S. HRG. 100-818

COMPETITIVE ISSUES IN THE CABLE TELEVISION INDUSTRY

HEARING

BEFORE THE

SUBCOMMITTEE ON ANTITRUST, MONOPOLIES AND BUSINESS RIGHTS

OF THE

COMMITTEE ON THE JUDICIARY UNITED STATES SENATE

ONE HUNDREDTH CONGRESS

SECOND SESSION

ON

THE CONCERN OF POSSIBLE COMPETITIVE PROBLEMS WITHIN THE CABLE TELEVISION INDUSTRY

MARCH 17, 1988

Serial No J-100-55

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COMPETITIVE ISSUES IN THE CABLE TELEVISION INDUSTRY

THURSDAY, MARCH 17, 1988

U S SENATE,
SUBCOMMITTEE ON ANTITRUST, MONOPOLIES
AND BUSINESS RIGHTS,
COMMITTEE ON THE JUDICIARY,
Washington, DC

The subcommittee met, pursuant to notice, at 9 35 a m , in room SD–226, Dirksen Senate Office Building, Senator Howard M Metzenbaum (chairman of the subcommittee) presiding

Also present Senators Thurmond and Humphrey

OPENING STATEMENT OF HON HOWARD M METZENBAUM, A U S SENATOR FROM THE STATE OF OHIO

Senator METZENBAUM The hearing will come to order

Cable television has brought enormous benefits to consumers It has provided American families with access to an incredible diversity of programming It has allowed community organizations and local governments access to the airwaves

But while consumers can benefit from cable, they can be treated unfairly by a cable monopoly Like any other area of the economy, if competition disappears or is foreclosed, the consumer will ultimately pay a price

From today's vantage point, it is possible to look ahead to see potential problems to consumers First, since cable rates were deregulated 16 months ago, cable rates have zoomed upward In some places, deregulation has led to increases of 200, 300, or even 400 percent For example, in Denver before deregulation consumers could buy services for $2 50 Now the smallest monthly check they can write is for $13 95

In Russell, OH, rates jumped from $5 to $16, and in Fairfax County, VA, cable subscribers lost six channels if they did not increase their monthly payments to $3 07 to $12 95

The message that is coming through loud and clear is that perhaps we should revisit our decision to deregulate cable I can tell you that if rates continue to spiral upward, this Senator will urge that Congress do just that

Since Congress deregulated the cable industry, technology has continued to advance, offering new and expanded competition to cable I am extremely bothered by reports that the cable industry is freezing its potential competition out of the market by refusing

to provide programming or by making programming available only at artificially high prices

Once a family subscribes to cable, access to free TV is practically limited to broadcast stations carried on cable Cable interests will increasingly compete with broadcasters for viewership and advertising revenue

I am concerned that while cable serves as a gatekeeper to the family TV set, it does so in a way that preserves and protects our valuable national resource of free TV I am troubled, and I think that millions of Americans that cannot afford to subscribe to cable, should also be troubled to see reports that one day a consumer might have to subscribe to cable to see the World Series, the Academy Awards, or the Summer Olympics

These are complicated issues, not susceptible to quick and facile solutions I look forward to discussing with today's witnesses how we can best preserve the benefits cable has provided and retain the vigorous and competitive market to protect consumers today and in the future

I think it should be understood that this hearing today is not a precursor to the introduction of legislation This hearing today is to sound a warning and an indication of concern to the cable industry that they have grown too powerful While cable is a medium that the American people are using more and more, and are pleased to do so, but that there can be an abuse of the rights which the cable operators have in this country

Congress went out of its way to let down the bars, so that municipalities could no longer regulate the rates Cable has a responsibility Free TV has a responsibility I would say that we would hope that at the conclusion of these hearings, that there might be some positive movements forward, by the industry, to avoid the necessity of Congress interceding

It is this Senator's view that under the best circumstances Government should not be involved An industry that is as powerful as this one, and many other industries as well, should look at their problems themselves and say maybe there are some changes that need to be made before the Congress of the United States has to direct its attention to the problem and come down with a legislative solution

We are very pleased to have with us today the very distinguished ranking member of this committee, Senator Strom Thurmond

OPENING STATEMENT OF HON STROM THURMOND, A U S SENATOR FROM THE STATE OF SOUTH CAROLINA

Senator THURMOND Thank you very much, Mr Chairman

Mr Chairman, there are many issues which we will hear about today concerning possible competitive problems within the cable television industry These problems affect not only the cable industry, but also other noncable distributors and the viewing consumers

In fact, just several months ago, we held a hearing concerning the contractual arrangements between the NFL and cable networks for the broadcast of regular season football games, including some Monday night games One of the issues raised was the extent

to which the broadcast of these games, previously on free television, should be available only on pay television

Cable television has grown by leaps and bounds since its introduction in 1948 and, by most accounts, can no longer be considered a fledgling industry According to one recent report, 43 million homes, or 50 percent of those homes which can subscribe to cable, do so This same report states that in 1952 there were 70 community antenna television operations, the precursor of cable, with approximately 200 subscribers per system

Today the cable industry is dominated by major companies known as multiple system operators, or MSO's, with approximately half of all cable subscribers subscribing to one of the 15 largest MSO's Furthermore, the number of program services has grown from HBO and WTBS in 1975 and 1976 to about 45 program services now offered by way of satellite on a pay basis

Mr Chairman, I welcome the opportunity to hear from our witnesses today, and to explore with them the problems and possible solutions which confront this very exciting technology Although it is no longer an infant or fledgling technology, it is a growing technology, and as such, it is bound to experience those problems associated with rapid growth

I want to thank our witnesses for appearing today I have a conflict with the Armed Services Committee, some secret information about what is going on in Central America, and I am going to have to leave in a little bit, but I assure you I will read this testimony and find out just what you have to say

I want to thank you, Mr Chairman, for conducting this hearing

Senator METZENBAUM Thank you very much, Senator Thurmond

Our first witness today is William Finneran, chairman of the New York State Commission on Cable Television from Albany, NY

The Chair wishes to announce that we have a 5-minute rule for witnesses We have 13 witnesses today, and if we are going to be able to hear all of them and get some questions in, as well, we are going to have to adhere very strictly to the 5-minute rule We will include your entire statement in the record

Mr Finneran, happy to have you with us, sir

STATEMENT OF WILLIAM FINNERAN, CHAIRMAN, NEW YORK STATE COMMISSION ON CABLE TELEVISION, ALBANY, NY

Mr FINNERAN Thank you, Senator Metzenbaum, Senator Thurmond

I deeply appreciate your invitation to be with you today

In Ellenville, NY, a once-flourishing business came to an end A plant shut down, laid off the workers, closed the doors Why? There was no longer a demand for the product it manufactured What was that product? That product, for which there was no longer a demand, was the rooftop antenna

Someday, in the not-too-distant future, a kid is going to be going through the Smithsonian Institute and he is going to stare over at an exhibit and he is going to ask "What is that, Mommy?" It is going to be a rooftop antenna

Today, American families get their television pictures two ways, over the air via broadcast, or this cable wire coming into their home Most Americans, more than 50 percent, get their television pictures from this wire coming into their home

In other words, we are moving into that age of the "single-wire dependence" It is happening

In my opinion, over-the-air broadcasting, as a significant medium to reach the American people, will be extinct by the end of the century And that is conservative I do not think there is any question about that

This single wire will be a family's sole interface to the whole universe of programmed entertainment and information and video news, all coming through this single wire So who controls the wire, who determines what signals are, or are not, transmitted on the wire, what role Government plays in reasonable oversight over that, these are public policy questions that are of profound importance and their resolution will shape our future

In enacting the Cable Act in 1984, Congress deregulated basic rates in areas where there was "effective competition" Congress delegated the definition of what is "effective competition" to the FCC, saying that "The FCC should consider the number of services provided, compared with the number of services available from alternative sources" That was the commission of the FCC

The industry had convinced the Congress that its growth was stymied by a melange of "alternative technologies" DBS, MDS, MMDS, STV, SMATV There were more alternative technologies than there were brands of alphabet soup Regulation embodied in the Cable Act was necessary for cable to prosper, to meet this competition

Let me say it was a myth, that those technologies were has-beens and never-weres I think it can be reduced to a single question There are 7,000 cable franchises across the United States serving 20,000 communities in these United States I think Mr Mooney or a spokesman for the industry ought to be challenged to name one community across the length and breadth of the United States where an alternative technology, any of those, has made any inroads or could compete successfully against this wire It is just not so

An awesome number of channels that can be transmitted through this wire In New York—forget the over-the-airs which are all included—you are talking here MTV, ESPN, Madison Square Garden, USA, Arts and Entertainment, Nickelodeon, Superstation, CBN, Cable Value News, Headline News, Financial News, Black Entertainment Network, Discovery Channel, Learning Channel, Daily News Network, C-SPAN, on and on and on This can carry 77 channels into the home

So the idea of the FCC that a few off-the-air channels, which are given free in the cable, can compete against cable is just a preposterous notion It is an Alice in Wonderland fairy tale

To the question—is cable a monopoly?—one need only ask any of the 45 million American families who enjoy cable They know that the gamut of their choice is twofold take it or leave it

But having said that, that cable is a monopoly, let me say that in this commission's view, a prospering monopoly can best benefit the

public It is the most efficient system To achieve public policy goals of diversity in programming, of universal access, cable needs a healthy revenue stream I think it can be a benevolent monopoly and the potential to fulfill the public interest is very real For example, we require, and the Cable Act requires poor neighborhoods to be wired

The constitutional point—that cable has the right to determine what goes on that wire, to have editorial jurisdiction over all those channels, to say if I own the cable outlets in Carolina, and I think CBS is soft on communism, I can take CBS off that channel, or I can preclude the Black Entertainment Network, or I can say fundamentalist ministers should be on or should not be on, depending on the operator's fancy, that concept of the Constitution that says, in effect, that the cable operator has the unfettered right, without any constraints, to determine what comes into the home of the American family—I just think is chilling and endangers the first amendment rights of all Americans

I have hardly begun my testimony I understand the time constraints I think if cable rates become excessive, Congress should revisit, particularly the renewal provisions of the act

Finally, if I may, one final point broadcast and cable Senator Metzenbaum has drawn attention to the endangerment of broadcast They have lived to mutual advantage, in a synergistic kind of relationship On the one hand, there was the compulsory license that cable enjoyed And then, on the other hand, there was the mandate to carry the local broadcast system

But with the mandate now being declared unconstitutional, with that "must carry" having been demised, I think that if the Congress does not redress that imbalance which now exists, that the broadcaster will undergo a sweep all right He will be swept into history in just a few short years

I think that is an important matter that Congress ought to give its attention to

I thank you, Senator, for the honor and privilege of being with you

Senator METZENBAUM Thank you

Let me first ask you, Mr Finneran, do you think that the FCC definition of effective competition pretty much abrogated the intent of Congress?

Mr FINNERAN I believe, and believe it or not, the Department of Justice claims that, that the intent of Congress was real alternatives There are no real alternatives No technology exists that can compete with 77 channels being brought through this wire into the home

The key point is the penetration Already 6 out of 10 American families, given the opportunity to have cable, have subscribed That rate will go to 70 and when the rate escalates, what happens in effect, the over-the-air broadcast becomes redundant The fact is that broadcast, if it survives, will get to the home through the wire

In effect, I think that the need for a local affiliate in every community evaporates because it becomes a dinosaur, a needless appendage, to have a local broadcaster After all, the cable company can receive the network signals off the satellite just as well as the local broadcaster Why, then, should the network pay its affiliates

across the country hundreds of millions of dollars needlessly when it can, with the local cable operator, distribute its network signal?

I am saying there is a real danger for the survival of broadcast

By the way, I think they ought to compete You see cable advertising revenues going in 1980 from $50 million to $1 5 billion this coming year That is at the expense of the networks I do not think there is anything wrong with that Indeed, revenues coming into cable from alternative sources than the consumer will lessen the upward pressure on cable rates to the consumers in Ohio

And so there is some element of that advantaging the public But the point is that broadcast at least ought to be assured of survival by being given a place on the cable system

I would recommend one approach whereby there would be long-term agreements—99-year leases for $1 a year—to assure that stations will get on the cable system and will have permanence on that system, and will not be discarded 10 years down the road when 90 percent of your transmission is into the home via the wire

Senator METZENBAUM What has happened to cable rates in New York since deregulation?

Mr FINNERAN Cable rates, since deregulation, have escalated We have some instances of 107 percent I note the examples, Senator, that you cited in your initial words Let me say I am not convinced that going from $2 to $14 is outrageous and unreasonable on the cable company's part

The fact is that what has happened was something that was unexpected As a result of the rate deregulation, something else happened, which I think savages the public interest, and it has nothing really to do with the rates It was the perception of cable as a cash cow, and indeed to some extent the reality

And so you have systems being sold at enormous prices It used to be $600 per subscriber was the going rate Then $1,000 Then $1,500, $2,000 I met a fellow here in Washington last night from Laredo, TX His system was just sold for $2,300 a subscriber

Many of those acquisitions, and that is what has happened over the last several years in these enormous acquisitions, the mom and pop cable systems evaporating, the acquisition by the few MSO's, as you indicated, to acquire the systems The number of systems in New York has diminished drastically

But the point is that with systems selling at over $2,000 a subscriber, and most of that being debt generated—in other words, the companies will go into debt to buy those systems So if you would look at a subscriber——

Senator METZENBAUM Mr Finneran, I have a number of questions for you, but if you answer each one as lengthy, I am afraid I will never get a chance to ask them all

Mr FINNERAN I apologize I will be more efficient with my words

Senator METZENBAUM Thank you It is the Senator and I who have the prerogative to filibuster

Let me ask you, if cable is a monopoly at the local level, does it really matter to the consumer whether there are 5 or 500 cable operating companies nationwide?

Mr FINNERAN Of course not, and you hit on one of the great fallacies It does matter in that as the industry evolves to half a dozen giants, they have marketing power that is enormous in getting their product a lot cheaper than the smaller systems But to each individual American family, those 45 million Americans, in their particular area is a monopoly and the only thing that is meaningful to that American family is the fact that they have no alternative

One interesting thing, one town in New York gave the franchise to two operators and they each started wiring from the opposite end of the town When the two areas abutted, where they each had wired, they stopped wiring They did not continue the wiring into neighborhoods that had been wired by their competitors

I think reasonable business prudence says you should not I think that is economically suicidal and inefficient The idea of overbuilds is nonsense Overbuilds are unstable economically and do not survive They survive for a little while, for some little competition, but one or the other bellies up and bankruptcies

It has happened in Phoenix and it has happened everywhere else that you have tried overbuilds

Senator METZENBAUM Briefly, I wonder if you want to comment on the impact or the fact that the New York Yankees have given exclusive rights to carry 100 of their games this summer on cable And as I understand it, there is very little cable outside of Manhattan That means that Yankee games will not be available to millions of hometown fans But as a matter of fact, it will not be available unless you get it on cable

I can see a movement starting to put the major sports events of this country on cable and they are not being on free television Do you have a brief comment on that?

Mr FINNERAN There clearly, as one growing up and rooting for the old Brooklyn Dodgers and looking forward avidly to it, I think the trend you are citing, Senator, is very real There is a sadness to it

In the Bronx, we have cable just getting started Senior citizens who look forward to their home team right in the center of the Bronx, the Bronx bombers, the Yankees, and cannot see them There is not even cable there yet to subscribe to There is a sadness

Families who have never seen any of the last dozen bouts or so of the heavyweight champion of this world, Mike Tyson They are all on cable That is the power of the technology, the awesome power of this wire

The networks simply cannot compete to offer, for example, a heavyweight championship fight, the kinds of dollars that cable can afford to do The competition is a very real one

What I am saying is that what you cite will happen unless there is some reasonable governmental oversight and regulation

Senator METZENBAUM Senator Humphrey, happy to have you with us

Senator HUMPHREY Thank you, Mr Chairman I have no questions

Senator METZENBAUM Thank you, very much

Thank you very much, Mr Finneran

Mr FINNERAN Thank you, Senator I deeply appreciate the honor of being with you

[The prepared statement of Mr Finneran follows]

TESTIMONY

OF

WILLIAM B FINNERAN
CHAIRMAN
NEW YORK STATE COMMISSION ON CABLE TELEVISION

In Ellenville, New York, a once-flourishing manufacturing company closed the doors of its plant and laid off its work force "The demand for our product is fast disappearing", said management The company was Channel Master The plant in Ellenville produced the rooftop antenna In the not-too-distant future, a child visiting the Smithsonian will point to a rooftop antenna "What is that?", he will ask his mother

Today, more than 50% of American families receive television signals by cable, it has been a delayed journey of promises and postponments, but we are well into the era of "single-wire dependence"

Indeed, in my opinion, "over-the-air" broadcasting, as a significant transmission medium to the populace at large, will be extinct before the end of the century

That single wire will be virtually an American family's sole interface with the outside universe of video news, programmed entertainment and information Who controls what is, or is not, transmitted over that wire, the nature of that control, and the presence or absence of reasonable governmental oversight, are profound public policy questions, how they are resolved will shape our future

In enacting the Cable Communications Policy Act in 1984, Congress deregulated basic cable rates in markets where "effective competition" existed Congress delegated such definition to the F C C as indicated in the Committee Report

> In determining whether (a) cable system is subject to effective competition for the purpose of regulation of basic cable service, the F C C should consider the number and nature of services provided, compared with the number and nature of services available from alternative sources and, if so, at what price Emphasis added

The industry had convinced the Congress that a melange of "alternative technologies" -- DBS, MDS, MMDS, SMATV, STV, etc ,

etc -- threatened its growth, and the deregulation embodied in the Cable Act would provide "a level playing field" on which to compete effectively

Question There are over 7,000 cable franchises serving perhaps 20,000 communities in the United States Name one community where any of the "alternate technologies" effectively competes with franchised cable? Or has garnished even a 5% market share where franchised cable is available?

Is cable a monopoly? Forty-five million American families know the answer to that, know that the gamut of choice is two-fold "take it" or "leave it"

But the term "monopoly" here need not be construed in the pejorative sense, a prospering monopoly has the potential to best serve the public interest To achieve the goals of public policy -- diversity in programming and universal service -- cable systems need a healthy revenue stream

The Cable Act requires that poor neighborhoods be wired, and gives strong legal underpinning to the right of state and local governments to require PEG (public, educational and governmental) programming, which assures a degree of diversity and, one hopes, a more enlightened citizenry

Thus, the intention of the Cable Act was to achieve a semblance of balance between the public obligations imposed on the cable operator and the de facto market exclusivity afforded the operator by the franchise

The federal law was no sooner enacted than some cable operators challenged any and all obligation flowing from the Act

New-found First Amendment rights as a "speaker" granted permanence in the community, and a supposed immunity from municipal review at renewal time Further as an "electronic publisher", the cable operator is claimed to have unfettered editorial control over each and every channel on his system

The adoption of this viewpoint would be a chilling day for America A cable operator, if he thought CBS was "soft on Communism",

could just take CBS off his system, or find no available channel for the Black Entertainment network, or put fundamentalist preachers on, or off -- whatever the operator's fancy -- the cable system What is claimed is the right to be sole arbiter of what American families see or do not see, and such view savages the treasured First Amendment rights of every American

A cable system is not a newspaper It is much more like a single newstand with an exclusive license to serve a city, town or village Given a single-source de facto monopoly, the unilateral right to determine what papers or magazines the citizens will be allowed to buy, puts the public's First Amendment rights at risk

With regard to the Cable Communications Policy Act

- If basic rates become excessive, municipalities should have the right to establish an "entry level" of service at a regulated rate
- The Act has emasculated accountability to local governments, Congress should consider revisiting the renewal provisions of the law to assure an acceptable level of responsiveness to the community
- There should be a reaffirmation by Congress that the states, and/or their municipalities, have the right to inspect for compliance with state or federally set technical standards for safety and picture quality

Finally, maintaining diversity of communications is clearly in the public interest Historically, cable television and broadcasting have enjoyed a synergistic relationship, and a balance of sorts achieved in that the liberties allowed the cable operators by the "compulsory license" have been tempered by imposition of the "must carry" mandate

With the demise of "must carry", that delicate balance has been upset If Congress or the F C C fails to restore that balance and takes no remedial action, the local broadcaster will be "swept" into history in a few years

I strongly recommend that long-term agreements -- perhaps ninety-nine year leases on the cable system at $1 per year -- be considered by the Congress

I thank you for the privilege of sharing my thoughts with you on these important issues

Senator METZENBAUM Our next witness panel consists of Mr James Theroux, on behalf of the Wireless Cable Association of Cleveland, Mark Foster, chairman and co-chief executive officer of The Microband Companies, NY, George Kocian, spokesperson for the Home Satellite Television Association of Tiverton, OH, and Thomas Burke, president, United Satellite Industry Association of North Little Rock, AR

Mr Theroux, we are very happy to have you with us this morning, and in 5 minutes I want you to tell us why the inability to obtain product is threatening your industry, which is I understand the thrust of your concern

STATEMENT OF A PANEL CONSISTING OF JAMES THEROUX, WIRELESS CABLE ASSOCIATION, CLEVELAND, OH, ACCOMPANIED BY NICK ALLARD, COUNSEL, WIRELESS CABLE ASSOCIATION, MARK FOSTER, CHAIRMAN AND CO-CEO, THE MICROBAND COS., INC, NEW YORK, NY; GEORGE KOCIAN, SPOKESPERSON, HOME SATELLITE TELEVISION ASSOCIATION, TIVERTON, OH, AND THOMAS BURKE, PRESIDENT, UNITED SATELLITE INDUSTRY ASSOCIATION, NORTH LITTLE ROCK, AR

Mr THEROUX Thank you, Mr Chairman, and Senator Humphrey This is Nick Allard, who is counsel to the Wireless Cable Association

My name is Jim Theroux I represent the Wireless Cable Association, a group of companies that stands ready to bring consumers all the benefits of competition, lower prices, better service, wider selection We do it with an advanced technology that can bring up to 33 television channels through the air to a tiny antenna on your roof

We seek to compete with cable and I can understand Mr Finneran not understanding that such a thing is possible, but this is a new technology that seeks to compete with cable, but not to destroy it The economics, the unique economics of our business allow us to be viable with only a small share of the cable market, much like MCI has a share of the long-distance telephone market

Although we seek to compete with cable, there are impediments to our serving consumers These impediments have the potential to kill our wireless cable industry and consumers will be left holding the bag, paying monopoly prices for cable and being stuck with the take it or leave it attitude of a monopolist

These impediments are refusals to deal with us by certain key programming services, such as HBO, Disney, Showtime, USA Network, and on and on and on These satellite programming services are like milk, eggs, or bread to a grocery store Just as you have Safeway and 7-11 that have very different products and serve the consumer in different ways, if either one of them could not get milk or eggs, he would be a dead duck

That is the situation that we face Without the milk and eggs of satellite programming, we will die and cable's monopoly will be perpetuated

Now cable does not like that word monopoly They hide from it like a vampire hides from the daylight But I can tell you that if you go to my hometown of Cleveland and walk down the street,

you are not going to find anybody who has any questions about whether cable is a monopoly

Cable will tell you that they are part of a broad market that includes theaters and VCR's and broadcasting, and that these things exert a competitive discipline on their prices But I think you can see the superficiality of that argument if you think about another product like food Think of the broad market of food in which you have eating at home, that exerts a competitive discipline on restaurants But would consumers be well served and would Congress tolerate it if one company controlled all the restaurants in a city? Does anyone doubt what would happen to restaurant prices and to quality of service, even if people still had the option of eating at home?

That is the situation that we face in cable

Now fortunately, there is restaurant competition And also now fortunately, there is a new technology that Mr Finneran is not aware of probably because it is so new But it started in Cleveland, OH, 2 years ago And that new technology does have the potential to compete with cable, so should not consumers have the benefit of that? Do not consumers deserve having a choice in how they get satellite programming

Senator METZENBAUM What is the concept of new technology?

Mr THEROUX The concept is that we send through the air, up to 33 channels to a tiny antenna on your roof It is an advanced new technology that, as I say, began 2 years ago in Cleveland

Now fortunately, in Cleveland we were able through lawsuits and other means to get enough programming to start up in business And we have got now thousands and thousands of satisfied customers These people like the programming we give them But what they really love is our prices For $9 95 our basic service, which includes the remote control flicker, is available to them If you go out into the suburbs of Cleveland and get equivalent service, you pay about $18

So we are better in price and we are also better in service We do surveys of our customers and theirs, which find us significantly superior to cable because we do things like answer the phone more promptly, we put a rose on top of your TV when we install the service So I have got a great technology——

Senator METZENBAUM Is that like a death rose? [Laughter]

Mr THEROUX I hope not It is not a funeral, I hope

Senator METZENBAUM Please wind up

Mr THEROUX I will So what is the problem? The problem is the cable monopoly It is nothing new Broadcasting tried to shut out cable when it was getting going, and now cable is trying to use HBO and programming services like it to perpetuate their monopoly and to halt progress They have got these local monopolies that are horizontally concentrated now They vertically integrate into programming That gives them the ability to deny access of HBO and Disney and all these others

So until the Department of Justice or the Congress does something, I feel that we are going to have this problem And I think these hearings are a good step in the direction of solving them I thank you and your colleagues for your interest

[The prepared statements of Mr Theroux follow]

Statement
of
James M Theroux, Chairman
Regulatory Affairs, Wireless Cable Association

Before the Antitrust, Monopolies and Business Rights Subcommittee
Senate Committee on the Judiciary

Good morning Mr Chairman My name is Jim Theroux and I represent the Wireless Cable Association, a group of companies that is ready to bring consumers all the benefits of competition lower prices, better service, and wider selection We do it through an advanced technology that sends up to 33 channels through the air to a tiny antenna on your roof

We don't seek to destroy cable, any more than MCI destroyed AT&T The unique economics of our business allow us to be viable with only a small share of the cable market, equivalent to what AT&T's competitors have achieved

But some severe impediments are preventing us from serving consumers. These impediments will kill our budding wireless cable industry, and the consumer will be left holding the bag, paying monopoly prices for cable, and being stuck with the monopolist's take-it-or-leave-it attitude

These impediments to competition consist of refusals to deal by satellite programmers such as HBO, Showtime, Disney, USA Network, and many others These programming services are to cable what milk, eggs, and bread are to a grocery store Without milk and eggs, no competitor to cable will have a chance of surviving in the retail marketplace

Of course, cable tries to hide from the word monopoly, just as a vampire hides from the daylight I'm not an economist,

but I guarantee you that the average guy in my hometown of Cleveland has no doubts that cable is a monopoly. But cable will try to tell you it is part of a broad video market in which theaters, VCR's and broadcasting exert competitive discipline on its prices

The superficiality of this point of view becomes apparent when one thinks of some other products. For example, you might say that there is a broad market for food in which eating at home restrains the prices that restaurants charge, just as, cable says, broadcasting restrains its prices But would consumers be well served and would Congress tolerate it if ONE COMPANY controlled all the restaurants in a city? Does anyone doubt what would happen to restaurant prices and services, even though people would still have the option of eating at home?

Fortunately, consumers have the benefit of restaurant competition. Now that there is a technology available to provide cable competition, why shouldn't consumers have that too? Don't they deserve a choice?

That new cable technology is more than just theoretically available. It actually got off the drawing boards and into the real world two years ago in Cleveland, Ohio In Cleveland, my company was able to get into business because conventional cable was not established, and through lawsuits and other means we got enough programming services to attract over 20,000 customers Those customers <u>like</u> the programming I deliver, but they LOVE our prices our Basic service, including remote control, costs $9 95 Cable charges about $18 00 for its equivalent And in service quality our surveys show us beating cable by a significant margin by doing things such as answering our phones more promptly and adding touches such as a fresh rose at the time we install the service.

So, I've got a great technology, terrific prices, excellent service, my customers like me, but they ask me certain nagging questions Why don't we have HBO, why don't we have Disney, why don't we have USA Network, the Weather Channel, and on, and on They blame me Yet here I sit with money in the bank ready to pay for the services

But just as the railroads tried to protect their monopoly from truckers, and broadcasters tried to protect themselves from cable, now conventional cable is using HBO and others to halt progress and protect its monopoly The cable industry is extending its newly deregulated power through horizontal concentration of retail monopolies which then vertically integrate into ownership of programming (e g CNN) This vertical integration allows big cable to deny access to programming to would-be competitors And consumers will continue to suffer the consequences until Congress or the Department of Justice takes action For this reason, Mr Chairman, we believe that these hearings are an important step in the right direction, and we appreciate your leadership

Mr Chairman, I would request that these brief remarks be supplemented by including my formal, prepared testimony into the record of this hearing I would, of course, be happy to respond to your questions

Thank you very much

TESTIMONY OF JAMES M. THEROUX
REGULATORY AFFAIRS CHAIRMAN
WIRELESS CABLE ASSOCIATION
Before The
UNITED STATES SENATE
COMMITTEE ON THE JUDICIARY
SUBCOMMITTEE ON ANTITRUST, MONOPOLIES AND BUSINESS RIGHTS

March 17, 1988

Mr. Chairman, members of the Subcommittee, on behalf of the Wireless Cable Association ("WCA"), I thank you for this opportunity to testify today. With my testimony, I hope to introduce and explain more fully the state-of-the-art satellite programming delivery system known as wireless cable and to enumerate the various anticompetitive practices by coaxial cable operators and programmers that threaten to destroy wireless cable as a competitor in the retail market for satellite-delivered programming. In the future, the WCA will stand ready to provide any assistance that this Subcommittee might require as it monitors the competitive health of the satellite-delivered programming marketplace

INTRODUCTION TO THE SATELLITE PROGRAMMING DELIVERY SYSTEM OF WIRELESS CABLE

The wireless cable industry consists of firms possessing licenses to deliver programming taken down from satellites and re-transmitted on microwave frequencies to tiny antennas on private homes and multiple unit dwellings The wireless cable delivery system eliminates the costly network of wiring required by traditional coaxial cable franchises. Instead, a wireless cable operator uses the Super High Frequency ("SHF") portion of the radio frequency spectrum, i.e., the spectrum above the Very High Frequency

("VHF") and Ultra High Frequency ("UHF") allocated to broadcast, to transmit satellite programming from a central point directly to a tiny antenna mounted on the subscriber's roof top. At the roof top, the SHF signals are coupled with the locally available VHF and UHF signals and relayed by coaxial cable to a 100 channel selector box on the subscriber's television set. Using this box, the subscriber may choose from the combined offering of local broadcast signals and satellite-delivered programming, the same as with a subscription to coaxial cable.1/

Does wireless cable represent a new technological method of delivering satellite programming? This question must be answered both yes and no. Yes, in the sense that wireless cable constitutes a new commercial enterprise sanctioned by the FCC in 1983 that delivers multiple channels of satellite programming through state-of-the-art reception, scrambling and addressing equipment. No, in the sense that wireless cable delivers this satellite programming via the

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1/ Many broadcast stations have had difficulty in securing carriage on coaxial cable systems. Coaxial cable systems all over the country that suffer from limited channel capacity are dropping broadcast stations in favor of other services. Wireless cable systems have no incentive to engage in such conduct. Because we pick broadcast stations up directly at the rooftop, and do not use our scarce SHF channels for retransmissions, we have nothing to gain by not passing an available broadcast signal to our subscribers. Regardless of what ultimately happens to the FCC's must carry rules, therefore, wireless cable is a system of "will carry", if the broadcaster provides a VHF or UHF signal to the rooftop, we will carry it through our cable to subscribers In addition, unlike many coaxial cable systems, wireless cable systems will carry all VHF and UHF stations on their assigned channels

same microwave frequencies utilized for many years by educators through Instructional Fixed Television Services ("IFTS"); municipalities through Operation Fixed Service ("OFS"); and retail distributors through Multipoint Distribution Service ("MDS"). In other words, just as modern coaxial cable originated from the cruder technology of community antenna television ("CATV"), so too did wireless cable grow out of the tried and true system of delivering satellite programming through microwave frequencies.

Wireless cable traces its origins to the Multipoint Distribution Service ("MDS") that started in the early 1970's. MDS systems delivered satellite programming through a single channel in the SHF band. Although limited to a single channel, MDS systems managed to forge market niches in particular areas by delivering HBO or a similar movie service to supplement the available VHF and UHF broadcast signals.2/

By the late 1970's, however, numerous other satellite-delivered programming services began to gain public recognition, for the most part through their carriage on coaxial cable systems. With only a single channel to offer, MDS essentially lost its ability to compete with coaxial

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2/ Even in the 1970's, coaxial cable operators displayed their affinity for anticompetitive conduct. In papers submitted to the FCC by the largest wireless cable firm, The Microband Companies, Inc., it was demonstrated that several coaxial cable operators warehoused the single SHF channel available prior to 1983 in areas where they operated or hoped to operate. As a result, the developments of MDS systems was preempted in many markets

cable. Besides financial problems, some MDS operators experienced difficulty protecting their signal from reception by non-subscribers.

In 1983, however, the FCC opened up new possibilities for the delivery of satellite programming through the SHF band.[3/] Recognizing that "there is no multichannel alternative to cable available now,"[4/] the FCC created the commercial possibility of wireless cable by reallocating for "multichannel MDS use"[5/] unutilized SHF channels that had been reserved for IFTS (educators) and OFS (municipalities and public safety and informational organizations). In addition, the FCC authorized multichannel MDS "to negotiate with existing cochannel and adjacent channel users of the IFTS channels to attempt to reach an accommodation whereby the needs of each can be satisfied."[6/] The result of these new FCC rules was to make available for multichannel MDS use up to 33 SHF channels in each major market

Concurrent with the FCC's rulemaking were several technological advancements in the delivery of satellite programming through microwave frequencies, including an

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3/ See In the matter of Amendment of Parts 2, 21, 74 and 94 of the Commission's Rules and Regulations in Regard to the Instruction Fixed Television Service, the Multipoint Distribution Service, and the Private Operation Fixed Microwave Service, 54 R.R. 2d (Pike & Fisher) 107 (1983), attached hereto as Exhibit A.

4/ Id. at 123.

5/ Id. at 130.

6/ Id.

antenna and channel selector capable of combining UHF, VHF and SHF signals and the Zenith scrambling and addressing equipment. The result is the state-of-the-art commercial enterprise known as wireless cable.7/

With its unique advantages, today's wireless cable represents a viable non-cable competitor in the market for satellite-delivered programming. Indeed, in areas unwired for cable, wireless cable can provide consumers with rapid access to satellite-delivered programming by eliminating the expensive and time-consuming process of burying wires below the streets or stringing them from telephone poles Alternatively, in cable wired areas, wireless cable can compete head-on with cable, thereby checking the cable rate increases that have gouged consumers since deregulation under the Cable Act of 1984.8/ Typically, wireless cable operators deliver programming to subscribers at lower costs The principle reason is that coaxial cable wiring expenses are high and cable must wire an entire street to deliver programming to any individual home on the street. In contrast, wireless cable's fixed costs are smaller, and the marginal cost of each new subscriber -- the cost of installing an antenna on a particular home -- is less than the pass-by costs incurred by cable.

7/ Most coaxial cable systems are limited to less than 36 channels, including those allocated to broadcast A wireless cable operator can theoretically offer up to 33 SHF channels in addition to those broadcast channels received by the rooftop antenna.

8/ See Exhibit O and discussion infra at 14-15

Another advantage besides lower costs is that wireless cable operators deliver a signal as good if not better than today's coaxial cable systems. Moreover, with its state-of-the-art Zenith scrambling and addressing system, wireless cable can provide better signal security than coaxial cable. Gone are the signal theft and financial problems associated with the MDS systems of the 1970's

In sum then, wireless cable represents a state-of-the-art viable competitive alternative to coaxial cable. As the General Electric Company recently noted.

> [Wireless Cable's] performance can meet and even exceed cable in fundamental performance areas like received signal level, carrier-to-noise ratio and nonlinear distortion products. Also [wireless cable] . . equipment can provide all of the bells and whistles of a cable system like addressability, scrambling and stereo broadcasts. Combining comparable features and improved performance can make [wireless cable] . . . a very competitive alternative.9/

INABILITY OF THE WIRELESS CABLE INDUSTRY TO OBTAIN PREFERRED PROGRAMMING

In spite of wireless cable's competitive potential, it remains unclear what markets are best suited for the wireless cable delivery system With its unique economics, wireless cable may thrive in either or both cable wired areas and/or unwired areas as well as urban areas and/or rural areas. The salient point is that the marketplace provides

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9/ "Wireless or Wired Cable Comparable Technologies?" by George Harter on behalf of The General Electric Company, attached hereto as Exhibit B.

the most efficient mechanism for sorting the merits of the various satellite programming delivery systems, assuming it is permitted to function freely. The anticompetitive practices by cable companies and programmers, however, have stymied the market sorting mechanism.

