

**The
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)
Applications for Consent to the)
Transfer of Control of Licenses)
)
Comcast Corporation and AT&T Corp.,)
Transferors,)
To)
AT&T Comcast Corporation,)
Transferee)

**JOINT CONSUMER REPLY TO AT&T COMCAST REPLY TO PETITION TO
DENY APPLICATIONS FOR CONSENT TO TRANSFER CONTROL**

(ARIZONA CONSUMERS COUNCIL, ASSOCIATION OF INDEPENDENT VIDEO AND FILMMAKERS, CALPIRG, CENTER FOR DIGITAL DEMOCRACY, CENTER FOR PUBLIC REPRESENTATION, CHICAGO CONSUMER COALITION, CIVIL RIGHTS FORUM ON COMMUNICATIONS POLICY, CITIZEN ACTION OF ILLINOIS, CONSUMER ACTION, CONSUMER ASSISTANCE COUNCIL, CONSUMER FEDERATION OF AMERICA, CONSUMER FRAUD WATCH, CONSUMERS UNITED/MINNESOTANS FOR SAFE FOOD, CONSUMERS UNION, CONSUMERS' VOICE, DEMOCRATIC PROCESS CENTER, FLORIDA CONSUMER ACTION NETWORK, IL (Illinois) PIRG MASSACHUSETTS CONSUMERS COALITION, MASSPIRG, MEDIA ACCESS PROJECT, MERCER COUNTY COMMUNITY ACTION, NATIONAL ALLIANCE FOR MEDIA ARTS AND CULTURE, MONTPIRG, NORTH CAROLINA JUSTICE AND COMMUNITY DEVELOPMENT CENTER, OREGON CITIZENS UTILITY BOARD, PRIVACY RIGHT CLEARINGHOUSE, TEXAS CONSUMER ASSOCIATION, TEXAS WATCH, UNITED CHURCH OF CHRIST, OFFICE OF COMMUNICATION, INC., US PIRG, VIRGINIA CITIZENS CONSUMER COUNCIL)

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SUMMARY

Joint Consumer Commenters reiterate their opposition to the AT&T Comcast merger.¹ The reply comments submitted by the merging parties are devoid of new or additional information to demonstrate that this merger will promote the public interest. As usual, AT&T Comcast and their experts and witnesses offer purely theoretical discussion about why anticompetitive behavior cannot happen in the industry and post hoc efficiency explanation for discriminatory business practices.² They have merely repeated their unsubstantiated theories, recently articulated in the horizontal ownership proceeding.³ They have merely restated promises that have been repeatedly broken in the past.

¹ “Petition to Deny of Arizona Consumers Council, Association Of Independent Video And Filmmakers, CalPIRG, Center For Digital Democracy, Center For Public Representation, Chicago Consumer Coalition, Civil Rights Forum On Communications Policy, Citizen Action Of Illinois, Consumer Action, Consumer Assistance Council, Consumer Federation Of America, Consumer Fraud Watch, Consumers United/Minnesotans For Safe Food, Consumers Union, Consumers’ Voice, Democratic Process Center, Empire State Consumer Association, Florida Consumer Action Network, ILPIRG (Illinois), Massachusetts Consumers Coalition, MassPIRG, Media Access Project, Mercer County Community Action, National Alliance For Media Arts And Culture, MontPIRG, New York Citizens Utility Board, NC PIRG, North Carolina Justice And Community Development Center, OsPIRG(Oregon State), Oregon Citizens Utility Board, Texas Consumer Association, Texas Watch, United Church Of Christ, Office Of Communication, Inc., US PIRG, Virginia Citizens Consumer Council, WashPIRG, Wisconsin Consumers League,” *In the Matter of Application for Consent to the Transfer of Control of Licenses Comcast Corporation and AT&T Corporation, Transferors, to AT&T Comcast Corporation, Transferee*, April 29, 2002 (hereafter, Consumer Petition).

² “Reply to Comments and Petitions to Deny Applications for Consent to Transfer” *In the Matter of Application for Consent to the Transfer of Control of Licenses Comcast Corporation and AT&T Corporation, Transferors, to AT&T Comcast Corporation, Transferee*, MB Docket NO. 02-70, May 21, 2002, and attached Declarations of Howard Shelanski and Janusz A. Ordover (hereafter AT&T Replies, Shelanski Replies, Ordover Replies)

³ “Comments of AT&T,” *In the Matter of Implementation of Section 11 of the Cable Television Consumer Protection and Competition Act of 1992 Implementation of Cable Act Reform Provisions of the Telecommunications Act of 1996 The Commission’s Cable Horizontal and Vertical Ownership Limits and Attribution Rules Review of the Commission’s Regulations Governing Attribution Of Broadcast and Cable/MDS Interests Review of the Commission’s Regulations and Policies Affecting Investment In the Broadcast Industry Reexamination of the*

The claims of AT&T Comcast have been thoroughly refuted in comments and reply comments filed by several members of the Joint Consumer Commenters in that proceeding.⁴

The broken promises have been documented in the initial petition of Joint Consumer Commenters in this proceeding and simply having corporate executives restate them in affidavits makes them no less likely to be broken.

The AT&T Comcast replies stand for the proposition that “It cannot happen here.” Two decades of evidence from the deregulated cable industry demonstrates that “It does happen on a regular basis.” Unleashing a dominant MSO – the largest in the history of the industry – on programmers and the American public will make anticompetitive and discriminatory behavior all the more likely. That is exactly what the merger review is intended to prevent.

Since the reply and attached declarations are purely theoretical statements about what cannot happen, the broad body of evidence that it does happen is directly relevant to this

Commission’s Cross-Interest Policy, CS Docket No. 98-82, CS Docket No. 96-85, MM Docket No. 92-264, MM Docket No. 94-150, MM Docket No. 92-51, MM Docket No. 87-154. January 3, 2002; Ordovery, Janusz A. 2002. “Declaration on Behalf of AT&T,” In the Matter of Implementation of Section 11 of the Cable Television Consumer Protection and Competition Act of 1992 Implementation of Cable Act Reform Provisions of the Telecommunications Act of 1996 The Commission’s Cable Horizontal and Vertical Ownership Limits and Attribution Rules Review of the Commission’s Regulations Governing Attribution Of Broadcast and Cable/MDS Interests Review of the Commission’s Regulations and Policies Affecting Investment In the Broadcast Industry Reexamination of the Commission’s Cross-Interest Policy, CS Docket No. 98-82, CS Docket No. 96-85, MM Docket No. 92-264, MM Docket No. 94-150, MM Docket No. 92-51, MM Docket No. 87-154. January 3, 2002 (hereafter Ordovery Horizontal); Rosston, Gregory and Howard Shelanski. 2002. “Declaration on Behalf of National Cable and Telecommunications Association,” In the Matter of Implementation of Section 11 of the Cable Television Consumer Protection and Competition Act of 1992 Implementation of Cable Act Reform Provisions of the Telecommunications Act of 1996 The Commission’s Cable Horizontal and Vertical Ownership Limits and Attribution Rules Review of the Commission’s Regulations Governing Attribution Of Broadcast and Cable/MDS Interests Review of the Commission’s Regulations and Policies Affecting Investment In the Broadcast Industry Reexamination of the Commission’s Cross-Interest Policy, CS Docket No. 98-82, CS Docket No. 96-85, MM Docket No. 92-264, MM Docket No. 94-150, MM Docket No. 92-51, MM Docket No. 87-154. January 3, 2002.

proceeding. Therefore, the attached declaration and study prepared by Dr. Mark Cooper, Director of Research of the Consumer Federation of America, synthesizes the discussion of real examples and scientific evidence on anticompetitive behavior and discriminatory practices by large MSOs that was presented to the Commission in the horizontal limits proceeding.⁵ Since AT&T would be the largest MSO in the history of the industry, the findings of prior bad behavior, some of which entail predecessors to the AT&T companies, is directly relevant to the prediction of future bad behavior. Further, Dr. Cooper explains how concern about the abuse of market power is heightened by this specific merger.

ANTICOMPETITIVE CONDUCT AND DISCRIMINATION IN THE PROGRAMMING MARKET

The most dramatic demonstration that the theory and explanations offered by AT&T Comcast and their experts have lost touch with reality can be found in the claim that programmers seek to have MSOs take an equity stake in their shows or desire exclusive arrangements to lower their risks or increase their profits.⁶ The stumbling block for programmers is not raising capital or assembling talent to create shows. The only thing they lack is carriage. As the examples presented in Dr. Cooper's declaration make clear,⁷ programmers do not ask MSOs to take equity stakes or to prevent them from hurting themselves by providing programming to all distribution systems; MSOs extort equity or exclusive arrangements from programmers by withholding carriage. The MSOs control the programming market and

⁴ Consumer Petition.

⁵ "Declaration of Dr. Mark N. Cooper, Discrimination and Anticompetitive Practices of Cable Operators in the Video Programming Market," *In the Matter of Application for Consent to the Transfer of Control of Licenses Comcast Corporation and AT&T Corporation, Transferors, to AT&T Comcast Corporation, Transferee*, MB Docket NO. 02-70, June 4, 2002 (hereafter, Cooper Declaration).

⁶ Shelanski, paras. 24, 26, 29, 40, 42.

⁷ Cooper Declaration, pp. 23-36.

undermine competing distributions systems with their anticompetitive and discriminatory practices.

The attached study of the programming market describes not only numerous examples of large vertically integrated and non-integrated MSOs seeking to impede the access of overbuilders and others to programming and to impede the access of programmers to consumers but also a body of econometric evidence that supports this conclusion. The entities that Ordover/Shelanski claim are being helped by large MSO in cable fantasy land, are the ones who are harmed by the anticompetitive practices in the real world,

- the programming market is dominated by a small number of huge entities that are interconnected through ownership and joint ventures,⁸
- programmers still find the dominant firms demand equity,⁹
- overbuilders cannot get programming,¹⁰
- integrated systems carry less programming,¹¹ and
- small cable companies are cut off from programming and forced to sell out to large MSOs at depressed prices.¹²

MARKET POWER

Examining the assumptions underlying the AT&T, et al. discussion of MSO lack of market power further demonstrates that the analysis cannot withstand the touchstone of reality. For example, AT&T et al. claim that cable MSOs lower consumers' rates because of the economies they achieve through concentration.¹³ They claim that MSOs do not seek to impede

⁸ Cooper Declaration, pp. 42-54.

⁹ Cooper Declaration, pp. 23-32.

¹⁰ Cooper Declaration, pp. 32-36.

¹¹ Cooper Declaration, pp. 7-10.

¹² Cooper Declaration, pp. 32-36.

¹³ Shelanski Replies, paras. 39, 40; Ordover Replies, para. 45; Ordover Horizontal, p. 69.

the access of overbuilders to programming¹⁴ and claim that the synergies/efficiencies from large horizontal consolidation are passed through to smaller cable operators.¹⁵

However, the empirical evidence contradicts these observations. The Commission's pricing analysis and other econometric evidence shows that larger, more integrated operators charge more.

- Affiliated MSO charge higher prices,¹⁶
- Larger MSOs charge higher prices,¹⁷
- Clustered MSOs charge higher prices.¹⁸

CABLE SATELLITE COMPETITION IS FEEBLE

AT&T Comcast and their experts continue to vastly overstate the extent of competition between satellite and cable.¹⁹ They ignore entirely the clear and overwhelming rigorous econometric evidence that the competitive overlap is weak.

¹⁴ Ordover Replies, p. 40; Ordover Horizontal, p. 43.

¹⁵ Shelanski Replies, para. 39, 40; Ordover Replies, para. 45, Joskow Paul, and Linda McLaughlin, "An Economic Analysis of Subscriber Limits," attached to Comments of AOL Time Warner In *the Matter of Implementation of Section 11 of the Cable Television Consumer Protection and Competition Act of 1992 Implementation of Cable Act Reform Provisions of the Telecommunications Act of 1996 The Commission's Cable Horizontal and Vertical Ownership Limits and Attribution Rules Review of the Commission's Regulations Governing Attribution Of Broadcast and Cable/MDS Interests Review of the Commission's Regulations and Policies Affecting Investment In the Broadcast Industry Reexamination of the Commission's Cross-Interest Policy*, CS Docket No. 98-82, CS Docket No. 96-85, MM Docket No. 92-264, MM Docket No. 94-150, MM Docket No. 92-51, MM Docket No. 87-154, January 3, 2002 (hereafter, Joskow and McLauhglin), p. 16.

¹⁶ Report on Cable Industry Prices, 2002, p. 28; 2001, p. 31.

¹⁷ Report on Cable Industry Prices, 2002, p. 18.

¹⁸ Report on Cable Industry Prices, 2001, p. 16; 2000, 17.

¹⁹ Ordover Replies, para. 120, drops corrects his mischaracterization of the FCC conclusion by refraining from declaring cable and satellite as close substitutes, but he still ignores the finding in the Report on Cable Industry Prices 2001 (Appendix D-2) that satellite's effect on cable is small. He also ignores the fact that in the Report on Cable Industry Prices 2002, the effect is not found to be statistically significant.

- The elasticity of demand for cable is small.²⁰
- The cross price elasticity between cable and satellite is non-existent.²¹
- Satellite does not have a statistically significant or substantial impact on the price, quantity or quality of cable output.²²

AT&T and Comcast have failed to refute our analysis of subscribership patterns. Indeed, they have affirmed them.

- Their experts now admit that fewer than half of all satellite subscribers have come from cable, directly contradicting their earlier claims.²³ This admission on their part would lower our estimate of competitive satellite subscribers from 10 million to 8 million.²⁴
- They cite our finding to support the proposition that cable and satellite are close substitutes, but they leave out the important qualifier that this applies to only a small share (less than one-quarter) of the overall market.²⁵

AT&T Comcast and their experts point to short-term promotions by satellite as evidence of price parity between satellite and cable.²⁶ They fail to note that these have long-term requirements and other restrictions that render them different from cable service. Ironically, at the same time that AT&T Comcast filed their replies at the FCC in Washington D.C. claiming price parity, Comcast was advertising that Washington area satellite subscribers who switched to

²⁰ Report on Cable Industry Prices, 2001, Appendix D-2, found a small effect. Report on Cable Industry Prices, 2002 and 2000, Appendix D-2, found no statistically significant effect.

²¹ The FCC has never found a significant cross price elasticity.

²² Report on Cable Industry Prices, 2002, D-2.

²³ Ordover Replies, para. 81.

²⁴ Consumer Federation of America, 2002c, Attachment “The Failure of Intermodal Competition in Cable and Communications Markets, p. 20.

²⁵ Consumer Federation of America, 2002c, Attachment “The Failure of Intermodal Competition in Cable and Communications Markets, pp. 20-21.

cable would save \$800.²⁷ This suggests a substantial difference in the monthly recurring cost of the two services.

Finally, it should be noted that there may come a time when cable's relentless price increases will push its charges up to a limit set by satellite.²⁸ It would be fundamentally incorrect to claim that competition is working. The purpose of the antitrust laws and the competition policy under the Communications Act is not to allow incumbents to collect monopoly rents of 20, 30 or 40 percent and then declare victory. Such an outcome implies substantial inefficiency and inequitable transfer of wealth from consumers to cable operators. The purpose of competition is to drive prices to costs and squeeze rents out. There is no doubt that satellite is incapable of providing that function with respect to cable in today's market.

THE BOTTOM LINE ON MARKET POWER IS THE BOTTOM LINE

Unable to muster a credible response to the overwhelming econometric and experiential evidence of the abuse of market power and confronted by price increases well over twice the rate of inflation, in spite of the much touted competition from satellite, the cable experts resort to the cable industry's tired, old refrain:

The programmers made me do it!

Ordover offers the observation that

Both SBC and CFA ignore the fact that the costs of the video programming purchased by cable operators – a significant component of their costs – have increased even faster than cable rates. According to the NCTA, between 1996 and 2000, the cable industry spent over \$36 billion on basic and premium

²⁶ Ordover Replies, para. 81.

²⁷ The advertising occurred on both television and radio.

²⁸ The statistical evidence indicates the elasticity of demand is rising, which is consistent with monopolists who price by demand. They are driving prices up the demand curve. Compare Report on Cable Industry Prices, 2000, p. 19, 2001, p.17, and 2002, p. 17.

programming – roughly 75 percent more than the \$20.6 billion it spend during the previous five years.²⁹

A total increase in programming costs of \$15.4 billion over five years may sound like a big number, but Ordover fails to note that the comparable increase in revenues over the same period is much larger. Driven by abusive price increases and bundling practices, cable industry revenue increased by over \$50 billion. Approximately 70 cents out of every dollar of the increase in revenue is unaccounted for by programming. Moreover, we should not forget that since cable operators own about half of the most popular programming, a significant part of the \$15.4 billion increase ends up in the cable industry's pockets.

If one wants to analyze revenues and costs, the most relevant figures are operating revenue per subscriber (revenue net of operating expenses). This has increased by over forty percent since the 1996 Act, over three times the rate of inflation (see Exhibit 1). This is what is driving the monopoly rents so evident to all observers, except the cable industry and its experts. Indeed, we observe the same pattern in the operating revenue numbers we noted in our initial filing with regard to prices and monopoly rents. When the pricing power of the cable operators is not restrained by regulation, operating revenue increases drive up system prices. Monopoly rents, measured by Tobin's q, rise dramatically because competition is too feeble to discipline cable market power.

AT&T offers a second tired, old excuse for rising rates. It argues that “on a *per channel* basis, cable prices have remained essentially constant over the past three years.”³⁰

Unfortunately, cable operators do not allow consumers to purchase service on a per channel basis. Consumers are offered a very restricted choice of “take-it-or-leave-it” bundles. The cable

²⁹ Ordover Replies, para. 118.

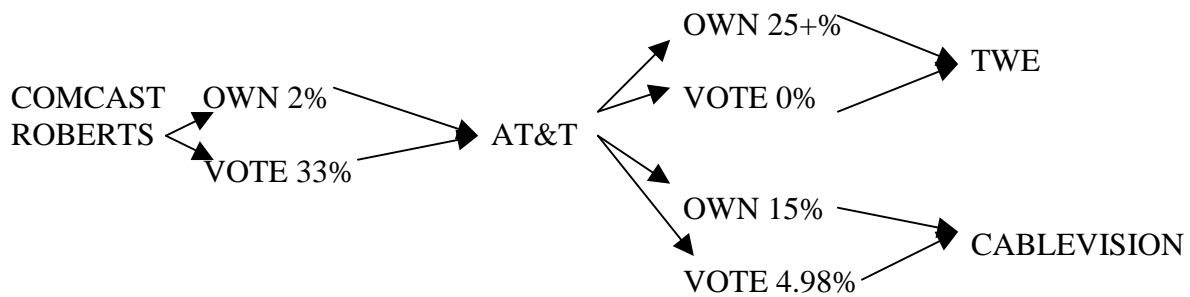
³⁰ AT&T Replies, p. 109.

operators decide what goes into the bundles and how much capacity is devoted to them. As explained in our initial comments, this extracts consumer surplus³¹ and the Commission should pay no attention to these claims about per channel costs until the industry allows consumers to purchase the service on a per channel basis.

All of these anticompetitive and anti-consumer effects would be reinforced by the merger. The merger creates the largest MSO in history, which would be vertically integrated, particularly with regional programming, and more clustered within a number of markets.³² It would also create a huge regional giant, in several areas of the country, taking the whole concept of clustering to a new level.

OWNERSHIP ISSUES

AT&T Comcast has now made the picture of ownership without responsibility and responsibility without ownership clear. AT&T holds large blocks of stock in Time Warner Entertainment and Cablevision, over which it has renounced its voting rights, at some level.



³¹ Consumer Federation of America, 2002, pp. 140-142.

³² AT&T and Comcast both own cable operations within single TV markets in Atlanta Georgia, Denver Colorado, Ft. Myers Florida, Harrisburg Pennsylvania, Hartford Connecticut, Lansing Michigan, Mobile Alabama, Richmond Virginia, Sacramento California, Toledo Ohio and Wilkes Barre Pennsylvania

The merger gives a massively disproportionate share of voting power to Comcast's owners,³³ exactly the type of supervoting position that has gotten other cable companies in trouble. Moreover, artificial arrangements further insulate management from accountability. Management committees and bans on board meetings are offered as consumer protections against influence over operating decisions. What they do is create a façade of independence of action, while they create a reality of unaccountability.

Not only are the voting rights completely out of alignment with ownership, but also restrictions on ownership functions further insulate management from responsible oversight. The combined AT&T Comcast board is precluded from meeting for three years. AT&T management cannot be fired for three years. Comcast management cannot be fired for six years.

The ability of regulators to ensure non-influence is undermined by this convoluted ownership structure. The ability of owners to ensure management responsibility is undermined by this ownership structure.

The distortion of ownership is embedded in the context of the definition of markets for purposes of the horizontal limits.³⁴ AT&T Comcast's quibbling over MVPD market data raises a few additional points that merit brief attention here. For one thing, they are incorrect in stating that "no party in this proceeding explicitly alleges that the proposed merger will violate the Communications Act...." Joint Consumer Commenters maintain that the merged AT&T/Comcast would be so great that it would, indeed, violate Section 613(f) of the Communications Act. That law proscribes any company's ownership of unreasonably large number of cable systems. And,

³³ AT&T Replies, pp. 26-27.

³⁴ While the Commission's initial rules implementing Section 613(f) were rejected by the Court of Appeals in *Time Warner Entertainment Co., L.P. v. FCC*, 240 F.3d 1126 (2001), the statute itself has been upheld as a valid exercise of Congressional power. *Time Warner I*, 211 F.3d

while the FCC has yet to implement that statute by promulgating appropriate regulations,³⁵ that fact does not relieve the Commission of its obligation to prohibit excessive cable ownership here or elsewhere.

AT&T Comcast persist in attempting to document their somewhat irrelevant claim that the number of systems they would own would not be above the 30 percent threshold set by the Commission in its first unsuccessful effort to adopt rules implementing Section 613(f). Their premise appears to be that, since the Court threw out the 30 percent rules as being inadequately supported, any new rules the Commission adopted will necessarily be more permissive. This is not necessarily so; several of the undersigned groups have submitted comments showing that the Commission failed to employ the correct analysis and failed to look at important evidence showing that it can and should implement a rule which would set a limit *below* 30 percent.³⁶

In challenging Joint Commenters' analysis of the MVPD market, AT&T Comcast devote particular attention to Joint Commenters' calculation of dual DBS/cable subscribers. This begs

³⁵While the Commission's initial rules implementing Section 613(f) were rejected by the Court of Appeals in *Time Warner Entertainment Co., L.P. v. FCC*, 240 F.3d 1126 (2001), the statute itself has been upheld as a valid exercise of Congressional power. *Time Warner Entertainment Co., L.P. v. FCC*, 211 F.3d 1313 (D.C. 2000).

