exclusivity agreements.[68] If the contract(s) submitted by the vendor lacks exclusivity language, the complainant has the burden of demonstrating exclusivity through other evidence.[69] Discovery is allowed only if the FCC staff determines it is necessary.[70] The FCC may dismiss the complaint or order relief, including requiring that the programming be made available.[71] The FCC believes it can impose a fine, but not award damages.[72]

2. Discrimination Among Distributors

Frequently small cable operators, overbuilders, SMATV and MMDS firms, and satellite direct-to-home providers have com-

[64] 47 C.F.R. § 76.1003(a).
[65] 47 C.F.R. §§ 76.1003(C)(1)(i)-(viii), (xi), (xiii).
[66] 47 C.F.R. § 76.1003(r).
[67] 47 C.F.R. § 76.1003(d).
[68] *Program Access First Report & Order*, 8 F.C.C.R. ¶ 77, at 3390.
[69] *Id.* ¶ 80, at 3391-92.
[70] 47 C.F.R. § 76.1003(g).
[71] *Program Access First Report & Order*, 8 F.C.C.R. ¶ 81, at 3392.
[72] *Id.*

plained that programmers refuse to deal with them except on terms that are less favorable than the terms offered to large MSOs. In response, Congress enacted Section 628(c)(2)(B) of the Communications Act,[73] requiring the FCC to issue regulations prohibiting discrimination by any satellite cable programming vendor in which a cable operator has an attributable interest and by any satellite broadcast programming vendor. Satellite cable programming vendors that are not vertically integrated with any cable operator are outside the reach of the anti-discrimination provision just as they are untouched by Section 628(b)'s general unfairness prohibition.[74] Similarly, the Section does not reach discrimination involving programming that is not satellite-delivered to or by the distributor.

Unlike Sections 628(c)(2)(C) and (D), which deal with exclusivity arrangements between a vendor and a cable operator, Section 628(c)(2)(B) on its face applies as well to the differential treatment of two multichannel distributors neither of which is a cable operator. Section 628(c)(2)(B) applies to discrimination not only in "prices" but also in "terms, and conditions of sale or delivery."[75] The FCC has said that this non-price discrimination includes unreasonable refusals to negotiate, or to sell, or to sell upon certain terms available to other distributors, *e.g.*, on an *a la carte* basis.[76]

a. *Competing and Similarly Situated Distributors*

In its implementing regulations, the FCC added several glosses to the statutory language. First, to be unlawful, the discrimination must be between competing distributors. The FCC requires some overlap in the actual or proposed service area of the complainant and that of the allegedly favored distributor.[77] The FCC expects that the relevant market will be local, regional, or national depending on how the complaining distributor purchases and distributes programming. The FCC intends nationally-oriented distributors, such as are in the DBS and HSD (*i.e.*, C-band TVRO home satellite dish) field, to make complaints based on comparisons with the terms offered other such national competitors. Similarly, the FCC

73 Communications Act § 628(c)(2)(B).

74 See Walt Disney Co., FCC File No. CSR-4197-P (petition filed December 16, 1993) requesting a waiver of 47 C.F.R. §§ 76.1000-.1003 so that the Disney Channel is treated as not vertically integrated despite Disney subsidiary's distribution of the channel to hotels at Disney World.

75 Communications Act § 628(c)(2)(B).

76 *Program Access First Report & Order*, 8 F.C.C.R. ¶ 116, at 3412-13.

77 *Id.* ¶ 96, at 3400-01.

expects locally-oriented distributors such as MMDS and SMATV to make comparisons of the terms offered other local entities.

The second FCC statutory gloss is that the comparison must be between "similarly situated" distributors.[78] A distributor is "'similarly situated' with respect to the complainant if it operates within a proximate geographic region, has roughly the same number of subscribers, and purchases a similar service, while also using the same distribution technology."[79] The FCC will also consider the date of the contract (*i.e.*, whether the allegedly more favorable contract was made years earlier when the service was a fledgling), whether the "specific [different] terms related to distinct attributes of the purchasers," and whether "secondary transactions [are] involved in the programming sale itself (*e.g.*, the distributor's agreement to undertake special promotional efforts)."[80]

b. *Factors Justifying Differential Treatment*

Sections 628(c)(2)(B)(i)-(iv) list a variety of factors that the FCC must consider in determining whether or not a particular form of differential treatment of distributors is illegally discriminatory.

(1) *Creditworthiness, Offering of Service, Character & Technical Quality*

Section 628(c)(2)(B)(i) specifically immunizes "reasonable requirements for creditworthiness, offering of service, and financial stability and standards regarding character and technical quality" but leaves to the FCC the further definition of these concepts and the evaluation of reasonableness. The FCC has ruled that problems in the creditworthiness of a specific distributor may justify a higher price so long as the vendor's consideration of this factor is "technology neutral," *i.e.*, based on an analysis of each individual distributor's situation and not some general assumption such as that MMDS firms are always less creditworthy than cable operators.[81] But if the specific distributor's deficiencies in creditworthiness are "already taken into account through different [contract] terms or conditions such as special credit requirements or payment guarantees," then the FCC will allow the vendor to use creditworthiness as a justification for a discriminatorily higher

78 47 C.F.R. § 76.1003(d)(6)(iii).
79 *Id.*
80 *Program Access First Report & Order*, 8 F.C.C.R. ¶ 127, at 3417-18 n.224.
81 *Id.* ¶ 109, at 3408-09.

price.[82]

The FCC interprets Section 628(c)(2)(B)(i)'s phrase "offering of service" as referring to differential treatment justified by "differences . . . in the actual service exchanged between the vendor and the distributor".[83] Thus, the FCC will permit price differences reasonably attributable to the favored distributor's offering the vendor, among other things, greater penetration (*e.g.*, carriage on all its systems or transmission to all of the system's subscribers), reduced retail pricing of a premium service to stimulate subscriptions, carriage in a key market (*e.g.*, Manhattan or Los Angeles), enhanced promotion and advertising, preferable channel position, purchase in a package or *a la carte*, prepayment, longer contract duration, long time carriage especially if dating from the program network's launch, and meeting competition among vendors for distributor's allegiance.[84] But these, and additional, potentially legitimate "offering of service" considerations will justify differential treatment of distributors only if "standardly applied in a technology neutral fashion."[85] On the other hand, a complaining distributor's ability to offer certain "functions [that] duplicate aspects of a vendor's service" will not necessarily be relevant in determining whether that distributor has been unfairly treated by the vendor.[86] In the case of a regional programming service vendor that offers increasingly larger discounts to distributors the further they are in concentric circles from the geographic focus of the programming (*e.g.*, a baseball stadium), the FCC has said such a practice would seem legitimate if it is technology neutral and consistently applied.[87]

"[S]tandards regarding character and technical"[88] quality will also justify differential treatment but, once again, only if based on the attributes of the specific distributors being compared and not on inapposite generalizations about the respective technologies.

(2) Cost Differences

Section 628(c)(2)(B)(ii) allows the vendor "to take into account actual and reasonable differences in the cost of creation, sale, delivery, or transmission" of programming in establishing dif-

---

[82] *Id.* n.186; *see also* 47 C.F.R. § 76.1002(b)(1) n.1.

[83] 47 C.F.R. § 76.1002(b)(1) n.2.

[84] *Program Access First Report & Order*, 8 F.C.C.R. ¶¶ 110-11, at 3409-10; *see also* 47 C.F.R. § 76.1002(B)(1) n.2.

[85] *Program Access First Report & Order*, 8 F.C.C.R. ¶ 111, at 3409-10.

[86] *Id.* ¶ 110, at 3409.

[87] *Id.* ¶ 100, at 3403 n.165.

[88] *Id.* ¶ 109, at 3408.

ferent terms for different distributors.[89] The FCC has ruled that the relevant cost differences must be those incurred by the vendor, not the distributor.[90] Consequently a vendor may be able to charge a cable operator less than an HSD firm where delivery to the latter causes the vendor to incur additional costs for advertising, copyright, customer service, authorization center, and signal security. But the vendor generally may not justify favoring a cable operator over an HSD firm with the excuse that the cable operator necessarily invests more in plant and equipment for each subscriber than does the HSD firm.[91] If, however, the vendor can show that the cable operator actually passes on the benefits of a discounted price to consumers, for instance, in the form of equipment investment while the HSD firm would simply retain the programming cost savings as pure profit, the FCC may well consider that a legitimate reason for the vendor to refuse the HSD firm a discount.[92]

(3) Economies of Scale and Other Volume-Related Factors

Section 628(b)(2)(B)(iii) permits a vendor to justify differential treatment of distributors based on "economies of scale, cost savings, or other direct and legitimate economic benefits reasonably attributable to the number of subscribers served by the distributor."[93] The FCC interprets this language as not requiring that volume discounts be based solely on transactional economies experienced by the vendor.[94] In addition, such discounts may reflect "other direct and legitimate economic benefits."[95] One example would be where an advertiser-supported programming network (*e.g.*, CNN) is better able to generate advertising revenues because of the large subscriber base supplied by the distributor.[96] The FCC does require that volume-related justifications be "made available to similarly situated distributors on a technology-neutral basis."[97] Moreover, the discounts must be "reasonably related to direct and legitimate economic benefits reasonably attributable to the number of subscribers served."[98] It remains to be seen what the

---

89 Communications Act § 628(c)(2)(B)(ii).

90 *Program Access First Report & Order*, 8 F.C.C.R. ¶¶ 106-07, at 3406-07.

91 *Id.* ¶ 107, at 3406-07.

92 *Id.*; *see also* 47 C.F.R. § 76.1002(b)(2) note.

93 Communications Act § 628(b)(2)(B)(iii).

94 *Program Access First Report & Order*, 8 F.C.C.R. ¶ 108, at 3407-08.

95 47 C.F.R. § 76.1002(b)(3) note.

96 *Program Access First Report & Order*, 8 F.C.C.R. ¶ 108, at 3407-08.

97 47 C.F.R. § 76.1002(b)(3) note.

98 *Id.*

FCC will do about any discounts that are received by a distributor in part simply as a reflection of the distributor's bargaining power relative to the programming vendor.

(4) Permitted Exclusive Contracts

Section 628(c)(2)(B)(iv) also indicates that the anti-discrimination provision should not prohibit the grant of exclusivity to a distributor in an area served by cable prior to October 5, 1992, provided that the exclusivity contract is a pre-June 1, 1990 grandfathered one[99] or has been approved by the FCC as in the public interest.[100]

c. *De Minimis Differentials*

The FCC has determined that if the alleged price differential is "equal to or less then five cents per subscriber or five percent, whichever is larger," it will be considered *de minimis*; the vendor will not have to justify the magnitude of the differential with documentary evidence.[101] But the vendor will have to provide sufficient reasons, based upon the statutory factors, to justify the price disparity.[102] In such *de minimis* situations, the complainant has a higher burden in establishing a *prima facie* case. The FCC insists that this special pleading approach to *de minimis* cases "does not establish any form of *per se* zone of reasonableness in pricing,"[103] but it remains to be seen what the FCC staff will do if presented with any five cents/five percent differential cases. The FCC has so far declined requests that it create a zone of rebuttably or irrebuttably reasonable differentials. Nor has the FCC agreed with the notion that the vertically integrated vendor's differential is necessarily reasonable if it is no greater than differentials employed by independent vendors not covered by Section 628.[104]

d. *Buying Groups*

The benefits of Section 628(c)(2)(B) are intended to apply not only to multichannel distributors, but to "their agents or buying groups," such as a small cable operators' purchasing cooperative and a rural utilities' umbrella organization. The FCC recognized that such groups are entitled to protection against non-

---

[99] *See* Communications Act § 628(h).
[100] *See id.* § 628(c)(4).
[101] 47 C.F.R. §§ 76.1003(d)(6)(i)-(ii).
[102] *Program Access First Report & Order*, 8 F.C.C.R. ¶ 133, at 3420.
[103] *Id.*
[104] *Id.* ¶ 104, at 3405.

discrimination.[105] To be eligible, however, the FCC requires that the buying group seeking unitary treatment from a programming vendor establish that the group members will be jointly and severally liable.[106] In addition, group members must agree to uniform billing and standardized contract provisions, but they do not necessarily have to agree on a joint marketing strategy.[107]

e. *Existing Contracts*

The FCC will apply Section 628(c)(2)(B) to contracts in existence at the enactment of the 1992 law, but it has granted vendors a grace period of 120 days after the effective date of its implementing regulations to bring prior contracts into compliance.[108] The statute and rules are to be applied prospectively after the end of the grace period, November 15, 1993; there will be no retroactive application in the sense of punishing past discrimination.[109]

f. *FCC Complaint Proceedings*

As with exclusivity complaints, administrative attacks on alleged discriminatory practices are subject to a one-year statute of limitations.[110] The complainant must file at the FCC within one year either: (i) from the entry of the contract which illegally benefits a competing distributor; (ii) from the vendor's offer to the complainant of allegedly discriminatory terms; or (iii) from the date the complainant notifies the vendor of its intention to complain to the FCC about a denied or unacknowledged request to negotiate a programming contract or revise an existing discriminatory one.[111] The complainant must first notify the vendor in sufficient detail regarding the discrimination problem and allow ten days for a response and an additional reasonable time for negotiations, after which the complaint may be filed at the FCC.[112]

The complainant may seek pre-complaint discovery from the vendor by certified letter; if the request is denied or unanswered, the complaint may rely upon information and belief regarding the allegedly preferable rates available to another distributor.[113] The complainant has the burden of establishing a *prima facie* case, *i.e.*,

---

105 *Id.* ¶ 114, at 3411-12.
106 *Id.* ¶ 115, at 3412.
107 *Id.*
108 *Id.* ¶¶ 120-22, at 3414-15; *see also* 47 C.F.R. § 76.1003(a).
109 *See* 47 C.F.R. § 76.1002(f).
110 47 C.F.R. § 76.1003(r).
111 *Id.*
112 *Program Access First Report & Order*, 8 F.C.C.R. ¶ 124, at 3416 n.221.
113 *Id.* ¶ 124, at 3416.

that the vendor meets the attribution standard, that the complainant actually or potentially competes nationally or locally in an overlapping service area with the preferred distributor, and that the complainant has been denied the terms accorded the other distributor.[114] The vendor's answer must provide justification for any differential and, unless *de minimis*, for the magnitude of any price differential.[115] The vendor should submit its standard rate card and discount schedule, if applicable, and thereby avoid having to submit contracts for comparisons. The vendor may also argue that the complainant is not similarly situated with the other distributor in question and may then submit for comparison a nondiscriminatory contract with a distributor that is a proper comparison.[116] If the complaint relates to nonprice discrimination, *e.g.*, refusal to deal at all or except on discriminatory terms, the answer may claim that the failure to sell is based on a "legitimate impasse in negotiations" and not vendor adherence to a discriminatory price or condition of sale.[117] After complainant's reply and any staff decision on discovery requests, the matter will be decided by the staff or referred to an administrative law judge for hearing and decision, and then be subject to appeal to the Commissioners and the appellate courts.[118] The FCC may order licensing on specific nondiscriminatory terms and impose a fine,[119] but it will not award damages.[120]

3. Undue or Improper Influence of Vendors

Section 628(c)(2)(A) of the 1992 Act authorizes the FCC to issue regulations to prevent cable operators from "unduly or improperly influencing" satellite cable and broadcast programming vendors in their decisions as to whether and on what terms to sell to "unaffiliated" multichannel distributors.[121] The provision applies only if the cable operator has an attributable interest in the vendor influenced. The FCC has promulgated a general prohibition that tracks the statutory language[122] but has not provided any additional substantive guidelines. Complaints of violations are sub-

---

[114] *Id.* ¶¶ 125-26, at 3416-17; *see also* 47 C.F.R. § 76.1003(c).
[115] 47 C.F.R. § 76.1003(d).
[116] 47 C.F.R. § 76.1003(d)(iii).
[117] *Program Access First Report & Order*, 8 F.C.C.R. ¶ 140, at 3422.
[118] *Id.* ¶¶ 137-38, at 3421.
[119] *See* Communications Act § 628(e).
[120] *See Program Access First Report & Order*, 8 F.C.C.R. ¶ 134, at 3420 referring to ¶ 81, at 3392. *Compare* comments requesting that FCC award damages. *Id.*, app. c, § IV(D).
[121] 1992 Cable Act § 628(c)(2)(A).
[122] 47 C.F.R. § 76.1002(a).

ject to the same general procedures as exclusivity and discrimination complaints, *viz.*: pre-complaint notice/negotiation, one-year limitations statute, burden of proof to set forth *prima facie* case, pleadings and discovery narrowly restricted, and so forth. Presumably the complainant will also have to show that it competes with the defendant cable operator[123] and that, as an unaffiliated distributor, it has been adversely affected by what the cable operator influenced the vendor to do.

