impact on a substantial number of small entities. The Commission received no comments on this certification.

List of Subjects in 17 CFR Part 240

Broker-dealers, Securities.

Statutory Basis and Text of the Rule

In accordance with the foregoing, title 17, chapter II of the Code of Federal Regulations is amended as follows:

PART 240—GENERAL RULES AND REGULATIONS, SECURITIES EXCHANGE ACT OF 1934

1. The authority citation for part 240 continues to read in part as follows:

Authority: 15 U.S.C. 77c, 77d, 77g, 77j, 77s, 77eee, 77ggg, 77nnn, 77sss, 77ttt, 78c, 78d, 78i, 78j, 78*l*, 78m, 78n, 78*o*, 78p, 78s, 78w, 78x, 78*ll*(d), 79q, 79t, 80a–20, 80a–23, 80a–29, 80a–37, 80b–3, 80b–4 and 80b–11, unless otherwise noted.

* * * * *

2. By adding § 240.15b7–1 to read as follows:

§ 240.15b7–1 Compliance with qualification requirements of self-regulatory organizations.

No registered broker or dealer shall effect any transaction in, or induce the purchase or sale of, any security unless any natural person associated with such broker or dealer who effects or is involved in effecting such transaction is registered or approved in accordance with the standards of training, experience, competence, and other qualification standards (including but not limited to submitting and maintaining all required forms, paying all required fees, and passing any required examinations) established by the rules of any national securities exchange or national securities association of which such broker or dealer is a member or under the rules of the Municipal Securities Rulemaking Board (if it is subject to the rules of that organization).

Dated: May 4, 1993.

By the Commission.

Jonathan G. Katz,

Secretary.

[FR Doc. 93–11036 Filed 5–10–93; 8:45 am]

BILLING CODE 8010–01–P

DEPARTMENT OF TRANSPORTATION

Coast Guard

46 CFR Part 25

[CGD 87–016a]

RIN 2115–AC69

Emergency Position Indicating Radio Beacons for Uninspected Vessels

AGENCY: Coast Guard, DOT.

ACTION: Final rule: corrections.

SUMMARY: This notice corrects a final rule previously published in the **Federal Register** on March 10, 1993, concerning requirements for emergency position indicating radio beacons (EPIRBs) to be carried on certain uninspected commercial vessels.

EFFECTIVE DATE: May 11, 1993.

FOR FURTHER INFORMATION CONTACT: ENS. Stephen H. Ober, U.S. Coast Guard, Survival Systems Branch (G–MVI–3), 2100 Second St., SW., Washington, DC 20593; (202) 267–1444. Normal office hours are from 7:30 a.m. to 4 p.m. Monday through Friday, except federal holidays.

SUPPLEMENTARY INFORMATION: This rule applies to all uninspected commercial vessels, but excludes commercial fishing industry vessels with galleys or berthing facilities and uninspected passenger vessels. Commercial fishing industry vessels with galleys or berthing facilities are already required to carry EPIRB's as a result of the final rules published on August 17, 1988 (53 FR 31004) and April 19, 1990 (55 FR 14920). The purpose of this document is to make corrections to the final rule published on March 10, 1993 (58 FR 13364) as follows:

Corrections:

§ 25.26–5 [Corrected]

(1) On page 13367, 2nd column, under § 25.26–5 (b)(3), line 3, delete "(a)" after "§ 25.26–30".

(2) On page 13367, 2nd column, under § 25.26–5(c), line 5, delete "and" and replace it with "or".

§ 25.26–20 [Corrected]

(3) On page 13367, 3rd column, under § 25.26–20(a)(2), line 3, delete "(a)" after "§ 25.26–30".

(4) On page 13367, 3rd column, under § 25.26–20(b)(3), line 3, delete "(a)" after "§ 25.26–30".

§ 25.26–50 [Corrected]

(5) On page 13367, 3rd column, under § 25.26–50(a), line 1, delete "owner" and replace with "master".

Dated: May 4, 1993.

R.C. North,

Captain, U.S. Coast Guard, Acting Chief, Office of Marine Safety, Security and Environmental Protection.

[FR Doc. 93–10965 Filed 5–10–93; 8:45 am]

BILLING CODE 4910–14–M

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 76

[MM Docket No. 92–265; FCC 93–178]

Cable Act of 1992—Program Distribution and Carriage Agreements

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: This Report and Order adopts rules to implement section 19 of the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act"), which adds a new section 628 prohibiting unfair or discriminatory practices in the sale of satellite cable and satellite broadcast programming to the Communications Act of 1934. The Notice and Proposed Rulemaking ("Notice"), in this proceeding sought comment on provisions that will govern access to multichannel video programming, as well as program carriage agreements. This action is taken in order to comply with the 1992 Cable Act.

EFFECTIVE DATE: July 16, 1993.

FOR FURTHER INFORMATION CONTACT: James R. Coltharp, Mass Media Bureau, Policy and Rules Division, (202) 632–6302 or Diane L. Hofbauer, Office of General Counsel, (202) 632–6990.

SUPPLEMENTARY INFORMATION: Public reporting burden for the collection of information under § 76.1002(c)(5) is estimated to vary from 10 to 25 hours per response with an average of 21 hours 40 minutes per response. The public reporting burden under § 76.1003 is estimated to vary from 2 to 40 hours per response with an average of 14 hours 24 minutes per response. These reporting burdens include the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding these burden estimates or any other aspect of these collections of information, including suggestions for reducing the burden, to the Federal Communications Commission, Office of Managing Director, AMD–PIRS, Records Management Division, Washington, DC

20554, and to the Office of Management and Budget, Paperwork Reduction Project, Washington, DC 20503. This is a synopsis of the Commission's First Report and Order, in MM Docket No. 92–265, FCC 93–178, adopted April 1, 1993, and released April 30, 1993. The complete text of this document is available for inspection and copying during normal business hours in the FCC Reference Center, 1919 M Street, NW, Washington, DC, and also may be purchased from the Commission's copy contractor, International Transcription Service (ITS), at (202) 857–3800, 2100 M Street, NW, suite 140, Washington, DC 20037.

Synopsis of Report and Order

1. This Report and Order adopts rules to implement section 19 of the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act"), which adds a new section 628 prohibiting unfair or discriminatory practices in the sale of satellite cable and satellite broadcast programming to the Communications Act of 1934. Section 628 is intended to increase competition and diversity in the multichannel video programming market, as well as to foster the development of competition to traditional cable systems, by prescribing regulations that govern the access by competing multichannel systems to cable programming services.[1]

Coverage of the Statutory Program Access Provisions

2. Section 628(b), which sets forth the general prohibition required by the statute, proscribes "a cable operator, a satellite cable programming vendor in which a cable operator has an attributable interest, or a satellite broadcast programming vendor" from engaging in unfair practices. Section 628(c) delineates the "minimum contents" of the program access regulations to be adopted by the Commission. The various provisions of section 628(c) expressly apply to undue influence exerted by "a cable operator which has an attributable interest in a satellite cable programming vendor or a satellite broadcast programming vendor" (628(c)(2)(A)); discrimination by "a satellite cable programming vendor in which a cable operator has an attributable interest, or by a satellite broadcast programming vendor" (628(c)(2)(B)); exclusive contracts in areas not served by cable "that prevent a multichannel video programming distributor from obtaining * * * programming from any satellite cable programming vendor in which a cable operator has an attributable interest or any satellite broadcast programming vendor in which a cable operator has an attributable interest" (628(c)(2)(C)); and exclusive contracts in areas already served by cable between "a cable operator and a satellite cable programming vendor in which a cable operator has an attributable interest or a satellite broadcast programming vendor in which a cable operator has an attributable interest" (628(c)(2)(D)).

3. Our regulations regarding program access will prohibit practices that are unfair and discriminatory, in a manner that is faithful to the policy of Congress to: (1) Promote the availability to the public of a diversity of views and information through cable television and other distribution media; (2) rely on the marketplace, to the maximum extent feasible, to achieve greater availability of the relevant programming; (3) ensure that cable operators continue to expand, where economically justified, their capacity and the programs offered over their cable systems; and (4) ensure that cable television operators do not have undue market power vis-a-vis video programmers and consumers. In order to best fulfill these objectives, we conclude that the program access regulation will apply to the specific entities enumerated in each provision of section 628. Moreover, where vertically integrated entities are involved, the statutory prohibitions will apply to such entities in all locations, regardless of vertical integration in the particular market.

4. *Vertically integrated satellite cable programming vendors.* Although other entities are implicated, a principal target of the restrictions contained in section 628 is the conduct of vertically integrated satellite cable programming vendors. For this purpose, the term "satellite cable programming" means video programming which is transmitted via satellite, other than satellite broadcast programming, and which is primarily intended for the direct receipt by cable operators for their retransmission to cable subscribers. The term "satellite cable programming vendor" means "a person engaged in the production, creation, or wholesale distribution for sale of satellite cable programming, but does not include a satellite broadcast programming vendor."

5. The general prohibition of section 628(b) against unfair practices will apply to vertically integrated satellite cable programming vendors, all satellite broadcast programming vendors and all cable operators in all locations, regardless of the existence of vertical integration in the particular market. While most of the provisions of section 628(c) specifically apply only to vertically integrated entities, that subsection includes only the minimum required regulations to be promulgated by the Commission under 628(b), and is not intended to be entirely inclusive. Thus, the Commission rejects the arguments of some commenters that a vertical integration requirement for cable operators or satellite broadcast programmers must be read into section 628(b). In addition, regarding the geographic considerations for vertical integration, the scope of the rules will not be limited to situations where a satellite cable programming vendor is vertically integrated with a distributor within a particular market. Instead, in order to file a complaint under section 628, a complainant need only show that the programmer is vertically integrated as a general matter.

6. *Attribution.* In assessing vertical integration, a cable operator will have an attributable interest in a programming vendor if the cable operator holds five percent or more of the stock of the programmer, whether voting or non-voting. We will not adopt a single majority shareholder rule as we did in conjunction with the broadcast attribution rule. In addition, all officer and director positions and general partnership interests will be attributable, as will limited partnership interests of five percent or greater, regardless of insulation. We note that various attribution rules have been used by the Commission and by other regulatory agencies depending on the specific policy or rule in question. The policy objective involved here, however, warrants a relatively inclusive attribution rule.

7. In fact, the rule adopted here is consistent with the standard used in the video dialtone context. The intent of the video dialtone proceeding is more analogous to the intent of Congress in adopting section 628. A behavioral test for assessing attribution is not adopted. Also, no exemption from our attribution standards for a programming vendor with less than five percent of its total program subscribership is adopted at this time, because the record does not provide sufficient data to support a definitive conclusion. However, we could revisit this issue generally to the extent that information is provided

[1] This *Report and Order* will not address carriage agreement issues from section 12 of the Act on which the Commission also sought comment in this proceeding. Although the carriage agreement and program access provisions involve similar unfair or anticompetitive practices in selling programming, section 12 carries a longer statutory deadline for implementation that will allow us to issue separate implementing rules at a later date.

regarding the incentives and past conduct of vendors with *de minimis* vertical interests.

8. *Non-vertically integrated satellite broadcast programming vendors.* Vertical integration is not a requirement for applying the provisions of section 628 to satellite broadcast programming vendors. The term "satellite broadcast programming vendor" means "a fixed service satellite carrier that provides service pursuant to (the compulsory licensing provision of section 119 of the Copyright Act), with respect to satellite broadcast programming." The term "satellite broadcast programming," in this context, means "broadcast video programming when such programming is retransmitted by satellite and the entity retransmitting such programming is not the broadcaster or an entity performing such retransmission on behalf of and with the specific consent of the broadcaster."

Unfair Methods of Competition and Deceptive Practices

9. In the Notice, we sought comment on whether Congress intended for the Commission to regulate any additional "unfair methods of competition or unfair or deceptive acts or practices" beyond those specifically referenced in subsection (c). In particular, we asked whether other practices that are precluded by the various antitrust laws—such as refusals to deal or "tying" arrangements—are encompassed within the terms of section 628 and warrant Commission regulation. We also noted that the language of section 628(b) itself addresses only practices that are (i) "unfair," "deceptive," or "discriminatory," and (ii) could significantly hinder multichannel video programming distributors (MVPDs) from providing satellite programming to consumers. Moreover, because practices that a particular competitor might consider "unfair" or "discriminatory" may not significantly harm competition generally in distributing multichannel video programming, we questioned whether our analysis should consider harm to (i) consumers, measured by the amount or availability of programming to consumers in the market; (ii) other distributors in the market; or (iii) both consumers and distributors.

10. Neither the record of this proceeding nor the legislative history offer much insight into the types of practices that might constitute a violation of the statute with respect to the unspecified "unfair practices" prohibited by section 628(b) beyond those more specifically referenced in section 628(c). The objectives of the provision, however, are clearly to provide a mechanism for addressing those types of conduct, primarily associated with horizontal and vertical concentration within the cable and satellite cable programming field, that inhibit the development of multichannel video distribution competition.

11. Thus, although the types of conduct more specifically referenced in the statute appear to be the primary areas of congressional concern, this provision is a clear repository of Commission jurisdiction to adopt additional rules or to take additional actions to accomplish the statutory objectives should additional types of conduct emerge as barriers to competition and obstacles to the broader distribution of satellite cable and broadcast video programming. In this regard it is worth emphasizing that the language of section 628(b) applies on its face to all cable operators. Elements of an offense under this provision would, however, include a demonstration that "the purpose or effect" of the conduct was to "hinder significantly or to prevent any multichannel video programming distributor from providing satellite cable programming or satellite broadcast programming to subscribers or consumers." In this regard, the complainant must show that its ability to distribute programming to customers has been hampered in some fashion. Parties filing complaints under this provision should use the procedures and statute of limitations established for violations of section 628(c)(2)(A) regarding undue or improper influence prohibitions.

Competitive Harm or Hinderance To Access as an Element of Rules

12. The general prohibition in section 628(b) precludes conduct "the purpose or effect (of which) * * * is to hinder significantly or prevent any multichannel video programming distributor from providing satellite cable programming or satellite broadcast programming to subscribers or consumers." We have thus concluded that parties bringing complaints under section 628(b) must demonstrate how the allegedly unfair practice has hampered or prevented the distribution of programming. A related question asked in the Notice was whether a similar showing of "harm" must be made by complainants seeking relief under the more specific provisions of section 628(c).