³⁶Consumer Federation of America. 2002a, "Comments of the Consumer Federation of America, Consumers Union, Center for Digital Democracy, The Office of Communications of the United Church of Christ, Inc., National Association of Telecommunications Officers and Advisors, Association for Independent Video Filmmakers, National Alliance for Media Arts and Culture, and the Alliance for Community Media." Federal Communications Commission, *In the Matter of Implementation of Section 11 of the Cable Television Consumer Protection and Competition Act of 1992 Implementation of Cable Act Reform Provisions of the Telecommunications Act of 1996 The Commission's Cable Horizontal and Vertical Ownership Limits and Attribution Rules Review of the Commission's Regulations Governing Attribution Of Broadcast and Cable/MDS Interests Review of the Commission's Regulations and Policies Affecting Investment In the Broadcast Industry Reexamination of the Commission's Cross-Interest Policy*, CS Docket No. 98-82, CS Docket No. 96-85, MM Docket No. 92-264, MM Docket No. 94-150, MM Docket No. 92-51, MM Docket No. 87-154, January 4, 2002 (hereafter, Consumer Federation of America, Horizontal Limits), pp. 191-2002.

an important question, because Joint Commenters threshold position is that, as a matter of law, the Commission must set its horizontal ownership limits based on the proportion of cable homes that an operator controls, not the number of MVPD homes.

That aside, AT&T Comcast miss Joint Commenters' other major point, which is that the data on which AT&T Comcast have relied in claiming to fall a fraction of a percentage point below the imaginary 30 percent limit are highly dubious.

The latter point is further demonstrated by an important new revelation. In its recent Quarterly Report to the Securities and Exchange Commission, DirecTV's parent revealed that it had been overstating subscribership by some 360,000 homes.³⁷ This error alone alters the total MVPD subscriber base by about four tenths of a per cent. More importantly, it underscores once more the unreliability of published data and the degree to which the private publishers upon which AT&T Comcast (and the Commission) have relied are entirely dependent on the charity of the companies voluntarily providing self-serving information.

HIGH SPEED INTERNET ACCESS

The response of AT&T Comcast and their experts to the demonstration that they have market power in advanced telecommunications services and are abusing it is to state,

³⁷“Beginning with the first quarter of 2002, DIRECTV changed its policy to no longer include pending subscribers in its cumulative subscriber base. Pending subscribers are customers who have purchased equipment and have had all of the required customer information entered into DIRECTV's billing system, but have not yet activated service. This new policy reflects a more simplified approach to counting customers and is consistent with the rest of the multi-channel television industry. As a result, /page 24/ DIRECTV reduced its cumulative subscriber base by approximately 360,000 subscribers that had been previously identified as pending subscribers.” *Hughes Electronic Corporation Quarterly Report (10-Q) for Q1 2002*, pp 23-24 (Filed May 6, 2002).

- (1) incorrectly that narrowband and broadband are the same product,³⁸
- (2) improperly define the broadband access market by failing to distinguish between business and residential customer,³⁹
- (3) allow one additional ISP (out of over 7,000 ISPs) to market Internet access over their wires,
- (4) promise to allow one-click access to the Internet, and
- (5) point out that they own no broadband content whatsoever.⁴⁰

These answers do not alleviate the severe anticompetitive problem posed by merger.

It has been well established since the AT&T MediaOne merger that broadband Internet is a different service than narrowband.⁴¹ All of the arguments put forth by AT&T Comcast that rely on competition between broadband and narrowband must be rejected by the Commission.

Our initial comments showed a very sharp distinction in the penetration of cable modem service and DSL service in different customer classes.⁴² By failing to properly define the product market, AT&T Comcast and their witnesses understate the market share of the merged company and overstate the competition between cable and DSL.

AT&T Comcast fail to describe the terms and conditions under which a small number of unaffiliated ISPs will be allowed to market high speed Internet access service over cable modem

³⁸ Shelanski Replies, para. 22.

³⁹ Shelanski Replies, para. 17.

⁴⁰ Shelanski Replies, para. 38.

⁴¹ Federal Communications Commission, 2001, *Applications for Consent to Transfer Control of Licenses and Section 214 Authorizations by Time Warner Inc. and America Online, Inc.*, paragraph 69, Department of Justice, *AT&T MediaOne Consent Decree*, 2000; Rubinfeld Daniel and Hal J. Singer, 2001. "Open Access to Broadband Networks: A Case Study of the AOL/Time Warner Merger." *Berkeley Technology Law Journal*. 16. Hausman, Gerry A., J. Gregory Sidak, and Hal J. Singer. 2001. "Residential Demand for Broadband Telecommunications and Consumer Access to Unaffiliated Internet Content Providers." *Yale Journal on Regulation*. 18..

⁴² Consumer Federation of America, 2002c, Attachment "The Failure of Intermodal Competition in Cable and Communications Markets, p. 24.

plant. By all accounts in the press, these terms will not allow meaningful competition between AT&T Comcast and independent ISPs.⁴³

The promise of one click access to the Internet is meaningless from the point of view of competition. AT&T Comcast and their experts argue that as long as anyone can put anything on the Internet that constitutes competition for AT&T Comcast, but a close look at this arrangement shows otherwise.⁴⁴

- This allows AT&T Comcast to monopolize the business of selling access to the Internet. Moreover, by monopolizing the business of selling access to the Internet, AT&T Comcast can easily strangle the business of selling content.
- The click-through-only approach does not allow independent ISPs to compete for consumer dollars until after the cable and telephone companies have charged consumers between \$40 and \$50 for Internet access, which undercuts any serious opportunity to compete. There is little discretionary income to compete for.
- The click-through-only approach glosses over the severe restrictions on the products and functionalities that independent ISPs can offer to the public.

BROADBAND CONTENT MARKETS

The fact that AT&T Comcast owns no broadband content is incorrect and, even if it were true, would not alter the fact that through their manipulation and control of access, they can dictate to the content market.

The claim that they own no broadband content of their own is absurd on its face. They own a great deal of the type of broadband content that is most critical to the development of the broadband marketplace – full motion video and they have a strong interest in controlling the roll out of this content to preserve their market power over distribution, even when they do not own content.

⁴³ Consumer Federation of America, 2002c, Attachment “The Failure of Intermodal Competition in Cable and Communications Markets, pp. 36-38..

The applicants claim they "have virtually no interests in "Broadband Content. " with just a minor 3% investment by Comcast in Intertainer.⁴⁵ Through Comcast Interactive Comcast has invested in broadband and interactive companies with commercial entities highly involved in the broadband content creation business, including MetaTV, NDS (run by Rupert Murdoch), Replay TV, Respond TV, Tivo, Bolt.com (leading youth site).⁴⁶ It is also involved with Wink, a leading ITV provider.⁴⁷

Their roll out and management of high-speed Internet access service has been driven by their desire to protect their market power over the productions and distribution of this content. Cable modem operators have acted in parallel to prevent the development of such competition, first by having joint ownership of an Internet service provider that explicitly restricted such applications, now by coincidentally imposing conditions on use of the service to preclude such competition.

Creating a single entity that acts as the lead gatekeeper in the transition between the traditional one-way video market and the interactive video market poses a major threat to the public interest. The applicants have not been candid about the changing nature of the basic model for television, and how these changes may negatively impact competition in the video (and broadband) markets.⁴⁸ As the applicant admits, it is engaged in the development of interactive television⁴⁹ and video on demand. As the Commission should know from its own proceedings on the matter, the emerging business model for digital and interactive TV is based

⁴⁴Shelanski Replies, para. 38.

⁴⁵ AT&T Replies, p. 74.

⁴⁶ <http://www.civentures.com/portfoliomain.htm>

⁴⁷ <http://www.bizjournals.com/philadelphia/stories/2000/11/27/daily11.ht>

ml.

⁴⁸ AT&T Replies, p. 31.

⁴⁹ AT&T Replies, p. 6.

on an integration of traditional video programming with the interactivity now observed online, especially the World Wide Web. Comcast officials have already indicated that they are committed to the "widespread deployment" of interactive TV.⁵⁰

AT&T officials have recently indicated the role which these changes are influencing their system architecture as well.⁵¹ The "everything on demand" paradigm is fundamentally changing the TV business, with companies like Comcast well advanced with their plans.⁵² The Commission can also learn more about the current evolution of the market by examining new applications being incorporated into the cable platform⁵³

Applicants will be able to effectively shape emerging marketplace. As CED Magazine noted recently, in its article on how the cable industry will be incorporating control over streaming video in its set-top boxes. " Adding streaming media capabilities to set-tops could also open revenue doors for MSOs, perhaps in a walled-garden environment, where the operator controls what can and cannot be streamed. Cable operators "don't want to just be a pipe provider says " (David) Novak (director of marketing of PaceMicro Technology America's) . At the same time, "they don't want to lose control of their network."⁵⁴

AT&T Comcast will be able to effectively shape the contours of the emerging new TV marketplace, given its control over the return path for the "T-commerce" applications which are at the heart of the emerging marketplace. As noted in Multichannel News, "Forecasters are sticking with their predictions that television commerce will outpace the cable industry's new darling, video-on-demand. Some estimates put t-commerce revenue at \$14 billion within 10

⁵⁰ See, for example, http://www.metatv.com/news/new/042001_28mil.htm and <http://www.philly.com/mld/philly/business/3155109.htm>.

⁵¹ <http://www.cedmagazine.com/ced/2002/0602/06d.htm>.

⁵² <http://www.cedmagazine.com/ced/2002/0202/id2.htm>

⁵³ <http://www.opencable.com/opencableprimer.html>.

years - double the VOD revenue stream."⁵⁵ The control which the proposed company will have on the Video On Demand space will also be specific, permitting the company to also gain unique commercial advantages in this major new cable TV programming marketplace. In addition to the proposed company involvement with key VOD distributor InDemand, The Video on Demand marketplace is sending "shockwaves" across the entire entertainment industry.⁵⁶

The applicants have positioned themselves to be a key gatekeeper for this important new "must-have" product for consumers. It is through the control of the prime bandwidth pipeline which will create the contours of the broadband marketplace. The ability to store and process applications (content, commerce) at the head-end or the set-top box will provide the company with a critical advantage in the distribution of content. AT&T Comcast will be a must-have partner, given the control it will have over the distribution layer.

As for Microsoft's involvement with Comcast, the FCC should not be fooled by their denials over the impact the investment will have on the proposed company. BusinessWeek itself termed such that. Comcast CEO Brian Roberts claim the Microsoft stake comes with "no strings attached;,,, could be an enormous understatement. Bill Gates & Co. hopes that its stake in Comcast will buy it broad distribution of its MSN Internet service via cable, which would be a great coup for the No. 2 online service."⁵⁷ And as ZDNET reported, the agreement is directly related to the merger, as Microsoft's funds are being used to address the debt which AT&T brings to the deal.⁵⁸

⁵⁴ <http://www.cedmagazine.com/ced/2002/0402/id2.htm>.

⁵⁵ Online Holiday Sales Lift ITV Outlook, 1/14/2002.

⁵⁶ Free or Not, VOD Steamrolls Ahead, *Multichannel News* 5/13/2002)

⁵⁷ AT&T-Comcast's Big Winner: Microsoft, December 21, 2001

⁵⁸ <http://zdnet.com.com/2100-1106-801615.html>

As for Cablelabs and set-top deployment, once again the applicants are not being forthcoming. It is a well-known fact that the consumer electronic industry has not been satisfied that cable companies are openly sharing specifications for set-top boxes so they can be reliably sold.⁵⁹ And given the prominent role which Brian Roberts has played leading CableLabs, as its Chair and Vice-chair, the applicants should be more forthcoming about the control their companies (and industry) have over the entire set-top infrastructure. As Gary Shapiro (in his capacity as the chairman of the Home Recording Rights Coalition) explained in a March 14, 2002 letter to the Senate Judiciary Committee, the requirement by Cablelabs that electronic manufacturers and others must sign the "Point of Deployment-Host Interface License Agreement gives content providers and cable operators the power to dictate how consumers use content. 'Once given this power, a movie studio, or cable or satellite operator, could simply turn off any interface at will, effectively making the consumer home network a part of its own distribution system,' Shapiro said in the letter."⁶⁰

TELEPHONE COMPETITION

AT&T's claims that the merger will promote telephone competition should be disregarded by the Commission. AT&T Comcast fail to show that there would be a significant gain to telephone consumers as a result of this merger and even if there were, the Commission should not trade the consumer harm in the video and high speed Internet markets for gains in the local telephone market.

⁵⁹ Multichannel News, Standards, Cooperation Needed for Retail
May 13, 2002.

⁶⁰ Multichannel News, CableLabs Chief Counters Allegations 4/9/2002) See also: HRRC
Urges Public Review And Fcc Action Now That "Secret" Phila License Made Public
(http://hrrc.org/html/what_s_new.html)

AT&T has about as many local telephone customers in New York, where it has no cable operations, than in all of its cable areas. New York is far and away the most competitive market and there is little cable telephony.⁶¹

AT&T has failed to respond to our observation that Comcast areas in which it might increase local competition are the most competitive. It mentions Philadelphia and Detroit, but presents no data on the extent of competition in these areas. It immediately shifts to national averages, and does not even recognize that these states, not to mention the major urban areas, are above the national average.

CONCLUSION

Relying on hypotheticals, ignoring empirical reality, and misinterpreting econometric evidence, AT&T Comcast and their experts arrive at the wrong conclusion. Ordovery boldly declares that

I am aware of no evidence that serving 30 percent of MVPD subscribers generally, or in this transaction in particular, would shift the profit calculus toward foreclosure and away from unimpeded access to the AT&T Comcast cable subscribers.⁶²

In fact, the leading text in the field, one that Ordovery cites several times when he agrees with it,⁶³ directly and explicitly contradicts his conclusion. Waterman and Weiss state in their conclusion, in a section clearly labeled MSO *Size Limits*

our analysis suggests that an MSO having a national market share well below 30 percent could exert significant monopsony power over many cable networks.⁶⁴

⁶¹ New York Public Service Commission, *Analysis of Local Exchange Competition in New York State*, December 31, 2000.

⁶² Ordovery, Replies, para. 55.

⁶³ Waterman, David and Andrew A. Weiss. 1997. *Vertical Integration in Cable Television*. Washington, D.C.: AEI Press.

⁶⁴ Waterman and Weiss, p. 154.

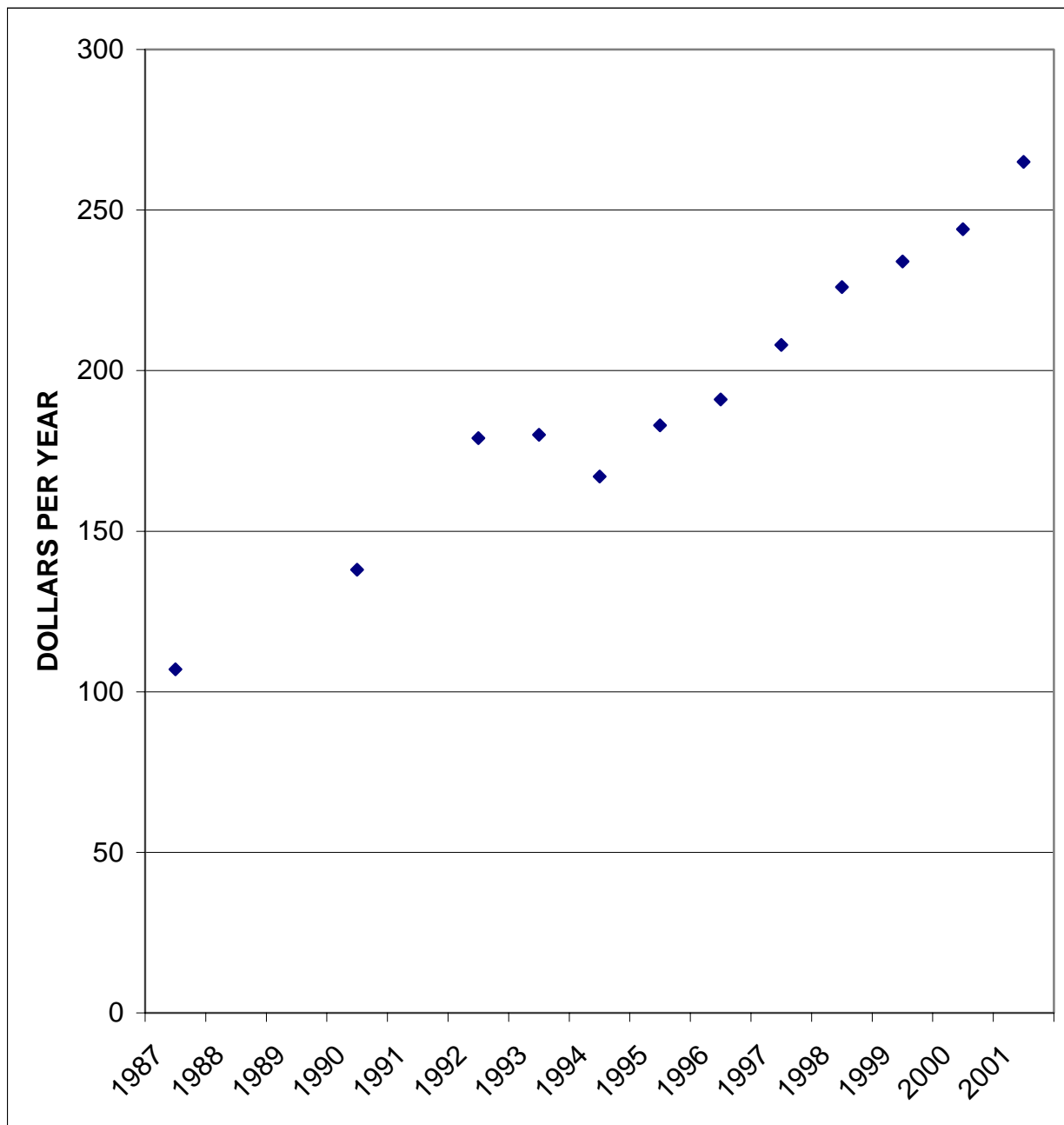
In the introduction to their study Waterman and Weiss, in a section entitled *Organization, Key Findings, and Recommendations*, they argue that the threshold might be as low as 20 percent.

[I]f the FCC's right to impose a limit on the proportion of homes that any single MSO can reach is upheld by the courts, then the FCC should reduce its limit from 30 percent to no more than 20 percent. While systematic evidence to document the extent to which individual MSOs might now exert monopsony power were not available, it is reasonable that an MSO with substantially less than 30 percent of the national market could anticompetitively affect competition in cable-programming supply because of economies of scale in cable network distribution. Conversely, it appears unlikely that a 20 percent or even lower limit would result in major sacrifices to economies of scale in cable system operations or to the creative and financial resources necessary to develop new programming and new technology.⁶⁵

This is one stark example, among many, of AT&T Comcast and their experts, epitomizes the effort to misrepresent the empirical evidence in an attempt to mislead the Commission into approving this merger.

⁶⁵ Waterman and Weiss, 1997, p. 8.

**EXHIBIT 1:
CABLE INDUSTRY OPERATING CASH FLOW PER SUBSCRIBER**



Source: Federal Communications Commission, *In the Matter of the Status of Competition in the Market for Delivery of Video Programming*, various issues: 1994, Table 7; 1995, B-6; Table 1997, Table B-6; 2002, Table B-4.

DECLARATION

Dr. Mark Cooper declares as follows:

1. I am Director of Research at Consumer Federation of America.
2. This declaration is submitted in support of the *Petition to Deny the Applications for Consent to the Transfer of Control of Licenses of Comcast Corporation and AT&T Corp., Transferors, to AT&T Comcast Corporation, Transferee*, Docket No. MB 02-70, filed on behalf of Arizona Consumer Council, *et al.*
3. I have reviewed the factual assertions contained in the *Petition to Deny* and I declare that they are true to the best of my knowledge.

I hereby state under penalty of perjury the forgoing is correct and true.

Executed on June 4, 2002

A handwritten signature in cursive script that reads "Mark Cooper".

Dr. Mark Cooper

**The
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)
)
Applications for Consent to the)
Transfer of Control of Licenses)
)
Comcast Corporation and AT&T Corp.,)
Transferors,)
To)
AT&T Comcast Corporation,)
Transferee)

DECLARATION OF DR. MARK N. COOPER

**DISCRIMINATION AND ANTICOMPETITIVE PRACTICES OF CABLE
OPERATORS IN THE VIDEO PROGRAMMING MARKET**

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I. INTRODUCTION

A. QUALIFICATIONS

My name is Mark Cooper. I am Director of Research at the Consumer Federation of America. I am also President of Citizens Research, a consulting firm specializing in economic, regulatory and policy analysis. Prior to these two positions, I spent four years as Director of Research at the Consumer Energy Council of America. Prior to that I was an Assistant Professor at Northeastern University teaching courses in Business and Society in the College of Arts and Sciences and the School of Business. I have also been a Lecturer at the Washington College of Law of the American University co-teaching a course in Public Utility Regulation.

I have testified on various aspects of the telecommunications and electricity industries making before the Public Service Commissions of Arizona, Arkansas, California, Colorado, Ohio, Delaware, the District of Columbia, Florida, Georgia, Hawaii, Illinois, Indiana, Iowa, Kentucky, Manitoba, Maryland, Missouri, New Jersey, New York, North Carolina, Ohio, Oklahoma, Pennsylvania, South Carolina, Tennessee, Texas, Vermont, Virginia, and Washington, Wyoming as well as the Federal Communications Commission (FCC), the Canadian Radio-Television and Telephone Commission (CRTC) and a number of state legislatures.

For a decade and a half I have specialized in analyzing regulatory reform and market structure issues in a variety of industries including telecommunications, railroads, airlines, natural gas, electricity, medical services and cable television. This includes approximately 200 pieces of testimony split fairly evenly among state regulatory bodies, federal legislative bodies, and federal administrative bodies.

I have been an expert for People’s Counsels in state proceedings in four major telecommunications merger cases, the Bell Atlantic – NYNEX merger and the SBC-SNET merger, the SBC-Ameritech merger in Illinois and the GTE-Bell Atlantic merger. I filed comments in these mergers at the FCC. I have filed comments in several major cable industry mergers at the federal level, including the Bell-Atlantic-TCI, Time Warner-Turner, ATT-TCI, ATT-MediaOne, and AOL Time Warner.

My C.V. is attached.

B. THE DANCE OF THE ENLIGHTENED ELEPHANTS

By any definition, AT&T Comcast would be a huge purchaser of video programming, controlling access to at least 26 million homes and having a significant ownership stake in cable systems that reach as many as 40 million households. Consequently, its role as monopsonist has been a focal point of attention in the merger proceeding. Moreover, the question of horizontal market power of buyers in multichannel video markets has gained a great deal of attention in the ongoing review of the horizontal limit on cable ownership.