The problem is simple: The wireless cable industry has been foreclosed from vigorous competition with coaxial cable operators due to its inability to obtain adequate satellite programming.10/ Many programmers either refuse to deal with wireless cable operators, or, alternatively, deal only at discriminatory prices, terms and conditions. This discrimination against a viable competitor of cable has coincided with an increased vertical integration of cable into programming.11/ In fact, many of the programmers that refuse to deal with wireless cable at fair terms and prices are owned in whole or in part by the large MSOs

To view this problem in concrete terms, let's look at the largest MSO, Tele-Communications, Inc. ("TCI"), and the two largest wireless cable operators, The Microband

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10/ At present, more than eighty firms and individuals possess FCC permits to deliver programming through wireless cable. See List of Wireless Cable Permittees attached hereto as Exhibit C. Of these permittees, however, only a handful are currently operating in Cleveland, Detroit and New York, among other places See List of Wireless Cable Operators, attached hereto as Exhibit D Many other entrepreneurs are attempting to bring wireless cable to other markets, but require assurances of program availability at fair terms and prices to start their businesses.

11/ See "The Trend Toward Vertical Integration by Cable Into Satellite Delivered Programming" attached hereto as Exhibit E.

Companies, Inc., which delivers programming in New York, NY, Detroit, MI and Washington, D.C., and Metroten Cablevision, Inc., which serves the Cleveland, OH area. With respect to the trend towards vertical integration, TCI has been a leader. TCI holds an equity stake in a number of major programmers, including WTBS, CNN, Headline News, Black Entertainment Television, Tempo TV, the Fashion Channel and American Movie Classics.[12/] Several of the programmers controlled in whole or in part by TCI continue to refuse to deal with such wireless cable firms as Metroten and Microband.[13/]

The Fashion Channel, for example, a home shopping network with over 8 7 million subscribers, and in which TCI has a 10.5% equity stake, adheres to a cable exclusive distribution policy.[14/] Several other TCI owned and/or controlled programmers have avoided explicitly stating a retail policy, but nevertheless are distributed in most major markets de facto exclusively through coaxial cable. These programmers include American Movie Classics, CNN[15/] and Black

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12/ Id.

13/ See "The Programming Bottleneck," attached hereto as Exhibit F.

14/ See Letter from Fashion Channel to Metroten (Nov. 19, 1987), attached hereto as Exhibit G

15/ Metroten distributes CNN, the second most popular basic service next to ESPN in the Cleveland, OH area Metroten, however, pays a higher price for CNN than coaxial cable operators. Microband has been denied access to CNN in the New York and Detroit markets, but is authorized to distribute the service in Washington, D.C. See Exhibit F.

Entertainment Television.[16]

Moreover, with its recent acquisition of Tempo TV, TCI now owns 10.1% of Turner Broadcasting System. Besides the fact that it already has 12.5 million subscribers, it is widely anticipated that "Tempo TV could serve another purpose: a launch platform for Turner Network Television."[17] TCI is interested in starting a new network-quality satellite-delivered channel, as is Turner Broadcasting System.[18] TCI and Turner could build such a channel by starting from the existing Tempo TV subscriber base. While Tempo TV has previously been available to wireless cable, Turner has explicitly proposed making TNT a cable-exclusive service.[19] If TCI denied wireless cable access to TNT, the anticompetitive effect would be even greater than a denial of access to the existing Tempo TV.[20]

16/ Microband is authorized to distribute Black Entertainment Network in Detroit and New York, but not in Washington, D.C. Microband has been refused Black Entertainment Television for the Washington market. Not surprisingly, the company awarded the Washington, D.C. coaxial cable franchise holds an equity stake in Black Entertainment Television.

17/ A Dynamite Tempo for TCI, Cable TV Programming, at 4 (Nov. 30, 1987); see Tempo Deal Expands TCI Reach, Cablevision at 12 (Nov. 23, 1987). Both articles are attached hereto as Exhibit H.

18/ The King of Cable TV, Business Week, at 88, 96 (Oct. 26, 1987), attached hereto as Exhibit I.

19/ Turner's TNT Adds Sparks to Atlantic Cable Show, Broadcasting, at 31 (Oct. 12, 1987), attached hereto as Exhibit J.

20/ Recognizing the anticompetitive potential of TCI's Tempo TV acquisition, the WCA has filed comments with the FCC that seek assurances of program availability.

Although a leader in the trend toward vertical integration, TCI is by no means alone. Viacom, for example, holds an equity stake in many major programmers, including MTV (100%); Lifetime (33%); VH-1 (100%); Cable Value Network (over 4%); and the Fashion Channel (over 4%).[21/] Other large MSOs hold similar equity stakes. Moreover, the programmers themselves have been cooperating with this vertical integration scheme by offering equity to coaxial cable operators. Such programmers include Cable Value Network, Teleshop, QVC Network, The Fashion Channel, The Travel Channel and Shop TV.[22/] This vertical integration has greatly enhanced coaxial cable's ability to cause denials of programming to wireless cable operators. In rare instances, wireless cable operators are permitted to distribute the service, but refused an equity stake.[23/]

The foreclosure of programming sources to wireless cable firms extends beyond programmers in which coaxial cable holds an equity stake. Many non-cable owned programmers also refuse to distribute through wireless cable systems These programmers include USA Network, The Weather Channel, and The Disney Channel. Moreover, even when non-cable owned

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See Wireless Cable Association Comments on the Application for Transfer of Control of Tempo Enterprises' FCC Licenses (Mar 4, 1988), attached hereto as Exhibit K.

21/ See Exhibit E.

22/ Id

23/ See Exhibit F

programmers deal with wireless cable, they impose discriminatory terms and prices. ESPN, for example, the most popular programming service in the basic package, imposes discriminatory terms and prices on both Microband and Metroten.24/

In addition to vertical integration, the coaxial cable industry has become far more horizontally concentrated subsequent to deregulation. The MSOs have extended their local monopoly to a national level. Not surprisingly, conversations between WCA representatives and several non-cable owned programmers have revealed a fear of alienating these large MSOs Of course, programmers are not likely to acknowledge publicly that coaxial cable operators influence or control their retail distribution policy with respect to wireless cable.

Even where cable franchises do not demand exclusive arrangements, many programmers are refusing to deal with wireless cable. The programmers' stated reasons include the view that wireless cable firms are not well-run; the claim that the wireless cable technology delivers a poor signal and is subject to theft; and the contention that future market penetration of such programming should be entrusted to cable As discussed above, however, none of these reasons has a sound factual basis. Wireless cable firms are not merely expanded versions of the MDS single channel system of the 1970's. Rather, wireless cable firms represent totally new

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24/ Id.

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commercial enterprises sanctioned by the FCC in 1983 that deliver satellite programming through state of the art reception, scrambling and addressing equipment.

Moreover, recent actions by programmers reflect the spuriousness of any criticism of the technology of wireless cable. The marketplace is an efficient mechanism for sorting the merits of various technologies, assuming it is permitted to function freely. The fact is that programmers and coaxial cable operators have also aimed their efforts towards preventing the development of "overbuilds" for cable, i.e., "second franchises" that use the cable technology.25/ This demonstrates that established cable franchises oppose not only alternate delivery technologies (regardless of their engineering merits) but any competitive retailer of satellite programming. Recognizing that "efforts to promote one method or kind of retail distribution over another . . . can frustrate competition and ultimately harm consumers," Senator John Kerry has recently directed pointed questions to HBO and others regarding the anticompetitive aspects of wireline exclusivity. So far, however, he has received evasive and self-serving responses.26/

Whether the exclusive dealing arrangement is explicit or implicit, the salient point is that cable operators are obtaining exclusivity in absence of a

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25/ Articles discussing wireline exclusivity proposals by various programmers are attached hereto as Exhibit L.

26/ These letters between Senator Kerry and various programmers are attached hereto as Exhibit M.

competitive bidding process and for little or no cost This suggests that an anticompetitive purpose or effect underlies the exclusive dealing arrangements between cable operators and programmers.

Of course, coaxial cable operators and programmers assert that these practices do not harm wireless cable as a competitor. They claim that wireless cable operators do not need a particular programming service to compete with coaxial cable operators. They argue, for example, that wireless cable operators do not need HBO when Showtime is available Some coaxial cable operators and programmers even assert that wireless cable firms should develop their own programming services Unfortunately, these arguments miss the point because subscribers buy programming not technology

No single programming service can probably be considered "necessary" or "essential." Instead, the basic package should be viewed as a distinct product consisting of a selection of programming that includes news, shopping, sports, variety and access to movies and other premium programming. Without programming in all of these selection categories, a wireless cable operator cannot compete.

Another way of stating this notion is that each programming component of the basic package represents an incremental market share. The consumer makes a decision to subscribe based upon in essence not more than five or six components of the basic package, i.e., the consumer "prefers" a package of particular components above all others

Although when viewed in isolation, no single programming service is absolutely "necessary" or "essential," nevertheless when viewed as one component of the basic package, the absence of any one service, for example the absence of ESPN, the premier sports channel with exclusive rights to ten NFL games, may result in a loss of market power because the consumer will subscribe to the basic package that contains all six "preferred" components as opposed to the package with only three or four. In other words, an incomplete "basic" package cannot compete effectively with a complete package.

THE HARM TO CONSUMERS RESULTING FROM ANTICOMPETITIVE PRACTICES BY COAXIAL CABLE OPERATORS AND PROGRAMMERS

Exclusive dealing, discriminatory dealing and vertical integration all have the effect of restraining competition at the retail level between coaxial cable and wireless cable operators. The biggest losers are the consumers. Indeed, consumers in areas unwired for cable cannot receive preferred satellite-delivered programming, while consumers in wired areas must pay monopoly prices for the delivery of such programming via coaxial cable.27/

Subsequent to deregulation under the Cable Act of

27/ See J. Ordover & Y. Braunstein, "Does Cable Television Really Face Effective Competition?" (Dec 1987) (proving that coaxial cable operators do not face effective competition from three broadcast stations) Shoshan & Jackson, Inc., "Opening the Broadband Gateway" (Jan. 20, 1988) (proving that coaxial cable operators earn monopoly profits). Both papers are attached hereto as Exhibit N

1984, coaxial cable subscription rates have increased an average of 27 percent, according to a National League of Cities survey, and 24 percent, according to a study by Paul Kagan Associates. Moreover, prices in many areas have risen over 50 percent since deregulation.28/

Concurrent with these price increases has been the practice of retiering by many coaxial cable operators. In essence, retiering may force consumers to pay for programming that they do not want. In West Virginia, for example, American Cable Television, Inc. ("ACT") combined its basic and satellite tiers and doubled its prices

Anticonsumer actions by coaxial cable operators have outraged many state and local communities As a result of ACT's post-deregulation behavior, the Attorney General of West Virginia has filed an antitrust and unfair trade practices action on behalf of consumers.29/ Similarly, the residents of Springfield, Oregon, angered by retiering and rate increases of over 50 percent, have launched an initiative whereby the public utility would take over the

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28/ These price surveys, as well as various articles reporting on this issue are attached hereto as Exhibit O.

29/ The State of West Virginia through its Attorney General, Honorable Charles G. Brown, has filed a parens partrie action charging American Television and Communications Corp. with antitrust and consumer protection violations in connection with its post deregulation behavior. See Exhibit P attached hereto. In addition, the National Association of State Attorney Generals ("NAAG") has formed a multistate antitrust task force to investigate the anticompetitive practices of cable and programmers See Exhibit Q attached hereto.

coaxial cable system now operated by TCI.[30/]

Exclusive dealing arrangements between coaxial cable operators and programmers, discriminatory dealing by programmers with viable cable competitors, vertical integration by cable into programming, outrageous coaxial cable subscriber rate increases and coercive coaxial cable subscriber terms and conditions all add up to only one thing coaxial cable operators constitute an unrestrained monopoly in the market for satellite-delivered programming. Indeed, the largest MSO, TCI, has been found guilty of monopolizing at least one geographic market and currently faces charges of monopolizing several others.[31/] Moreover, other coaxial cable operators have been admitted to being monopolies, but argue that they represent a lawful monopoly.[32/] Yet, it seems incredible to suggest that with the passage of the Cable Act of 1984, Congress intended to usher in an era of coaxial cable monopolization. Indeed, coaxial cable operators contended before Congress that only through

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30/ See Exhibit O.

31/ See, e.g., Central Tele-Communications, Inc. v TCI Cablevision Inc , 800 F.2d 711 (8th Cir. 1986), cert denied 107 S. Ct. 1358 (1987); H.R M., Inc. v. Tele-Communications, Inc., 653 F. Supp. 645 (D. Colo. 1987) Copies of these opinions are attached hereto as Exhibit R.

32/ See Friedman v. Adams Russell Cable Services-New York, Inc., 624 F. Supp. 1195 (S.D N.Y. 1986), attached hereto as Exhibit S, Memorandum in Support of Motion of American Television and Communications Corporation to Dismiss the Complaint, State of West Virginia v. American Tel. & Comms. Corp., No. 0203 (S.D W.V. dated Dec. 18, 1987). See Exhibit Q

deregulation under the Cable Act of 1984 could they compete with other satellite programming delivery systems such as wireless cable.

THE SOLUTION TO THE COAXIAL CABLE MONOPOLY PROBLEM

For the benefit of consumers, legislative action must be taken to curb the anticompetitive practices of coaxial cable operators and programmers that threaten to destroy wireless cable and other viable competitors in the retail distribution market for satellite programming.[33/] At the very least, coaxial cable operators should be required to compete with wireless cable operators on the basis of service and price In other words, the consumer should decide the relative merits of each delivery system, rather than be forced to accept or reject the product offered by the local coaxial cable monopolies

Effective head-to-head competition will not become a reality, however, until wireless cable operators obtain access to preferred satellite-delivered programming. By "access," I mean an opportunity to obtain such programming for retail distribution at nondiscriminatory terms and

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33/ The WCA applauds the NAAG investigation into coaxial cable operators' anticompetitive practices It also supports lawsuits at the state level on behalf of consumers, such as the West Virginia action The scope of the coaxial cable monopoly and its long-term threat on a nationwide level, however, suggest that legislation may provide the most far-reaching and effective solution. Indeed, legislation seems particularly appropriate given that Congress did not intend to create an unrestrained cable monopoly with the passage of the Cable Act of 1984.

prices. Any exclusive distribution rights must result from a competitive bidding process. Such vigorous competition will most benefit the consumers, who have been either denied access to preferred programming or forced to pay monopoly rents. Coaxial cable competitors like wireless cable will also reap the rewards of a free marketplace. Moreover, programmers should support vigorous competition as well, for elementary economic principles suggest that no manufacturer or wholesaler desires a monopoly at the retail distribution level. In such a state of vigorous competition, the only losers are the coaxial cable monopolists They will lose the business weapons of exclusivity, discrimination, vertical integration and monopoly rents. Coaxial cable operators will be forced to deal fairly with consumers, to cease leveraging and coercing programmers and to compete vigorously with wireless cable operators. With this state of affairs, everyone wins. Most of all the consumer is benefitted.

Thank you.

EXHIBIT A

INSTRUCTIONAL TELEVISION FIXED SERVICE (MDS REALLOCATION)

FCC 82-243
33344
48 FR

In the Matter of	)	
	)	
Amendment of Parts 2, 21, 74 and 94 of the Commission's Rules and Regulations in regard to frequency allocation to the Instructional Television Fixed Service the Multipoint Distribution Service and the Private Operational Fixed Microwave Service	)	General Docket No 80-112
	)	
Inquiry into the development of regulatory policy with regard to future service offerings and expected growth in the Multipoint Distribution Service and Private Operational Fixed Microwave Service and into the development of provisions of the Commission's Rules and Regulations in regard to the compatibility of the operation of satellite services with other services authorized to operate in the 2500-2690 MHz band	)	
	)	
Amendment of Part 21 of the Commission's Rules to Permit the Use of Alternative Procedures in Choosing Applicants for Radio Authorizations in the Multipoint Distribution Service	)	CC Docket No 80-116
	)	
Petition for Rule Making filed by Microband Corporation of America to amend Section 21 901 of the Commission's Rules and Regulations	)	RM-3540
	)	
Application of Channel View Inc for an Experimental (Developmental) station at Salt Lake City	)	File No 8938-ED-MR-82
	)	
Application of Contemporary Communications Corporation for Developmental Authorizations to Establish Multi-Channel Systems (MCS) in New York, Chicago, Los Angeles, St Louis and Philadelphia	)	File No BPEX-820802KH

Adopted May 26, 1983
Released July 15, 1983

[¶54 902, ¶54 931, ¶71 901, ¶71 909] ITFS-MDS reallocation

In view of the likelihood that demand for ITFS channels for use by institutions of higher learning (for the delivery of graduate level training to the workplaces of engineers, scientists and other professionals), while increasing will not match the demand for multichannel MDS facilities if such facilities are authorized, the Commission amends the rules to reduce the restrictions on multichannel MDS systems and reallocates eight channels from the ITFS to the MDS While the Commission believes that it remains in the public interest to have a spectrum reserve for the ITFS, moreover, there * * *

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INSTRUCTIONAL TELEVISION FIXED SERVICE (MDS REALLOCATION)

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I Introduction and Summary

1 On May 2, 1980 the Commission released a Notice of Inquiry and Proposed Rule Making and Order in General Docket 80-112, 45 FR 29,323 (1980) (hereinafter Notice), in which it proposed to reallocate the 2500-2690 MHz band to provide additional channels for the Multipoint Distribution Service (MDS) and the Private Operational Fixed Microwave Service (OFS) and to reduce the number of channels available for the Instructional Television Fixed Service (ITFS) The Notice referred to these services as "area wide microwave distribution services" (AMDS) and inquired into their future prospects and anticipated growth

2 Approximately 200 entities submitted comments and reply comments in response to the Notice On February 10, 1982 Microband Corporation of America (Microband) submitted a 3 volume proposal to create what it termed a "wireless cable system" using frequencies in the 2500-2690 MHz band Proposal of Microband Corporation of America, General Dockets 80-112 and 80-113 (February 10, 1982) (hereinafter Microband Proposal) Microband simultaneously submitted a "Motion for Acceptance of Additional Comments" requesting that its proposal be accepted as additional comments in this proceeding and in the companion proceeding in General Docket 80-113 1/ On April 20, 1982 the Chief of the Common Carrier Bureau, acting pursuant to delegated authority, issued an order accepting the Microband Proposal as additional comments in these dockets and inviting interested parties to submit reply comments Order Accepting Additional Comments, 47 FR 18,932 (1982) Approximately 190 reply comments were received in response to the Microband proposal 2/

3 On August 2, 1982 Contemporary Communications Corporation (CCC) submitted a set of applications in which it requested developmental authority to construct what it termed Multi-Channel Systems (MCS) in New York, Philadelphia, Chicago, St Louis and Los Angeles The CCC applications are similar in some respects to the Microband proposal and to the experimental authorization we granted to Channel View in Salt Lake City (see Note 24, infra) They are different in that Microband filed additional comments in response to the Notice while Channel View requested authority to construct experimental facilities in Salt Lake City CCC specifically requested authority to conduct market trials in five cities It made two basic claims in support of * * *

1/ Notice of Inquiry and Proposed Rule Making in Gen Docket No 80-113, FCC 80-137, 45 FR 29,350 (April, 1980) In that proceeding the Commission proposed to revise certain technical rules applicable to the Multipoint Distribution Service, operating in the 2150-2162 MHz band, and inquired into the feasibility of applying the proposed rules to 2500-2690 MHz band

2/ A list of all those submitting comments in this proceeding is contained in Appendix A This list includes all comments both formal and informal Comments that were not filed in a timely manner are hereby accepted as informal comments Some entities submitted more than one set of comments and hence are listed more than once

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INSTRUCTIONAL TELEVISION FIXED SERVICE (MDS REALLOCATION)

B The 2500-2690 MHz Band

7 This band is divided into thirty-one 6 MHz channels and thirty-two 125 KHz response channels Twenty-eight of the 6 MHz channels and the same number of response channels are allocated to the ITFS 47 CFR §§74 902, 74 939 The remaining three 6 MHz channels and three response channels are allocated to the OFS 47 CFR §94 65(f) The remaining 125 kHz reponse channel is not assigned to either service

C ITFS

8 The ITFS was created by a Report and Order in Docket No 14744 adopted by the Commission in 1963 Educational Television, 39 FCC 846 [25 RR 1785] (1963), recon denied, 39 FCC 873 [2 RR 2d 1615] (1964) (hereinafter ETV) By this action the Commission allowed the newly created ITFS to use the 2500-2690 band on a shared basis with the existing OFS stations with the proviso that no new OFS stations be authorized in the band for 3 years except for modifications or expansions of existing stations, or for the use of the band by OFS eligible entities for television transmission in accord with ITFS technical standards Prior to this action the band had been allocated to the Fixed Service for shared use by Operational Fixed Stations and International Control Stations In taking this action, the Commission stated its intention to observe the amount of use of these channels by educators and "[to] determine what course of action should be taken to encourage the fullest development of the 2500-2690 Mc/s band " at the end of the three year period Id at 851

9 The Commission stated in 1963 that the purpose of the service was to transmit

> "instructional material to selected receiving locations in accredited public and private schools colleges and universities for the formal education of students Systems which have been licensed for this purpose may also be used for other incidental purposes among which are the transmission of cultural material and entertainment to these same receiving locations, the transmission of special training material to selected receiving locations outside the school system such as hospitals, nursing homes, training centers clinics, rehabilitation centers, commercial and industrial establishments, etc , the transmission of special material to professional groups or individuals to inform them of new developments and techniques in their fields and instruct them in their use and to perform other related services directly concerned with formal or informal instruction and training When not beng used for such purposes, the facilities licensed under these rules may be used for handling administrative traffic of the licensee such as the transmission of reports and assignments, conferences with personnel, etc Individual stations or complete systems will not be licensed solely for handling administrative traffic "

ETV, 39 FCC at 853 The Commission further stated that this service could also be used for the relay of such material Id These service limitations are contained in §74 931 of the rules, 47 CFR §74 931 Elsewhere in this Order, we are amending §74 931 to allow ITFS licensees to lease any excess capacity available on their channels (paragraphs 110 - 127, infra) In addition, we are today opening another proceeding in which we propose, inter alia, to broaden permissible uses of the ITFS channels

10 The Commission limited the eligibility to hold an ITFS license to accredited institutions providing a program of formal education and to those eligible to hold a non-commercial educational TV license ETV, 39 FCC at 853-854 The eligibility standards for the ITFS are contained in §74 932 of the rules, 47 CFR §74 932

11 The Commission did not consider the use of this band again until 1971 when it adopted the Second Report and Order in Docket No 14744 Instructional Television, 30 FCC 2d 197 [22 RR 2d 1635] (1971) (hereinafter ITV) In that proceeding the Commission made the present exclusive allocation of 28 channels to the ITFS

D OFS

12 As noted above, prior to 1963 the 2500-2690 MHz band was allocated to what was then known as the Fixed Service When the Commission established the ITFS it allowed the newly created

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service to use this band and limited the Fixed Service use of the band for three years to expansion or modification of existing stations, or the establishment of new television transmission stations The traditional Fixed Service use of this band was not for television transmission but rather was for more traditional private microwave communications uses such as multichannel voice and data circuits The Commission recognized that there were certain traditional OFS users such as municipalities that might have television transmission needs and, although it declined to allow such entities to apply as ITFS applicants it did invite them to apply for facilities under the rules governing the public safety radio services ETV 39 FCC at 854 When the Second Report and Order was adopted in Docket No 14744 the Commission determined that the video transmission needs of municipalities and other entities eligible for Fixed Service licenses could be met by a 3 channel allocation It based this conclusion on the fact that only 16 stations had been licensed to such entities ETV, 39 FCC at 200 The Commission further suballocated these channels to the Public Safety Service on a primary basis and to all other fixed service eligibles on a secondary basis 4/ This preference was deleted in 1975 when the Commission created what is now known as the Private Operational Fixed Microwave Service Private Operational Fixed Microwave Service 52 FCC 2d 894, 900 [33 RR 2d 1047] (1975) That action made the three channels available to all eligible entities on an equal basis

13 In 1973 the Commission authorized Columbia Pictures to use what was then known as Business Radio Service spectrum for the distribution of "feature motion picture films" and associated promotional material to "guests" in "hotels " Columbia Pictures Industries, Inc , 39 FCC 2d 411, 413 [26 RR 2d 711] (1973) In making this grant, the Commission questioned whether this was an appropriate use of the Business Radio Service spectrum and as a result specifically conditioned the grant on the result of the inquiry and rule making proceeding in General Docket 19671 5/ that was initiated simultaneously with the grant Id at 412, n 1

14 In 1981 the Commission issued the First Report and Order in Docket No 19671 Use of Private Microwave Frequencies 86 FCC 2d 299 [49 RR 2d 931] (1981), stay denied sub nom Operational Fixed Microwave Services, 87 FCC 2d 768 (1981) After considering the comments submitted in response to its inquiry, the Commisson concluded "that it is in the public interest to allow the use of the OFS frequencies for distribution purposes and, more generally, to restrict as little as possible alternative uses of the spectrum " Id at 306 In allowing this use of the OFS spectrum, the Commission noted that it was only "authorizing a licensee to distribute products and services in which the licensee has an ownership or other interest to the licensee's own customers or subscribers " Id at 309 The Commission also specifically declined to authorize a licensee of "point-to-multipoint" microwave facilities in the OFS to transmit any video programming directly to apartment houses, MATV systems or private homes pending resolution of the question of whether the similarity of such services to services such as subscription television requires that they be similarly regulated Id at 311

15 In the Notice the Commisson concluded that if it were to authorize the use of the OFS to distribute entertainment programming to subscribers there would be an increase in demand for the OFS channels in the 2500-2690 MHz band Notice, supra at para 37 Since the adoption of the First Report and Order in Docket 19671, we have received more than 1,400 applications from 60 different entities seeking to provide video entertainment services on the 3 OFS channels In a separate action, we are today excluding the distribution of video entertainment material on OFS frequencies lower than 21 2 GHz for two years 6/ 47 CFR §§94 9(a)(1), 94 9(b)(2)(iii)

4/ When the Commission allowed the newly created ITFS to use the 2500-2690 MHz band, the move was resisted by the traditional users of this band on the basis that what was being created was a "quasi-broadcast" service and that other portions of the spectrum were more suitable for the new service It was further argued that the decision could result in the permanent exclusion of operational fixed users from the band ETV, supra, at 874

5/ Transmitting Program Material to Hotels, 39 FCC 2d 527 (1973)

6/ Memorandum Opinion and Order , Docket No 19671, FCC 83-245, released June 23, 1983

16 Because we have decided not to allow the distribution of video entertainment material on the OFS channels in the 2500-2690 MHz band at this time, we have concluded that there is no reason to provide additional spectrum for that service in this band Thus we will not consider OFS further in this order

III Discussion

A Spectrum Utilization

17 The Commission based its proposals to reallocate the 2500-2690 MHz band on three tentative conclusions First, it concluded that the demand for MDS service exceeded the supply This conclusion was based primarily on the observation that there were a large number of situations in which more than one party had filed for the same channel and that many applicants were proposing to "short space" stations Notice, at paras 19-23 Second, it was concluded that the 2500-2690 MHz band was under-utilized Id at para 28 Finally, it was concluded that if the existing restrictions on the use of the OFS channels were removed there would be increased demand for these channels Id at para 57 The Commission recognized a need to develop a better record concerning the facts on which these tentative conclusions were based For this reason a series of questions was included in the Notice to elicit the kind of information needed to make a reasoned decision on the issues before the Commission Id at para 52 and Appendix C

1 ITFS Spectrum Use

18 Very few of the comments filed in this proceeding contained quantitative information concerning the use of the ITFS spectrum Most of the comments filed by the ITFS community expressed the view that the spectrum should not be reallocated and supported this proposition with public policy arguments rather than spectrum utilization data The policy arguments raised in these comments are discussed below See paras 52-64 infra

19 The most extensive analysis of current ITFS spectrum use was submitted by the Center for Excellence (Centex) of Williamsburg Virginia 7/ The Centex data showed that as of August 1980 there were 82 operating ITFS stations using 492 channels The 82 systems were spread over 27 states California had 15 operating systems and New York had 11 operating systems Of the 27 states that had operating systems 13 had only one system operating The Centex analysis also contained data on ITFS channels use in the top 50 markets as defined by the 1979 Arbitron population book These data showed that in only one market, Los Angeles were all the ITFS channels being used In fact, the data showed that the Los Angeles market had 40 channels in use with applications pending for 8 more channels The data also showed heavy use in several other markets New York, Chicago, San Francisco, Boston, Cleveland Dallas Ft Worth, San Diego, and Milwaukee all had 10 or more channels in use On the other hand Pittsburgh, St Louis Seattle, Baltimore, Hartford, and many other large cities had no current channel use The total number of channels being used in the top 50 Arbitron market was 319 Of these 232 were operating in the 9 cities listed above as having more than 10 channels operating Comments of Center for Excellence, Inc General Docket 80-112 Attachment C (September 26 1980) (hereinafter Centex comments)

7/ The Center for Excellence, Inc (Centex) "is a non-profit Virginia Corporation engaged in educational, medical and social services delivery, research and research development " Comments of Center for Excellence, Inc General Docket No 80-112, at 1 (September 26, 1980) In 1976 Centex began a study program that included a "biennial study of the use of ITFS across the Nation " This study was updated in 1980 Id Attachment C 7-8 This data was referred to by several commenters from the ITFS community and many included portions of it with their comments

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20 Microband included as part of its proposal an "ITFS Spectrum Utilization Study " In making this study Microband claimed that it had been unable to find a "single authoritative source or data base identifying the location and ownership of all ITFS channel licenses " Microband Proposal supra Appendix H, 1 Microband produced its analysis on the basis of data from "(a) the FCC non-Government Frequency List, (b) TV Fact Book, (c) Compucon and (d) copies of licenses obtained through Downtown Copy Center " Id 8/ 9/

21 The Microband survey was different from the Centex survey in several respects The Centex survey was a compilation of existing and proposed licensees by channel group on a city-by-city and a state-by-state basis The Microband survey listed on a city-by-city basis for each channel whether there was an existing licensee either within 25 or 50 miles of the coordinates of the Channel 1 MDS station 10/ This methodology could have resulted in Microband showing a channel in use where Centex showed it vacant or vice-versa It is more likely, however that Microband would show a channel as being occupied that Centex showed to be vacant because the Microband data was based on a 50 mile spacing and was on a channel-by-channel basis as opposed to the channel group basis used by Centex Thus, the Microband data represents a finer grain analysis of channel use than the Centex study On the basis of its study, Microband concluded that within 25 miles of the location of the MDS Channel 1 station 75% of the ITFS channels are not licensed It also showed that in 38 of the 50 markets surveyed less than half the channels were licensed

22 The Commisson staff conducted its own spectrum utilization studies based on all stations licensed as of November 1 1982 11/ The staff study showed that there were 124 licensed ITFS operators using 808 channels These operators were distributed over 29 states and the District of Columbia More than half of the licensed channels were located within 25 miles of a major metropolitan area There were 21 states with no ITFS licensees, 9 states with 1 licensee and 5 states with 2 licensees On the other hand, California had 22 licensees using 167 channels, New York had 13 licensees using 76 channels, Florida had 12 licensees using 22 channels and Pennsylvania had 8 licensees using 53 channels

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8/ The Downtown Copy Center is a private organization that contracts with the Commission to reproduce our public records and sell the reproductions to the public

9/ The 50 cities that Microband submitted data for were not the same cities that were the subject of the Centex survey Centex surveyed the 50 Arbitron markets, whereas Microband surveyed the 50 cities listed in §21 901 of the rules, 47 CFR §21 901 The two surveys contain 40 common cities The cities in the Microband survey that were not in the Centex survey were Akron Anaheim, Gary, Rochester, San Antonio, San Bernardino, San Jose, Syracuse and Toledo Ft Worth was considered separately from Dallas in the Microband Survey The two were consolidated in the Centex Survey The Cities in the Centex survey that were not surveyed by Microband were Nashville, Charlotte Greenville Grand Rapids Orlando/Daytona Beach, Charleston, Raleigh, Harrisburg, Salt Lake and Wilkes Barre

10/ Microband conducted its surveys at 25 and 50 miles because it is generally assumed that if cochannel MDS stations are located more than 50 miles apart there is unlikely to be harmful cochannel interference It is also assumed that if cochannel stations are closer than 25 miles that harmful interference will occur When the separation is between 25 and 50 miles a detailed interference study must be done to assess the possibility that harmful cochannel interference will occur Thus, if there are cochannel stations within 25 miles of a proposed transmitter location, the channel is deemed to be in use and not available If there is no cochannel station within 50 miles of the proposed transmitter location, the channel is likely to be available

11/ This survey was done using the Commission's ITFS station card file that is readily available to the public This file includes all licensed ITFS stations and all stations for which a construction permit has been issued It is possible that some of the stations included are no longer operating and it is also possible that some stations had not been indexed however, we believe that it represents a generally accurate picture of ITFS channels use This study has been made a part of the record in this proceeding

23 The Commission staff also did a computer analysis of the ITFS channel use in the same markets Microband used in its study The staff analysis was only done for 25 miles That is the analysis only considered those ITFS stations located within 25 miles of the MDS station coordinates The results of the staff analysis were not identical to the results submitted by Microband, however, they were similar The staff analysis showed more ITFS stations than the Microband study because the staff study was done later and hence included more recently licensed ITFS stations It should also be noted that the staff analysis also included stations for which construction permits had been granted but which had not yet been licensed Neither study included pending applications

24 In its comments on the Microband proposal, the Corporation for Public Broadcasting (CPB) pointed out that the issue of adjacent channel operation must be considered before any conclusions can be drawn concerning spectrum use or availability The 2500-2690 MHz spectrum is divided in 7 groups of four 6 MHz channels and 1 group of three 6 MHz channels The channels within each group are not adjacent they are alternated with those of another group to provide a 6 MHz guard band between the channels within each group. Traditionally ITFS licensees have been granted up to 4 channels in a single group The operation on these channels is protected from adjacent channel interference where feasible by not licensing the guard band channel in the same area This means that if the A group channels (A1, A2 A3, A4) were licensed in a given area, the B group channels that serve as the guard band channels for the A group channels (B1, B2, B3, B4) would not be licensed in the same area For these reasons, CPB suggests that in analyzing channel use the adjacent channels should also be considered occupied 12/ CPB redid the analysis submitted by Microband on the basis that if a cochannel were licensed within 50 miles of a given set of coordinates or an adjacent channel were licensed within 25 miles of the same coordinates, the channel was in use in that area CPB also included all channels applied for as well as those licensed in its analysis The CPB analysis indicates much greater channel use in the 50 metropolitan areas than either the Microband survey or the Commission staff analysis The CPB analysis does, however, indicate that in 24 of the 50 cities surveyed there are 8 or more adjacent channels available Further Comments of the Corporation for Public Broadcasting, Engineering Statement, 8, 9 and Figure 11 (July 2, 1982)

25 Although the studies submitted and the study made by the Commission's staff did not produce identical results, the results are similar enough to allow certain conclusions to be drawn First in several large metropolitan areas the ITFS channels are heavily licensed On the other hand, there are several large metropolitan areas in which there are no licensed ITFS stations Finally, there is little ITFS spectrum in use outside the large metropolitan areas We believe these conclusions tend to confirm the tentative findings made in the Notice that while the ITFS channels are heavily licensed in some metropolitan areas, they are not heavily licensed in other metropolitan areas Further, neither CPB nor any other commenter offered any evidence that the ITFS channels are heavily licensed outside the major metropolitan areas

2 MDS Spectrum Use

26 As of December 22, 1982 there were 234 licensed MDS Channel 1 stations These licensees were distributed over 50 states, the District of Columbia, Puerto Rico and the Virgin Islands Construction permits had been granted for an additional 114 stations There were 194 pending Channel 1 applications Of these, 172 were mutually exclusive with at least 1 other application There were 5 licensed Channel 2 stations Construction permits had been granted for 3 additional stations There were 143 pending applicaitons for channel 2 licenses in 42 cities All of these applications were mutually exclusive with at least 1 other application There were 3 licensed Channel 2A stations Construction permits had been granted for 16 additional Channel 2A stations In addition, there were 9 pending Channel 2A applications for 4 cities Of these applications, 8 were mutually exclusive with at least one other application

27 The Commisison does not keep records of whether licensed MDS stations are actually operating Since MDS is a common carrier service, whether a station is on the air at a given time is not determined by the licensee but rather by whether a customer has purchased time from the licensee At least one private concern, Paul Kagan Associates, Inc , collects such data