13. The record shows that either of two interpretations could be supported by the express language of the statute. One interpretation of the words of section 628 is that subsection (b) generally proscribes anticompetitive behavior that causes harm to MVPDs, and that subsection (c) defines specific conduct which the Commission's rules must prohibit and which Congress has already determined causes anticompetitive harm. Alternatively, because subsection (c) requires the Commission to "prescribe regulations to specify particular conduct that is prohibited by subsection (b)," it is possible to read subsection (b)'s limitations as equally applicable to the behavior specified in subsection (c), such that the conduct specified in subsection (c) is only prohibited if it is shown to "hinder significantly or prevent" any MVPD from providing programming.

14. Analysis of the legislative history, particularly the inclusion of the Tauzin amendment, indicates that Congress did not intend to place a threshold burden on aggrieved MVPDs to show either specific or generalized harm to competition in those circumstances specifically prescribed in subsection (c). We conclude, therefore, that the language in subsection (b) was not intended to impose an additional burden or threshold showing on complainants with respect to the activities specified in subsection (c). We determined that if behavior meets the definitions of the activities proscribed in subsection (c), such practices are implicitly harmful. However, for those complainants alleging a violation of a general "unfair practice" prohibited by section 628(b), consistent with the express statutory language we will require the complaint to demonstrate that the purpose or effect of the conduct complained of was to "hinder significantly or to prevent" an MVPD from providing programming to subscribers or customers.

Limitations on Exclusive Contracting

15. Section 628(c)(2)(C) requires the Commission to develop rules that prohibit practices, understandings, arrangements and activities, including exclusive contracts between cable operators and vertically integrated satellite cable and broadcast programming vendors, that prevent an MVPD from obtaining satellite cable or satellite broadcast programming for distribution to persons in areas not served by a cable operator as of the date of enactment of the 1992 Cable Act. Section 628(c)(2)(D) requires the Commission to prohibit such exclusive contracts in areas served by a cable operator unless the Commission determines that the exclusive contract is in the public interest pursuant to section 628(c)(4). Section 628(h)

exempts exclusive contracts, relating only to areas served by a cable operator, that were entered into on or before June 1, 1990 until such time, after October 5, 1992, as they are renewed or extended. Pursuant to section 628(c)(5) these restrictions cease to be effective 10 years after enactment unless the Commission finds their continuation necessary "to preserve and protect competition and diversity in the distribution of video programming."

A. Areas Unserved by Cable

16. Section 628(c)(2)(C) is specific in mandating implementing regulations that prohibit "practices, understandings, arrangements, and activities, including exclusive contracts" between cable operators and vertically integrated satellite cable or broadcast programming vendors that prevent MVPDs from obtaining such programming for distribution "in areas not served by a cable operator as of the date of enactment of this section." The statute is unequivocal in this regard and thus the rules adopted will provide that such practices constitute a *per se* violation. As indicted in the Conference Report, an area "served" by a cable system is defined as "an area actually passed by a cable system and which can be connected for a standard connection fee."

17. Given that the statute specifically exempts exclusive contracts in served areas that were entered into on or before June 1, 1990, but specifically excludes exclusive contracts in unserved areas from this "grandfathering," congressional intent is clear. Thus, if the contract predates June 1, 1990, exclusivity in the served areas is permitted, but is prohibited in unserved areas. As for "other practices, understandings, arrangements and activities" that should come within the scope of our rules, any behavior that is tantamount to exclusivity is prohibited in unserved areas. Any other interpretation would undermine the goals Congress sought to achieve by prohibiting exclusivity itself. Thus, the rules will prohibit vertically integrated programmers from engaging in activities that result in *de facto* exclusivity, or from imposing requirements on MVPDs that prevent or restrict them from delivering their programming to any unserved area.

B. Areas Served by Cable

18. Section 628(c)(2)(D) treats exclusive contracts between vertically integrated programming vendors and cable operators in areas served by cable in a somewhat less restrictive manner. Contracts of this type are to be prohibited unless the Commission determines that "such contract is in the public interest." In making this judgment, the Commission is to consider each of the following factors with respect to the effect of such contract on the distribution of video programming in area: (A) The effect of such exclusive contract on the development of competition in local and national multichannel video programming distribution markets; (B) the effect of such exclusive contract on competition from multichannel video programming distribution technologies other than cable; (C) the effect of such exclusive contract on the attraction of capital investment in the production and distribution of new satellite cable programming; (D) the effect of such exclusive contract on diversity of programming in the multichannel video programming distribution market; and (E) the duration of the exclusive contract.

19. Exclusivity under this provision is not absolutely prohibited. As a general matter, the public interest in exclusivity in the sale of entertainment programming is widely recognized. Indeed, elsewhere in the 1992 Cable Act, in the context of the broadcast station-cable system relationship, specific steps have been taken to protect exclusive rights. In the unique situation presented here, however, it is clear that exclusivity is not favored. Congress has clearly placed a higher value on new competitive entry into multichannel video programming distribution than on the continuation of exclusive distribution practices that impede this entry. Cable systems have generally developed without effective competition and it is recognized that if "facilities-based" competition is to develop, access to programming is an essential prerequisite. We thus found it entirely consistent with the objectives of the Act that, while exclusivity may be shown to be in the public interest in certain circumstances, the burden must be on the party seeking exclusivity to demonstrate persuasively that it is justified.

20. *Public Interest Standard.* As for the appropriate standard to be applied when making this public interest determination, it is not necessary or consistent with the statutory language to articulate a single standard in this proceeding that can govern the public interest assessment generally. The section 628(c)(4) factors are sufficiently broad to incorporate many of the standards proposed by the Commission. However, at least at the outset, it is more consistent with the statute to require individual, case-by-case determinations using the five statutory criteria specified. The statute requires that the burden be placed on the proponent of exclusivity to demonstrate that exclusivity is in the public interest.

21. With respect to new programming, there may well be circumstances in which exclusivity could be shown to meet the public interest test, especially when the launch of local origination programming is involved that may rely heavily on exclusivity to generate financial support due to its more limited appeal to a specific regional market. The record is insufficient, however, on this point, to support any general findings, or to identify appropriate general limitations on, for example, such factors as the permissible duration of exclusivity. Thus, we will handle exclusivity proposals on a case-by-case basis in order to tailor the scope of any specific exclusivity terms granted to ensure compliance with the statutory public interest standard.

22. *Approval of Contracts.* Section 628(c)(2)(D) states on its face that exclusive contracts in served areas are prohibited unless the Commission finds that exclusivity is in the public interest. Thus, the statute itself requires that the Commission make an affirmative finding that a specific exclusive contract meets the statutory public interest standard before the contract can be enforced. Accordingly, the rules will require any vertically integrated programmer or any cable operator seeking to enforce an exclusive contract to seek and obtain our public interest judgment before doing so. This may be accomplished through the submission of a petition containing those portions of the programming contract relevant to exclusivity to the Commission for approval, along with a statement setting forth the petitioner's reasons that support a finding that the contract meets the public interest test that addresses each of the five criteria outlined in section 628(c)(4). The petition will be placed on public notice for 30 days, and any MVPD that competes with the cable operator may file an opposition, arguing that under the statutory criteria, exclusivity in this case is not in the public interest. If a formal opposition is filed, the *ex parte* rules governing restricted proceedings will be applied. The petitioner will have ten days to respond, and the Commission will rule on the petition. If the Commission determines that the petitioner has appropriately addressed the statutory criteria and made a persuasive public interest showing, it will issue an order granting the petition and approving the contract. Until any order is issued

granting the petition, the exclusivity may not be enforced.

C. Issues Applicable to Both Served and Unserved Areas

23. One area of concern referenced in our Notice that is applicable to served and unserved areas alike relates to so-called subdistribution agreements, arising from a concern that a distributor's access to programming may be impaired through the use of such agreements. Granting subdistribution rights, however, can be a legitimate practice for a programming vendor, but we to must address incentives for a subdistributor to refuse to sell to a competing MVPD that may be inherent in such rights, appropriate safeguards are adopted to limit the potential for anticompetitive behavior. In particular, the rules will prohibit specific terms in subdistribution agreements that are unreasonably restrictive or are not adequately related to the subdistribution itself.

24. Thus, the rules will prohibit a subdistributor from tying programming rights to other, unrelated, programming. They will also prohibit a subdistributor from coercing an MVPD to provide access to private property in exchange for access to programming. In addition, a subsdistributor may not charge more for programming than the vendor itself would have been permitted to charge under the anti-discrimination provisions we also adopt. Finally, a subdistributor will be required to respond to a request for programming within 15 days of the request. If the subdistributor refuses to sell to an MVPD, the MVPD must be able to negotiate directly with the vendor.

25. With respect to time-delay requirements, so long as such requirements are available as an option and do not become a *de facto* substitute for any impermissible exclusivity, they may legitimately be used to enable programming to be distributed to more viewers through additional MVPDs. Should an MVPD not want to pay the premium price for particular programming that its competitor has paid, but would rather negotiate a lower price in exchange for a reasonable time-delay limitation, such a transaction is permissible.

D. Complaint and Enforcement Procedures

26. Section 628(d) provides that any MVPD aggrieved by conduct it alleges to violate sections 628 (b) or (c) may commence an adjudicatory proceeding at the Commission. We note that the Notice proposed to establish a single complaint process to govern any complaint brought under section 628. Given the complexity of issues involved in each type of behavior addressed by section 628, we ultimately describe the enforcement procedures individually. There are, however, issues that apply generally to all complaint cases filed under section 628.

27. First, the record does not support either the establishment of any general criteria that can be used to standardize or abbreviate our analysis of whether a complainant has made a *prima facie* case, or the use of any sales volume or penetration "benchmarks". Second, the *ex parte* rules governing restricted proceedings will apply to any proceeding initiated by a complainant alleging violation of any provision of the program access rules. Third, with respect to appropriate remedies, the statute provides a broad grant of authority to the Commission to fashion remedies for section 628 violations that include all remedies available under title V of the Communications Act, as well as the ability to establish prices, terms and conditions for the sale of programming to aggrieved multichannel distributors. Thus, the only practical approach is to develop remedies on a case-by-case basis, in the context of specific facts.

28. In order to file a complaint under the any provision of section 628, the complainant must first notify the vendor or cable operator of its belief that a violation of our rules has occurred, providing sufficient specificity so that the vendor or cable operator can determine the precise nature of the dispute. If the parties cannot resolve the dispute, the complainant may file a complaint with the Commission along with evidence (an affidavit or copy of a certified letter) that the required notice has been given. Failure to include such evidence shall result in immediate dismissal of the complaint. Similarly, we will dispose of as many complaint cases as possible on the basis of a complaint, answer and reply. Discovery will not be permitted as a matter of right, but on a case-by-case basis as deemed necessary by the Commission staff reviewing the complaint. Any complaint filed pursuant to section 628 must be filed within one year of the date on which one of the following occurs: (a) The vendor enters into a contract with the complainant, which the complainant alleges to violate section 628; (b) the vendor offers to sell programming to the complainant pursuant to terms that the complainant alleges to violate section 628; (c) the complainant notifies a vendor that it intends to file a complaint based on a request to purchase or negotiate to purchase the vendor's programming, or a request to amend an existing contract pertaining to such programming to bring the existing contract into compliance with the new program access requirements adopted herein, that has been denied or unacknowledged allegedly in violation of section 628.

29. *Exclusivity Complaints.* When filing an exclusivity complaint, the burden of proof is on the complainant MVPD to make a *prima facie* showing that it has attempted to obtain programming for distribution into a specified area, and that it has been unable to obtain such programming due to a prohibited exclusive arrangement (either directly or through a subdistribution arrangement that violates our rules) between a vertically integrated programming vendor and a cable operator. The complaint must identify both the programmer and cable operator who are parties to the alleged prohibited agreement. The complaint must be supported by documentary evidence of the violation, or an affidavit (signed by an officer of the complaining MVPD) setting forth the basis for the complainant's allegations. The complainant must also demonstrate that the relevant vertically integrated programming vendor meets the attribution standards adopted herein. The complainant must also establish that it has attempted to purchase the relevant programming and has been refused. In addition, the complainant must establish that it can or does serve the area specified in the complaint, and must provide some evidence, either documentary or an affidavit setting forth the basis for complainant's belief, that the alleged prohibited exclusive arrangement governs such area. Finally, the complaint should specify the relief requested.

30. *Answer and Reply.* The defendant vendor or cable operator will be given thirty days to file an answer refuting the complainant's allegations. If the defendant is the vendor, or a cable operator selling the programming pursuant to a subdistribution agreement, the answer should include the defendant's reasons for refusing to sell the subject programming to the complainant. In addition, the defendant will be permitted to submit its programming contracts, along with a certification that it has submitted or fully described all relevant contracts (written and oral), that relate to the area specified in the complaint. The written contracts will then be subjected to an *in camera* inspection by the Commission and the complainant (pursuant to a protective order) to determine whether they contain provisions relating to

exclusivity. If there are no contracts or agreements relating to the specified area between the vendor and cable operator identified in the complaint, the defendant will so certify. The burden will be on the defendant to establish that it does not have prohibited exclusivity arrangements governing the area specified in the complaint.

31. Any contracts or proprietary information submitted by a vendor with its answer may be submitted pursuant to a request for confidentiality. The complainant will be granted access to any such contracts or proprietary information provided it agrees to abide by the terms of a protective order that limits access to such information and limits the purposes for which any information obtained through the section 628 complaint process may be used. The complainant will be given twenty days to file any necessary reply to the arguments and/or defenses contained in the defendant's answer. The complainant will not be permitted to submit new evidence or allegations in its reply and the reply must be limited to responding to the answer to the complaint.