AT&T Comcast and their experts argue that discrimination and anticompetitive conduct by cable operators as buyers in the programming market simply cannot and does not happen.¹ This declaration, based on a review of two decades of evidence from the deregulated cable industry, demonstrates that “It does happen on a regular basis.” Unleashing a dominant MSO – the largest in the history of the industry – on programmers and the American public will make anticompetitive and discriminatory behavior all the more likely. That is exactly what the merger review is intended to prevent.

¹ Ordover, 2002a, 2002b, 2002c; Joskow and McLaughlin, 2002; Shelanski, 2002; Rosston and Shelanski, 2002.

Cable experts argue that monopsony power does not matter in the cable TV industry because of the nature of the product—i.e. video programming is a highly differentiated product with high first copy costs.² If products are very different from each other, they possess attributes that distinguish them in the mind of the consumer, which enables the programmers who own popular content to withhold their products and force MSOs to enter fair and efficient deals.³ Even where the cable operators might have market power, cable operators realize that they share a strong interest with programmers to ensure the flow of quality programming, so they treat programmers fairly.

In order to make this analysis plausible, cable industry experts must assume away key facts about the cable market. Ordovery, who presents the lengthiest discussion, assumes no ability to price discriminate,⁴ no market power for the buyers,⁵ a lack of specialized inputs,⁶ fair competition for the sellers⁷ and highly differentiated products.⁸ With the most challenging problems assumed away, the cable companies have reduced the entire analysis to a battle over rents, which they assume can have no basis in public policy.⁹

In order to put a reasonable face on the “bargaining” that results, the cable experts must assume what is essentially a marketplace of huge and powerful programmers, some of whom are vertically integrated facing off against huge and powerful MSOs, some of whom are integrated.¹⁰

² Ordovery, 2002c, para. 13, 26.

³ Ordovery, 2002a, p. 36; 2002c, para. 15, 35, 36.

⁴ Ordovery, 2002a, p. 34; 2002c, para 29.

⁵ Ordovery, 2002a, p. 37.

⁶ Joskow and McLaughlin, 2002, p. 9.

⁷ Ordovery, 2002a, p. 35; Ordovery, 2002c, para. 30.

⁸ Ordovery, 2002c, para. 15; Joskow and McLaughlin, 2002, p. 10.

⁹ Ordovery, 2002a, pp. 17, p. 36; 2002c, para. 43.

¹⁰ Ordovery, 2002c, para. 87.

In addition to being vertically integrated, other strategies that might help programmers survive are to have large portfolios of programs¹¹ or sell in foreign markets.¹²

Independent producers and the consumer get trampled in the process. There is little room for independent, modestly sized, domestic producers of programming in this dance of the elephants. Therefore, in the hypothetical cable world, small independent entities depend on the enlightened self-interest of the cable operators to protect them. They need not fear in this fantasy world, cable operators behave well. Indeed, the bigger the cable operator, the better they treat the small independent producers because they have too much to lose.¹³

As an MSO's share of subscribers increases, it is more likely to recognize that its program purchasing decisions can affect the ability of a new program service to be successful. It recognizes both that it has something to gain by carrying the service and something to lose if the program service cannot gain enough subscribers overall in the market to generate an adequate subscription and advertising revenue to be financially viable...¹⁴

II. THE INCENTIVE AND ABILITY TO DISCRIMINATE

It is easy to dream pretty pictures of efficient cooperation and fair bargaining between programmers and distributors, but the pictures must eventually come to grips with a much uglier reality. Do the assumptions underlying the theory properly reflect economic reality? In the case of the cable commenters, the answer is no.

A. DISCRIMINATION AND OTHER ANTI-COMPETITIVE PRACTICES

Cable company conduct reflects the exercise of the market power conferred by a concentrated, integrated industry structure. Companies do not conquer markets with innovation,

¹¹ Ordover, 2002a, pp. 16, 21; 2002c, paras. 11, 74.

¹² Ordover, 200a, pp. 29-30; 2002c, paras. 74-75.

¹³ Ordover, 2002a, p. 40; 2002c, para. 35.

they operate on a monopoly model that frustrates competition. They discriminate and use other anticompetitive practices by leveraging their control of distribution to defend their franchise product.

Evidence of these problems is both qualitative and quantitative and it comes from both integrated and nonintegrated entities.¹⁵ Allegations of anti-competitive cable practices are not limited to industry critics. Occasionally the practices within the industry became so bad that the collegiality breaks down and even major players became involved in formal protests. Viacom and its affiliates, a group not interconnected significantly with the top two cabals in the industry, filed an antitrust lawsuit against the largest chain of affiliated competitors in its New York territory.¹⁶ Ultimately, it sold its distribution business to its competitors. The ongoing dispute between Yankee Entertainment Sports (YES) and Cablevision is another example.¹⁷

Integrated MSOs have a long history of granting preferential access to subscribers for affiliated programmers and denying access to those who are not affiliated. As the MSO becomes larger and larger, this increasingly undermines prospects for competition in the programming market. Price discrimination against competing programming,¹⁸ refusals to carry such programming,¹⁹ or placing competitive programming at a disadvantageous location on the dial (e.g. very high, near other programs with low ratings),²⁰ and refusals to deal for programming

¹⁴ Joskow and McLaughlin, 2002, p. 15.

¹⁵ Ahn, and Litman, 1997.

¹⁶ Viacom International V. Telecommunication Inc., et. al. United States District Court of Southern New York, September 23, 1993.

¹⁷ Yankee Entertainment and Sports Network, 2002.

¹⁸ Dertouzos and Wildman, 1999.

¹⁹ Waterman and Weiss, 1997.

²⁰ Yankee Entertainment Sports, 2002; Subcommittee on Antitrust, Monopolies and Business Rights, 1988.

due to loopholes in the law requiring non-discriminatory access to programming²¹ have once again become common practice in the cable industry.²²

Non-integrated operators also have mechanisms to gain advantage. The landscape of the cable industry is littered with examples of anti-competitive practices, such as exclusive arrangements that prevent competing technologies from obtaining programming,²³ as well as preventing competition from developing within the cable industry.²⁴ These include, for example, exclusive deals with independents that freeze-out overbuilders,²⁵ tying arrangements,²⁶ and denial of access to facilities.²⁷ Large MSOs often secure “most favored nation” clauses from programmers. Such clauses are supposed to guarantee an MSO as good a price as any other operator pays for programming, sometimes excluding Time Warner and TCI.²⁸

²¹ The loophole will be terrestrial transmission to regional clusters, thereby avoiding the requirement to provide non-discriminatory access to satellite delivered programming. Reddersen, 1997, gives examples of Comcast in Philadelphia and Time Warner in Orlando (p. 5). Lenart, 1997, cites Cablevision in New York and a similar process seems to be developing in Detroit.

²² Subcommittee on Antitrust, Monopolies and Business Rights, Committee on the Judiciary, United States Congress, 1988 for early examples. More recently, for example, The Time Warner-Turner merger as originally proposed included preferential treatment for TCI (see Pitofsky, Steiger and Varney, 1997).

²³ Federal Communications Commission, 2001a, para. 28; Joint Comment, 2001, p. 8.

²⁴ HBO, a subsidiary of Time, played a key role in the effort to prevent TVRO operators from obtaining programming (see Chan-Olmsted and Litman, 1988 p. 11), and the effort to sell overbuild insurance (Subcommittee on Antitrust, Monopolies and Business Rights, Committee on the Judiciary, United States Congress, 1988, at 127, 152-174). The current efforts to impose exclusive arrangements have raised numerous complaints from potential competitors (Reddersen, 1997; Lenart 1997). Everest, p. 6, gives a different example.

²⁵ Reddersen, 1997, p. 4, cites examples of suspected exclusive arrangements involving Eye on People, MSNBC, Viacom, and Fox, as does Lenart, 1997, p. 7.

²⁶ Reddersen, 1997, gives examples including NBC/CNBC, Scripps Howard/Home and Garden (p. 5).

²⁷ Mahoney, 1997.

²⁸ McAdams, 1999; Yankee Entertainment Sports, 2002.

One of the keys to proper analysis of the issue of discrimination is to pay careful attention to the actual reason for discrimination – i.e. it must look at programs within specific categories. The issue of product differentiation discussed above is more complex than the cable theorists admit and it provide a good starting point for discussion of the cable commenters' programming analysis. Different categories of programming – such as news versus entertainment – are clearly differentiated. There is also an effort to create differentiation within program categories through branding. Hit comedies are distinct and the producers of such programs may have bargaining power. At the same time, there is a process of rivalrous imitation in the industry.

[R]ivalry in the broadcast network television industry have been clearly mapped... patterns of imitation that might be described as rivalrous imitation among the television networks. Program types that were popular, as indexed by ratings, were more likely to be imitated, while less popular program types were not. Imitation takes the form of emulating programs with high ratings and also spin-offs of successful series. As evidenced by other studies, the result of such rivalrous imitation among television networks was a decline in program diversity.²⁹

When such a view is taken, discrimination is apparent.

Operators who own premium cable services offer, on average, one fewer premium services than do other operators. In particular, operators who own premium movie services are less likely to carry the rival basic movie service, American Movie Classics (AMC). In addition, TCI and Comcast, two operators who own the basic shopping service, QVC, are less likely to carry both QVC and HSN. These results are statistically significant and establish that premium operators and certain basic operators are less likely to carry rival services.³⁰

While differences are often insignificant or minor, a consistent general pattern emerges: Integrated cable systems tend to "favor" the programming with which they have ownership ties, either by carrying those networks more frequently than would otherwise be expected or by pricing them lower or marketing them more vigorously. Our analysis also shows that integrated systems tend to disadvantage unaffiliated networks in those same respects, at least if the latter are good substitutes for affiliated programming. Integrated systems also tend to offer fewer

²⁹ Dimmick and McDonald, 2001, p. 201, citations omitted.

³⁰ Chipty, 2000. p. 429.

cable networks in total, although the differences are very small. The dominant effect appears to be that integrated cable systems replace unaffiliated networks with similar, affiliated networks. A separate analysis of the effects of vertical integration on larger channel capacity systems suggests that those effects of integration will persist, though they will diminish, as channel capacities expand or VOD systems are developed.³¹

It is also important to recognize that complete foreclosure is not the only concern. The terms and conditions of carriage are at least as important. The vertically integrated firms defend the marquis programming in which they have a direct interest by frustrating entry and extract rents from others.

The power to foreclose also implies the ability to force down the license fees that an MSO pays to networks. Some anecdotal evidence suggests the possibility that larger MSOs hold significant monopsony power in the programming market.³²

Carriage data provide an incomplete picture of vertical integration's effects on premium networks. In particular, even if both affiliated and unaffiliated networks are carried, an integrated system might price them differently to subscribers. Personal selling and other marketing tactics offer other opportunities for system operators to favor one available network over another... For the most part, those subscribership results suggest that integrated systems also tend to favor their affiliated premium networks in pricing and promotion behavior.³³

This published analysis is quite strong on the foreclosure finding. It provides a detailed understanding of foreclosure motivations and behaviors. Integrated owners of basic programming, whose profits rise by increasing basic subscribers, exclude competitors for their basic package but offer more of their own basic packages and more premium packages.³⁴

³¹ Waterman and Weiss, 1997, p. 7.

³² Waterman and Weiss, 1997, p. 66.

³³ Waterman and Weiss, 1997, pp. 93...94.

³⁴ Chipty, 2000, p. 429.

[O]perators integrated with basic programming successfully sell more basic cable subscriptions, despite their tendency to exclude certain program services from their distribution networks. These operators stimulate demand by offering somewhat larger basic cable packages with less programming duplication and more premium packages.

Owners of premium services foreclose competitors and sell more of their own, but offer fewer services at higher prices.³⁵ While the published research on foreclosure to which the Commission points is strong on finding foreclosure, it is weak on the consumer welfare impact of vertical foreclosure.³⁶ At best, the result for basic services is more variety, but less diversity of ownership.³⁷ The change in welfare is positive (because of more subscribers) but not statistically significant. Measured purely in economic terms the conclusion is “that consumers in unintegrated markets are certainly no better off than consumers in integrated markets, despite the tendency of integrated operators to exclude certain program services.”³⁸

The leading study in the field, Waterman and Weiss finds that horizontal market power is the central concern. Indeed, it advocates lowering the cap to 20 percent on very similar grounds as we identified in our initial comments. It finds vertical integration is clearly associated with discriminatory carriage rates. It finds that there are both strategic (anticompetitive) and

³⁵ Chipty, 2000, p. 429,

Similarly, operators integrated with premium programming successfully sell more premium subscriptions. While these operators offer fewer premium choices at higher prices, they manage to stimulate demand for premium services by offering smaller, cheaper basic cable packages.

³⁶ Chipty, 2000, p. 430.

Estimates suggest that consumers are better off in integrated markets than in unintegrated markets, although the differences are not statistically significant.

³⁷ Waterman and Weiss, 1997, p. 109, argue that economic efficiency results in roughly the same menu of programs being offered by integrated and non-integrated programmers, they are just owned by the integrated MSO. Implicit in the process, variety is served at the expense of diversity of ownership and antagonism between owners. They do not show hard evidence of efficiency gains, however.

Although we cannot be sure of the reasons for the observed outcomes of vertical integration, and evidence of the benefits of integration to consumers remains ambiguous, an overall empirical pattern emerges: The relatively minor effects on the total amount of programming made available suggest that the main result of vertical integration is the substitution of one similar network for another or, perhaps, more advantageous market of one rather than another.

³⁸ Chipty, 2000, p. 430.

efficiency justifications that are consistent with the findings of vertical foreclosure. Therefore, they hesitate to condemn vertical integration. Nevertheless, they conclude that economies of scale are not strong enough on the MSO side to justify a cap above 20 percent.³⁹

B. STRUCTURAL CONDITIONS FOR ANTICOMPETITIVE CONDUCT – MARKET POWER

The natural tendency of the industry's largest players to discriminate was documented in the Time Warner/Turner/TCI merger proposal. The FTC rejected the Time Warner/Turner/TCI merger proposal and imposed conditions on it. It rejected a preferential deal for TCI's purchase of Time Warner programming and required TCI to reduce its level of ownership in Time Warner to less than 10 percent of nonvoting stock (i.e., a non-attributable, passive level).⁴⁰ With respect to the programming market it found:

Entry into the production of Cable Television Programming Services for sale to MVPDs that would have a significant impact and prevent the anticompetitive effects is difficult. It generally takes more than two years to develop a Cable Television Programming Service to a point where it has a substantial subscriber base and competes directly with the Time Warner Turner "marquee" or "crown jewel" service throughout the United States. Timely entry is made even more difficult and time consuming due to a shortage of available channel capacity.⁴¹

In the Time Warner/Turner/TCI merger analysis, the FTC found that entry into the distribution market was difficult:

³⁹ The efficiency arguments that cause analysts who find discrimination to hesitate in concluding that it is strategically motivated have been criticized by Dertouzos and Wildman, 1997, pp. 14-25. In the context of bilateral bargaining between MSOs and programmers. They argue that the transaction costs that large MSOs point to in order to justify their large discounts on programming are too small to be justified on efficiency grounds. They conclude that it embodies significant strategic discrimination against smaller MSOs. The same logic applies to efficiency gains from vertical integration. If transaction cost savings are small, then the efficiency gains of vertical integration are small as well.

⁴⁰ Federal Trade Commission, 1997.

⁴¹ Federal Trade Commission, 1997, pp. 7.

Entry into the sale of Cable Television Programming Services to households in each of the local areas in which Respondent Time Warner and Respondent TCI operate as MVPDs is dependent upon access to a substantial majority of the high quality, “marquee” or “crown jewel” programming that MVPD subscribers deem important to their decision to subscribe and that such access is threatened by increasing concentration at the programming level, combined with vertical integration of such programming into the MVPD level.⁴²

The FTC’s enumeration of the ways in which the Time Warner/Turner/TCI merger was a threat to lessen competition are instructive for both the cable TV and the broadband Internet markets. First, with respect to programming, the FTC saw a number of grounds for believing competition would be lessened:

enabling Respondent Time Warner to increase prices on its Cable Television Programming Services sold to MVPDs, directly or indirectly (e.g., by requiring the purchase of unwanted programming). Through its increased negotiating leverage with MVPDs, including through purchase of one or more “marquee” or “crown jewel” channels on purchase of other channels.

enabling Respondent Time Warner to increase prices on its Cable Television Programming Services sold to MVPDs by raising barriers to entry by new competitors or to repositioning by existing competitors, by preventing such rivals from achieving sufficient distribution to realize economies of scale; these effects are likely, because

Respondent time Warner has direct financial incentives as the post-acquisition owner of the Turner Cable Television Programming Services not to carry other Cable Television Programming Services that directly compete with Turner Cable Television Programming Services; and

Respondent TCI has diminished incentives and diminished ability to either carry or invest in Cable Television Programming Services that directly compete with the Turner Cable Television Programming Services because the PSA agreements require TCI to carry Turner’s CNN, Headline News, TNT and WTBS for 20 years, and because TCI, as a significant shareholder of Time Warner, will have significant financial incentives to protect all of Time Warner's Cable Television Programming⁴³

The FTC also concluded that the Time Warner/Turner/TCI merger could reduce competition in distribution markets by

⁴² Federal Trade Commission, 1997, pp. 7.

⁴³ Federal Trade Commission, 1997, pp. 8.

denying rival MVPDs and any potential rival MVPDs of Respondent Time Warner competitive prices for Cable Television Programming Services, or charging rivals discriminatorily high prices for Cable Television Programming services.⁴⁴

The cable TV programming market has not changed much since the FTC made these observations. If anything, it has gotten much worse, if for no other reason than it has an additional “crown jewel” to leverage against competitors and unaffiliated programmers – high-speed Internet access. The reality is that larger, more clustered systems charge more and behave in other anticompetitive ways. In short, the empirical evidence suggests that such a merger does harm competition.

I have shown that market power continues to be exercised and abused by cable operators. For purposes of this discussion, a brief review and response to more recent cable industry arguments will suffice. The Commission’s pricing analysis and other econometric evidence shows that larger, more integrated operators charge more.

- Affiliated MSO charge higher prices,⁴⁵
- Larger MSOs charge higher prices,⁴⁶
- Clustered MSOs charge higher prices.⁴⁷

AT&T Comcast and their experts continue to vastly overstate the extent of competition between satellite and cable.⁴⁸ They ignore entirely the clear and overwhelming rigorous econometric evidence that the competitive overlap is weak.

⁴⁴ Federal Trade Commission, 1997, pp. 8.

⁴⁵ Report on Cable Industry Prices, 2002, p. 28; 2001, p. 31.

⁴⁶ Report on Cable Industry Prices, 2002, p. 18.

⁴⁷ Report on Cable Industry Prices, 2001, p. 16; 2000, 17.

⁴⁸ Ordovery Replies, para. 120, drops corrects his mischaracterization of the FCC conclusion by refraining from declaring cable and satellite as close substitutes, but he still ignores the finding in the Report on Cable Industry Prices 2001 (Appendix D-2) that satellite’s

- The elasticity of demand for cable is small.⁴⁹
- The cross price elasticity between cable and satellite is non-existent.⁵⁰
- Satellite does not have a statistically significant or substantial impact on the price, quantity or quality of cable output.⁵¹

AT&T and Comcast have failed to refute our analysis of subscribership patterns. Indeed, they have affirmed them.

- Their experts now admit that fewer than half of all satellite subscribers have come from cable, directly contradicting their earlier claims.⁵² This admission on their part would lower our estimate of competitive satellite subscribers from 10 million to 8 million.⁵³
- They cite our finding to support the proposition that cable and satellite are close substitutes, but they leave out the important qualifier that this applies to only a small share (less than one-quarter) of the overall market.⁵⁴

AT&T Comcast and their experts point to short-term promotions by satellite as evidence of price parity between satellite and cable.⁵⁵ They fail to note that these have long-term requirements and other restrictions that render them different from cable service. Ironically, at

effect on cable is small. He also ignores the fact that in the Report on Cable Industry Prices 2002, the effect is not found to be statistically significant.

⁴⁹ Report on Cable Industry Prices, 2001, Appendix D-2, found a small effect. Report on Cable Industry Prices, 2002 and 2000, Appendix D-2, found no statistically significant effect.

⁵⁰ The FCC has never found a significant cross price elasticity.

⁵¹ Report on Cable Industry Prices, 2002, D-2.

⁵² Ordover Replies, para. 81.

⁵³ Consumer Federation of America, 2002c, Attachment “The Failure of Intermodal Competition in Cable and Communications Markets, p. 20.

⁵⁴ Consumer Federation of America, 2002c, Attachment “The Failure of Intermodal Competition in Cable and Communications Markets, pp. 20-21.

⁵⁵ Ordover Replies, para. 81.

the same time that AT&T Comcast filed their replies at the FCC in Washington D.C. claiming price parity, Comcast was advertising that Washington area satellite subscribers who switched to cable would save \$800.⁵⁶ This suggests a substantial difference in the monthly recurring cost of the two services.

Finally, it should be noted that there may come a time when cable's relentless price increases will push its charges up to a limit set by satellite.⁵⁷ It would be fundamentally incorrect to claim that competition is working. The purpose of the antitrust laws and the competition policy under the Communications Act is not to allow incumbents to collect monopoly rents of 20, 30 or 40 percent and then declare victory. Such an outcome implies substantial inefficiency and inequitable transfer of wealth from consumers to cable operators. The purpose of competition is to drive prices to costs and squeeze rents out. There is no doubt that satellite is incapable of providing that function with respect to cable in today's market.

Unable to muster a credible response to the overwhelming econometric and experiential evidence of the abuse of market power and confronted by price increases well over twice the rate of inflation, in spite of the much touted competition from satellite, the cable experts resort to the cable industry's tired, old refrain:

The programmers made me do it!

Ordover offers the observation that

Both SBC and CFA ignore the fact that the costs of the video programming purchased by cable operators – a significant component of their costs – have increased even faster than cable rates. According to the NCTA, between 1996 and 2000, the cable industry spent over \$36 billion on basic and premium

⁵⁶ The advertising occurred on both television and radio.

⁵⁷ The statistical evidence indicates the elasticity of demand is rising, which is consistent with monopolists who price by demand. They are driving prices up the demand curve. Compare Report on Cable Industry Prices, 2000, p. 19, 2001, p.17, and 2002, p. 17.