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12/ We do not agree that use of one channel group necessarily precludes use of the interleaved channel group See paras 65-78, infra

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According to its latest report, as of August 3, 1982, there were 82 MDS stations operating and an additional 120 stations licensed that had not yet obtained a customer "Statistical Progress of MDS," The MDS Data Book, 64 (October 1982)

28 MDS Channel 1 licenses have been granted in 49 of the 50 markets listed in §21 901(c) of the rules, 47 CFR §21 901(c) A construction permit has been granted for the remaining city Of the 49 stations licensed, 43 have customers Outside of these markets there were, as of the date of the Kagan survey, 152 stations licensed Of these 39 had customers On the basis of these facts, it can be concluded that the MDS Channel 1 is heavily used in the larger metropolitan areas but less used outside these areas

29 All the Channel 2 applications that are not mutually exclusive have been granted As of December 12, 1982 five stations had been licensed and construction permits had been granted for three additional cities Only one of these channels has a customer As was pointed out in the Notice, there are certain technical problems that limit the simultaneous use of Channel 1 and Channel 2 in the same area The nature of the downconversion equipment used in MDS is such that if different operators are using Channel 1 and Channel 2, the Channel 1 subscribers will be able to receive the Channel 2 programming and the Channel 2 subscribers will be able to receive the Channel 1 programming Scrambling of both signals would negate this problem but it is expensive to add scrambling to existing MDS systems This means that if we were to authorize a Channel 2 station in an area that already has a Channel 1 station delivering unscrambled programming and the Channel 2 station offered scrambled service, the customers of the Channel 2 operator could receive both the scrambled Channel 2 programming and the unscrambled Channel 1 programming There is a Channel 1 station authorized in every locale that has a Channel 2 available Furthermore, because Channel 1 and Channel 2 have no guard band between them it is possible that noncolocated Channel 1 and Channel 2 transmitters could cause unacceptable adjacent channel interference

30 These factors have contributed to the light use of MDS Channel 2 In one city Phoenix, Arizona these problems have been overcome There, Microband is the licensee of Channel 1 and Contemporary Communications Corporation is the licensee of Channel 2 American Cable Television is the subscriber of both Microband and Contemporary and programs both channels and has a common set of customers receiving two-channel service

3 Projected ITFS Growth

31 One of the most controversial issues raised in this proceeding concerns the projected ITFS growth In the Notice, the Commission concluded that there are no reasons to expect some growth in the demand for ITFS channels, but not such a significant amount that most vacant channels could be expected to be lifted Several commenters from the ITFS community took issue with these conclusions The comments submitted by the University of Maryland were typical It claimed that the Commission's conclusion was a "vast underestimation of future ITFS demand " Comments of the University of Maryland, General Docket 80-112, at 3 (September 26, 1980) Those commenting on this issue gave several reasons why they believed the future demand for ITFS channels was much greater than the Commission envisioned

32 The most commonly made argument concerned availability of funding Many commenters pointed out that ITFS growth took place without any federal funding until the Public Telecommunications Financing Act of 1978, 92 Stat 2405 (1978) (47 USC §§390-399), authorized The National Telecommunications and Information Administration (NTIA) to make funds available for ITFS facilities The NTIA has informed us that in 1979 $1,130,000 was made available for 4 ITFS systems In 1980 $211,937 was made available for 3 systems, in 1981 $815,260 was made available for 4 systems and in 1982 $570,485 was made available for 4 systems Thus, NTIA records show that since ITFS has become eligible to receive such funds 15 ITFS systems have received a total of $2,727,682 13/

13/ This information was furnished by the Policy Branch of the Office of Policy Coordination and Management of the National Telecommunications and Information Agency

33 Other commenters have stressed that the increased use of ITFS to deliver graduate level engineering, scientific and business training directly into the work places of those needing such training will result in accelerated demand for ITFS channels Typical of the systems referred to are those operated by Stanford University and the Illinois Institute of Technology Stanford operates a 4 channel ITFS system known as the Stanford Instructional Television Network that is used to transmit graduate level engineering courses and continuing education courses to approximately 20 high technology companies located in California's "Silicon Valley " In its comments, Stanford indicated that it will likely need more channels in the future to satisfy the increased demand for this type of educational service Comments of the Leland Stanford Junior University, General Docket 80-112, Attachment B (September 26, 1980)

34 The Illinois Institute of Technology (IIT) operates a 4 channel ITFS system known as Interactive Instructional Television (IIT/V) that is used to provide graduate level engineering education to over "1200 professional engineers, scientists, and managers annually in the greater Chicago area " Comments of the Illinois Institute of Technology relative to Microband Proposal, Docket 80-112 and 80-113, at 2 (July 2, 1982) In its comments, IIT presented data that indicated the level of enrollment in its program has risen constantly from approximately 100 students per semester in 1976 to approximately 550 students per semester in 1980 (Comments of Illinois Institute of Technology, Docket 80-112, at 8 (September 26, 1980))

35 In some states graduate level and other post secondary instructional television is handled on a state-wide basis by a single entity For example in Indiana, the Indiana General Assembly established the Indiana Higher Education Telecommunications Systems (IHETS) to provide for the development of telecommunications systems to meet the needs of public and private post secondary institutions in Indiana IHETS operates 23 ITFS stations in sixteen Indiana cities using 28 ITFS channels. 14/ IHETS intends to add three additional channels to this system in the near future In the longer term, IHETS sees the need for 19 more channels in Indiana These stations are used to distribute medical, engineering and other forms of post secondary education throughout the state of Indiana Comments in Opposition to Microband Proposal General Dockets 80-112 and 80-113, James R Potter, Indiana Higher Education Telecommunications System (July 8, 1982) The IHETS plan is typical of State wide plans to use the ITFS channels Other states have similar systems either operating or planned

36 Less comment was received on the future growth in the use of the ITFS channels by elementary schools, junior high schools, and high schools Dr Gerald A Rosander, County Superintendent of Schools, Department of Education, San Diego County, submitted extensive comments showing that virtually all the ITFS channels are used in San Diego Much of this use is for primary, junior high, and high school education Comments were received from most of the school districts in San Diego County articulating the value of ITFS delivered programming at these educational levels Comments expressing the same view were also submitted by several teachers from San Diego County Schools Thus, while very little comment was received on the projected growth in the use of ITFS for the delivery of educational programming at this level it is possible that if other school systems followed the lead of San Diego County there would be increased demand for ITFS channels by such secondary school systems

37 Some comments suggested, on the other hand, that the future growth of ITFS may be limited at this time by what was referred to in the comments submitted by the National Education Association and others as "the proposition 13 mentality " Comments of the National Education Association, Docket 80-113, Appendix A, at 2 (September 30, 1980) These commenters note that when the amount of money available for public schools is being reduced by taxpayers, expenses for educational technologies such as ITFS are usually among the first to be reduced or eliminated NEA also pointed out that there is a general reluctance on the part of educators to use new technologies It stated that "many teachers and administrators tend to view educational innovations as fads that will pass if they are ignored " Id

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14/ It is useful to note that IHETS provides these 28 channels of service using only 12 different ITFS channels Furthermore, it does not use more than 4 channels in any city It uses 4 channels in one city, 3 channels in another city, 2 channels in six cities, and 1 channel in nine cities Of the 12 channels used, Channel A_1, B_1, and D_1 are used 4 times, Channels A_2 and G_2 are used 3 times, Channels C_1 D_2 and E_1 are used twice and Channels B_2, E_2, F_1 and F_2 are used once

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38 Another commenter, the United States Catholic Conference (USCC), indicated that when the Catholic Church institutes its nationwide satellite network, to be known as the Catholic Telecommunication Network of America, local dioceses will use ITFS facilities to connect the satellite earth stations with the end user of the communication service It is estimated that at least 700 and perhaps as many as 1 050 ITFS channels may be required to fill this need Comments of Department of Communications, United States Catholic Conference, General Dockets 80-112 and 80-113, 3 (July 2, 1982) The services to be offered on these channels are described as

> (a) Church-related communications capabilities and (b) community-related uses of the system Among the Church-related communication capabilities are
>
> 1 National and regional teleconferencing for Church organizations
>
> 2 Data and facsimile transmission of the Church's national news service to the 150 newspapers of the American Catholic press
>
> 3 In-service training for specialized Catholic social service organizations, for example, schools, hospitals, Catholic charities, etc
>
> 4 Electronic message and related internal digitalized communications
>
> The community-related uses include
>
> 1 Educational programming services to local cable systems
>
> 2 Specialized community-related digital services (For example, CAT scanner interconnections to regional centralized computer facilities)
>
> 3 Regional teleconferencing for civic organizations
>
> 4 Inter-connection for national, non-profit, educational/cultural/ inter-religious organizations (via cost-sharing arrangements)

Id at 4 The growth projected by the USSC is difficult to categorize Data subsequently submitted by the Catholic Television Network 15/ show that 11 Catholic Dioceses are now operating systems that use 108 channels The 11 systems reach 28% of the U S population Another 7 Dioceses are building systems that will use 84 channels and serve 9% of the U S population Thus, the 18 Diocesan systems either in existence or under construction use 192 channels to serve 37% of the U S population Contrasted with these data are the data concerning the 60 Diocesan systems to be constructed in 2 to 5 years for CTN These 60 systems will require 720 channels to reach 30% of the U S population On the basis of these figures, it can be concluded that much of the growth projected by USCC will occur in areas where ITFS channels have traditionally been most underutilized

39 In addition, it is not clear what is encompassed by each of the uses listed It appears that some of what is to be transmitted is not "instructional and cultural material for the primary purpose of providing a formal education and development to students enrolled in accredited public and private schools, colleges and universities" as required by §74 931(a) of the rules 47 CFR §74 931(a) Furthermore, much of the demand projected by CTN will not occur for many years, and when it does occur it will be concentrated in those areas where

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15/ On February 7 1983, the Catholic Television Network (CTN) submitted a document titled "Information Indicating Current and Projected ITFS Utilization by Catholic Dioceses" and simultaneously requested pursuant to §1 41 of the rules, 47 CFR §1 41, that the information be made part of the record in this proceeding and in the proceeding in General Docket 80-113 The information submitted by CTN on February 7, 1983 is hereby accepted in this proceeding and in General Docket 80-113 This action is taken pursuant to §1 415(d) of the rules 47 CFR §1 415(d)

ITFS channels have been underutilized Thus it appears that even if all the channel requirements projected by CTN do materialize it is most likely that sufficient channels will be available to meet the projected demand regardless of the reallocation authorized by this order

40 Finally, the Association of Hospital Television Networks (AHTN), a national non-profit consortium whose 32 members operate or are planning to operate systems to provide instructional programming for health professions, indicated that although not all these systems use ITFS frequencies to distribute their programming it is expected that some of the systems not yet constructed will use ITFS channels if they are available Comments of the Association of Hospital Networks, General Dockets 80-112 and 80-113, (July 2, 1982)

41 The growth of ITFS channel use during the pendency of this proceeding has been robust As noted above, just after this proceeding was started Centex reviewed ITFS channel use and determined that there were 82 ITFS systems using 492 channels Our own analysis conducted approximately two years later showed that there were 124 ITFS systems using 808 channels Thus the number of ITFS operators has grown by approximately 50% and the number of licensed channels has grown by over 60% In addition, as of October 1982, we had 183 applications pending for new construction permits 16/ As discussed below many in the MDS community have expressed the view that this growth was triggered by our instituting this proceeding This may or may not be accurate In any event, if an applicant is eligible and otherwise qualified and intends to use the spectrum for the purposes stated in our rules, we have no basis to question its motivation for deciding to proceed at any particular time

42 On the basis of the above the following conclusions can be made It is likely there will be an increase in demand for ITFS channels for use by institutions of higher education for the delivery of graduate level training to the workplaces of engineers scientists and other professionals There is less evidence that there will be substantial growth of ITFS use by elementary, junior high, and high school systems There is also some evidence that there will be growth in the delivery of health services information, but such growth is not likely to be substantial It also is likely that growth projected by CTN that is appropriate for ITFS will occur in areas where ITFS utilization already is low Finally, in a companion Notice adopted today we are proposing to relieve ITFS licensees of a number of regulatory burdens thereby encouraging the fuller use of the ITFS channels

4 Projected MDS Growth

43 It is very difficult to make predictions about the future growth of MDS In the Notice the Commission observed that in the 50 major markets and in many of the secondary markets further acceptance of MDS applications is precluded by the cutoff rules Notice supra at para 19 As noted above, there are mutually exclusive Channel 1 applications pending in 84 cities and mutually exclusive Channel 2 applications pending in 42 cities Thus there are no MDS channels available for growth in any major metropolitan, and many non-metropolitan areas of the country Furthermore, unless the mutually exclusive applicants reach an agreement among themselves a comparative hearing is required to resolve each mutually exclusive situation

44 The principal factor that most of the MDS entities commenting in this proceeding cited as limiting the growth of MDS is the lack of a multichannel capability Virtually every member of the MDS community that filed comments in this proceeding expressed the view that if MDS is to survive as an industry, multichannel operation is an absolute necessity These views were summarized in the comments submitted by the Ad Hoc Committee for Wireless Cable which argued "the expansion of existing MDS service to a multichannel, over-the-air delivery in competition with cable and other forms of distribution is essential to the continued viability of the MDS

16/ About 120 of the applications were filed by the Public Broadcasting Service (PBS) and its member stations to provide what PBS terms a National Narrowcast Service Whether PBS is eligible to be an ITFS licensee is presently under review

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industry and of its existing carriers and operators " Comments of the Ad Hoc Committee for Wireless Cable, General Dockets 80-112 and 80-113, at 3 (July 2, 1982) This claim is especially noteworthy because the Committee is made up of "representatives from substantially all the Carriers and Operators in the MDS Industry " Id at 2 17/ In addition Microband and others have submitted data in this proceeding to support the proposition that there is a large unmet demand for multiple channels of premium television that is unlikely to be met by cable television or any other available technologies (See paras 57-64, infra) Microband also submitted studies which it claims establish that the per channel cost for a 5 channel system will be 60% less than for a single channel system because of common equipment and operations It argues that consumer appeal increases substantially when the number of channels increases but the cost is not substantially higher Microband Proposal at 57-72

45 There are two reasons why there is only one multichannel MDS system in operation today The first reason is of course that there are not enough channels available to allow multichannel operation As noted above there are only two MDS channels capable of transmitting a standard television signal available in the top 50 markets Outside of these markets there is only one such channel available Furthermore, in most of the top 50 markets a comparative hearing may be required before the second channel is licensed Even when it is licensed there will be very limited opportunity for even two-channel MDS operation In general, this appears feasible only if the same operator becomes the customer of both licensees as has occurred in Phoenix (paragraph 30 infra)

46 The other reason is that §21 901(d) of our rules 47 CFR §21 901(d) precludes a licensee from obtaining a second channel in the same metropolitan area until it has operated the first channel for at least one year and can show that there is a public demand for additional service that is not likely to be met by a competing carrier In the Notice, the Commission proposed to repeal this rule and it will be discussed below The rule is pertinent here because it has been shown to be an impediment to MDS growth Except for this rule, existing Channel 1 licensees would be better able to work out arrangements with the Channel 2 applicants that would facilitate 2-channel operation Or the same entity could have applied for both channels and offered 2-channel service to one customer or offered one channel service to two customers

47 On the other hand as was observed in the Notice and by most of the ITFS commenters in this proceeding the fact that there are a large number of applications for authority to construct MDS stations does not necessarily mean there is an unmet demand for MDS service In fact many have claimed that the MDS applications on file are merely a reflection of a "land rush mentality" rather than real demand Typical of these comments was the view that

> "demand for MDS channels, manifested through applications filed with the Commission and the demand for MDS service are two entirely different things Many MDS applicants, like land speculators are applying for spectrum with no certain knowledge of what they would do with an MDS channel and in many cases with no immediate plans for using any MDS channel which may be granted to them "

Comments of the Association for Higher Education of North Texas, et al General Docket 80-112 and 80-113, at 14 (July 2, 1982)

48 Many members of the ITFS community submitting comments regarding MDS channel use and projected growth did so on the basis of information supplied by Centex For this reason, we believe it is appropriate to comment on the Centex MDS analysis Centex submitted an analysis of the growth of MDS from 1972 thru 1980 that Centex claims "points to fundamental errors in the FCC analysis of MDS channel needs " Centex Comments, supra, Attachment C 12 Centex

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17/ The Committee is made of both licensed MDS carriers and the MDS operators who are the customers of the licensees The carriers represent more than 80% of the existing or potential MDS licensees in the top 50 markets and the operators provide programming for 70% of all active MDS channels Ad Hoc Committee Comments, supra, 2 and 1

claims that during this period a total of 1 771 MDS applications of various types were filed Centex also states that "there are in fact 21 different types of applications listed by the FCC, of which only 8 deal directly with construction permits and licenses, while 13 deal with modifications or additions The FCC dockets fail to make this important point clear " Id The Centex data shows that of 1,771 applications filed 1,137 were for construction permits and 102 were for station licenses Because of this Centex exclaims "the number of applications for licenses for new stations is, however, only 102 or 5 8% of all applications' " Id at 13 (emphasis in original) The Centex data also shows that of a total of 239 channel 2 applications, only 2 were for licenses On the basis of this data Centex makes the following assertion

> "Since serious operators – both profit and non-profit entities – usually aggressively pursue their applications for construction permits and assiduously pursue station construction authorizations, one could rightly ask, why has this not occurred in the case of MDS? Is it because applications are being made on the basis of Oklahoma-type land-grabs with the hope that valuable 'mineral' or 'farm lands' may be acquired? Regardless of the basis for the current status of MDS applications the fact that only 1 of every 14, or 7%, of all MDS channel applications has developed into an FCC-licensed operation is indicative of the real status of MDS " Id at 14

49 We recognize and appreciate that Centex is the most reliable private source of ITFS facility data however we believe that these comments suggest a misunderstanding of the MDS industry and Commission processing procedures on Centex's part When an entity desires to construct a MDS facility it submits a construction permit application to the Commission If the application is not mutually exclusive with another construction permit application and is complete in all respects and if the Commission finds that the applicant is legally, technically and otherwise qualified the Commission will grant the requested construction permit After the permittee constructs the station it will then apply for a station license As is clear from the statistics quoted by Centex, there are many more construction permit applications than there are channels available and thus most of the construction permit applications received are mutually exclusive with at least one other application None of these mutually exclusive applications can be granted until either a comparative hearing is held or the mutually exclusive applicants reach a satisfactory settlement agreement This situation accounts in part for the slow growth in the number of MDS stations 18/

50 It also may be that there is some truth in these assertions It does appear that in many areas the development of MDS has been slow (see para 28, supra) The data submitted by MDS interests suggest that the marginal cost of providing additional channels is sufficiently low that additional penetration could be anticipated were multichannel operations authorized (see para 44, supra)

51 On the basis of the information presented, we conclude that there will be little growth in the use of MDS channels as long as there are only two channels available and each licensee is only allowed to use one channel per metropolitan area (see para 44, supra) The market for single channel MDS in many areas is limited (see para 28, supra) We further conclude that if more channels were made available and if the restrictions on multiple channel operation are removed there could be a rapid acceleration in the growth of MDS

B Public Policy Considerations

52 Several ITFS commenters in this proceeding claimed that even if the ITFS channels are not now fully utilized, as a matter of public policy, the Commission should continue to keep

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18/ The Centex comments also included a table that represented a statistical comparison of MDS OFS, and ITFS In this table, Centex claimed that 98 MDS stations served a total of 133 receive sites with an average I 4 receiving sites per installation Id at 19 It is not clear where Centex obtained these figures, but it is clear that they represent a gross misstatement of MDS channel use According to the figures compiled by Paul Kagan Associates, Inc as of June 30, 1980 the MDS industry was providing premium television service to 352 000 individual locations MDS Data Book supra, at 12 It may be that what Centex did in its analysis was confuse the number of entities purchasing time from MDS stations with the number of locations receiving service via MDS In the usual MDS situation there is a single MDS licensee with a single subscriber who provides service to a large number of customers

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all 28 channels reserved for ITFS For example, the American Library Association asserted that "as a matter of public policy the Commission should retain this spectrum for noncommercial educational use As the guardian of the airwaves for the public, the Commission has a special responsibility – in our judgment – to set aside a portion of the spectrum for the benefit of the public, just as is done in the case of land development in Alaska and the Far West " Comments of the American Library Association, General Docket 80-112, at 3 (September 5, 1980) The National Association of Educational Broadcasters stated that

> "The growth of instructional telecommunications systems depends on the concept of reservation Educational and public telecommunication interests should not be forced into the 'marketplace' with commercial and private microwave system operators The ITFS band is the last 'free' resource available to the country for educational purposes The Commission maintains the noncommercial reservation of the lower 4 MHz of the FM radio band and of unused assignments in the TV Table of Allocations, despite the pressures from would-be commercial broadcasters to invade this reserved territory Maintenance of the reserved nature of the 2500-2690 MHz band is also warranted by the same policy considerations "

Comments of the National Association of Educational Broadcasters, General Docket 80-112, 6 (September 26, 1980)

53 We recognize that there are sound public policy reasons for creating spectrum reserves In the order granting the exclusive use of the 28 channels to the ITFS, the Commission concluded that "[b]y providing the exclusivity desired by the educators, planning of the system as well as usage should be simplified since they will not need to consider the questions of new non-ITFS systems " ITV, supra, at 200 In the same order the Commission recognized that it should wait longer to review the use of spectrum allocated for educational use "because it was aware of the problems encountered by educational interests in preparing funding and implementing the new tool as well as developing the operational expertise " Id at 199 We continue to believe that the concept of a spectrum reservation for educational and other public service entities is valid We also continue to recognize as many of the ITFS commenters in this proceeding have again emphasized, that the nature of educational institutions is such that it will generally take them much longer than it would take a commercial entity to begin using a new technology such as ITFS 19/ It has been pointed out in this proceeding that educators are slow to accept new technologies and that many of the funding sources for education are even slower to make funds available for innovative endeavors such as ITFS We also note in this regard that in its comments, Microband stated that "[w]hile it might be argued that school systems, which must pay for land, buildings, supplies, electricity and other facilities, should otherwise compete in the free market for these channels, we do not subscribe to such an approach Instead we would urge the retention of a number of channels for exclusive ITFS use " Comments of Microband Corporation of America, General Docket 80-112, at 27 (October 9, 1980) We agree Thus, we continue to believe it is in the public interest to have a spectrum reserve for the ITFS

54 Deciding that it is the public interest to have a spectrum reserve does not mean, however that a 28 channel nationwide reserve is in the public interest In this proceeding, we have tried to determine whether the channels that have been available for the ITFS since 1963 are now being used or will be used in the future As summarized above, the evidence indicates that in some of the largest metropolitan areas most of the ITFS channels have been licensed In other metropolitan areas there has been limited or no use of the channels In many states there are no channels in use, and in most of the other states, there is little use outside of the metropolitan area Although it is difficult to make accurate projections concerning the future use of these channels the evidence available indicates that there will be some growth, but not enough to fully utilize all the channels on a nationwide basis

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19/ It could be argued that ITFS can no longer be considered a new technology since it has been available for almost 20 years However, it is only recently that many of the school systems and universities have become aware of its potential

INSTRUCTIONAL TELEVISION FIXED SERVICE (MDS REALLOCATION)

55 Having found that there are ITFS channels that are not now being used and are unlikely to be used in the near future, we are faced with the question of whether it would be in the public interest to reallocate some of them for use by MDS as proposed in the Notice MDS is now used primarily for the distribution of premium television to hotels, motels, apartments and single family residences In its proposal, Microband submitted extensive evidence that there is a large unmet demand for multichannel premium television and that "cable (television) is not capable of meeting the existing demand now or any time in the foreseeable future " Microband Proposal, supra, at 55 Microband further argues that making more channels available for MDS would act as a competitive spur to the cable television industry and that "[s]ince there are no alternative distribution systems authorized to provide multichannel broadband service cable has been able to behave as a monopoly industry, building at a schedule suited to its own pace, with little incentive to upgrade antiquated systems " Id at 12 (footnotes omitted) Microband concludes that an expanded MDS would "provide a competitive spur to cable, thereby moderating its monopoly characteristics and speeding its growth " Id at 25

56 On the other hand, most of the ITFS commenters expressed the view that expanding the MDS was unnecessary in view of the number of alternative methods of delivering entertainment programming to the public The Public Broadcasting Services (PBS) comments were typical PBS asserted that

> "Microband's argument that multichannel MDS systems should be used to increase competition for cable television does not justify a departure from the nation's long established and sound policy of assuring adequate telecommunications resources for educational purposes, especially when that competition is provided by numerous other technologies Nor are multichannel MDS systems required to fill in service gaps where cable television is not available With the explosion of STV, and DBS and low power television on the short-term horizon, there will be more than sufficient alternative services available to the public in both urban and rural areas Low power television and DBS, in particular, have been highly touted as solutions to the problem of underserved rural areas "

Comments of the Public Broadcasting Service, General Dockets 80-112 and 80-113 (June 2 1982)

57 These comments do not demonstrate that there is no substantial public demand for additional premium entertainment programming Rather, they address the matter of how the demand should be met As to the timing of the introduction of other new services, we note that there is no multichannel alternative to cable available now STV is a one channel service A high power Direct Broadcast Satellite service, transmitting entertainment programming directly to individual homes on a widespread basis, is several years away 20/ Low power television as a means for delivering subscription television is basically a low power version of STV In any case, multichannel MDS will expand consumer options, and expanding consumer options is a legitimate public interest justification for reallocating spectrum If those who claim there is no market for multichannel MDS are correct then whatever spectrum is allocated for multichannel MDS will go unused and can be reallocated back to the ITFS or to some other appropriate use

58 If, on the other hand, a market does develop for multichannel MDS there would be benefits to the public at large and there could be large benefits to the users of the ITFS channels as well For example, in both this proceeding and in the companion proceeding in Docket 80-113 we have been informed by ITFS licensees that there has been no reduction in the cost of the equipment they are being offered by manufacturers This is in direct contrast to the MDS industry where the cost of the downconversion equipment has decreased from over one thousand

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20/ A number of entities (e g United Satellite Communications, Inc) have announced plans to attempt to use low power fixed satellites to deliver video entertainment programming to individual homes, in addition to traditional fixed satellite reception points (cable television systems, MDS systems, hotels, etc) The fixed satellite service is at a comparative technical disadvantage vis-à-vis the direct broadcast satellite service because, among other things, the lower power transmitters require larger receive antennas and the satellites are spaced more closely together which increases the possibility of interference In any event such systems are nascent in design and may be subject to further regulatory considerations

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dollars to less than one hundred dollars We believe that if there is widespread use of multichannel MDS there could be similar reductions in the cost of ITFS equipment These savings would result from economies of scale in the manufacture of reception equipment This could result in dramatic decreases in the cost of constructing ITFS systems thereby making them affordable to many who cannot now afford to build these systems 21/ Lower cost ITFS reception equipment could also make it possible for existing ITFS systems to expand the market for their programming It could become economically and technically feasible to deliver instructional programming directly to private homes

59 Microband further claims that authorizing multichannel MDS would be in the public interest because it would "promote economic activity in a high technology field which is important to the nation's future " Id at 73 Microband estimates that the authorization of the multichannel MDS could provide 20 000 new jobs Id Bogner Broadcast Equipment claims that the authorization of multichannel MDS would cause equipment manufacturers such as itself "to develop new improved and competitively priced multichannel reception equipment " Bogner further claims that "the stimulus will have a ripple effect throughout the industry benefitting manufacturers, marketers, retailers MDS licensees, MDS programmers and most of all the consumer " Comments on Proposal Bogner Broadcast Equipment Corporation General Dockets 80-112 and 80-113, at 2 (June 2, 1982) Other equipment manufacturers have expressed similar views Conifer Corporation asserts that authorization of multichannel MDS "will create new business opportunities and will benefit the economy " Comments on Proposal, Conifer Corporation, General Dockets 80-112 and 80-113, at 2 (June 2 1982) Lance Industries states that authorizing multichannel MDS "will cause a re-vitalization of a significant segment of the American-based electronics manufacturing industry" and thereby "create jobs and benefit society as a whole ' Comments in Support of Rule Making Proposal, Lance Industries General Dockets 80-112 and 80-113 at 2 (May 28, 1982)

60 Another public interest argument made by some commenters is that authorizing multichannel MDS will make multiple premium television channels available to rural areas that may never be served by conventional cable television One citizen from West Virginia made the following observation

> "Any survey of rural America will demonstrate that the presently allocated instructional television fixed channels are not being used or are used only in a minimal fashion in rural areas The likelihood that a multi-channel MDS service would impinge on the availability of such channels for instructional purposes is most remote at best
>
> "I really believe that it is about time that your agency give as much consideration to expanding various electronic services to rural America as you give to increasing the plethora of electronic services that are available in the larger markets "

Informal comment of S Craig Curtis, General Dockets 80-112 and 80-113 (May 8 1982) An MDS operator from New Hampshire surveyed potential multichannel MDS customers and submitted the following summary of the responses received

> "Most of these residents cited a recent article that appeared in the newspapers concerning a small town that was considering Cable Television, wherein one of the politicians stated that 'Only 50% of the residents in the State of New Hampshire will ever have Cable Television Service ' Their general reaction to this article is that when an electronic type of service is available to provide them with this service, which will not cost the taxpayers any additional money and will actually employ more people in the State, why should they be deprived of this service simply because they choose to build their home and raise their family in a suburban type of atmosphere? Others expressed views that they realized that it was more costly for their water, sewage system and fire insurance rates where their homes have been erected, but their reaction was, 'Isn't this what the United States is all about – Freedom of choice?' And they felt as long as they were willing to pay the cost for their freedom the FCC should provide them the same equal opportunity that is provided to those who have elected to live in a large city, provided the cost is paid for by themselves and not the state or government "

21/ This does not argue against reallocation of a portion of the band to MDS because the premise of the reallocation is based on commercial operation

INSTRUCTIONAL TELEVISION FIXED SERVICE (MDS REALLOCATION)

Comments of Dynamic Sound, General Dockets 80-112 and 80-113, at 3 (June 1, 1982)

61 Two major public interest arguments favoring the authorization of multichannel MDS are efficiency and flexibility It is clear that substantial demand exists for multichannel premium television service In uncabled areas (some of which may never be cabled), multichannel MDS is a means for satisfying consumer demand for additional premium television service In areas that are or are about to be cabled, competition from multichannel MDS may spur cable systems to build promised systems faster, improve existing systems, and keep prices low The efficient production of goods and services and the efficient use of spectrum are promoted when competition among providers is present

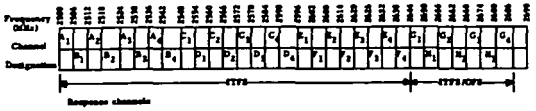
62 Multichannel MDS is also a particularly flexible service While current indications are that its primary use would be for premium video, many other uses are possible (e g , high speed data transmission or transmission of educational programming) The common carrier nature of MDS means that the type of service provided can change on public demand Thus, the frequencies authorized for multichannel MDS use are likely to be employed in their highest valued use

63 In addition to these two advantages it is also possible that multichannel MDS would stimulate equipment innovations that would lower the cost of ITFS equipment This could make ITFS service more widely available

64 The major argument raised in opposition to the reallocation, other than the spectrum reservation argument discussed above is that multichannel MDS is not needed because there are other technologies available to meet whatever demand exists After carefully considering all these arguments we have concluded that reallocating some ITFS channels to MDS will serve the public interest We believe the benefits noted above are sufficently likely to permit MDS entrepreneurs an opportunity to expand consumer choice by offering a multichannel MDS service Should these benefits not materialize, a further reallocation may be undertaken We do not believe our reallocation plan discussed below compromises the legitimate needs of the ITFS community for channels of communication

C Reallocation Plans

65 Before reviewing the reallocation plans considered, we believe it is useful to review the existing allocation scheme used for the 2500-2690 MHz band The band is divided into thirty-one 6 MHz channels and the same number of 125 kHz response channels 22/ (The final 125 kHz of the band is not allocated for these services) The thirty-one 6 MHz channels are contained in the portion of the band from 2500 MHz to 2686 MHz and the thirty-one 125 kHz response channels are contained in the band from 2686 MHz to 2689 8750 MHz The thirty-one 6 MHz channels are further divided into 7 groups of 4 channels each and a single group of 3 channels The 4 channel groups are designated channel groups A through G and are assigned to the ITFS The 3 channel group is designated the H group and is assigned to the OFS Within each group there is a 6 MHz gap between each of the channels That is channels within each group are not adjacent they are alternated with those of another group to provide a 6 MHz guard band between the channel within each group The chart below illustrates the allocation plan



66 ITFS licensees are limited to no more than 4 channels in a single area, all of which must come from the same group 47 CFR §74 902(c) If an applicant is not ready to use all four channels when it first applies, it may request the remaining channels be reserved for it for future use Id In those situations in which there are two ITFS licensees in the same area, the channel groups are assigned insofar as is possible so that there is no adjacent channel

22/ The response channels are used by some existing ITFS channels to allow students in the remote classrooms to speak with the instructor at the studio Other systems use telephone lines for this purpose and their response channels are unused

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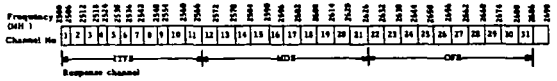
operation For example, if there were an A group licensee in a given area, we would try to avoid granting a B group license in the area It should also be pointed out in this regard that our rules provide for reusing channels in the same area if doing so would not cause harmful interference 47 CFR §74 902(d)

67 The principal reason for adopting the present scheme was that it allowed the use of simple and inexpensive reception equipment Instruction Television Fixed Service, 2 RR 2d 1615 (1964) The equipment used to receive an ITFS signal consists of an antenna, a downconverter and a conventional television receiver The downconverter simultaneously converts the incoming signals from the four ITFS channels (if four channels are being transmitted) to four VHF television channels The VHF channels used are usually either 7, 9, 11 and 13, or 8, 10, 12 and 13(+) 23/ Which set to use is determined by which VHF channels are used in the area This eliminates the possibility of the VHF stations interfering with the downconverted ITFS channel It also allows the local television channels to be distributed on the same cable as the downconverted ITFS channels Id at 1617

68 In the Notice we proposed a plan whereby the 31 channels in the 2500-2690 MHz band would be reallocated for shared use by the ITFS, the MDS and the OFS Under this plan there was to be a primary allocation of 11 channels to the ITFS 10 channels to the OFS, and 10 channels to the MDS We also proposed that if the primary allocation of a service was fully used in one area any unused channels in the other two allocations could be used to satisfy the excess demand in the fully used service The proposed plan did away with the channel groups described above and replaced them with contiguous allocations The chart below illustrates the proposed allocation plan



69 This plan received virtually no support from the commenters in this proceeding It was criticized as being technically not feasible and unduly disruptive of the existing ITFS allocation scheme

70 The claims that it was technically not feasible were all based on the belief that adjacent channel operation cannot readily be achieved Several reasons were given to support the claim First, some claimed that adjacent channel operation would preclude the use of the block downconversion equipment now used by virtually all ITFS systems One of the major advantages of the block downconversion technique is that it "avoids interference created from 'direct pickup' of a VHF television station by the television receiver, or by a 'MATV' system used to distribute converted ITFS signals to school classrooms " Further Comments of the Corporation for Public Broadcasting, General Dockets 80-112 and 80-113, Engineering Statement at 5 (July 2 1982) If adjacent channel operation were required the local VHF television signal would be picked up by the television receiver being used to display the ITFS signal and cause a degraded picture CPB outlined a downconversion scheme that would mitigate this problem but that would also produce another problem, interference with the reception of the local VHF signals carried on the same distribution system Id at 6 The equipment required to implement the downconversion scheme was much more complicated and expensive than existing ITFS downconversion equipment

71 CPB also mentioned two other problems that could occur with adjacent channel operation unavoidable unauthorized reception of the adjacent channel programming and downconverter

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23/ The designation 13+ refers to the use of the spectrum immediately above Channel 13 This is made possible by adjusting certain circuits within the television receiver Further Comments of the Corporation for Public Broadcasting, General Dockets 80-112 and 80-113, *Engineering Statement* at 6 (July 2, 1982)

overloading Id at 2 The unauthorized reception referred to by CPB would occur when different licensees were using interleaved channel groups For example if one ITFS licensee were using the A group and another ITFS licensee were using the B group in the same area, the block downconversion equipment used at the receiving sites of both licensees would be capable of receiving programming from both licensees The other problem raised by CPB, downconverter overloading, could result if 8 strong signals were received at a single location from two nearby ITFS stations CPB claims that the presence of eight signals in the downconverter would produce intermodulation interference to both systems