32. *Staff Determination.* Upon the close of the pleading cycle, Commission staff will review the complaint, answer and reply. If the record does not support complainant's allegations that a prohibited exclusive arrangement exists between a vertically integrated programming vendor and a cable operator that governs the specified area to which complainant seeks to deliver the subject programming, the complaint will be dismissed. Thus, if the defendant has submitted its contracts to the Commission and complainant, and such contracts do not include provisions relating the exclusivity, the complainant will not make a *prima facie* case, unless in its compliant, it has provided other evidence to support its claim that an exclusive arrangement nonetheless exists.

33. If the staff determines that a prohibited exclusive arrangement does exist, it will order relief and impose sanctions as it deems appropriate. With respect to remedies, if a vertically integrated programming vendor is found to have entered into a prohibited exclusive arrangement with any cable operator, the exclusivity will be unenforceable. Thus, the vendor may be ordered to make its programming available to the complainant on the same terms and conditions, and at a non-discriminatory rate, as given to the cable operator. In addition, sanctions available under title V of the Communications Act may be imposed. The 1992 Cable Act, however, does not grant the Commission the authority to assess damages against the programmer or cable operator. In the unusual circumstance that an exclusivity complaint cannot be resolved on the basis of the pleadings previously discussed, the staff shall have the authority to order any necessary discovery pursuant to the procedures outlined for discrimination complaints. Interlocutory applications for review shall be permitted only after the staff has ruled on the merits. Either party may file an application for review directly to the Commission of any staff decision on the merits.

Prohibitions Against Discrimination

34. The Notice sought comment on how we should identify discriminatory practices and on whether there are any objective standards to use to distinguish prohibited discriminatory behavior—with respect to pricing or other practices—from permitted legitimate business behavior that may occur in the marketplace for video programming. Examples of sales practices for certain types of programming that may require a graduated pricing structure in order to facilitate broad distribution of that programming were also solicited, as well as situations in which a requirement of uniform pricing could reduce the amount of programming available to subscribers.

A. Competing and Similarly-Situated Distributors

35. As a general matter, discrimination under section 628(c) exists when the same or essentially the same programming service is sold to competing distributors at different prices or pursuant to different terms or conditions. Such discrimination is prohibited if not justified under one of the specific factors enumerated in the statute.

36. *Competing Distributors.* Because section 628 is intended to prevent and remedy anticompetitive conduct in the multichannel video marketplace, complaints of discriminatory conduct should logically involve competing distributors. Thus, when addressing a section 628 complaint, a complainant must demonstrate that it has been offered or is paying a higher price, or has received favorable terms, than a competing distributor. In establishing that another distributor is a competitor for these purposes, there must be some overlap in actual or proposed service area. Moreover, the geographic market for assessing whether distributors compete with each other (either actually or potentially) can be local, regional or national, depending on how the distributors buys and distributes programming. With respect to nationally-oriented competitors that buy programming and serve subscribers beyond a local or regional market—such as DBS an HDS distributors—parties may make complaints based on comparisons between contracts of national competitors, provided that the complaint includes a justification for that comparison.

37. This approach for defining the relevant geographic market for competing distributors is the most reasonable approach when analyzing discrimination complaints. Where local competition actually occurs, not a distributor alleging discrimination will not be permitted to draw comparisons to another distributor operating outside the bounds of that competition. Similarly, where national competition actually occurs, a complaint is not constrained to drawing a comparison to local or regional distributors.

38. *Similarly Situated Distributors.* In order to distinguish between legitimate practices and prohibited discriminatory conduct, a discriminatory practice must involve the offering of the program service to similarly-situated distributors. Indeed, while a vendor may sell the same satellite programming service to various distributors, both the statute and the record recognize that the prices, terms and conditions of the contracts will reflect the particular attributes of the distributor and its willingness to provide certain secondary services in return for receiving the programming service. In analyzing allegedly discriminatory conduct, we will consider not only whether the two distributors being compared are competitors, but also whether the differences in their programming contracts are justified under the statutory factors governing permissible price differentials.

39. Therefore, in evaluating a discrimination complaint, it will often be useful to conduct a two-step analysis. First, the difference in programming prices (or terms or conditions) paid by (or offered to) the complainant and the competing distributor will be compared. Second, the programmer may justify the difference under the statutory factors by either (i) submitting a showing that one or more of the factors is involved and the price differential reflecting those factors is reasonable, or (ii) submitting an alternative contract for a more reasonably comparable, or more "similarly situated", distributor. Although such a contract will not necessarily provide definitive evidence that the price difference can be explained under the statutory factors, it

will often be useful in assessing whether the programmer has adequately explained the difference. For purposes of evaluating alternative contracts offered by programmers, a distributor is defined as "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 as the "competing" distributor with whom the complainant seeks to compare itself. We emphasize that an analysis of "similarly situated" distributors may be useful in demonstrating that the vendor has offered comparable terms to distributors with similar attributes. However, additional evidence may be needed to establish that the magnitude of a price difference for a consistently applied term (such as a standard volume discount) is reasonably justified under the statute's permissible factors.

40. We believe that this general approach toward identifying discriminatory conduct—and the accompanying enforcement process—fulfills the legislative requirement to specify particular conduct that is prohibited by section 628(b) of the Act. Moreover, the regulations regarding discrimination carefully weigh the many facets of the 1992 Cable Act as balanced with the complex dynamics of the marketplace for satellite cable programming and satellite broadcast programming. These regulations will effectively prohibit discriminatory practices by programming vendors, while still following the statute's objectives to "rely on the marketplace, to the maximum extent feasible, to achieve greater availability" of the relevant programming. In this regard, we believe that certain practices involving price differentials benefit the public by increasing the availability of programming—as well as reducing the price of service—to consumers. For instance, we conclude that our rules must allow for fundamental differences in pricing of satellite cable programming as opposed to satellite broadcast programming, because satellite broadcast programming vendors face a unique, artificial ceiling on program prices as well as comparative ease of entry barriers for potential competitors seeking to offer the same signal. In addition, we also recognize that certain regional programming services use a form of graduated prices to promote broad distribution of the service into more distant communities. We also believe that our regulations regarding discriminatory practices will satisfy the stated policy of Congress to "ensure that cable operators continue to expand, where economically justified, their capacity and the programs offered over their cable systems." Furthermore, we believe that faithful implementation of the statute requires us to allow for differences based on the permissible factors enumerated in section 628(c)(2)(B)(i)–(iv), as defined below, and that we must deny claims of discrimination resulting from factors that the 1992 Cable Act has established as entirely justified and reasonable. In establishing these implementing regulations, we also emphasize that it is essential to identify and preserve legitimate differences in pricing behavior so that programming vendors may continue to market their services creatively to all distribution technologies and achieve widespread availability and penetration to all subscribers. In this regard, we stress that our effort in this proceeding has been to "serve the congressional intent to prohibit unfair and anticompetitive actions without restraining the amount of multichannel programming available by precluding legitimate business practices common to a competitive marketplace."

B. General Approaches to Identifying Prohibited and Permitted Discriminatory Conduct Proposed in the Notice

41. The Notice proposed several possible objective standards that might be used for separating prohibited discriminatory conduct from permitted actions. We also suggested that these standards would apply in the enforcement process for resolving particular complaints, thus assisting a complainant to establish a *prima facie* case of discriminatory conduct. The record shows that each proposed approach to price comparisons contains certain principles that could merit application in the particular context of multichannel video programming. Thus none of the standards, applied independently, would provide the best or most comprehensive guide for our implementing regulations for section 628(c)(2)(B). The regulations adopted, therefore, are not based solely on any of the specific options proposed, but rather incorporate particular aspects of each standard that are applicable in the context of satellite cable or satellite broadcast programming.

C. Justifiable Price Differences

42. The legal process for resolving complaints will allow for a range of justifiable differentials as specified in the statute. According to the definition of the four permissible factors, vendors will assume the responsibility of justifying the legitimacy of such factors in order to maintain their pricing differentials between distributors, as well as the magnitude of differences based on those factors. Vendors may generally employ those legitimate discounts or surcharges associated with the factors specified in section 628(c)(2)(B), provided that similar terms are standardly available to various distributors. Therefore, we adopt the following definitions and guidelines for the factors involving, in general terms: (i) Cost differences at the wholesale level among distributors, (ii) volume differences, (iii) creditworthiness and financial stability, and (iv) differences in "offering of service".

43. *Cost Justifications.* Section 628(c)(2)(B)(ii) allows a vendor to establish different prices, terms, and conditions to take into account actual and reasonable differences in the cost of creation, sale, delivery, or transmission of satellite cable programming or satellite broadcast programming. We believe the record shows that service to HSD distributors [2] may be more costly than service to others using different delivery systems, such as cable operators, as additional costs are often incurred for advertising expenses, copyright fees, customer service, DBS Authorization Center charges and signal security. It indicates that cost differences are particularly evident when providing program services to distributors who do not provide a complete distribution path to individual subscribers. Cost differences may also occur within a given technology as well as between technologies. Therefore, the adopted regulations will allow vendors to base programming prices on legitimate cost factors. Vendors will not have to use a uniform rate card, although they will incur the risk and burden of showing that the cost factors they claim to cause a price differential are legitimate and are not designed to conceal prohibited discrimination.

44. The record also raises the issue of whether a vendor may take into account those cost differences incurred by distributors in providing service to subscribers—cost differences at the retail level—when justifying price

[2] With respect to the term "HSD distributors", many different types of entities in the HSD or television receive-only market purchase satellite programming services from vendors and sell that programming to consumers, while also providing various other services for HSD consumers. For the purposes of the program access regulations, we will use the term "HSD distributor" to refer to all such entities, including those entities that are commonly known as HSD dealers or third-party program packagers.

differences for programming as charged to distributors. Although costs incurred by distributors in some delivery systems may be lower than in others, it would contravene the statute to allow vendors to charge higher prices based on this factor alone, on the grounds that such a result could artificially raise the retail price of programming and discourage the development of low cost technologies, contrary to the statute's goals. Accordingly, a vendor generally cannot consider a distributors' costs in delivering service to subscribers. A vendor who can show, however, that the lower price offered to the distributor will not result in lower prices to consumers may justify a price differential based on retail costs.

45. *Volume Justifications.* Section 628(c)(2)(B)(iii) permits a vendor to establish different prices, terms, and conditions that take into account economies of scale, cost savings, or other direct and legitimate benefits reasonably attributable to the number of subscribers served by the distributor. The record in this proceeding indicates that volume-related information is often available on some rate cards through "volume discounts" based upon a distributor's number of subscribers. The statute speaks of "economies of scale, cost savings, or other direct and legitimate economic benefits reasonably attributable to the number of subscribers" rather than simple volume discounts. As possible standards related to volume, rules could require that rate cards reflect economies due to volume differences between distributors or adopt certain alternatives to permit only cost-based volume discounts. Alternatively, it could be viewed that in addition to cost economies, a larger number of subscribers confers non-cost "economic benefits" by delivering more viewers, thus increasing revenue from advertising more than proportionally, and providing a larger base for amortizing the costs of the programming service. The latter interpretation most closely follows the language of section 628 regarding "direct and legitimate economic benefits," which distinguishes "volume differences" from "cost differences" considered in the first permissible factor. Therefore, we will permit volume-related justifications to the extent that they are standardly available to similarly situated distributors. As a procedural matter, when relying upon standard volume-related factors that are available to all MVPDs using all technologies, the vendor may be required to demonstrate that any such volume discounts are reasonably related to "direct and legitimate economic benefits reasonably attributable to the number of subscribers served by the distributor" if unique questions arise about the application of that discount. The vendor is not required to provide a strict cost justification for the structure of such standard volume factors, but can identify non-cost economic benefits related to increase viewership as identified by the vendor.

46. *Justifications based on creditworthiness, offering of service, and financial stability and standards regarding character and technical standards.* According to statutory guidelines, regulations are adopted that will allow programming vendors to take into account a distributor's or customer's creditworthiness of financial stability when it negotiates a price for a programming service. Vendors will have the right to consider this factor in developing pricing policies. In doing so, vendors are permitted to create a distinct class or classes of service in pricing to reflect concerns about credit considerations or financial stability. However, any distinctions based on considerations of creditworthiness must be applied on a technology neutral basis. Also, vendors may not manifest factors such as creditworthiness or financial stability in price differentials if such factors are already taken into account through different terms or conditions such as special credit requirements or payment guarantees.

47. The statute also directs that the Commission's regulations should allow price differentials based on differences in "offering of service". Neither the statute nor its legislative history provides much guidance on the proper definition of this term, although it apparently refers to differences related to the actual service exchanged between the vendor and the distributor. For example, such considerations could be manifested in standard contract terms based on a distributor's willingness to provide secondary services that are reflected as a discount or surcharge in the programming service's price. Although some MVPDs maintain that all distributors fall into one class, we determined that the flexibility from "offering of service" discounts ultimately facilitates greater availability of programming. Moreover, with respect to service to the HSD market, certain distributors may have capabilities to function like other (cable) distributors, yet many of these functions duplicate aspects of a vendor's service and are not necessarily used in the programming transmission. As a result, these duplicative capabilities should not immediately lead to establishing a single class of distributors. Even assuming a single class of distributors, the record clearly demonstrates that each distributor will seek to distinguish itself within a medium by its willingness to accept certain terms, or to provide secondary functions in return for a lower price.

48. Consequently, we adopt regulations to allow programming vendors to establish price differentials based on factors related to offering of service. Such factors could include, for example, penetration of programming to subscribers or to particular systems; retail price of programming to the consumer for pay services; amount and type of promotional or advertising services provided by a distributor; a distributor's purchase of programming in a package or a la carte; channel position; importance of location for non-volume reasons; prepayment discounts; contract duration; date of purchase, especially purchase of service at launch; and other legitimate factors as standardly applied in technology neutral fashion. This list of considerations is intended to provide examples of frequently used contractual terms, and is not exclusive; vendors may use other standardly applied "offering of service" discounts (or surcharges), to the extent that they are willing to justify such terms, as necessary on a case-by-case basis.