It remains to be seen whether this prohibition will prove to be surplusage in light of the more detailed exclusivity and discrimination regulations. Absent a whistle blower from inside the cable operator or the vendor, it will be difficult for a competing distributor to gather sufficient evidence for a *prima facie* case against the cable operator even if there is a case against the vendor on exclusivity or discrimination grounds. Further handicapping any potential complainant is the FCC's failure, so far, to provide guidance as to what type or amount of influence would be considered "undue" or "improper." In an analogous area, antitrust courts are reluctant to discourage the free flow of communications between supplier and distributor, including even complaints about other distributors.[124] The antitrust laws seldom penalize distributor-supplier communications about distribution policies, practices, and participants unless there is collusion among the distributors to coerce the supplier. Moreover, in the Section 628(c)(2)(A) context where the putative defendant cable operator has an attributable interest (such as majority or greater ownership) in the vendor, it might seem entirely appropriate for that operator to have a voice in the vendor's general wholesale pricing and distribution policies, if not the designation of particular distributors.

B. *Carriage Agreements: Financial Agreements: Financial Interests, Coercion/Retaliation, Discrimination*

As we have seen, Section 628 regulates unfair (or deceptive), exclusive, and discriminatory arrangements involving, and undue influence by cable operators of, vertically-integrated programming vendors. The Section's objective is to provide program access for multichannel distributors competing against cable systems or operating in uncabled areas. To complement that effort, Section 616[125] of the new law seeks to promote competition among multichannel

[123] *See* 47 C.F.R. § 76.1003(c)(1)(viii).
[124] *See, e.g.*, Monsanto Co. v. Spray-Rite Service Corp., 465 U.S. 752, 762-64 (1984).
[125] Communications Act § 616, 47 U.S.C. § 536.

distributors in another way: by preserving the freedom of all program producers and vendors (including particularly those independent of cable ownership) to sell programming to all types of multichannel distributors. After seeking comment,[126] the FCC issued implementing regulations which basically parrot the statute[127] and leave full development of Section 616's meaning to case-by-case adjudication.

Section 616 applies to "video programming vendors," which are defined in subsection (b) to include not only satellite cable and broadcast programming vendors, but also any "person engaged in the production, creation, or wholesale distribution of video programming for sale."[128] Thus, the provision encompasses programming delivered to a multichannel distributor by wire, terrestrial radio or microwave, or cassette, as well as satellite. Further evidencing Congress' broad intent, Section 616 governs the carriage-related contracting activities of all types of multichannel distributors, not just cable operators or distributors that have an attributable interest in the particular vendor.[129]

Section 616(a)(1) obligates the FCC to issue regulations that prevent any multichannel distributor "from requiring a *financial interest* in a program service as a *condition* for carriage" by the distributor.[130] Congress believed that cable operators, as the most important outlet for new networks, have potentially enormous leverage over programmers. In the past, some cable operators exercising that leverage may have insisted on ownership interests in order to induce programmers not to sell potentially popular programming to the cable operators' competitors. Congress also was aware of testimony (advanced by executives of cable-owned networks such as Cable News Network, The Discovery Channel, and Black Entertainment Television) that cable MSOs' investments had been crucial to many networks' survival. Not wanting to discourage the emergence of risky new networks that contribute to program-

---

126 Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992—Development of Competition and Diversity in Video Programming Distribution and Carriage, *Notice of Proposed Rulemaking*, 8 F.C.C.R. ¶¶ 54-58, at 194, 205-06 (1992) [hereinafter *Program Access NPRM*].

127 Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992—Development of Competition and Diversity in Video Programming Distribution and Carriage, MM Dkt. No. 92-265. *Second Report & Order*, FCC 93-457 (rel. Oct. 22, 1993), *reprinted in* 73 Rad. Reg.2d. (P&F) 1350. [hereinafter *Carriage Agreement R&O*]. The regulations appear at 47 C.F.R. §§ 76.1300-.1302.

128 Communications Act § 616(b); *see also* 47 C.F.R. § 76.1300(d).

129 Included in the definition of multichannel distributors are certain "buying groups" and "agents." *See* 47 C.F.R. § 76.1300(b).

130 Communications Act § 616(a)(1) (emphasis added).

ming diversity, Congress wrote Section 616(a)(1) in such a way as to permit multichannel distributors to make investments that are affirmatively desired by the program vendor and to forbid such investments only when they are "*requir[ed]* [by the distributor] . . . as a *condition* for carriage."[131]

In enforcing Section 616(a)(1), the FCC will have to distinguish situations where a multichannel distributor merely negotiates for (or suggests the desirability of) an investment but never actually refuses carriage on the ground that the network vendor rejected the proffered investment. Certainly, if the network vendor introduces the subject of investment by the distributor, it should be quite difficult thereafter to prove a violation of Section 616(a)(1); but the contrary is not necessarily so. Because many multichannel distributors (including MSOs) lack the size and geographic reach to have coercive market power *vis-a-vis* all or some network vendors, the FCC eventually may develop presumptions or exemptions to reduce the reach of its implementing regulations. The term "financial interest" will also require definition to determine if it applies to nonequity or conditional interests or to interests under a certain monetary amount.[132] In any event, it is most unlikely that the FCC would use this Section to force divestiture of financial connections between distributors and programmers that predate the Act even if proof could be offered of impermissible "condition[ing]."

Section 616(a)(2) mandates FCC regulations that prohibit any multichannel distributor "from *coercing* a video programming vendor to provide, and from *retaliating* against such a vendor for failing to provide, exclusive rights against other multichannel video programming distributors as a condition of carriage."[133] Distinguishing "coercing" and "retaliating" (as well as Section 616(a)(1) "condition[ing]") from mere hard bargaining may be a difficult task for the FCC. Presumably, one form of impermissible "retaliating" might be the deleting or repositioning of a network; but the FCC will need to develop a methodology for not unduly intruding on the distributor's legitimate business discretion. The FCC has said that an actual expressed threat is not a prerequisite for a finding of impermissible coercion or retaliation (or improper conditioning) and that the statute reaches "implicit" behavior.[134] Moreover, "ultimatums, intimidation, . . . the exertion of pressure

---

131 *Id.* (emphasis added).
132 "Financial interest" remains undefined in 47 C.F.R. § 76.1301(a).
133 Communications Act § 616(a)(2) (emphasis added).
134 *Carriage Agreement R&O* ¶ 18.

beyond good faith negotiations, or behavior that is tantamount to an unreasonable refusal to deal," are examples of what might well violate the statute.[135] Beyond that, the FCC has declined to provide specific guidelines, saying instead that "the unique aspects of individual negotiations will require a more direct examination and evaluation of the facts pertaining to each complaint situation."[136] If complaints are filed, presumably the FCC will have to weigh factors such as the parties' relative bargaining power, past patterns of conduct between them, and whether either party is insisting upon or refusing to accept a contractual term that is fairly standard in the industry.[137]

Section 616(a)(3) mandates FCC regulations "to prevent a multichannel video programming distributor from engaging in conduct the effect of which is to unreasonably restrain the ability of an unaffiliated video programming vendor to compete fairly by *discriminating* in video programming distribution *on the basis of affiliation or nonaffiliation of vendors* in the selection, terms, or conditions for carriage of video programming provided by such vendors."[138] This convoluted provision seems designed to prevent distributors from discriminating in their carriage decisions against vendors in which the distributors lack an attributable interest.[139] Thus, for example, a cable operator would be barred from relegating an independent cable network (*e.g.*, ESPN or The Disney Channel) to a disadvantageous channel or tier position simply because the network is not owned by it or other cable operators. Impermissible discrimination might also take the form of imposing on the unaffiliated vendor more onerous technical quality standards, less attractive payment terms, and the like, or refusing to promote (or to assist the programmer in promoting) the service.

Proof that the multichannel distributor acted "on the basis of

---

[135] *Id.* ¶ 17.

[136] *Id.*

[137] The FCC may need to decide whether any pre-June 2, 1990 exclusive satellite cable network distribution contracts grandfathered by Section 628(h)(1) might nonetheless be subject to FCC invalidation under Section 616(a)(2). Section 628(h)(1) says only that "[n]othing in this section" shall affect the referenced exclusive rights; it does not mention Section 616. In considering whether to approve any other cabled area exclusive contract as "in the public interest" under Section 628(c)(4), presumably the FCC would entertain evidence as to whether the exclusive rights were "coerc[ed]" within the meaning of Section 616(a)(2).

[138] Communications Act § 616(a)(3) (emphasis added).

[139] Under FCC rules, the vendor is affiliated with a multichannel distributor if it holds an officership, directorship, general partnership interest, five percent limited partnership interest, or five percent stock interest (whether voting or not). *See* 47 C.F.R. § 76.1300(a). Ownership by a single majority shareholder or insulation of limited partners will not eliminate the affiliation for Section 616 purposes. *Id.*

[the] affiliation or nonaffiliation of [the] vendor[ ]" rather than for some legitimate reason such as the nature of the programming, price, etc., may be very difficult.[140] Through case-by-case adjudication, the FCC will eventually explicate the Section's crucial clause: "the effect of which is to unreasonably restrain the ability of . . . [the] vendor to compete fairly."[141] Clearly, an unreasonable "effect" must be established for there to be a violation. Moreover, to be unlawful, the discriminatory action must be so "unreasonabl[e]" that the vendor cannot "fairly" compete. In explaining the "effect" issue in a given case, the FCC presumably will want to consider how important carriage by the particular distributor is, measured by the nature of the network, the size and geographic reach of the distributor, the availability of an adequate alternative distributor in that distributor's territory, the carriage decisions of distributors in other territories, and other relevant factors. Given Section 628(c)(4)'s recognition that some exclusive distributorships may be in the public interest, it is also conceivable that exclusive carriage by a distributor of only one of several competing, similar-format networks may be reasonable and consistent with fair competition among networks for distribution outlets.[142] To minimize any risk of liability under Section 616(a)(3), the cable operator would be well advised in its carriage decisions to avoid any reference to a network's "affiliation" status *vel non* and to eschew the use of disprovable pretexts for not carrying a network.

Section 616 contemplates FCC enforcement through "expedited review of any complaints" and imposition of "appropriate penalties and remedies for violations . . . , including carriage" and "penalties . . . [for] filing a frivolous complaint."[143] Awards of damages are not mentioned. Additionally, state and federal antitrust laws (which would afford damage remedies) remain fully applicable to the covered conduct.

The FCC's adjudicatory complaint process under Section 616 contemplates pleadings limited to complaint, answer, and reply (no motions normally), discovery only if authorized by the staff, and staff-designated hearings before administrative law judges on factual disputes.[144] The FCC anticipates that "most" Section 616 complaints will require hearings to evaluate contested facts, espe-

---

[140] Communications Act § 616(a)(3).

[141] *Id.*

[142] Even the broadcast "must carry" provisions of the 1992 Cable Act indicate that excessive duplication may be an inappropriate use of channel space. *See* Communications Act § 614(b)(5), 47 U.S.C. § 534(b)(5).

[143] Communications Act §§ 616(a)(4)-(6).

[144] *See* 47 C.F.R. § 76.1302.

cially alleged "coercive" practices "related to the parties' specific negotiations."[145] Complaints must be filed by vendors within one year of either: (1) the vendor's entry into the allegedly unlawful contract, (2) the multichannel distributor's offer of carriage on allegedly improper terms, or (3) the vendor's notice to the distributor of its intention to file a complaint regarding a refused or unacknowledged carriage request.[146] The complaint must also specify the remedy sought, *e.g.*, forfeiture, cease and desist order, mandatory carriage, revised carriage terms, etc.[147] The FCC believes it has authority to reform carriage agreements by deleting illegally obtained terms and imposing detailed carriage terms.[148]

C. *Structural Limitations*

In addition to the conduct regulation imposed by Sections 616 and 628 of the amended Cable Act, the 1992 law also authorizes certain structural limitations designed to promote competition and diversity. The limitations fall into four principal categories: (1) a ceiling on MSO horizontal growth within the cable medium as measured by total number of subscribers; (2) a limit on the number of channels a vertically-integrated cable operator may devote to the programming of services in which it has an attributable interest; (3) further expansion of the cable operator's 1984 Act obligation to lease access channels for third parties' commercial programming; and (4) restrictions on cross-ownership between cable operators, on the one hand, and potentially competitive MMDS and SMATV systems, on the other.

1. Subscriber Limits

Section 613(f)(1)(A) of the Communications Act, as added by Section 11(c) of the 1992 Act, requires the FCC to prescribe "reasonable limits on the number of cable subscribers a person is authorized to reach" through the cable systems in which the person has "an attributable interest."[149] The overall purpose of such national horizontal limits is "to enhance effective competition."[150]

---

145 *Carriage Agreement R&O* ¶ 24.

146 47 C.F.R. § 76.1302(r). The complaining vendor, in any case, must notify the distributor of the specific nature of the contemplated complaint and allow the distributor at least ten days' response time before formally filing the complaint. *Id.* § 76.1302(a). Frivolous complaints are subject to sanction. *Id.* § 76.1302(g).

147 *Carriage Agreement R&O* ¶¶ 26-29.

148 *Id.* ¶ 26 n.47. If a staff or ALJ order of carriage would necessitate deletion of other programming, the order will be automatically stayed pending appeal to the commissioners. *Id.* ¶ 34.

149 Communications Act §§ 613(f)(1)(A)-(B), 47 U.S.C. §§ 533(f)(1)(A)-(B).

150 *Id.* § 613(f)(1).