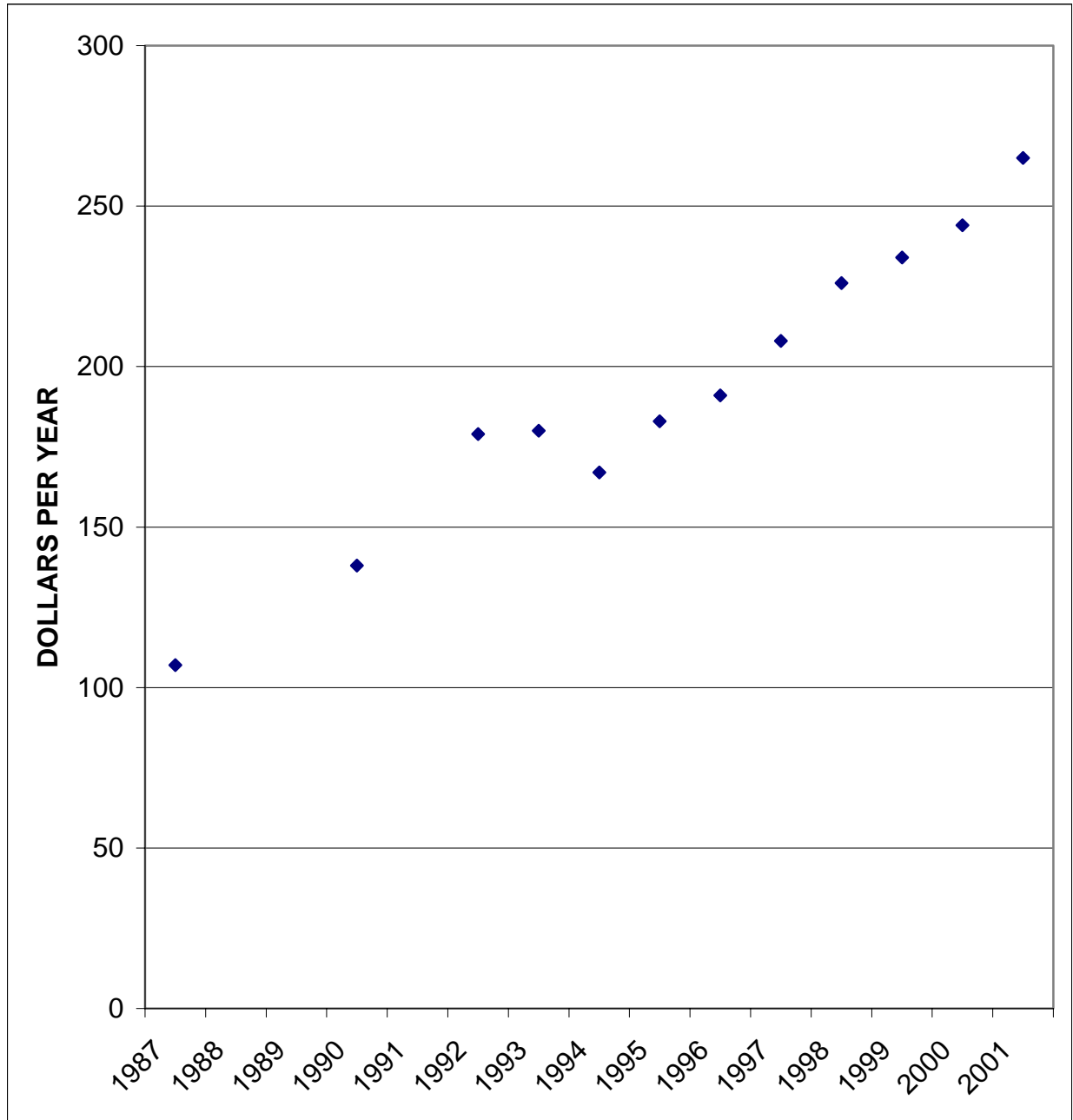
programming – roughly 75 percent more than the \$20.6 billion it spend during the previous five years.⁵⁸

A total increase in programming costs of \$15.4 billion over five years may sound like a big number, but Ordover fails to note that the comparable increase in revenues over the same period is much larger. Driven by abusive price increases and bundling practices, cable industry revenue increased by over \$50 billion. Approximately 70 cents out of every dollar of the increase in revenue is unaccounted for by programming. Moreover, we should not forget that since cable operators own about half of the most popular programming, a significant part of the \$15.4 billion increase ends up in the cable industry's pockets.

If one wants to analyze revenues and costs, the most relevant figures are operating revenue per subscriber (revenue net of operating expenses). This has increased by over forty percent since the 1996 Act, over three times the rate of inflation (see Exhibit II-1). This is what is driving the monopoly rents so evident to all observers, except the cable industry and its experts. Indeed, we observe the same pattern in the operating revenue numbers we noted in our initial filing with regard to prices and monopoly rents. When the pricing power of the cable operators is not restrained by regulation, operating revenue increases drive up system prices. Monopoly rents, measured by Tobin's q , rise dramatically because competition is too feeble to discipline cable market power.

⁵⁸ Ordover Replies, para. 118.

**EXHIBIT II-1:
CABLE INDUSTRY OPERATING CASH FLOW PER SUBSCRIBER**



Source: Federal Communications Commission, *In the Matter of the Status of Competition in the Market for Delivery of Video Programming*, various issues: 1994, Table 7; 1995, B-6; Table 1997, Table B-6; 2002, Table B-4.

Indeed, we observe the same pattern in the operating revenue numbers we noted in our initial filing with regard to prices and monopoly rents. When the pricing power of the cable operators is not restrained by regulation, operating revenue increases drive up system prices. Monopoly rents, measured by Tobin's q , rise dramatically because competition is too feeble to discipline cable market power.

AT&T offers a second tired, old excuse for rising rates. It argues "on a *per channel* basis, cable prices have remained essentially constant over the past three years."⁵⁹ Unfortunately, cable operators do not allow consumers to purchase service on a per channel basis. Consumers are offered a very restricted choice of "take-it-or-leave-it" bundles. The cable operators decide what goes into the bundles and how much capacity is devoted to them. As explained in our initial comments in the horizontal limits proceeding, this extracts consumer surplus⁶⁰ and the Commission should pay no attention to these claims about per channel costs until the industry allows consumers to purchase the service on a per channel basis.

C. MERGERS MAKE MATTERS WORSE

All of these anticompetitive and anti-consumer effects would flow from and would be reinforced by the merger. The merger creates the largest MSO in history, which would be vertically integrated, particularly with regional programming, and more clustered within eleven markets. It would also create a huge regional giant, in several areas of the country, taking the whole concept of clustering to a new level.

There are good theoretical reasons that past mergers have and this merger would enhance the ability of cable operators to exercise their market power. this would be the case. Greater

⁵⁹ AT&T Replies, p. 109.

⁶⁰ Consumer Federation of America, 200a, pp. 140-142.

economies of scale achieved by merged incumbents raise the scale of entry for new competitors, making competition less likely. Greater leverage by larger incumbents enables them to frustrate potential entrants by resisting their obtaining the necessary certifications or withholding key inputs, like programming. They have more resources to engage in selective predatory pricing targeted at overbuilders.⁶¹ In addition to creating larger regional and national entities, these mergers remove the most likely competitors, especially where systems are located in close proximity to each other.

As they cluster their systems, they gain additional leverage over the local market (area-wide advertising, marquee programming, etc.). Regional clustering may also make it easier to distribute certain regional programming (like local sports) terrestrially (rather than by satellite). This enables vertically integrated cable owners to withhold the programming from competing distributors

Both AT&T and Comcast are vertically integrated through ownership and joint ventures into the production of content (video programming and Internet service provision) for local distribution markets. ATT/Comcast would also be one of the largest purchasers and controllers of content from both video and potentially Internet content producers. They have exhibited repeated patterns of foreclosure, discrimination and other types of behaviors that increase barriers to entry and seek to preserve and enhance their market power in both of these markets.

The size of the cable owner plays an important role in the content market. Large operators gain leverage in bargaining with content providers. Much to the consternation of the Federal Communications Commission, its own analyses show that the larger the cable operators become and the more regional control they gain (by pulling cable systems into clusters), the

⁶¹ Rios, 2002.

higher are monthly prices⁶² and the monopoly rents realized. Efficiency gains are not passed through to consumers in the form of lower prices. Clustering and increasing the size of cable operators leads to higher prices, makes content discrimination easier and more profitable and increases barriers to entry.

A large national player, with market power at the point-of-sale, has an interest in controlling the flow of unaffiliated content, even if it does not own any of its own programming. Controlling the flow of programming enables it to deny programming to potential rivals. By denying the availability of inputs to rivals, it can reduce the likelihood of entry. Exercising its monopsony power, it can raise its rate of profit, relative to actual or potential competitors, and drive programmers to seek to recover their costs from smaller program purchasers.⁶³

A large operator certainly can interfere with the ability of another operator to disseminate the same content for strategic reasons. When a large operator demands exclusivity so that potential or actual competitors cannot have access to it,⁶⁴ or explicitly demands to be given the lowest price,⁶⁵ or implicitly pushes the content provider to recover a disproportionate share of his costs from smaller operators who lack monopsony power,⁶⁶ he places the competitor at a disadvantage. The size of the entity is critical to the effectiveness of the demand, but that is what

⁶²Federal Communications Commission, 2002b, p. 29, 2001c, p. 31, 2000, p. 33.

⁶³ All of the industry experts incorrectly equate the simple economics of program production with the political economy of market structure. For example, Rosston and Shelanski, 2002, p. 6, argue “the incentive of cable operators to act monopsonistically is further weakened by the fact that programs are non-rivalrous goods. One operator’s distribution of a program does not interfere with the ability of another operator to disseminate the same program.”

⁶⁴ Consumer Federation of America, et al, 2002a, p. 102-105, 124-139, Consumer Federation of America et al, 2002b, pp. 46-56.

⁶⁵ See comments of the Consumer Federation of America, et al, 2002a, p. 102-105, 124-139, Consumer Federation of America et. al, 2002b, pp. 46-56.

⁶⁶ Consumer Federation of America, et al, 2002a, p. 102-105, 124-139, Consumer Federation of America et al, 2002b, pp. 46-56.

monopsony is all about. When one large operator withholds access, he can increase distribution costs for programmers by forcing them to incur transaction costs of negotiating with many smaller MSOs. If the MSO's systems are located in key strategic markets, as they are in the case of AT&T Comcast, withholding access can disproportionately undermine programmer revenues by denying advertising access to highly valued markets.⁶⁷

Market power at the point-of-sale is also readily transmitted back up the value chain when cable operators become vertically integrated. Reduced competition at the point-of-sale enables them to favor their own content or hinder unaffiliated content in reaching the market, since unaffiliated programs have little or no chance of reaching consumers within the service areas that the cable operators dominate. Once they become vertically integrated, cable companies have incentives to withhold content from potential competitors in (downstream) distribution markets or to squeeze those competitors by driving up their costs.⁶⁸

A substantial market share for dominant firms in the national content market is an independent problem that is reinforced by horizontal concentration and vertical integration. By controlling a substantial number of eyeballs, cable operators can make or break content production. Exercising monopsony power as buyers, they can squeeze programmers by holding down what they pay or by insisting on sharing the profits (demanding equity stakes). Once they become vertically integrated, their incentive to squeeze out rivals is reinforced. The fewer the alternatives available for specialized inputs (creative producers), the easier their task of controlling the programming market.

⁶⁷ Haring, Rohlf and Shooshan, 2002, Yankee Entertainment Sports, 2002.

⁶⁸ Consumer Federation of America, et al, 2002a, p. 102-105, 124-139, Consumer Federation of America et al, 2002b, pp. 46-56.

Although some argue that “the traditional models of discrimination do not depend on the vertically integrated firm obtaining some critical level of downstream market share,”⁶⁹ market size is important here, to ensure adequate profits are earned on the distribution of service over the favored conduit.⁷⁰ In reality, the size of the vertically integrated firm does matter since “a larger downstream market share enhances the vertically integrated firm’s incentive to engage in discrimination.”⁷¹

This merger that creates a dominant integrated firm would enhance the ability to discriminate. AT&T Comcast now use cable-broadband wire as a new “crown jewel.” They condition access to cable-based broadband transmission capacity on the taking of “unwanted programming.” Comcast uses local and regional sports as its crown jewel. AT&T uses its monopsony power to disadvantage contiguous systems.

As cable operators become larger and more clustered, the strategy of refusing to make programming they own available will become increasingly attractive to them. Where the large MSOs do not have direct ownership of video services, as they become larger it is easier to obtain exclusive arrangements, thereby denying competitors and potential competitors access to programming. Because the dominant MSOs are so large, they can influence important programmers not to sell to competitors and potential competitors. It is easy to discriminate against smaller programmers,⁷² especially if they are new entrants, and particularly if they are contemplating developing programs that competes with the dominant integrated offerings.

⁶⁹ Hausman, Sidak and Singer, 2001, p. 156; American Cable Association, 2002, p. 13 provides the calculation for cable operators

⁷⁰ Rubinfeld and Singer, 2001, p. 567.

⁷¹ Hausman, Sidak and Singer, 2001, p. 156.

⁷² Waterman and Weiss, p. 98,

Dominant, vertically-integrated MSOs can inflict “discriminatory or excessively burdensome terms and conditions of programming distribution”⁷³ even on the largest program producers.”⁷⁴ Powerful cable MSOs have been able to prevent, restrict, or restructure programming networks, diminishing competition, diversity, and innovation. This unfortunate trend has occurred in both the national and local cable programming marketplaces.⁷⁵

III. IN REALITY IT HAPPENS ALL THE TIME

Having demonstrated that incentive and ability to discriminate, we should not be surprised to find some examples of discriminatory behavior. Contrary to the claims of the current owners of the TCI systems, not only can discriminatory practices happen, they do so repeatedly. When anti-competitive moves are made by a cable operator in the decades since the deregulation of cable, it is likely that that the largest operators are involved.

The following discussion emphasizes the fact that the cable operators leverage their position to undercut program competition. In particular, it demonstrates that the theory and explanations offered by AT&T Comcast that assert that programmers need or seek the help of MSOs with equity or benefit from exclusive arrangements bear no relationship to the reality of the programming market.⁷⁶ Programmers have little trouble raising capital and assembling talent to create shows. The only thing they lack is carriage. Programmers do not ask MSOs to take equity stakes or seek benefits in deals that prevent them from making their shows available to all

⁷³ Qwest, 2001, p. 3; Federal Communications Commission, 2001d, p. 90.
Dertouzos and Wildman, 1999.

⁷⁴ Joint Comments, 2001, p. 9.

⁷⁵ Joint Commenters, 2001, p. 8. Przybyla, 2001; Anon, 2001.

⁷⁶ Ordover, 2002c, paras. 35, 45; Shelanski, 2002, paras. 24, 26, 29, 40, 42.

means of distribution; MSOs extort equity or exclusive arrangements from programmers by withholding carriage. The MSOs control the programming market and undermine competing distributions systems with their anticompetitive and discriminatory practices.

A. THE LONG HISTORY OF EXCLUSION BY DOMINANT MSOS

1. News and Commentary

In the late 1980s, TCI and Time Warner, both part owners of CNN, refused to carry a new NBC Cable News channel when it was proposed to them.⁷⁷ Clearly, a new cable news channel could have had a competitive (what they view as negative) effect on CNN. Instead of considering the benefits for their viewers (an added news voice that creates new stories and perspectives, etc.) TCI and Time Warner worked to keep CNN free of competition.

A similar situation arose in the early 1990s and persisted throughout the decade *vis-à-vis* Rupert Murdoch, head of News Corp., who tried for years to get TCI and Time Warner to carry his conservative-slanted Fox News channel in order to reach their tens of millions of viewers. The operator goliaths already carried other News Corp. programming but refused to carry Fox News⁷⁸ because of the competitive effect it would have had on their news channel and the opposing political stance the station would have taken. Without the eyeballs that TCI and Time Warner controlled made available, launching Fox News was not a worthwhile venture and Murdoch was prohibited from delivering his content.

Rupert Murdoch's plans to create the Fox News Channel in 1994, for example, were thwarted by both Time Warner and TCI.⁷⁹ In order to eventually receive carriage for Fox News,

⁷⁷ Keating, 1999, p.19; Waterman and Weiss, 1997, p. 56.

⁷⁸ Keating, 1999, p. 17

⁷⁹ Keating, 1999, pp. 17-18, characterizes the incident as described in this paragraph. Recent comments in the program access proceeding summarize these events aptly:

Murdoch had to loan then TCI “\$200 million...and an option to buy 20 percent of the network.” Other programmers who did not have an investment in the country’s then largest MSO suffered. “To make room (for Fox News), Malone cleared out existing networks like a bowling ball cracking into the headpin. The arrival of Fox News in Denver pushed Court TV to split the programming day with Spice, a pay-per-view sex network.”⁸⁰

Fox fought a similar battle with Time Warner. In 1996, Time Warner (who owned a 20% stake in CNN’s parent company, Turner broadcasting) refused to allow any other cable network to compete with CNN on its cable systems.⁸¹ The nation’s largest cable operator at the time, TCI, also owned a stake in CNN, and as a result would also not allow any competitive news services on its systems. Consequently, the U.S. public was denied an alternative news service—despite several attempts at entry from major programmers, e.g. NBC, into the 24 hour news channel business—until the consent decree in the merger of Time Warner and Turner forced the cable operators’ hands.

The Federal Trade Commission’s (FTC) consent decree⁸² required the merged company to make available to at least 50 percent of its cable subscribers a second twenty-four hour news channel in which it held no financial interest. It seems odd that the FTC would have to force a

It is also well known that Fox News Channel (“FNC”) owes its very existence to Telecommunications, Inc. (“TCI,” since acquired by AT&T), whose agreement to carry FNC on systems serving 90% of TCI’s subscribers was critical to the successful launch of the network. Not coincidentally, Fox made FNC available to incumbent cable operators on an exclusive basis. Like the saga of News Corp./EchoStar, FNC’s launch and subsequent exclusivity to the cable MSOs is a case study of how the largest incumbent cable operators control the destiny of new programming services, and why programmers sell to cable’s competitors at their own risk.

⁸⁰ Joint Commenters. p. 8.

⁸¹ Grossman, 1997.

⁸² Federal Trade Commission, 1996.

cable system to put a second news channel on their system if the MSO had no incentives to the contrary.

While Fox was battling to get on to TCI systems, John Malone and TCI had no problem launching a libertarian-slanted public affairs show in 1996 on all TCI systems called *Damn Right*. The show, which discussed subjects such as ending income taxation, arose mysteriously at the same time as TCI was booting The 90s Channel, a liberal news program, off of seven TCI systems by imposing a massive rate hike, one which The 90s Channel could not afford.⁸³ While the controversy surrounding this ‘coincidence,’ coupled with *Damn Right*’s lack of success did lead to the removal of the show, what TCI’s decisions indicate about their motivations is clear – serve yourself and your company above all.

Even the BBC was stymied by MSOs who had other cable news programming interests.⁸⁴ The BBC was prevented by cable MSOs from establishing a cable news channel as far back as 1991. In 1998, the BBC announced it hoped to form agreements with cable operators to carry BBC World, its international news service, within the next two or three years. A CNN spokesman, Steve Haworth, is quoted as saying, “Competition is always good for journalism, but I think that the BBC will find this to be a very tough marketplace for them. Remember, this is a second attempt for them,” referring to BBC World’s unsuccessful first attempt to gain US cable distribution. BBC World was launched in 1991 but only made its first appearance in the United States in 1997 after it made a deal with 25 public television stations for them to carry daily news bulletins. BBC, as the Commission knows, was only able to secure some digital distribution after it partnered with MSO-linked Discovery Channel, creating the BBC America channel.

⁸³ Keating, Stephen, 1999, p. 72; Waterman and Weiss, 1997, p. 156

⁸⁴ Przybyła, 2001, characterizes the incident as described in this paragraph.

These practices are not restricted only to major national programs. At the local level, AT&T eliminated a San Francisco Bay Area cable news channel after the channel's other owners no longer had the protection secured by a retransmission consent agreement.⁸⁵ The BayTV News Network was a "local news and information channel" created as a result of "retransmission-consent negotiations between AT&T's predecessor, Tele-Communications Inc., Liberty Media, and then-KRON owner Chronicle Broadcasting." KRON was then the NBC affiliate in San Francisco (KNTV in San Jose became the new NBC affiliate on January 1, 2002). KRON owner Young Broadcasting said they had made "numerous improvements" to Bay TV News and had "achieved significant gains in viewership." Yet AT&T, according to Multichannel News, decided to end the channel and give its slot to the Food Network."

In August of 1998, Time Warner Cable announced that it would launch an all-news, 24-hour TV channel in Austin, Texas to be available to 220,000 area subscribers, with the specific intent of focusing on central-Texas news. The A.H. Belo Corporation, a media company that currently owns 18 broadcast television stations and four daily newspapers nationwide (including 4 stations and the *Dallas Morning News* in Texas), had also planned to start a cable news channel during the following year.⁸⁶ In January of 1999, Belo launched the Texas Cable News (TXCN), another CNN-style cable news program that was to run in the Dallas-Ft. Worth area on TCI and Marcus cable.⁸⁷ Belo intended to invest \$15 million in TXCN over the course of 1999, and according to the broadcast division president Ward Huey Jr., they were already negotiating with Time Warner Cable for distribution on their cable systems in Austin, San Antonio, and Houston by the time of the announcement of the launch.

⁸⁵ Multichannel News, 2001.

⁸⁶ Breyer, 1998, p. D1.

According to a February 26, 1999 article in the *Austin American-Statesman*, Belo then purchased KVUE Channel 24 in Austin from Gannett Company for \$55 million and a Sacramento station (KXTV-TV).⁸⁸ The executive vice-president of Belo was quoted as saying, “We have always wanted to get into the Austin market just because it not only is a good complement to what we already have, but it now gives us two-thirds of the homes in the state of Texas.” The addition of an Austin channel would allow Belo to use KVUE’s news reports on TXCN. However, the article states flatly that “...most viewers shouldn’t expect to see TXCN in the Austin area any time soon. That’s because the region’s primary cable television provider, Time Warner Cable, is planning its own 24-hour news channel and isn’t expected to carry TXCN.” By May of 1999, Time Warner Cable still does not carry TXCN. Dianne Holloway reports in the *Austin American-Statesman* that, “Belo has been trying for months to break into the Austin television market with its Texas Cable News channel.”

Bill Carey, president of Time Warner Cable in Austin, justified the decision to exclude TXCN by saying, “I’m sure [Belo] do what they do very well, but we haven’t seen any interest among our customers in state news.... I think of news channels the way I do newspapers, and only local sells. News 8 [TWC’s cable news channel] fills a badly needed niche: instantly accessible news and weather with a strong local focus. I don’t know of any newspapers or news channels that succeed with statewide or regional news.”⁸⁹

In September of 2000, Belo and Time Warner entered into an agreement that would allow the former to air its TXCN on TWC in exchange for splitting the \$25 million bill to create two more cable news stations in Houston and San Antonio. In an article on the deal, Heather Cocks

⁸⁷ Anon, *Austin American-Statesman*, 1999, p. B2.