49. *Use of rate cards.* Given that the definition of "discrimination" by a vendor initially requires a price differential as compared among competing distributors, there must be a common basis for such price comparisons and such information must be generally accessible to potential complainants. Accurate comparisons could occur by using a vendor's "rate card," standard contracts, or other generally accepted pricing information regarding a vendor's programming service. The record in this proceeding, however, has established that vendors currently employ a variety of sales practices, and that individual vendors require considerable flexibility in establishing a mutually acceptable price in order to facilitate the continued sale of multichannel video programming under dynamic market conditions. Therefore, vendors will be permitted to choose whether to use a "rate card", as well as the format and relevant pricing factors, without requiring a filing with the Commission, with the provision that such pricing information will play an integral role in a vendor's ability to justify rate differences between competing distributors. Accordingly, under the complaint process, potential complainants may make a certified

request of information by vendors; if the request is denied or insufficient information is provided for a comparison, a distributor may file a complaint without a contract. Under this framework, vendors may determine their own sales practices in order to accommodate the desired level of flexibility, thus assuming their own degree of risk in proving legitimacy of their pricing differentials. With respect to the filing of "rate cards", contracts, or other types of pricing information, requiring vendors to file pricing materials would impose a major administrative burden on Commission resources, and could create additional problems related to the confidentiality of such information. Further, a filing requirement would impose an excessive constraint on vendors.

50. *Buying groups.* Commission regulations will require that a buying group seeking unitary treatment from a programming vendor must agree to be financially responsible for any fees due under a contract to which it is a party. Alternatively, if individual members are contracting parties, they must agree to joint and several liability for commitments of the group. In addition, group members must agree to uniform billing and standardized contract provisions. With respect to technical performance, a vendor offering unitary treatment to a purchasing group has the right to require members to agree to certain reasonable technical standards which will be guaranteed by the group entity or its individual members. A programming vendor can, of course, legitimately apply any of the statutorily permissible justification factors such as creditworthiness to buying groups in the same manner as they would be applied to individual MVPDs on a nondiscriminatory basis.

D. Non-price Discrimination

51. Non-price "discrimination" by a programming vendor between competing distributors is also covered within 628(c). While specific practices within this prohibition are not well identified or discussed, we believe that one form of non-price discrimination could occur through a vendor's "unreasonable refusal to sell", including refusing to sell programming to a class of distributors, or refusing to initiate discussions with a particular distributor. The Commission will distinguish "unreasonable" refusals to sell from certain legitimate reasons that could prevent a contract between a vendor and a particular distributor, including (i) the possibility of parties reaching an impasse on particular terms, (ii) the distributor's history of defaulting on other programming contracts, or (iii) the vendor's preference not to sell a program package in a particular area for reasons unrelated to an existing exclusive arrangement or a specific distributor. Implementation of the non-price discrimination aspects of section 628(c) concerning unreasonable refusals to sell or similar exclusionary practices will draw upon certain antitrust precedents to define "unreasonable", as well as other principles and will be addressed individually through the enforcement process. In addition, section 628(c)'s prohibition against non-price discrimination will also encompass situations in which a vendor refuses to offer particular terms to an individual distributor, or class of distributors, that are offered to competing distributors.

E. Application of Rules to Existing Contracts

52. We affirm our tentative conclusion in the *Notice* "that any pricing policies or restrictions developed to implement section 628 should not be applied *retroactively* to existing contracts." Therefore, the antidiscrimination rules adopted herein will not affect prices paid for past video programming services or penalize vendors for practices preceding passage of the Act. The Commission will, however, apply the rules adopted under section 628 prospectively to existing contracts and to contracts entered into after the effective date of the rules.

53. Given that renegotiation of existing affiliation agreements will have some disruptive effect on the market and on the entities involved, it is in the public interest to afford parties a reasonable period of time of 120 days after the effective date of the new rules in which to bring their agreements into compliance. After this date, a complainant may base a claim of discrimination on comparisons with contracts that predate passage of the Act, but the point of comparison for determining whether the contract rates offered to the complainant are reasonable should be the current rate paid by its competitor under its original terms or, if the contract has been renegotiated, the renegotiated terms. In all cases, the reference point for comparing disparities among contracts must be the terms in effect at the time the complaint is filed rather than those in effect at some other time during the contract.

F. Complaint and Enforcement Procedures Regarding Discrimination

54. *Complaint.* When filing a complaint, the burden of proof is on the complainant MVPD to make a *prima facie* showing that there is a difference between the terms, conditions or rates charged (or offered) to complainant and its competitor by a satellite broadcast programming vendor or a vertically integrated satellite cable programming vendor that meets our attribution test. Thus, if the complaint is brought against a satellite cable programming vendor, the complaint must establish that the vendor meets the attribution standards adopted in this proceeding. In addition, the complainant must establish that it "competes" with the MVPD to which it seeks comparison, either on a national or local basis. Thus, the complainant must demonstrate that there is some overlap in actual or proposed service area with the "competing" distributor.

55. Next, the complaint must established that the vendor has provided or offered different terms and conditions, or different prices, to the complainant and its competitor. The complainant may use a "rate card," some other generally available information, or the current contract between the defendant vendor and the complainant's competitor for comparison purposes to demonstrate a differential. If an aggrieved MVPD does not have access to a "rate card" or other comparative rate information (such as the contract with its competitor), it should request, by certified mail, such information from the vendor. If the vendor refuses to provide rate information pertaining to the MVPD's competitor, then the MVPD can file a complaint based on information and belief of an impermissible rate differential, supported by an affidavit, along with a statement that the vendor refused to provide the necessary specific comparative information. The staff will then accept the complainants' rate allegations as true for purposes of its *prima facie* determination. In this way, we have addressed any concern raised about the MVPD's lack of access to information without requiring vendors to file "rate cards" or contracts at the Commission, because an aggrieved MVPD will be able to file a complaint and make a *prima facie* case whether it has access to its competitor's contract or not.

56. *Answer.* The vendor will be given thirty days to file an answer challenging the complainant's allegations or presenting affirmative defenses that the difference in terms and conditions, or the difference between its price to the complainant and its price to the complainant's competitor, is justified by the four factors set forth in the statute for permitted differentials. Alternatively, if the vendor believes that

the complainant and the competitor are not sufficiently similar, and thus cannot be realistically compared, it can state its reasons for this conclusion and submit an alternative contract for comparison with another more similarly situated MVPD that uses the same distribution technology as the competitor selected by the complainant.

57. Even if the defendant vendor chooses to demonstrate that the difference in its price to complainant and to complaint's competitor is justified by the factors set forth in the statute, without relying on an alternative contract providing a comparison to a similarly situated customer, the Commission may still need to reference a contract with a similarly situated customer to determine that the magnitude of the differential is not discriminatory. For example, if the vendor argues that the price difference between the complainant and its competitor is due to the vendor's standard volume discounts, specific cost differences between the two customers, and certain "offering of service" factors (such as number of services purchased, channel positioning, penetration or marketing incentives), the Commission will have to determine whether each reason offered by the vendor for a differential is allowed under the statutory factors, and whether the precise magnitude of the price difference is justified by those factors.

58. The magnitude of a price differential due to standard volume discounts and specific cost differences may be ascertainable without the need to reference any other contract for comparisons. If the vendor submits written documentation that describes any standardized volume discounts routinely used by the vendor, we will accept such evidence in lieu of additional contracts to quantify the magnitude of a permissible differential. Similarly, if the vendor also offers standard discounts for the number of services purchased, channel positioning, penetration, and marketing commitments, then these too can be readily factored in the price calculation without reference to another contract, so long as the vendor submits written documentation that describes such standardized discounts or surcharges. If the vendor does not, however, use standard discounts, the vendor should submit, with its answer, a contract with a similarly situated customer in the same class of service as the complainant's competitor who has negotiated a price based on the same, or as closely similar as possible, terms as the complainant to support the vendor's argument that the price to complainant is fair. The vendor would argue that the price and/or discounts or surcharges given to this similarly situated distributor apply to complainant, and therefore demonstrate that the price offered or charged to the complainant is not discriminatory. Any contracts or proprietary information submitted by a vendor with its answer may be submitted pursuant to a request for confidentiality. Vendors will not be permitted to redact any information contained in any contracts submitted for comparison purposes. The complainant will be granted access to any such contracts or proprietary information submitted provided it agrees to abide by the terms of a protective order that limits access to such information and limits the purposes for which any information obtained through the section 628 complaint process may be used. The defendant will be given an extra five (5) days to submit a second, redacted version of its answer for the public file.

59. *Reply and Staff Determination.* The complainant may file a reply within twenty days after the answer is filed. The reply may challenge the justifications for the price differential relied upon by the vendor, or may challenge any alternative comparison the vendor seeks to make as inappropriate because the contract submitted by the vendor is not with a customer who is similarly situated to the complainant. The complainant will have an extra five (5) days to file a second, redacted copy of the reply for the public record if it contains confidential or proprietary information. After reviewing the complaint, answer and reply, the staff will issue what, for purposes of these proceedings, we will deem a *prima facie* determination. If the complainant has not shown that there is a differential, or has not met the competitor or attribution standards, or if the vendor has completely justified both the reasons for and the magnitude of the differential to the satisfaction of the reviewing staff, the staff will find that the complainant has not made a *prima facie* case and will dismiss the complaint with prejudice.

60. It is in the public interest to assign a somewhat higher burden of proof for making a *prima facie* case on a complainant if the complaint is based on a *de minimis* price differential. In those cases in which the differential between the complainant's price and that of its competitor is equal to or less than five cents per subscriber or five percent, whichever is larger, the vendor is not required to justify the magnitude of the differential, so long as it provides sufficient reasons that are justified by the statutory factors for a difference in price. In any discrimination complaint case, the vendor must always demonstrate to the Commission's satisfaction that it has sufficient reasons that are justifiable under the statutory factors to support a *de minimis* price difference.

61. If the staff determines that the complainant has established a *prima facie* case, and no further information is necessary to determine the fair or reasonable price, the staff will issue an order ruling in favor of the complainant, with appropriate remedies. In most cases, the appropriate remedy will be to order the vendor to revise its contract or offer to the complainant in accordance with the Commission's findings. However, the statute provides broad authority to the Commission to order additional remedies or impose sanctions for violations of section 628, which will be used in appropriate circumstances.

62. *Discovery.* If the staff determines that the complainant has established a *prima facie* case, and further information is necessary to resolve the complaint, the staff will issue a ruling to that affect. The staff will then determine what additional information is necessary, and will develop a discovery process and timetable to resolve the dispute expeditiously. Given the nature of the programming distribution marketplace, and the wide range of sales practices, it would not be efficient or advisable to mandate uniform discovery processes herein for section 628 complaints. Instead, the staff will have flexibility to assess each case and order discovery accordingly. In some cases, the reviewing staff will itself conduct discovery by issuing appropriate letters of inquiry or require that specific documents be produced. The staff will order that document or answers to such inquiries will be submitted to the Commission and to the complainant (pursuant to a protective order) within a specified time period.

63. If the staff cannot readily identify what information is needed, it can direct the parties to submit discovery requests and supporting memoranda within a specified time period. The staff will then schedule a status conference to resolve discovery disputes and establish a timetable for compliance. The staff will be authorized to issue oral rulings at the status conference which will be confirmed in writing to the parties. Discovery will be limited to issues raised by the vendor's defenses. Any information exchanged through discovery will also be subject to a protective order.

64. After the conclusion of discovery the staff will require the parties to

submit briefs, together with proposed findings of fact, conclusions of law and proposed remedies at a specified date. Reply briefs should be filed within the following fifteen days. The parties will be given an additional five days in which to file redacted copies of briefs and reply briefs for the public record when they contain confidential or proprietary information. The staff is expected to act expeditiously. After a ruling on the merits, either party may file an application for review of the staff's determinations directly to the Commission. Such ruling will include a timetable for compliance, and will be effective upon release. In the absence of a stay, any relief or remedy imposed in the order will remain in effect pending review. Stays will not be routinely granted.

65. *Referral to ALJ.* If the staff determines that the complainant has established a *prima facie* case, and that extensive discovery will probably be required to resolve the complaint, it will so advise the parties in writing. If both parties agree, they may elect to resolve the dispute through ADR. If the parties do not agree to ADR, the staff will refer the complaint to an administrative law judge (ALJ) for adjudication. The ALJs are expected to resolve such cases expeditiously, and should promptly hold a status conference to establish timetables for discovery, hearing, and submission of briefs and proposed findings of fact and conclusions of law. A ruling on the merits by the ALJ may be appealed directly to the Commission. Such ruling will include a timetable for compliance, and will be effective upon release. In the absence of a stay, any relief or remedy imposed in the ruling will remain in effect pending appeal. Stays will not be routinely granted.

G. Complaints Alleging Non-price Discrimination

66. *Complaint/Answer/Reply.* When filing a complaint, the burden of proof is on the complainant to make a *prima facie* showing that a satellite broadcast programming vendor or a vertically integrated satellite cable programming vendor that meets the attribution standards has engaged in some form of non-price discrimination. The complaint must include proof that the complainant has notified the vendor of its potential claim, and must be supported by appropriate documentation or an affidavit setting forth the basis for the claim that the vendor has engaged in a form of non-price discrimination. The complaint should also specify the relief requested. A one-year statute of limitations will apply to non-price discrimination complaints. The vendor will have thirty days in which to respond to the complaint. The vendor must establish that it has not engaged in discriminatory behavior. The complainant will have twenty days following the answer in which to file a reply.

67. *Staff Determination.* The staff is expected to issue a ruling on the merits expeditiously. Such ruling may be oral or written; any oral ruling will later be released in writing. If discovery is required, the staff may proceed with discovery as allowed in a price discrimination case. In a case regarding an unreasonable refusal to sell, if appropriate, the staff will order the parties to attempt to negotiate a sale. If the parties cannot resolve their differences with a specified time period, rather than engage in discovery or protracted adjudication, the staff will hold a status conference with the parties to determine whether the failure to reach an agreement is the result of a legitimate negotiating impasse. If, however, the staff determines that the vendor's refusal to sell on non-discriminatory terms and conditions is unreasonable, it will issue an order with appropriate remedies and sanctions. An application for the review of any staff ruling on the merits may be filed directly by either party to the Commission. Such ruling will include a timetable for compliance and will become effective upon release, and any relief or remedies imposed in the order will remain in effect pending review.