Section 613(f)(2) further provides that the "public interest objectives" of the FCC regulations shall be to: (A) ensure that the flow of video programming from programmer to consumer is not "unfairly impeded" due to "the size" of any individual MSO or to "joint actions by a group of operators of sufficient size;" (B) "ensure that cable operators . . . do not favor" affiliated programmers in their carriage decisions or "unreasonably restrict the flow" of programming from such programmers to "other video distributors;" (C) take into account the cable industry's "market structure, ownership patterns, and other relationships" including "the nature and market power of the local franchise, . . . joint ownership of . . . systems and . . . programmers, and . . . various types of non-equity controlling interests;" (D) "account for . . . efficiencies and other benefits that might be gained through increased ownership or control;" (E) "reflect the dynamic nature of the communications marketplace;" (F) refrain from "bar[ring] cable operators from serving previously unserved rural areas;" and (G) "not . . . impair the development of diverse and high quality video programming."[151] Plainly, there is potential tension between some of these objectives (e.g., A and B) and others (e.g., D, F, and G).

The FCC initially proposed a national subscriber limit of twenty-five percent of homes passed,[152] but more recently adopted a thirty-percent ceiling on attributable interests[153]—a level that the largest MSO (TCI) has not attained. To encourage minority ownership, the ceiling goes as high as thirty-five percent provided that the additional systems are minority-controlled.[154] The ceiling is based on homes passed, not subscribers served, so as to most accurately reflect operators' potential "reach." The Commission, however, declined to subtract from the total of homes passed, those homes located in areas where the operator faces effective competition.[155] Nor did the FCC accept the invitation to add in unpassed homes in the franchise area. The agency also refused to prorate

151 *Id.* § 613(f)(2)(A)-(G).

152 Implementation of Sections 11 and 13 of the Cable Television Consumer Protection and Competition Act of 1992—Horizontal and Vertical Ownership Limits, Cross-Ownership Limitations, *[First] Report & Order and Further Notice of Proposed Rule Making*, 8 F.C.C.R. ¶¶ 132-66, at 6828, 6847-53 (1993) [hereinafter *Subscriber/Channel Occupancy Limits NPRM*].

153 47 C.F.R. § 76.503(a), adopted in Implementation of Sections 11 and 13 of the Cable Television Consumer Protection and Competition Act of 1992—Horizontal and Vertical Ownership Limits, *Second Report & Order*, 8 F.C.C.R. ¶¶ 9-40, at 8565 (1993) [hereinafter *Subscriber/Channel Occupancy Limits R&O*].

154 47 C.F.R. § 76.503(b). The FCC believed that the increased diversity resulting from minority ownership outweighed any marginal adverse impact on competition. *Subscriber/Channel Occupancy Limits R&O*, 8 F.C.C.R. ¶ 28, at 8565.

155 *Id.* ¶ 29.

the count of homes passed in accordance with the relative percentage size of the attributable interest in each particular cable system.

The thirty-percent limit was selected because it required no divestitures, left some room for additional investment by the largest MSOs, and was well under the level that an MSO would need in order to impede single-handedly a new programming service, even one supported by advertising.[156] The FCC sought to balance "the possibility that large horizontally integrated MSOs might have the ability to preclude the launch of new video programming services" against "the benefits and efficiencies that result from greater horizontal concentration."[157] The Commission adopted the same attribution criteria that its broadcast rules employ.[158] This means that a minority interest in a cable system will not count unless it reflects at least five percent voting ownership interest and there is no single majority shareholder. Limited partnership interests may be insulated so that they do not count either. Essentially, the purpose of such an attribution standard is to include only those entities where there is influence or control over management and programming decisions.

The FCC concluded that a regional subscriber ceiling (in addition to a national cap) was inadvisable, although within the agency's power. The agency determined that any reduction in the potential for anticompetitive behavior in the regional or local programming and advertising sales markets that might have been accomplished by a regional ceiling would be outweighed by the likely sacrifice of regional efficiencies in fiber optic deployment, programming development, and customer service. The FCC also was concerned that a regional ceiling might discourage cable service to unserved areas and impede the development of cable competition in local telephony.[159]

The FCC agreed to entertain waivers, determined that compliance should be through federal rather than local certification, and promised to periodically review the ceiling.[160] In deference to a district court holding that Section 613(f)(1)(A)'s imposition of a

---

[156] *Id.* ¶¶ 25-27.

[157] *Id.* ¶ 25. The FCC said that the goal of promoting diversity in programming sources justified using a lower subscriber ceiling than might be required under strict antitrust concentration analysis. *Id.* ¶ 11.

[158] *Id.* ¶¶ 34-35; *see* 47 C.F.R. § 76.503 n.1(c).

[159] *Subscriber/Channel Occupancy Limits R&O*, 8 F.C.C.R. ¶¶ 16-17, at 8565.

[160] *Id.* ¶¶ 39-40. Any MSO holding attributable interests in cable systems reaching 20 percent of homes passed nationwide must, prior to acquiring an additional system, certify to the FCC that the 30-35 percent ceiling will not be exceeded as a result of the acquisition. 47 C.F.R. § 76.503(c).

subscriber cap is facially invalid under the First Amendment,[161] the FCC stayed its new rule pending appeal of that ruling.

2. Channel Occupancy Limits

Section 613(f)(1)(B) requires the FCC to issue regulations "establishing reasonable limits on the number of channels on a cable system that can be occupied by a video programmer in which a cable operator has an attributable interest."[162] As with Section 613(f)(1)(A)'s subscriber cap requirement, Congress' overall purpose is "to enhance effective competition."[163] In promulgating channel occupancy limits, the FCC is required to consider the same list of public interest objectives as is relevant to the subscriber ceiling, e.g., avoiding undue favoritism for vertically-integrated program services, promoting the flow of programming to the consumer, preserving efficiencies, and promoting diverse and high quality programming.[164] At bottom, of course, the purpose of channel occupancy limits is to ensure that a sufficient number of programmers not vertically integrated with cable operators (including potentially independent programmers that also distribute through non-cable modes) have adequate access to the vertically integrated operators' subscribers. This structural approach supplements Section 616(a)(3)'s behavioral regulation discussed earlier, where the forbidden conduct is unreasonable discrimination by any multichannel distributor against unaffiliated programming vendors in their carriage agreement negotiations. Section 613(f)(1)(B), however, applies its structural limits only to one type of multichannel distributor—cable operators.

Although the statutory language is somewhat ambiguous, the FCC has decided to apply its recently promulgated channel capacity limits only to those programmers that are vertically integrated with the particular cable operator in question rather than count all programmers in which any cable operator may have an attributable interest.[165] The agency reasoned that an operator would have no incentive to favor an unaffiliated programming service simply because one or more other cable operators happen to own that service. Nor did the FCC have any empirical evidence that vertically integrated cable operators systematically deny access to independent programmers. Furthermore, as the FCC found, the fact that a

161 Daniels Cablevision, Inc. v. United States, 835 F. Supp. 1 (1993).
162 Communications Act § 613(f)(1)(B), 47 U.S.C. § 533(f)(1)(B).
163 *Id.* § 613(f)(1).
164 *See id.* § 613(f)(2).
165 *See* 47 C.F.R. § 76.504(a).

cable operator owns interests in other programming services would not, by virtue of such ownership, afford it an opportunity to influence the content or distribution of vertically-integrated services that it does not own. Additionally, the FCC feared that a draconian application of channel occupancy limits to all vertically-integrated programmers would unduly inhibit otherwise beneficial MSO investment in programming.[166]

The FCC has now ruled that the number of channels that can be occupied by national programmers in which the operator has an attributable interest is forty percent.[167] To encourage the development of minority-controlled programmers, however, the operator may devote up to two additional channels or an additional five percent of its channels (whichever is greater) to minority-controlled national programming in which it has an attributable interest.[168] Channel capacity beyond seventy-five channels will not be subject to these vertical ownership/carriage restrictions.[169] Thus, on a 100-channel system only thirty channels (*i.e.*, forty percent of seventy-five) may be occupied by affiliated video programming; but the operator has the discretion to choose the particular channel assignments.[170] The channel occupancy limits do not apply to local or regional programming services in which the cable operator has an attributable interest.[171] No exception is carved out for the most popular channels or for new services. All national services in which the cable operator has an attributable interest, including pay-per-channel services, pay-per-view channels, and multiplex channels (which afford time diversity for programming carried at regular times on other channels), count fully towards the overall forty-percent limit.[172] The forty-percent ceiling applies to all activated channels, including (1) those carrying local broadcast signals, (2) public, educational, and government ("PEG") and

---

166 *Subscriber/Channel Occupancy Limits R&O,* 8 F.C.C.R. ¶¶ 52-53, at 8565.

167 47 C.F.R. § 76.504(a).

168 *Id.* § 76.504(c). The FCC's rules consider each 6 MHz of spectrum to be a channel for purposes of these limits even though, on systems with compression, several video programs might be transmitted simultaneously through one such channel. *Subscriber/Channel Occupancy Limits R&O,* 8 F.C.C.R. ¶ 68, at 8565 n.86. When applying the percentage limit, the permisssible number of affiliated channels must be rounded to the nearest whole number. *Id.* ¶ 68 n.87. A 6 MHz channel shared by an affiliated and a non-affiliated service is treated as affiliated if it occupies the channel 50 percent or more of the time. *Id.*

169 47 C.F.R. § 76.504(b). An under 75-channel system cannot use video signal compression to take advantage of this provision.

170 *Subscriber/Channel Occupancy Limits R&O,* 8 F.C.C.R. ¶ 84, at 8565 n.107.

171 *See* 47 C.F.R. § 76.504(a) (only "national" services). The FCC considered the exemption for regional and local services a desirable means for encouraging MSO investment in such services. *Subscriber/Channel Occupancy Limits R&O,* 8 F.C.C.R. ¶ 78, at 8565.

172 *Subscriber/Channel Occupancy Limits R&O,* 8 F.C.C.R. ¶¶ 76-77, at 8565.

commercial leased access programming, and (3) local/regional nonbroadcast channels.[173]

The FCC's Section 613(f)(1)(B) rules employ the broadcast attribution criteria rather than the stricter criteria used for Section 628's behavioral regulation.[174] This means that, for purposes of the channel-occupancy limits, an interest is attributable if the ownership interest is a voting interest of at least five percent (and no other party is a single majority shareholder) and is not an adequately insulated limited partnership interest. The FCC indicated that this more lenient approach is appropriate in the structural context and particularly in light of the potential benefits of MSO investment and consequent risk-spreading in connection with new programming services.[175]

If there are any cable systems that exceeded the applicable ceiling on December 4, 1992, carriage of the excessive channels is grandfathered so as to avoid disruption of operator-programmer relationships and subscriber confusion.[176] The FCC will also entertain waiver requests. To avoid imposing on limited local regulatory resources and to assure uniformity in dealing with complex national corporate interrelationships, the FCC will enforce the channel occupancy limits through monitoring by itself, programmers, and franchise authorities, and through complaints.[177]

3. Vertical Integration into Programming Creation/Production

Section 613(f)(1)(C) authorizes the FCC "to consider the necessity and appropriateness of imposing limitations on the degree to which multichannel video programming distributors may engage in the creation or production of video programming."[178] The FCC has concluded that no restrictions on this form of vertical integration are needed.[179]

4. Leased Commercial Access

The 1984 Cable Act required cable operators to make channel capacity available for lease by unaffiliated commercial enterprises

---

[173] *Id.* ¶ 54.

[174] 47 C.F.R. § 76.504 Note 1(c).

[175] *Subscriber/Channel Occupancy Limits R&O*, 8 F.C.C.R. ¶¶ 61-63, at 8565.

[176] *Id.* ¶¶ 93-94; *see* 47 C.F.R. § 76.504(e). The limits apply even if the cable system is subject to effective competition. *Subscriber/Channel Occupancy Limits R&O*, 8 F.C.C.R. 8565, ¶¶ 88-89.

[177] *Subscriber/Channel Occupancy Limits R&O*, 8 F.C.C.R. ¶¶ 98-99, at 8565. Operators' public files must disclose their attributable interests in programming carried the previous three years. *See* 47 C.F.R. § 76.504(e).

[178] Communications Act § 613(f)(1)(C), 47 U.S.C. § 533(f)(1)(C).

[179] *Subscriber/Channel Occupancy Limits R&O*, 8 F.C.C.R. ¶¶ 102-06, at 8565.

at rates to be determined by the cable operators.[180] The law forced cable systems with thirty-six to fifty-four activated channels to reserve ten percent of those channels for leased access. Systems with over fifty-five activated channels were obliged to reserve fifteen percent of those channels for leased access. Leased access, however, did not become a very practical or popular way for commercial programming vendors to reach potential subscribers.

The 1992 Cable Act made one of the express purposes of the leased access provisions "to promote competition."[181] To prevent cable operators from setting access rates so high as to discourage this form of competition, Congress gave the FCC express authority to determine "maximum reasonable rates."[182] The FCC also was directed to establish "reasonable terms and conditions . . . including for billing and collection" of subscriber accounts.[183] The FCC then issued regulations[184] designed, *inter alia*, to make leased access a more viable competitive option for programming distributors and to provide a dispute resolution forum. This article is not the place for a detailed explanation of leased access rules and procedures. It remains to be seen whether the statutory amendments and implementing regulations will cause leased access to generate significant intra-system competition.

5. Cross-Ownership Restrictions

Section 613(a)(2) of the Communications Act makes it "unlawful for a cable operator to hold a license for multichannel multipoint distribution service [MMDS], or to offer satellite master antenna television service [SMATV] separate and apart from any franchised cable service, in any portion of the franchise area served by that cable operator's cable system."[185] Subsection (A) requires the FCC to waive the prohibition for any cross-owned situation that existed on the enactment date (October 5, 1992). Subsection (B) permits the FCC to issue additional waivers "to the extent . . . necessary to ensure that all significant portions of a franchise area are able to obtain video programming."[186] Congress was concerned

---

[180] *See* Communications Act § 612.

[181] 1992 Cable Act § 9(a).

[182] *Id.* § 9(b)(2)(i).

[183] *Id.* § 9(c)(2)(ii).

[184] 47 C.F.R. §§ 76.970-.977 as adopted in Implementation of Sections 11 and 13 of the Cable Television Consumer Protection and Competition Act of 1992—Rate Regulation, MM Dkt. No. 92-266, *Report & Order and Further Notice of Proposed Rulemaking*, FCC 93-177 ¶¶ 485-541 (rel. May 3, 1993), published in 58 Fed. Reg. 29736 (May 21, 1993).

[185] Communications Act § 613(a)(2), 47 U.S.C. § 533(a)(2).

[186] *Id.* § 613(a)(2)(B).

that common ownership might reduce competition and voice diversity, and result in warehousing of potential competition to cable. The Congress deleted Senate-proposed restrictions on cable-DBS cross-ownership from the 1992 legislation as premature, there being no U.S. high-power DBS systems yet in operation. Additionally, Congress determined that the FCC already had authority to impose such restrictions.[187]

a. *MMDS Ownership and Leasing*

To enforce the new provision, the FCC had to revise only modestly a cross-ownership proscription promulgated in 1990.[188] Revised Section 21.912(a) of the Commission's Rules provides that a cable operator may not have an attributable interest in an MMDS authorization where the MMDS "station's protected services area is within the portion of the franchise area actually served by the cable operator's system."[189] The "area actually served" is "any area actually passed by the cable operator's cable system and which can be connected for a standard connection fee."[190] Overlap with an unserved portion of the cable franchise does not create a problem.