⁸⁸ Tyson, 1999. p. A1, characterizes the incident as described in this paragraph.

⁸⁹ Holloway, p. E1.

noted that Time Warner had “resisted carrying the Dallas media company’s 18-month-old Texas Cable News because of a perceived conflict with the News 8 Austin station that Time Warner launched last year.”⁹⁰ She quotes the senior vice president of Belo as saying, “We’ve been having conversations with Time Warner since we launched TXCN in January of last year, but it got serious this past spring....To be on cable in Texas, they’re obviously a major player.” The companies will split resources for the new channels, and the board of representatives for each channel will be comprised of 50 percent Belo and 50 percent Time Warner. The TXCN airs on channel 230 in Houston on Time Warner’s digital tiers only.⁹¹

2. Entertainment

Discrimination extends to entertainment programs. A particularly stark incident took place in 1990 when The Learning Channel (TLC) was being sold. TLC is a popular channel that is very valuable to any cable dial in terms of the public service and information it provides. Lifetime appeared to be the highest bidder, offering \$40 million, and thought for sure they would acquire the network. TCI, though, threatened to remove it entirely from their systems if the channel was not sold to them⁹². However, TCI offered substantially less money, and effectively lost the bidding war to Lifetime. Daunted by the prospect of having their network disappear, at least before the eyes of TCI’s tens of millions of viewers, TLC was sold to TCI and Lifetime was left mistreated and TLC-less. This illustrates how the largest MSO can leverage the programming market, to maximize profits and control the flow of programming.

Another instance of the operators tampering with programming revolved around the home shopping network boom. The early 90s were spent consolidating this branch of cable TV

⁹⁰ Cocks, p. D1.

⁹¹ Turner, 2001.

⁹² Waterman and Weiss, 1997, p. 65; Davis, 1998, p. 97

after the initial channels exploded with profits. What started as 35 channels, owned and operated by various people, was transformed into 4 channels (Home Shopping Network, HSN II, QVC, and QVC Fashion) all run by cable operators, with TCI owning a major stake in all four.⁹³ When nearly three dozen home shopping channels existed, the home shopping industry resembled a mall, with choices galore and price differentiation. Unfortunately, such a consumer-friendly environment did not appeal to the cable operators who stood to profit far more from a viewer's inability to find a lower price. With TCI owning part of all four channels, it effectively was positioned to limit the competitiveness of these channels.

A final example of TCI's programming offenses can be found in the electronic programming guide sector. With News Corp. owning TV Guide, the largest publication of its kind by a mile, and Bill Gates working avidly to get his hands in the on-screen channel selection pie, TCI offered Rupert Murdoch 2 billion dollars to try to monopolize the programming guide sector. News Corp. agreed and TCI came away with 44 percent control of the sector, with News Corp.'s share at 40 percent. After News Corp. bought out TVSM, publisher of Total TV and the Cable Guide, there were no possible competitors left⁹⁴. The merged companies threw the little assets TVSM accounted for into their anti-competitive cauldron and took, in practice, complete control of the on-screen TV Guide market. This fit nicely with the stranglehold TCI already had on the cable operator world.

Powerful MSOs even have the power of life and death over well-established programmers who are resident on the cable system. For example, in a recent interview with Black Entertainment Television (BET) president and CEO Debra Lee, she acknowledged that

⁹³ Waterman and Weiss, 1997, p. 73; Davis, 1998, p. 143.

⁹⁴ Keating, 1999, p. 257

plans to establish BET II, a family and public affairs channel, were scuttled because “the industry just didn’t embrace it.”⁹⁵ According to Lee, BET heard from AT&T and others that the industry wanted to see “another black channel.” As Lee told Multichannel News: “ We were saying, Well, if that’s the case, we’ll be glad to do it.... We put together a 24-hour programming schedule and sent it to the major cable operators, and there just wasn’t a lot of interest.”

Indeed, additional minority channel programming fare is very much endangered. According to Multichannel News, “one year after Viacom’s blockbuster purchase of BET, several African American-targeted networks are fighting an uphill battle...” for carriage.⁹⁶ “Despite continued calls for more programming for African-American viewers, industry observers said Viacom’s \$3 billion acquisition has given BET and its related analog and digital services greater leverage—thus making it more difficult for upstarts New Urban Entertainment Television (NUE-TV), Major Broadcasting Co. and World Network to register significant distribution gains.” The article notes that the ability of Viacom to bundle BET services with their networks like MTV will give BET an advantage over their programming competitors.

The Arts channel Trio has “lacked the leverage to make cable operators sit up and take notice” since its 1994 launch, despite its digital tier ambitions.⁹⁷ Consequently, the network’s owners (which included the Canadian Broadcasting Company), decided it had to sell the channel to the well-connected Barry Diller’s USA Networks. But the price to secure US MSO carriage appears to have changed the channel’s original mission of “films, dramas, and documentaries.” Now, under Diller, the early 1970’s series “Rowan and Martin’s Laugh-In” will “anchor Trio’s prime-time line-up along with reruns of the PBS music series Sessions at West 54th.”

⁹⁵ Anon, *Multichannel News*, 2001.

⁹⁶ Anon, 2001a, *Multichannel News*.

⁹⁷ Anon, 2001b, *Cablevision*.

AT&T Comcast and their experts have cited the ongoing dispute between Yankee Entertainment Sports (YES) and Cablevision as testimony to the fact that satellite is an alternative to cable.⁹⁸ YES does not see it quite that way. The suit is much more of a testimonial to the discriminatory and anticompetitive practices of the industry.

YES alleges and provides facts to support its claim that the refusal to provide nondiscriminatory carriage is part of a scheme to prevent competition in sports programming,⁹⁹ and preserve Cablevision's local monopoly in distribution.¹⁰⁰ It documents a long history of threats to foreclose markets as a lever against programmers back to the 1980s.¹⁰¹ The demands of the operator include demands for equity¹⁰² and exclusivity.¹⁰³ "Bargaining" with a dominant distribution incumbent involves take-it-or-leave-it-threats¹⁰⁴ that offers inferior placement,¹⁰⁵ discriminatory prices,¹⁰⁶ or exclusion from carriage. Programmers have little bargaining power,¹⁰⁷ particularly since denial of access to 40 percent of the market renders new programming unviable.¹⁰⁸

The market structure that conveys the leverage to the distributors is precisely described by YES. There is little direct competition in distribution, with Cablevision having a 90 percent market share,¹⁰⁹ which remains insulated behind barriers to entry.¹¹⁰ Market power has been

⁹⁸ Ordover, Replies, para 11.

⁹⁹ Yankee Entertainment Sports, 2002, para.1, 12.

¹⁰⁰ Yankee Entertainment Sports, 2002, para., 2, 13.

¹⁰¹ Yankee Entertainment Sports, 2002, para. 16, 29.

¹⁰² Yankee Entertainment Sports, 2002, para. 16, 114.

¹⁰³ Yankee Entertainment Sports, 2002, para. 66.

¹⁰⁴ Yankee Entertainment Sports, 2002, para. 70.

¹⁰⁵ Yankee Entertainment Sports, 2002, paras. 53, 67.

¹⁰⁶ Yankee Entertainment Sports, 2002, para. 69.

¹⁰⁷ Yankee Entertainment Sports, 2002, para. 89.

¹⁰⁸ Yankee Entertainment Sports, 2002, para. 107.

¹⁰⁹ Yankee Entertainment Sports, 2002, para. 64.

acquired and reinforced by acquisition of distribution and programming.¹¹¹ Regional market power through clustering plays a critical role¹¹² particularly for advertising markets.¹¹³ Dominating specific programming categories generates both high profits and provides leverage to undermine competitors.¹¹⁴ Cable operators have recently added bundling of high speed Internet to frustrate to their arsenal of anticompetitive practices¹¹⁵ and reinforced it with anticompetitive contracts.¹¹⁶

B. MANIPULATING ACCESS TO CONTENT TO UNDERMINE COMPETITIVE DISTRIBUTION

Overbuilders have faced vigorous efforts to prevent competition through exclusion from access to programming and regulatory tactics of incumbent cable operators.¹¹⁷ Comcast has shifted some sports programming to terrestrial delivery, thereby avoiding the open access requirement of the 1992 statute. As cable operators become larger and more clustered, this strategy will become increasingly attractive to them. Specific areas where such programming has been denied are Phoenix, Kansas, Philadelphia and New York. The denial of access to marquee sport programming can have a devastating effect, with satellite providers in markets where foreclosure has occurred achieving a market penetration only one-quarter of the national average.¹¹⁸

¹¹⁰ Yankee Entertainment Sports, 2002, para. 36-40.

¹¹¹ Yankee Entertainment Sports, 2002, para. 39.

¹¹² Yankee Entertainment Sports, 2002, para. 17, 28-29.

¹¹³ Yankee Entertainment Sports, 2002, para. 34-35, 54.

¹¹⁴ Yankee Entertainment Sports, 2002, para. 30-31.

¹¹⁵ Yankee Entertainment Sports, 2002, paras. 14, 41.

¹¹⁶ Yankee Entertainment Sports, 2002, para. 41.

¹¹⁷ *RCN Telecom Service of New York, Inc. v. Cablevision Corp., DIRECTV v. Comcast; EchoStar v. Comcast*. Problems can also occur on an event-by-event basis (see Everest, 2001, p. 4; Gemini Networks, 2001, p. 3).

¹¹⁸ Joint Comments, p. 14.

Integrated MSOs wield immense power against smaller cable companies, exploiting loopholes in the program access rules.

MSOs are already responding to the incentives to deny small cable companies access to programming.

The incentives to deny programming and the consequences to program diversity are not hypothetical. In circumstances outside of Section 628(c)(2)(D), these incentives are already resulting in denial of programming to small cable companies.¹¹⁹

BELD (Braintree Electric Light Department) competes in Braintree with AT&T, the USA's largest company, and Echostar/DirectTV, the USA's largest satellite companies. If AT&T and other major MSOs could withhold programming from use, our video business would likely fail and consumers in Braintree would lose the benefits of true facilities-based competition.

One major MSO is already denying BELD access to important regional programming. BELD's situation provides a clear example of how a major MSO will use program access to thwart a small competitor. NECN [New England Cable News], a regional news network partly owned by AT&T, refuses to sell its service to BELD, purportedly due to an exclusive contract with AT&T. This denies our customers important regional programming and hurts our ability to compete.¹²⁰

For the smaller entities, the current refusals to deal are not limited to sports programming.

Other services have been denied, such as video on demand.¹²¹

¹¹⁹ American Cable Association, 2001, p. 15.

¹²⁰ Braintree, 2001. American Cable Association, 2001, p. 16, elaborates. AT&T/New England Cable News ("NECN"). The Commission is familiar with NECN. In 1994, in response to a petition for exclusivity by Continental Cablevision, the Commission granted a limited waiver of Section 628(c)(2)(D) for NECN.¹²⁰ The Order gave NECN an 18-month window to enter into exclusive programming contracts, and the exclusivity terms were to end by June 2001. AT&T is the successor to Continental's attributable interest in NECN.

NECN has recently denied access to its service to at least one ACA member based on an exclusive contract with AT&T. The small system seeking access to NECN competes with AT&T in one market. NECN now claims that it is delivered terrestrially, and it cannot provide access to its programming because of its contract with AT&T.

¹²¹ Everest, 2001, p. 6.; Qwest, 2001, p. 4.

Second, where the large MSOs do not have direct ownership of video services, they have obtained exclusive arrangements, thereby denying competitors and potential competitors access to programming.¹²²

AT&T/DigitalTVLand. AT&T owns Headend in the Sky (“HITS”), a wholesale distributor of digital programming via satellite. HITS services have been instrumental in enabling many smaller systems to expand channel offerings through digital services, and ACA has been a prime supporter of this service. Among the digital services carried by HITS is TVLand, a popular entertainment channel. But of all the channels carried by HITS, ACA members cannot receive digital TVLand from HITS. AT&T apparently has a national exclusive contract for the service.¹²³

The exclusionary tactics apply not only to head-to-head cable operators and satellite providers, but also to DSL-based providers seeking to put together a package of voice, video, and data products. Bundling is critical to entry into the emerging digital multimedia market.

CTN [CT Communications Network Inc.], a registered and franchised cable operator, has been unable to purchase the affiliated HITS transport service from AT&T Broadband, the nation’s largest cable operators, despite repeated attempts to do so.... Based on its own experience and conversations with other companies who have experienced similar problems, CTCN believes that AT&T is refusing to sell HITS to any company using DSL technology to deliver video services over existing phone lines because such companies would directly compete with AT&T entry into the local telephone market using both its owns system and the cable plant of unaffiliated cable operators. AT&T simply does not want any terrestrial based competition by other broadband networks capable of providing bundled video, voice and data services.¹²⁴

Third, because the dominant MSOs are so large, they can influence important programmers not to sell to competitors and potential competitors. As the Commission noted, Ameritech and the WCA found that they were cut off from programming.¹²⁵

¹²² Everest, p. 6, gives a different example.

¹²³ American Cable Association, 2001, p. 15.

¹²⁴ Competitive Broadband Coalition, 2001, p. 11.

¹²⁵ Federal Communications Commission, 2001a, para. 28

One of the more prominent examples was summarized in the recent program access proceeding as follows:

It is well known, for example, that News Corp. abandoned its 1997 joint venture with DBS operator EchoStar Communications Corporation (EchoStar) after incumbent cable operators responded to the transaction by refusing to discuss carriage of Fox cable programming. Unwilling to put the financial viability of Fox's programming at risk, News Corp. took the path of least resistance, left Echostar at the altar and switched its affections to the cable-controlled PrimeStar DBS service

"Time Warner, Inc. and [Fox] appear to have entered a symbiotic truce following [Fox's] new proposed affiliation with cable TV industry-owned Primestar Partners L. P. [Fox] originally proposed a merger with EchoStar Communications Corp. to compete with cable TV operators. But according to industry sources, [Fox] received not-so-subtle signals from cable TV operators that its cable TV programming would have trouble finding carriage on their systems if the EchoStar deal went through.

It was also reported that New Corp.'s abandonment of its joint venture with EchoStar was a prerequisite for at least one cable Mao's blessing of Fox's \$2 billion acquisition of the Family Channel.¹²⁶

And, as Qwest points out, the problem is not simply one of complete exclusion. Dominant, vertically-integrated MSOs can inflict "discriminatory or excessively burdensome terms and conditions of programming distribution."¹²⁷ Recent comments in the program access proceeding point to an even more stark demonstration of the power of cable to engage in content discrimination. Joint Comments note that the "retransmission consent process has provided even more evidence of the economic power that incumbents cable operators hold over programming services, even those owned by NBC, CBS and ABC."¹²⁸ Here, cable market power is evidenced not by pricing, but by the ability to deny content to competing conduit providers.

¹²⁶ Joint Comment, 2001, p. 8.

¹²⁷ Qwest, 2001, p. 3; Dertouzos and Wildman, 1999.

¹²⁸ Joint Comments, 2001, p. 9.

NBC, for example, surrendered exclusivity for the MSNBC cable network to incumbent cable operators in exchange for carriage of NBC broadcast stations. Similarly, during retransmission consent negotiations for carriage of CBS stations, CBS surrendered exclusivity for its own news-oriented cable channel, Eye on People. The Joint Parties have also learned that ABC surrendered exclusivity for the Soap net cable network to MSO Charter Communications in the Los Angeles market during retransmission consent negotiations for ABC broadcast stations. In other words, when confronted with dominance of the largest cable MSOs in local markets, NBC, CBS and ABC, like Fox, acquiesced to the MSOs' demand that they withhold their cable programming from competing distributors.

IV. STASIS AND DOMINANCE IN PROGRAMMING

The repeated examples of anticompetitive conduct do not comport with the image of a benign, efficiency enhancing monopsonist offered by the cable experts. A second problem with the benign picture painted by the cable industry experts is the fact that a small number of companies dominate the programming side of the multichannel video market and have done so for a decade.

Relying on hypotheticals, ignoring empirical reality, and misinterpreting econometric evidence, AT&T Comcast and their experts arrive at the wrong conclusion. Ordovery boldly declares that

I am aware of no evidence that serving 30 percent of MVPD subscribers generally, or in this transaction in particular, would shift the profit calculus toward foreclosure and away from unimpeded access to the AT&T Comcast cable subscribers.¹²⁹

In fact, the leading text in the field, one that Ordovery cites several times when he agrees with it, contradicts his conclusion. Waterman and Weiss declare their conclusion, under a subtitle *MSO Size Limits*

¹²⁹ Ordovery, 2002c, para 55.

our analysis suggests that an MSO having a national market share well below 30 percent could exert significant monopsony power over many cable networks.¹³⁰

In the introduction to study in a section entitled *Organization, Key Findings*, and Recommendations, the study went on to argue that the threshold might be as low as 20 percent.

[I]f the FCC's right to impose a limit on the proportion of homes that any single MSO can reach is upheld by the courts, then the FCC should reduce its limit from 30 percent to no more than 20 percent. While systematic evidence to document the extent to which individual MSOs might now exert monopsony power were not available, it is reasonable that an MSO with substantially less than 30 percent of the national market could anticompetitively affect competition in cable-programming supply because of economies of scale in cable network distribution. Conversely, it appears unlikely that a 20 percent or even lower limit would result in major sacrifices to economies of scale in cable system operations or to the creative and financial resources necessary to develop new programming and new technology.¹³¹

Programmers who have hit shows that are distinctive and well branded may have some bargaining power, but there are very few of them. How new entrants get into that position is unclear, especially when integrated entities can foreclose the market or discriminate against new entrants. There is very little entry by unaffiliated entities and very little churn in the ownership of programming in the industry.

A. MARKET POWER EXISTS AT 30 PERCENT MARKET SHARE

As suggested in the discussion of the Time Warner/Turner deal, entry is difficult because scale carriage is difficult to obtain and scale is difficult to achieve. The issue of the size of sustainable entry of programs into the market has been the focal point of analysis in the FCC's implementation of the Section 11 of the 1992 Act that required the Commission to place a limit on the number of households a cable company could serve. The 30 percent limit has been the

¹³⁰ Waterman and Weiss, 1997, p. 154.

¹³¹ Waterman and Weiss, 1997, p. 8.

object of continuous litigation since its adoption.¹³² The cable companies argue the limit is far too low, under a theory that only collusion or unilateral action can be the basis for inferring the threat of anticompetitive behavior.¹³³

Economic theory and antitrust practice have long recognized that markets with small numbers of participants are conducive to anticompetitive behaviors that result from routine behaviors of uncoordinated games. In fact, in this context, the FCC's 30 percent limit is too low.¹³⁴

Interpreting the congressional charge narrowly, the FCC set out to identify situations in which a small number of cable-system owners could prevent programming from successfully getting to market. This foreclosure analysis sought to identify how a wide an "open field" was necessary to provide programmers with a chance of getting in front of enough viewers to succeed. The FCC took a very narrow and conservative approach in three ways.

First, it erred by defining the word impede to mean foreclose. Foreclosure is only the most extreme form of anticompetitive behavior that could impede producers from getting their product to market.

Second, it erred when it identified the risk as any *two* large cable operators, acting in parallel or concert, to foreclose the market to a new entrant programmer. The theory of non-cooperative games would support considering the behaviors of a larger number of actors.

Third, the FCC erred by defining the size of the open field needed very conservatively. That is, it set the size of the open field at a very low level. The hearing record indicates that a much larger open field may be necessary.

¹³² Time Warner Entertainment, 2001.

¹³³ Ordoover, 2002c, paras. 25, 36, 64-65, 89.

The FCC determined that achieving a market of 15 to 20 million subscribers was necessary. There was strong evidence that a larger number would be necessary to become attractive to advertisers. The comments generally agree that 30 to 40 million subscribers are necessary to attract this type of revenue.¹³⁵

The FCC then estimated the number of MSOs who might take (or not take) the show, even after there had been a decision to allow the show to be offered to MSOs. It found that the average carriage rate is between 36 percent and 53 percent. This led to an estimate of the size of the open field that was needed for programs to have a reasonable chance to succeed.

The horizontal limit was then calculated by estimating the number of subscribers who could be controlled by two MSOs that would not exceed the open field. This number was divided by 2 and taken as a percentage of the total market. The horizontal limit that is justified by this analysis ranges from 15 percent to 33 percent. Based on this analysis, the limit could easily have been set at 20 or 25 percent. Indeed, the FCC discussed the 20 percent limit, but rejected it on grounds that MSOs need larger scale for economic efficiency. FCC could also have divided the open field by 3 or 4, since anticompetitive outcomes are plausible with such small numbers of market participants in market that would be oligopolies.¹³⁶

The rule was developed several years ago and the FCC has repeatedly found that programming costs have increased. If costs are increasing so dramatically, and assuming a competitive programming market as the FCC does, the minimum market to be successful could well have grown. For example, Comcast is quoted as targeting 20 to 30 million subscribers for a

¹³⁴ Consumer Federation of America, 2002a, 2002b.

¹³⁵ Federal Communications Commission, 1999a,

¹³⁶ Viscusi, Vernon, and Harrington, 2000, Chapter 5.

highly targeted niche offering.¹³⁷ Indeed, networks need to debut with 10 million subscribers and quickly reach 30 million if they are just going to survive.¹³⁸ As the Commission noted three years ago, “most digital networks can expect to run without advertising until they reach the 30 million subscriber count or higher.”¹³⁹ Bravo, seeking a more mass audience network claims to need 60 million to do a good job.¹⁴⁰

¹³⁷ Joint Comments, 2001, p. 25, offer the following on the size and speed with which subscribers must be gained,

Comcast announced the launch of G4, a video game-oriented network 100% owned by Comcast... Comcast stated that cable systems serving seven million subscribers have already agreed to carry the network, and that the network expects to be carried on systems serving another 2.5 to 5 million households by the end of the year... Comcast also indirectly confirmed that carriage by the largest cable MSOs is critical to the success of the network... Comcast, the principal investor in the project, said it could get it venture off the ground for less than \$200 million if it could make the channel available to 20 million to 30 million cable subscribers.

¹³⁸ Grillo, 2001,

It became all or nothing, with lots of costs loaded upfront, he [Derek Baine, Senior Analyst, Paul Kagan Associates] explains. New nets were determined to debut with at least 10 million subs, and many were willing to pay anywhere from \$7 to \$10, or more, to get carriage.

“Fox put aside \$300 million to buy 30 million subs,” Baine says. “If you are going to make that huge of an investment, then you’ll need to come up with some glitzy, high profile programming.”

¹³⁹ Messina, 2001.

¹⁴⁰ Forkan, 2001.

Bravo, another Rainbow network, has increased its presence as an insertable channel on local cable systems by about 5 million this year to some 37 million subscribers, senior vice president of local ad sales John Duff said.

In fall 1998, Bravo boosted its commercial load to three breaks per hour, after airing limited Public Broadcasting-style sponsorships. It began offering local avails in spring 1999.