Prohibitions Against Undue or Improper Influence

68. The Commission is directed in subsection (c) to prescribe regulations to specify particular conduct that is prohibited by subsection (b) in three specific areas. The first of these relates to the exercise of certain types of "undue influence." Specifically, the regulations are to establish effective safeguards to prevent a cable operator which has an attributable interest in a satellite cable programming vendor or a satellite broadcast programming vendor from unduly or improperly influencing the decision of such vendor to sell, or the prices, terms, and conditions of sale of, satellite cable programming or satellite broadcast programming to any unaffiliated multichannel video programming distributor.

69. The concept of undue influence between affiliated firms is closely linked with discriminatory practices and exclusive contracting, the direct regulation of which is to be undertaken pursuant section 628(c)(2) (B), (C), and (D) based on externally ascertainable pricing and contracting information. Section 628(c)(2)(A) can play a supporting role where information is available (such as might come from an internal "whistleblower") that evidences "undue influence" between affiliated firms to initiate or maintain anticompetitive discriminatory pricing, contracting, or product withholding. Although such conduct may be difficult for the Commission or complainants to establish, its regulation provides a useful support for direct discrimination and contracting regulation. A prohibition against such conduct will accordingly be incorporated into the rules.

70. *Complaint and Enforcement Procedures.* As in the case of both discrimination and exclusivity complaints, any complainant must first notify the cable operator, vertically integrated satellite cable programming vendor, or satellite broadcast programming vendor of its belief that said party has engaged in prohibited acts or practices. Such notice must provide sufficient specificity so that the cable operator or programming vendor can ascertain the precise nature of the dispute. If the parties cannot resolve the dispute without involving the Commission, the complainant may file a complaint along with evidence (an affidavit or copy of a certified letter) that the required notice has been given. Failure to include such evidence will be grounds for immediate dismissal of the complaint.

71. As with all other section 628 cases, we seek to dispose of as many complaints as possible on the basis of a complaint, answer, and reply. Discovery will not be permitted as a matter of right, but on a case-by-case basis as deemed appropriate by the reviewing staff. Interlocutory applications for review shall be permitted only after the staff has issued a ruling on the merits.

72. *Complaint/Answer.* When filing a complaint, the burden of proof will be on the MVPD to make a *prima facie* showing that the defendant has engaged in conduct prohibited by section 628(c)(2)(A). The complainant must show that the defendant is a cable operator, a satellite broadcast programming vendor, or a vertically integrated satellite cable programming vendor that meets the attribution standards established. The complaint must be supported by documentary evidence of the alleged violation, or by an affidavit (signed by an officer of the complaining MVPD) setting forth the basis for the complainant's allegations. Finally, the complaint should specify the relief requested. The defendant will be given thirty (30) days to file an answer responding to the complainant's

allegations. The answer should be supported by documentary evidence, or an affidavit (signed by an officer of the defendant), that refutes the complainant's allegations or supports any affirmative defenses the defendant may raise. The complainant will be given thirty (30) days to respond to the defendant's answer.

73. *Staff Determination/Discovery.* After reviewing the complaint, answer and reply, the staff will make a *prima facie* determination. If the complainant has not made a *prima facie* case of a violation the complaint will be dismissed. If the staff determines that the complainant has made a *prima facie* case of a violation, the staff will so rule, and will determine whether it can grant relief on the basis of the existing record. If the record is not sufficient to resolve the complaint, the staff will determine and outline the appropriate procedures for discovery. The staff will determine what additional information is necessary to resolve the complaint, and will develop a discovery process and timetable to resolve the dispute expeditiously. Wherever possible, to avoid discovery disputes and arguments pertaining to relevance, the staff will itself conduct discovery by issuing appropriate letters of inquiry or requiring that specific documents be produced. The staff will order that documents or answers to such inquiries will be submitted to the Commission and to the opposing party pursuant to a protective order within a specified time period. If the staff cannot readily determine what information is needed, it can direct the parties to submit discovery requests and supporting memoranda within a specified time period. The staff will then schedule a status conference to resolve discovery disputes and establish a timetable for compliance. The staff is authorized to issue oral rulings at the status conference which will be confirmed in writing to the parties. Any information exchanged through discovery will be subject to a protective order.

74. Upon conclusion of discovery, the staff will direct the parties to submit briefs, together with proposed findings of fact, conclusions of law and proposed remedies at a specified date. Reply briefs should be filed within the following fifteen (15) days. Redacted copies of briefs and reply briefs should be filed for the public record within an additional five (5) days when they contain confidential or proprietary information from material that is subject to a protective order. After a ruling on the merits, either party may file an application for review of the staff's determinations directly to the Commission. A ruling on the merits will include a timetable for compliance and will become effective upon release. In the absence of a stay, any relief or remedies imposed in the order will remain in effect pending review. Stays will not be routinely granted.

75. *Referral to ALJ.* If the staff determines that the complainant has established a *prima facie* case, and that extensive discovery will probably be required to resolve the complaint, it will so advise the parties in writing. If both parties agree they may elect to resolve the dispute through ADR. If the parties do not agree to ADR, the staff may refer the complaint to an administrative law judge (ALJ) for an administrative hearing. The ALJs are expected to resolve such cases expeditiously, and should hold an immediate status conference to establish timetables for discovery, hearing, and submission of briefs and proposed findings of fact and conclusions of law. Interlocutory appeals shall be permitted only after a ruling on the merits. A ruling on the merits by the ALJ must be appealed directly to the Commission. Such ruling will include a timetable for compliance and will become effective upon release. In the absence of a stay, any relief or remedies imposed in the order will remain in effect pending review. Stays will not be routinely granted.

Frivolous Complaints

76. As required by section 628(f)(3), regulations are adopted prohibiting the filing of frivolous complaints alleging violation of any provision of section 628. The regulations will also require that all complaints alleging violations of section 628 must be accompanied by an affidavit signed by an authorized officer or agent of the complainant. To enforce the prohibition against filing frivolous complaints, monetary forfeitures will be assessed in accordance with section 503 of the Communications Act and our forfeiture regulations and policies. For purposes of section 503(b)(5), one finding that a complainant has filed a frivolous complaint under any provision of section 628 shall be sufficient to fulfill the citation requirements of the forfeiture provisions.

77. Complaints filed without any effort to ascertain or review the underlying facts should be considered frivolous. The requirement adopted herein that complaints be accompanied by affidavit should assure that such complaints are based on specific and substantiated facts. When this is not the case, the complainant will be liable for sanctions for violating our rule against frivolous complaints. Similarly, complainants will be liable for sanctions for frivolous complaints that are based on arguments that have been specifically rejected by the Commission in other proceedings, or for filing a complaint that has no plausible basis for relief. A complaint will not be found frivolous if dismissal of the complaint is based on evidence that the complainant had no way of knowing before it was produced by the defendant in the complaint process. Further standards will be developed as specific cases are adjudicated.

Annual Report to Congress

78. Section 628(g) of the 1992 Cable Act directs the Commission to annually report to Congress on the status of competition in the video programming marketplace. The Commission must issue its first report within 18 months of promulgating program access regulations.

79. We intend to include in our annual report to Congress (1) the number of independently owned cable operators and programming distributors; (2) the degree of vertical integration between cable operators and programming distributors; and (3) the penetration or availability of programming to competing multichannel services. Such data will be readily available through existing industry publications and through data submitted during the complaint process, and reporting requirements will not be imposed on programmers or distributors. Annual analysis of this information will enable us to closely follow the competitive development of the video programming industry. While data regarding the levels of pricing differentials for programming, including the range and average of volume-related discounts and other permissible differentials would also be informative, the disclosure of such data, even in aggregate form, could hinder competition in the industry. Our experience with the complaint process will be summarized in our reports to Congress, including the total number of complaints resolved and the general nature of those complaints. Thus, the reports to Congress will also include public or nonprotected information from the complaints, as well as a general summary of data without divulging proprietary information. In addition, although there is no specific program access reporting requirement, we may subsequently request program access information as part of a general collection of information commenced with respect to other requirements of the 1992 Cable Act.

Conclusion

80. In this Report and Order, we adopt rules to implement section 19 of the 1992 Cable Act regarding program access. After evaluating the record in this proceeding, we recognize that even as distributors gain access to programming services, their ability to enhance the diversity of programming available to the public will still depend upon their opportunities to arrange to purchase programming at nondiscriminatory prices and terms. Therefore, the implementing rules for section 628 are intended to prohibit and remedy such problems, thus enhancing program access to fulfill the Congressional intent—as expressed in the 1992 Cable Act and the legislative history—to prohibit unfair or anticompetitive actions, without restraining the amount of multichannel programming available by precluding legitimate business practices that enhance competition and create programming diversity. Also, in response to the Congressional mandate to develop an adjudicatory process for implementing the provisions of section 628, procedures are tailored to specific classes of complaints in order to resolve such matters as expeditiously as possible.

Administrative Matters

Final Regulatory Flexibility Analysis

81. Pursuant to the Regulatory Flexibility Act of 1980, the Commission's final analysis is as follows:

I. Need and purpose of this action: This action is taken to implement section 19 of the Cable television Consumer Protection and Competition Act of 1992.

II. Summary of the issues raised by comments in response to the Initial Regulatory Flexibility Analysis: There were no comments submitted in response to the Initial Regulatory Flexibility Analysis.

III. Significant alternatives considered: We have analyzed the comments submitted in light of our statutory directives and have formulated regulations which, to the extent possible, minimize the regulatory burden placed on entities covered by the program access provisions of the Cable Act. Different entities will be affected in different ways. Some programming vendors may be forced to alter their pricing policies or their contracting policies while other MVPDs, who are more likely to be small entities, may receive benefits in increased access to or lower prices for satellite cable or satellite broadcast programming.

IV. Federal Rules which overlap, duplicate or conflict with these rules: Sherman Act, Clayton Act, and Robinson-Patman Act.

V. Paperwork Reduction Act Statement: The proposal contained herein has been analyzed with respect to the Paperwork Reduction Act of 1980 and found to impose new and modified information collection requirement on the public. Implementation of any new or modified requirements will be subject to approval by the Office of Management and Budget as prescribed by the Act.

82. The Secretary shall cause a copy of the *Report and Order*, including the Final Regulatory Flexibility Analysis, to be sent to the Chief Counsel for Advocacy of the Small Business Administration in accordance with section 603(a) of the Regulatory Flexibility Act, Public Law No. 96–354, 94 Stat. 1164, 5 U.S.C. 601 *et seq.* (1981).

Ordering Clauses

83. Accordingly, it is ordered that, pursuant to sections 2(a), 4(i), and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. 152(a), 154(i), and 303(r), part 76 of the Commission's rules, 47 CFR part 76 is amended as set forth below.

84. It is ordered that the rules of this *Report and Order* will be effective July 16, 1993.

85. It is further ordered that MM Docket No. 92–265 will remain open until such time as the remaining issues relating to section 12 of the Cable Act are resolved.

List of Subjects in 47 CFR part 76

Cable television.

Federal Communications Commission.

Donna R. Searcy,

Secretary.

Amendatory Text

Part 76 of title 47 of the Code of Federal Regulations is amended as follows:

PART 76—CABLE TELEVISION SERVICE

1. The authority citation for part 76 is revised to read as follows:

Authority: 47 U.S.C. 152, 153, 154, 301, 303, 307, 308, 309, 532, 533, 535, 542, 543, 548, 552.

2. The heading of Subpart O is revised to read as follows:

Subpart O—Competitive Access to Cable Programming

3. Subpart O is amended by adding §§ 76.1000 through 76.1003 and by revising §§ 76.1004 through 76.1010 to read as follows:

§ 76.1000 Definitions

As used in this subpart:

(a) *Area served by cable system.* The term "area served" by a cable system means an area actually passed by a cable system and which can be connected for a standard connection fee.

(b) *Attributable interest.* For purposes of determining whether a party has an "attributable interest" as used in this subpart, the definitions contained in the notes to § 76.501 shall be used, provided, however that:

(1) The single majority shareholder provisions of Note 2(b) to § 76.501 and the limited partner insulation provisions of Note 2(g) to § 76.501 shall not apply; and

(2) The provisions of Note 2(a) to § 76.501 regarding five (5) percent interests shall include all voting or nonvoting stock or limited partnership equity interests of five (5) percent or more.

(c) *Buying groups.* The term "buying group" or "agent," for purposes of the definition of a multichannel video programming distributor set forth in paragraph (e) of this section, means an entity representing the interests of more than one entity distributing multichannel video programming that:

(1) Agrees to be financially liable for any fees due pursuant to a satellite cable programming, or satellite broadcast programming, contract which it signs as a contracting party as a representative of its members or whose members, as contracting parties, agree to joint and several liability; and

(2) Agrees to uniform billing and standardized contract provisions for individual members; and

(3) Agrees either collectively or individually on reasonable technical quality standards for the individual members of the group.

(d) *Competing distributors.* The term "competing," as used with respect to competing multichannel video programming distributors, means distributors whose actual or proposed service areas overlap.

(e) *Multichannel video programming distributor.* The term "multichannel video programming distributor" means an entity engaged in the business of making available for purchase, by subscribers or customers, multiple channels of video programming. Such entities include, but are not limited to,

a cable operator, a multichannel multipoint distribution service, a direct broadcast satellite service, a television receive-only satellite program distributor, and a satellite master antenna television system operator, as well as buying groups or agents of all such entities.

(f) *Satellite broadcast programming.* The term "satellite broadcast programming" means broadcast video programming when such programming is retransmitted by satellite and the entity retransmitting such programming is not the broadcaster or an entity performing such retransmission on behalf of and with the specific consent of the broadcaster.

(g) *Satellite broadcast programming vendor.* The term "satellite broadcast programming vendor" means a fixed service satellite carrier that provides service pursuant to section 119 of title 17, United States Code, with respect to satellite broadcast programming.

(h) *Satellite cable programming.* The term "satellite cable programming" means video programming which is transmitted via satellite and which is primarily intended for direct receipt by cable operators for their retransmission to cable subscribers, except that such term does not include satellite broadcast programming.