The applicable attribution standard is that contained in the cable/broadcast cross-ownership rules[191] except that the single majority partner and insulated limited partner exceptions do not apply.[192] Consequently, the cable operator is deemed to have the proscribed cross-ownership interest if it has a five percent voting or nonvoting stock, general partnership, or five percent limited partnership interest in the MMDS licensee, or has a common officer or director.

In light of Congress' desire to promote competition and diversity, the FCC eliminated from Section 21.912 any flat exception for cable operators and for rural operations, although those subjects may be addressed in a waiver petition. The FCC said it will grant a rural waiver where no other applicant timely cross-files against an otherwise proscribed cable operator's (including rural telco/cable

187 H.R. Conf. Rep. No. 862, 102d Cong., 2d Sess. 82 (1992).

188 Implementation of Sections 11 and 13 of the Cable Television Consumer Protection and Competition Act of 1992—Horizontal and Vertical Ownership Limits, Cross-Ownership Limitations and Anti-trafficking Provisions, *[First] Report & Order and Further Notice of Proposed Rulemaking*, 8 F.C.C.R. ¶¶ 101-12, 131, at 6828 (1993) [hereinafter *Cross-Ownership Limitations R&O*].

189 47 C.F.R. § 21.912(a).

190 *Id.* § 21.912 n.1(B).

191 *See* notes accompanying 47 C.F.R. § 76.501.

192 47 C.F.R. § 21.912 n.1(A).

operator's) MMDS application. The 1990 rules already grandfathered then-existing cable/MMDS combinations.

Although the 1992 Act does not address cable operators' leasing channels from MMDS licensees, Section 21.912(b) of the Commission's Rules forbids MMDS licensees from leasing transmission time or capacity to an entity in which a cable operator has an attributable interest if the MMDS protected service area overlaps with any portion of the franchise "actually served" by the cable operator. Believing this provision consistent with the 1992 Act's competition and diversity objectives, the FCC has continued the leasing prohibition in force. But, in light of the Act's endorsement of localism, the FCC has also retained Section 21.912(e)'s exception to Section 21.912(b) that allows the cable operator to use one MMDS channel to feed locally-produced programming to the cable head.

The Commission will enforce the cable/MMDS cross-ownership restrictions through the MMDS application process as well as through complaints.

b. *SMATV Ownership*

The FCC promulgated Sections 76.501(d) and (e) to enforce Section 613(a)(2)'s proscriptions against cable/SMATV cross-ownership.[193] The same, moderately toughened broadcast attribution standard as used with cable/MMDS cross-ownership is employed here.

The statute does allow cross-ownership when the SMATV entity is not "separate and apart from any franchised cable service."[194] The FCC interprets this to mean that, inside the cable-served area, cable operators may *construct* stand-alone SMATV operations or SMATV operations physically-interconnected to the cable system provided that the "SMATV service is offered in accordance with the terms and conditions of the cable franchise agreement."[195] The cable operator may not, however, *acquire* such SMATV operations in its cable-served area. (If the SMATV operator has been terminated by a building owner or manager, however, the cable operator could construct its SMATV operations using pre-existing facilities not owned by the former operator.) Given the availability of noncable purchasers of SMATV operations, the FCC did not see any public policy need to preserve sale to the franchised cable operator as a "potential exit strategy." If the SMATV operation would

---

[193] *See* 47 C.F.R. §§ 76.501(d)-(e).
[194] 47 C.F.R. § 76.501(d).
[195] 47 C.F.R. § 76.501(e)(1).

be within the cable operator's franchise area but not in a "served" portion thereof, the FCC's rules permit the operator to *acquire or construct* the SMATV system, provided that "SMATV service is offered in accordance with the terms and conditions of the cable franchise agreement."[196] This "includ[es] any uniform programming, service, and rate requirements provided" for in the franchise agreement.[197] The fact that a SMATV technically qualifies as a cable system under Section 602(7)(B) of the Communications Act (because it serves non-commonly-owned multiple dwellings or serves commonly-owned multiple dwellings and crosses a public right of way) will not prevent common ownership between SMATV and MMDS.[198]

FCC enforcement of the cable/SMATV cross-ownership rules is by complaint, there being no specific reporting requirements.

c. *State/Local Regulation of Ownership*

The 1992 Act also clarified that state and local authorities are not preempted from imposing certain horizontal or vertical restrictions on the ownership of cable systems in their jurisdictions. Sections 613(d) of the Communications Act now reads:

> Nothing in this section shall be construed to prevent any State or franchising authority from prohibiting the ownership or control of a cable system in a jurisdiction by any person
>
> (1) because of such person's ownership or control of any other cable system in such jurisdiction; or
>
> (2) in circumstances in which the State or franchising authority determines that the acquisition of such a cable system may eliminate or reduce competition in the delivery of cable service in such jurisdiction.[199]

It remains to be seen whether this provision will be used to prevent the merger of an incumbent and an overbuilder,[200] cap MSO concentration at the state level, restrict cable/MMDS or cable/SMATV or cable/DBS cross-ownership, or limit vertical integration of cable operators and programming vendors or producers.

---

196 47 C.F.R. § 76.501(e)(2).

197 *Cross Ownership Limitations R&O*, 8 F.C.C.R. ¶ 122, at 6828.

198 *Id.* ¶ 128.

199 Communications Act § 613(d)(2), 47 U.S.C. § 533(d)(2).

200 The amendment was intended to overrule the holding in Cable Alabama Corp. v. City of Huntsville, 768 F. Supp. 1484 (N.D. Ala. 1991), that Section 613 of the Communications Act preempted local authority to prevent competing cable operators from merging or being purchased together by a third party. H.R. REP. No. 628, 102d Cong., 2d Sess. 91 (1992).

III. The Primestar Antitrust Decrees

Contemporaneous with the promulgation of FCC regulations to implement the 1992 Cable Act, two antitrust investigations culminated in 1993 in the filing of consent decrees governing certain video competition practices of the seven major MSOs involved. For several years in the late 1980s, a task force of state attorneys general had been investigating assertions that MSOs and programmers were conspiring to prevent SMATV and MMDS operators from obtaining programming on nondiscriminatory terms. The states also were examining whether MSOs in the mid-1980s had illegally induced programmers to scramble satellite programming as part of a broader scheme to prevent direct-to-home ("DTH") backyard receive-only satellite TV antenna ("TVRO") service from developing as an alternative to cable. In early 1990, after several of the largest MSOs joined in a DTH venture of their own called "K Prime" and later "Primestar," the states broadened their antitrust investigation to include that venture. At the same time, the Antitrust Division of the U.S. Department of Justice undertook an investigation focused on the MSOs' Primestar venture. On June 9, 1993, state and federal officials announced the settlement of these investigations and the parties' agreement to the Primestar consent decrees.

A. *The Department of Justice Settlement*

1. The Department of Justice Complaint

The formal Department of Justice complaint filed in federal court in New York City named nineteen defendants—the Primestar venture itself, the ten Primestar partners, and the partners' parents.[201] The complaint alleged that, beginning with the formation of Primestar, the defendants had "conspir[ed] to restrain competition in the provision of multichannel subscription television service, in violation of Section 1 of the Sherman Act (15 U.S.C. § 1)."[202] Although "multichannel subscription television service" was defined broadly to include "any of various methods" of provid-

---

201 ATC Satellite, Inc., Warner Cable SSD, Inc., and parent Time Warner, Inc.; Comcast DBS, Inc. and parent Comcast Corporation; Continental Satellite Company, Inc. and parent Continental Cablevision, Inc.; Cox Satellite, Inc. and parent Cox Enterprises, Inc.; New Vision Satellite and parent Newhouse Broadcasting Corporation; TCI K-1, Inc., United Artists K-1 Investments, Inc., and parent Tele-Communications, Inc.; Viacom K-Band, Inc. and parent Viacom Inc.; and GE Americom Service, Inc. and parent GE American Communications, Inc.

202 Complaint ¶ 47, United States v. Primestar Partners, L.P., No. 93 Civ. 3913 (S.D.N.Y. filed June 9, 1993) [hereinafter DOJ Primestar Complaint].

ing "multiple channels of video programming,"[203] the Department of Justice's more detailed allegations focused entirely upon Direct Broadcast Service ("DBS"). DBS was defined to include medium- and high-power DTH service transmitted over Ku-band radio frequencies and to exclude C-band DTH service which required much larger receiving antennas.[204]

The Department of Justice's Primestar Complaint alleged that DBS offered "the potential to provide a competitive alternative to cable television service" to a much greater degree than did C-band DTH, MMDS, and SMATV.[205] In the Department's view, the conspirators had agreed to:

> a) establish Primestar . . . with the specific purpose to delay, if not preempt, and to raise barriers to entry by other firms into DBS,
>
> b) jointly restrain the availability . . . of partner-owned or controlled programming to other DBS entrants;
>
> c) jointly discourage nondefendant programmers from making their programming available to other DBS entrants or potential DBS entrants; and
>
> d) facilitate a coordinated retaliatory response by the MSO defendants to DBS entry by others.[206]

Allegedly, "[o]ne of the purposes of forming Primestar was to make it more difficult or more costly for any other medium-power or high-power DBS service to obtain popular cable programming, including both programming owned or controlled by the MSO defendants and other programming."[207] The Department of Justice specifically objected to the Partnership Agreement's "most-favored nation ['MFN'] clause" as "mak[ing] it more difficult for any other DBS service to obtain popular programming."[208] Curiously, however, the MFN features cited by the Department did not forbid the

---

[203] *Id.* ¶ 8.

[204] *Id.* ¶¶ 3-5, 33, 40. Primestar initially leased capacity on GE Americom's Satcom K-1, a *medium-power satellite transmitting in the "fixed" service portion of the Ku-band. Id.* ¶¶ 5, 28, 42. High-power DBS satellites, according to the DOJ complaint, will transmit in the "direct broadcast" portion of the Ku-band to receiving antennas that are 15-24 inches in diameter, in contrast to mid-power's 2.5-5 foot dishes and C-band's 8-12 foot antennas. *Id.* ¶¶ 4, 33, 40. The technical distinction between "fixed" and "broadcast" portions of the electromagnetic portion of the spectrum has essentially nothing to do with the antitrust issues in the Primestar settlements.

[205] *Id.* ¶ 39.

[206] *Id.* ¶ 48.

[207] *Id.* ¶ 44. The Department of Justice asserted, however, that when Primestar was formed, the medium-power DBS satellite K-1 leased by the venture "was the only suitable satellite then available" and "there were no satellites then available for high-power DBS." DOJ Competitive Impact Statement at 6, 58 Fed. Reg. 33,944, 33,948-49 (1993) [hereinafter DOJ CIS].

[208] DOJ Primestar Complaint ¶ 45.

MSO defendants' programming affiliates from supplying programming to other DBS ventures but simply restricted them from doing so on a more favorable basis than available to Primestar or on a DBS-exclusive basis.[209] Nonetheless, the Department of Justice believed that the venture agreement as drafted "reduce[d] the ability and incentives of each MSO defendant to deal with or invest in another DBS venture" and "assure[d] each of the MSO defendants that no other MSO defendant will invest in or sell programming on attractive terms to another DBS venture."[210] The MSO defendants had ownership interests in many popular cable networks (*e.g.*, HBO, Cinemax, Showtime, The Movie Channel, MTV, VH-1, Nickelodeon, CNN, Headline News, Cartoon Channel, TNT, Discovery, Black Entertainment Television, and Lifetime) that allegedly would be affected by the objectionable programming access provisions.[211]

The Department of Justice complaint further theorized that the venture "facilitate[d] a coordinated retaliatory response by the MSO defendants to any cable programmer that sells programming on attractive terms to a competing DBS service."[212] By controlling access to over fifty percent of the nation's cable subscribers, according to the Department of Justice, the MSO defendants "can limit the incentives of nondefendant cable programmers to deal with competing DBS ventures by their ability to threaten or actually take retaliatory actions."[213] Such retaliation might include "refusing to promote the programmer's programming within their franchise areas, assigning an unfavorable service tier or channel position to the programming, charging a high price for the programming if it is a premium service, and, sometimes, refusing to carry the programming at all."[214] The Department of Justice omitted to explain, however, how the existence or contract terms of the Primestar venture "facilitate[d] a coordinated retaliatory response" with respect to programming not owned by any of the venturers.[215]

---

[209] The Department of Justice further alleged that the MFN clause "ma[de] it more difficult for any other DBS service to obtain popular programming because it force[d] any Primestar partner that ma[de] such a sale to disclose the fact and the terms of sale to its joint venture partners, and force[d] that partner to offer the programming on equivalent or better terms to Primestar." DOJ CIS at 7, 58 Fed. Reg. at 33,949. The Department of Justice noted that NBC, an affiliate of defendant GE Americom, was not bound by the MFN provisions. *Id.* at 7 n.2; *see also* 58 Fed. Reg. 33,949 n.2.

[210] DOJ Primestar Complaint ¶ 49.

[211] *Id.* ¶ 38.

[212] *Id.* ¶ 51.

[213] *Id.* ¶ 50.

[214] *Id.*

[215] *Id.* ¶ 51.

2. *The Department of Justice Final Judgment*

Simultaneous with the issuance of the complaint, the defendants consented to a decree (DOJ Primestar Final Judgment) settling the complaint but without admitting any of the facts alleged or conceding that a Sherman Act § 1 violation had occurred.[216] The consent decree, which lasts for five years,[217] applies principally to the MSO defendants (Comcast, Continental, Cox, Newhouse, TCI, Time Warner, and Viacom), Primestar, and their "affiliates, subsidiaries, officers, directors, employees, agents, successors, and assigns."[218] The terms "affiliates, subsidiaries," etc., are not defined, but presumably include entities controlled by, or under common control with, the defendants. The Final Judgment contains some prohibitions focused on Primestar and other prohibitions that apply to the MSO defendants' more general programming practices as they affect DBS and other distribution modes.

a. *Primestar*

Section IV(A) of the Final Judgment nullifies "any provision of the [Primestar] Partnership Agreement that affects the availability, price, terms or conditions of provision, sale, or licensure of programming to any provider of multichannel subscription television, including Primestar Partners, L.P."[219] This part of the consent decree eliminates the agreement's MFN provision, so that a partner no longer need notify the other partners that it intends to license programming to a competing DBS venture, and (subject to the rest of the decree and other applicable law) each partner may license programming on an exclusive or preferential basis to such a venture. Section IV(D) prevents Primestar from acquiring DBS-exclusive rights to any of the sixty-one "national video programming service[s] existing as of May 1, 1992," whether or not the service is

---

216 The DOJ Primestar Final Judgment was published in 58 Fed. Reg. 33,944, 33,945 (1993), *reprinted in* 7 Trade Reg. Rep. (CCH) ¶ 50,747. Public comments and the Department of Justice's response to those comments appear in 58 Fed. Reg. 60,672 (1993).