Duff projected that Bravo could hit 40 million insertable subscribers by year-end. Bravo’s overall count reached 60.8 million subscribers, up nearly 12 million over a year ago.

“That growth will draw attention on Madison Avenue, according to Bravo Networks Executive vice president of affiliate sales and marketing Gregg Hill. “Things start to change when you get to 60 million,” Hill said. “You get to critical mass.”

B. DOMINANT FIRMS

The pattern of development of programs supports this view. We start our analysis with the popular networks, and work down from there. The Commission's annual reports provide a basis for assessing the movement in the most popular program networks (see Exhibit IV-1). To be consistent, we identified the top 20 networks by subscription and the top 15 by prime time ratings in the First and Eighth Annual Reports on Video Competition. These networks account for over one-half of cable's prime time viewers and about one-third of cable's all day viewers. There are 26 networks on the two lists. Of these, 23 are on both lists. All but one of them (the Weather Channel) has ownership interest of either a cable MSO or a broadcast network. In other words, it appears that you must either own a wire or have transmission rights to be in the top tier of program networks. Four entities – AOL, Liberty, ABC/Disney and CBS/Viacom account for 20 of these networks.

The dominance of a few entities is not restricted to the most popular shows that were generally established prior to the passage of the 1992 Act. As Exhibit IV-2 shows, of the 39 new networks identified by the cable commenters that have been created since 1992, only 6 do not involve ownership by a cable operator or a national TV broadcaster. Sixteen of these networks have ownership by the top four programmers. Eight involve other MSOs and 10 involve other TV broadcasters. These numbers contradict the claim that there has been a dramatic change in the programming environment. The number of independent networks as a percentage of the total

EXHIBIT IV-1: CONCENTRATION OF MARQUEE PROGRAMMING

NETWORK	1993		2000		OWENRSHIP
	SUBS RANK	PRIME TIME RANK	SUBS	PRIME TIME RANK	
ESPN	1	4	4	12	ABC/DISNEY
CNN	2	12	11		AOLTW
USA	3	1	5	2	LIBERTY
NICK	4	6	10	6	CBS/VIACOM
DISCOVERY	5	10	2	8	LIBERTY
TBS	6	2	1	5	AOLTW
TNT	7	3	3	3	AOLTW
CSPAN	8		12		CABLE CONSORTIUM
MTV	9	13	15	14	CBS/VIACOM
LIFETIME	10	7	9	1	ABC/DISNEY
TNN	11	11	13	10	CBS/VIACOM
FAMILY	12	8	6		FOX/ABC/DISNEY
A&E	13	9	7	7	ABC/DISNEY
WEATHER	14		13		
HEADLINE NEWS	15		17	17	AOLTW
CNBC	16		18		NBC
VH-1	17		20		CBS/VIACOM
QVC	18		16		COMCAST
AMC	19		19		CABLEVISION
BET	20	14		19	CBS/VIACOM
WGN	21			9	LOCAL BCAST
CARTOON		5		4	AOLTW
SCI-FI	1	5		16	LIBERTY
TLC			14	13	LIBERTY
HISTORY				11	ABC/DISNEY
FX				15	FOX

FCC, *In the Matter of the Status of Competition in the Market for the Delivery of Video Programming*, First and Eighth Reports.

EXHIBIT IV-2: THE LACK OF INDEPENDENT ENTRY

NETWORK	LAUNCHOWNER	
Cartoon Network	1992	MSO
Sci-Fi Network	1992	MSO
Turner Classic Movies	1994	MSO
Independent Film Channel	1994	MSO
WAM! Kidz Network	1994	MSO
Much Music USA	1994	MSO
Golf Channel	1995	MSO
Outdoor Life	1995	MSO
Great Amer.	1995	MSO
Animal Planet	1996	MSO
CNNFI	1996	MSO
CNNSI	1996	MSO
BET Jazz	1996	MSO
WE: Women's Entertainment	1997	MSO
Discovery Health Channel	1998	MSO
Tech TV	1998	MSO
Style	1999	MSO
Oxygen	2000	MSO
TV Land	1996	BCAST
Soapnet	2000	BCAST
Nat. Geog	2001	BCAST
ESPN 2	1993	BCAST
FX Network	1994	BCAST
History Channel	1995	BCAST
ESPN Classic	1995	BCAST
Fox News Channel	1996	BCAST
MSNBC	1996	BCAST
Speedvision	1996	BCAST
ESPNNews	1996	BCAST
Fox Sports	1996	BCAST
LMN	1998	BCAST
Home & Garden	1994	BCAST
Food	1993	BCAST
Flix	1992	IND
Game Show Network	1994	IND
Bloomberg	1995	IND
Health	1998	IND
Goodlife	1998	IND
Ovation	1998	IND

Sources:

Joskow and McLaughlin, *An Economic Analysis of Subscriber Limits*, Table 2, *Comments of the Writers Guild of America Regarding Harmful Vertical and Horizontal Integration in the Television Industry*, Appendix A. FCC, *In the Matter of the Status of Competition in the Market for the Delivery of Video Programming*, Eighth Report, Tables D-1, D-2, D-3.

has remained about the same, as has the number of subscribers to independent networks.

Moreover, each of the dominant programmers has guaranteed access to carriage on cable systems – either by ownership of the wires (cable operators) or by carriage rights conferred by Congress (broadcasters).

- AOL Time Warner (has ownership in cable systems reaching over 12 million subscribers and cable networks with over 550 million subscribers),
- Liberty Media (owns some cable systems and has rights on ATT systems and owns cable networks with approximately 880 million subscribers),
- Disney/ABC (has must carry-retransmission rights and ownership in cable networks reaching almost 700 million subscribers),
- Viacom/CBS (has must carry-retransmission rights and ownership in cable networks reaching approximately 625 million subscribers).

These four entities have ownership rights in 20 of the top 25 programming networks based on subscribers and prime time ratings. They account for over 60 percent of subscribers to cable networks, rendering this market a tight oligopoly. Other entities with ownership or carriage rights account for four of the five remaining most popular networks. The only network in the top 25 without such a connection is the Weather Channel. It certainly provides a great public service, but is hardly a hotbed for development of original programming or civic discourse. Entities with guaranteed access to distribution over cable account for 80 percent of the top networks and about 80 percent of all subscribers' viewing choices on cable systems.

Cable magnate John Malone controls Liberty Media Corp., owns a substantial stake (currently passive) in News Corp., which owns the Fox broadcast network, local broadcast stations serving about 40% of the public, and dozens of cable regional sports channels. When Liberty was spun off from AT&T, it kept significant carriage rights. In addition, Malone has gone public with the fact that he intends to ask the Federal Trade Commission for full voting

rights on Liberty Media Corp.'s 4% stake in AOL Time Warner, Inc.¹⁴¹ The voting rights of this stake were limited as a result of the 1996 Federal Trade Commission consent decree, approving the merger of Time Warner and Turner. The FTC imposed this condition due to concerns about the potential anti-competitive effects of aligning the interests of two of the largest cable companies at the time, Malone's TCI and Time Warner. Liberty, as the programming arm of TCI, was subject to these restrictions when it acquired the Time Warner stake.

There has been speculation in the media that Malone would use this interest, as well as the interest of Ted Turner—an additional 3.8%, giving them a combined 8%—to achieve anti-competitive goals. This is significant because not only would Mr. Malone be able to manipulate a large share of AOL Time Warner, but he is also expected to become Comcast's largest shareholder after he converts his QVC stock to Comcast stock. The merger of Comcast and AT&T, the nation's largest cable company, is currently pending.

The active interests in AOL Time Warner and the combined AT&T/Comcast would give Mr. Malone a significant amount of influence over cable systems in the U.S. Although Liberty may not appear to be a dominant, vertically integrated MSO at this point in time, in reality it is positioned, through John Malone's broad ownership interests, to ensure distribution of Liberty and News Corp. programming over anywhere from one-third to all cable systems in the U.S.

C. ENTRY AND SURVIVAL IN THE PROGRAMMING MARKET

Cable commenters attempt to show that there are a variety of strategies available for entry into programming that make concerns about horizontal concentration unnecessary, either because costs of entry are small or success can be achieved with an extremely small number of subscribers.

¹⁴¹ Peers, 2002

A recent cable analysis identified eleven networks that have achieved substantial success since the passage of the 1992 Act. Every one of these is affiliated with an entity that has guaranteed carriage (see Exhibit IV-3). Five of these are also associated with a strategy of launching with scraps from the cutting room floor/or as a spin off of a sister channel. In the case of the spin offs, they use the name of the successful show and focus on a subcategory of issues or ideas originally covered by the hit show (CNN begets CNN Headline News and CNNFI). In the case of cutting room floor shows (particularly news) they use content created but not used by the hit show, in addition to simply reusing content that was already used. Viewers receive a ten-second sound byte on they broadcast news and a three minute interview on the cable news.

Two of these program networks involve early buy-outs. An additional three networks that were also affiliated with MSO/Broadcasters also involved launch through the cutting room floor/sister channel strategy. There are three networks on this list with fewer than twenty million subscribers, two associated with broadcasters and one with an MSO. Three have disappeared. The average number of subscribers at the time of a sales transaction was 22 million. Although five of the networks sold out at less than 20 million, two of those resold. Of the three networks that were sold with fewer than 20 million subscribers, all are defunct. They have been acquired by dominant programmers in the same category and have ceased to exist.¹⁴² The ability of a programmer to sell out if they if the programmers encounter discrimination at a much lower rate of profit than dominant firms, hardly indicates a healthy industry.¹⁴³

¹⁴² Moss, 2001; Zinkin, 2001.

¹⁴³ Moss, 2001.

EXHIBIT IV-3: SELL-OUT/BUY OUT OF NEW ENTRANT NETWORKS

NETWORK	OWNER	SALE DATE	SUBS	EXISTS
FX	BCAST	10/95	25.0	Y
AMERICA'S TALKING	BCAST	12/95	20.0	N
FOOD		5/96	25.8	Y
GOLF	MSO	8/96	3.8	Y
		2/00	30.0	
		5/01	33.4	
TECH/TV	MSO	6/97	9.0	Y
		11/99	14.0	
CLASSIC SPORTS		9/97	10.4	N
EYE ON PEOPLE	MSO	12/98	11.0	N
SPEEDVISION	BCAST	05/01	42.0	Y
OUTDOOR LIFE	MSO	05/01	36.0	Y

Joskow and McLaughlin, *An Economic Analysis of Subscriber Limits*, Table 4,

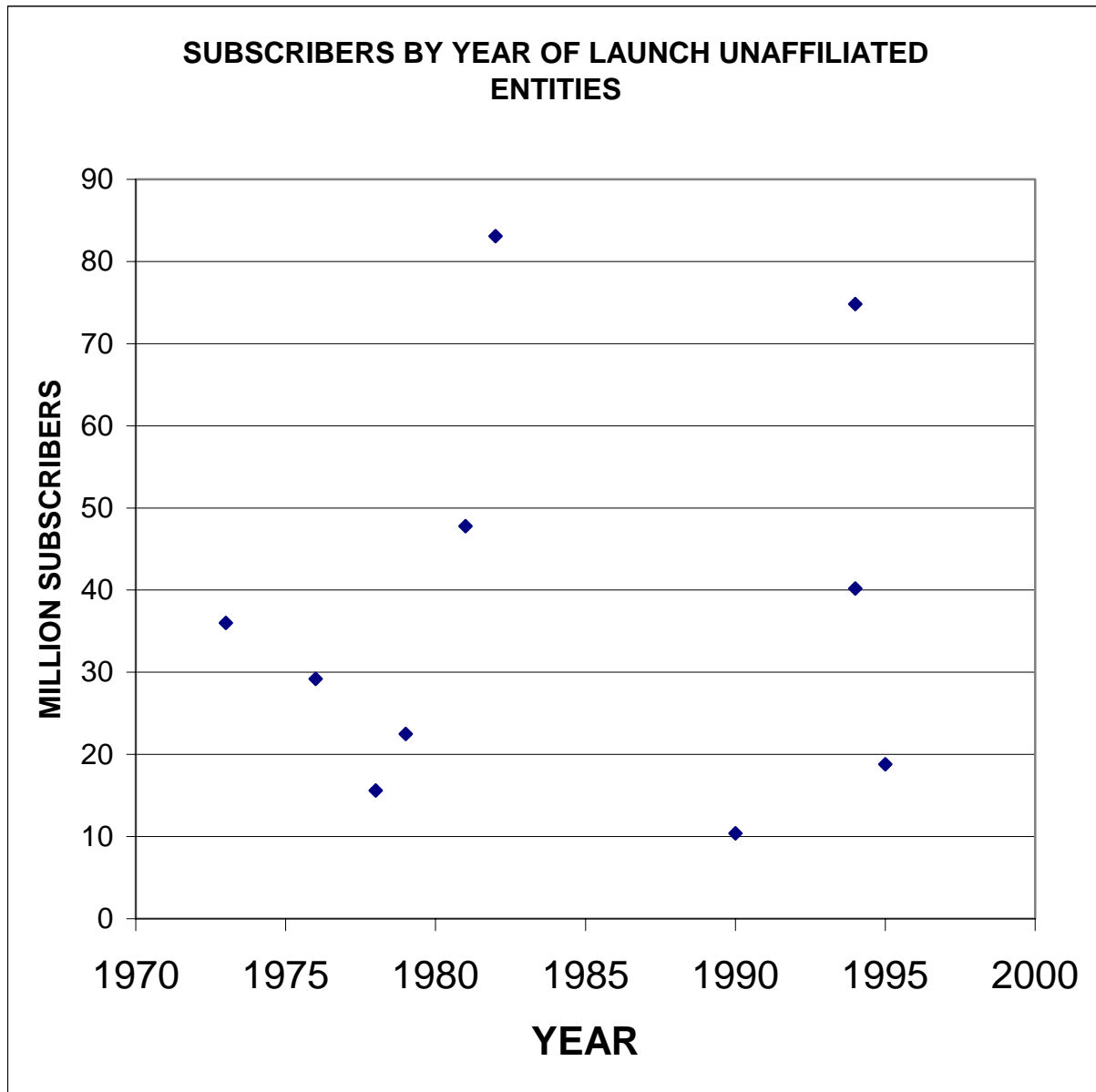
The list of low penetration channels offered by AT&T Comcast and their experts reinforces these points.¹⁴⁴ Every one is either a spin off of a larger brand or has been forced to sell equity to entities with distribution rights to gain carriage.

The analyses in Exhibits IV-4 and IV-5 clearly support the conclusion that independent programmers need to achieve 20 to 30 million subscribers if they are ultimately going to succeed. The existence of a potential buyout/sellout strategy does not change this observation. Exhibit IV-4 shows the pattern of subscribers and launch dates for affiliated entities for basic networks that are more than three years old. Exhibit VI-5 shows similar data for unaffiliated networks. These include all of the networks identified in the cable industry comments. Since the data set ends in 2000, we look at networks launched in 1997 or earlier. The message is clear: almost no networks survive past three years with fewer than 20 million subscribers, especially for the independents.

It is certainly true that a number of very small, predominantly regional networks exist. These are overwhelmingly cutting room floor or sister channel strategies. We have identified over 110 such entities. They account for about 5 percent of all subscribers. Of these networks, over half are affiliated with MSOs. Another 23 are regional sports and news channels, almost all affiliated with broadcasters. Six are foreign language networks. Four are devoted to reruns, which cannot be the source of original programming.

¹⁴⁴ AT&T Replies, p. 47; Shelanski, paras. 56-57.

EXHIBIT IV-5: INDEPENDENT CHANNELS



Writers Guild of America, "Comments of the Writers Guild of America Regarding Harmful Vertical and Horizontal Integration in the Television Industry," Federal Communications Commission, *In the Matter of Implementation of Section 11 of the Cable Television Consumer Protection and Competition Act of 1992 Implementation of Cable Act Reform Provisions of the Telecommunications Act of 1996 The Commission's Cable Horizontal and Vertical Ownership Limits and Attribution Rules Review of the Commission's Regulations Governing Attribution Of Broadcast and Cable/MDS Interests Review of the Commission's Regulations and Policies Affecting Investment In the Broadcast Industry Reexamination of the Commission's Cross-Interest Policy*, CS Docket No. 98-82, CS Docket No. 96-85, MM Docket No. 92-264, MM Docket No. 94-150, MM Docket No. 92-51, MM Docket No. 87-154, Federal Communications Commission, *In the Matter of the Status of Competition in the Market for the Delivery of Video Programming*, Eighth Report, January 14, Tables D-1, D-2, D-3, Cahiers, TVInsite, *Network Subscriber Counts*, September 17, 2001.

In addition, the network has financial power to leverage sports rights, spreads coverage over the network and cable channel. Sports involves unique events—marquee programming—different from all other “original” programming (except in breaking news events). Obviously, some sporting events are of greater interest in a particular community (i.e. home teams) than on a nationwide basis, and therefore would not need more than 20 million subscribers to survive in a regional market—high local interest would provide enough demand to ensure local cable carriage.

D. THE BROADCAST CHANNEL OF DISTRIBUTION

One of the more ironic arguments offered by the cable operators feeds off of the observation that broadcast networks have carriage rights. They argue that even if cable operators foreclosed their channels to independent programmers, these programmers could sell to the broadcast networks. This ignores the fact that cable operators control the vast majority of video distribution capacity.

There are approximately 60 channels per cable operator on a national average basis.¹⁴⁵ There are approximately 8 broadcast stations per DMA on a national average basis.¹⁴⁶ Each broadcast station has must carry rights for one station. They can bargain for more, particularly in the digital space, but the cable operators control more stations there as well. In other words, if we foreclose 85 percent of the channels, the programmers will be able to compete to sell to the remaining 15 percent of the channels. Needless to say, this prospect does not excite independent programmers.

¹⁴⁵ Federal Communications Commission, 2002b, p. 10.

¹⁴⁶ BIA Financial, 2002.

Moreover, when we examine the ownership of these all the networks, we discover that almost three-quarters of them are owned by six corporate entities. The four major TV networks, NBC, CBS, ABC, Fox, and the two dominant cable providers AOL Time Warner and ATT/Liberty, completely dominate the tuner. Estimates of the writing budgets of these producers are generally consistent with the subscriber counts. Moreover, as Exhibit IV-6 shows, these entities are thoroughly interconnected through joint ventures.

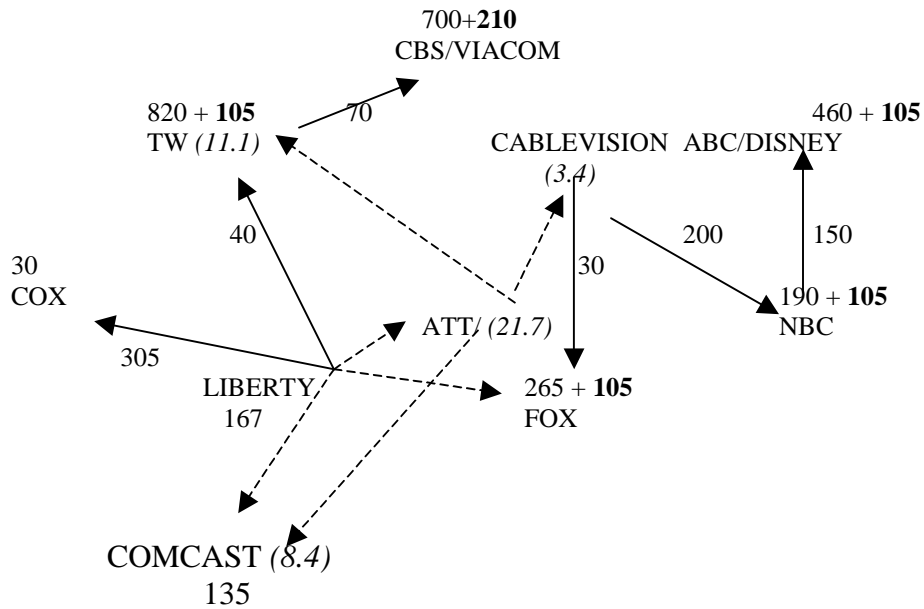
Not only does this argument not make sense from the economic point of view, but it does not make sense from a legal point of view. Congress clearly was concerned about cable market power in the programming market independent of and beyond network must carry/retransmission rights. It is evident from both the actual text of the statute and the legislative history that Congress had a more far-reaching purpose; Congress intended to limit the bargaining power of cable systems *vis a vis* independent programmers as well as broadcasters.

The 1992 Cable Act provided two mechanisms to ensure the carriage of local broadcast signals by cable systems. Broadcasters can elect either 1) Retransmission Consent, where they can negotiate with cable systems for compensation for their carriage, but carriage by the cable system is optional; or 2) Must Carry, where a cable system is required to carry a local broadcast signal, but no compensation is granted to the broadcaster. Public Law 102-385, §§ 15-16.

EXHIBIT IV-6: DOMINANT VIDEO PROGRAM PRODUCERS/DISTRIBUTORS

	SUBS (Million)	%	WRITING BUDGET (Million)	%
AOL – TIME WARNER	935	15.6	\$206	16.8
CBS/VIACOM	910	15.1	145	11.8
ABC/DISNEY	705	11.8	132	10.8
LIBERTY	540	9.0	106	8.6
NBC	495	8.3	53	4.4
FOX	<u>400</u>	<u>6.6</u>	<u>130</u>	<u>10.6</u>
Subtotal Top 6	3985	66.4	772	63.0
TOTAL	6000	100.0	1225	100.0

VERTICAL INTEGRATION AND JOINT VENTURES



SOURCES: Writers Guild of America, "Comments of the Writers Guild of America Regarding Harmful Vertical and Horizontal Integration in the Television Industry," Federal Communications Commission, *In the Matter of Implementation of Section 11 of the Cable Television Consumer Protection and Competition Act of 1992 Implementation of Cable Act Reform Provisions of the Telecommunications Act of 1996 The Commission's Cable Horizontal and Vertical Ownership Limits and Attribution Rules Review of the Commission's Regulations Governing Attribution Of Broadcast and Cable/MDS Interests Review of the Commission's Regulations and Policies Affecting Investment In the Broadcast Industry Reexamination of the Commission's Cross-Interest Policy*, CS Docket No. 98-82, CS Docket No. 96-85, MM Docket No. 92-264, MM Docket No. 94-150, MM Docket No. 92-51, MM Docket No. 87-154, Federal Communications Commission, *In the Matter of the Status of Competition in the Market for the Delivery of Video Programming*, Eighth Report, January 14, Tables D-1, D-2, D-3, Cahiers, TVInsite, *Network Subscriber Counts*, September 17, 2001. This is computed as Cable networks = Millions of Subscribers, total is 4.9 billion

Each broadcast network (in bold) is set at all TV households 105. Total broadcast networks "subscribers" is 1.17 billion. I got this from database (# of independent owners in each DMA times TV households per DMA.