(i) *Satellite cable programming vendor.* The term "satellite cable programming vendor" means a person engaged in the production, creation, or wholesale distribution for sale of satellite cable programming, but does not include a satellite broadcast programming vendor.

(j) *Similarly situated.* The term "similarly situated" means, for the purposes of evaluating alternative programming contracts offered by a defendant programming vendor, that an alternative multichannel video programming distributor has been identified by the defendant as being more properly compared to the complainant in order to determine whether a violation of § 76.1002(b) has occurred. The analysis of whether an alternative multichannel video programming distributor is properly comparable to the complainant includes consideration of, but is not limited to, such factors as whether the alternative multichannel video programming distributor operates within a geographic region proximate to the complainant, has roughly the same number of subscribers as the complainant, and purchases a similar service as the complainant. Such alternative multichannel video programming distributor, however, must use the same distribution technology as the "competing" distributor with whom the complainant seeks to compare itself.

(k) *Subdistribution agreement.* The term "subdistribution agreement" means an arrangement by which a local cable operator is given the right by a satellite cable programming vendor or satellite broadcast programming vendor to distribute the vendor's programming to competing multichannel video programming distributors.

§ 76.1001 Unfair practices generally.

No cable operator, satellite cable programming vendor in which a cable operator has an attributable interest, or satellite broadcast programming vendor shall engage in unfair methods of competition or unfair or deceptive acts or practices, the purpose or effect of which is to hinder significantly or prevent any multichannel video programming distributor from providing satellite cable programming or satellite broadcast programming to subscribers or consumers.

§ 76.1002 Specific unfair practices prohibited.

(a) *Undue or improper influence.* No cable operator that has an attributable interest in a satellite cable programming vendor or in a satellite broadcast programming vendor shall unduly or improperly influence the decision of such vendor to sell, or unduly or improperly influence such vendor's prices, terms and conditions for the sale of, satellite cable programming or satellite broadcast programming to any unaffiliated multichannel video programming distributor.

(b) *Discrimination in prices, terms or conditions.* No satellite cable programming vendor in which a cable operator has an attributable interest, or satellite broadcast programming vendor, shall discriminate in the prices, terms, and conditions of sale or delivery of satellite cable programming or satellite broadcast programming among or between competing cable systems, competing cable operators, or any competing multichannel video programming distributors. Nothing in this subsection, however, shall preclude:

(1) The imposition of reasonable requirements for creditworthiness, offering of service, and financial stability and standards regarding character and technical quality;

Note 1: Vendors are permitted to create a distinct class or classes of service in pricing based on credit considerations or financial stability, although any such distinctions must be applied for reasons for other than a multichannel video programming distributor's technology. Vendors are not permitted to manifest factors such as creditworthiness or financial stability in price differentials if such factors are already taken into account through different terms or conditions such as special credit requirements or payment guarantees.

Note 2: Vendors may establish price differentials based on factors related to offering of service, or difference related to the actual service exchanged between the vendor and the distributor, as manifested in standardly applied contract terms based on a distributor's particular characteristics or willingness to provide secondary services that are reflected as a discount or surcharge in the programming service's price. Such factors include, but are not limited to, penetration of programming to subscribers or to particular systems; retail price of programming to the consumer for pay services; amount and type of promotional or advertising services by a distributor; a distributor's purchase of programming in a package or a la carte; channel position; importance of location for non-volume reasons; prepayment discounts; contract duration; date of purchase, especially purchase of service at launch; meeting competition at the distributor level; and other legitimate factors as standardly applied in a technology neutral fashion.

(2) The establishment of different prices, terms, and conditions to take into account actual and reasonable differences in the cost of creation, sale, delivery, or transmission of satellite cable programming or satellite broadcast programming;

Note: Vendors may base price differentials, in whole or in part, on differences in the cost of delivering a programming service to particular distributors, such as differences in costs, or additional costs, incurred for advertising expenses, copyright fees, customer service, and signal security. Vendors may base price differentials on cost differences that occur within a given technology as well as between technologies. A price differential for a program service may not be based on a distributor's retail costs in delivering service to subscribers unless the program vendor can demonstrate that subscribers do not or will not benefit from the distributor's cost savings that result from a lower programming price.

(3) The establishment of different prices, terms, and conditions which take into account economies of scale, cost savings, or other direct and legitimate economic benefits reasonably attributable to the number of subscribers served by the distributor; or

Note: Vendors may use volume-related justifications to establish price differentials to the extent that such justifications are made available to similarly situated distributors on a technology-neutral basis. When relying upon standardized volume-related factors that are made available to all multichannel video programming distributors using all technologies, the vendor may be required to demonstrate that such volume discounts are

reasonably related to direct and legitimate economic benefits reasonably attributable to the number of subscribers served by the distributor if questions arise about the application of that discount. In such demonstrations, vendors will not be required to provide a strict cost justification for the structure of such standard volume-related factors, but may also identify non-cost economic benefits related to increased viewership.

(4) Entering into exclusive contracts in areas that are permitted under paragraphs (c)(2) and (c)(4) of this section.

(c) *Exclusive contracts and practices.*—(1) *Unserved areas.* No cable operator shall engage in any practice or activity or enter into any understanding or arrangement, including exclusive contracts, with a satellite cable programming vendor or satellite broadcast programming vendor for satellite cable programming or satellite broadcast programming that prevents a multichannel video programming distributor from obtaining such programming from any satellite cable programming vendor in which a cable operator has an attributable interest, or any satellite broadcast programming vendor in which a cable operator has an attributable interest for distribution to persons in areas not served by a cable operator as of October 5, 1992.

(2) *Served areas.* No cable operator shall enter into any exclusive contracts, or engage in any practice, activity or arrangement tantamount to an exclusive contract, for satellite cable programming or satellite broadcast programming with a satellite cable programming vendor in which a cable operator has an attributable interest or a satellite broadcast programming vendor in which a cable operator has an attributable interest, with respect to areas served by a cable operator, unless the Commission determines in accordance with paragraph (c)(4) of this section that such contract, practice, activity or arrangement is in the public interest.

(3) *Specific arrangements: Subdistribution agreements.*—(1) *Unserved areas.* No cable operator shall enter into any subdistribution agreement or arrangement for satellite cable programming or satellite broadcast programming with a satellite cable programming vendor in which a cable operator has an attributable interest or a satellite broadcast programming vendor in which a cable operator has an attributable interest for distribution to persons in areas not served by a cable operator as of October 5, 1992.

(ii) *Served areas.* No cable operator shall enter into any subdistribution agreement or arrangement for satellite cable programming or satellite broadcast programming with a satellite cable programming vendor in which a cable operator has an attributable interest or a satellite broadcast programming vendor in which a cable operator has an attributable interest, with respect to areas served by a cable operator, unless such agreement or arrangement complies with the limitations set forth in paragraph (c)(3)(iii) of this section.

(iii) *Limitations on subdistribution agreements in served areas.* No cable operator engaged in subdistribution of satellite cable programming or satellite broadcast programming may require a competing multichannel video programming distributor to

(A) Purchase additional or unrelated programming as a condition of such subdistribution; or

(B) Provide access to private property in exchange for access to programming. In addition, a subdistributor may not charge a competing multichannel video programming distributor more for said programming than the satellite cable programming vendor or satellite broadcast programming vendor itself would be permitted to charge. Any cable operator acting as a subdistributor of satellite cable programming or satellite broadcast programming must respond to a request for access to such programming by a competing multichannel video programming distributor within fifteen (15) days of the request. If the request is denied, the competing multichannel video programming distributor must be permitted to negotiate directly with the satellite cable programming vendor or satellite broadcast programming vendor.

4. *Public interest determination.* In determining whether an exclusive contract is in the public interest for purposes of paragraph (c)(2) of this section, the Commission will consider each of the following factors with respect to the effect of such contract on the distribution of video programming in areas that are served by a cable operator:

(i) The effect of such exclusive contract on the development of competition in local and national multichannel video programming distribution markets;

(ii) The effect of such exclusive contract on competition from multichannel video programming distribution technologies other than cable;

(iii) The effect of such exclusive contract on the attraction of capital investment in the production and distribution of new satellite cable programming;

(iv) The effect of such exclusive contract on diversity of programming in the multichannel video programming distribution market; and

(v) The duration of the exclusive contract.

(5) *Prior Commission approval required.* Any cable operator, satellite cable programming vendor in which a cable operator has an attributable interest, or satellite broadcast programming vendor in which a cable operator has an attributable interest seeking to enforce or enter into an exclusive contract in an area served by a cable operator must submit a "Petition for Exclusivity" to the Commission for approval.

(i) The petition for exclusivity shall contain those portions of the contract relevant to exclusivity, including:

(A) A description of the programming service;

(B) The extent and duration of exclusivity proposed; and

(C) Any other terms or provisions directly related to exclusivity or to any of the criteria set forth in paragraph (c)(4) of this section. The petition for exclusivity shall also include a statement setting forth the petitioner's reasons to support a finding that the contract is in the public interest, addressing each of the five factors set forth in paragraph (c)(4) of this section.

(ii) Any competing multichannel video programming distributor affected by the proposed exclusivity may file an opposition to the petition for exclusivity within thirty (30) days of the date on which the petition is placed on public notice, setting forth its reasons to support a finding that the contract is not in the public interest under the criteria set forth in paragraph (c)(4) of this section. Any such formal opposition must be served on petitioner on the same day on which it is filed with the Commission.

(iii) The petitioner may file a response within ten (10) days of receipt of any formal opposition. The Commission will then approve or deny the petition for exclusivity.

(6) *Sunset provision.* The prohibition of exclusive contracts set forth in paragraph (c)(2) of this section shall cease to be effective on October 5, 2002, unless the Commission finds, during a proceeding to be conducted during the year preceding such date, that said prohibition continues to be necessary to preserve and protect competition and diversity in the distribution of video programming.

(d) *Limitations*—(1) *Geographic limitations.* Nothing in this section shall require any person who is engaged in the national or regional distribution of

video programming to make such programming available in any geographic area beyond which such programming has been authorized or licensed for distribution.

(2) *Applicability to satellite retransmissions.* Nothing in this section shall apply:

(i) To the signal of any broadcast affiliate of a national television network or other television signal that is retransmitted by satellite but that is not satellite broadcast programming; or

(ii) To any internal satellite communication of any broadcast network or cable network that is not satellite broadcast programming.

(e) *Exemptions for prior contracts.*—(1) *In general.* Nothing in this section shall affect any contract that grants exclusive distribution rights to any person with respect to satellite cable programming and that was entered into or before June 1, 1990, except that the provisions of paragraph (c)(1) of this section shall apply for distribution to persons in areas not served by a cable operator.

(2) *Limitation on renewals.* A contract that was entered into on or before June 1, 1990, but that was renewed or extended after October 5, 1992, shall not be exempt under paragraph (e)(1) of this section.

(f) *Application to existing contracts.* All contracts, except those specified in paragraph (e) of this section, related to the provision of satellite cable programming or satellite broadcast programming to any multichannel video programming distributor must be brought into compliance with the requirements specified in this subpart no later than November 15, 1993.

§ 76.1003 Adjudicatory proceedings.

Any competing multichannel video programming distributor aggrieved by conduct that it alleges to constitute a violation of the regulations set forth in this subpart may commence an adjudicatory proceeding at the Commission.

(a) *Notice required.* Any aggrieved multichannel video programming distributor intending to file a complaint under this section must first notify the potential defendant cable operator, and/or the potential defendant satellite cable programming vendor or satellite broadcast programming vendor, that it intends to file a complaint with the Commission based on actions alleged to violate one or more of the provisions contained in § 76.1001 or 76.1002. The notice must be sufficiently detailed so that its recipient(s) can determine the specific nature of the potential complaint. The potential complainant must allow a minimum of ten (10) days for the potential defendant(s) to respond before filing a complaint with the Commission.

(b) *General pleading requirements.* Program access complaint proceedings are generally resolved on a written record consisting of a complaint, answer and reply, but may also include other written submissions such as briefs and written interrogatories. All written submissions, both substantive and procedural, must conform to the following standards :

(1) Pleadings must be clear, concise, and explicit. All matters concerning a claim, defense or requested remedy, should be pleaded fully and with specificity.

(2) Pleadings must contain facts which, if true, are sufficient to constitute a violation of the Act or Commission order or regulation, or a defense to such alleged violation.

(3) Facts must be supported by relevant documentation or affidavit.

(4) Legal arguments must be supported by appropriate judicial, Commission, or statutory authority.

(5) Opposing authorities must be distinguished.

(6) Copies must be provided of all non-Commission authorities relied upon which are not routinely available in national reporting systems, such as unpublished decisions or slip opinions of courts or administrative agencies.

(7) Parties are responsible for the continuing accuracy and completeness of all information and supporting authority furnished in a pending complaint proceeding. Information submitted, as well as relevant legal authorities, must be current and updated as necessary and in a timely manner at any time before a decision is rendered on the merits of the complaint.

(c) *Complaint.* (1) A program access complaint shall contain:

(i) The name of the complainant and each defendant;

(ii) The type of multichannel video programming distributor that describes complainant, the address and telephone number of the complainant, whether the defendant is a cable operator, satellite broadcast programming vendor or satellite cable programming vendor (describing each defendant), and the address and telephone number of each defendant;

(iii) The name, address and telephone number of complainant's attorney, if represented by counsel;

(iv) Citation to the section of the Communications Act and/or Commission regulation or order alleged to have been violated;

(v) A complete statement of facts, which, if proven true, would constitute such a violation;

(vi) Any evidence that supports the truth or accuracy of the alleged facts;

(vii) Evidence that supports complainant's belief that the defendant, where necessary, meets the attribution standards for application of the program access requirements;

(viii) Evidence that the complainant competes with the defendant cable operator, or with a multichannel video programming distributor that is a customer of the defendant satellite cable programming or satellite broadcast programming vendor;

(ix) In complaints alleging discrimination, documentary evidence such as a rate card or a programming contract that demonstrates a differential in price, terms or conditions between complainant and a competing multichannel video programming distributor or, if no programming contract or rate card is submitted with the complaint, an affidavit signed by an officer of complainant alleging that a differential in price, terms or conditions exits, a description of the nature and extent (if known or reasonably estimated by the complainant) of the differential, together with a statement that defendant refused to provide any further specific comparative information;

(x) If a programming contract or a rate card is submitted with the complaint in support of the alleged violation, specific references to the relevant provisions therein;

(xi) In complaints alleging exclusivity violations:

(A) The identity of both the programmer and cable operator who are parties to the alleged prohibited agreement,

(B) Evidence that complainant can or does serve the area specified in the complaint, and

(C) Evidence that the complainant has requested to purchase the relevant programming and has been refused or unanswered;

(xii) In complaints alleging a violation of § 76.1001, evidence demonstrating that the behavior complained of has harmed complainant; and

(xiii) The specific relief sought.