217 DOJ Primestar Final Judgment § VII(A).

218 *Id.* § III. Defendants GE Americom Services (a Primestar partner) and its parent, satellite space segment supplier GE American Communications, are, like all the defendants, prohibited from enforcing several provisions of the Partnership Agreement. *See id.* § IV(A).

219 Section IV(A) also eliminates any Primestar Agreement provision "that in any way affects the status or partnership interest of a partner as a consequence of the provision, sale, or licensure of programming to any provider of multichannel subscription television." The CIS explains that this nullifies a clause that allowed the MSOs to purchase GE Americom's Services' partnership share if a sister entity (e.g., NBC) were to license programming on a preferential or exclusive basis to a rival DBS venture. Proposed Final Judgment and Competitive Impact Statement, 58 Fed. Reg. 33,949.

controlled by one or more of the Primestar partners.[220] If, however, "a competing DBS venture obtains any exclusive programming, Primestar may . . . obtain a reasonably comparable amount of programming of a reasonably comparable type and quality on a reasonably comparable exclusive basis."[221]

By restricting for five years Primestar's ability to acquire exclusive programming, Section IV(D) goes beyond the new Section 616(a)(2) of the Communications Act.[222] The latter prohibits a DBS multichannel distributor from "coercing" exclusivity but implicitly permits it to acquire exclusivity through noncoercive negotiations. Section IV(B) of the decree enjoins Primestar from agreeing with any other defendant to threaten to (or to actually) retaliate against a programming vendor or other entity "for the purpose of deterring or preventing such [entity] . . . from providing programming to or investing in a rival DBS operator [or other multichannel distributor] or punishing such person for doing so."[223] This anti-retaliation language expands upon Section 616(a)(2) of the Communications Act[224] which prohibits multichannel distributors like Primestar from "retaliating against" a programming vendor "for failing to provide . . . exclusive rights" but does not address retaliation against a vendor or other entity for investing (or planning to invest) in another multichannel distributor.[225]

b. *The MSO Defendants*

Like Primestar itself, each MSO defendant is enjoined by Section IV(B) from agreeing with "any other defendant with which it is not under common control" to threaten to (or to actually) retaliate against a programming vendor or other entity so as to prevent or punish that entity's investing in, or providing programming to, another multichannel distributor. To illustrate, Time Warner and TCI may not concertedly threaten to refuse to carry a vendor's programming service on their cable systems as retaliation for that vendor's sister company investing in, or planning to provide programming to, an entity that will sell multichannel programming to SMATV, MMDS, DBS, or other multichannel distributors.

220 The restriction does not apply to national pay-per-view, interactive, or distant independent broadcast programming, or to regional services. *See* DOJ Primestar Final Judgment § IV(C)(3)(b) and Exhibit A.

221 *Id.* § IV(D). Primestar must give the Department of Justice "60 days prior written notice" but need not await the Department's approval. *Id.*

222 Communications Act § 616(a)(2).

223 DOJ Primestar Final Judgment § IV(B).

224 Communications Act § 616(a)(2).

225 *Id.*

Unilateral action, even if it involves, let us say, coordinated conduct by several of an MSO defendant's at least fifty percent-owned subsidiaries, is not reached by this anti-retaliation provision. In contrast, Section 616(a)(2) of the Communications Act does proscribe unilateral "retaliating" by an MSO, but only if that retaliation is against a programming vendor for failing to provide the MSO exclusive rights.

Section IV(C)(1) of the Final Judgment prohibits, absent Department of Justice approval, a programming service controlled by one or more of the MSO defendants from agreeing with a programming service not controlled by that particular MSO defendant (or group) "with respect to the terms or conditions on which either service [will license or refuse to license programming] to any provider of multichannel subscription television."[226] For example, Time Warner-controlled HBO would have to obtain Department of Justice approval before it could *agree* with Viacom-controlled MTV that one or the other or both of them would (or would not) supply programming to a particular multichannel distributor. HBO, of course, could decide *unilaterally* to supply (or not to supply) programming to a Viacom-controlled or third party-controlled multichannel distributor, even if it knew that distributor would (or would not) be carrying Viacom's MTV. Additionally, at least as far as Section IV(C)(1) is concerned, HBO could agree with another Time Warner fifty percent-owned programming service that neither service would supply programming to a particular multichannel distributor except on certain terms.

Section IV(C)(2) is a parallel provision prohibiting, absent Department of Justice approval, cable systems controlled by one MSO defendant and cable systems controlled by another MSO defendant from agreeing, even "indirectly [to acquire programming upon] any condition that prohibits the purchase or directly affects the availability, price, terms, or conditions [of acquiring programming] by any other provider of multichannel subscription television."[227] Irrespective of what collective stand an MSO defendant's systems may take on the terms (including exclusivity *vel non*) that they require, that defendant may not agree with another MSO defendant on a common course of conduct. This means, for example, that defendant Cox may perhaps unilaterally insist upon an exclusive distributorship in its franchise cable areas for a particular

226 DOJ Primestar Final Judgment § IV(C)(1).
227 *Id.* § IV(C)(2).

third party's programming service;[228] but Cox may not obtain MSO defendant Comcast's agreement that Comcast will take the same negotiating position for its cable systems.

Section IV(C)(3) of the decree, in contrast to Sections IV(C)(1) and (2), applies to ostensibly unilateral conduct by MSO defendants, specifically the acquisition of exclusive programming distributorships for any MSO defendant's cable system. The provision focuses upon present or future regional sports services and upon existing (as of May 1, 1992) national video services (non-sports or sports). The restrictions on exclusivity do not apply to pay-per-view, interactive, or superstation programming,[229] to existing or future regional non-sports programming,[230] or to "new" (*i.e.*, commencing subscriber service post-May 1, 1992) national non-sports services.[231]

Section IV(C)(3)(a) enjoins any MSO defendant "[w]ith respect to any cable system it controls [from] . . . entering into, directly or indirectly, any agreements or contracts that contain exclusive distribution provisions or from renewing existing exclusivity provisions with any national video programming service that is listed on Exhibit A [(there are sixty-one listed)], or with any existing or new regional sports service [(thirty-three are listed on Exhibit A)]."[232] The types of exclusivity provisions covered are those "that restrict or limit the rights of such programming service to deal with any direct-to-home satellite service (C-band, Ku-band, or Direct Broadcast Satellite (DBS)), Multichannel Multipoint Distribution Service (MMDS), Satellite Master Antenna Service (SMATV), or cable operator."[233] The decree further restrains "[e]ach MSO defendant . . . from enforcing any existing contract

[228] In the example, Cox could not unilaterally "coerce" exclusivity without running afoul of Section 616(a)(2) of the Communications Act. *See* 47 U.S.C. § 536(a)(2). If the programming vendor were one in which a cable operator had an "attributable interest," Cox's exclusive contract would require prior FCC approval under Sections 628(c)(2)(D) and (c)(4) of that Act. *See* 47 U.S.C. §§ 548(c)(2)(D) & (c)(4).

[229] See DOJ Primestar Final Judgment § IV(C)(3)(b) which excludes those programming types from the definition of "national video programming service." Moreover, Section IV(C)(3)(a) expressly exempts pay-per-view.

[230] Section IV(C)(3)(a) expressly excludes any "new . . . regional non-sports service not providing programming service to the public as of May 1, 1992." By implication, pre-May 1, 1992 regional non-sports services are not encompassed within the Section IV(C)(3)(a) restriction on exclusivity involving "any *national* video programming service" or "any existing or new regional *sports* service." *Id.* (emphasis added).

[231] Section IV(C)(3)(a) expressly excludes "any new national . . . non-sports service not providing programming service to the public as of May 1, 1992."

[232] *Id.* § IV(C)(3)(a).

[233] The term "cable operator" is defined to include rural telephone companies authorized by the FCC to provide video programming. *Id.* § IV(C)(3)(c). But the term otherwise expressly excludes any telephone common carrier (or its controlled affiliate) that provides video programming in its "telephone service area." *Id.* An entity providing programming

terms that restrict, limit or condition the rights of [the regional sports service or the existing (as of May 1, 1992) national service] . . . to deal with any DBS provider."[234]

In short, the MSO defendants' cable systems may not enter into, or renew, exclusive distributorships for any national service that existed on May 1, 1992, or for any regional sports service, whether then-existing or new, where that exclusivity (however incomplete in terms of the universe of distribution modes covered) would restrict a satellite DTH, MMDS, SMATV, or "cable operator"[235] from acquiring that same programming. Consequently, the fact that the MSO defendant's cable operations acquired exclusivity as against MMDS competitors but not against C-band DTH, for example, would not save the restrictions. Note, though, that there is no prohibition in the Department of Justice decree on enforcing exclusivity language that existed prior to the decree, except to the extent the language excludes or restricts "any DBS provider."[236]

The Department of Justice decree's treatment of exclusivity contrasts somewhat with that of the 1992 amendments to the Communications Act. Most significantly, Final Judgment Section IV(C) applies only to the Primestar Partner MSO defendants and not to all the other cable operators covered by the 1992 legislation. Also, the Act's exclusivity language[237] applies only when a cable operator has an attributable interest in the programming vendor; the decree applies to contracts with independent programmers, too. The Act even applies to pay-per-view, interactive, and superstation satellite programming; Section IV(C) of the Final Judgment excludes those services and new national video services as well as regional non-sports programming (which conceivably might be delivered to cable headends by satellite). The Act applies only to programming that is transmitted via satellite, whereas the decree technically also reaches programming that is microwaved or hard-wired to cable systems.

The decree exempts certain types of programming altogether and leaves open the door for prior Department of Justice approval

over such a telco's video dial tone system presumably is not considered a "cable operator" either.

[234] *Id.* § IV(C)(3)(a).

[235] As defined *supra* note 233.

[236] The second sentence of Final Judgment § IV(C)(3)(a) eliminating exclusivity enforcement in the DBS area does not include the limiting language "With respect to any cable system it controls" which introduced the previous sentence. This omission raises an issue whether the MSO defendants (including commonly owned affiliates) may enforce pre-decree contractual language granting exclusivity within the DBS medium to a single DBS provider where the contract has nothing to do with licensing cable systems.

[237] Communications Act §§ 628(c)(2)(C), (c)(2)(D), (c)(4).

of exclusivity provisions otherwise forbidden by the decree. On the other hand, the Act contemplates that the FCC may legalize certain exclusive contracts as "in the public interest."[238] The Act grandfathers (although not for renewal) satellite cable exclusive distributorships entered into on or before June 1, 1990 if they relate to distribution to persons in areas that were served by cable as of October 5, 1992. The Final Judgment, by contrast, does not use the June 1, 1990 date or draw any distinction between historically cabled and non-cabled areas. Rather, the Final Judgment distinguishes between new and old programming services and uses the service commencement date of May 1, 1992 as the cut-off. Finally, the Department of Justice decree expires in five years whereas the Communications Act exclusivity prohibition sunsets in ten years (unless continued by the FCC).

B. *The Multistate Settlement*

1. The State Complaints

The state complaints filed in New York City named essentially the same Primestar-related defendants as the Department of Justice complaint.[239] Two closely similar Final Judgments, one applicable to all the defendants except Viacom and the other applicable only to the Viacom defendants, were entered by the Court on September 14, 1993, over the objections of several *amicus curiae.*[240] For simplicity, this Article will cite only the New York complaint[241] and will refer to the Final Judgment as to all defendants except Viacom as the "Primestar MSO Partner Final Judgment" (or "MSO Final Judgment") and the Final Judgment as to Viacom Inc. and Viacom K-Band Inc. as the "Viacom Final Judgment."[242]

The state complaint asserted that the cable operators acted in concert to forestall the development of competitive alternatives to cable. The complaint alleged that in the mid-1980s cable operators successfully demanded that programmers scramble their satellite signals and grant MSOs exclusive program subdistribution rights to

---

238 47 U.S.C. § 548(c)(2)(D).

239 The sole defendant added by the states was Time Warner Entertainment Company. There were 45 separate complaints in New York v. Primestar Partners, L.P., et al., No. 93 Civ. 3868 and consolidated Nos. 93 Civ. 3869-907, 5799-804.

240 The objectors included the FCC, DirecTv, National Rural Telecommunications Cooperative, Television Viewers of America, Consumer Federation of America, the Wireless Cable Association International, Ameritech, Bell Atlantic, Bell South, Nynex, Pacific Telesis, Southwestern Bell, US West, GTE Service Corporation, and the U.S. Telephone Association.

241 No. 93 Civ. 3868 (S.D.N.Y. filed November 9, 1993).

242 The state decrees were published in 1993-2 Trade Cas. (CCH) ¶¶ 70, 403-404.

TVRO, SMATV, and MMDS operators within and contiguous to their franchise areas, thus enabling the MSOs to control their competitors' access to programming.[243] Then, in 1986, the defendant MSOs allegedly commenced a conspiracy to suppress Ku-band DBS competition—which was a more significant competitive threat to cable because DBS uses less expensive and cumbersome antennas than C-band TVRO and SMATV.[244] Allegedly, recognizing that the K-1 satellite was the only orbiting Ku-band satellite capable of providing DBS, the MSO defendants formed Primestar to acquire control of the satellite and thereby reduce substantially the capacity that could be used by a potential DBS competitor seeking to enter the market.[245] According to the complaint, the Primestar venture contained an anticompetitive MFN clause (described above in connection with the Department of Justice decree) and another anticompetitive provision authorizing each MSO defendant to be an exclusive Primestar retailer in its cable franchise areas.[246] Also, allegedly, the defendant MSOs sought to acquire several scarce high-power DBS applications to further eliminate potential competition.[247] The states claimed that the MSO defendants monopolized, conspired to monopolize, and attempted to monopolize the "local" market for "the delivery of multichannel subscription television programming to consumers" in violation of Sherman Act § 2 (claims I-III), conspired and attempted to monopolize along with Primestar the "national" market for "the delivery of multichannel subscription television programming to consumers" in violation of Sherman Act § 2 (claims IV-V), and conspired through Primestar and otherwise to restrain trade in the alleged local and national markets in violation of Sherman Act § 1 (claim VI).[248]

2. The State Final Judgments

As with the Department of Justice settlement, the two State Final Judgments were filed contemporaneously with the complaints.[249] Each judgment recites that the defendants continue to

[243] State Complaint ¶¶ 48-50.
[244] *Id.* ¶¶ 51-54.
[245] *Id.* ¶¶ 53-57.
[246] *Id.* ¶¶ 58-60.
[247] *Id.* ¶¶ 63-64.
[248] The complaint also alleged that satellite lessor GE American Communications' action in having its subsidiary GE Americom Services enter the Primestar agreement constituted a conspiracy in violation of Sherman § 1 (claim VII), and that the entire group of defendants also violated state antitrust law (claim VIII).
[249] Five states and the District of Columbia filed "tag along" complaints on August 18, 1993. In addition to final judgments as to Viacom and as to all defendants except Viacom, the states and Liberty Media Corporation entered into an agreement (not a decree), a

deny the allegations and that the "Final Judgment shall not be evidence or admission by any party with respect to any issue of fact or law."[250] The decree expires on October 1, 1997 (approximately four years and one-half month after entry), except for a possible two-year extension to October 1, 1999 in connection with the supply of programming to high-power DBS.[251] The Final Judgments "only apply in the United States,"[252] but there they apply broadly to each "defendant and its successors and assigns, subsidiaries, divisions and organizational units of any kind, and its directors, officers, employees, agents, representatives and other persons acting on its behalf."[253] Thus, for example, the decree will apply to the merged entity that results from the combination of a defendant MSO with a telephone company, a movie studio, another MSO, or whatever. The State Final Judgments' injunctive provisions can be considered in four parts: Primestar, high-power DBS, responsibilities of programmers, and restrictions on cable operators.

a. *Primestar*

With Viacom having taken steps to withdraw from the venture,[254] Primestar is allowed to continue in existence; but the venture must add at least two "independent" directors to its governing board[255] and must accord its chief officers a financial incentive to expand the subscriber base.[256] MSO partners that distribute the Primestar service may not acquire exclusive distribution rights within and adjacent to their cable franchise areas and may not re-

---

copy of which was submitted to the court for its information. Under that agreement, Liberty Media undertook certain obligations that are "far more limited" than those imposed on the defendants. *Plaintiff States' Memorandum of Law in Support of the Consent Decrees* at 2 n.1 (filed August 23, 1993).