Subscribers in joint ventures are attributed to the larger partner. Arrows point in the direction in which subscribers are attributed to owners.

Cable subscribers are in italics.

In essence, with Retransmission/Must Carry, broadcast has bargaining power equal to or greater than that of the cable system operator. Whereas cable owns the wire, broadcast networks have been given a right of transmission over cable systems. If the broadcaster has market power, i.e. if it has programming that it knows the cable system must obtain to maintain its subscriber base, the Retransmission provisions allow the broadcaster to obtain additional value—money or additional channel capacity—in return for the value to the cable company of having this particular channel on its cable system. If they do not have such confidence, the Must Carry provisions grant them certain carriage of their programming.

Although Congress did not grant a specific result to broadcasters, e.g. a certain dollar figure for broadcast programming, they provided broadcasters with a set of procedures and a bargaining structure to ensure carriage, plus additional value to the broadcaster. Because Congress felt that the service provided to communities by broadcasters was extremely valuable—such as their requirements to carry educational programming and meet the needs of the community through localized content—they enacted these mechanisms to protect broadcasters’ programming.

The 1992 Cable Act had some unusually detailed legislative findings (§2(a)(4)): Congress found that the cable industry has become highly concentrated, that the potential effects of such concentration are barriers to entry for *new programmers* and a reduction in the number of media voices available to consumers. Note the statute’s invocation of “new programmers,” which clearly intends beyond the scope of current broadcast networks and any additional channels these broadcasters might offer.

Because of MSOs clear incentives¹⁴⁷ to deny carriage of broadcast channels, and the public's interest in ensuring the future of broadcast programming, Congress found that it was necessary to guarantee carriage of those channels through the Must Carry rules; the Supreme Court upheld this reasoning in response to the cable industry's First Amendment challenge to Must Carry.¹⁴⁸ If Congress thought it were sufficient for independent programmers to get carriage through broadcast, as cable commenters contend in this proceeding, Congress would have had no reason to do anything more than impose the Must Carry/Retransmission requirement on cable companies, since these provisions guarantee that anything coming through a broadcast signal can reach the public in the appropriate local community. However, what cable commenters have failed to take note of is the numerous other provisions in the 1992 Cable Act that would be unnecessary to protect broadcasters who elect Must Carry/Retransmission, but are essential to any independent programmer who seeks carriage on cable through other means. Clearly, Congress intended to do much more than guarantee independent programmers an avenue to sell their programming to broadcast licensees and obtain carriage on cable systems as part of the broadcast-owned programming.

Instead, Congress crafted separate structural and behavioral requirements for cable companies to ensure that independent programmers had a reasonable opportunity to obtain

¹⁴⁷ In *Turner Broadcasting System, Inc., et al. v. Federal Communications Commission, et al* 1994 (upholding the must carry provisions of the 1992 Cable Act), the Supreme Court found immense incentives on behalf of MSOs to deny carriage of broadcasters. That is, despite the MSOs' protestations that they were and are nondiscriminatory in choosing programming for their systems, the Court noted even when broadcast channels had ratings higher than all cable channels, those broadcast channels were denied carriage. In other words, even where subscribers valued channels very highly as evidenced by ratings, the MSOs denied them carriage because they competed against the MSO for advertising dollars.

¹⁴⁸ *Turner Broadcasting Systems, Inc.*, 1994..

carriage rights on cable systems on their own. In the Conference Report on the Cable Act¹⁴⁹ Congress specifically noted that certain broadcast affiliated networks, such as ESPN, had substantial market power against MSOs. “In addition, there are certain major programmers that are more able to fend for themselves. It is difficult to believe a cable system would not carry the sports channel, ESPN. However, the Committee continues to believe that the operator in certain instances can abuse its locally-derived market power to the detriment of programmers and competitors. The provisions in the legislation reflect those concerns.”

In other words, throughout the entire section of the law that pertains to discrimination in programming and cable’s market power, Congress established unique mechanisms to enable independent programmers who have no relationship with broadcast networks to have an opportunity to disseminate their programming under fair terms and conditions. Independent programming—unaffiliated with cable, not directly or indirectly owned by broadcasters and not packaged through broadcast-supported channels—was the basis for the entire portion of the 1992 Act requiring the Commission to establish on horizontal and vertical limits on cable ownership.

V. MONOPSONY POWER HAS BEEN DEMONSTRATED BY PRIOR ECONOMETRIC ANALYSIS

The claim by AT&T Comcast and their experts that prior research on bargaining and monopsony power indicates an absence of discrimination and the abuse of monopsony power does not stand close scrutiny. It is either purely theoretical or relies on assumptions or situations

¹⁴⁹ Cable Television Consumer Protection and Competition Act of 1992, Senate Report; House Report; House Conference Report No. 102-862.

that are directly contradictory to conditions in the cable TV industry.¹⁵⁰ When looked at carefully, it refutes the cable industry claims that discrimination is not possible or likely.

A. BARGAINING

For example, recent research and theoretical analysis which purports to show that large size does not confer market power in bargaining with input suppliers rests on the fundamental assumption that there is no vertical integration¹⁵¹ or that programmers and cable operators have equal bargaining power.¹⁵² Ironically, three quarters of the networks studied were, in fact, vertically integrated. We have shown that there is substantial vertical integration in the industry—with one third of all program networks and one half of the top networks being vertically integrated—and that a few large firms dominate the landscape, using their bargaining power to extract concession from programmers or prevent them from getting on the cable system altogether.

The study that empirically addresses bargaining in the cable industry does so by estimating the shape of the revenue curve. It estimates the point at which becoming larger by merger leads to an increase in revenue for the cable operators at the expense of programmers. The study did not find that merging to achieve leverage is not possible. It found that leverage occurred at a large size (36+ million subscribers). The inflection point on the revenue curve occurs at a large number.

Unfortunately, it looks at the wrong issue in bargaining, or at best, looks at only part of the issue. It focuses on the advertising revenues earned by programmers, and explicitly excludes

¹⁵⁰ Chipty and Snyder, 1999, Raskovich, 2000.

¹⁵¹ This is only one of many critical factors that reduces or eliminates the relevance of these discussions to the current proceeding. For example, in their theoretical discussion, Waterman and Weiss, 1997, p. 79, assume *a la carte* pricing.

an assessment of programming license fees. In the real world, the largest disputes about discrimination pertain to license fees. In fact, the two very large, pending mergers have been justified on the grounds that cable operators will gain leverage to lower programming costs. EchoStar/Direct TV believes it can achieve leverage in bargaining with programmers at 17 million subscribers. ATT/Comcast claim the same objective at 22 million (or 30 if attributable subscribers are included).

Dertouzos and Wildman show that license fees account for a much larger part of the economic benefits that larger MSOs obtain in bargaining with programmers.¹⁵³ They see license fee discounts are three times as large as advertising revenue gains. Indeed, they argue that splits of revenues from advertising (which would appear to favor programmers) are offset by higher license fees, which would favor MSOs.¹⁵⁴

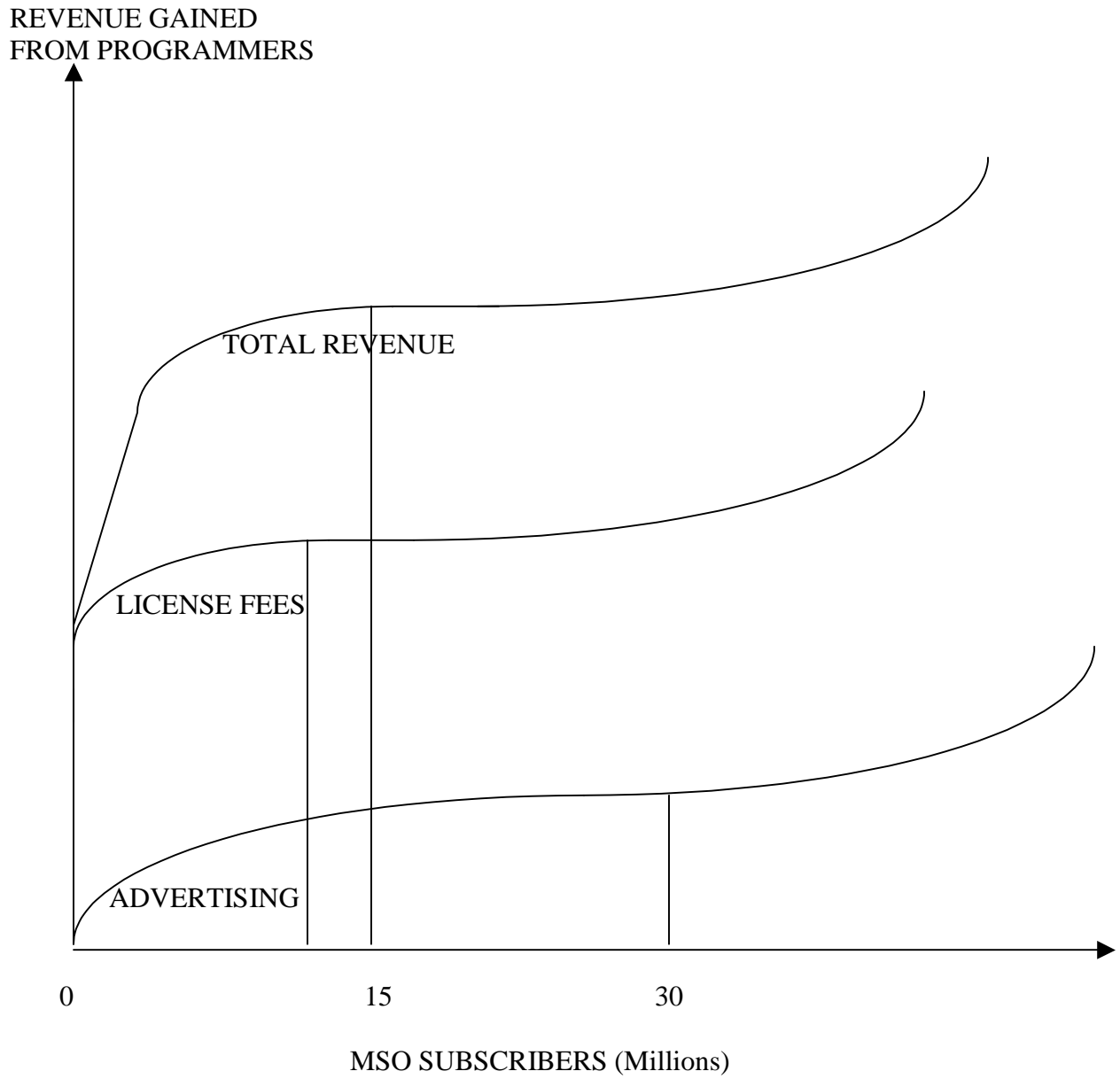
Inclusion of program licensing fees in the bargaining process could significantly shift the inflection point to lower levels of ownership. In today's market of 88 million subscribers, a 30 percent limit would be just over 26 million subscribers. Exhibit V-1 depicts this argument.

¹⁵² Joskow and McLaughlin, 2001, p. 15.

¹⁵³ Dertouzos and Wildman, 1999.

¹⁵⁴ Dertouzos and Wildman, 1999, p. 25, showing that half of the higher ad revenues for ESPN and CNN, which would indicate lack of bargaining power by MSO *vis-à-vis* programmers in an analysis of advertising only, is returned to MSOs in the form of higher license fees.

EXHIBIT V-1: GAINING LEVERAGE IN BARGAINING OVER REVENUE AS
AS SYSTEMS INCREASE IN SIZE



B. FLAW IN THE CABLE INDUSTRY'S ANALYSIS OF DISCRIMINATION

Cable industry commenters have built an economic house of cards by reifying each others' assumptions and standing on unsubstantiated hypotheses. Ordover cites Besen several times.¹⁵⁵ Besen presents a hypothetical analysis that attempts to demonstrate that it is not in the interest of the cable operators to discriminate. Ordover cites this analysis as proof that his hypothetical/theoretical arguments apply, but he provides no independent empirical analysis.

Besen's argument is also a hypothetical since it never examines the real world behavior of either cable operators or cable consumers. It takes average industry economics, makes assumptions about the costs and benefits of excluding networks and then asks the question "how many subscribers would the cable company have to lose to make the foreclosure strategy unprofitable?"

He builds an unrealistic hypothetical and concludes that

With these assumptions a very modest reduction in the number of subscribers served by a large vertically integrated cable operator would more than offset the operator's share of any increase in profits that an affiliated program service would obtain from the foreclosure of a rival service.

He assumes that the reader will be convinced that the number is so small; it is obvious that discrimination is not in the interest of the cable operator. He is wrong because he ignores the essence of the business model used by cable operators.

Like all of the cable industry commenters, Besen ignores the leverage provided by bundling—the most powerful arrow in the cable industry's anticompetitive quiver. Because cable operators have immense market power, they can force consumers to buy bigger and bigger bundles of services. They force take-it-or-leave-it decisions on the consumer. Besen assumes that, if a cable operator drops one channel, consumers who watch that channel will drop cable.

Because cable operators offer only bundles, the consumer must give up all of the channels in a tier of service. We have already shown that for price and other reasons, core cable subscribers—the lunch bucket crowd—are not likely to switch to satellite.

First, for the purpose of argument, at this stage, we will accept all of Besen's economic assumptions and assertions, but expose them to a reality check. Later we will criticize his assumptions. We focus on his 10 percent increase in price of programming case, since most public policy analyses have moved away from a 5 percent increase in price as a reason to take action. Besen calculates that if the cable operator lost about 1 percent of its subscribers as a result of the foreclosure strategy, it would not be profitable (see Exhibit V-2).

Besen did not notice that while this may be a modest percentage of the total number of subscribers of the large MSO, it is actually a very large part of the audience of the programming that is being foreclosed. In fact, only the most popular five program networks have audiences larger than that the threshold figure that Besen calculates. In other words, vertically integrated programmers would have to lose more subscribers than most networks have viewers to make discrimination unprofitable.

Even for the most popular network, if the cable company forced it off the system, more than half of its audience would have to give up cable service to make it unprofitable for the cable company to discriminate (see Exhibit V-3). In other words, more than half the people who really wanted channel X – one of 30+ channels in a cable package – would have to decide to give up the entire package of cable service for Besen's theory to be accurate. It is highly unlikely that such a large number of subscribers will be lost.

¹⁵⁵ Ordovery, 2002c, paras. 58-62, 125.

EXHIBIT V-2: BESEN THRESHOLDS FOR BREAK-EVEN

5 PERCENT PRICE INCREASE

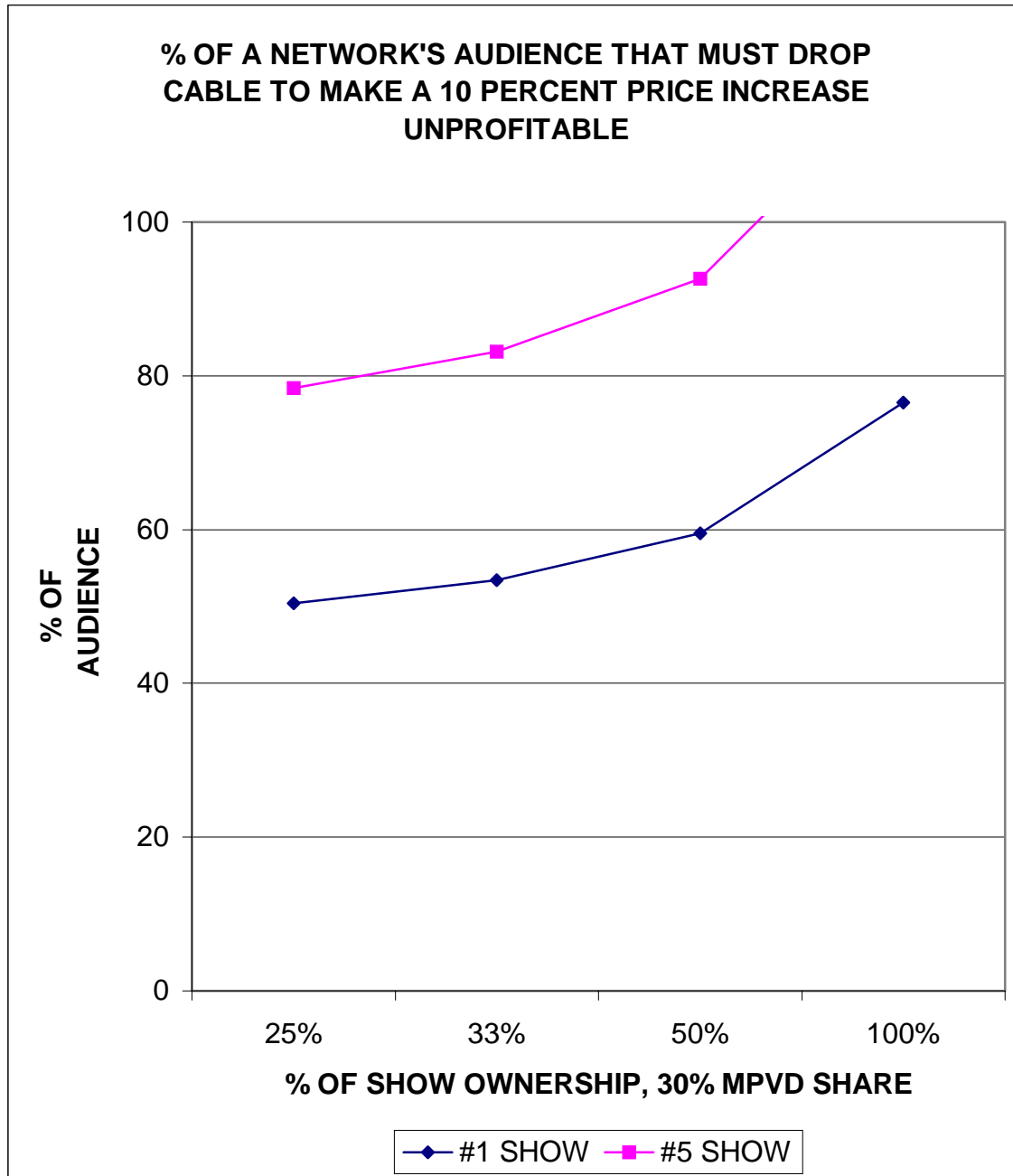
MSO PROGRAM SERVICE OWNERSHIP PERCENTAGE	CABLE OWNERSHIP OF MVPD SUBSCRIBERS				
	30%	35%	40%	50%	60%
25%	.79%	.78%	.77%	.76%	.76%
33%	.81	.80	.79	.78	.77
50%	.86	.84	.83	.81	.79
100%	.99	.95	.93	.89	.88

10 PERCENT PRICE INCREASE

MSO PROGRAM SERVICE OWNERSHIP PERCENTAGE	CABLE OWNERSHIP OF MVPD SUBSCRIBERS				
	30%	35%	40%	50%	60%
25%	.83%	.81%	.80%	.77%	.76%
33%	.88	.85	.83	.80	.78
50%	.98	.94	.91	.86	.83
100%	1.26	1.18	1.12	1.04	.98

Besen, Stanley M. 2002. "Declaration" attached to "Application and Public Interest Statement," *In the Matter of Applications for Consent to the Transfer of Control of Licenses Comcast Corporation and AT&T Corp., Transferors, To AT&T Comcast Corporation, Transferee*, February 28. p. 19.

EXHIBIT V-3:



Cahiers/ TVInsite, Basic Cable Primetime Ratings Average, 2001, January 10, 2002 for subscribers, Besen, Stanley M. 2002. "Declaration" attached to "Application and Public Interest Statement," *In the Matter of Applications for Consent to the Transfer of Control of Licenses Comcast Corporation and AT&T Corp., Transferors, To AT&T Comcast Corporation, Transferee*, February 28. p. 19, for loss of subscribers.

The Commission's econometric analysis provides a direct contradiction to Besen's contention. Assume that the average subscriber has 33 expanded basic cable networks, since there are about 35 networks with more than 70 million viewers. The elimination of one network constitutes about a 3 percent reduction in quality ($1/33 = .03$). Under Besen's approach, subscribers lose 3 percent of their networks as a result of the foreclosure.

If we apply the elasticity of substitution to a 3 percent reduction in quality – i.e. a removal of 3 percent of the programming, which is what Besen assumes happens, we find that only .41 percent of the cable subscribers would switch. This is between one-third and one-half the number that Besen calculated would be necessary to make discrimination unprofitable. In every case, it would be profitable for the vertically integrated cable company to discriminate.

Besen assumes that there is no price increase passed through to the public as a result of the increase in costs effected by the vertically integrated cable operator. This is completely at odds with the statements of cable operators who insist that they are just passing programming cost through to the public every year, when they raise cable rates for their customers. The price increase would be small (.3 percent) and it would have a small effect on subscribership for non-integrated companies (we can assume that the integrated entity does not have to increase its prices since this is partly an internal transfer).¹⁵⁶ One could argue that the integrated company would only pass through the percentage of the cost increase it had to pay to its partners in the program, in which case the loss of subscribers would increase slightly as the percentage ownership declined (see Exhibit V-4). As the ownership interest declines the profitability narrows, but discrimination remains profitable.

Besen's analysis flunks the reality test.

An empirically grounded view of cable industry and consumer behavior contradicts Besen's theory. Several of Besen's assumptions are not consistent with economic reality.