72 Notwithstanding the theoretical merits of CPB's criticisms we note that there are many large metropolitan areas where interleaved channel groups are being used For example, the A and B groups are licensed in Los Angeles San Francisco, New York and Milwaukee, and we have received no reports of the problems raised by CPB This is not to say that problems do not exist, but we can only assume that they are not great since we have not received any reports of this arrangement producing problems

73 Another commenter claimed that adjacent channel operation would eliminate the ability of ITFS operators to use the same transmitter for both the aural and the visual channels as is done now and force them to the expense of using a separate transmitter for each channel It was claimed the present "mode of operation simplifies the transmitter and makes it less expensive but also complicates the suppression of energy outside the particular channel transmitted " Comments of National Instructional Telecommunications Council, Inc and Catholic Television Network, General Docket 80-112, Attachment H, Engineering Statement by Jules Cohen & Associates, at 2 (July 26, 1980) According to Mr Cohen single transmitter operation would produce so much interference that adjacent channel operation would be impossible Finally Dr William Kincheloe, Jr , Adjunct Professor of Electrical Engineering at Stanford University concludes, "that such a major change in policy for frequency allocations as that proposed by the adjacent channel assignment in Docket No 80-113 should be done with great care if a situation is not to develop where many instances of degraded service would be experienced to the embarrassment of the FCC " Comments of the Leland Stanford Junior University, Attachment A at 6 (September 26, 1980)

74 These and other commenters are only claiming that the adjacent channel operation that was implicit in our proposal is not technically feasible using existing ITFS equipment None has claimed that such operation is not technically feasible using state-of-the-art engineering practices In fact, the Corporation for Public Broadcasting made the following claim in its first set of comments

> "With present state-of-the-art engineering practices, it is no longer necessary to restrict distribution systems to alternate channels Primarily by careful control and maintenance of signal strength ratios, systems can be constructed to successfully utilize adjacent channels, as in the now common cable television distribution systems where all 12 VHF channels are filled "

Comments of the Corporation for Public Broadcasting, General Docket 80-112 Appendix 1, at 57, n 1 (September 26, 1980)

75 In its proposal Microband expressed some doubt about adjacent channel operation using existing MDS equipment It stated

> "We rejected a scheme which would make use of a block of contiguous channels all operating on the same polarization The major difficulty associated with this plan is not knowing what the adjacent channel interference performance of such a system would be Existing equipment type accepted for MDS and ITFS operation would not be capable of operating without significant adjacent channel interference because the vestigial sideband attenuation required by paragraph 73 687 of these rules does not provide for sufficient isolation between adjacent channels Thus, without additional isolation provided by orthogonal polarization operation and/or a significant increase in the vestigial sideband filtering, interference-free adjacent channel operations will not be possible "

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Microband Proposal supra at 33 n 37 (emphasis added) Contrasted with Microband's view was that of Richard Vega who claimed that "the transmission of copolarized adjacent channels can easily be accomplished by relatively simple and inexpensive modifications to existing type accepted MDS transmitters " Comments of Richard L Vega General Dockets 80-112 and 80-113, at 5 (July 2, 1982) (emphasis added) Mr Vega further claims that the multichannel experiment being conducted in Salt Lake City supports this claim Id 24/ In its comments Contemporary Communications Corporation (CCC), while agreeing with Microband's claim that the existing MDS and ITFS transmitters will not allow adjacent channel operation, contends that "state-of-the-art transmitters are readily available today whose technical specifications will permit adjacent channel operation using the same polarization without causing interference " Additional Comments of Contemporary Communications Corporation, General Dockets 80-112 and 80-113, at 19 (July 2 1982) CCC also suggests that modifications of some sections of the rules would make adjacent channel operation easier Id

76 Many ITFS operators have claimed that even if adjacent channel operation were technically feasible the costs of the necessary equipment changes would be prohibitive For example, the University of Southern California stated "the suggested channel reallocation would entail significant additional costs which educational institutions in their present financial circumstances, can ill afford " USC further argued that "[a]ny new allocation schemes that would increase the technical complexity of existing ITFS equipment would undermine the very basis upon which the low cost educational use of ITFS was originally promoted " Comments of the University of Southern California Instructional Televison Network, General Docket 80-112, at 3 (September 29 1980)

77 Many of the existing ITFS licensees claimed that the proposed plan would result in substantial reductions in the service they are now providing For example the California Public Broadcasting Commission (CPBC) claimed that if the plan in the Notice were adopted "there would be a net loss of two-thirds of the channels now operating or imminent in Los Angeles, San Francisco and San Diego," and "that California's principal cities will face massive reductions in their present ITFS service " Comments of the California Public Broadcasting Commission, General Docket 80-112, at 7 (September 26, 1980) We are aware that these California cities represent areas of unusually heavy ITFS channel use, and that there is some validity to the concerns that our initial proposal could cause dislocations or additional expense

78 On the basis of these considerations, we have reached the following conclusions regarding the reallocation plan in the Notice Adjacent channel operation is technically feasible but it can only be implemented using transmission and reception equipment that is different from existing ITFS equipment We believe implementation of the allocation plan in the Notice would be expensive and would put an undue financial burden on existing ITFS licensees 25/ Furthermore the plan would be disruptive of many existing and planned ITFS systems For these reasons and since we have concluded that there are less disruptive methods to make spectrum available for MDS use we have concluded that adoption of the allocation plan in the Notice would not be in the public interest

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24/ On December 3, 1981 the Commisson granted Channel View, Inc an experimental station license to test the technical feasibility of transmitting eight adjacent channels from a single site The station is designated KM2XBN File No 866-ED-PL-81 The early results submitted by Channel View indicated some difficulty in reducing the spurious emissions from the transmitter more than 60 dB below the peak visual transmitter output, however, subsequent design adjustments in the transmission equipment have solved this problem and the tests have demonstrated that operating an 8 channel system using adjacent channels appears to be technically feasible Channel View subsequently sought permission to conduct a "market experiment" using these frequencies File No 8938-ED-MR-82 In particular, Channel View requested authorization to program its multichannel system with premium programming and to provide service to the public for profit The original experimental authorization prohibited Channel View from offering multichannel service to the public for profit In view of our action reallocating spectrum, a market experiment would serve no useful purpose and that portion of Channel View's application therefore is denied

25/ It is difficult to make precise estimates of the costs that would be incurred in converting existing ITFS systems to adjacent channels systems It is likely that in most situations the

[Footnote continued on following page]

79 The Notice also discussed other allocation plans One was that each service be allocated specific channels within the band We rejected that plan for two reasons First, it required us to make predictions concerning the future needs of the services, a prediction we felt unable to make at the time Second, we felt that such a plan would not be flexible enough to deal with regional variations in the number of channels required for the services For these reasons, we proposed the primary allocation plan that allowed sharing of unused channels by the other two services As articulated above, the voluminous record in this proceeding has enabled us to develop a better sense of the future growth of these services It also has demonstrated that our concerns about regional variations were valid There are wide regional variations in the use of both MDS and ITFS

80 We also considered the alternative of unlimited sharing of the band by all three services We rejected this plan because we believed it would be difficult to administer, especially if different technical rules were applied for each of the services sharing the band After reviewing the record in this proceeding, we have also concluded as set out above, that such a plan would be contrary to the public interest in that it would not insure that some spectrum would continue to be reserved for potential ITFS applicants

81 On the basis of these conclusions, we have reviewed the reallocation options available and have concluded that a plan that considers regional variations in spectrum use while at the same time reserving some channels for potential ITFS applicants would best serve the public interest Several of those commenting in this proceeding also expressed the view that an allocation plan that reflected regional differences in spectrum use also made more sense than a uniform nationwide plan See Comments of Oklahoma State Regents For Higher Education, General Docket 80-112 (June 16, 1980), Comments of C Peter Magrath, President, University of Minnesota, General Docket 80-112 3 (September 29 1980), Comments of the State University of New York, General Docket 80-112, 4 (September 24, 1980)

82 We have considered various methods to take into account the regional variations in the demand for ITFS stations and multichannel MDS One method suggested by President Magrath of the University of Minnesota was to hold local or regional public hearings to determine, inter alia, "the views of the community affected concerning the merits of the existing and proposed services " Comment of the University of Minnesota, General Docket 80-113 at 3 (September 5 1980) Such public hearings could also be used to get accurate detailed information on the projected demand for ITFS channels and the demand for multichannel MDS for each area We believe that holding such hearings would be a lengthy and expensive process, requiring a substantial amount of travel and administrative support We do not believe that such a procedure is feasible and even if it were we do not believe that results obtained would be so substantially better than those obtained by other methods as to justify the expense and delay involved

83 We have also considered reallocating channels to provide multichannel MDS only in those areas where there has been little or no use of the existing ITFS channels Proceeding in this manner has two distinct disadvantages First, it could involve the Commission in a protracted process to determine the boundaries of such areas The only realistic way this could be done would be to wait until a multichannel application was received and then determine the ITFS channel use within a specified distance of the proposed MDS station Only after conducting such an analysis could we accurately determine ITFS channel use in the proposed MDS service area Of course, we could require MDS applicants to include this analysis as a part of their applications This would likely cause many existing and potential ITFS licensees to challenge the accuracy of the MDS applicant's analysis thereby involving the Commission staff in a series of contested proceedings This would clearly delay the introduction of multichannel service in many areas

84 The other difficulty with such a plan is that there would be little possibility of multichannel MDS in those metropolitan areas where the ITFS channels are extensively used Thus, even where existing ITFS licensees were willing, or even desired, to transfer their license to an MDS operator, MDS operations would not be permissible

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25/ [Footnote continued from preceding page]

existing transmitters would need to be replaced at a cost in excess of $100,000 per transmitter It is also possible that existing downconverters would need to be replaced or modified The total cost involved would be a function of the number of receiver sites and the cost per site could be several hundred dollars

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85 The plan we have settled upon takes into consideration regional variations in ITFS channel use "grandfathers" all existing ITFS licensees permittees, and applicants and reallocates a specific set of channels for MDS use on a strict noninterference basis The plan works as follows

a The E and F groups are reallocated for multichannel MDS use on a nationwide basis

b A multichannel MDS permittee will not be authorized to begin construction until it submits a statement from all existing cochannel and adjacent channel ITFS users with transmitters located within 50 miles of the new MDS station that the operation of the multichannel MDS station will not interfere with the ITFS operation or that the ITFS operator would accept any interference that did occur This means that the MDS permittee is authorized to negotiate with existing cochannel and adjacent channel users of the ITFS channels to attempt to reach an accommodation whereby the needs of each can be satisfied In those cases where there are no ITFS operators within 50 miles of the proposed MDS transmitter location that are using the authorized channels or any adjacent channels, the MDS permittee must so state 26/

c All ITFS licensees and permittees of, and applicants for, the channels as of the adoption date of this order will be grandfathered with rights of renewal That is, all ITFS licensees of E or F group channels will be allowed to renew their licenses Furthermore all permittees of and applicants for either E or F group channels that ultimately obtain a license will be allowed to renew such licenses No assignments, other than pro forma assignments of ITFS E or F group licenses, applications or construction permits will be authorized

d No new ITFS applications for the E or the F group channels filed after adoption of this order will be accepted

86 The elements of this plan have several advantages that other plans lack Reallocating a specific set of channels on a nationwide basis means that in those areas where the reallocated channels are not being used, channels will be immediately available for multichannel MDS It also creates at least the possibility that multichannel MDS will be available even in those areas where the reallocated channels are being used by ITFS service providers It does this by granting conditioned construction permits for multichannel MDS in such areas and allowing the holders of these construction permits to negotiate with the existing cochannel and adjacent channel users to attempt to reach an accommodation whereby the requirements of both can be met

87 We expect that such negotiations would consider inter alia, the relocation of the existing ITFS users to other available ITFS channels the use of frequency reuse techniques such as cross-polarization, site shielding and frequency offsets and even the possibility of satisfying some of the communication requirements of the existing ITFS users in other areas of the spectrum In this regard, we note that some members of the MDS community have argued that ITFS channel use is inefficient in the large metropolitan areas For example, in its proposal, Microband claimed that many of the licensed ITFS channels were being used for point-to-point communication rather than for omnidirectional communication and concluded that, "[t]he significance of these point-to-point uses is that when intermixed with an intended omnidirectional use, they lead to a significant waste of spectrum " Microband Proposal, supra, Appendix H, at 6

26/ We expect existing and potential ITFS operators to cooperate with MDS permittees in determining whether the operation of the MDS facilities will interfere with the ITFS operators If the MDS permittee is not able, after making reasonable efforts, to obtain the desired statement from the ITFS operator it may submit evidence to the Commisison on the issue of whether harmful interference will occur The MDS permittee must also detail the efforts it made to obtain the desired statement and must serve a copy of all evidence submitted to the Commission to all affected ITFS operators We expect such submissions to represent extraordinary cases

In his first set of comments, Richard L Vega concluded that, "[i]n many cases the ITFS authorized channel is for point-to-point microwave service thereby creating a wasteland of co-channel and adjacent channels over a relatively large geographical area due to the potential harmful interference " Comments of Richard L Vega, General Docket 80-112, at 2 (September 30 1980) In many cases, the use of ITFS channels for point-to-point communications is complementary to point-to-multipoint or omnidirectional use in the same area The point-to-point use of the ITFS channels is usually for studio to transmitter links (STLs) For example, under the proper set of circumstances, it could be possible to use one group of a pair of interleaved channel groups in an omnidirectional configuration and to use the other group as an STL in the same area Furthermore, the use of an ITFS channel group for point-to-point communications allows the ITFS operator to use simpler and less expensive equipment than would be required by conventional point-to-point service Finally, of course, such use is specifically provided for in §73 931(d) of the rules 47 CFR §74 931(d) We do believe, however, that it may be possible to accommodate such users in other portions of the spectrum In regard to these negotiations we would expect the multichannel MDS permittee to give reasonable compensation for any dislocations caused by the operation of its facilities

88 Another advantage to reallocating a specific set of channels and requiring an agreement prior to construction of the multichannel facilities is that it is easy to administer This is in a sense a double advantage It makes it easier for applicants to file acceptable applications and makes it easier for the staff to review the applications Under this plan, an applicant is not required to conduct an interference analysis until after he has received an authorization Thus, all applicants are expected to comply with all pertinent Sections of Part 21 including those we are adopting today except that they are not required to show non-interference with existing and proposed cochannel and adjacent channel ITFS users of the reallocated channels until after a construction permit has been granted This procedure will save unsuccessful applicants the time and expense required to prepare such analysis and it will save the staff the time required to review each analysis submitted Furthermore, we expect that the analyses that are submitted by permittees will be of a much higher quality than those submitted by applicants Another administrative advantage is that under all of the other plans considered it may have been necessary to freeze the acceptance of all further ITFS applications for some period of time This plan does not require such a procedure because it does not change the application process for the twenty channels still allocated for ITFS use

89 A final advantage to a uniform nationwide allocation for multichannel MDS is that it avoids, to the greatest extent possible, disrupting the authorized satellite use of the 2500-2690 MHz band The use of the band by the broadcast satellite service is limited domestically "to domestic and regional systems for community reception of educational television programming and public service information " 47 CFR §2 106, n NG 101 The bands 2500-2535 MHz (space to earth) and 2655-2690 MHz (earth to space) are also shared with the fixed satellite service for common carrier use in Alaska and certain areas in the Western Pacific and in the contiguous United States, Alaska and the Mid and Western Pacific areas for education use 47 CFR §2 106, n NG 102

90 Several of those filing comments in this proceeding suggested that if we were to reallocate spectrum from the ITFS use to the MDS use we would reduce the possibility of any satellite service sharing the band

91 The shared use of the band by terrestrial and satellite services poses two distinct problems First, the broadcast satellite transmissions can interfere with the reception of terrestrial signals In general, this would be a problem for any terrestrial service, but it could be more of a problem for MDS than for ITFS users because of the receiving antennas used ITFS receiver sites generally are equipped with higher gain and hence more directional antennas than MDS receiver sites The latter in many cases use low gain less directional antennas that are much more likely to pick up interfering signals from satellites than are the higher gain ITFS antennas The Corporation for Public Broadcasting submitted an extensive analysis of the impact of sharing this band between terrestrial and satellite users that indicated that terrestrial ITFS users could co-exist with satellite users CPB was unwilling to extend this analysis to include MDS because of the antenna differences Comments of the Corporation for Public Broadcasting, supra , at 31, 32

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92 Terrestrial transmissions in the shared band can interfere with the reception of the satellite signal by nearby earth stations Here also CPB claimed that the sharing of the band between ITFS and the satellite service was possible but it was again unwilling to extend its analysis to the MDS sharing CPB claimed that the studies that it presented for ITFS sharing were not valid for MDS because MDS uses omnidirectional antennas and higher power whereas many ITFS stations use directional antennas and lower power transmitters Id The argument is that terrestrial transmitters of whatever kind create "holes" where no frequency sharing satellite receive stations can be located and that MDS transmitting stations create larger "holes" than ITFS We agree However others have argued that the creation of such holes should not be used as a justification for precluding terrestrial operation in the same band The Public Service Satellite Consortium (PSSC) commented as follows

> "PSSC respectfully urges that limiting the development of 2 5 GHz terrestrial distribution by claiming that it limits potential satellite distribution in the same band, is not sufficiently strong justification for such action To limit the developmental potential which 2 5 GHz terrestrial distribution service has, by claiming that such terrestrial distribution causes interference 'holes' in potential satellite coverage in the same band, has few merits when the potentials are viewed together It is true that 'holes' would be made in satellite coverage in the presence of local ITFS (or other uses of the 2500 to 2690 MHz band), and that satellite earth stations in this band would require careful placement or other precautions to avoid being interfered with But to limit development of terrestrial networks, which have at least an order of magnitude of more program capacity and flexibility, would be unwise The total variety of potential programs which could be distributed via satellite on these frequencies is relatively small In contrast the variety of programming which could be aired terrestrially within the same band, is about five to six programs for each location where terrestrial transmitters can be coordinated This would represent thousands of program possibilities which could be tailored to local or regional needs
>
> "Another consideration which should be recognized as a factor in this argument relates to the demographic distribution of potential 'holes' in satellite coverage If an assumption is made that a local entity wants to receive a satellite-distributed public service or instructional program, and can point its antenna to one of five or six satellites to receive it, it could do it But if the program content did not match its needs for programming, either generally or at that particular time, it would probably choose from alternative sources This is where the demographic distribution enters in The more densely a city or region is populated, the more likely it will be that diverse programs are available to the public, and therefore less likely that a small selection of nationally distributed material will be useful Where the satellite-distributed material will be most useful is in the more rural areas of the country where alternatives are not as plentiful
>
> "Carrying the argument further, rural areas are not as likely to have as great economic justification for installing ITFS transmitters as the more populated regions would have In rural areas, low-cost satellite receivers installed to serve small towns and having local signal distribution via low-power VHF or UHF transmitters would seem to fit the need best Terrestrial distribution at 2 5 GHz band frequencies would not be justifiable for individual users who would have to invest in additional receiving equipment to get the programs Simplistically then, there would be no interference 'holes' in satellite beam coverage, where such coverage is most appropriate – in areas where terrestrial distribution at these frequencies is less appropriate and economical "

Comments of the Public Service Satellite Consortium, General Docket 80-113, at 8-10 (Sept 2 1980) incorporated by reference in Comments of the Public Service Satellite Consortium, General Docket 80-112, at 4 (September 2, 1980) Perhaps more important in this regard is the fact that we are not aware of any existing plans to construct a public service satellite using this band Many of those that used the ATS-6 satellite that operated in this band are now leasing transponders from existing satellite communications providers that operate in a different band

INSTRUCTIONAL TELEVISION FIXED SERVICE (MDS REALLOCATION)

93 The National Aeronautics and Space Administration (NASA) has indicated that it is exploring the use of this band to provide what it terms "feeder links" to provide communications between a "satellite and fixed earth stations, to facilitate interconnection of a mobile satellite service with the terrestrial telephone network " Further Comments of the National Aeronautics and Space Administration General Dockets 80-112 and 80-113, at 2, 3 (July 2 1982) NASA is proposing to use the 806-890 MHz band to communicate between a mobile user and a satellite and to use the feeder link to communicate from the satellite back to the feeder link earth station This would allow for the extension of mobile telephone service to users beyond the range of planned terrestrial networks NASA has proposed to use the 2500-2535 MHz for the space to earth segment and the 2655-2690 MHz band for the earth to space segment of the feeder links NASA's proposal is not an allowed use under the existing table allocation and thus would require a separate rule making proceeding before it could be implemented 27/ In light of its plan NASA suggests that any additional use of the 2500-2690 MHz by terrestrial users would make sharing of the band by satellite users more difficult

94 Reallocating specific groups of ITFS channels for MDS would mitigate the problems pointed out by CPB and NASA and would move in the direction suggested by PSSC Allocating a specific set of channels for MDS use would mean that any future public service satellite use of this band could be structured to avoid sharing the MDS frequencies Thus, the analysis presented by CPB would be valid in most of the band Further, the use of the frequencies NASA proposed for its feeder links could also be avoided Of course proceeding in this manner will increase the use of the channels that remain available to ITFS but if the CPB analysis is correct and ITFS use of these is much less inimical to sharing of the band than is MDS use sharing can still be accommodated

95 Grandfathering all existing licensees and permittees of and applicants for the reallocated channels accounts for regional variations in ITFS channel use without extensive Commission involvement or analysis It does not require any existing ITFS licensees, permittees or applicants to alter planned or present use of their authorizations Where the channels are not being used multichannel MDS applicants have immediate access to the channels 28/ and where the channels are licensed or applied for MDS operations cannot commence without negotiations with affected ITFS entities

96 The final element of the plan we are adopting – not accepting any ITFS applications for the reallocated spectrum after adoption of this order – is necessary in order to keep the reallocated channels available for multichannel MDS and to avoid having mutually exclusive fundamentally different applicants for the same channel In most cases, the would-be ITFS applicants will be able to be accommodated in the 20 channels that will continue to be available for ITFS

97 On the basis of this analysis we have concluded this plan strikes a reasonable balance between the need to continue to make spectrum available for traditional ITFS users and at the same time makes spectrum available for multichannel MDS It does so by minimizing the disruption to the plans of existing ITFS licensees permittees or applicants It is easy to administer and provides at least the possibility of multichannel MDS on a nationwide basis It also preserves, to the greatest extent possible, the future satellite use of this band

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27/ On November 29, 1982 NASA filed a Petition for Rule Making in which it formally proposed, inter alia, that this band be made available for this purpose

28/ It could be argued that if the reallocated channels were the only channels not used in a particular area, and if an applicant were just about to file for these channels, such an applicant would be left with nowhere to apply We believe that such occurrences will be rare and when they do occur it may be possible to reuse some of the 20 channels that will continue to be available for ITFS use to satisfy the needs of the would-be applicant Furthermore, in regard to frequency reuse, we have recently been furnished data that indicate there is extensive frequency reuse in several of the large metropolitan areas where ITFS use is heavy For example, in New York 19 of the 27 authorized channels are reused at least once in Los Angeles 24 of the 28 authorized channels are reused at least once, in San Francisco 10 of the 26 authorized channels are reused at least once and in Boston 14 of the 26 authorized channels are reused at least once "Letter from Victor E Ferrall, Jr.," General Docket Nos 80-112 and 80-113, attachment titled "ITFS Channel Utilization in the Top 25 Markets," (May 4, 1983) The letter and the data attached thereto are hereby accepted as informal comments in this proceeding

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98 We now address the question of how many channels to reallocate for multichannel MDS This question really involves three separate questions First how many channels constitute a viable multichannel MDS system? Second, how many multichannel systems should be provided for in each market? Third, how many channels should be kept in reserve for ITFS use?

99 The existing MDS rules do not allow MDS licensees to operate even a two channel system Specifically, §21 901(d), 47 CFR §21 901(d), precludes an existing licensee from applying for at least one year and even then it must show that there is a public demand for additional service that is unlikely to be satisfied by a competing carrier The new rules proposed in the Notice did not contain this restriction However, the proposed repeal of the section was not discussed in the Notice and we did not receive much comment on it in the first set of comments filed in this proceeding Virtually all the MDS entities that filed reply comments in response to the Microband Proposal strongly supported the concept of multichannel MDS Microband itself also noted that the existing restrictions "for all practical purpose, limit carriers to a single channel in any one market " because "it is virtually impossible for MDS carriers to prove a negative – that no other carrier is likely to provide service " Microband Proposal, supra at 38, and 39, n 48 In its filing, Contemporary Communications Corporation (CCC) argued strongly for multiple channel MDS CCC claimed that

> "For both technical and economic reasons, the public would be better served by a single entity operating multiple channels, as opposed to many operators each limited to one channel Studies have shown that if multiple channels are to be provided to subscribers, careful control must be exercised over the transmitting parameters of the channels In particular, for best operation, transmitting locations should be the same Even better operation will result if common transmitting antennas are used To achieve satisfactory reception, relative frequencies of the several transmitters must be controlled with respect to one another to a degree much finer than that required for a single channel Power levels must also be related among the several transmitters, transmission lines, and transmitting antennas if interference is to be reduced In sum, only a single operator can insure efficient operation of a multiple channel system
>
> "In addition to technical operating factors, economic factors also support common ownership of multiple channels Common transmission line (often costing as much as $25 per foot) and common antennas, costing thousands of dollars, can be utilized for multiple channels if there is only one operator Rent can be reduced, since only one antenna would be employed and multiple equipment can be operated in the same room, thereby decreasing the total floor space as compared to a multiplicity of rooms that might be required for multiple operators Common maintenance personnel can also reduce the maintenance cost per channel Further, the number of spare parts needed by a single operator of multiple channels is obviously less than the number required by separate operators each operating one channel Even electricity costs will be less for multiple channel operations."

Additional Comments of CCC, supra at 7-8

100 Of course, it is possible to have multichannel MDS systems where each of the channels is licensed to a different carrier As mentioned earlier, this is the situation in Phoenix where Microband and Contemporary are the carriers and both have the same customer American Cable Television, offering two-tier programming with the two channels We believe that for technical reasons, this is probably the only way a two-channel operation will be achieved under the existing rules Allocating a single channel to each licensee has done little to promote diversity of ownership, and has the significant detriments of increased system complexity, cost, and regulatory delays in providing service to the public The increased complexity and costs result from the factors listed by CCC in its comments In a service where the licensee is not permitted to exercise program control the benefits of diversity are less pronounced then they might be where the licensee controls the material transmitted Although diversity may lead to competition in such things as quality of service, allocating a single channel to each carrier means that there will likely be a comparative hearing for each channel as compared to a single hearing for a multiple channel application For these reasons, we have concluded that there is no reason to continue to limit MDS carriers to a single channel operation and that the public interest would be better served by the repeal of the single channel limitation contained in §21 901(d) of the rules

INSTRUCTIONAL TELEVISION FIXED SERVICE (MDS REALLOCATION)

101 Given that multichannel MDS operation will benefit the public interest, we must address the question of how many channels should be in each system In its proposal Microband suggested that a five channel system was optimum It based this conclusion on an analysis that showed that "four channels of Pay TV will satisfy 85% of consumer demand " It thus concluded a multichannel system should consist of "four video channels plus a data channel " Microband Proposal supra, at 48 Another commenter Tekkom, suggested that 10 channels per system would be in the public interest Comments of Tekkom, Inc , General Dockets 80-112 and 80-113, 11 (June 28 1982) CBS, on the other hand, argued that the demand in each market should determine the number of channels in multichannel systems CBS Comments on the Microband Proposal for Multichannel MDS Service General Dockets 80-112 and 80-113, at 10 (July 1 1982) We agree with CBS's claim that there may be regional variations in the number of channels that would be optimum in a multichannel system On the other hand, we recognize that we are making this reallocation from a band that is divided into four channel groups and that four channel systems would, therefore be less disruptive of the existing scheme Also the Microband analysis suggested that 4 channels would satisfy nearly all the consumer demand for premium channels Furthermore, the fact that MDS is a common carrier service means that market forces will still play a part in determining how users acquire the channels and offer services to the public Depending on the particular market conditions, a licensee may find it desirable, in a system of carrier initiated tariffs, to offer channels in a variety of different ways See e g , Metrock Corporation 73 FCC 2d 802 (1979) This variety would reflect the particular needs and desire of users in different areas Not only may the terms of the offering of channels vary, but also the uses to which they are put may vary For example, although it appears the channels will at least initially be used for the distribution of premium televison programming, our rules permit "any kind of communications service consistent with the Commission's rules " 47 CFR §21 903 For these reasons, we have concluded that authorizing 4 channel MDS systems serves the public interest

102 We also recognize that it is possible that the same entity could lease all of the capacity of each common carrier, thereby precluding others from becoming MDS programmers Since the public only deals with the customers of the common carrier – and not the common carrier itself - the public could be forced to deal with a single multichannel MDS provider We have considered requiring multichannel MDS licensees to so tariff their service that such an eventuality could not occur We have decided not to adopt such a requirement for several reasons First we believe that the fact that an entity desiring to lease all available MDS channels will be required to deal with two common carriers somewhat reduces the possibility this will occur Furthermore, since we are also by this order allowing ITFS licensees to lease excess capacity in their facilities it is possible that an entity that wishes to provide premium television service to the public could do so using such excess capacity It is also possible that in many areas, the public will be offered a choice between multichannel MDS and cable Finally, we believe that restricting MDS tariffs would prevent market forces from determining the optimum mix of channels Adopting such a requirement would create an artificial upper limit on the maximum number of channels a single entity could program

103 Finally, we must address the related questions of how many channels to reallocate for MDS and how many channels to hold in reserve for future growth in ITFS What we must do here is balance the need to make a reasonable number of multichannel MDS systems available with the need to ensure that an adequate number of channels are available for future ITFS growth

104 In its proposal, Microband suggested that we reallocate three full ITFS groups or twelve channels for MDS use Microband Proposal, supra, at 33 Microband claims to have based this suggestion on its analysis of the potential number of customers for multichannel MDS service in the top 50 markets Microband did not submit any analysis to support its suggestion It did present data on the number of potential multichannel MDS customers in the top 50 market but it did not relate this data to the number of competitive MDS systems that would be optimum or even reasonable The data presented show that on the average, there are 1,770,800 potential multichannel MDS subscribers in the top 5 markets and 70,400 in markets 46 through 50 Microband took these figures and divided each by 18,000, the break even number of subscribers for a multichannel system, to produce what it called a coverage ratio What this figure purports to represent is the number of systems that could reach a financial break even point if all the potential customers were to subscribe to a single service and if each of the competing services were to have an equal share of the available customers The coverage ratio for the top 5 markets was 98 4 and the coverage ratio for markets 46-50 was 3 9 All that the Microband data really show is that there are potential customers for multichannel MDS systems We believe that there

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are factors other than the number of homes not passed by cable that will determine the number of multichannel MDS systems that can profitably serve an area These include the nature and quality of the programming available, the quality of signal that can be delivered, the availability of competitive services, the price of the service, and the discretionary income of the residents of the area These factors may combine in one area in such a way that only one MDS system can be profitable and in another area in such a way that 3 or more systems could be profitable

105 Consideration of all these factors does not lead to clear choice for the number of multichannel systems that should be authorized in each area However it does appear that in many large areas at least two systems could be viable Moreover, authorization of more than one system should provide a number of public interest benefits Competition between competing systems could stimulate technological innovation, could increase system availability and could also make lower cost service available to the public We also believe that we should continue to hold a substantial amount of spectrum in reserve for ITFS use For these reasons, we have concluded that we should make two groups of ITFS channels available for multichannel MDS This will allow two competitive MDS operators to offer multichannel service in those areas and will keep 20 channels in reserve for existing and future ITFS use 29/

106 Another issue to be resolved is what channels to reallocate In its proposal, Microband suggested that the E, F and G groups be reallocated for MDS use It based this recommendation on its conclusion that these were the bands least used by ITFS licensees We do not agree Our records show that the distribution of ITFS licenses among groups is as follows A group-225 B group-93 C group-128, D group-82, E group-112, F group-91, and G group-113 Thus it would appear that except for the A-B group, use of the interleaved ITFS frequency groups is about the same It should also be noted that the A, C and E groups are significantly more used than the groups with which they are interleaved This is to be expected because the use of channels in one pair of an interleaved group tends to preclude use of the other group in the same area Because the interleaved ITFS group use does not vary significantly by group except for the A-B group we must look to other criteria to select the group to assign to MDS

107 The most important factor in selecting the groups to be reallocated is minimum interference to the remaining ITFS licensees This means that we should reallocate an interleaved pair of groups Proceeding in this manner will result in only two ITFS channels being adjacent to MDS channels Choosing non-interleaved groups could result in there being as many as 9 ITFS channels adjacent to MDS channels We also believe that we should avoid reallocating either the group of channels that share the band (2500-2535 MHz and 2665-2690 MHz) that NASA is proposing to use for its feeder link operation so as not to jeopardize consideration of that proposal This eliminates the A-B pair and G group This reduces the choice to either the C-D pair or the E-F pair We also believe that it would be useful to leave the widest possible contiguous band available for ITFS because this would result in the largest possible contiguous bandwidth being left available for shared use by ITFS and Public Service satellite use This means that if there is a public service satellite use of this band, it would be shared with only ITFS over the largest possible contiguous band For these reasons, we have concluded that the best pair of channels to reallocate for MDS are the E and F groups

108 Finally, we must address the question of how to divide the eight channels in the E and F groups between the two MDS operators licensed We could follow the ITFS assignment method discussed above and assign the 4 channel E group to one licensee and the 4 channel F group to the other licensee Proceeding in this manner has the advantage of allowing the use of simpler transmitters and downconversion equipment, but it has the disadvantage that widespread adjacent channel interference could occur if the transmitters of the two operators were not colocated We could also authorize each operator to use 4 adjacent channels, that is assign Channels E_1, F_1, E_2, F_2, to one operator and Channels E_3, F_3, E_4, F_4 to the other operator Thus, there would only be one pair of adjacent Channels F_2 and E_3 Of course with either method Channel E_1 will be adjacent to ITFS Channel D_4 and Channel F_4 will be adjacent to ITFS Channel G_1, both of which may be in use in the area where the MDS channels are being authorized Thus, by licensing adjacent channels to the same operator, we would be leaving

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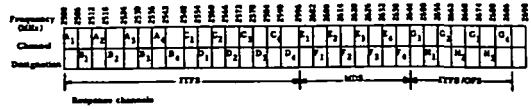
29/ Each applicant will only be allowed to file a single multi-channel application in each service area

the possibility of adjacent channel interference with existing ITFS stations unchanged and would be eliminating most of the non-colocated adjacent operation from the reallocated spectrum This could require that the multichannel operators use more complicated transmission and reception equipment

109 We did not address this issue extensively in the companion Notice, and, although we did not receive much comment on it in response to the companion Notice, some of those commenting on the Microband proposal did address the issue One commenter, the Microwave Communications Association (MCA), noted that because we did not specifically propose rules for multichannel operation, we would be required to do so in the future MCA further expressed the view that "this is fortuitous because it will permit the Commission to consider multichannel systems' operating experience Actual operating experience is clearly preferable to a lengthy technical rule making based only upon theoretical calculations " Comments of MCA, supra at 9 There is some validity to MCA's claim however, we cannot reallocate spectrum without specifying what channels are available for each applicant 30/ For this reason, we have concluded that the best course to follow is to have each applicant apply for a four channel MDS authorization using the interleaved channel plan now used by ITFS licensees We also will require each applicant to include as part of its application, an analysis of the potential for adjacent channel interfere with a non-colocated licensee operating on the interleaved channel group If the two successful applicants determine either before or after initiation of service that there would be less adjacent channel interference by operating on adjacent channels, we will allow such operation We believe that the two licensees in each area will be in a better position to make the final determination as to which channelization scheme is best