(2) Every complaint alleging a violation of the program access requirements shall be accompanied by a sworn affidavit signed by an authorized officer or agent of the complainant. This affidavit shall contain a statement that the affiant has read the complaint and that to the best of the affiant's knowledge, information and belief formed after reasonable inquiry it is

well grounded in fact and is warranted under Commission regulations and policies or is a good faith argument for the extension, modification or reversal of such regulations or policies, and it is not interposed for any improper purpose. If the complaint is signed in violation of this rule, the Commission upon motion or its own initiative shall impose upon the complainant an appropriate sanction.

(3) The following format may be used in cases to which it is applicable, with such modifications as the circumstances may render necessary;

Before The Federal Communications Commission, Washington, DC 20554. In the matter of Complainant, v. Defendant. File No. (To be inserted by the Commission) [Insert Subject/Nature of Issue: Discrimination; Exclusivity; Undue Influence; Unfair Practice]

Program Access Complaint

To: The Commission.

The complainant (here insert full name of complainant, and if a corporation, the corporate title of such complainant).

1. (Here state the complainant's method of multichannel video program distribution; post office address, and telephone number of the complainant).

2. (Here insert the name, whether a cable operator, satellite broadcast programming vendor or satellite cable programming vendor, address and telephone number of each defendant).

3. (Here insert fully and clearly the specific act or thing complained of, together with such facts as are necessary to give full understanding of the matter, including relevant legal and documentary support).

Wherefore, complainant asks (here state specifically the relief desired).

(Date)

(Name of complainant)

(Name, address, and telephone number of attorney, if any)

(4) The complaint must be accompanied by appropriate evidence demonstrating that the required notification pursuant to paragraph (a) of this section has been made.

(d) *Answer.* (1) Any cable operator, satellite cable programming vendor or satellite broadcast programming vendor upon which a program access complaint is served under this section shall answer within thirty (30) days of service of the complaint, unless otherwise directed by the Commission.

(2) The answer shall advise the parties and the Commission fully and completely of the nature of any and all defenses, and shall respond specifically to all material allegations of the complaint. Collateral or immaterial issues shall be avoided in answers and every effort should be made to narrow the issues. Any defendant failing to file and serve an answer within the time and in the manner prescribed by these rules may be deemed in default and an order may be entered against defendant in accordance with the allegations contained in the complaint.

(3) The answer shall state concisely any and all defenses to each claim asserted and shall admit or deny the averments on which the adverse party relies. If the defendant is without knowledge or information sufficient to form a belief as to the truth of an averment, the defendant shall so state and this has the effect of a denial. When a defendant intends in good faith to deny only part of an averment, the answer shall specify so much of it as is true and shall deny only the remainder. The defendant may make its denials as specific denials of designated averments or paragraphs, or may generally deny all the averments except such designated averments or paragraphs as the defendant expressly admits. When the defendant intends to controvert all averments, the defendant may do so by general denial.

(4) Averments in a complaint are deemed to be admitted when not denied in the answer.

(5) An answer to an exclusivity complaint shall provide the defendant's reasons for refusing to sell the subject programming to the complainant. In addition, the defendant may submit to the Commission its programming contracts covering the area specified in the complaint with its answer to refute allegations concerning the existence of an impermissible exclusive contract. If there are no contracts governing the specified area, the defendant shall so certify in its answer. Any contracts submitted pursuant to this provision may be protected as proprietary pursuant to paragraph (h) of this section.

(6) An answer to a discrimination complaint shall state the reasons for any differential in prices, terms or conditions between the complainant and its competitor, and shall specify the particular justification set forth in § 76.1002(b) relied upon in support of the differential.

(i) When responding to allegations concerning price discrimination, except in cases in which the alleged price differential is *de minimis* (less than or equal to five cents per subscriber or five percent, whichever is greater), the defendant shall provide documentary evidence to support any argument that the magnitude of the differential is not discriminatory.

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

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

(iv) Any documents or contracts submitted pursuant to this subparagraph may be protected as proprietary pursuant to paragraph (h) of this section.

(7) An answer to a complaint alleging an unreasonable refusal to sell programming shall state the defendant's reasons for refusing to sell to the complainant, or for refusing to sell to the complainant on the same terms and conditions as complainant's competitor, and shall specify why the defendant's actions are not discriminatory.

(e) *Reply.* Within twenty (20) days after service of an answer, the complainant may file and serve a reply which shall be responsive to matters contained in the answer and shall not contain new matters. Failure to reply will not be deemed an admission of any allegations contained in the answer, except with respect to any affirmative defense set forth therein. Replies containing information claimed by defendant to be proprietary under paragraph (h) of this section shall be submitted to the Commission in confidence pursuant to the requirements of § 0.459 of this chapter and clearly marked "Not for Public Inspection." An edited version removing all proprietary data shall be filed with the Commission for inclusion in the public file within five (5) days from the date the unedited reply is submitted, and shall be served on the defendant.

(f) *Motions.* Except as provided in this section, or upon a showing of

extraordinary circumstances, additional motions or pleadings by any party will not be accepted.

(g) *Discovery.* (1) The Commission staff may in its discretion order discovery limited to the issues specified by the Commission. Such discovery may include answers to written interrogatories or document production.

(2) The Commission staff may in its discretion direct the parties to submit discovery proposals, together with a memorandum in support of the discovery requested. Such discovery requests may include answers to written interrogatories, document production or depositions. The Commission staff will then hold a status conference with the parties, pursuant to paragraph (j) of this section, to determine the scope of discovery. If the Commission staff determines that extensive discovery is required or that depositions are warranted, the staff will advise the parties that the proceeding will be referred to an administrative law judge in accordance with paragraph (m) of this section.

(h) *Confidentiality of proprietary information.* (1) Any materials generated or provided by a party in the course of adjudicating a program access complaint under this provision may be designated as proprietary by that party if the party believes in good faith that the materials fall within an exemption to disclosure contained in the Freedom of Information Act (FOIA), 5 U.S.C. 552(b). Any party asserting confidentiality for such materials shall so indicate by clearly marking each page, or portion thereof, for which a proprietary designation is claimed. If a proprietary designation is challenged, the party claiming confidentiality will have the burden of demonstrating, by a preponderance of the evidence, that the material designated as proprietary falls under the standards for nondisclosure enunciated in the FOIA.

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

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

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

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

(iv) The Commission and its staff; and

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

(3) The persons designated in paragraph (h)(2) of this section shall not disclose information designated as proprietary to any person who is not authorized under this section to receive such information, and shall not use the information in any activity or function other than the prosecution or defense in the case before the Commission. Each individual who is provided access to the information by the opposing party shall sign a notarized statement affirmatively stating, or shall certify under penalty of perjury, that the individual has personally reviewed the Commission's rules and understands the limitations they impose on the signing party.

(4) No copies of materials marked proprietary may be made except copies to be used by persons designated in paragraph (h)(2) of this section. Each party shall maintain a log recording the number of copies made of all proprietary material and the persons to whom the copies have been provided.

(5) Upon termination of the complaint proceeding, including all appeals and petitions, all originals and reproductions of any proprietary materials, along with the log recording persons who received copies of such materials, shall be provided to the producing party. In addition, upon final termination of the complaint proceeding, any notes or other work product derived in whole or in part from the proprietary materials of an opposing or third party shall be destroyed.

(i) *Other required written submissions.* (1) The Commission may, in its discretion, require the parties to file briefs summarizing the facts and issues presented in the pleadings and other record evidence. These briefs shall contain the findings of fact and conclusions of law which that party is urging the Commission to adopt, with specific citations to the record, and supported by relevant authority and analysis.

(2) The Commission may require the parties to submit any additional information it deems appropriate for a full, fair, and expeditious resolution of the proceeding, including copies of all contracts and documents reflecting arrangements and understandings alleged to violate the program access requirements set forth in the Communications Act and §§ 76.1001 and 76.1002, as well as affidavits and exhibits.

(3) Any briefs submitted shall be filed concurrently by both the complainant and defendant at such time as is designated by the staff. Such briefs shall not exceed fifty (50) pages.

(4) Reply briefs may be submitted by either party within twenty (20) days from the date initial briefs are due. Reply briefs shall not exceed thirty (30) pages.

(5) Briefs containing information which is claimed by an opposing or third party to be proprietary under paragraph (h) of this section shall be submitted to the Commission in confidence pursuant to the requirements of § 0.459 of this chapter, and shall be clearly marked "Not for Public Inspection." An edited version removing all proprietary data shall be filed with the Commission for inclusion in the public file within five (5) days from the date the unedited version is submitted and served on opposing parties.

(j) *Status conference.* (1) In any program access complaint proceeding, the Commission staff may in its discretion direct the attorneys and/or the parties to appear for a conference to consider:

(i) Simplification or narrowing of the issues;

(ii) The necessity for or desirability of amendments to the pleadings, additional pleadings, or other evidentiary submissions;

(iii) Obtaining admissions of fact or stipulations between the parties as to any or all of the matters in controversy;

(iv) Settlement of the matters in controversy by agreement of the parties;

(v) The necessity for and extent of discovery, including objections to interrogatories or requests for written documents;

(vi) The need and schedule for filing briefs, and the date for any further conferences; and

(vii) Such other matters that may aid in the disposition of the complaint.

(2) Any party may request that a conference be held at any time after the complaint has been filed.

(3) Conferences will be scheduled by the Commission at such time and place as it may designate, to be conducted in person or by telephone conference call.

(4) The failure of any attorney or party, following reasonable notice, to appear at a scheduled conference will be deemed a waiver and will not preclude the Commission from conferring with those parties or counsel present.

(5) During a status conference, the Commission staff may issue oral rulings pertaining to a variety of interlocutory matters relevant to the conduct of a program access complaint proceeding including, *inter alia,* procedural matters, discovery, and the submission of briefs

or other evidentiary materials. These rulings will be promptly memorialized in writing and served on the parties. When such rulings require a party to take affirmative action not subject to deadlines established by another provision of this subpart, such action will be required within ten (10) days from the date of the written memorialization unless otherwise directed by the staff.

(k) *Specifications as to pleadings, briefs, and other documents; subscriptions.* (1) All papers filed in a program access compliant proceeding must be drawn in conformity with the requirements of §§ 1.49 and 1.50 of this chapter.

(2) All averments of claims or defenses in complaints and answers shall be made in numbered paragraphs. The contents of each paragraph shall be limited as far as practicable to a statement of a single set of circumstances. Each claim founded on a separate transaction or occurrence and each affirmative defense shall be separately stated to facilitate the clear presentation of the matters set forth.

(3) The original of all pleadings and submissions by any party shall be signed by that party, or by the party's attorney. Complaints must be signed by the complainant. The signing party shall state his or her address and telephone number and the date on which the document was signed. Copies should be conformed to the original. Except when otherwise specifically provided by rule or statute, pleadings need not be verified. The signature of an attorney or party shall be a certificate that the attorney or party has read the pleading, motion, or other paper; that to the best of his or her knowledge, information and belief formed after reasonable inquiry, it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification or reversal of existing law; and that it is not interposed for any improper purpose. If any pleading or other submission is signed in violation of this provision, the Commission shall upon motion or upon its own initiative impose upon the party an appropriate sanction. Where the pleading or submission is signed by counsel, the provisions of §§ 1.52 and 1.24 of this chapter shall also apply.

(l) *Copies; service.* (1) The complainant shall file an original plus three copies of the complaint with the Commission. However, if the complaint is addressed against multiple defendants, complainant shall provide three additional copies of the complaint for each additional defendant.

(2) An original plus two copies shall be filed of all pleadings and documents other than the complaint.

(3) The complainant shall serve the compliant on each defendant at the same time that it is filed at the Commission.

(4) All subsequent pleadings and briefs, as well as all letters, documents or other written submissions, shall be served by the filing party on all other parties to the proceeding, together with proof of such service in accordance with the requirements of § 1.47 of this chapter.

(5) The parties to any program access compliant proceeding brought pursuant to this section may be required to file additional copies of any or all papers filed in the proceeding.

(m) *Referral to administrative law judge.* (1) After reviewing the complaint, answer and reply, and at any stage of the proceeding thereafter, the Commission staff may, in its discretion, designate any program access compliant proceeding for an adjudicatory hearing before an administrative law judge.

(2) Before designation for hearing, the staff shall notify, either orally or in writing, the parties to the proceeding of its intent to so designate, and the parties shall be given a period of ten (10) days to elect to resolve the dispute through alternative dispute resolution procedures, or to proceed with an adjudicatory hearing. Such election shall be submitted in writing to the Commission.

(3) Unless otherwise directed by the Commission, or upon motion by the Mass Media Bureau Chief, the Mass Media Bureau Chief shall not be deemed to be a party to a program access compliant proceeding designated for a hearing before an administrative law judge pursuant to this paragraph.

(n) *Petitions for reconsideration.* Petitions for reconsideration of interlocutory actions by the Commission's staff or by an administrative law judge will not be entertained. Petitions for reconsideration of a decision on the merits made by the Commission's staff should be filed in accordance with §§ 1.104–1.106 of this chapter.

(o) *Interlocutory review.* (1) Except as provided below, no party may seek review of interlocutory rulings until a decision on the merits has been issued by the staff or administrative law judge.

(2) Rulings listed in this paragraph are reviewable as a matter of right. An application for review of such ruling may not be deferred and raised as an exception to a decision on the merits.