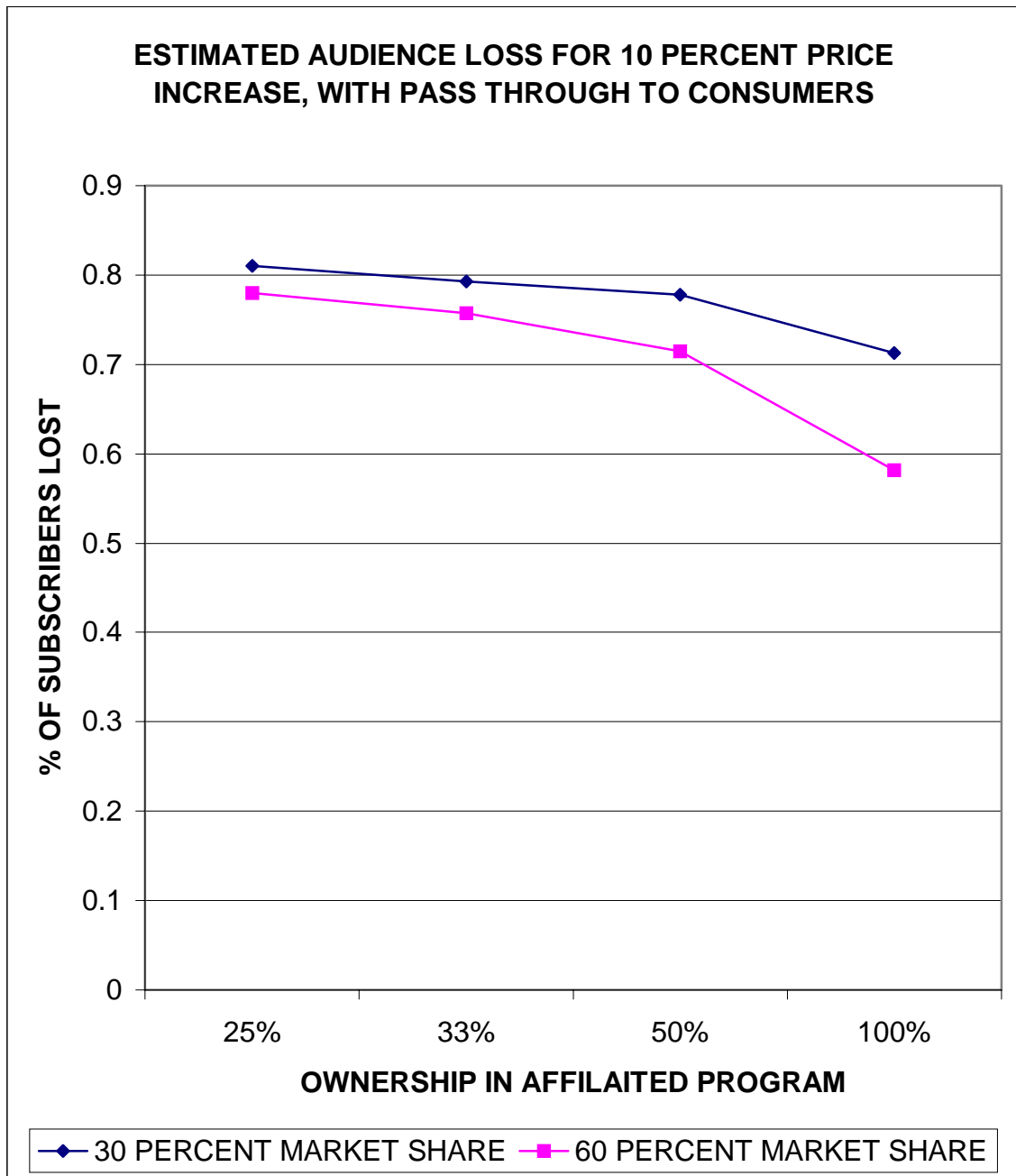
Within a foreclosure framework, Besen appears to have ignored several benefits because he assumes that when a program network is eliminated from a cable system, the channel goes blank. He does not estimate how much the integrated programmer gains by adding more subscribers on non-affiliated systems. Integrated MSOs do not discriminate at random, they are more likely to discriminate against programs that compete with their owned offering. If the competitor exits the market, other cable operators would want to add a substitute program, perhaps that of the integrated MSO who triggered the exit.

Similarly, Besen does not identify any gains to the integrated MSO by adding one of its own offerings in the slot vacated by the foreclosed network. In work conducted by independent researchers, this appears to be exactly the pattern of cable behavior. As discussed below, vertically integrated companies foreclose in order to add more of their own shows and charge higher prices to consumers.

The benefits that Besen has overlooked flow from his incorrect methodological and analytic approach which relies on the argument that foreclosure should be looked at for the aggregate of all networks carried and not carried, rather than for discrimination against specific program networks. In Besen's approach, the discrimination by an integrated operator against a high value

¹⁵⁶ The 70 percent of the market that is not integrated but increased prices would suffer slight reduction of subscribers -- .3 percent). The combined effect (.71 percent) would still be less than the threshold values Besen calculated.

EXHIBIT V-4:



Cahiers/ TVInsite, Basic Cable Primetime Ratings Average, 2001, January 10, 2002 for subscribers, Besen, Stanley M. 2002. "Declaration" attached to "Application and Public Interest Statement," *In the Matter of Applications for Consent to the Transfer of Control of Licenses Comcast Corporation and AT&T Corp., Transferors, To AT&T Comcast Corporation, Transferee*, February 28. p. 19, for loss of subscribers.

premium or basic channel that competes with one of its marquee offerings is offset by its lack of discrimination against an unaffiliated basic educational network or a religious network programming, where the vertically integrated company has no offering.

Besen's conclusion that there is no foreclosure is in contrast to published studies that found foreclosure, particularly when one considers directly competing types of program networks. Indeed, the strongest conclusion in studies cited by the Commission finds foreclosure.¹⁵⁷ Exhibit V-5 applies the lessons of the published studies of discrimination to the Besen data. That is, it breaks out the premium movie channels (per Waterman and Weiss) and the basic movie channels¹⁵⁸ and home shopping (per Chipty).

We find that there is strong favoring for affiliated movie programming *vis a vis* directly competing programming in Besen's the simple and probit analyses. Since TCI had between 9 and 10 million subscribers in this data set, it was using a substantial degree of its resources to favor its programming. All of the shopping networks considered in Besen's analysis were affiliated. The fact that TCI appears to "disfavor" this programming is more of a function of the effort to avoid redundancy in a category in which it faced no competition (at least in this data set). In fact, TCI displayed these networks to more subscribers in total than did non-TCI affiliated MSOs, even though three of the four individual networks that were "disfavored." These three networks account for half of the affiliated networks Besen found TCI "disfavored."

¹⁵⁷ Chipty and Waterman and Weiss are cited at p.

¹⁵⁸ We have included all basic channels that Waterman and Weiss, 1997, (see Table 3-1) identified as showing movies.

EXHIBIT V-5: PROGRAM CATEGORY SPECIFIC DISCRIMINATION

NETWORK	SUBSCRIBERS	
	ADVANTAGED/ SIMPLE	DISADVANTAGED/ PROBIT
PAY MOVIES NETWORKS		
TCI		
ENCORE	8471	5812
NON-TCI		
CINEMAX	309	
SHOWTIME	282	196
HBO	13	5
TMC	-1237	-836
NET	9104	6447
BASIC MOVIE NETWORKS		
TCI		
FAMILY	265	177
TNT	766	530
TBS	202	142
AMC	2971	2034
NON-TCI		
USA	147	105
DISNEY	13	12
BRAVO	-403	-280
WWOR	-995	-681
WPIX	-713	-490
WGN	-1479	-1019
NET BASIC MOVIE	7634	5236
SHOPPING		
TCI		
HSN	-2286	-1563
QVC-FASH	-760	-463
HSN-2	-363	-248
QVC	1681	1151
NET	-1728	-1123

Besen, Stanley M. 2002. "Declaration" attached to "Application and Public Interest Statement," In the Matter of Applications for Consent to the Transfer of Control of Licenses Comcast Corporation and AT&T Corp., Transferors, To AT&T Comcast Corporation, Transferee, February 28, pp. 27-30.

This critique of Besen/Ordovery can be stated in another way that makes it even more relevant to this proceeding. It is easy to discriminate against smaller programmers,¹⁵⁹ especially if they are new entrants, and particularly if they are contemplating developing programs that compete with the dominant integrated offerings.

There are a number of additional reasons that Besen's foreclosure analysis should not be relied upon by the Commission to relax the horizontal limit in the mistaken belief that integrated MSOs have not discriminated against unintegrated programmers.

First, his data pertain to a period in which rates were regulated. Rate regulation changes the incentives for large, vertically integrated firms.¹⁶⁰

Second, Besen's analysis shows that there is a positive, but not statistically significant relationship between ownership and carriage rates. This first calculation is a simple correlation coefficient that does not control for any other characteristics of networks or cable operations.

Third, in the analysis that includes statistical controls for system characteristics, the statistics for the full model are not presented, so there is no opportunity to evaluate its validity or representativeness. Arbitrary decision about which programs were included were made (e.g. why were 12 states chosen?). The statistical validity of several important assertions is not reported.

¹⁵⁹ Waterman and Weiss, 1997, p. 98,

Although the data are less complete than for premium networks, the weight of the evidence is that MSOs integrated with basic and hybrid networks also tend to favor those networks by carrying them more frequently than the average nonintegrated system. The differences appear to be very minor, however, for more widely distributed basic networks.

¹⁶⁰ Chipty, 2000, p 430, notes that price regulation may be a confounding factor in previous foreclosure analysis.

Fourth, Besen's assumption is that the objective of discrimination is to force programming to exit and that foreclosure is the only means of discrimination. However, we show that there are other types of discrimination that are important. We have argued and demonstrated that foreclosure is only one form of discrimination.

Discrimination may also take place for non-economic reasons. Given the massive monopoly rents being earned by cable operators, as demonstrated in our initial comments and confirmed above, owners have the flexibility to pursue their political agendas. Since discrimination is likely to impose little, if any cost, this becomes a large concern.¹⁶¹

The empirical evidence and this critique of the industry comments lead to a simple and clear conclusion in terms of the statute. Imposing a limit on horizontal ownership and thereby checking both the horizontal monopsony power and the vertical market power of the large MSOs promotes diversity without detracting from consumer welfare. Citizens gain and consumers do not lose.

¹⁶¹ Waterman and Weiss, 1997, pp. 155-156, make this point in arguing that vertical integration is a smaller problem than horizontal concentration.

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DECLARATION

Dr. Mark Cooper declares as follows:

4. I am Director of Research at Consumer Federation of America.

5. This declaration is submitted in support of the *Petition to Deny the Applications for Consent to the Transfer of Control of Licenses of Comcast Corporation and AT&T Corp., Transferors, to AT&T Comcast Corporation, Transferee*, Docket No. MB 02-70, filed on behalf of Arizona Consumer Council, *et al.*

6. I have reviewed the factual assertions contained in the *Petition to Deny* and I declare that they are true to the best of my knowledge.

I hereby state under penalty of perjury the forgoing is correct and true.

Executed on June 4, 2002



Dr. Mark Cooper

CURRICULUM VITA

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EDUCATION:

Yale University, Ph.D., 1979, Sociology
University of Maryland, M.A., 1973, Sociology
City College of New York, B.A., 1968, English

PROFESSIONAL EXPERIENCE:

President, Citizens Research, 1983 - present
Research Director, Consumer Federation of America, 1983-present
Fellow, Stanford Center on Internet and Society, Present
Associated Fellow, Columbia Institute on Tele-Information, Present
Principle Investigator, Consumer Energy Council of America, Electricity Forum, 1985-1994
Director of Energy, Consumer Federation of America, 1984-1986
Director of Research, Consumer Energy Council of America, 1980-1983
Consultant, Office of Policy Planning and Evaluation, Food and Nutrition Service, United States Department of Agriculture, 1981-1984
Consultant, Advanced Technology, Inc., 1981
Technical Manager, Economic Analysis and Social Experimentation Division, Applied Management Sciences, 1979
Research Associate, American Research Center in Egypt, 1976-1977
Research Fellow, American University in Cairo, 1976
Staff Associate, Checchi and Company, Washington, D.C., 1974-1976
Consultant, Division of Architectural Research, National Bureau of Standards, 1974
Consultant, Voice of America, 1974
Research Assistant, University of Maryland, 1972-1974

TEACHING EXPERIENCE:

Lecturer, Washington College of Law, American University, Spring, 1984 - 1986, Seminar in Public Utility Regulation
Guest Lecturer, University of Maryland, 1981-82, Energy and the Consumer, American University, 1982, Energy Policy Analysis

Assistant Professor, Northeastern University, Department of Sociology, 1978-1979, Sociology of Business and Industry, Political Economy of Underdevelopment, Introductory Sociology, Contemporary Sociological Theory; College of Business Administration, 1979, Business and Society

Assistant Instructor, Yale University, Department of Sociology, 1977, Class, Status and Power

Teaching Assistant, Yale University, Department of Sociology, 1975-1976, Methods of Sociological Research, The Individual and Society

Instructor, University of Maryland, Department of Sociology, 1974, Social Change and Modernization, Ethnic Minorities

Instructor, U.S. Army Interrogator/Linguist Training School, Fort Hood, Texas, 1970-1971

PROFESSIONAL ACTIVITIES:

Member, Advisory Committee on Appliance Efficiency Standards, U.S. Department of Energy, 1996 - 1998

Member, Energy Conservation Advisory Panel, Office of Technology Assessment, 1990-1991

Fellow, Council on Economic Regulation, 1989-1990

Member, Increased Competition in the Electric Power Industry Advisory Panel, Office of Technology Assessment, 1989

Participant, National Regulatory Conference, The Duty to Serve in a Changing Regulatory Environment, William and Mary, May 26, 1988

Member, Subcommittee on Finance, Tennessee Valley Authority Advisory Panel of the Southern States Energy Board, 1986-1987

Member, Electric Utility Generation Technology Advisory Panel, Office of Technology Assessment, 1984 - 1985

Member, Natural Gas Availability Advisor Panel, Office of Technology Assessment, 1983-1984

Participant, Workshop on Energy and the Consumer, University of Virginia, November, 1983

Participant, Workshop on Unconventional Natural Gas, Office of Technology Assessment, July, 1983

Participant, Seminar on Alaskan Oil Exports, Congressional Research Service, June 1983

Member, Thermal Insulation Subcommittee, National Institute of Building Sciences, 1981-1982

Round Table Discussion Leader, The Energy Situation: An Open Field For Sociological Analysis, 51st Annual Meeting of the Eastern Sociological Society, New York, March, 1981

Member, Building Energy Performance Standards Project Committee, Implementation Regulations Subcommittee, National Institute of Building Sciences, 1980-1981

Participant, Summer Study on Energy Efficient Buildings, American Council for an Energy Efficient Economy, August 1980

Member, University Committee on International Student Policy, Northeastern University, 1978-1979

Chairman, Session on Dissent and Societal Reaction, 45th Annual Meeting of the Eastern Sociological Society, April, 1975

Member, Papers Committee, 45th Annual Meeting of the Eastern Sociological Society, April, 1975

Student Representative, Programs, Curricula and Courses Committee, Division of Behavioral and Social Sciences, University of Maryland, 1973-1974

President, Graduate Student Organization, Department of Sociology, University of Maryland, 1973-1974

HONORS AND AWARDS:

American Sociological Association, Travel Grant, Uppsala, Sweden, 1978
Fulbright-Hays Doctoral Research Abroad Fellowship, Egypt, 1976-1977
Council on West European Studies Fellowship, University of Grenoble, France, 1975
Yale University Fellowship, 1974-1978
Alpha Kappa Delta, Sociological Honorary Society, 1973
Phi Delta Kappa, International Honorary Society, 1973
Graduate Student Paper Award, District of Columbia Sociological Society, 1973
Science Fiction Short Story Award, University of Maryland, 1973
Maxwell D. Taylor Award for Academic Excellence, Arabic, United States Defense Language Institute, 1971
Theodore Goodman Memorial Award for Creative Writing, City College of New York, 1968
New York State Regents Scholarship, 1963-1968
National Merit Scholarship, Honorable Mention, 1963

BOOKS:

Equity and Energy: Rising Energy Prices and the Living Standard of Lower Income Americans (Boulder, Colorado: Westview Press, 1983)
The Transformation of Egypt: State and State Capitalism in Crisis (Baltimore: Johns Hopkins University Press, 1982)

ARTICLES AND PAPERS:

“Open Communications Platforms: Cornerstone of Innovation and Democratic Discourse In the Internet Age,” The Regulation of Information Platforms, University of Colorado School of Law, January 27, 2002 (to be published in Journal on Telecommunications, Technology and Intellectual Property).

“Inequality In The Digital Society: Why The Digital Divide Deserves All The Attention It Gets,” Bridging The Digital Divide: Equality In The Information Age, Cardozo School Of Law, November 15, 2000, Cardozo Arts and Entertainment Law Journal, 2002.

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“Antitrust And Consumer Protection In The New Economy: Lessons From The Microsoft Case,” Conference On Antitrust Law In The 21st Century Hasting Law School, February 10, 2000, Hastings Law Journal, 52: 4, April 2001.

“Foundations And Principles Of Local Activism In The Global, New Economy,” The Role of Localities and States in Telecommunications Regulation: Understanding the Jurisdictional Challenges in an Internet Era, University of Colorado Law School
April 16, 2001

“The Role Of Technology And Public Policy In Preserving An Open Broadband Internet,” The Policy Implications Of End-To-End, Stanford Law School, December 1, 2000

“Picking Up The Public Policy Pieces Of Failed Business And Regulatory Models,” Setting The Telecommunications Agenda, Columbia Institute For Tele-Information November 3, 2000

"Progressive, Democratic Capitalism In The Digital Age," 21st Century Technology and 20th Century Law: Where Do We Go from Here? The Fund for Constitutional Government, Conference on Media, Democracy and the Constitution, September 27, 2000

"Open Access To The Broadband Internet: Technical And Economic Discrimination In Closed, Proprietary Networks," University of Colorado Law Review, Vol. 69, Fall 2000

"Freeing Public Policy From The Deregulation Debate: The Airline Industry Comes Of Age (And Should Be Held Accountable For Its Anticompetitive Behavior)," American Bar Association, Forum On Air And Space Law, The Air and Space Lawyer, Spring 1999

"Evolving Concepts of Universal Service," The Federalist Society, October 18, 1996

"Protecting the Public Interest in the Transition to Competition in New York Industries," The Electric Utility Industry in Transition (Public Utilities Reports, Inc. & the New York State Energy Research and Development Authority, 1994)

"Delivering the Information Age Now," Telecom Infrastructure: 1993, Telecommunications Reports, 1993

"Divestiture Plus Four: Take the Money and Run," Telematics, January 1988

"Regulatory Reform in Telecommunications: A Solution in Search of a Problem," Telematics, 4:11, November, 1987.

"The Line of Business Restriction on the Regional Bell Operating Companies: A Plain Old Anti-trust Remedy for a Plain Old Monopoly," Executive Leadership Seminar on Critical Policy Developments in Federal Telecommunications Policy, The Brookings Institution, October 7, 1987

"An Uninformed Purchase," Best's Review: Life/Health Insurance Edition, July 1987

"The Trouble with the ICC and the Staggers Act," Pacific Shipper, June 1, 1987

"The Downside of Deregulation: A Consumer Perspective After A Decade of Regulatory Reform," Plenary Session, Consumer Assembly, February 12, 1987

"Regulatory Reform for Electric Utilities, Plenary Session, Consumer Federation of American, Electric Utility Conference, April 4, 1987

"Round Two in the Post-Divestiture Era: A Platform for Consumer Political Action," Conference on Telephone Issues for the States -- 1984: Implementing Divestiture, May, 1984

"The Leftist Opposition in Egypt," Conference on Sadat's Decade: An Assessment, conducted by the Middle Eastern Studies Program of the State University of New York at Binghamton, April, 1984

"The Seven Percent Solution: Energy Prices, Energy Policy and the Economic Collapse of the 1970s," in Energy Concerns and American Families in the 1980s (Washington, D.C.: The American Association of University Women Educational Foundation, 1983)

"State Capitalism and Class Structure in the Third World: The Case of Egypt," International Journal of Middle East Studies, XIV:4, 1983

"Natural Gas Policy Analysis," in Edward Mitchell (Ed.), Natural Gas Pricing Policy (Washington, D.C.: American Enterprise Institute, 1983)

"The Crisis in the Rental Housing Market: Energy Prices, Institutional Factors and the Deterioration of the Lower Income Housing Stock," 53rd Annual Meeting of the Eastern Sociological Society, March, 1983

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"The Militarization and Demilitarization of the Egyptian Cabinet," International Journal of Middle East Studies, XIII:2, 1982

"The Role of Consumer Assurance in the Adoption of Solar Technologies," International Conference on Consumer Behavior and Energy Policy, August, 1982

"Energy and the Poor," Third International Forum on the Human Side of Energy, August, 1982

"Energy Price Policy and the Elderly," Annual Conference, National Council on the Aging, April, 1982

"Sociological Theory and Economic History: The Collegial Organizational Form and the British World Economy," 51st Annual Meeting of the Eastern Sociological Society, March, 1981

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"Impact of Incentive Payments and Training on Nursing Home Admissions, Discharges, Case Mix and Outcomes," Massachusetts Sociological Society, November, 1979

"The State as an Economic Environment," 7th Annual New England Conference on Business and Economics, November, 1979

"The Domestic Origins of Sadat's Peace Initiative," Yale Political Union, March, 1979

"State Capitalism and Class Structure: The Case of Egypt," 49th Annual Meeting of the Eastern Sociological Society March, 1979

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"The Welfare State and Equality: A Critique and Alternative Formulation from a Conflict Perspective," 48th Annual Meeting of the Eastern Sociological Society, April, 1978

"A Comparative Evaluation of Operation Breakthrough," Annual Meeting of the Environmental Research Design Association, April, 1975

"Personality Correlates of Technology and Modernization in Advanced Industrial Society (with Ed Dager), 8th Annual Meeting of the International Sociological Society, August, 1974

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"Racialism and Pluralism: A Further Dimensional Analysis," Race and Class, XV:3, 1974

"Toward a Model of Conflict in Minority Group Relations," Annual meeting of the District of Columbia Sociological Society, May, 1973

"The Occurrence of Mutiny in World War I: A Sociological View," International Behavioral Scientist, IV:3, 1972

"A Re-evaluation of the Causes of Turmoil: The Effects of Culture and Modernity," in A Reader in Collective Behavior and Social Movements (F.E. Peacock: New York, 1978). First published in Comparative Political Studies, VII:3, 1974. First presented at the 43rd Annual Meeting of the Eastern Sociological Society, March, 1973

TESTIMONY:

STATE AND PROVINCE

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"Direct Testimony Of Dr. Mark N. Cooper On Behalf Of The Attorney General Of Oklahoma, Before The Oklahoma Corporation Commission Application Of Ernest G. Johnson, Director Of The Public Utility Division, Oklahoma Corporation Commission, To Require Arkla, A Division of Reliant Energy Resources Corporation To Inform The Commission Regarding Planning Of Energy Procurement Practices And Risk Management Strategies And For A Determination As To Appropriate Methods To Lessen The Impact Of Energy Price Volatility Upon Consumers, Cause No. Pud 2001-00094, May 18, 2001

"Direct Testimony Of Dr. Mark N. Cooper On Behalf Of The Attorney General Of Oklahoma, Before The Oklahoma Corporation Commission Application Of Ernest G. Johnson, Director Of The Public Utility Division, Oklahoma Corporation Commission, To Require Oklahoma Natural Gas Company To Inform The Commission Regarding Planning Of Energy Procurement Practices And Risk Management Strategies And For A Determination As To Appropriate Methods To Lessen The Impact Of Energy Price Volatility Upon Consumers, Cause No. Pud 2001-00097, May 14, 2001

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"Statement of Dr. Mark N. Cooper before the Governor's Task on Electricity Restructuring," Las Vegas Nevada, November 30, 2000

"Open Access," Committee on State Affairs of the Texas House of Representatives, August 16, 2000

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