110 To summarize we conclude that it is in the public interest to reallocate 8 of the channels now allocated for ITFS for use by the MDS nationally Existing ITFS licensees (as well as existing permittees and applicants that eventually become licensees) of the reallocated channels would be grandfathered in perpetuity Further we have concluded that reallocating the E and F groups for MDS use would be least disruptive of the existing and potential uses of the 2500-2690 MHz band We will accept applications for multichannel MDS in all areas of the country regardless of whether the reallocated channels have been previously applied for by an ITFS applicant In those situations where there is an existing ITFS licensee, permittee or applicant we shall issue multichannel MDS construction permits conditioned on the permittee obtaining prior to commencing construction, a statement from each adjacent channel and cochannel ITFS licensee, permittee, or applicant whose transmitter is located within 50 miles of the proposed MDS transmitter site, that the operation of the MDS facility will not cause harmful interference to the ITFS operation or if it does the ITFS operator will accept the interference We expect that the MDS permittees and the ITFS users of the reallocated channels will negotiate in good faith to mutually accommodate each others' communications requirements We believe that this process will be beneficial to all concerned The MDS permittees will be able to offer a potentially profitable new communications service to the public Existing ITFS users of the reallocated spectrum may end up with better and more efficient communication facilities at no expense, will most likely benefit from technical expertise of the commercial users of the band and will likely benefit from the decreased costs of equipment that will result from the partial commercial exploitation of the band Finally the public will benefit from the more efficient use of a valuable national resource the electromagnetic spectrum We recognize that there may some large cities in which no reallocation will occur despite the steps we take today It is likely in those areas in which this plan does not make multichannel MDS available there will be alternative means available by which the public will be able to obtain multichannel MDS including leasing the excess capacity of existing ITFS channels The following chart illustrates the channel plan we are adopting



30/ We will apply existing technical rules to multichannel MDS We expect to adopt new technical rules for MDS prior to or shortly after the authorization of the first multichannel MDS station (See Note 1, supra)

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D Time Sharing and Leasing

111 In the Notice we invited comments on the "technical and practical feasibility" of permitting ITFS stations to share unused transmission time with MDS users We stated that because most educational use occurs during daytime hours while entertainment television occurs in the evening, sharing appeared to be practical Three forms of sharing were discussed separate station facilities sharing the same frequency, jointly licensed facilities, and lease of unused transmission time by ITFS licensees We also asked whether sharing ought to be mandated Notice, supra, at para 51

112 Several ITFS entities accepted our invitation and submitted comments on time sharing of the ITFS channels Most of the comments received were not favorable For example, the Joint Council on Educational Telecommunications commented that colleges, universities and hospitals use their channels in evening hours and on weekends, and that entertainment programming often is transmitted on a 24-hour basis Comment of the Joint Council on Educational Telecommunications, General Docket 80-112 at 5-6 (September 29, 1980) The National Education Association (NEA) reiterated the concerns of JCET and added that sharing is not feasible for other reasons For example it stated that ITFS systems are configured to reach designated educational sites while MDS systems that are used to transmit pay television are configured to reach the greatest population possible Comments of the National Education Association, General Docket 80-112, at 6-7 (September 25 1980)

113 Several others raised anothr reason why time-sharing is not feasible In its comments, the Archdiocese of Los Angeles made the following observations

> " 'Education has for its object the formation of character ' Under the second and third Commission sharing schemes, ITFS licensees would lose control over the content of certain transmissions from their facilities Much of the programming being broadcast today via MDS is considered by many people to be objectionable – even, at times, pornographic Proposals for construction of new ITFS facilities, and continued funding of present stations will likely meet strong opposition from university regents, local boards of education private institutions and concerned parent-teacher groups if they are placed in the position of having to purvey material which they consider disconsonant with their responsibilities as educators Thus, these sharing schemes could discourage further ITFS growth – and perhaps result in a reduction of the present number of stations
>
> "Indeed, the Los Angeles Archdiocese is totally opposed to imposition of either of the latter sharing schemes The Archdiocese would be forced into a difficult moral decision if it faced the prospect of its facilities being used for the transmission of programming which it considered offensive to Catholic values If the Archdiocese lacked the ability to discriminate as to users of its facilities, it might well have to decide to give up its station altogether so as to avoid becoming party to transmissions contrary to the mission of the Church "

Comment of the Archdioceses of Los Angeles, General Docket 80-112, at 14-15 (September 26 1980) (footnote omitted) (quoting Herbert Spencer, Social Statistics, pt 1 ch 2 (1851))

114 We agree with the majority of commenters who oppose any requirement that ITFS licensees share or lease their excess channel capacity Contrary to the belief of those commenters, however, we believe that it is in the public interest to permit ITFS licensees to lease their excess channel capacity The decision to lease excess capacity thus remains entirely up to the individual ITFS licensee As a result of the current decrease in federal funding for ITFS, we believe it is appropriate to modify our rules to permit ITFS operators to generate revenues by using their excess capacity for a variety of non-ITFS purposes 31/ As the excess capacity of ITFS operators is put to use serving the public, greater use of the available spectrum should result 32/

31/ The Public Broadcasting Amendments Act of 1981 (Public Law (97-35) Section f(a))

32/ The Commisson today is also adopting a Notice of Proposed Rule Making that would further assist ITFS licensees in their operations See Amendment of Part 74 of the Commission's Rules and Regulations in regard to the Instructional Televison Fixed Service, FCC 83-244, (adopted) May 26, 1983

115 We think that the changes that we are making today are appropriate for two basic reasons First the cost of constructing and operating an ITFS system represents a significant burden to licensees In addition, the cost of education is increasing daily ITFS provides a low-cost alternative to specialized instruction, adult education and other instructional modes However new revenue sources are necessary in order to give ITFS every chance to grow and succeed Second, increased interest has been generated in the ITFS band including demand for broader use of the spectrum

116 Thus substantial benefits to the public may be derived from allowing ITFS licensees to use excess channel capacity, either by directly utilizing it themselves or through leasing it to others The income derived from such service could enable stations to be on the air for a greater portion of the day and to increase programming availability In addition, new revenues might prove sufficient to bring currently vacant channels on the air

117 Increased revenue would widen ITFS' base of support and contribute to the service's ability to withstand a diminution in any one source of funding without being forced to significantly reduce its overall service to the community If federal government funding declines, the success of licensees in recouping at least part of the loss may be crucial to ITFS growth and development The option licensees have to lease excess ITFS channel capacity is consistent with several recent actions taken by the Commission The Commission amended Part 74 of its rules to permit the shared use of broadcast auxiliary facilities with other broadcast and non-broadcast entities 33/ It also recently has authorized non-broadcast uses of non-main channel operations, such as teletext and FM subcarriers 34/ We are adopting policies in this proceeding for leased uses of ITFS excess channel capacity that are consistent with the decisions in the Part 74, teletext and FM subcarrier rule proceedings

118 Therefore we are amending Part 74 to permit use of facilities by ITFS licensees for non-ITFS purposes This authorization includes use of the ITFS station's main broadcast channel and the use of non-main channel excess capacity including subcarriers and the vertical blanking interval (VBI) Furthermore, licensees are permitted to make this excess capacity available to others if they so choose on a profit-making basis We will not at this time, adopt specific time limitations on non-ITFS use of licensee excess channel capacity By declining to specify any such limitations, we hope to maximize the spectrum efficiencies that shared use will provide This will also afford ITFS licensees flexibility in offering their excess capacity to other entities. However, we do expect ITFS licensees to utilize each of their ITFS main channels substantially for legitimate ITFS use Since we cannot anticipate in advance how much time is required for each licensee to address its ITFS needs, we do not wish to force ITFS channels to remain idle when other legitimate demands for the channels exist Such an outcome is precisely the situation that we are attempting to avoid by allowing shared use of the channels This policy is consistent with action taken by the Commission in amendment of Part 74, Subpart F of the Commission's rules to permit shared use of broadcast auxiliary facilities with other broadcast and non-broadcast entities, 48 FR 17081 (published April 21, 1983) As in the proceedings discussed above, if ITFS licensees do make excess capacity available the question arises as to whether the licensee is engaging in common carrier activity After briefly explaining the legal requirements under which we must decide the common carriage issue we shall apply those requirements to the two types of excess capacity at issue, in turn, below

119 In National Association of Regulatory Utility Commissioners v FCC, 525 F2d 630 [35 RR 2d 1484] (DC Cir), cert denied 425 US 992 (1976) (NARUC I), the court specifically stated that a carrier will not be a common carrier where its practice is to make individualized decisions in particular cases whether and on what terms to deal 525 F2d at 641 The court continued, moreover, that the distinction between common and private carriers was not based on the services offered or the clientele served, but rather on "the manner and terms by which

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33/ 48 FR 17081 (April 21, 1983)

34/ See Amendment of Parts 2, 73 and 76 of the Commission's Rules to Authorize the Transmission of Teletext by TV Stations Report and Order in BC Docket No 81-741 [53 RR 2d 1309], adopted March 24, 1983, and Amendments of Parts 2 and 73 of the Commission's Rules Concerning the Use of Subsidiary Communications Authorizations, Report and Order in BC Docket No 82-536 [53 RR 2d 1519], adopted April 7, 1983

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they approach and deal with their customers " Id at 642 The court then stated that in determining whether a particular carrier should be accorded common carrier status, a finding must be made as to whether any legal compulsion to serve indifferently exists, or whether there are reasons implicit in the nature of the operation to expect an indifferent holding out

120 With respect to leasing of the main ITFS channel, we see no reason to require ITFS licensees who engage in such leasing to be common carriers One purpose of this proceeding is to make unused channels in the 2500-2690 MHz band available for use on a common carrier basis We are reallocating channels from ITFS to MDS to serve this purpose, and we believe experience with the reallocation is necessary before we take an additional step and find the need for common carrier channels is so great that all excess capacity should be offered on that basis Moreover the requirements of Title II may well discourage or inhibit ITFS licensees from making spare capacity available if they could only do so as common carriers For these reasons, we will not require that spare capacity on the main channel be leased on a common carrier basis

121 With respect to the second test for classifying common carriers, whether there are reasons implicit in the nature of the operation to expect an indifferent holding out, we believe that main channel leasing should not, at least initially, be considered a common carrier activity Our reasoning closely parallels the decision recently adopted in BC Docket No 81-794 in which we stated that the selling of excess capacity on television broadcast auxiliary stations would not be treated as common carriage Shared Use of Broadcast Auxiliary Facilities 48 FR 17081 [53 RR 2d 1101] (April 21, 1983) We believe ITFS will not engage in a generalized holding out of their excess capacity but instead will carefully select lessees for long-term contracts The comments demonstrate that licensed facilities do not readily lend themselves to widespread MDS use They have been tailored to the particular requirements of the licensee and if they do lend themselves to use by another careful coordination will be necessary The licensee also must consider its own growth requirements and likely will limit the availability of the excess capacity so it will be able to use the facilities for its own primary purpose when the need arises Individual contractual arrangements would better serve this purpose than would a general offer to deal with the public indiscriminately This individualized selection of clients due to the need to protect the licensee's own use of the facilities was one factor thought by the court in NARUC I to be inconsistent with common carrier status 525 F2d at 642 We find nothing inherent in the potential leasing activities of ITFS licensees that would lead them to make indifferent offerings of excess capacity on the main channel Accordingly we do not believe that ITFS licensees will act as common carriers 35/

122 We recognize that permitting ITFS licensees to lease their main channels for other than traditional ITFS purposes may effectively result in a diminution of the channels reserved for traditional purposes but we believe this risk is acceptable First only excess capacity may be leased We presume the channels were obtained, and are primarily utilized for, satisfying a legitimate ITFS requirement Because these requirements appear to be increasing in a number of areas, we presume the traditional uses will continue Second the pleadings indicate if anything, a reluctance on the part of licensees to engage in any form of sharing Finally any wholesale abandonment of the primary purpose of the facility could jeopardize the entity's license

123 Just as we find ITFS main channel sharing analogous to our recent Broadcast Auxiliary proceeding 48 FR 17081 (April 21, 1983), we believe that the regulatory status of subcarrier and VBI leasing can be resolved in essentially the same manner as in the recently adopted FM-SCA and Teletext decisions

124 Depending on the nature of the information disseminated via an ITFS station's subcarriers or VBI, the regulatory status accorded the service may vary As noted in the FM-SCA Report and Order, the provision of "broadcast-related services on subchannels is well established and does not raise any new issues of appropriate regulation " Thus, so long as the services provided over the station's subcarriers or BVI are broadcast related no extraordinary regulatory treatment will attach to the profit-making activity

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35/ If our initial analysis if incorrect, and ITFS licensees do in fact begin offering main channel excess capacity on an indifferent basis, it would be incumbent on the Commission to determine the extent to which traditional Title II regulation should be applied See NARUC I at 644 Shared Use of Auxiliary Broadcast Facilities at para 26

125 However, other subchannel or BVI uses may be similar to services being provided by licensees in the private radio or common carrier services To the extent that services offered via ITFS facilities are private radio or common carrier services these ITFS-delivered services will be treated in the same manner, and with all the same benefits, obligations and responsibilities as the providers of similar services Thus, with regard to non-broadcast related uses of the ITFS station's subcarriers and VBI, it will be necessary to determine whether the service offered constitutes private or common carriage under NARUC I and applicable statutes

126 With one exception the determination as to whether a particular non-broadcast service offered on an ITFS subchannel or VBI is private or common carriage will be made in accordance with the guidance given in NARUC I as discussed above Essentially, if the ITFS operator indiscriminately offers the station's subcarriers and VBI to other users, the operator will be regarded as a common carrier and will be treated accordingly If, on the other hand, the licensee does not engage in an indiscriminate holding out, common carrier obligations will not attach and private carriage rules will apply The one exception to utilizing the NARUC I test involves land mobile services

127 With regard to land mobile services the Communications Amendments Act of 1982, Section 120, establishes a demarcation between private and common carrier land mobile services, and indicates that the test contained in the new Section 331 (c) of the Communications Act is intended to supersede the NARUC I standard Public Law No 97-259 96 Stat 1087 We believe that the test in the new legislation would apply to some of the communications services that could be offered on ITFS subchannels or the VBI The Act defines a "Mobile Service" as a radio communication service carried on between mobile stations or receivers and land stations , and includes both one-way and two-way radio communication services " Public Law 97-259 at Section 120(b)(2) 96 Stat 1097, 47 USC §153(n) It is clear that potential ITFS subchannel and VBI services such as paging would therefore be governed by the new legislation, and such services will be judged by the test in the new Section 331(c) The new statutory test is based on the manner in which a multiple licensed or shared private land station is interconnected with a telephone exchange or interexchange service or facility 36/ See also H R Rep No 765 97th Congress 2nd Session, pp 52-56 (1082) 37/ The statute also makes it clear that if it is a private system, it is exempt from state and local regulation 47 USC §331(c)(3)

128 Once an ITFS licensee has determined whether the proposed service is private or common carriage, either under the NARUC I standard or, for land mobile services, Section 331(c) of the Act, the licensee, in order to provide a common carrier service, must seek the appropriate authorization from the FCC 38/ The ITFS licensee will be in the same position entitled to the same privileges and subject to the same obligations and regulations as a traditional offerer of common carrier services 39/

36/ New Section 331(c)(1) of the Act provides, in pertinent part, that "private land mobile service shall include service provided by specialized mobile radio, multiple licensed radio dispatch systems, and all other radio dispatch systems, regardless of whether such service is provided indiscriminately to eligible users on a commercial basis, except that a land station licensed in such service to multiple licensees or otherwise shared by authorized users (other than a nonprofit, cooperative station) shall not be interconnected with a telephone exchange or interexchange service or facility for any purpose, except to the extent that (A) each user obtains such interconnection directly from a duly authorized carrier, or (B) licensees jointly obtain such interconnection directly from a duly-authorized carrier "

37/ The Commission's interpretation of the test in the new legislation will be fully explored in our reconsideration of the Second Report and Order, Docket No 20846, 89 FCC 2d 741 [51 RR 2d 313] (April 8, 1982), and our treatment of land mobile services herein is expressly subject to the outcome of that proceeding

38/ These authorization and filing requirements are illustrated in greater detail in the FM-SCA Report and Order at paragraphs 25-27

39/ In all cases, involving either private or common carrier services, the applicant will not be seeking approval for the technical facilities of the ITFS station The Commission regards ITFS subcarrier and VBI use as a secondary privilege that runs with the primary ITFS station license That right is conferred on the primary station licensee only In this

[Footnote continued on following page]

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129 ITFS licensees seeking to provide private carrier service on an ITFS subchannel or BVI must notify the Licensing Division of the Private Radio Bureau at Gettysburg, Pennsylvania, 17325 by letter, prior to initiating service In the letter, they must certify that their facilities will be used in this regard only for permissible purposes See 47 CFR Parts 90 and 94 When providing land mobile service, they must also certify that service will be offered only to users eligible under Part 90 of the Commission's rules, and that any interconnection of the station with a telephone exchange or interexchange service or facility will be obtained in accordance with new Section 331 of the Communications Act, supra Such notifications will not give rise to a comment period and no separate authorization will be issued by the Commission As in the case of common carrier services, the ITFS operator offering a private service will be in the same position entitled to the same privileges and subject to the same obligations and regulations as a traditional offerer of such services

E Selection Procedures

130 Several of the commenters in this proceeding expressed the view that if the Commission decided to reallocate spectrum to the MDS, it should simultaneously act to ensure that the application processing procedure will not unduly delay the offering of multichannel MDS service to the public The Ad Hoc Committee for Wireless Cable outlined the perceived problem as follows

> "Our primary concern in this regard is that the Commission might adopt a procedure involving comparative hearings for all of the allocated frequencies It is inevitable that this will lead to interminable delays in conflict with the public interest Recent Commission experience has established that a certain 'gold-rush' mentality has accompanied reallocation of frequencies The reallocation of frequencies to the Low Power Television Service spawned thousands of applicants and swamped the processing mechanism Even the recently allocated spectrum for the Digital Electronic Message and Cellular Radio Service have been sought by more applicants than can be licensed
>
> "Moreover, many of the applications would probably not meet minimum qualifications necessary to operate a multi-channel MDS system The development, construction, operation and maintenance of multi-channel MDS systems will require substantial and sophisticated experience in construction and operation of microwave facilities The time and effort needed to evaluate the qualifications of potential applicants and then compare these applicants would delay the introduction of the service indefinitely, thereby eliminating the prompt introduction of new and innovative programming and the competition such an introduction would bring Moreover, it would place substantial burdens on Commission resources and personnel "

Ad Hoc Committee Comments, supra at 5-6 (footnotes omitted) The National Association of MDS Service Companies (NAMSCO), the trade organization for users of licensed MDS facilities, expressed the view that "without a concurrently established procedure for processing new MDS applications, the benefits of the long awaited action in this proceeding will be rendered academic " Comments of the National Association of MDS Service Companies General Dockets 80-112 and 80-113, at 5 (July 2, 1982)

131 In its proposal Microband suggested that these problems could be avoided if the Commission were to "[expand] the capacity of existing MDS Channel 1 and Channel 2 in the top 50 markets by separate allocation " Microband Proposal, supra, at 87 In particular, what Microband proposed was that we reallocate three ITFS channel groups to the MDS and that we allow only existing MDS Channel 1 licensees, permittees and applicants to apply for one of the reallocated groups for I year after the date of the order A second reallocated channel group would be similarly reserved for Channel 2 applicants, permittees and licensees The third group would

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39/ [Footnote continued from preceding page]

> regard, it should be noted that an ITFS licensee that elects to use a subchannel for private or common carriage remains an ITFS licensee for all other purposes Only the use of the subchannel for non-broadcast related purposes would be regulated in accordance with private radio or common carrier regulation

be available to any applicant that met the requirements of §21 900 of the rules 47 CFR §21 900 Id Appendix F at 3 Thus what Microband proposed is that two channel groups be made available for existing MDS licensees permittees, and applicants and that another channel group be made available for all other applicants

132 In support of its plan, Microband claimed "that the Commission has routinely established separate frequency allocations where the need for the new service was immediate " Comments of Microband Corporation of America, General Dockets 80-112 and 80-113, at 9 (July 2 1982) (hereinafter cited as 2nd Microband Comments) In Cellular Communications Systems, the most recent Commission decision cited by Microband to support this proposition, we did state that "the Commission in the past has routinely established separate wireline and non-wireline frequency allocations" Cellular Communications Systems, 86 FCC 2d 469 492 [49 RR 2d 809] (1981) on recon , 89 FCC 2d 58 [50 RR 2d 1673] (1982) (emphasis added) (hereinafter Cellular Order and Cellular Order on Reconsideration) In the Cellular Order, we reviewed the line of cases now relied upon by Microband and concluded that there is

> "[a] firm legal foundation for establishing a separate wireline allocation in a situation where (1) there is an immediate need for service to the public, (2) this need can be addressed quickly by a wireline company's expertise, (3) the separate allocation licensing scheme is a reasonable means of avoiding long delays in the availability of any cellular service attributable to comparative hearings and (4) we have taken reasonable steps to guard against anticompetitive practices "

Cellular Order supra, at 493 (emphasis added) Before applying these tests to the present situation, we first note that in the past we have only authorized separate allocations for wireline carriers in various mobile communications services Wireline carriers and non-wireline carriers were two distinct classes of applicants for the services There are not two distinct classes of MDS carriers For this reason, we believe that Microband's reliance on our policy of making separate frequency allocations for wireline and non-wireline carriers providers of the same service to support its plan is misplaced

133 Disregarding this fundamental distinction we nevertheless apply the tests articulated in the Cellular Order to the Microband plan First, is there an immediate need for service to the public? Microband and other MDS licensees and their customers have argued that there is an unmet public demand for a multichannel premium television service that multichannel MDS will satisfy We do not believe that this demand is analogous to the verified congestion that existed on two-way mobile systems prompting our separate allocation decision for the Cellular Service Id at 489 Rather we believe what really is at issue here is the timing of multichannel MDS entry in to the pay television market relative to the growth curve of cable television and other competitive services As Microband itself noted, "the primary market for multiple channel MDS will shrink at a rate of ten to fifteen percent per year of delay due to increased cable penetration alone " Second Microband Comments, supra, at 12 What Microband is telling us is that while there is now a need for multichannel MDS, the need may decrease with the passage of time Thus, we believe it is reasonable to conclude that there is a demand for the delivery of multichannel premium programming that multichannel MDS would be well-suited to provide, however, the need for the service does not justify the separate allocation suggested

134 Next, do existing licensees and permittees possess some special technical expertise in operating multichannel MDS systems? It is not clear that operating a single channel system gives a licensee multichannel expertise Even assuming that Microband and other single channel licensees have some technical expertise in operating multiple channel systems as a result of their experience with single channel systems, we do not see how those entities that have only filed applications can be said to have any expertise at all It could be argued that the only entities with any real experience in operating multiple channel video systems are cable television operators Thus, we conclude that the Microband separate allocation proposal would not bring a significant special technical expertise to the multichannel MDS service In reaching this conclusion, we are comparing the technical expertise of those that the Microband plan would favor with the expertise that wireline carriers had in cellular and related technology The applicants that the Microband proposal would favor do not have equivalent expertise in multichannel MDS

135 Third, would the separate allocation be a reasonable means to avoid long delays in making multichannel MDS available and, fourth, would it adequately guard against anti-competitive practices? We are considering these two criteria together because we believe

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that one of the fundamental elements of reasonableness is competitive effect The Microband separate allocation scheme reasonably could be expected to result in the early availability of multichannel MDS service The Microwave Communications Association, an industry trade organization of MDS carriers MDS users, equipment manufacturers and others, analyzed the results of the Microband plan as follows

> "Microband owns 26 Channel 1 MDS stations outright and partially owns an additional 9 Channel 1 MDS stations in which it has management responsibilities, or a total of 35 MDS stations - 70% of the top 50 markets Further, Microband is a Channel 2 applicant in an additional 13 markets Thus Microband potentially could have multiple channel ownership interests in 48 out of the top 50 markets Even more significantly, since most of the Channel 2 markets are mutually exclusive with more than one applicant (there are only three Channel 2 licensees), Microband (or a Microband related company) would be the sole multichannel licensee in 64% of the top 50 markets until the mutually exclusive Channel 2 markets were resolved "

Comments of the Microwave Communications Association, General Dockets 80-113 at 10 (July 2, 1982)

136 American Home Theatre the MDS customer in Salt Lake City termed the Microband scheme "flagrantly anti-competitive" and concluded that what Microband was seeking was "a substantial 'leg-up' on the provision of Multichannel MDS service while new entrants to the market place would still be tied up in litigation in comparative hearings before the Commission " Comments of American Home Threatre Inc With Respect to Proposal of Microband Corporation of America, General Docket 80-112 and 80-113, at 7 (June 2, 1982) On the other hand, Microband claims that if its plan were to be adopted, it would own only twenty-two percent of the 150 multichannel licenses and that this would result in a decrease in its percentage of ownership Second Microband Comments, supra, at 8-9 Of course, because we are only authorizing two multichannel operations, rather than the three Microband proposed, Microband would have 33% of the licenses We believe the quoted Microwave Communications Association analysis presents a more realistic view of the ownership statistics that would result if the Microband proposal were adopted We have concluded that the adoption of the Microband separate allocation proposal would unnecessarily and unreasonably concentrate control of multiple channel MDS systems in a few entities including Microband, and that it would also give such entities a substantial head start in the provision of multichannel MDS service in most markets Moreover we believe that other means are available to make multichannel MDS available expeditiously and we therefore conclude that the advantages of the Microband proposal are outweighed by its detriments 40/

137 Having reached this conclusion, we must now decide whether to adopt any special procedure for dealing with the expected large number of applications for the newly allocated channels If we do nothing, the comparative hearing procedures of Part 21 of our rules will apply As discussed above, many of those filing comments in this proceeding expressed the view that proceeding in this manner would embroil the applicants in lengthy comparative hearing procedures and thereby unnecessarily delay availability of the service to the public Before discussing other procedures that could circumvent the problems caused by the comparative procedures, we feel that it is useful to consider Microband's view of the existing Part 21 procedures In its proposal Microband stated

> "This MX situation has been with the industry almost since its inception Unlike some other segments of the communications industry, however, a solution to this problem has been found merger of competing applications In nine years, only four MX situations have actually been decided by resorting to comparative hearings Microband believes that the joint venture solution, which has worked well to date, will continue to solve the MX problem with a minimum of expense to the applicants and to the Commission "

40/ We recognize that our decision to authorize multichannel MDS could impact upon other services However, there is no evidence in the record before us that would support protecting existing entities from competition and we expect the public overall to benefit from these authorizations

Microband proposal, supra, Appendix A, at 1, n 1 Thus, Microband seems to contend that we should adopt a new procedure to avoid the problems of our comparative hearing procedures, and in the same proposal tells us that our comparative procedures have worked rather well This position is not necessarily inconsistent The comparative hearing procedure can work well where there are only two or three entities applying for the same frequency If there are 5, 10 or more mutually exclusive applicants for the same frequency, the comparative procedures work less well In the first place it is much less likely that 10 mutually exclusive applicants will reach an agreement to form a joint venture than if there are only two or three mutually exclusive applicants Furthermore in those situations in which it is necessary to hold a hearing among a large number of mutually exclusive applicants it is likely that several of the applicants will be equally well qualified and thereby force us to make a choice on the basis of very minor differences in the applicants For these reasons, we conclude that the comparative hearing procedure may not be the best method to resolve mutually exclusive multichannel MDS applications

138 Some of those that predicted we would receive a large number of mutually exclusive applications if we authorized multichannel MDS suggested that we use a lottery procedure to grant multichannel MDS authorizations For example Contemporary Communications Corporation suggested that, "In the current pro-competitive deregulatory environment we believe the only fair method of selecting licensees is by lottery among applicants meeting threshold qualifications determined by the Commission " Additional Comments of CCC supra, at 10

139 Section 309(i) of the Communications Act authorizes us to grant licenses or permits "through the use of a system of random selection " 47 USC §309(i)(1) On March 31 1983 we adopted the Second Report and Order in General Docket 81-768 in which we provided specific rules to implement a lottery scheme In adopting the Order, we noted that Congress intended that we use a lottery where it would best serve the public interest and that we should consider the following factors in determining whether a lottery would be in the public interest whether there are a large number of available licenses whether there are a large number of mutually exclusive applications for each license, whether there is a significant backlog of applications, whether the lottery would significantly speed up the process of getting the service to the public, and whether diversity of information sources would be enhanced Using these factors we initially determined that 5 services are amenable to the use of random selection techniques The services were low power television, private land mobile radio private operational fixed microwave, aviation and marine services, and domestic public land mobile

140 The new legislation also directs us to use notice and comment rule making procedures each time we intend to use a lottery in a specific service 47 USC §309(i)(4)(A) Many of the commenters in this proceeding predicted that we would receive a large number of applications if we made spectrum available for multichannel MDS We agree that this is a likely result We are therefore proposing to use a lottery to select all MDS permittees both multichannel and single channel, in a separate Further Notice of Proposed Rule Making in this Docket

141 In regard to using random selection procedures for MDS we note that we had previously proposed several alternative methods for selecting from among mutually exclusive MDS applicants 41/ One of the methods proposed was a lottery The other two methods proposed were an auction and a paper hearing The Lottery Notice was primarily concerned with the question of our legal authority to employ alternatives to comparative hearings to resolve mutually exclusive situations Since the new legislation specifically authorizes us to use a random selection procedure and provides Congressional guidance on when the expedited procedure should be used, there is no reason to consider further the selection procedure proposals contained in the Lottery Notice

142 The only other issue raised in that proceeding concerned trafficking rules In the Lottery Notice, we suggested that, if we were to adopt a lottery procedure, it would also be appropriate to eliminate or modify the existing anti-trafficking rules now applicable to MDS

41/ In the Matter of Amendment of Part 21 of the Commission's rules to Permit the Use of Alternative procedures in Choosing Applicants for Radio Authorizations in the Multipoint Distribution Service, Notice of Inquiry and Proposed Rule Making, CC Docket No 80-116 45 FR 29,335 (May 2, 1980) (hereinafter Lottery Notice)

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Lottery Notice, supra para 74 and Appendix A In Appendix A, we pointed out that the anti-trafficking provisions contained in §§21 27 and 21 39 of the Rules, 47 CFR §§21 27, 21 39, are mandated by Section 310 of the Communications Act, 47 USC §310 We further noted that §21 40 of the Rules, 47 CFR §21 40, was not required by the Act This section gives us discretion to inquire whether a facility that has been operated less than 2 years by the proposed assignor or transferor had been acquired for the purpose of profitable sale rather than public service

143 We recently considered the question of the continued usefulness of the anti-trafficking rules and policies with reference to broadcast licensees In the Matter of Amendment of §73 3597 of the Commission's Rules (Applications for Voluntary Assignments or Transfers of Control) Report and Order, BC Docket No 81-887, FCC 82-519 [52 RR 2d 1081] (released December 2, 1982) (hereinafter Trafficking Order) There we eliminated what was known as the "three year rule " That rule, which was similar to §21 40, required that we designate for hearing all applications for transfer or assignment of broadcast station licenses that had not been held for three years Id at para 1 After reviewing the reasons for the rule and its effect during its 20 years of existence, we concluded that it was

> "appropriate to eliminate our 'trafficking policy' and to limit Commission action in this area to enforcing the requirements of Sections 301 and 304 of the Communications Act Such Commission inquiry will be restricted to whether any party has engaged in activity indicating action contrary to the statutory prohibition on license sales, such as attempting to profit on the transfer of a bare license The Commission will continue to exercise its statutory authority under the Communications Act to determine that each transfer it approves is in the public interest "

Id, at para 29 We also concluded that because Sections 301 and 304 state that radio station licenses do not convey a property interest, "profiting on the transfer of a construction permit is contrary to the letter and spirit [of these sections] " Id at para 32 Finally, we concluded that we should treat licensees that had obtained their license in a comparative hearing differently than other licensees In particular, we held that a one year holding period after starting operation should be imposed on permits obtained through comparative hearings Id at para 35

144 Because the Part 21 common carrier trafficking rules stem from the broadcast policy we have concluded there is no reason to continue to apply these rules to common carriers where we are no longer applying them to broadcast licensees Therefore, for reasons analogous to those relied upon in the Trafficking Order, we have decided to eliminate those portions of §21 40 that limit the free transferability of Part 21 licenses 42/ We shall retain those portions of §21 40 that limit the transferability of construction permits and we shall add new language to §21 40 to limit the transferability of station licenses that were obtained through comparative hearings This action is independent of whether we ultimately decide to use a lottery for multichannel MDS The new §21 40 is included in Appendix B

145 Finally we recognize that although it is our belief that elimination of the trafficking rules will in general result in the more efficient use of the spectrum in that the ultimate licensee will be the entity that values it most highly, it is possible that situations could occur in which the licensee's best interest would be in not using the spectrum For example, it is possible that a cable television company that had been awarded a cable franchise for a particular area but had not yet constructed its system would find it in its best interest to purchase the multichannel MDS license and not use the station, thereby preventing the establishment of MDS service in the area This would preserve the largest possible customer base for the cable company Because this is common carrier service, the licensee is required to render service on a reasonable basis in accordance with the obligations imposed by Title II of the Act For this reason, we believe we have adequate regulatory tools to deal with this problem should it occur

146 We have now resolved the only unresolved issue raised in the Lottery Notice We are, therefore terminating that proceeding Comments relating to the use of a lottery in multichannel MDS should be filed in Docket 80-112

42/ Section 22 40 of the rules is equivalent to §21 40 In common carrier Docket 80-57, we are considering the revision and updating of Part 22 We will consider equivalent changes to §22 40 in that proceeding

F Application Procedures

147 One of our primary concerns in making this reallocation is to ensure that no existing ITFS operation experiences unacceptable degradation in service as a result of the operation of a multichannel MDS station For this reason we are adding a new subsection to the rules requiring that multichannel MDS permittees demonstrate that they will not cause any harmful interference to any ITFS receiver site located within 50 miles of the proposed MDS transmitter location 47 CFR §21 902(d)

148 We have tried to anticipate other eventualities that could unduly delay the introduction of multichannel service to the public One such eventuality, commonly referred to as "grid-lock " could be caused by the combination of a large number of applications and the operation of §21 31(c) of the rules 47 CFR §21 31(c) Grid-lock refers to the situation in which applications proposing to serve widely separated geographical areas are mutually exclusive For example, if two metropolitan areas, A and B, were separated by 75 miles and several applications were filed for each area, it is unlikely that any of the applications proposing to serve area A would be mutually exclusive with those proposing to serve area B If however, even one application was filed that proposed to serve the area located midway between area A and area B, it is likely that it would be mutually exclusive with all the applications proposing to serve area A and all the applications proposing to serve B This means that all of the applications proposing to serve area A would be in a sense mutually exclusive with those proposing to serve area B If another area C were located 75 miles from either A or B a similar set of circumstances could result in all the applications filed for area C being mutually exclusive with those filed for both area A and area B and the connecting areas It is not difficult to envision a set of circumstances in which an application that proposed to serve a location in Maine would be mutually exclusive with an application proposing to serve a location in Florida

149 We have considered several methods to avoid this result One of these was to enforce rigorously §21 902(a) of the rules, 47 CFR §21 902(a) that requires all applicants to make "exceptional efforts" to avoid blocking cochannel use in nearby cities We do not believe that this rule alone is enough to avoid the problem For this reason, we have decided to limit the applications that will be considered to be mutually exclusive for purposes of inclusion in either a comparative hearing or a lottery — if we should decide to use such a selection procedure in this service — to those applicants that propose to locate their transmitters within a given Standard Metropolitan Statistical Area (SMSA) or within 15 miles of the boundary of the SMSA (if the transmitter is not located in another SMSA) or that propose to serve the SMSA In those situations where the SMSA to be served is a part of a Standard Consolidated Statistical Area (SCSA) it will be considered with all other applications proposing to serve the SCSA 43/ We are requiring applicants proposing to serve any portion of an SMSA to specify what SMSA it intends to serve In those situations where SMSAs that are not part of SCSAs are either adjacent or so close that a single transmitter could produce a signal strong enough to cause harmful interference in both SMSAs, we require that each applicant not only specify which SMSA it intends to serve but also to detail what steps it will take to prevent blocking cochannel use in the adjacent SMSA Issues of mutual exclusivity for applications not proposing to serve SMSAs will be resolved using only existing Part 21 Rules However, we do require all such applicants to specify the name of the primary service area Each applicant will only be allowed to file a single application for each service area

150 We believe that by using techniques such as cross-polarization and frequency offsets that it will be possible to avoid cochannel interference in most situations We stress again that we expect applicants to address this problem in their applications Those applications that do not contain an analysis of how the applicant intends to avoid cochannel interference in adjacent areas will not be considered acceptable for filing

151 We expect existing ITFS licensees to cooperate with would be MDS applicants to make channels available We believe that cooperation between MDS providers and ITFS licensees could result in benefits to each The ITFS licensees could benefit from the technical expertise of MDS operators and the MDS operators would benefit from access to the ITFS spectrum Most importantly the public will benefit from more intensive use of the spectrum

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43/ We intend to use the list of SMSAs and SCSAs to be published by the Office of Management and Budget on June 30 1983 as our source for SMSA definitions in this service

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152 All MDS applications must contain a statement that the applicant will comply with the following interference protection requirements