[250] *See* MSO and Viacom Final Judgments "Whereas" clauses at 2. Only the signatory states may enforce the decrees, which create no right of action for any third parties. *Id.* § VI(A).

[251] *Id.* § IX. At defendants' initiation, the Court may modify the decrees upon a showing of "changed circumstances," whether foreseeable or not, that make enforcement "no longer appropriate." *Id.* § VII(A).

[252] *Id.* § III. The DOJ Final Judgment has no comparable express limitation on its geographic reach.

[253] *Id.* § III.

[254] Viacom Final Judgment § IV(I).

[255] MSO Final Judgment § IV(I)(3). To qualify as "independent" the director must not have been employed during the previous three years by or had investments in Primestar, its partners, any cable operator, or any company 50-percent owned by cable operators. Each independent director will be unable to work for Primestar or its partners for two years after ceasing to be a director.

[256] Not less than 20 percent of the "incentive compensation" of Primestar's CEO, CFO, and COO "shall be based upon the performance of the Primestar venture measured expressly by number of subscribers." MSO Final Judgment § (I)(i). As of March 29, 1993 (three years after the venture was formed), Primestar allegedly had 53,000 subscribers. DOJ Complaint ¶ 43.

fuse "a prospective subscriber because such subscriber is a present or potential cable subscriber."[257] Evidently, the states believed these measures would encourage Primestar to compete more vigorously, even in cabled areas.

Primestar is free to become involved in high power DBS as an operator, licensee, investor, or distributor, but must give the states forty-five days prior notice.[258] Partners also may transfer their Primestar partnership interest to existing or new partners upon forty-five days notice to the states.[259]

The MSO Final Judgment nullifies the partnership agreement's MFN and related provisions that prevented partners' programming entities from supplying programming to Primestar's DBS competitors without notifying the partners and without offering comparable or better terms to Primestar.[260] Primestar itself may not "obtain exclusive distribution rights to any national video programming or regional sports programming service(s) unless a competing DBS provider obtains any exclusive programming, in which case Primestar may obtain a reasonably comparable amount of programming on an exclusive basis."[261]

b. *High-Power DBS*

The decrees require each Primestar MSO partner and Viacom to give the states forty-five days prior notice of "its [including that of any entities controlled by the partner's or Viacom's ultimate parent] intent to acquire a high-power DBS license or an interest in a high-power DBS license or, an interest in, commence operation of, or commence distribution for, any high-power DBS provider."[262] The term "High Power DBS" is defined to include only those serv-

---

257 MSO Final Judgment § IV(I)(4).

258 *Id.* § IV(I)(7).

259 *Id.* § IV(I)(2).

260 *Id.* § IV(I)(6). Unlike the federal decree, the MSO Final Judgment does not nullify particular provisions governing partners' investment in competing businesses.

261 *Id.* § IV(I)(5). This provision is closely similar to Section IV(D) of the DOJ Final Judgment, except that the Department of Justice requires 60 days prior written notice when Primestar intends to acquire comparable exclusive programming. Neither the state nor the federal prohibition on Primestar acquiring exclusive rights applies to pay-per-view, interactive, or broadcast superstation programming. *See* MSO Final Judgment §§ II(H), (J), (P); DOJ Final Judgment § IV(D) and Exhibit A. The federal decree also does not bar Primestar from acquiring exclusive rights to new national video services that begin to serve subscribers after May 1, 1992, or exclusive rights to regional services. DOJ Final Judgment § IV(D).

262 MSO Final Judgment § IV(G)(1); Viacom Final Judgment § IV(G); Defendants GE Americom Services and GE American Communications have a comparable prior notice obligation for such high-power DBS involvement by any "General Electric Company affiliate [not] engaged in the financial services business," but only if "the owners of cable systems own more than 15 percent of the equity of such DBS provider." MSO Final Judgment § IV(G)(2).

ices transmitting in the direct broadcast portion of the Ku-band.[263]

c. *Programmers' Licensing Obligations*

By means of extremely complex provisions, the State Final Judgments impose upon Viacom and the Primestar MSO Partners' programming entities the obligation to license their controlled programming to the competing multichannel distribution modes.[264] The obligations apply if the programming service is one that Viacom or the applicable Primestar MSO Partner's ultimate parent entity "controls,"[265] individually or collectively, with the ultimate parent entity of any other Primestar MSO Partner(s) or Viacom.[266] The duty-to-license also applies to controlled programming "subsequently acquir[ed] or develop[ed]."[267] The programmers' obligations relate to any controlled "national video programming service serving subscribers as of May 1, 1992 [listed in Exhibit C] and any [controlled] regional sports video programming service" (whether in operation on May 1, 1992 and, therefore, listed in Exhibit D, or more recent).[268] Pay-per-view, interactive, and broadcast superstation services are exempt, as are truly new (i.e., post-May 1, 1992) national video services ("New Services").[269] Also excluded are any services subject to existing exclusivity provisions already disclosed to the states (which provisions

---

263 *Id.* § II(G).

264 See MSO Final Judgment concerning DBS and MMDS (§ IV(A)(1)), TVRO and SMATV (§ IV(A)(2)), and cable (§ IV(A)(3)). The Viacom Final Judgment imposes somewhat comparable obligations to deal with DBS (§ IV(A)(1)(j)), MMDS, SMATV, and cable overbuilders (§§ IV(A)(1)(c), (d), & (f)), and TVRO (§§ IV(A)(1)(b), (g) & (h)).

265 For purposes of the decree, "control" is defined as set forth in the Hart-Scott-Rodino Act antitrust premerger notification regulations, 16 C.F.R. § 801.1 (1993), MSO and Viacom Final Judgments § II(D). Ownership of 50 percent of the voting rights, for example, is considered "control."

The MSO decree identifies the "ultimate parent entities" as Time Warner, Comcast Corp., Continental Cablevision, Cox Enterprises, Newhouse Broadcasting, and Tele-Communications, Inc., even if those may not be "ultimate parent entities" under 16 C.F.R. § 801.1. MSO Final Judgment § II(0). Viacom's ultimate parent entity includes the ultimate parent entities of Viacom Cable and Viacom Inc. as defined under 16 C.F.R. § 801.1. Viacom Final Judgment § II(S).

266 For services in which there is an existing or subsequently acquired "non-controlling interest," the MSO defendants and Viacom pledge to "not seek or support any conduct or arrangements" that would be "inconsistent" with Section IV(A) if the relevant programming service were directly governed by Section IV(A). *See* Section IV(B) of both state decrees. At the time the decrees were filed, the non-controlled services were listed in Exhibit D of the MSO decree (Black Entertainment Television, Court TV, Liberty Media, Prime Sports-Rocky Mountain and Upper Midwest, QVC, Sunshine, Turner (TNT, CNN, and Headline News), and Video Jukebox) and in Exhibit C of the Viacom decree (Comedy Central, Lifetime, and Prime Sports-Northwest).

267 MSO and Viacom Final Judgments § IV(A)(1)(a).

268 *Id.*

269 See the definitions in Sections II(H), (J), (K), and (P) in both decrees.

may not be renewed)[270] and any services allowed by Section IV(C) to be licensed on an exclusive basis.[271]

When the settlements were submitted to the court, the only individually or collectively defendant-controlled programming services identified as covered by Section IV(A)(1) were: The Discovery Channel, The Learning Channel, Comedy Central, E! Entertainment Television, HBO, and Cinemax ("Primestar Partner Services");[272] and Showtime, The Movie Channel, MTV, VH-1, and Nickelodeon ("Viacom Services").[273] Subsequent developments, such as changes in control and the emergence of new defendant-controlled regional sports services, may alter these lists of Primestar Partner Services and Viacom Services to which the Section IV(A) duty-to-license attaches. For example, defendant TCI's recently proposed resumption of control over Liberty Media would bring Encore and any other Liberty-controlled services under Section IV(A)'s duty-to-license provisions.

(1) MMDS

Upon request, the controlling defendant(s) must "make available" to any MMDS provider "on reasonable business terms" any then-covered Primestar Partner Service or Viacom Service, as the case may be.[274] "Any grounds for refusing to deal or conditions on

---

[270] *See* MSO Final Judgment § IV(A)(5). The Viacom Final Judgment does not have a comparable provision in Section IV(A).

[271] *See* MSO Final Judgment § IV(A)(1)(a); Viacom Final Judgment § IV(A)(1)(a).

[272] MSO Final Judgment Appendix, Exhibit B.

[273] Viacom Final Judgment § IV(A)(1).

[274] MSO and Viacom Final Judgments § IV(A)(1)(a).

The MMDS industry argued that the decrees' definition of "control" should be revised to include situations where the MSO defendants have the power to direct certain management decisions even though they may lack 50 percent of the voting stock or board directorships. Memorandum of Law of Amicus Curiae The Wireless Cable Association International, Inc. in Opposition to Proposed Consent Decrees at 7-9, New York v. Primestar Partners, 93 Civ. 3868 (S.D.N.Y. filed July 21, 1993) [hereinafter WCA Amicus Brief]. WCA claimed that defendants TCI and Time Warner have the right to veto major Turner Broadcasting decisions that require super-majority board approval and that they, therefore, can control whether Turner licenses programming such as TNT to MMDS. *Id.* at 8.

The MSOs responded (i) that none of them has an exclusive agreement with Turner preventing licensing of TNT to MMDS operators, and (ii) that Section IV(B) of the MSO Final Judgment prevents them from using their minority ownership rights to "seek or support any conduct or arrangements inconsistent with Paragraph IV(A) were such non-controlled programming service subject to Paragraph IV(A)." *See* Defendants' Memorandum in Support of Proposed Final Judgment and in Opposition to the Common Carriers' Motion to Intervene at 9, New York v. Primestar Partners, No. 93 Civ. 3868 (S.D.N.Y. filed Aug. 23. 1993) [hereinafter MSOs' Brief]. The states agreed and added that existing MMDS programming contracts must be revised to eliminate any discrimination under the decrees. Plaintiff States' Memorandum of Law in Support of the Consent Decrees at 19-21, New York v. Primestar Partners, No. 93 Civ. 3868 (S.D.N.Y. filed Aug. 23, 1993) [hereinafter States' Brief]. The States added that the decrees do not eliminate any rights MMDS operators may have to complain directly under federal or state law. *Id.* at 22. The court ap-

which deals would be made . . . sh[ould] be reasonable" and not "pretext."[275] The fact that the MMDS provider "contemplates that it will compete with a cable operator shall not under any circumstances be grounds for a refusal to deal."[276] All contracts for Primestar Partner Services entered into with MMDS providers during the life of the decree "shall contain volume discount schedules no less favorable than those offered to cable operators of comparable size, measured by the total number of subscribers."[277] The price and other terms offered to the MMDS provider for a Primestar Partner Service may "not discriminate against such [MMDS] technology as compared to the most favorable price and other terms (taken as a whole) afforded to a cable operator of comparable size, measured by the total number of subscribers."[278] Nevertheless, "[r]efusals to deal . . . or differences in price and other terms of carriage (taken as a whole) between such provider and a cable operator of comparable size may be based on grounds of in-

proved the decrees as drafted, noting that the MMDS operators could initiate their own lawsuit. Oral Argument Transcript at 16 (Sept. 3, 1993).

275 MSO Final Judgment § IV(A)(1)(d); Viacom Final Judgment § IV(A)(1)(e).

276 MSO Final Judgment § IV(a)(1)(f); Viacom Final Judgment § IV(A)(1)(d). The Viacom provision also says that it is not "a legitimate business reason" for Viacom to refuse to deal because "a cable operator urges Viacom not to [deal]."

277 MSO Final Judgment § IV(A)(1)(e). Viacom does not expressly commit to afford MMDS providers cable-equivalent volume discount rates, but it does pledge to not increase its "base license fee (including volume discount rates, if any) in its then current published MMDS . . . rate card[ ] for the Viacom Services unless Viacom simultaneously increases by the same or greater percentage the base license fee rates (including volume discount rates, if any) in its then current published cable rate cards for the Viacom Services." Viacom Final Judgment § IV(A)(1)(f).

The 1992 Cable Act prohibits discriminatory treatment of MMDS and other multichannel distributors, but expressly authorizes different prices "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." 1992 Cable Act § 19(c)(2)(B)(iii).

278 MSO Final Judgment § IV(A)(1)(b). Viacom did not agree to charge MMDS operators the same fee for Showtime, The Movie Channel, VH-1, or future services, as charged cable operators of comparable size. Viacom, however, did agree to charge any large MMDS operator with 50,000 or more subscribers no higher base fee (including volume discounts) for Nickelodeon and MTV than charged comparably sized cable operators. Viacom Final Judgment § IV(A)(1)(f) (proviso).

The FCC objected to the "uniform national pricing" approach taken by the MSO Final Judgment with respect to cable, MMDS, and SMATV. *See* Memorandum of Law of the Federal Communications Commission as Amicus Curiae at 17, New York v. Primestar Partners, 93 Civ. 3869 (S.D.N.Y. filed August 23, 1993) [hereinafter FCC Amicus Brief]. In the FCC's view, it is not good policy simply to compare an MMDS (or SMATV) operator's purchase price with the most favorable price afforded to any cable operator of comparable size located somewhere else in the country. The FCC preferred a full consideration of all the factors in Section 628(c)(2)(B) of the Communications Act (47 U.S.C. § 548(c)(2)(B)), including cost or other factors specific to the local market. The FCC expressed concern that, under the decrees, programming vendors would be reluctant to negotiate a lower price in one market for fear that price would form the basis of discrimination complaints by distributors across the country. FCC Amicus Brief at 17. Despite the FCC's reservations, the court approved the decrees without change.

adequate signal security arrangements, inadequate creditworthiness or an impracticable business plan or that such prospective partner is in breach of any contract with the Primestar Partner Service or any affiliated company."[279] "[A]ny other grounds shall be presumed, subject to refutation, to be unreasonable or discriminatory."[280]

(2) SMATV

Primestar Partner Services must, upon request, be available "on reasonable business terms" to SMATV operators.[281] It is sufficient, however, if Primestar Partners Services are available indirectly through "noncable-affiliated third parties."[282] With respect to Primestar Partner Services, "[t]he rates and other terms (taken as a whole) charged to noncable operator SMATV wholesalers shall in no case be more than the rates and other terms (taken as a whole) afforded to cable operators of comparable size, measured by total number of subscribers."[283] The Viacom decree makes clear that any refusals or conditions shall be reasonable and not pretextual,[284] that contemplated competition by the SMATV operator against a cable operator or urgings by that cable operator are not legitimate reasons to refuse to deal,[285] and that any reason other than the SMATV operator's inadequate creditworthiness, inadequate signal security, impracticable business plan, or existing breach of a Viacom (or Viacom affiliate) contract is rebuttably pre-

279 MSO Final Judgment § IV(A)(1)(c). The Viacom decree contains very similar wording expressly applicable to refusals to deal, but omits mention of differing prices or carriage terms. Viacom Final Judgment § IV(A)(1)(c).