(i) If the staff's ruling denies or terminates the right of any person to participate as a party to the proceeding, such person, as a matter of right, may file an application for review of that ruling.

(ii) If the staff's ruling requires production of documents or other written evidence, over objection based on a claim of privilege, the ruling on the claim of privilege is reviewable as a matter of right.

(iii) If the staff's ruling denies a motion to disqualify a staff person from participating in the proceeding, the ruling is reviewable as a matter of right.

(p) *Expedited review.* (1) Any party to a program access complaint proceeding aggrieved by any decision on the merits issued by the staff pursuant to delegated authority may file an application for review by the Commission in accordance with § 1.115 of this chapter.

(2) Any party to a program access complaint proceeding aggrieved by any decision on the merits by an administrative law judge may file an appeal of the decision directly with the Commission, in accordance with § 1.276(a) and §§ 1.277(a)–(c) of this chapter, except that unless a stay is granted by the Commission, the decision by the administrative law judge will become effective upon release and will remain in effect pending appeal.

(q) *Frivolous complaints.* It shall be unlawful for any party to file a frivolous complaint with the Commission alleging any violation of this subpart. Any violation of this paragraph shall constitute an abuse of process subject to appropriate sanctions.

(r) *Statute of limitations.* Any complaint filed pursuant to this subsection must be filed within one year of the date on which one of the following events occurs:

(1) The satellite cable programming or satellite broadcast programming vendor enters into a contract with the complainant that the complainant alleges to violate one or more of the rules contained in this subpart; or

(2) The satellite cable programming or satellite broadcast programming vendor offers to sell programming to the complainant pursuant to terms that the complainant alleges to violate one or more of the rules contained in this subpart; or

(3) The complainant has notified a cable operator, or a satellite cable programming vendor or a satellite broadcast programming vendor that it intends to file a complaint with the Commission based on a request to purchase or negotiate to purchase satellite cable programming or satellite broadcast programming, or a request to amend an existing contract pertaining to such programming pursuant to

§ 76.1002(f) that has been denied or unacknowledged, allegedly in violation of one or more of the rules contained in this subpart.

(s) *Remedies for violations*—(1) *Remedies authorized.* Upon completion of such adjudicatory proceeding, the Commission shall order appropriate remedies, including, if necessary, the establishment of prices, terms, and conditions for the sale of programming to the aggrieved multichannel video programming distributor. Such order shall set forth a timetable for compliance, and shall become effective upon release.

(2) *Additional sanctions.* The remedies provided in paragraph (s)(1) of this section are in addition to and not in lieu of the sanctions available under title V or any other provision of the Communications Act.

§§ 76.1004 through 76.1010 [Reserved]

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[FR Doc. 93–10873 Filed 5–10–93; 8:45 am]
BILLING CODE 6712–01–M

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47 CFR Part 76

[MM Docket No. 82–434; FCC 92–262]

Network-Cable Cross-Ownership Rule

AGENCY: Federal Communications Commission.

ACTION: Final rule; technical amendment.

SUMMARY: This technical amendment is being made to correct an error in the Commission's Report and Order in MM Docket No. 82–434, 57 FR 35468 (August 10, 1992), FR Doc. 92–18121. In the amended rules of this Report and Order, 57 FR 35472, Section 76.501 should be corrected by adding Notes 1–4 after paragraph (b). Therefore, Section 76.501 should read as follows: (a), (b), notes, and (c).

EFFECTIVE DATE: May 11, 1993.

FOR FURTHER INFORMATION CONTACT: Jim Coltharp, Mass Media Bureau, Policy and Rules Division, (202) 632–6302.

SUPPLEMENTARY INFORMATION:

Background

The final rule that is the subject of this correction modified the Commission's rules, which prohibited common ownership of cable television systems and national television networks (the "network-cable cross-ownership rule").

Need for Correction

As published, the final rule inadvertently omitted Notes 1–4 of Section 76.501.

List of Subjects in 47 CFR Part 76

Cable television.

Part 76 of chapter I of title 47 of the U.S. Code of Federal Regulations is amended to read as follows:

1. The authority citation for part 76 continues to read as follows:

Authority: 47 U.S.C. 154, 303.

2. Section 76.501 is revised to read as follows:

§ 76.501 Cross-ownership.

(a) No cable television system (including all parties under common control) shall carry the signal of any television broadcast station if such system directly or indirectly owns, operates, controls, or has an interest in a TV broadcast station whose predicted Grade B contour, computed in accordance with § 73.684 of part 73 of this chapter, overlaps in whole or in part the service area of such system (i.e., the area within which the system is serving subscribers).

(b) (1) A cable television system (including all parties under common control) may directly or indirectly own, operate, control, or have an interest in a national television network (such as ABC, CBS, or NBC) only if such a system does not pass more than:

(i) 10 percent of homes passed on a nationwide basis when aggregated with all other cable systems in which the network holds such a cognizable interest, and

(ii) 50 percent of homes passed within any one ADI, except that a cable television system facing a competing system will not be counted toward this 50-percent limit.

(2) The requirements of paragraph (b)(1) of this section are applied at the acquisition date, except that a party with no prior attributable interests in a broadcast network or cable systems may exceed these limits in connection with a purchase of these operations from a party with such existing network-cable interests. Paragraph (b) of this section will not be applied so as to require divestiture of existing facilities.

(3) For purposes of paragraph (b) of this section:

(i) *Homes passed* is defined as the number of homes to which cable service is currently available whether or not a given household subscribes to the service.

(ii) *ADI* is defined as the Arbitron Area of Dominant Influence.

(iii) A *competing system* is faced by a network-owned cable system where the cable system provides service in the same area as another independently owned, multichannel video delivery system, as specified in § 76.33(a)(2)(ii). In order to be counted, such multichannel competitor must be capable of providing a package of local broadcast signals integrated within the service.

Note 1: The word "control" as used herein is not limited to majority stock ownership, but includes actual working control in whatever manner exercised.

Note 2: In applying the provisions of this section, ownership and other interests in broadcast licensees and cable television systems will be attributed to their holders and deemed cognizable pursuant to the following criteria:

(a) Except as otherwise provided herein, partnership and direct ownership interest and any voting stock interest amounting to 5% or more of the outstanding voting stock of a corporate broadcast licensee or cable television system will be cognizable;

(b) No minority voting stock interest will be cognizable if there is a single holder of more than 50% of the outstanding voting stock of the corporate broadcast licensee or cable television system in which the minority interest is held;

(c) Investment companies, as defined in 15 U.S.C. 80a–3, insurance companies and banks holding stock through their trust departments in trust accounts will be considered to have a cognizable interest only if they hold 10% or more of the outstanding voting stock of a corporate broadcast licensee or cable television system, or if any of the officers or directors of the broadcast licensee or cable television system are representatives of the investment company, insurance company or bank concerned. Holdings by a bank or insurance company will be aggregated if the bank or insurance company has any right to determine how the stock will be voted. Holdings by investment companies will be aggregated if under common management.

(d) Attribution of ownership interests in a broadcast licensee or cable television system that are held indirectly by any party through one or more intervening corporations will be determined by successive multiplication of the ownership percentages for each link in the vertical ownership chain and application of the relevant attribution benchmark to the resulting product, except that wherever the ownership percentage for any link in the chain exceeds 50%, it shall not be included for purposes of this multiplication. [For example, if A owns 10% of company X, which owns 60% of company Y, which owns 25% of "Licensee", then X's interest in "Licensee" would be 25% (the same as Y's interest since X's interest in Y exceeds 50%), and A's interest in "Licensee" would be 2.5% (0.1×0.25). Under the 5% attribution benchmark, X's interest in "Licensee" would be cognizable, while A's interest would not be cognizable.]

(e) Voting stock interests held in trust shall be attributed to any person who holds or

shares the power to vote such stock, to any person who has the sole power to sell such stock, and to any person who has the right to revoke the trust at will or to replace the trustee at will. If the trustee has a familial, personal or extra-trust business relationship to the grantor or the beneficiary, the grantor or beneficiary, as appropriate, will be attributed with the stock interests held in trust. An otherwise qualified trust will be ineffective to insulate the grantor or beneficiary from attribution with the trust's assets unless all voting stock interests held by the grantor or beneficiary in the relevant broadcast licensee or cable television system are subject to said trust.

(f) Holders of non-voting stock shall not be attributed an interest in the issuing entity. Holders of debt and instruments such as warrants, convertible debentures, options or other non-voting interests with rights of conversion to voting interests shall not be attributed unless and until conversion is effected.

(g) (1) A limited partnership interest shall be attributed to a limited partner unless that partner is not materially involved, directly or indirectly, in the management or operation of the media-related activities of the partnership and the licensee or system so certifies.

(2) In order for a licensee or system to make the certification set forth in paragraph (g)(1) of this note, it must verify that the partnership agreement or certificate of limited partnership, with respect to the particular limited partner exempt from attribution, establishes that the exempt limited partner has not material involvement, directly or indirectly, in the management or operation of the media activities of the partnership. The criteria which would assure adequate insulation for purposes of this certification are described in the Memorandum Opinion and Order in MM Docket No. 83–46, FCC 85–252 (released June 24, 1985) as modified on reconsideration in the Memorandum Opinion and Order in MM Docket No. 83–46, FCC 86–410 (released November 28, 1986). Irrespective of the terms of the certificate of limited partnership or partnership agreement, however, no such certification shall be made if the individual or entity making the certification has actual knowledge of any material involvement of the limited partners in the management or operation of the media-related businesses of the partnership.

(h) Officers and directors of a broadcast licensee or cable television system are considered to have a cognizable interest in the entity with which they are so associated. If any such entity engages in businesses in addition to its primary business of broadcasting or cable television service, it may request the Commission to waive attribution for any officer or director whose duties and responsibilities are wholly unrelated to its primary business. The officers and directors of a parent company of a broadcast licensee or cable television system, with an attributable interest in any such subsidiary entity, shall be deemed to have a cognizable interest in the subsidiary unless the duties and responsibilities of the officer or director involved are wholly unrelated to the broadcast licensee or cable television system subsidiary, and a statement properly documenting this fact is submitted to the Commission. [This statement may be included on appropriate Ownership Report.] The officers and directors of a sister corporation of a broadcast licensee or cable television system shall not be attributed with ownership of these entities by virtue of such status.

(i) Discrete ownership interests will be aggregated in determining whether or not an interest is cognizable under this section. An individual or entity will be deemed to have a cognizable investment if:

(1) The sum of the interests held by or through "passive investors" is equal to or exceeds 10 percent; or

(2) The sum of the interests other than those held by or through "passive investors" is equal to or exceeds 5 percent; or

(3) The sum of the interests computed under paragraph (i)(1) of this note plus the sum of the interests computed under paragraph (i)(2) of this note is equal to or exceeds 10 percent.

Note 3: In cases where record and beneficial ownership of voting stock is not identical (e.g., bank nominees holding stock as record owners for the benefit of mutual funds, brokerage houses holding stock in street names for benefit of customers, investment advisors holding stock in their own names for the benefit of clients, and insurance companies holding stock), the party having the right to determine how the stock will be voted will be considered to own it for purposes of this subpart.

Note 4: Paragraph (a) of this section will not be applied so as to require the divestiture of ownership interests proscribed herein solely because of the transfer of such interests to heirs or legatees by will or intestacy, provided that the degree or extent of the proscribed cross-ownership is not increased by such transfer.

(C) *Effective date.* The provisions of paragraph (a) of this section are not effective until November 8, 1987, as to ownership interests proscribed herein if such interests were in existence on or before July 1, 1970 (e.g., if franchise were in existence on or before July 1970), and will be applied to cause divestiture as to ownership interests proscribed herein only where the cable system is directly or indirectly, owned, operated, controlled by, or has an interest in a non-satellite television broadcast station which places a principal community contour encompassing the entire community and there is no other commercial non-satellite television broadcast station placing a principal community contour encompassing the entire community.

Federal Communications Commission.

Donna R. Searcy,

Secretary.

[FR Doc. 93–10755 Filed 5–10–93; 8:45 am]

BILLING CODE 6712–01–M

INTERSTATE COMMERCE COMMISSION

49 CFR Part 1033

[Ex Parte No. 334 (Sub-Nos. 8 and 8A)]

Joint Petitions for Rulemaking on Railroad Car Hire Compensation and for Exemption of Arbitration Rule and Motion to Dismiss

AGENCY: Interstate Commerce Commission.

ACTION: Final rule; amendment.

SUMMARY: The Commission amends its rules, which effect a phased deprescription of railroad car hire rates. The amendment clarifies that prescribed car hire rates will not be increased for additions and betterments performed after December 31, 1990, and reinstates earlier language governing expiration of OT–37 surcharges.

EFFECTIVE DATE: The new rules are effective June 10, 1993.

FOR FURTHER INFORMATION CONTACT: Richard B. Felder, (202) 927–5610 [TDD for hearing impaired: (202) 927–5721].

SUPPLEMENTARY INFORMATION: The Commission adopted final rules governing car hire rates in a decision served and published in the **Federal Register** at 57 FR 53450 on November 10, 1992. It revised them in a decision served December 22, 1992, and published in the **Federal Register** at 57 FR 61584 on December 28, 1992, so that new cars and cars rebuilt since January 1, 1991, would be treated similarly. The rules, as revised, became effective January 1, 1993.

The Commission now adds language to the rules to confirm that prescribed car hire charges will be increased to reflect investments made after December 31, 1990, only for cars that were rebuilt. The Commission also confirms that rebuilt cars are those that have either been rebuilt under AAR Rule 88 or refurbished under AAR Circular OT–37.

Additional information is contained in the Commission's decision and in its two preceding decisions. To purchase a copy of the full decisions, write to, call, or pick up in person from: Dynamic Concepts, Inc., room 2229, Interstate Commerce Commission Building, Washington, DC 20423. Telephone: (202) 289–4357/4359. [Assistance for the hearing impaired is available through TDD services (202) 927–5721.]

Regulatory Flexibility Analysis

The Commission certified in its decisions served November 10 and December 22, 1992, that its actions will not have a significant impact on a