(1) With respect to the ITFS, the MDS operator must attempt to obtain the written consent of all licensees permittees and applicants of cochannel and adjacent channel ITFS transmitters located within 50 miles of the MDS transmitter prior to commencing MDS construction facilities

(2) With respect to cochannel and adjacent channel MDS operations, the MDS applicant must provide the level of interference protection proposed in Docket 80-113 until a resolution of that proceeding has occurred

(3) To assist us in enforcing §21 902(a) of our rules, that requires applicants to make "exceptional efforts" to avoid blocking cochannel use in nearby cities and adjacent channel use in the same city the applicant must explain what efforts it has made to comply with this section

Applicants will be granted construction permits conditioned on their submitting to the Commission prior to commencing construction, a statement from all cochannel and adjacent channel ITFS licensees permittees or applicants that have transmitter sites within 50 miles of the proposed MDS transmitter that the operation of the multichannel MDS facility will not cause harmful interference to their ITFS operations or if it does that the ITFS operator will accept such interference If the applicant is not able after making reasonable efforts to obtain such a statement it may in the alternative submit evidence that the operation of the proposed MDS would not cause harmful interference to the existing ITFS operations 44/

153 Finally as noted above (see para 88 supra) we do not believe it would be in the public interest to require the first group of applicants for the reallocated channels to submit the interference analysis required by §21 902(c)(1) of our rules, 47 CFR §21 902(c)(1) For this reason we are hereby waiving the requirement that the first group of applicants for the reallocated channels comply with §21 902(c)(1) If we subsequently decide to accept a second group of applications for these channels (see para 154, infra) such applications must contain the interference analysis required by §21 902(c)(1)

154 Because it is possible that two new MDS construction permits will be granted simultaneously in some markets, and because it is possible that MDS or ITFS operations in markets that are in close proximity may present potential interference problems, it will be difficult for applicants to comply fully with §21 902(a) We will therefore allow MDS construction permit holders to apply for modifications to their facilities in order to minimize interference potential with other MDS and ITFS operations

155 Section 21 43 of our rules, 47 CFR §21 43 requires construction of an MDS facility within eight months of grant, athough construction permit holders may request extensions We believe that it is appropriate to grant extensions liberally to MDS construction permit holders in the E and F groups The reason for this is that, particularly in major markets, many of the E and F channels will be occupied In this case, the grant of an MDS constuction permit is simply an authorization for the permittee to enter into negotiations with certain ITFS licensees While the permittee may subject to the interference protection requirements, commence operations on as few as one channel the enterprise may not be viable unless a larger block is assembled Hence, while we will look favorably on requests for time extensions of construction permits, such requests must include information on the permittee's efforts to assemble a viable block of channels and an estimate of the construction timetable

156 In general, we will use existing Part 21 procedures to process multichannel MDS applications However, we believe it is necessary to adopt procedures to deal with what we referred to in the Cellular Reconsideration Order as "one-upmanship " There we stated that

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44/ In this regard it should be noted that lessees of the E or F group channels will not be protected from harmful interference caused by an MDS licensee operating on these channels

"We want all participants to file applications which represent their best view of a service plan for the named SMSA To do so, we do not find it necessary for participants to consult the plans of their potential competitors Setting up a plan which would allow applicants to revise their filings after viewing the applications of others would encourage applicants to engage in 'one-upmanship,' which has harmful consequences This would undermine our ability to compare proposals with some measure of confidence that the applicant had participated in its development Plans based on another proposal would no longer represent the applicants' best idea of how to serve a given area but would, instead represent applicants' use of the administrative process to obtain an advantage over competitors Furthermore, allowing opportunity for one-upmanship would needlessly encumber an administrative process which we must streamline to its essentials if the American public is to receive cellular service without unnecessary delay "

Cellular Reconsideration Order supra, at 89 (footnotes omitted) We recognize that there are significant differences between the technical planning required to operate a cellular communication system and that required to operate a multichannel MDS system Our experience with both MDS and the more recently authorized Digital Electronic Message Service (DEMS) has taught us that some applicants merely copy applications that have previously been filed and resubmit them with the names changed We believe that this kind of activity does smack of the "land rush" or "gold rush" mentality that concerned many of the commenters in this proceeding Our experience with single channel MDS applications is that in many instances a local entity will perceive the need for service in its community and file the appropriate application only to have another entity file a competing application on the final day allowed by our Rules thereby delaying the introduction of service to the public We do not believe that such activity is in the public interest We will therefore initially only accept multichannel MDS applications on the 45th day after publication of this Order in the Federal Register 45/ We cited the well-established legal precedent for proceeding in this manner in the Cellular Reconsideration Order and noted that this procedure "treats all prospective applicants equally and fairly by giving them substantial advance notice of due dates for their applications " Id at 90 After processing the first set of applications, we will determine whether to proceed to accept further applications in this manner or to allow applicants to file using the existing Part 21 cut-off procedures

G Other Matters

157 Several of the commenters in this proceeding questioned the need and wisdom of continuing to regulate MDS as a common carrier service Michael Benages claimed that

"The Commission's rules impose on the MDS licensee its status as a common carrier, but they do not alter the fact that in operation the licensee is functionally equivalent to [a] broadcast licensee, and most specifically, the licensee of a subscription television facility "

Comments on Proposal of Microband Corporation of America, by Michael Benages General Dockets 80-112 and 80-113 at 7-8 (July 2, 1982) In the same vein Tekkom commented that

"Common sense would dictate a current regulatory approach to MDS similar to that adopted for STV STV is, as a practical matter little different from MDS In STV, the licensee can either operate the subscription television service or sell the airtime to another under terms of a contract negotiated to meet the marketplace realities The staff's adherence to a strict interpretation of tariff rules prevents MDS from being allowed to act on a cost efficient basis and, instead, imposes a regulator's view as to what is 'possible, practical and desirable ' "

Comment of Tekkom, Inc , supra, at 4-5 Contrasted to these views is the view expressed by the Ad Hoc Committee for Wireless Cable

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45/ If the 45th day after release of this Order falls on a holiday applications should be filed on the next business day 47 CFR §§1 4(j), (d)

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"[T]he Commission wisely chose to establish MDS as a common carrier service By separating the ownership of facilities from decisions over programming, the Commission permitted the risks of this new venture to be spread among different entrepreneurs with differing focuses, interests and abilities Whereas Carriers gained expertise in system construction and operation, Operators moved into each community and provided the service which they believed was most demanded in that community The latter invested their resources in trucks, technicians, reception equipment, programming and advertising They were also unencumbered by the costs of regulatory compliance This separation of investment risks has maximized the speed with which MDS has grown

"The existing MDS structure has worked well and has been to the benefit of the public It should not be changed for the sake of change "

Comments of the Ad Hoc Committee supra at 11-12 Because we did not propose to change the regulatory status of MDS in this proceeding, we believe it would be inappropriate for us to act on this issue in this proceeding Those who believe that this issue should be addressed further are invited to submit a Petition for Rule Making

158 The National Cable Television Associaton (NCTA) and Warner Amex Cable Communications, Inc (Warner Amex) filed comments concerning another issue not raised in the Notice Warner Amex and NCTA point to heavier regulatory burdens faced by cable television systems as compared to those faced by other providers of video services including MDS and conclude that the Commission should act to eliminate these disparities The NCTA position is that

"[I]t is crucially important that the Commission recognize that the new service that Microband proposes would enjoy significant regulatory advantages over cable that would distort competition between the two services To promote its own objectives of fostering true competition and diversity, the Commission should accompany any authorization of Microband's proposed service with a comprehensive proceeding fashioned to level the playing field on which MDS cable and the other old and new video services will compete "

Comments of the National Cable Television Association, Inc , General Docket 80-112 and 80-113, at 12 (July 2 1982) Warner Amex concludes that

"Before considering Microband's proposal and the issues in the above-captioned rule making proceedings, the Commission must first address the issue of regulatory parity among competing technologies To ignore this issue any longer while at the same time creating additional economic advantages for cable's competitors (via preemption), is unfair to the cable industry, its subscribers and the public interest generally "

Comments Warner Amex Cable Communications, Inc , General Dockets 80-112 and 80-113 at 6 (July 2, 1982) It may not be possible (assuming it were desirable) to "level the playing field" on which multichannel MDS and cable "play " There are vast technological differences between multichannel MDS and cable that strongly favor cable Cable systems have the capability of providing more than one hundred channels of television service The multichannel MDS systems we are authorizing today are limited to four channels Cable systems have the capability to serve all locations within a service area Our experience with single channel MDS is that most operators, because of various propagation factors have difficulty serving more than 50% of the locations within their service areas Furthermore, the service areas of MDS operators are frequently much smaller than the service areas of cable companies As far as regulatory burdens are concerned, MDS licensees are subject to the full panoply of Title II common carrier regulation Cable has never been subject to these obligations For these reasons, we find little merit to arguments raised by NCTA and Warner Amex as presented Petitioners may wish to submit a petition for rule making addressing these issues in a substantiated focused manner

159 Turner Broadcasting Systems (TBS) urged that we act on its Petition for Rule Making requesting the deletion of the cable television "must-carry" rules TBS notes that Microband in its proposal claims that multichannel MDS operators will provide the "right mix" of channels on their systems to maximize subscribers and concludes that cable television systems, especially 12 channel systems, are not free to similarly provide the "right mix" of programming to their

customers because of the must-carry rules TBS's petition is now being studied by the Commission staff However, we do not believe it would be in the public interest to delay this proceeding pending action on the TBS petition

160 Finally, on December 21, 1979, Microband filed a Petition for Rule Making RM-3540 in which it requested that we investigate the feasibility of exchanging the existing MDS Channel 2 allocation (2156-2162 MHz) with a 6 MHz band allocated to some other service Microband suggested that we consider common carrier frequencies in the 2110-2130 MHz and 2162-2180 MHz bands or operational fixed frequencies in the 2130-2150 MHz, 2180-2200 MHz and 1850-1990 MHz bands Microband's reason for submitting this petition was its concern that Channel 2 operation would cause unacceptable adjacent channel interference with existing Channel 1 operations As discussed above Channel 1 and Channel 2 are now being operated in Phoenix, Arizona and none of the interference problems suggested by Microband have materialized Furthermore, since we are by this order removing the restriction limiting MDS operators to single channel per service area we believe that many Channel 2 operators can enter into joint ventures with existing Channel 1 operators and thereby make two channel service available For these reasons we have concluded that there is no need to proceed with the rule making suggested by Microband and we will by this Order dismiss its petition

IV Regulatory Flexibility Act

161 The Regulatory Flexibility Act of 1980 does not apply to rules adopted after January 1, 1981 when the underlying notice of proposed rule making was adopted before that date The underlying Notice of Proposed Rule Making for this proceeding was adopted March 19 1980 Accordingly there is no need for certification under the Regulatory Flexibility Act See 5 USC §601

V Conclusions

162 We believe that we have in this Report and Order arrived at equitable treatment of all concerned parties and at the same time have adopted policies that best serve the public interest In particular, we believe that the policies and rules set out herein recognize and provide for the unique needs of the existing and potential users of the ITFS channels and also provide would-be providers of multichannel MDS service spectrum to meet anticipated public demand This proceeding has required that we balance difficult competing interests in reaching a decision which should result in more intensive use of the spectrum while preserving legitimate needs of existing users

163 Accordingly, it is ordered, pursuant to Sections 4(i) and 303(r) of the Communications Act, 47 USC §§154(i), 303(r), that Title 47 of the Code of Federal Regulations is amended as described in Appendix B These amendments shall become effective thirty days after publication of this Order in the Federal Register and we will accept multichannel MDS applications only on the forty-fifth day after publication of this Order in the Federal Register

164 It is further ordered that the Microband Petition for Rule Making RM-3540 is dismissed and that proceeding is terminated

165 It is further ordered that the proceeding in Common Carrier Docket 80-116 is terminated

166 It is further ordered, that the portion of the application of Channel View, Inc requesting authority to conduct a market experiment, File No 8938-ED-MR-82, is denied

167 It is further ordered that the developmental applications of Contemporary Communications Corporation to construct and operate multichannel over-the-air pay video service facilities in New York, Chicago, Los Angeles, St Louis, and Philadelphia, File No BPEX-820802KH, are denied

168 It is further ordered that Form 330P is amended as set forth in Appendix C effective upon obtaining approval of the Office of Management and Budget as required by the Paperwork Reduction Act 44 USC §3502(4)

169 It is further ordered that applications for Channel Groups E and F filed after 12 00 PM, May 26, 1983, must be consistent with the provisions herein

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CONCURRING STATEMENT OF
FCC COMMISSIONER JAMES H QUELLO

As you know my consistent position on this issue has been that there is a heavy burden of proof on those who seek to take away frequencies reserved for educational purposes I am concerned that the Commission is not adequately taking into consideration the educational community's future needs for this spectrum as this nation moves into the information age Nevertheless the staff and some of my colleagues do want to make additional channels available for commercial video services Given that this is inevitable, I believe that this document represents an exceptional balancing of competing interests in a very difficult area I believe that if reallocation must result, this document appears to be a reasonable approach which maintains priority where it belongs — with educational entities

I have been reluctantly persuaded to concur in this document because of the following provisions and assurances

(1) all existing ITFS applicants permittees, and licensees have been "grandfathered",

(2) at least 20 channels are reserved exclusively for ITFS

(3) educators will be permitted for the first time to lease excess capacity so as to provide the potential for needed additional revenues

(4) MDS applicants will receive only a conditional construction permit and must get an agreement in writing from the existing ITFS licensee before they can begin construction on the same channel or an adjacent channel

(5) MDS applicants must protect ITFS operators against interference

Finally, I must note that the Commission in making its decision had to give some weight to the *lack of existing use of the ITFS spectrum* It is a significant argument that in a substantial number of states there are no channels in use and no applications on file

While we cannot ignore the loss of potential for ITFS service resulting from this action, I strongly hope that the educational community will recognize the significant benefits which will accrue to the ITFS service as a result of this decision We must all now look to the future and allot the highest priority to applying the ITFS service as an innovative tool for making our nation more productive and our people better able to cope with a rapidly changing world

CONCURRING STATEMENT OF COMMISSIONER MIMI WEYFORTH DAWSON

I concur in the "reallocation" of certain ITFS channels for multi-channel MDS use, but I do so with a number of reservations In particular, while I agree with the allocation of spectrum for multi-channel use, I think the Commission could have accomplished this in a way which is both less intrusive to ITFS operators and at the same time better insures the viability of the multi-channel service which the Commission purports to create

As to the effect on ITFS, for example, I do not understand the necessity for the creation of two four-channel MDS systems rather than one system This Commission has often spoken of the proliferation of competition in the video marketplace With this multitude of services, a single four-channel MDS system would face competition whether or not the Commission authorizes a second four-channel system And obviously, the authorization of a single four-channel system would have had a substantially lesser impact on existing ITFS users, particularly if the Commission had reallocated the three under-used OFS channels for MDS use rather than dipping into the more heavily used ITFS channels I wish these options had been seriously explored by the Commission staff

However, having made the policy choice to "reallocate" enough spectrum for two multi-channel MDS systems, the Commission should have proceeded to make multi-channel MDS as viable as possible But I am fearful that the Commission's decision fashioned in the name of compromise, does not bode well for the timely creation of multi-channel MDS systems, at least in the major markets And if it appears that the Commission has so burdened multi-channel

MDS that it stands little chance of getting off the ground then I believe that the Commission should reevaluate its allocation of ITFS spectrum to MDS

The burdens on potential MDS operators in this oddly configured "reallocation" are numerous For example even the "winners" of MDS lotteries 1/ win only the right to negotiate with co- and adjacent channel ITFS licensees within a 50-mile radius of the MDS stations 2/ In fact, MDS permittees before they may begin construction, must submit a statement from those co- and adjacent channel ITFS users to the effect that "the operation of the multi-channel MDS station will not interfere with the ITFS operation or that the ITFS operator would accept any interference that did occur " 3/ Obviously this gives current ITFS operators something in the nature of a veto power over MDS systems with the only bright spot in such a procedure being that the veto must be related to "harmful interference" to existing stations 4/ Thus at least it would appear inappropriate under the negotiation process adopted by the Commission for an ITFS operator to veto MDS systems simply because the ITFS operator does not agree with the programming proposed to be presented on the MDS system or for any reason other than a reasonable belief that the MDS system will interfere with the ITFS operator's existing facilities 5/

In short, while I agree with the allocation of spectrum for multi-channel MDS operation, I hope that the Commission has not pre-ordained laggard construction and fitful performance by the multi-channel systems, if the Commission has done so then the disruption to existing ITFS users will have occurred for no reason 6/

STATEMENT OF COMMISSIONER HENRY M RIVERA
CONCURRING IN PART, DISSENTING IN PART

This Report and Order has two principal aims to create a new multi-channel video delivery service, and to assure adequate spectrum for future ITFS growth With respect to these aims

---

1/ The failure of the Commission to adopt lottery procedures now – which I believe the Commission could have done – also adds to the delay in providing multi-channel MDS service I can only hope that the further notice proposing lottery can be completed expeditiously so that MDS service may be provided to the public in something approaching a timely manner

2/ Report and Order at para 85

3/ Id

4/ Id Rather than this clumsy and laborious process I would have preferred the application of the "last-in" theory familiar both to the Commission and to broadcasters E g , Sudbrink Broadcasting of Georgia Inc 65 FCC 2d 691, 692 (1977) Under this more familiar procedure MDS systems could have been permitted to construct but would have been required to correct any harmful interference to ITFS operators

5/ It is also important to emphasize my belief that the Commission's decision grandfathers only "existing" ITFS facilities, i e , those which have been granted those which are operating and those which have been applied for To extend grandfathering to inchoate systems is to invite confusion and to delay even further the provision of multi-channel MDS service See Report and Order at para 85

6/ I must disagree with one small aspect of the Commission's decision Consistent with the decision in Amendment of §73 3597 of the Commission's rules, ___ FCC 2d ___ (BC Docket 82-887, released December 2, 1982), the instant decision substitutes a "one-year" transferability rule for the "three-year" rule now in force at least for those licenses "that were obtained through comparative hearings " Report and Order at para 144 While it seems unlikely that this rule will have much effect given the proposed application of lotteries to choose MDS permittees, I continue to believe that any such limitation on the free transferability of licenses "is wholly antithetical to the deregulatory philosophy of this Commission " Amendment of §73 3597 of the Commission's rules, ___ FCC 2d at ___ (dissenting opinion)

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the decision represents a basically fair balancing of the interests of the affected spectrum users and I concur in most of it However the Commission erred in failing to precisely define and limit the degree to which ITFS licensees may lease "excess" capacity and I dissent to that part of the decision As I have previously indicated 1/ I am concerned about the potential de facto spectrum reallocation made possible by the Commission's failure to adopt clear guidelines governing excess capacity leasing If de facto reallocation occurs one of the aims of this Report and Order – assuring adequate spectrum for future ITFS growth – will be thwarted In view of the apparently intense outside commercial interest in these microwave frequencies, this issue will be far more than academic at least in the long term, as ITFS usage multiplies While I certainly do not wish to deprive ITFS licensees of the new income-producing opportunities extended other licensees I am concerned that the Commission's laissez-faire approach here will prove detrimental to our ability to manage the spectrum in the future

I also emphatically dissent to the majority's decision to sidestep the media diversity issues inherent in the new "wireless cable service" provided by multichannel MDS My fellow commissioners apparently believe that there is no place for such concerns in a common carrier service I disagree While MDS is nominally regulated as a common carrier service the majority should have faced the fact that to the viewer the wireless cable transmission is indistinguishable from other home video mediums no matter what their regulatory classification 2/ To the viewer it is all "television " Whether we care to acknowledge it or not MDS transmissions can influence social, cultural, political and moral values to the same extent as conventional broadcast television Given this reality the Commission should have explicitly evaluated options to assure that the new multichannel service will optimally further the robust ideological diversity we have worked so long to achieve in broadcasting

Common carriers by law, may neither discriminate among those wishing to use their facilities nor exercise control over transmission content At first blush these limitations would appear to mitigate many of the concerns underlying structural and behavioral regulation of broadcast licensees who do control channel access and transmission content However, the theoretical programming diversity benefits of common carrier regulation are constrained in MDS As an initial matter our rules allow an MDS licensee to provide up to fifty percent of its transmission time to an "affiliated subscriber " 3/ Although carriers are prohibited from influencing the content of such transmissions, the efficacy of such a prohibition upon affiliated entities is highly questionable Where such substantial influence actually is exerted the diversity-related virtues of common carrier regulation as well as the classification of MDS as a common carrier, are frontally undermined

The MDS licensee's apparent freedom to enter long-term contracts with a single customer as to one or more channels in a given local market also substantially curtails if not eliminates, the diversity-related benefits common carrier regulation might otherwise be expected to provide In such circumstances, the programmer-customer is functionally indistinguishable from a broadcast licensee Unlike a broadcaster, however, its discretion over programming is completely unfettered As a result, the public's exposure to the widest possible diversity of viewpoints may be diminished despite the fact that authorization of multichannel MDS is intended to promote that goal

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1/ See Report and Order Authorizing Shared Used of Broadcast Auxiliary Facilities with Other Broadcast and Non-Broadcast Entities, released April 15, 1983 (Docket 81-794) (Concurring Statement of Commissioner Henry M Rivera)

2/ In point of fact there is little apparent practical difference between MDS home video service and broadcast subscription television In both services, a licensee typically leases transmission facilities to program distributors or their surrogates whose goal is to reach as many members of the public as are willing to pay for the service Neither service can be employed without special equipment The STV licensee, unlike the MDS licensee, is entitled to deal with the lessee/programmer of its choice and is legally responsible for transmissions over its facility However the soundness of the disparate regulatory classifications applied to MDS and STV is open to question, given that an MDS licensee may lease most or all of its channel capacity to a single lessee See generally Report and Order paras 101-102, Metrock Corp 73 FCC 2d 802 (1979)

3/ See 47 CFR §21 903(b)

INSTRUCTIONAL TELEVISION FIXED SERVICE (MDS REALLOCATION)

In the broadcast arena the Commission has traditionally held the view that programming diversity can most effectively be maximized by diversity of ownership and control of broadcast outlets It has therefore placed heavy emphasis upon structural regulatory policies which among other things promote diversity of ownership in local markets through one-to-a-market, duopoly and media cross-ownership rules narrowing curbing local media combinations 4/ The media diversity objective underlying local ownership restrictions in the broadcast service is no less compelling in MDS, which is widely viewed as as alternative to conventional broadcasting, and whose regulatory status and configuration are murky at best The fact that the FCC has elected to regulate MDS as a common carrier service simply does not negate the reduction in diversity of viewpoint that occurs when an entity obtains the unfettered right to program an MDS channel in a market where that entity already controls another mass communications medium or when a single entity obtains the right to program multiple MDS channels 5/ The majority has apparently blessed such anti-diversity combinations in MDS essentially because restrictions "would prevent market forces from determining the optimum mix of channels " See Report and Order paras 101-102

For the reasons just outlined, the majority's failure to consider even minimal regulation in furtherance of First Amendment values was a serious mistake The Commission could have easily provided a small measure of assurance that diversity would be furthered by formulating tariff requirements preventing MDS licensees from leasing channels to entities already owning other media interests in the same geographic market Furthermore, the Commission could have considered tariff requirements precluding programmers from leasing more than one MDS channel per market This would have demonstrated at least a minimal commitment to longstanding FCC policies in furtherance of diversity of voices within local markets The Commission has previously confirmed its authority to reach the activities of a common carrier's programmer-customer through tariff provisions, 6/ and it would not have been difficult to fashion such restrictions for MDS, whose service characteristics are reasonably well established

The Commission could also have elected to fully explore what alternative or additional diversity-enhancing policies to apply to MDS in the further rule making notice to be issued regarding MDS lotteries In the final analysis, this more comprehensive approach may well have been preferable The options to be examined could have included various tariff prescriptions including but not limited to those described above a dual licensing scheme for MDS carriers and their programmer-customers or reclassification of MDS as a broadcast

---

4/ Among the other structural broadcast regulatory rules and policies designed to promote programming diversity are those which proscribe regional broadcast ownership concentration, limit the total number of broadcast properties that can be commonly owned emphasize diversification of ownership in the comparative licensing process and mandate non-discrimination and affirmative action in broadcast employment If the Commission had seen fit to examine more broadly the media-related implications of MDS and the policy options available to address those concerns see infra, it could also have explored the extent to which the foregoing regulation should be applied to MDS

5/ Some of my colleagues contend that the FCC has never directly regulated programmers and that therefore regulation of MDS programmer-customers is legally foreclosed Their basic operating assumption is incorrect Cf Columbia Broadcasting System Inc v FCC, 629 F2d 1 26 (DC Cir 1980) aff'd 453 US 367 (1981) (confirming FCC authority to apply Section 312(a)(7) to the major broadcast networks) However there is a logical reason why the FCC ordinarily does not regulate programmers per se its policies directly apply to the entities responsible for program selection and transmission i e broadcast licensees In any event the Commission has broad discretion to regulate interstate communications by radio or wire to protect the public interest See, e g , 47 USC §§152(a) 154(i) 303(g), 303(r), United States v Southwestern Cable Co 392 US 157 (1968) See generally, National Broadcasting Co v United States, 319 US 190, 209-21 (1943) In this instance important policy objectives detailed previously counsel in favor of utilizing this broad discretion to impose diversity-related requirements upon MDS programmer-customers either directly or indirectly

6/ See, e g , Direct Broadcast Satellites 90 FCC 2d 676 711 and n 85 (1982) The Commission declined to impose limited broadcast-type regulation on DBS common carrier

[Footnote continued on following page]

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service 7/ At the conclusion of that proceeding if additional regulations were adopted applicants could have been allowed to amend their applications to conform to these new rules as necessary

My colleagues have not seen fit to follow either route, apparently out of fear that by doing so the Commission would be expected to saddle MDS with the panoply of rules that apply to broadcast licensees Any such fear was largely without foundation This Commission has shown that it can be very creative in regulating the many communications services within its purview by rejecting outmoded or unnecessary rules while continuing those which further fundamental communications policy That approach could have been followed here Instead the Commission essentially decided to remain blind to the actual service characteristics of MDS and to important policy issues implicit in it By blinking reality the FCC has seriously undermined the credibility of its efforts to maximize diversity of ownership and expression To this highly regrettable if unexpressed, policy shift I dissent

APPENDIX A

Comments for General Docket 80-112

Illinois Institute of Technology
Memorial Hospital Medical Center of Long Beach CA
Interact Interactive Television Network, Hanover NH
The American College of Physicians
Spring Branch Independent School District, Houston TX
Joint Council on Educational Telecommunications
Indiana Higher Education Telecommunications System
San Diego City Fire Department
Association of Hospital Television Networks
Georgia Institute of Technology
Harris Corporation
Farmon Electric Operations
Purdue University
Oklahoma State Regents for Higher Education
Association of American Railroads
Communications Satellite Corporation
KLVX Channel 10 Las Vegas NV
Connecticut Board of Education
State of MO Dept of Elementary and Secondary Education
Office of the Los Angeles County Superintendent of Schools

6/ [Footnote continued from preceding page]

programmers because the service is novel and still in the developmental stage Id The same cannot fairly be said of MDS which was created in 1974 and is currently provided in several markets around the nation

7/ No doubt a variety of options exist – I am not particularly wedded to any one of the foregoing at this juncture

Northeastern University
Anaheim City School District
Superintendent of Public Instruction State of North Carolina
Board of Education, Chicago IL
Bert Edwards
Ninth District PTA (California)
University of California, Santa Barbara
Instructional Television Center, Dallas Co Community College
American Association for Community Junior Colleges' Task Force on the Uses of Mass Media Learning
Advanced Micro Devices Inc
Colorado State University
Lawrence Livermore Laboratory
Daytona Beach Community College
Watkins-Johnson Company
The University of Alabama in Birmingham
Vista Unified School District Vista CA
Hillsborough County Public Schools
Sperry Univac Computer Systems
The Hospital Council of Western Pennsylvania
University of Colorado
Miami-Dade Community College
Hewlett-Packard Company
El Centro College Dallas, TX
South Bay Union School District
Systems Control Inc
Bakersfield City School District
Satellite Business Systems
National Aeronautics & Space Administration
Intel Corporation
School Board of Pinellas County, FL
American College of Radiology Chicago, IL
Eastfield College
Richland College
Long Beach Unified School District
San Dieguito Union High School District
Honorable, Senator Harrison Schmitt (NM)
Southern Pacific Communications Company
Ford Aerospace & Communications Corporation
Cherry Electrical Products Corporation
Lakeside Union School District
Indiana Higher Education Telecommunication System
California Media & Library Educators Association
TV College Consortium San Diego & Imperial Counties Community College Association
The School Board of Broward County, FL
Argonne National Laboratory
The California State University & Colleges
Mark Controls Corporation
San Diego Regional Instructional Television Fixed Service System
San Diego County Superintendent of Schools
Florida Department of Education
Fresno County Department of Education
San Diego Unified School District
Rev John Geaney, C S P Unda - USA
San Diego Miramar College
South Carolina Educational Television Commission
National Educational Association
Southwestern College
Arizona State University
San Diego & Imperial Counties Community College Association
MiraCosta College
Teleprompter Corporation
National Association of Educational Broadcasters

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National Public Radio
Satellite Syndicated Systems, Inc
Public Service Satellite Consortium
University of South Florida
California Public Broadcasting Commission
Northstar Communications
Elburn MDS Co
San Bernardino MDS Co
Angeles MDS Co
Microwave Communications Systems Inc
The National Association of Public Television Stations
Sylvania Systems Group
Oceanside Unified School District, CA
Board of Regents The University of Wisconsin System
Dade County Public Schools
Illinois Institute of Technology
Kirkwood Community College
Central Committee on Telecommunications of the American Petroleum Institute
American Library Association
Superintendent of Public Instruction, State of California
A Ruth Badgett
Homer H Badgett
Nantucket MDS
Marion County Schools, Ocala FL
Commonwealth Edison, Trustee of the Illinois Institute of Technology
Massachusetts Department of Education
California Department of Education
School Board of Palm Beach County FL
Chula Vista City School District CA
Caterpillar Tractor Co
Association for Educational Communications & Technology
New Trier Township Television/Film Cooperative
Coronado Unified School District, CA
Cable Television Review Commission County of San Diego, CA
Pasadena Unified School District CA
Southern California ITFS Advisory Committee
Jules Cohen & Associate
International Harvester
Illinois Institute of Technology
American Association of School Administrators
Ohio Educational Broadcasting Network Commission
Georgia State Board of Education
Schwartz Woods & Miller
CBS Inc
Archdiocese of San Francisco
University of Maryland
National Telecommunications & Information Administration
Joint Council on Educational Telecommunications
National Association of MDS Service Companies, Inc
Public Interest Satellite Association
Archdiocese of Los Angeles
National Instructional Telecommunications Council, Inc and Catholic Television Network
U S Catholic Conference
The Leland Stanford Junior University
The Volusia County School Board
Motorola, Inc
Corporation for Public Broadcasting
Center for Excellence Inc
Archdiocese of New York
University of California
Grossmont Community College District
University of Minnesota
Aiken Cablevision, Inc

Colony Communications Corporation
Comcast Corporation
Cox Cable Communications Inc
Palmer Communications, Inc
U S Department of Education
The Prism Company
Palomar College
St Petersburg Junior College
David A Fountain
University of California, San Francisco
University of Southern California
Illinois Institute of Technology
Jet Propulsion Laboratory
Richardson Independent School District
Huntsville City Schools
National Catholic Educational Association
The Association for Higher Education of North Texas
Office of the Governor of Georgia
Rocky Mountain Corporation for Public Broadcasting
School Board of Dade County FL
Standard Oil Company of California
Norman M Jackson
Microband Corporation of America
Centerstage
Humbert Cardinal Medirros, Archbishop of Boston
The Los Angeles Radiological Society
General Dynamics
Glendale District Los Angeles County Medical Association
KHS78 Instructional TV, Mesquite TX
(TAGER) The Association for Graduate Education & Research
Concordia College
Texas Wesleyan College
U S Catholic Conference
F Raymond Zintz
Boston Catholic Television Center
Electronics, Missiles and Communications, Inc
The Association for Higher Education of North Texas
University of Maryland
Catholic Television Network San Francisco
Richardson Instructional Television Center
Instructional Television of the Archdiocese of N Y
Corporation for Public Broadcasting
CBS Inc
Microband Corporation of America, "Urbanet" Proposal

Responses to Microband's "Urbanet" Proposal

Reverend Jesse L Jackson, Operation Push, Inc
The Archdiocese of Los Angeles
Ad Hoc Committee for Wireless Cable
American Home Theater, Inc
Bogner Broadcast Equipment Corporation
Omega Communications, Inc
Test, Inc
Vista Unified School District
National School District, National City, CA
San Dieguito Union School District, CA
Chula Vista City School District, CA
Cajon Valley Union School District, CA
San Diego Unified School District
Palomar College
California Media and Library Educators Association
National Cable Television Association, Inc

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Microband Corporation of America
Pay Television of Greater New York, Inc
American Cable
Showbiz
Santa Ana Unified School District
Alfred E Anscombe
Regional Educational Television Advisory Council of Los Angeles County
Telecare Diocese of Rockville Centre
Ultravision Communications
State of Connecticut Board of Education
California State University, Sacramento
The California State University System
University of Maryland - College of Engineering
Public Broadcasting Service
Turner Broadcasting System
Indiana Higher Education Telecommunication System
Mary Sue Manley
TRI-State Regional Planning Commission
Northeastern University
Multipoint Distribution Systems
Superintendent Fresno County Schools
California State College Stanislaus
Legislative Commission on Science and Technology, State of N Y
CBS Inc
The Association of Hospital Television Networks
Microband Corporation of America
Long Beach Unified School District
Metropolitan Education and Cultural Communications Association
Northeastern University
Simmons College
Suffolk University
WGBH Educational Foundation
University of Massachusetts
Boston Catholic Television Center
Harris Corporation-Farinon Electric Operations
Aiken Cablevision, Inc
Colony Communications Corporation
Comcast Corporation
Connersville Cable TV, Inc
Cox Cable Communications, Inc
Multimedia Cablevision Inc
Palmer Communications Incorporated
Televents Inc
U S Cable Corporation
The Association for Higher Education of North Texas
Catholic Television Network
Center for Excellence Inc
Illinois Institute of Technology
National Instructional Telecommunications Council, Inc
The Leland Stanford Junior University
San Francisco Archdiocese
Movie Systems Inc
Walter B Hewlett and Michael Guite
Robert A Bednarek
The Corporation for Public Broadcasting
Department of Education, San Diego County
Richard L Vega & Associates
First National Home Theaters, Inc
Microwave Communications Associations Inc
South Carolina Educational Television Commission
Michael Benages
Sunday School Board of the Southern Baptist Convention

INTRUCTIONAL TELEVISION FIXED SERVICE (MDS REALLOCATION)

Rev George Byrne Diocese of San Diego
University of California, Berkeley
Contemporary Communications Corporation
Indiana University
National Black Media Coalition
Sterling Recreation Association
National Association of MDS Service Companies
Oklahoma State Regents for Higher Education
Department of Communications United States Catholic Conference
Sterling Recreation Organization Company
State of New York Legislative Commission on Science & Technology
David S Saxon, President University of California
University of California Systemwide Administration
California Community Colleges ITFS Advisory Committee
Superintendent of Public Instruction, State of California
University of California San Francisco
San Diego and Imperial Counties, Community Colleges Association
Tekkom, Inc
KLVX Channel 10 Las Vegas, Nevada
Standard Communication
Gordon & Healy
Warner Amex Cable Communications Inc
Emerson College
National Association of Public Television Stations
Central Committee on Telecommunications of the American Petroleum Institute
Department of Education, State of Florida
Los Pios Community College District
TV 5 The Movie Channel
Grambling State University
Georgia Institute of Technology
Bay Area Community College Television Consortium
University of South Carolina
Telecommunications Systems, Inc
Viking Communications
Lance Industries
Grossmont Community College District
Imperial Valley College
University of South Carolina
Marshall University
San Diego State University
Ninth District PTA (CA)
Mendocino County Superintendent of Schools
University of California, San Diego
Muzak Dynamic Sound
TDS Engineering Co
Comfer Corporation
Lipper-LaRue
Twin Cities Public Television Inc
Troy State University
Miami-Dade Community College
Townsend Associates
Southwestern College
Electronics, Missiles & Communications, Inc
Archdiocese of New York
The School Board of Broward County, Florida
Channel Master
Coronado Unified School District
University of California, Davis
University of California, Irvine
University of California, Riverside
University of California, San Diego
San Diego Miramar College
John W Hunt
California State Steering Committee for Curriculum Development & Publications