280 MSO Final Judgment § IV(A)(1)(c); see nearly identical language in Viacom Final Judgment § IV(A)(1)(c). There are some additional grounds that the 1992 Cable Act would consider to be potentially reasonable justifications for differential treatment of distributors. The Act allows vendors to impose "reasonable requirements for creditworthiness, offering of service, and financial stability and standards regarding character and technical quality," to establish "different" prices that "take into account actual and reasonable differences in the cost of creation, sale, delivery, or transmission" of the programming, and to consider "economies" attributable to subscriber count. Communications Act §§ 628(c)(2)(B)(i), (ii), (iii).

281 MSO Final Judgment § IV(A)(2)(a); Viacom Final Judgment § IV(A)(1)(a).

282 MSO Final Judgment § IV(A)(2)(a). The Viacom decree does not address expressly whether Viacom may make its services available to SMATV through noncable third party wholesalers or whether direct sale to SMATV retailers is required.

283 MSO Final Judgment § IV(A)(2)(c). As with MMDS, *see supra* note 278, Viacom agrees not to increase its SMATV rate card by a greater percentage than its cable rate card. Viacom Final Judgment § IV(A)(1)(f). Additionally, Viacom guarantees that an MMDS operator with 50,000 or more subscribers will pay no higher base rate (including volume discounts) than a comparably sized cable operator pays. *Id.* (proviso).

284 Viacom Final Judgment § IV(A)(1)(e).

285 *Id.* § IV(A)(1)(d).

sumed to be an illegitimate excuse for refusal to deal.[286] It is not clear why comparable language was omitted from the Primestar MSO Partners Final Judgment, which does have such language for dealings with MMDS, DBS, and, in part, cable overbuilders.

(3) TVRO

Primestar Partner Services and Viacom Services must be made available upon "reasonable business terms through, among others, noncable affiliated third parties to Television Receive Only System ("TVRO") households that receive such service from a C-band frequency satellite."[287] It is not sufficient to make the programming service available directly to consumers through the defendant's (or its affiliate's) packaging entity. The decrees do not require the defendant to supply the programming to the third-party TVRO packager at the same rate as a comparably sized cable operator is charged for sales to *cable* subscribers. (This contrasts with the parity obligation that applies to licensing of Primestar Partners Services to MMDS.) Rather, the license rate must be "no . . . more than the most favorable rates afforded to a cable operator for distribution to a comparable number of *TVRO* households."[288] Although the programmer is allowed to continue the present practice of generating higher annual wholesale revenues per TVRO subscriber than per cable subscriber, the decrees prevent the programmer from altering its future rates such that the annual revenues per subscriber differential will ever exceed by ten percent what they were when the decrees were entered.[289] This revenue differential regulation, therefore, will tend to keep cable and TVRO wholesale rates from further disadvantaging TVRO distributors.

(4) Cable Operators/Overbuilders

The MSO defendants must make Primestar Partner Services available "to any cable operator on reasonable business terms."[290] Refusals to deal based on any grounds other than inadequate signal security, inadequate creditworthiness, impracticable business

---

[286] *Id.* § IV(A)(1)(c). As noted earlier, there may be other defensible reasons for differential treatment. *See* Communications Act § 628(c)(2)(B).

[287] MSO Final Judgment § IV(A)(2)(a); Viacom Final Judgment § IV(A)(1)(b).

[288] MSO Final Judgment § IV(A)(2)(b)(emphasis added); see nearly identical language in Viacom Final Judgment § IV(A)(1)(g).

[289] MSO Final Judgment § IV(A)(2)(b); Viacom Final Judgment § IV(A)(1)(h).

[290] MSO Final Judgment § IV(A)(2)(a). Viacom's identical obligation is expressly toward second and subsequent cable competitors, i.e., "cable overbuilders," not just "any cable operator." Viacom Final Judgment § IV(A)(1)(a). Literally, it seems Viacom could withhold a programming service from all cable operators and license it instead to a competing mode, e.g., DBS.

plan, or breach of contract, are rebuttably presumed to be "unreasonable or discriminatory."[291] Defendants may "not discriminate against cable overbuilders [(i.e., second and subsequent competing cable operators)] with respect to rates and other terms (taken as a whole) as compared to other cable operators of comparable size, measured by total number of subscribers."[292] An overbuilder's TVRO and/or DBS subscribers may not be aggregated with its cable subscribers for purposes of this rate parity requirement,[293] but perhaps SMATV and MMDS subscribers in the United States would count along with the cable subscribers. Because "cable operator" is defined to exclude any telephone common carrier (or affiliate) providing video programming in the carrier's telephone service area (except for FCC-authorized rural telco video providers),[294] this obligation to license programming will not benefit telcos that obtain First Amendment or legislative relief from the legal strictures currently barring telco entry into the video business.[295]

---

291 MSO Final Judgment § IV(A)(3); Viacom Final Judgment § IV(A)(1)(c). The Viacom decree makes explicit what may be implicit in the other decree, i.e., that refusal to provide Viacom services must be based on reasonable grounds not pretext and that the fact that another cable operator competes with the overbuilder or urges refusal are not legitimate reasons for denying a license. Viacom Final Judgment §§ IV(A)(1)(d), (e).

292 MSO Final Judgment § IV(A)(3). There is no equivalent express requirement for rate parity among comparably sized cable operators in the Viacom Final Judgment. It is not clear whether rate discrimination would conflict with Viacom's "reasonable business terms" obligation or whether Viacom might have "legitimate business reasons" for different rate schedules.

293 MSO Final Judgment § IV(A).

294 MSO and Viacom Final Judgments § II(B).

295 One court has freed Bell Atlantic to offer video service in its exchange areas and has declared unconstitutional under the First Amendment of the U.S. Constitution, Sections 613(b)(1)-(2) of the Communications Act which forbid such telco video offerings. *See* Chesapeake & Potomac Telephone Co. v. United States, 1993-2 Trade Cas. (CCH) ¶ 70,339 (E.D. Va. 1993). Other telco First Amendment suits are pending. Legislation to modify or eliminate the ban is also being considered in Congress.

The telcos sought unsuccessfully to have the Primestar decrees modified or disapproved. *See* Joint Memorandum of Law of the Common Carriers, New York v. Primestar Partners, No. 93 Civ. 3868 (S.D.N.Y. filed July 23, 1993) [hereinafter Telcos' Brief]. They argued that the decrees were anticompetitive and contrary to the 1992 Cable Act because nonrural common carrier telcos and their video dialtone customers were not assured access to programming controlled by the defendants.

The states responded that the decrees eliminate none of the telcos' rights or remedies under other law and that telcos (or video dialtone entities) that obtain a cable franchise would qualify as "cable operators" receiving the benefits of nondiscriminatory program access under the decrees. States' Brief at 22-25. Aware that nonrural telco involvement in video is in its infancy and that the decrees do not legalize treatment that the telcos might complain about in their own litigation, the court entered the decrees unchanged. *See* Oral Argument Transcript at 39-40, 46-47, New York v. Primestar Partners, No. 93 Civ. 3868 (S.D.N.Y. Sept. 3, 1993). The telcos' intervention motion was formally denied on October 6, 1993.

(5) DBS

(a) *Primestar MSO Partners' Obligations*

The MSO defendants must make Primestar Partner Services available on "reasonable business terms" to Ku-band DBS providers whether mid-power (like Primestar) or high-power.[296] To be eligible, the DBS provider must transmit a package of services, including at least one that it does not own or control.[297] The obligation of defendants to license Primestar itself extends only to distribution to residential consumers by individual DBS satellite antennas; but as to other DBS providers, it extends as well to distribution by master antennas.[298] Unless prohibited by agreement between the master antenna DBS provider and some other programming service, the MSO defendant may condition its grant of a license on the DBS provider in turn appointing the Primestar Partner Service (e.g., HBO) as "a nonexclusive distributor" of the DBS programming package to such residences.[299]

All contracts with DBS providers must contain "volume discount schedules no less favorable than those offered to cable operators of comparable size, measured by the total number of subscribers."[300] Other than contracts with Primestar, the price and other terms offered to any DBS provider must "not discriminate against such technology as compared to the most favorable price and other terms (taken as a whole) afforded to a cable operator of comparable size, measured by the total number of [U.S.] subscribers."[301] "Refusals to deal with DBS . . . providers (other than Primestar) or differences in price and other terms of carriage (taken as a whole) between such [DBS] provider and a cable operator of comparable size may be based on grounds of inadequate signal security arrangements, inadequate creditworthiness or an impracticable business plan or that such prospective provider is in breach of any contract with the Primestar Partner Service or any

---

296 MSO Final Judgment § IV(A)(1)(a). Viacom's obligation to license DBS apparently is limited to high-power operations. "DBS distribution" is defined in the Viacom decree to exclude anything but high power operation in the direct broadcast portion of the Ku-band of frequencies. Viacom Final Judgment §§ II(E), (G).

297 *See* MSO Final Judgment § II(E).

298 MSO Final Judgment § IV(A)(1)(a).

299 MSO Final Judgment § IV(A)(1)(c). This right to condition the license does not extend beyond master DBS to distribution of service to residences served by individual DBS antennas. *Id.*

300 *MSO Final Judgment § IV(A)(1)(e).*

301 MSO Final Judgment § IV(A)(1)(b). For purposes of the subscriber count, residences served by individual antennas may not be aggregated with residences served by master antennas. *Id.* Nor may the DBS provider include in its count cable and TVRO subscribers that it (or its affiliate) also serves. *Id.* § (IV)(A)(4).

affiliated company."[302] Refusals or differences based on other grounds will be rebuttably presumed to be "unreasonable or discriminatory."[303]

Grounds for refusals or conditions must be "reasonable" and not "pretext."[304] Neither the prospect that the DBS provider will compete with cable operators or the urgings of cable operators is a legitimate basis for refusing to license Primestar Partner Services to the DBS provider.[305]

The MSO decrees allow Primestar Partner Services to elect an alternate set of obligations for licensing high-power DBS providers, although the decree's duration automatically extends for two years with respect to high-power DBS.[306] Presumably the rationale is that in exchange for early licensing of programming to DBS, the programming service is allowed greater flexibility in its contract terms. With respect to licensing of DBS providers that use satellites at 101° W.L., election of the alternate rules is accomplished by licensing the Service for individual and master residential distribution to at least one "high-power DBS provider operating from the 101° orbital position [(other than Primestar)]."[307] This licensing must occur within three years from entry of the decree or twelve months from the operation date of the first 101° DBS satellite, whichever comes first.[308] With respect to licensing programming to high-power DBS providers operating from other orbital slots (*e.g.*, 110°, 119°), the Primestar Partner Service must be available to consumers within twelve months of a satellite becoming operational in such slot.

Regardless of the orbital slot involved, the Primestar Partner Service may be licensed on a slot-exclusive basis, provided that the exclusivity does not (i) extend beyond the slot, (ii) run to the benefit of a high-power DBS provider controlled by MSOs accounting for more than twenty percent of all cable subscribers, or (iii) require that the service be an exclusive distributor for the DBS providers.[309] If these conditions are avoided, then the programming vendor need only offer "reasonable business terms" no less favorable than the first high-power DBS provider operating at 101°

---

[302] *Id.* § IV(A)(1)(c).
[303] *Id.*
[304] *Id.* § IV(A)(1)(d).
[305] *Id.* § IV(A)(1)(f).
[306] *Id.* § IV(A)(1)(g). The ostensible purpose of the two-year extension is to benefit DBS providers that may not launch until the late 1990s.
[307] *Id.*
[308] *Id.*
[309] *Id.*

has received.[310] The requirement of offering DBS providers as good a price as cable operators[311] would be superseded by a less onerous duty.

(b) *Viacom's Obligations*

Viacom has no obligation to make Viacom Services available to Primestar or any DBS distributor individually or collectively controlled by cable operators.[312] Nor is it obliged to invest in high-power DBS licenses or to become a DBS distributor itself.[313]

Viacom is, however, minimally required to make Viacom Services available to high-power DBS providers on "reasonable business terms"[314] and must have reasonable grounds—not mere pretexts—for refusing to deal or imposing conditions.[315] Inadequate signal security or creditworthiness, an impracticable business plan, or breaking a contract with Viacom or its affiliate is each a legitimate reason not to license.[316] That the DBS operator will compete with a cable operator or that a cable operator objects is not a proper basis for refusal to license the DBS operator.[317]

In lieu of the foregoing requirements, however, Viacom has the option to license its programming to at least one high-power DBS satellite (other than or in addition to Primestar) in each orbital slot. Absent *force majeure,* Viacom must make its Viacom Services available to a high-power DBS satellite at 101° within three years from entry of the decree, or twelve months from the date the satellite commences operations, whichever is earlier.[318] Within twelve months of operation of each satellite in the other orbital slots (*e.g.*, 110°, 119°), Viacom must license its programming on a basis no less favorable than that negotiated at 101°.[319] Viacom agrees that it will not license a DBS provider on an exclusive basis in one slot that precludes licensing in another slot.[320] Viacom also agrees not to issue a slot-exclusive license to a DBS distributor controlled by cable operators serving twenty percent or more of all cable subscribers.[321]

---

310 *Id.* § IV(A)(1)(g).
311 *Id.* § IV(A)(1)(b).
312 Viacom Final Judgment § IV(A)(1)(j)(viii).
313 *Id.*
314 *Id.* § IV(A)(1)(j)(iv).
315 *Id.* § IV(A)(1)(j)(vii).
316 *Id.* § IV(A)(1)(j)(v).
317 *Id.* § IV(A)(1)(j)(vi).
318 *Id.* § IV(A)(1)(j)(i).
319 *Id.* § IV(A)(1)(j)(ii). This undertaking also is subject to a *force majeure* clause.
320 *Id.* § IV(A)(1)(j)(iii).
321 *Id.*

(c) *The Court's Ruling on Amici's Objections*

The decrees' provisions allowing the defendant programmers to grant high-power DBS orbital slot-specific exclusive distributorships and to charge the DBS distributors potentially more than competing cable operators were among the most controversial matters in the proceedings leading up to the court's entry of the decrees. Some technical and historical background is necessary to understand the controversy.

There are only three (or maybe four) orbital positions established by the FCC which are technically suitable for delivering high-power DBS service to the entire continental United States.[322] They are 101°, 110°, 119° (and possibly 61.5°) W.L., with 101° being considered possibly the best location. For several years the FCC has been issuing construction permits for the limited DBS frequencies available at each orbital slot. Hughes Communications received permits for twenty-seven transponders and United States Satellite Broadcast ("USSB") for five transponders at 101°.[323] In early 1994 Hughes launched the first of two DBS satellites at 101°. By agreement, Hughes will operate eleven transponders and USSB five transponders on that first satellite. A second satellite to be launched later in 1994 will have sixteen Hughes-operated transponders. With 4:1 compression, Hughes will broadcast forty-four video channels and USSB twenty video channels. The 101° satellites are expected to be launched several years before satellites at 110°, 119°, and 61.5°. Hughes and USSB have agreed upon certain technical cooperation so that consumers will be able to use the same reception and decryption equipment for both services.[324]

Prior to the filing of the Primestar decrees, USSB acquired from defendants Time Warner and Viacom exclusive 101° DBS rights for HBO and Showtime (and possibly also for The Movie Channel, Comedy Central, FLIX, MTV, VH-1, and Nickelodeon) at what USSB called "freely negotiated . . . reasonable" rates.[325] DirecTv, the Hughes DBS marketing arm, and the National Rural Telecommunications Cooperative ("NRTC"), whose member cooperatives will retail DirecTv's service in rural areas, challenged the

322 In re Applications of United States Satellite Broadcasting Co., Inc., For Modification of Construction Permit for Direct Broadcast Satellite System and for Expansion of Time to Construct Direct Broadcast Satellite System. 7 F.C.C.R. 7247 n.2 (1992).

323 *Id.*

324 Memorandum of Law of Amicus Curiae United States Satellite Broadcasting Company, Inc. at 1 n.1 and 4 n.8, New York v. Primestar Partners, No. 93 Civ. 3868 (S.D.N.Y. filed August 23, 1993) [hereinafter USSB Amicus Brief].

325 *Id.* at 2.

decrees' provisions permitting USSB's exclusive distributorships.[326] The FCC joined in that challenge.[327] The essence of the argument was an alleged conflict between the decrees and the Cable Act. DirecTv argued that the grant to USSB of DBS orbital slot programming exclusives was an unfair act, practice, or method of competition in violation of Section 628(b) of the Communications Act.[328] DirecTv also asserted that the provision implicitly allowing the price to DBS operators to be higher than cable operators pay conflicted with the spirit, if not the letter, of the Communications Act § 628(c)(2)(B)'s price discrimination prohibitions.[329] The FCC added that disparities between the antitrust decree and FCC regulation would foster confusion and complicate FCC enforcement.[330]

The states and defendants responded that Congress had not expressly forbidden DBS exclusives, that the FCC had not yet declared such exclusives to be "unfair" or regulated the pricing of DBS distribution agreements, that DBS exclusives were not necessarily anticompetitive and might be procompetitive, and that the decrees ensured DBS operators in other slots would be charged no more than the 101° exclusive distributor is charged.[331] The states also pointed to the decree's proviso[332] that, in the event the 1992 Cable Act and implementing regulations prohibited high-power DBS slot-specific exclusives, then the main provisions of Section IV(A) of the decree, which do not permit exclusives and generally require parity with cable prices, would apply. In rejecting the *amici's* challenge to the DBS portion of the decrees, the court accepted the states' argument, observing that "by the terms of the decree[s] [them]sel[ves], that which is illegal [under the Communications Act] is not permitted."[333] As the FCC itself said: "[T]he Decrees do not purport to, nor could they, grant the parties thereto an exemption for conduct that would violate the 1992 Cable Act or

---

326 Joint Amicus Curiae Memorandum of Law of DirecTv, Inc., National Rural Telecommunications Cooperative, Consumer Federation of America and Television Viewers of America, Inc., New York v. Primestar Partners, No. 93 Civ. 3869 (S.D.N.Y. filed July 16, 1993) [hereinafter DirecTv Amicus Brief].

327 FCC Amicus Brief at 14 n.24, 17-18.

328 DirecTv Amicus Brief at 19.

329 *Id.*

330 FCC Amicus Brief at 14-15, 18.

331 MSOs' Brief at 15-17.

332 MSO Final Judgment § IV(A)(1)(g).

333 Oral Argument Transcript at 46, New York v. Primestar Partners, No. 93 Civ. 3868 (S.D.N.Y. Sept. 3, 1993). The court said: "If I approve this decree, I am indicating no opinion whatsoever in any shape, manner or form with respect to whether exclusive contracts do or do not conform with the Cable Act." *Id.* at 22-23.

the FCC's rules."[334]

(6) Obligations May Follow Sold Programming Assets and Will Apply to Purchased Programming Interests

Third parties that acquire programming assets which were controlled by defendants at the time the decrees were entered (September 14, 1993) may find that those assets continue to be subject to the decrees. The obligations do *not* follow programming assets sold by the Primestar MSO Partners unless, at a minimum, the purchaser already controls cable systems or other cable programming assets.[335] The obligations *do* follow the assets if, after the sale, the selling Primestar MSO Partner is left with less than eighty percent of the programming assets that it had when the decree was entered.[336] Even if the Primestar MSO Partner or Viacom retains at least eighty percent of such programming assets, the obligations *will* follow the sold programming interests only if the purchaser's ultimate parent entity controls cable operations serving at least 1.4 million subscribers.[337] If a third party acquires programming assets in circumstances where the decree follows the assets, other programming assets controlled by that third party remain outside the decree.[338]

By completely divesting its cable system interests, Viacom can place its retained programming operations outside the reach of the decree.[339] And if, through a single one-step or multiple-step transaction, Viacom's cable system and programming interests become controlled by different ultimate parent entities, the programming interests controlled by the new entity would be free from compliance with Section IV(A) of the decree.[340]

The decrees also clearly apply to programming services over which the defendants acquire control during the lives of the decrees.[341]

---

[334] FCC Amicus Brief at 2.

[335] MSO Final Judgment § V(C).

[336] *Id.* § V(A).

[337] *Id.* § V(A); Viacom Final Judgment § V(C). The obligations of either decree do not follow the transferred programming assets if the transfer is to a creditor in a default or bankruptcy situation or if the transfer is for the purpose of complying with the 1992 Cable Act. MSO Final Judgment §§ (V)(E),(F); Viacom Final Judgment §§ V(F), (G).

[338] MSO Final Judgment § V(G); Viacom Final Judgment § IV(H).

[339] Viacom Final Judgment § V(E).

[340] *Id.* § V(E). If Viacom retains a non-controlling interest in the programming assets, it would still have the obligation under Section IV(B) not to seek or support any practices by the programmer inconsistent with the spirit of Section IV(A). *Id.*

[341] MSO and Viacom Final Judgments §§ IV(A), (B).

d. *Cable Operators' Obligations*

(1) Exclusive Distributorships

During the lives of the respective decrees, cable systems individually or collectively controlled by any of the Primestar MSO Partners or by Viacom (alone or with one or more of the MSO Partners) may not enter into any new exclusivity provisions with respect to any national video programming service that was serving subscribers on May 1, 1992, or any existing or future regional sports service.[342] The prohibition extends to any exclusivity provision "that restricts or limits the rights of such programming service to deal with any DBS, MMDS, SMATV, TVRO provider or cable operator."[343] The cable systems may continue to enforce pre-decree exclusivity rights as to national video services that were serving subscribers on May 1, 1992.[344] The one exception is that they may "not enforce any existing contract terms that restrict or limit the rights of such a programming service to deal with any DBS provider."[345]

As to any "New Service" (i.e., any non-pay-per-view, non-interactive, non-superstation national video programming service that began serving subscribers after May 1, 1992),[346] cable systems individually or collectively controlled by the Primestar MSO Partners or by Viacom (alone or with one or more of those Partners) may acquire and enforce a limited number of exclusive distributorships as against any DBS, MMDS, SMATV, and TVRO providers, and other cable operators. With respect to New Services controlled by one or more cable operators collectively serving thirty percent or more of all U.S. basic cable subscribers, the cable system may acquire an exclusive distributorship for no more than "one out of every three" such cable-controlled New Services.[347] This means, for example, that if there are four to six such cable-controlled New

---

[342] MSO and Viacom Final Judgments § IV(C)(1). Three months prior to the decrees' expiration, the cable systems may enter into otherwise proscribed exclusivity arrangements to become effective only after the decrees expire. *Id.*

[343] Because the term "cable operator" excludes nonrural common carrier telephone companies that provide video in their telephone service areas (*see* MSO and Viacom Final Judgments § II(c)(2)), the defendant cable systems may continue to obtain or enforce exclusivity as to such telcos even if the telcos succeed through legislation and/or First Amendment litigation in obtaining the right to offer video service in their local telco exchange areas.

[344] The states were given lists of such exclusive agreements. *See* MSO and Viacom Final Judgments § IV(C)(1).

[345] *Id.*

[346] *Id.* § II(K). A service is not "new" if it is simply a renamed pre-existing service or consists of "significant programming" taken from a pre-existing service for the purpose of evading the decrees. MSO and Viacom Final Judgments § IV(H).

[347] MSO Final Judgment § IV(C)(2); Viacom Final Judgment § IV(C)(2).

Services, two exclusives are permitted.[348] "[P]romptly upon entering . . . any new exclusive distribut[orship]" for a New Service, the defendants must notify the states.[349]

In addition to the foregoing one-of-three limitation, there is a more general restriction on exclusive distributorships irrespective of whether the New Services are controlled by cable operators. Immediately prior to the cable operator entering into an exclusive with a New Service, the operator must look at subscriber data as of December 31 of the previous year and determine whether the contemplated exclusive would cause the operator to exceed its "Allowable Percentage" of exclusives.[350] The Allowable Percentage refers to that percentage of the total nationwide subscribers for all technologies served by all (not just new) national video programming services that would be represented by the total nationwide subscribers for all technologies served by all (not just new) national video programming services with which the particular Primestar MSO Partner (or Viacom) has or would have exclusives.[351] "A separate calculation shall be performed with respect to each competitive distribution system."[352] The defendant "may enter into exclusivity arrangements up to the Allowable Percentage separately for each competitive distribution system."[353] Until December 31, 1994, the Allowable Percentage is twenty-five percent; after that, until the decree expires, the Allowable Percentage will be twenty percent.[354] In this way, the cable operator cannot deprive its competitors of an unduly large fraction of the most desirable programming.

These restrictions on exclusivity, of course, are in addition to Cable Act limitations, *e.g.*, the need for prior "public interest" approval of a cable operator's non-grandfathered exclusive contracts with programming vendors in which a cable operator has an attributable interest,[355] and the absolute prohibition on cable exclusives with such vendors in areas not served by cable on October 5, 1992.[356] But, for the defendants subject to the antitrust decrees, the decrees' restrictions also extend to programming services in which no cable operator has an attributable interest.

---

348 *See* MSO and Viacom Final Judgments Appendix, Exhibit E. As cable ownership of New Services fluctuates and as each New Service emerges, the permissible number of exclusives may change.

349 MSO and Viacom Final Judgments § IV(C)(3).

350 *Id.* § IV(C)(2).

351 *Id.*

352 *Id.*

353 *Id.*

354 *Id.*

355 Communications Act §§ 628(c)(2)(D), (c)(4), (h).

356 *Id.* § 628(c)(2)(C).

(2) Conditioning Affiliation Agreements

Except to the extent included in any exclusive distribution agreement permitted under the decrees, the MSO defendants may not condition their willingness to distribute a programming service upon competing distributors being required to sell through the defendant (or its agent) or to sell only in geographic areas not served by the defendant.[357] Nor may affiliation agreements be conditioned on the defendant being compensated for sales that others make.[358] If the programming service is not individually or collectively controlled by the defendants (and thus is outside the reach of Section IV(A)'s duty-to-license provisions), the defendants may not condition their distribution of the service upon the programming vendor "taking action with respect to any other competing provider" that the vendor could not take if it were covered by Section IV(A).[359] For example, the defendant may not require the programming vendor to terminate or refuse to enter a distribution agreement on the basis of a phony concern about the other distributor's signal security or credit arrangements.

(3) Retaliation

Defendants' controlled cable systems may not threaten or take retaliatory actions against any programmer for providing programming to a competing distributor.[360] Nor may defendants seek or support such retaliatory action by cable systems in which they have a non-controlling investment.[361] These prohibitions echo the 1992 Cable Act provision forbidding any multichannel distributor from retaliating against a vendor for failing to provide exclusivity.[362]

(4) Obligations May Follow Sold Cable Systems and Will Apply to Purchased Systems

Third parties that subsequently acquire cable systems which were controlled by defendants at the time the decrees were entered (September 14, 1993) may find themselves obligated to operate those systems in accordance with the decrees. The obligations do *not* follow the assets in any single sale of a defendant's cable systems serving fewer than 5000 subscribers, unless the single trans-

[357] MSO and Viacom Final Judgments §§ IV(D)(1)(a), (c).

[358] *Id.* § IV(D)(1)(b). This eliminates the possibility of profit pass-overs to the defendant cable operator as primary distributor.

[359] *Id.* § IV(D)(1)(d).

[360] MSO and Viacom Final Judgments § IV(E).

[361] *Id.* § IV(F).

[362] Communications Act § 616(a)(2).

action is part of a series designed to evade the decrees.[363] On the other hand, for MSO Partners the obligations *will* follow the transferred 5000-plus subscriber cable assets if the ultimate parent of the purchaser already controls MSOs serving 1.4 million or more subscribers, or if the selling defendant no longer retains at least eighty percent of the subscribers it had when the decrees were entered.[364] In any case, other cable systems owned by the purchaser will not be affected.[365]

The decrees also clearly apply to cable systems over which the defendants acquire control during the lives of the decrees.[366]

IV. Conclusion

A key goal of the 1992 legislation (both behavioral and structural) and the *Primestar* litigation is to liberate the multichannel video marketplace from perceived shortcomings in competitiveness and diversity. But the incredible complexity of the resulting FCC regulations and antitrust decrees, with their overlaps and inconsistencies and their inevitable need for ongoing interpretation, seems the very opposite of liberating. Only time will tell whether the best of regulatory enforcement intentions have created a public policy victory or nightmare. Perhaps unanticipated breakthroughs in technology and changes in industry ownership patterns will render the whole mind-numbing regulatory undertaking essentially moot or irrelevant.

---

363 MSO and Viacom Final Judgments § V(B).

364 MSO Final Judgment § V(A). Viacom may make system sales aggregating 300,000 subscribers without having the obligations of the decree follow the assets. Viacom Final Judgment § V(A). The obligations of either decree do not follow the transferred cable systems if the transfer is to a creditor in a default or bankruptcy situation, or if the transfer is for the purpose of complying with the 1992 Cable Act. MSO Final Judgment §§ V(E), (F); Viacom Final Judgment §§ V(F), (G).

365 MSO Final Judgment § V(G); Viacom Final Judgment § V(H).

366 *See* MSO and Viacom Final Judgments §§ IV(C)(1), (C)(2), (D)(1), (E), (F). Additionally, cable systems sold by Viacom to a Primestar MSO Partner remained covered expressly by the Viacom decree. Viacom Final Judgment § V(D).