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Woodrow Wilson Junior High School CA
Lawrence Livermore National Laboratory
The School Board of Marion County FL
Taft Broadcasting Corporation
Southern California Instructional TV Fixed Service Advisory Committee
Superintendent of Public Instruction, State of California
Ms Anne G Wall
Don Ferkovich
David D Pascoe
W D Stainback
Ms Helen L Patterson
Rosemarie Nelson
Temple University
Grossmount Union High School, CA
Catholic Television Network of Chicago
Ms Mary M Long Meridian School
Ms Linda A Brown
Ms Carol R Esmay
Mr Peter J Saccone
Bernadine Hollers
Ms Sabina R Meyers
School Board of Palm Beach County FL
Ms Janice E Peters
Miramar Ranch School
Lakeside Union School District
Ms Deanna Oakes
Ballantyne Elementary School
Mr Paul Dekock
Diocese of San Diego
Santee School District
Marquee Television Network, Inc
Nevada Pay Television Inc
Educational TV Association of Metropolitan Cleveland
American Association of State Colleges & Universities
Sandia National Laboratories at Livermore, CA
NASA
Edmund G Brown Jr
California Postsecondary Education Commission
American Council on Education
American Association of Community and Junior Colleges
National Association of State Universities and Land-Grant Colleges
National University Continuing Education Association
Fresno County Department of Education
California Community Colleges
Assemblyman, Denes J Butler, New York State
CDS Inc
Eastfield College

List of Reply Comments

American Broadcasting Companies, Inc
Microband Corporation of America
Citizens Communications Center
U S Department of Education
National Association of Educational Broadcasters
The Corporation for Public Broadcasting
National Instructional Telecommunications Council, Inc
National Association of Public Television Stations
Catholic Television Network
The Leland Stanford Junior University
Illinois Institute of Technology
Center for Excellence Inc
San Francisco Archdiocese
The Association for Higher Education of North Texas
Utilities Telecommunications Council

Central Committee on Telecommunications of the American Petroleum Institute
Teleprompter Corporation
Public Interest Satellite Association
Joint Council on Educational Telecommunications

APPENDIX C

1 Form 330P, Application for Authority to Construct or Make Changes in an Instructional TV Fixed Station and For Response Station(s) and Low Power Relay Station(s) is amended by adding the following

Describe briefly the primary purpose of the requested authorization

State the anticipated percentage of time for which the channel will be used by entities other than the licensee

List the total number of existing authorizations and state the combined percentage of time for which these channels are presently used for transmissions of material for others

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FCC 83R-45
4759

In re Applications of	)	
GAF BROADCASTING CO , INC	)	BC Docket No 82-371
For Renewal of License of Station WNCN(FM) New York, New York	)	File No BRH-810202G7
CLASSICAL RADIO, INC New York New York	)	BC Docket No 82-372
For Construction Permit	)	File No BPH-810501AD

Adopted June 14, 1983
Released June 16 1983

[¶51 223, ¶51 225] Leave to intervene denied

The administrative law judge's denial of a petition to intervene in an FM renewal proceeding which was filed by a local listeners' group, is affirmed The judge did not abuse his discretion in rejecting petitioners' claim that, if permitted to intervene, they could offer significant evidence not necessarily available to any other party concerning pending changes in the licensee's management, the licensee's relations with organized listener groups and the licensee's alleged manipulation of the station's citizens advisory group, nor in concluding that the proffered evidence was irrelevant to any issue designated in the proceeding or was suitable for presentation by non-party witnesses GAF B/casting Co , Inc , 54 RR 2d 159 [Rev Bd , 1983]

ORDER

By the Review Board (Board Chairman Marino issuing separate statement)

1 Appellants WNCN Listeners' Guild, Inc and Classical Radio for Connecticut, Inc have been attempting to intervene in this proceeding as parties, pursuant to §1 223 of the Commission's rules, 47 CFR §1 223 The presiding Administrative Law Judge (ALJ) initially denied their request and we tentatively affirmed by Memorandum Opinion and Order, FCC 83R-39 [54 RR 2d 94], released May 19, 1983, but permitted appellants additional time to supplement their appeal to demonstrate that they had met the standard of discretionary intervention of §1 223(b) of the rules Although appellants had not met that standard theretofore, the Board invoked the "spirit" of Office of Communications of the United Church of Christ v FCC, 350 F2d 994 [7 RR 2d 2001] (DC Cir 1966), to allow them to show how their intervention would illuminate the issues designated in this case In a later Order, FCC 83R-42 [54 RR 2d 96], released May 25 1983,

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we instructed that any such supplementation should be filed with the ALJ We did so because of temporal exigencies 1/ and because "the ALJ who is to conduct that hearing may be in the best position to determine whether any supplemental material submitted would affect his prior determination on intervention " Id at para 1 The ALJ considered appellants' supplementation, Classical Radio Inc 's supporting comments and the Mass Media Bureau's opposition and again denied intervention Order FCC 83M-1929 released June 13 1983

2 We now have before us an emergency appeal filed by appellants on the eve of hearing, in which they request the Board to rule on the basis of the pleadings already submitted to the ALJ Because of the exigencies of the situation, we will rule ex parte, without waiting for the filing of responsive pleadings Section 1 45(e), 47 CFR §1 45(e) In the instant appeal appellants assert that if allowed to intervene as parties they could offer significant evidence at hearing not necessarily available to any of the other parties concerning three areas (1) pending changes in GAF management, (2) GAF's relations with "organized" listener groups (3) GAF's alleged "manipulation" of the station's citizens advisory group The ALJ reviewed the appellants' outline of proposed evidence and concluded that it is "either irrelevant to any issue designated in this proceeding or is suitable for presentation by non-party witnesses " FCC 83M-1929, supra at 2

3 Having previously declaimed that the ALJ was probably in the "best position" to determine whether appellants' intervention would assist in the trial of the issues, we will not second-guess the ALJ's decision, no error of law being apparent 2/ If, after hearing, appellants wish to submit an amicus brief to the ALJ or, if any initial decision is appealed to the Board, their views should be welcome 3/

4 Accordingly it is ordered, that the appeal from denial of leave to intervene, filed June 13 1983 by WNCN Listeners' Guild Inc and Classical Radio for Connecticut, Inc is denied

SEPARATE STATEMENT OF BOARD CHAIRMAN MARINO

While I join in the Board's Order it should be noted that the Administrative Law Judge did not rule on the question of whether appellants are entitled to intervene as a matter of right See American Communications Association v FCC 298 F2d 648 [22 RR 2060] (DC Cir 1967) His action is probably attributable to the fact that many of the allegations on which appellants relied had been previously rejected by the Bureau Chief, whose actions are awaiting Commission review For us to demand more of the ALJ would exceed our limited authority

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1/ The hearing was scheduled to commence on June 13 1983

2/ Appellants' concerns (2) and (3) relate to an application for review presently pending before the Commission on which we cannot comment See FCC 83R-39 supra at n 2

3/ We again note that §1 225(b) of the rules, 47 CFR §1 225(b) specifically permits participation in hearings by a non-party who "shall [not] be precluded from giving any relevant, material and competent testimony at a hearing because he lacks a sufficient interest to justify his intervention as a party in the matter " Thus, from a substantive standpoint denial of formal intervention rights does not preclude appellants from appearing and presenting relevant evidence here However, based on what has been shown so far, we agree that granting appellants a formal party status — replete with discovery and subpoena rights as well as cross-examination rights on the issues already designated (on which appellants have shown no interest) — has not been justified We also note appellants' allegation that the licensee has attempted to "manipulate" its Citizens Advisory Committee one or more of whose members may testify at hearing Appellants further allege that two of its members are also members of the Advisory Committee and could testify as to such "manipulation " Supplemental Petition for Leave to Intervene, Exh A at 3-4 Should members of the Advisory Committee testify, §1 225(b) would accord appellants' two member witnesses the identical right, and we observe that neither the Advisory Committee nor its other members have sought to intervene as separate parties Whatever the licensee's relations with its Advisory Committee we see no reason why the matter cannot be injected into the record through witnesses on both sides of the apparent dispute

EXHIBIT B

Wireless or Wired Cable, Comparable Technologies?

By George Harter
General Electric
Comband Division

Can the performance of a microwave Multichannel Multipoint Distribution Services (MMDS) meet or exceed cable system performance? The answer is yes. MMDS performance can meet and even exceed cable in fundamental performance areas like received signal level, carrier-to-noise ratio and nonlinear distortion products. Also, MMDS equipment can provide all of the bells and whistles of a cable system like addressability, scrambling and stereo broadcasts. Combining comparable features and improved performance can make MMDS a successful compliment to an existing cable system or a very competitive alternative.

Performance

To begin, let us define a typical MMDS and cable system as shown in Figure 1. The MMDS system will utilize an omnidirectional transmitting antenna mounted 500 feet above ground level. For simplicity we will assume a constant receive antenna height of 20 feet and a flat earth, realizing the farthest practical receive site distance will be limited to approximately 40 miles by the radio horizon. The detailed characteristics of the transmit and receive site equipment are listed in Table 1.

The cable system design is simple and consists of a series of feedforward trunk amplifiers with a generous 2600' of separation. Each trunk amp breaks off into feeder legs consisting of a bridger amplifier and two line extenders. The performance levels at the output of this second line extender will be compared with the MMDS performance levels at the block downconverter output. The characteristics of each of the amplifiers are listed in Table 2.

Using the systems described above, the C/N was calculated for distances out to 40 miles (80 trunk amplifiers) and is shown in Figure 2. The perturbations in MMDS C/N from .5 to 1.5 miles out is caused by the elevational pattern characteristics of the transmitting antenna. Now, 80 trunk amplifiers may not be practical for cable system operation, but 40 miles of coverage area certainly is practical for MMDS operation. As you can see from Figure 2, the MMDS system C/N with only 10 watts of transmitter output power exceeds the cable system performance out to a distance of approximately 28 miles (57 trunk amplifiers). Increasing the transmitter output power to 20 or 100 watts can potential increase the C/N margin even further.

Figure 2 describes the ideal situation where the C/N is only limited by the signal level received at each receive site. For systems of 2 to 16 channels in size this level of performance is quite practical. However, when the number of channels increases to beyond 16, the downconverter dynamic range will typically limit the maximum allowable received signal level and thus will be the controlling factor for C/N. This is especially true for clear line-of-site receive sites out to distances of 20 to 25 miles from the transmitting antenna.

Likewise, the downconverter dynamic range will usually be the controlling factor for the system nonlinear distortion performance The architecture of the MMDS transmitting system is optimized for minimum distortion generation. An individual transmitter is used for each channel and channels are combined through the use of passive waveguide combiners. Typical crossmodulation and intermodulation numbers of -60 db are very typical at the output of the transmitting antenna(s). Therefore, the downconverter is the only active element in the system handling the combined power of all channels. Because of this, the downconverter input level must be kept within the specified dynamic range to insure optimum intermodulation and crossmodulation performance (typically -55 to -60 db). This adjustment of received signal level will ultimately affect the C/N ratio.

Cable has a much more severe problem with nonlinear distortions because of the number of active devices handling all of the video channels. Crossmodulation, intermodulation and composite triple beat will worsen through every amplifier. The major contributor to nonlinear distortions in a cable system are the feeder lines containing the bridger amplifiers and line extenders. These amplifiers typically have 20 to 30 db worse distortion figures than the trunk amplifiers. Because our model of a cable system contains only two line extenders and one bridger amplifier per trunk amp, the crossmodulation calculations result in excellent performance for both cable and MMDS. However, unlike MMDS, the potential for distortion products to increase grows as a cable system expands.

Limitations

As described above, MMDS can have significant performance advantages over cable. However, there are limitations placed on MMDS because it is an over-the-air technology. Because of the frequency of the MMDS transmissions (2.1 to 2.7 GHZ) it is essentially a line-of-site technology. Receive sites with totally or partially obstructed views of the transmitting antenna may have tremendous variations in received signal strength. Receive sites surrounded by foliage may experience large signal level fluctuations as the seasons change. It is essential to insure clear line-of-site between transmit and receive sites in order to obtain consistant performance at all times.

However, these problems with terrain and obstructions can be managed. There are signal strength contour studies available which will predict the amount of loss an MMDS operator can expect from terrain. By combining these studies with intuitive reasoning regarding other structures in the propagation area and foliage, an MMDS operator can predict his coverage area very accurately.

Other Advantages

Not only can MMDS offer performance advantages over cable, but also increased system reliability. Since there is no closed distribution system, the only equipment concerns are at the transmit site and the subscriber's home. The current design trend for MMDS transmitting equipment is away from tube technology and towards solid state devices Solid state technology is more reliable and less power consuming

The receive site antenna and downconverter are designed to reside on the subscriber's roof in a variety of weather conditions with excellent reliability. However, the potential weak link in the receive site installation can be the interconnections from the downconverter to the antenna and into the subecriber's home. Care must be taken to insure all connections are sealed and weather tight. The ingress of moisture into these interconnections can have considerable impact on received signal quality.

Another significant advantage to MMDS is the speed at which a system can be built. Once the construction of the system begins, it is not unusual to be ready to install subscribers 1 to 3 months afterwards. This is significantly better than the typical start-up times for a cable system

Bells and Whistles

Currently available MMDS equipment also offers all of the operational features of cable systems and then some. Signal security, addressability, stereo compatibility and spectrum space for ancillary data services are all available in MMDS.

Security wise, both audio and video scrambling techniques are available Current techniques consist of video inversion, sync suppression, bandwidth compression and combinations of these.

Addressability is performed through the use of in-band data transmission. Current techniques involve transmission in either the video or audio paths. Along with addressability come features like pay-per-view capability, flexible tiering and combining of programming, channel mapping and increased deterrents to pirating of signals and converters

Since most MMDS equipment is designed to handle the additional audio bandwidth for BTSC stereo, the system is stereo transparent from the beginning. With the addition of stereo encoders at the transmitter site and decoders in the home, subscribers can enjoy excellent quality stereo sound.

Conclusions

A well designed and well managed MMDS system can exceed cable system performance in the fundamental areas which significantly impact subscriber satisfaction. Through careful and detailed system design, MMDS can achieve an excellent reputation as a high quality and high performance broadcast service. Also, since MMDS operators do not have an expensive distribution system to maintain, more attention can be paid to customer service and satisfaction. However, it is important for an MMDS operator to understand the technical capabilities and limitations of his system With this understanding, an MMDS operator can build a successful and profitable business

EXHIBIT C

Addresses of MMDS Permitees

APPLICANT	COUNSEL
Alabama	
Mobile	
Multichannel Distribution of America, Inc 2550 South Parker Road Suite 300 Aurora, CO 80014 Omar A Duwaik, President (303) 751-6100	Gerald Stevens-Hittner Fleischman & Walsh 1725 N Street, N W Washington, D C 20036 (202) 466-6250
Alaska	
Anchorage	
Echonet Corporation c/o P O Box 255 Evergreen, CO 80439 Charles Ergen President (303) 399-1543	James F Ireland, Esq Cole, Raywid & Braverman 1919 Pennsylvania Ave N W Washington DC 20006 (202) 659-9750

Fairbanks

Lawrence N. Brandt
Suite 220
3201 New Mexico Ave , N.W.
Washington, DC 20016
(202) 363-1100

Todd D. Gray, Esq.
Dow, Lohnes & Albertson
1255 23rd St., N.W.
Washington, DC 20037
(202) 857-2500

Homer

MDS/System
P.O. Box 190929
Anchorage, AK 99519
James Hendershot

Ketchikan

Advancom, Inc.
P.O. Box 2563
Spokane, WA 99220

Seward

Gouchi
880 N St.
Suite 304
Anchorage, AK 99501

Arizona

Phoenix

Haddonfield Wireless
400 Merion Ave.
Haddonfield, NJ 08033
John S. deCelis, President
(609) 354-1832

Arkansas

El Dorado

Multichannel Distribution of
America, Inc
2550 South Parker Road
Suite 300
Aurora, CO 80014
Omar A Duwaik, President
(303) 751-6100

Gerald Stevens-Kittner
Fleischman & Walsh
1725 N Street, N W
Washington, D.C. 20036
(202) 466-6250

California

Chico

Kannew Broadcast Technolgies
c/o A. G Newmyer III
1220 L St., N W
Washington, DC 20005
(202) 289-6300

Todd D. Gray, Esq
Dow, Lohnes & Albertson
1255 23rd St , N W
Washington, DC 20037
(202) 857-2500

Eureka

Lawrence N Brandt
Suite 220
3201 New Mexico Ave., N W.
Washington, DC 20016

Todd D Gray, Esq
Dow, Lohnes & Albertson
1255 23rd St , N W
Washington, DC 20037
(202) 857-2500

Fresno

George Fritzinger
Group III Management Corp
419 N. Larchmont Blvd
Suite 256-A
Los Angeles, CA 90004

Benito Gaguine, Esq
Flye, Shuebruk, Gaguine,
Boros & Braun
1211 Connecticut Ave , N W
Washington, DC 20036
(202) 835-9699

T/V Communications Associations
c/o Thompson Communications Corp
5601 N MacArthur Blvd
Suite 210
Irving, TX 75062
Carl B Hilliard, Jr.
(619) 231-3900

Petaluha (channel 1)

Hydra Communications
26573 Basswood Ave
Ranchos Palos Verdes, CA 90274

Riverside (chanel 1)

Riverside MDS Co.
145 Huguenot St.
Suite 401
New Rochelle, NY 10801

Sacramento

Steven C. Bailey
7120 Calcite St.
Diamond Springs, CA 95619
(916) 626-8211

Jacob W. Mayer, Esq
Farrow, Schildhause & Rains
1730 M St., N.W , Suite 708
Washington, DC 20036
(202) 822-8300

San Luis Obispo

Multichannel Distribution of America, Inc
2550 South Parker Road
Suite 300
Aurora, CO 80014
Omar A Duwaik, President
(303) 751-6100

Gerald Stevens-Kittner
Fleischman & Walsh
1725 N Street, N W
Washington, D C 20036
(202) 466-6250

Visalia

Manabi Hirasaki
862 Camino Concordia
Camarillo, CA 93031

Colorado

Colorado Springs

Charisma Telecasting Corp
P.O. Box 1061
Columbus, MS 39703
Charles B. Cooper, Pres

David G. Richards, Esq
1990 M St , N W
Washington, DC 20036
(202) 331-0885

Denver

Midwest Cable & Satellite
90 South Eleventh St
Minneapolis, MN 55403

Ft. Collins (chanel 1)

Contemporary Communications
c/o Howard S Klotz
145 Huguenot St
New Rochelle, NY 10801
(914) 576-6622

Thomas J. Casey
Mintz, Levin, Cohn, Ferris,
Glovsky, Popeo, P C
1825 Eye St , N W
Washington, DC 20006

Florida

Lakeland

BDC-MMDS Co
3660 Maguire Blvd
Suite 200
Orlando, FL 32803

Miami

Miami MMDS Inc
c/o Richard L Vega
& Associates
P O Box 19768
Orlando, FL 32814

Ocala

Lawrence N Brandt
Suite 220
3201 New Mexico Ave , N W
Washington, DC 20016

Todd D Gray, Esq
Dow, Lohnes & Albertson
1255 23rd St , N W
Washington, DC 20037
(202) 857-2500

Orlando

BDC/MMDS of Orlando
c/o Richard L Vega
P O Box 191
Pasadena, MD 21122

Panama City

Kansas City Southern Industries, Inc.
114 W. 11th St.
Kansas City, MO 64105
Phil Brown, Vice President
(913) 384-0401

Jane Maxwell, Esq
Sullivan & Worcester
1025 Connecticut Ave., N W
Washington, DC 20036
(202) 725-8190

National Television Co.
Suite 620
1110 Vermont Ave., N.W.
Washington, DC 20005
B. Waring Patridge III, Pres.
(202) 785-5500

Robert F. Corazzini
Pepper & Corazzini
200 Montgomery Bldg
1776 K St., N W
Washington, DC 20006
(202) 296-0600

Pensacola

Cox Cable Communications
1400 Lake Hearn Drive
Atlanta, GA 30319

Sarasota

General Microwave Entertainment Ltd
3443 D Tamiami Trail
Port Charlotte, FL 33952

Guam

Agana

Guahan Airwaves Corp.
P.O. Box 24816
Agana, Guam 96921

Georgia

Columbus

Kansas City Southern
Industries Inc.
114 W 11th St.
Kansas City, MO 64105
Phil Brown, Vice President
(913) 384-0401

Jane Maxwell, Esq
Sullivan & Worcester
1025 Connecticut Ave , N W
Washington, DC 20036
(202) 775-8190

Macon

Universal Telecom Network
2000 M St., N W , Suite 260
Washington, DC 20036
Linda Brown, Treasurer

Leo I George, Esq
McFadden, Evans & Sill
2000 M St , N.W., Suite 260
Washington, DC 20036
(202) 293-6700

Illinois

Decatur

National Television Co
Suite 620
1110 Vermont Ave , N.W
Washington, DC 20005
B Waring Patridge III, Pres
(202) 785-5500

Robert F Corazzini
Pepper & Corazzini
200 Montgomery Bldg
1776 K St., N W
Washington, DC 20006
(202) 296-0600

Indiana

Terre Haute

Capital Cities Entertainment
Systems, Inc
1330 Avenue of the Americas
34th Floor
New York, NY 10019

Andrea Timko Sillet, Esq
Wilmer, Cutler & Pickering
2445 M St , N W
Washington, DC 20037

Iowa

Des Moines

Stella A. Pappas
5111 East McKinley Ave
Fresno, CA 93727
(209) 255-2600

Iowa

Kansas City Southern
Industries Inc.
114 W 11th St.
Kansas City, MO 64105
Phil Brown, Vice President
(913) 384-0401

Jane Maxwell, Esq
Sullivan & Worcester
1025 Connecticut Ave., N W
Washington, DC 20036
(202) 775-8190

Sioux City

Citadel Communications
249 E. 48th St , Suite 10-D
New York, NY 10017

National Television Co
Suite 620
1110 Vermont Ave , N.W
Washington, DC 20005
B Waring Patridge III, Pres
(202) 785-5500

Robert F. Corazzini
Pepper & Corazzini
200 Montgomery Bldg.
1726 K St., N W
Washington, DC 20006
(202) 296-0600

Kansas

Hayes

Multichannel Distribution of
America, Inc
2550 South Parker Road
Suite 300
Aurora, CO 80014
Omar A Duwaik, President
(303) 751-6100

Gerald Stevens-Kittner
Fleischman & Walsh
1725 N Street, N W
Washington, D C 20036
(202) 466-6250

Sullivan

Multichannel Distribution of
America, Inc
2550 South Parker Road
Suite 300
Aurora, CO 80014
Omar A Duwaik, President
(303) 751-6100

Gerald Stevens-Kittner
Fleischman & Walsh
1725 N. Street, N W
Washington, D C 20036
(202) 466-6250

Kentucky

Lexington

HDH Telecommunications 33 Cardinal Dr. Roslyn, NY 11576 Kenneth A Horowitz, President	John Q Hearne, Esq Fisher, Wayland, Cooper & Leader 1255 23rd St., N W. Suite 800 Washington, DC 20037 (202) 659-3494

Owensburg

Belwen, Inc 7 Boyle Road Scotia, NY 12302 Wayne E Wagner, President (618) 374-6079	Gerald Stevens-Kittner, Esq Fleischman & Walsh 1725 N St , N W Washington, DC 20036 (202) 466-6250

Louisiana

Shreveport

Capital Cities Entertainment Systems, Inc 1330 Avenue of the Americas 34th Floor New York, NY 10019	Andrea Timko Sillet, Esq Wilmer, Cutler & Pickering 2445 M St , N W Washington, DC 20037

Maine

Portland

International Broadcast Consultants 8070 Soquel Dr , Suite 260 Aptos, CA 95003 Robert A Ruark, President (408) 688-3992	Charles O Verrill, Jr , Esq Patton, Boggs & Blow 2550 M St , N W Washington, DC 20037

Michigan

Detroit

George Fritzinger
Group III Management Corp
419 N Larchmont Blvd.
Suite 256-A
Los Angeles, CA 90004

Benito Gaguine, Esq
Flye, Shuebruk, Gaguine,
Boros & Braun
1211 Connecticut Ave., N W
Washington, DC 20036
(202) 835-9699

Ironwood

Superior Communications Systems
James R Maccani
4140 Elkhorn Drive, N.E.
Cedar Rapids, IA 52401

Jackson

Booth American Co
333 W Fort St
Detroit, MI 48226

Minnesota

Alexandria

Walter Bush
1125 Natham Lane, N.
Suite 317
Plymouth, MN 55441

Morton

Walter Bush
1125 Natham Lane, N.
Suite 317
Plymouth, MN 55441

Willmar

Walter Bush
1125 Natham Lane, N.
Suite 317
Plymouth, MN 55441

Winthrop

Todd Communications
6545 Cecilia Circle
Minneapolis, MN 55435

Mississippi

Columbus

Lawrence N Brandt
Suite 220
3201 New Mexico Ave , N W
Washington, DC 20016
(202) 363-1100

Todd D Gray, Esq
Dow, Lohnes & Albertson
1255 23rd St , N W
Washington, DC 20037
(202) 857-2500

Hattiesburg

Microband Corporation of America
655 Third Ave.
New York, NY 10017
Don Franco, President

Stephen R Bell
Squire, Sanders & Dempsey
1201 Pennsylvania Ave , N W
Washington, DC 20004

Meridian

Multichannel Distribution of
America, Inc
2550 South Parker Road
Suite 300
Aurora, CO 80014
Omar A Duwaik, President
(303) 751-6100

Gerald Stevens-Kittner
Fleischman & Walsh
1725 N Street, N W
Washington, D C 20036
(202) 466-6250

Missouri

Kansas City

Kansas City Southern Industries, Inc
114 W 11th St.
Kansas City, MO 64105
Phil Brown, Vice President
(913) 384-0401

Jane Maxwell, Esq
Sullivan & Worcester
1025 Connecticut Ave , N W
Washington, DC 20036
(202) 725-8190

Kennett

Chancie L Pylant
125 Corporate Drive
Hot Springs, AK 71914

St. Louis

Blue St Louis Partnership
c/o Du Treil-Rackley
1200 18th St., N.W
Suite 607
Washington, DC 20036

Nevada

Reno

Jonsson Communications
620 Bercut
Sacramento, CA 95814

New Mexico

Deming

Telmaster
Box 1763
Deming, NM 88031

Gallup

Lawrence N. Brandt
Suite 220
3201 New Mexico Ave , N.W.
Washington, DC 20016
(202) 363-1100

Todd D Gray, Esq
Dow, Lohnes & Albertson
1255 23rd St , N W
Washington, DC 20037
(202) 857-2500

New York

Elmira

Private Networks
c/o William Walker,
Tri-Ad Consultants, Ltd
157 W. 57th St.
New York, NY 10019

Tyrone Brown
Steptoe & Johnson
1330 Connecticut Ave , N W
Washington, DC 20036

North Carolina

Charlotte

Cheyenne Corp
8503 Hollyridge Rd.
Jacksonville, FL 32216

Hickory

Microband Corporation of America
655 Third Ave
New York, NY 10017
Don Franco, President

Stephen R Bell
Squire, Sanders & Dempsey
1201 Pennsylvania Ave , N W
Washington, DC 20004

North Dakota

Fargo

Joseph W Hubbard
26573 Basswood Ave
Ranchos Palos Verde, CA 90274

Ohio

Cincinnati

Gencom, Inc.
Three Forest Plaza
12221 Merit Drive, Suite 800
Dallas, TX 75251

Superior Broadcasting Co
27181 Euclid Ave
Euclid, OH 44132

Youngstown

WKBN Broadcasting Co.
3930 Sunset Blvd.
Youngstown, OH 44501

Oklahoma

Oklahoma City

Hinton Telephone Co
Box 100
Hinton, OK 73047

Pennsylvania

Erie

Microband Corporation of America
655 Third Ave.
New York, NY 10017
Don Franco, President

Stephen R Bell
Squire, Sanders & Dempsey
1201 Pennsylvania Ave , N W
Washington, DC 20004

Philadelphia

Dominion Leasing Corp
84-14 170 Street
Jamaica, NY 11432

Northwest Communication
7900 Germantown Avenue
Philadelphia, PA 19118

Pittsburg

Pro Communication
1105 Delaware, 2nd Fl.
Buffalo, NY 14213
Michael J. Specchio, President

James F. Ireland
Cole, Raywid & Braverman
1919 Pennsylvania Ave , N W
Washington, DC 20006
(202) 639-9750

Puerto Rico

Mayaguez

Lawrence N Brandt
Suite 220
3201 New Mexico Ave , N.W.
Washington, DC 20016
(202) 363-1100

Todd D Gray, Esq.
Dow, Lohnes & Albertson
1255 23rd St , N W.
Washington, DC 20037
(202) 857-2500

Ponce

Placido Gonzales Cordova
P O Box 1161
Caguas, PR 00626

Robert J. Walser
G P O Box AL
San Juan, PR 00936

San Juan

International Broadcast Consultants
8070 Soquel Dr., Suite 260
Aptos, CA 95003
Robert A Ruark, President
(408) 688-3992

Victor Ginorio Gomet
Epedregal #7
Box 307
Humacao, PR 00661

Charles O. Verrill, Jr , Esq
Patton, Boggs & Blow
2550 M St., N W
Washington, DC 20037

Tennesee

Knoxville

Belwen, Inc.
7 Boyle Road
Scotia, NY 12302
Wayne E Wagner, President
(618) 374-6079

Gerald Stevens-Kittner, Esq
Fleischman & Walsh
1725 N St., N W.
Washington, DC 20036

Capital Cities Entertainment
Systems, Inc.
1330 Avenue of the Americas
34th Floor
New York, NY 10019

Andrea Timko Sillet, Esq
Wilmer, Cutler & Pickering
2445 M St., N W
Washington, DC 20037

Memphis

Tel-Radio Communications Property
517 N Segoe Road
Madison, WI 53105

Texas

Abilene

Kannew Broadcast Technolgies
c/o A G Newmyer III
1220 L St , N W
Washington, DC 20005
(202) 289-6300

Todd D. Gray, Esq
Dow, Lohnes & Albertson
1255 23rd St , N W
Washington, DC 20037
(202) 857-2500

Brownsville

HHT/Robert D. Hanna
P.O Box 72254
Las Vegas, NV 89170

Joel R Wolfson
1815 H St., N W , Suite 600
Washington, DC 20006

El Paso

T/V Communications Associations
c/o Thompson Communications Corp.
5601 N. MacArthur Blvd.
Suite 210
Irving, TX 75062
Carl B. Hilliard, Jr.
(619) 231-3900

Houston

Block & Associates
3777 Boise Avenue
Los Angeles, CA 90066

San Antonio

Texas Wired Music Inc.
P.O Box 8278
San Antonio, TX 78208

EXHIBIT D

MMDS
OPERATORS
8-1-87

√Metro TEN
1250 Granger Road
Cleveland, OH 44131-1234
Jim Theroux Pres
216-749-0500

Premier Communications
821 Malcom Road
Burlingame, CA 94010
Jack Capuzelo, Pres
415-697-3074

Family Entertainment
210 N Main
Mitchell SD 57301
Kevin Johnson G M
605-996-1200

De Fontes TV
P O Box HM 1450
Hamilton 5 Bermuda
Ken De Fontes Owner
809-292-0050

Pennsylvania Pay TV
3600 Conshocken Ave
Philadelphia PA 19131
Bill Gross Pres
215-487-3100

√Microband
555 Third Ave
New York NY 10017
Don Franco Pres
212-867-9590

√T V -3
P O Box 21115
Billings MT 59102
Doug Malmgren Pres
406-652-4280

Milwaukee Entertainment
P O Box 12546
Milwaukee WI 53212-0546
Bruce Massey Pres
414-277-4026

Union City Microvision
Box 709
Union City TN 38261
Joe Rampole Pres
901-885-3341

TBS
P O Box 415
Curacao Netherlands Antilles
Noel Hendrickson GM
599 96 -1266

Tele-Cable of Puerto Rico
P O Box 41
Hormigueros PR 0667
[illegible]
[illegible]

EXHIBIT E

THE TREND TOWARD VERTICAL INTEGRATION
BY CABLE INTO SATELLITE-DELIVERED PROGRAMMING*

Network	Subscribers	Ownership
	Basic Services	
ESPN	46,100,000	Capital Cities/ABC (80%), RJR Nabisco (20%)
WTBS	42,528,000	Turner Broadcasting (Ted Turner 65%, Time Inc [ATC] 11.5%, TCI 10.1%, UA 4 8%, United 3.2%, Warner 1.8%)
CNN	42,528,000	Turner Broadcasting (Ted Turner 65%, Time Inc. [ATC] 11 5%, TCI 10 1%, UA 4 8%, United 3.2%, Warner 1 8%)
USA	41,000,000	MCA (50%), Paramount (50%)
MTV	39,400,000	MTV Networks Inc (Viacom)
Nashville	37,000,000	Gaylord Broadcasting
CBN	37,212,000	Christian Broadcasting Network
Nickelodeon	37,900,000	MTV Networks Inc (Viacom)
Lifetime	35,440,000	CC/ABC (33%), (Viacom) (33%), Hearst (33%)
Weather Chan.	31,600,000	Landmark Communications (former parent of TeleCable)
Nick at Nite	32,500,000	MTV Networks Inc (Viacom)
Headline News	28,352,000	Turner Broadcasting (Ted Turner 65%, Time Inc [ATC] 11.5%, TCI 10.1%, UA 4 8%, United 3 2%, Warner 1 8%)
FNN	27,300,000	Infotech (20%), Dr Earle Brian (15%)
A&E	30,000,000	CC/ABC (33%), (NBC) (33%), Hearst (33%)

*Statistics from Cablevision, vol. 12, no 38 (Feb 29, 1988), p 106 and Broadcasting, vol 113, no 21 (Nov 23, 1987), p 41

Network	Subscribers	Ownership
Discovery	27,494,000	TCI (14%), United (14%), Cox (14%), Group W (14%), Newhouse (14%), management, New York Life Co , Allen & Co (30%)
C-SPAN	33,000,000	Cable operator supported
VH-1	24,700,000	MTV Networks Inc (Viacom)
WGN	23,888,216	Tribune Broadcasting
Score	19,800,000	Infotech (20%), Dr. Earle Brian (15%)
CVN	18,400,000	COMB Co. (50%), 18 cable operators**
BET	18,000,000	Bob Johnson (51%), BET president, TCI (16%), HBO (16%), Taft (16%)
HSN I	15,200,000	Home Shopping Networks Inc
C-SPAN II	12,500,000	Cable operator supported
Tempo TV	14,500,000	TCI
Telshop	11,000,000	Infotech (20%), Dr Earle Brian (15%)***
QVC Network	11,200,000	QVC Network (65%), Comcast (14%), cable operators (21%)****

**CVN--The ownership by 18 cable operators--American, ATC, Adam Corp., Cablevision, Colony, Continental, Cooke, Daniels & Associates, Heritage, Newhouse, Rogers, Sammons, TCI, Times Mirror, United Artists, Viacom, Warner--is based on percentage of subscribers committed to service

***Telshop--FNN is offering equity to cable operators (500,000 shares). FNN will retain two million shares.

****QVC Network--It is presently owned by the public (65%), Comcast (14%) and cable operators (21%) When cable operators exercise warrants on 483,000 shares of preferred stock, redeemable for 10 shares of common stock, another 4 83 million shares will be added to the approximately 10 million shares outstanding At that point, cable operators would own approximately 8 5 million shares of the 15 million shares outstanding, or 56% of the service The largest in that group would be TCI (2,150,000).

Network	Subscribers	Ownership
Inspirational	10,500,000	PTL Club
Learning Chan.	11,000,000	Infotech (40%), Appalachian Community Service Network (40%), officers and employees (20%)
WWOR	9,657,482	MCA
Silent Network	10,000,000	Silent Network Inc
Video Mall Net.	14,000,000	Video Shopping Mall (Goodway Marketing 80%)
Trinity	7,037,000	Trinity Broadcasting Network (nonprofit)
Eternal World TV	7,100,000	Eternal World Television (nonprofit)
Fashion Channel	8,700,000	Charlie Gee (32%), 65 cable operators (25%)***** TCI (10 5%), United (10 5%)
Country Music	6,800,000	Jim Guercio (principal owner)
Acts	6,300,000	Southern Baptist Convention
Travel Channel	7,000,000	TWA Marketing (100%), after equity offering TWAM will hold 63%, cable operators 37%******
HSN II	5,800,000	Home Shopping Networks Inc

*****Fashion Channel--Among the larger cable operators with an equity stake are Adelphia, American, ATC, Barden, Bresnan, Cablevision Industries, Centel, Century, Colony, Commonwealth Cablesystems, Continental, Cooke, Cox, Daniels, Enstar, First Carolina, Harron, Hauser, Heritage, Lenfest, Maclean Hunter, Marcus, Media General, Newhouse, Omega, Post Newsweek, Prestige, Sammons, Scripps Howard, Simmons, Susquehanna, Sutton Capital, Taft, TeleCable, TCI, Times Mirror, Triax, UA, United, United Video Cablevision, Viacom and Warner

******Travel Channel--The final equity offering is to be placed by Dec. 1, whereby TWA Marketing will retain 6 million shares and cable operators will be offered 3 5 million

Network	Subscribers	Ownership
Movietime	4,000,000	Employees (30%), Mabon, Nugent & Co., SRK Management, Loeb Partners and Hallmark (70%)
Shop TV	3,000,000	JC Penney (63%) STN (37%)*******
WPIX	8,875,212	Tribune Broadcasting
Hit Video USA	2,164,000	Wodlinger Broadcasting
KTVT	3,502,352	Gaylord Broadcasting
Nostalgia	2,500,000	Cooke Cablevision (9%), TeleCable subsidiary has small percentage, largest single owners
Liberty	1,049,000	Liberty Broadcasting Network (nonprofit)
Consum. Disc. II	1,000,000	Entertainment Marketing Inc
Sky Merchant	1,000,000	Jones Int'l (parent of Jones Intercable)
America's Shop	1,000,000	Cox Cable
Galavision	1,000,000	Univisa
Gospel Music Net.	744,447	GMN Ltd
Motivation Net.	200,000	Rock Christian Network (nonprofit)
CDN I	526,000	Entertainment Marketing

*******Shop TV--It has equity commitments from 30 MSO's representing 3 3 million subscribers MSO's will receive 1% equity in the service for each million himes they commit to Cable operaors who have major stakes in other shopping programs, such as TCI, United and Comcast, are not a part of Shop Among the MSO's whose systems are carrying Shop TV are Cablevision Systems, Rogers, Continental and Warner

Network	Subscribers	Ownership
	Pay Services	
HBO	15,900,000	Time Inc.
AMC	9,000,000	Rainbow Program Enterprises (Cablevision Systems) 50%, TCI 50%
Showtime	5,700,000	Viacom
Cinemax	5,100,000	Time Inc.
Disney	3,810,000	Walt Disney Co
Movie Channel	2,600,000	Viacom
Playboy	520,000	Playboy Enterprises
Bravo	1,000,000	RPE (Cablevision Systems)
Festival	30,000	Time Inc.
	Pay-per-view services	
View. Choice I, II	4,000,000	Viacom
Request TV	2,500,000	Daniels, United Cable, Centel, Heritage, American, major motion picture studios
Home Premiere	2,300,000	General Instrument
Cable Video Store	40,000	ATC, Cox, TeleCable Continental and Newhouse 20% each.

Bold face in right-hand column indicates cable operator ownership by company with cable systems in separate subsidiary

THE PROGRAMMING BOTTLENECK [1]

SERVICE		DESCRIPTION	NUMBER OF SUBSCRIBERS [2]	AVAIL METROTEN	DISCRIM PRICE/TERMS TO METROTEN [3]	AVAIL MICROBAND	DISCRIM PRICE/TERMS TO MICROBAND [4]	CABLE OWNERSHIP IN WHOLE OR IN PART [5]
	I BASIC							
A	ESPN	Sports	46 1 million	YES [6]	YES/YES	YES [7]	YES/YES	0% CABLE

1/ This chart illustrates the inability of wireless cable operators to obtain satellite-delivered programming at fair prices and terms, as well as the trend toward vertical integration by cable into such programming In fact, as the chart reflects, many of the programmers refusing to deal with wireless cable at fair prices and terms are owned in whole or in part by the large MSOs The chart focuses on the two largest wireless cable firms Microband, which delivers programming in New York, NY, Detroit, MI and Washington, D C , and Metroten, which serves the Cleveland, OH area

2/ Statistics from Cablevision, Vol 12, no 38, at 106 (Feb 29, 1988)

3/ Discriminatory Price refers to the situation where the wireless cable operator pays a *higher* price than cable operators for the same programming Discriminatory Terms refers to the situation where the wireless cable operator's contract with the programmer contains less favorable non-price terms than the programmer's standard contract with cable operators Such discriminatory terms have included geographic restrictions limiting service to areas unwired for cable and refusals to provide the equity options offered to cable operators

4/ Id

5/ Statistics from Broadcasting, Vol 113, no 21, at 41-42 (Nov 23, 1987)

6/ ESPN's NFL Package is not available to wireless cable customers in some cable wired areas

7/ Id

EXHIBIT F

SERVICE	DESCRIPTION	NUMBER OF SUBSCRIBERS	AVAIL METROTEN	DISCRIM PRICE/TERMS TO METROTEN	AVAIL MICROBAND	DISCRIM PRICE/TERMS TO MICROBAND	CABLE OWNERSHIP IN WHOLE OR IN PART
B. CABLE NEWS NETWORK	News	42 5 million	YES[8/]	YES/NO	NO	N/A	31.4% CABLE
C WTBS[9/]	Variety	42 5 million	YES	N/A	YES	N/A	31.4% CABLE
D USA	Variety	41 million	NO	N/A	NO	N/A	0% CABLE
E MTV	Music	39 4 million	YES	YES/NO	YES	YES/NO	100% CABLE
F NICKELODEON	Children	37 9 million	YES	YES/NO	YES	YES/NO	100% CABLE
G CHRISTIAN BROADCAST NETWORK	Religious variety	37 2 million	YES	NO/NO	YES	NO/NO	0% CABLE
H NASHVILLE NETWORK	Music	37 million	YES	YES/NO	YES	YES/NO	0% CABLE
I. LIFETIME	Variety	35 4 million	NO	N/A	NO	N/A	66% CABLE
J C-SPAN	Government	33 million	YES	NO/NO	YES	NO/NO	CABLE SUPPORTED
K WEATHER CHANNEL	Weather	31 6 million	NO	N/A	NO	N/A	0%
L ARTS & ENTER-TAINMENT	Movies, variety	30 million	NO	N/A	NO	N/A	33% CABLE

8/ Metroten is the only non-cable distributor of Cable News Network

9/ As an independent broadcast network delivered by common-carrier, cable-owned WTBS may not discriminate as to retail affiliates

	SERVICE	DESCRIPTION	NUMBER OF SUBSCRIBERS	AVAIL METROTEN	DISCRIM PRICE/TERMS TO METROTEN	AVAIL MICROBAND	DISCRIM PRICE/TERMS TO MICROBAND	CABLE OWNERSHIP IN WHOLE OR IN PART
M	HEADLINE NEWS	News	28 3 million	YES	YES/NO	YES	YES/NO	31 4% CABLE
N	DISCOVERY	Science	27 4 million	NO	N/A	NO	N/A	70% CABLE
O	FINANCIAL NEWS NETWORK	Financial	27 3 million	YES	YES/NO	YES	YES/NO	0% CABLE
P	WGN[10/]	Variety	23 8 million	YES	N/A	NO	N/A	0% CABLE
Q	BLACK ENTER-TAINMENT TV	Ethnic	18 million	YES	NO/NO	YES (NY & DET) NO (D C)	NO/NO	54% CABLE
R	HOME SHOPPING NETWORK	Shopping	15 2 million	NO	N/A	NO	N/A	?% CABLE
S	TEMPO TV[11/]	Variety	14 5 million	YES	NO/NO	YES	NO/NO	100% CABLE
T	LEARNING CHANNEL	Educational	11 million	YES	NO/NO	YES	NO/NO	0% CABLE
J	WOR[12/]	Variety	9 6 million	YES	N/A	YES	N/A	0% CABLE

10/ As an independent broadcast network delivered by common-carrier, WGN may not discriminate as to retail affiliates

11/ Tempo TV is the common carrier for WTBS With its recent acquisition of Tempo TV, Tele-Communications, Inc (TCI) now owns 10 1% of Turner Broadcasting System It is widely anticipated that Tempo TV will serve as a launch platform for Turner Network Televion (TNT) TCI is interested in starting a new network-quality satellite-delivered channel as is Turner Broadcasting System While Tempo TV has previously been available to wireless cable, Turner has explicity proposed making TNT a cable-exclusive service If TCI denied wireless cable access to TNT, the anticompetitive effect would be even greater than the denial of access to the existing Tempo TV

12/ As an independent broadcast network delivered by common-carrier, WOR may not discriminate as to retail affiliates

SERVICE		DESCRIPTION	NUMBER OF SUBSCRIBERS	AVAIL METROTEN	DISCRIM PRICE/TERMS TO METROTEN	AVAIL MICROBAND	DISCRIM PRICE/TERMS TO MICROBAND	CABLE OWNERSHIP IN WHOLE OR IN PART
V	FASHION CHANNEL	Shopping	8 million	NO	N/A	NO	N/A	46% CABLE
W	TRAVEL CHANNEL	Travel	7 million	N/A	N/A	YES	NO/YES	37% CABLE
X	NOSTALGIA CHANNEL	Vintage movies	2 5 million	YES	NO/NO	YES	NO/NO	0% CABLE
Y	MADISON SQUARE GARDEN	Local sports	2 1 million	N/A	N/A	YES	?/YES	0% CABLE
Z	GALAVISION	Spanish variety	1 million	N/A	N/A	YES	NO/NO	0% CABLE
	II PREMIUM							
A	HBO	Movies, specials, orig programs	15 9 million	NO	N/A	YES	YES/YES	100% CABLE
B	AMERICAN MOVIE CLASSICS	Vintage movies	9 million	NO	N/A	NO	N/A	100% CABLE
C	SHOWTIME	Movies	5 7 million	YES[13/]	YES/YES	NO	N/A	100% CABLE
D	CINEMAX	Movies	5 1 million	NO	N/A	NO	N/A	100% CABLE
E	DISNEY CHANNEL	Family	3 8 million	NO	N/A	NO	N/A	0% CABLE
F	MOVIE CHANNEL	Movies	2 6 million	NO	N/A	NO	N/A	100% CABLE
G	BRAVO	Cultural	1 million	NO	N/A	NO	N/A	10% CABLE

13/ Metroten carries Showtime as a result of the settlement of an antitrust lawsuit

SERVICE	DESCRIPTION	NUMBER OF SUBSCRIBERS	AVAIL METROTEN	DISCRIM PRICE/TERMS TO METROTEN	AVAIL MICROBAND	DISCRIM PRICE/TERMS TO MICROBAND	CABLE OWNERSHIP IN WHOLE OR IN PART
H. SPORTS CHANNEL	Sports	45,000 (FLA), 800,000 (NEW ENGLAND), 1 MILLION (NEW YORK)	N/A	N/A	NO	N/A	100% CABLE
I FESTIVAL	Variety	30,000	NO	N/A	NO	N/A	100% CABLE

EXHIBIT G

THE Fashion CHANNEL

November 19, 1987

Margaret Robinson
Metropolitan Cablevision
1250 Granger Rd
Brooklyn Heights, OH 44131

Dear Maggie

Per your request, I've enclosed some information on The Fashion Channel Thank you, again, for your interest in our service; however, at this time The Fashion Channel is unable to offer our service to "Metro 10" We are currently a cable exclusive shopping service and are presently affiliated with North Coast Cable of Cleveland

Maggie, when we talked, I was unaware of this information I hope that the information is helpful to you even though we will be unable to affiliate with your company at this time Should our board of directors decide to change this policy and offer service to MMDS companies, I will be sure to let you know

Thanks, again, for your call I wish you and "Metro 10" much success!

Sincerely,

Leah Lyles Bradley

Leah Lyles Bradley
Regional Manager

LLB/tt

Enclosures

cc. Morgan Lambert Howe

2300 Computer Ave I-46
Willow Grove, PA 19090
215-657-2005

EXHIBIT H

A DYNAMITE TEMPO FOR TCI

Tele-Communications, Inc , will add Tempo TV to its program holdings, which already include equity in Turner Bcstg , American Movie Classics, Black Entertainment TV, Cable Value Network, QVC Network and The Fashion Channel

Tempo TV, the 12 5 mil -sub network in the process of reconfiguring its programming to appeal to the 45+ demographic, is a subsidiary of Tempo Enterprises Other Tempo holdings include the distribution of WTBS via satellite, cable systems serving 17,000 subs and two independent TV stations

TCI has offered--and the Tempo board has agreed--to exchange 5 6 mil shares of Tempo stock valued at $8/share for TCI stock valued at $21/share at a 2 625 1 ratio

The TCI offer values all of Tempo's assets at only $45 mil (Tempo has traded as high as $21.25/share--equal to $120 mil --last year when the network dabbled briefly with carriage of home shopping programs)

From Tempo's perspective, the deal feels closer to $16/share--$90 mil in total value--because it believes TCI stock is privately worth twice its current quote (CABLE TV INVESTOR #399, 11/17/87)

We reach a private market value for Tempo TV of $50 mil by adding up the company's separate pieces and subtracting them from the $90 mil value

Total private market value of Tempo Enterprises .	$90 mil
Cable systems (17,000 subs @ $1,500) .	25 mil
WTBS satellite distribution ($5 mil in c f) .	25 mil
Miscellaneous assets .	5 mil
Subtotal . .	. $55 mil
Debt. . .	15 mil
Value net of debt	$40 mil
Tempo TV PMV .	$50 mil

© 1987 *CABLE TV PROGRAMMING Estimates of Paul Kagan Associates, Inc*

The network, which in the past has sold most of its program time directly to producers, has generated cash flow as high as $5 5 mil as recently as 1986 (see table, P 2)

Expenses associated with its program reorientation plans are expected to bring cash flow temporarily below breakeven in 1988 (a $153,000 loss is budgeted), but a return to profitability is foreseen for succeeding years $2 8 mil in 1989, $6 8 mil in 1990 and $12 4 mil in 1991

Those pro forma cash flows and a $50 mil valuation would imply Tempo TV sold for 17 8x 1989 c f , 7 3x 1990 c f and 4x 1991 c f

Our analysis assumes TCI would allow the network to follow its current business plan (CTP #112, 8/31/87) But Tempo TV could serve another purpose a launch platform for Turner Network Television (TNT)

Tempo's 6 mil -7 mil full-time subs (of its 12 5 mil total) could solve some of the tight channel-capacity objections voiced by cable operators recently approached with the TNT proposal (CTP #114, 10/29/87)

Whatever the outcome, TCI's acquisition could prove a tonic for Tempo, whose sub counts stalled the past two years

First, MSOs objected to a plan to add license fees, then Tempo made an abortive attempt to carry home shopping part-time

TCI's position as an equity investor--despite being viewed negatively by some MSOs--has helped other networks, such as The Discovery Channel, CVN and TFC, grow rapidly

FRONT LINE

Tempo deal expands TCI reach

NEW YORK—In a deal that will give TCI a foothold in the nascent TVRO business and further its involvement in programming the country's largest multiple system operator has agreed to acquire Tempo Enterprises in a transaction valued at $61 million The merger agreement provides for an exchange of TCI stock valued at $21 a share for stock of Tempo Enterprises at $8 a share Tempo shareholders have the option of receiving $8 in cash for their holdings or converting their shares into TCI stock at a ratio of 2 625 to one On Nov 6 the last trading day before the deal was announced Tempo closed at $7 a share

Tempo Enterprises, formerly known as Satellite Syndicated Systems, is the common carrier for Superstation WTBS. In addition, it owns and manages Tempo Television, a 24-hour basic cable network with 12 million subscribers cable systems serving 16 000 subscribers in the Southwest, and Tempo Development Corp a packager of satellite programming to the backyard dish market.

The primary attractions to Tempo Enterprises for TCI say industry sources are its programming network and TVRO business John Malone president and chief executive officer of TCI, has been touting his interest in expanding TCI's involvement in the programming business for over a year now Two months ago he told a group of institutional investors that he would like TCI to have a percentage interest in programming equal to that in system operations (*CV* 9/28/87 p 12) "This is a real 'in into the programming market," says Gene Gawthrop executive vice president at Communications Equity Associates which represented Tempo Enterprises in the negotiations "The bulk of the deal's value is in the network" and the license to transmit WTBS, he notes

The common carrier business generates $5 million a year in cash flow Not only will TCI gain access to that flow of money but also it will gain immediate cost savings by controlling the service The risk is that either the reimposition of syndicated exclusivity or the elimination of the compulsory license could mean the end of superstations entirely

Malone has said WTBS could be converted to a basic network at that point, and until the legal and regulatory issues are resolved Turner Broadcasting could start another channel TBS is exploring that possibility now under the working title of Turner Network Television (see separate story, page 36)

As Steve Effros, president of the Community Antenna Television Association, notes Tempo Television could provide the vehicle for TNT "With a transponder and an existing audience" the building blocks are there

Just as important an attraction to TCI is Tempo Development Corp "This is a very important part of the deal" says Marty Lafferty president of Tempo Development. "TCI has big plans to pursue the TVRO market" much more aggressively than it has in the past, he says "We're on a very fast track," and TCI has had "the opportunity to study us closely" says Lafferty

Part of the plans for Tempo Development reportedly include merging those operations with those of Netlink USA, which provides cable operators and TVRO owners with the signals of the three broadcast network affiliates in Denver the Denver PBS station and two Denver area independent television stations Tempo Development is designed to serve the TVRO market with packages of cable programming TCI owns 40 percent of Netlink USA Western Tele Communications Inc owns another 40 percent, and Netlink founder Gordon Rock owns 20 percent.

According to Lafferty estimates are that the total TVRO market, if C-band satellites continue to be used will be 5 million households, a number which equals TCI's own subscriber figure of wholly-owned systems If the market moves on to K band satellites, it could be much larger At this time there are 275 000 descramblers in place but according to Lafferty that number could leap in coming months

Tempo Development now serves 42 000 TVRO subscribers, Lafferty says, after just six weeks of marketing The company offers two services one direct to TVRO customers, which allows them to pick their own packages of cable programming services, and another to cable operators, which offers dish owners three types of packages.

The key point in the latter service is that the operators negotiate for the TVRO rights directly with the programmers. Tempo Development is responsible for handling calls from the operators themselves or the customers, authorizing the TVRO owner's receiver for the appropriate programming services, and then billing the customers and collecting monthly payments

While Tempo Enterprises has been an enthusiastic backer of the TVRO service, Lafferty notes that TCI's greater financial resources should allow the service to move into new areas

The deal is contingent on receiving an acceptable fairness opinion the approval of the Tempo Enterprises shareholders, and various regulatory approvals. Because of the size of the transaction TCI must make a filing under the Hart-Scott-Rodino antitrust amendments. In addition, the Federal Communications Commission must approve the transfer of Tempo's common carrier license for WTBS the transfer of the cable system CARS licenses and several broadcast licenses

As is the case every time TCI makes another acquisition, new questions arise about whether this is the deal where the Justice Department finally tells the company it cannot grow any more

In this case questions of antitrust are not likely to center around the cable systems but rather around TCI's further moves into programming and its entrance into the TVRO market Department of Justice inquiries in recent years have focused on the ability of alternative delivery mechanisms to provide cable programming to subscribers If TCI gains control over one of those delivery mechanisms—the TVRO market—that would raise substantial questions However, industry attorneys note that the market for TVRO program packagers is still highly decentralized that there are a number of packaging services, and that entrance into that market still is easy

Where TCI could run into regulatory problems is in its bid to control Tempo's common carrier license A broadcaster cannot control its common carrier and several years ago the FCC forced Ted Turner to divest Satellite Syndicated Systems. Turner sold it to Ed Taylor, now chairman of Tempo Enterprises, for $1 Since TCI already owns a percentage of Turner Broadcasting it is possible the company could run up against that prohibition.

—*Virginia Munger Kahn*

RADIO TELEVISION CABLE SATELLITE
Broadcasting Mar 14

Wireless cable Wireless Cable Association increasingly active trade association representing wireless cable operators filed comments on Tele-Communications Inc.'s proposed $46-million purchase of Tempo Enterprises Inc. saying that TCI should provide assurances that Tempo programing and that of other services in which it has interest will be available to wireless cable operators and other potential competitors of cable. Assurances are necessary because of TCI's growing vertical integration with programers.

Wireless cable, which uses mix of ITFS and MDS channels to broadcast multiple cable programing services to subscribers, is now available in such large markets as New York, Detroit and Cleveland.

FCC has turned down request by Cablevision Systems, MSO with franchise for about one million homes within Microband targeted market, to bar Microband Companies Inc. from offering its service in outer boroughs of New York until other channels now hung up in interference disputes become available and Cablevision can offer competitive wireless cable service. In responding to Cablevision's petition, Microband charged that Cablevision was trying to use FCC to block competition. It also alleged three cable programing services affiliated with Cablevision—SportsChannel New York, American Movie Classics and Bravo—have refused to deal with Microband in effort to weaken Microband's ability to compete.

Multichannel News — March 14 1988

Cabbages & Kings

Ops' Exclusivity Not Worth the Trouble

By Thomas P Southwick

DENVER — It must have seemed like a good idea at the time but it is proving to be more trouble than it is worth

The issue is exclusivity — granting a cable system the sole right to distribute a particular programming service within the system s franchise area



HBO was first out of the box with an offer of wireline exclusivity designed to protect against overbuilders (but not against alternative technologies such as multichannel MDS) at a cost to MSOs of 25 cents per sub per month

Showtime quickly upped the ante offering a defense against both overbuilders and Ku satellite delivery (HBO has long been a backer of Ku-band delivery to cable systems) Most of the other services have their own versions of exclusivity on the drawing boards

But all this fun just had to end somewhere and one could just count on a U S senator to provide the wet blanket It came in the form of a letter from Sen John Kerry (D-MA) who questioned the antitrust implications of the HBO proposal

Sen Kerry may be right or wrong HBO has a plausible defense that many businesses (movie studios automobile manufacturers etc) offer exclusive distribution rights to their affiliates

But the Kerry letter is only the first robin of spring many more are on the way There is a perception in Washington that cable is an uncontrolled monopoly out to gain a death grip on the television sets of America It doesn t matter whether that is true In politics perception is 90 percent of the game exclusive deals can only add to that perception

And the benefits of exclusive contracts do not warrant the risk that it might provide just the impetus for a brand new attorney general or some zealous congressional committee to launch a crusade against cable

If somebody comes along with a better distribution system — be it a better cable system fiberoptics MMDS or something still undreamed of — the cable programming services will in short order either accommodate themselves to the new delivery system or watch some upstart programmer emerge to fill the vacuum

In such an envuronment it won t be long before cable s exclusive deals are worth about as much as exclusive rights to sell horseshoes were when Henry Ford came along

The only real protection cable operators have from competition is to provide good service at a reasonable cost, and to stay a jump ahead of the programming and technology adding new services and adopting such new developments as fiber or high-definition television as they come along

As long as cable operators do this they will have little to fear from overbuilders or alternative technologies (at least those that now exist)

But where systems provide poor service at inflated prices and decline to add new services and keep pace with the technology all the pieces of paper in the world from Showtime and HBO won t — and shouldn t — save their financial skins □

EXHIBIT I

THE BATTLE OF THE SUPERCOMPUTERS PAGE 110

BusinessWeek

OCTOBER 26, 1987 A McGRAW-HILL PUBLICATION $2.00

WALL STREET'S NEW AUSTERITY
SALOMON ISN'T ALONE PAGE 28

THE KING OF CABLE

TCI President John Malone is fast becoming the most powerful man in the television industry And a lot of people don't like it PAGE 88



THE KING OF CABLE TV

MEET THE MAN WHO MAKES THE NETWORKS TREMBLE

Time was running out for James M Hoak Jr The president of Heritage Communications Inc. didn t know last January if he could beat the raiders preparing to put his cable-television company in play So Hoak flew from his Des Moines headquarters to Denver hoping to be rescued by the one man he knew could make a quick deal—John C. Malone president of Tele-Communications Inc. In just two hours says Hoak, they shook hands on Malone s proposal. TCI would pay $1.3 billion for Heritage and keep Hoak's management team in place It was the largest amount Malone had ever paid for a single company Hoak left grateful and considerably swed.

Malone has been a big spender for close to three years now In that time he has shelled out nearly $3 billion for more than 150 cable companies. The result is that one out of every five cable subscribers plugs into a TCI-controlled system, giving the company twice as many customers as its closest rival Time Inc. s American Television & Communications Corp And Malone is now eyeing Storer Communications Inc —the country s fourth-largest cable company It is expected to be sold for around $3 billion.

His acquisitions have made Malone 46 the king of cable and, as the cable industry grows possibly the most powerful man in television. Broadcasters and cable networks still decide what programs to offer but Malone can decide whether or not to show them to his subscribers. That makes Malone a formidable gatekeeper now that nearly half the country's viewers subscribe to cable instead of using antennas as they once did to pick up broadcast signals for free

TCI and other operators are big shots in their franchise areas because there is usually the only game in town. Operators don t have direct competition, and they have been able to set their own rates since January when the industry was deregulated Operators own the hardware—cable and overhead wire—that feeds the software or programs, to subscribers homes An operator can break a local low rated station, especially a public or independent broadcaster by refusing to carry its programs. Local subscribers see only the national services operators choose to buy such as Christian Broadcast Network, the Spanish-language Univision Inc. programs, kid s shows on Nickelodeon, the Black Entertainment Television Network, or the Arts & Entertainment Network.

But Malone is more formidable than any other cable operator because it's virtually impossible to make money from a cable network without TCI s 8 million subscribers. Indeed, Malone s support has launched fledgling networks and his opposition has kept others from getting off the ground. Even producers of established cable programs, such as MTV and ESPN have learned that it's risky to try to charge their biggest customer more than he s willing to pay Other cable operators rarely challenge Malone even when he negotiates deals that affect the entire industry

A FREE HAND. Malone has made his clout felt. He was the driving force behind a deal that prevented Hollywood or the networks from getting a piece of Ted Turner's debt-plagued Turner Broadcasting System Inc. (page 96). So powerful is TCI that right after Sumner M Redstone CEO of National Amusement Corp bought Viacom International Inc. he made a courtesy call on Malone Viacom owns several cable franchises and programming services such as Showtime/The Movie Channel and MTV And even NBC Inc. chief Robert Wright, who is busily talking up the prospects of starting the network s own cable channel, is wooing Malone.

Those who have been on the opposite side of the table in business deals say Malone is a bully that he uses his financial muscle ruthlessly Malone the holder of five college degrees frequently salts his conversation with profanity He doesn t think much of some TV network chiefs and dismisses them, in less-than-





SEE "ANYTHING'S POSSIBLE" FOR CABLE



HE FOUNDED TCI AND GAVE MALONE HIS START IN CABLE

BLAIR: MALONE PUT HIM IN CHARGE OF GA

PHOTOGRAPHS BY CHARLES THATCHER

polite language as self impressed effete snobs He doesn t have to clear his statements with anybody at TCI and has pret ty much a free hand in dealmaking Ma lone and Bob Magness TCI s chairman and founder own more than half of the company's voting shares

In early 1986 financier Irwin L. Jacobs saw Malone in action Malone wanted a big piece of the fast-growing business of home-shopping programs which was dominated by an independent company Home Shopping Network Inc. Jacobs also wanted in through a discount mer chandiser COMB Co where he is a direc tor He knew he would need Malone s help to launch a new cable channel and invited the TCI chief to meet him in Minneapolis In less than an hour they had a tentative deal Malone promised to deliv er enough cable outlets to give the ven ture a good send-off In return Malone asked for a fairly large stake in COMB s Cable Value Network. Jacobs agreed Now 32 operators own half of the re cently reorganized parent company—called CVN Cos —and the shopping chan nel is shown on 104 systems The profit able channel should generate more than $300 million in revenues this year

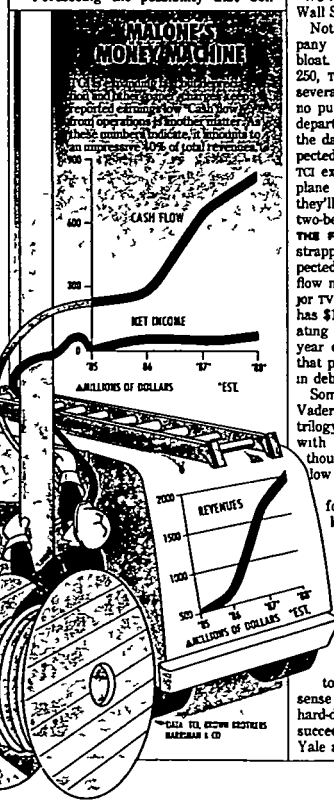
FROZEN OUT Some cable operators, however resent Malone s attempts to play them like cards in his dealmaking hand. But they're afraid to take him on publicly reserving their grousing for private safe occasions Malone doesn t have to threaten operators They know if they don t go along they could get frozen out of the next deal says John Tinker a cable analyst with Morgan Stanley & Co

Malone says the accounts of his power and ruthlessness are exaggerated. May be so, but Malone was not Mr Nice Guy in 1981 when the city council of Jefferson City Mo tried to get rid of TCI The council, unhappy with TCI s service planned to yank TCI s cable franchise when it expired in 1982 and turn it over to a local company Central Telecommunications Inc. TCI sued the city and threatened to undermine any cable company that took its place. A U S. Court of Appeals judge found that TCI said it would cut off service and let its cable wires rot rather than sell to another cable provider TCI also tried to intimidate the city by vowing to sell satellite dishes at low prices

After the city council caved in, Central Telecommunications the local cable operator charged TCI with restraint of trade. Early this year the U S Supreme Court declined to hear an appeal of a lower court s judg ment against TCI a decision that cost the company nearly $44 million

The judgment is not the kind of public ity the cable industry can afford these days With consumer complaints on the rise Congress is seriously looking at re regulating the cable operators They re rapidly becoming the newest generation of robber barons says Larry Munroe president of Munrcon Inc., a consultant to cities on cable mat ters And the ubiquitous Jack J Valenti president and CEO of the powerful Mo tion Picture Association of America, says cable operators have abused the freedom they've had since January to raise rates and shift channels around on the dial at will

Foreseeing the possibility that Con-



gress or federal regulators might limit the size of cable companies Malone be gan decentralizing TCI in early 1986 He cut the company into six separate divi sions each nearly autonomous with its own marketing accounting and engi neering departments If forced, Malone plans to spin off the companies to share holders—much as American Telephone & Telegraph Co was broken up He s even thinking of restructuring the com pany without a push from Washington 'We might do it if it looks like we re getting too big or unwieldy or if our stock s too undervalued he says

TCI stock has soared 66% since Janu ary to 25 but some Wall Street analysts believe TCI still sells for less than the company is worth Malone rarely wor ries that his deals will dilute earninga We ve never bowed to the whims of Wall Street, declares founder Magness

Not that Wall Street objects to a com pany that shows virtually no signs of bloat. With a corporate payroll of only 250, TCI has secretaries who work for several different executives There are no public relations or human resources departments Ten senior executives run the day to-day business and each is ex pected to handle different departments TCI executives can fly on the corporate plane but when they visit New York, they'll sleep at the company's spartan two-bedroom downtown apartment.

THE FORCE. The TCI empire is hardly strapped for spending money It is ex pected to generate $850 million in cash flow next year more than all three ma jor TV networks combined The company has $14 billion in total assets and oper ating profits should hit $285 million this year on revenues of $1 7 billion Given that performance even TCI s $4 6 billion in debt seems manageable

Some have nicknamed Malone Darth Vader after the villain in the *Star Wars* trilogy and the Force does seem to be with him For all Malone s power though few people really know the low profile executive and dealmaker

Malone first showed his keen eye for an opportunity when he was a kid growing up in the affluent town of Milford, Conn He bought old surplus General Electric radi os for $1 apiece fixed them up and resold them for $7 His fa ther a GE engineer and inventor encouraged Malone to study engineering He was fascinated by it. Instead of getting bogged down in fancy analysis, I learned to develop an educated feel or horse sense for things says Malone His hard-driving father expected Malone to succeed And he did earning degrees at Yale and then at Johns Hopkins

BOB COYLOW

But by then Malone was weary of academia. In 1967 he joined management consultants McKinsey & Co and later General Instrument Corp s Jerrold Distribution Systems Div which sold cable equipment. Malone learned a lot about hardware but learned even more about how to deal with people Though only 29 he managed to win the trust and loyalty of his cable operator customers. Years later the same customers remembered how Malone extended their credit while they were scratching to make it in the infant industry

One customer former Texas rancher Bob Magness, showed his gratitude in 1973 by offering Malone the opportunity that launched his career Magness, who raised the money to start TCI by selling some of his cattle needed someone who could run his small cable company which he based in Denver in 1965 to serve tiny towns in Montana, Utah, Nevada, and Colorado Malone an outdoorsman had had his fill of New York and wanted freedom to run a business. So he turned down the offer of a higher-paying cable job with Warner Amex Cable Communications and joined TCI The 32-year-old Malone with a PhD in operations research—a combination of math and engineering—under his arm, was considered a novelty "a rocket scientist, recalls one employee

HITTING BOTTOM. Malone arrived in Denver to find that TCI was in trouble. Interest rates were soaring the stock market had taken a dive, and TCI risked defaulting on millions of dollars in loans "We were lower than whaleshit," says Malone. He showed his mettle on one of his first jobs The city council of Vail, Colo was clamoring for more services but didn t want to approve higher rates, so Malone cut all programming for one weekend and instead flashed the mayor and city manager's names and phone numbers on the screen The city surrendered, but TCI soon sold the system.

For the next two years Malone fought city cable regulators throughout the country and negotiated with bankers. His efforts began to show results in 1977 when he succeeded in getting a $77 million line of credit that allowed the company to refinance its debt. A moderate drinker Malone says he "drank more booze that night than any night in my life.

Most of TCI s cable systems were in small suburbs and rural areas, but Malone had his eye on the big time. He stayed out of the big-city franchise bidding wars of the late 1970s and bided his time. He had to wait a couple of years all the while fattening up his treasury Thus TCI was ready to pick up the pieces when operators found they couldn t fulfill their extravagant promises. Pittsburgh was a model After losing millions

THIS TOWN FOUGHT TCI AND WON—WELL, SORT OF



SPICER (RIGHT) AND FELLOW ACTIVIST: "IT WAS LIKE THE STORMING OF THE BASTILLE"

For Ronald D Spicer the Luciano Pavarotti incident was the ultimate outrage. The retired musician tuned in last Dec. 29 for a Pavarotti TV special only to discover that Channel 7 no longer carried public television. Instead, he got a home-shopping program. An irate Spicer marched straight down to the local Tele-Communications Inc. office in Springfield, a small mill town in western Oregon, to complain and found 500 other furious viewers there. "It was like the storming of the Bastille," Spicer recalls. But the mob found TCI's doors locked. "They conveniently closed down for a four-day holiday " says Spicer

It didn't take long for TCI to acknowledge its gaffe. A week later it put the station back in the same spot on the dial. But that didn t placate Spicer He says that since 1985, when TCI became the franchise owner rates have doubled and service has deteriorated. He and a few stalwarts decided they weren't going to take it anymore.

"WORST CULPRIT" The rebellion produced a referendum last June that will allow the Springfield Utility Board (SUB) to build a cable service in competition with TCI. The SUB has commissioned a study to help it decide by February whether to go ahead. "People call from all over and ask me how we did it and how they can get started," says SUB spokeswoman Mary Ann Rhodes. "I tell them we didn t do it, the citizens did it."

The fight cost both sides a lot of money A TCI-sponsored group opposing the referendum, Springfield Tax payers Against Subsidizing Cable TV put $45 000 into TV ads and mailings The rebel group, Cable TV Freedom, spent $12,000—about $10 000 of which came from the Washington-based Association of Independent Television Stations (INTV). James B Hedlund, INTV's vice-president, calls TCI 'the country's worst culprit in abusing independent stations

Shortly after the vote, which the rebels won by the slimmest of margins TCI executives flew in from Denver to mend fences TCI contributed $2,500 to the annual broiled chicken festival Donations went to other local events

Why doesn t TCI simply give its subscribers in Springfield what they want? After all, the 11 000 customers are hardly a ripple in the company's overall revenue stream, and the rebels merely want fewer channels and a lower basic rate. TCI responds that the opposition does not represent all the subscribers The system s growing people are happy says J C. Sparkman TCI s executive vice-president. "No one should complain about paying $16 for [31] channels

One casualty of TCI s programming decisions is Eugene s KLSR, an independent station in nearby Eugene that TCI claims it doesn t have room for The low-powered KLSR may have to share a spot on the dial with a local-government access channel It's not great, but it s better than nothing says KLSR s President John E. Field.

By Katherine M Hafner in Springfield

RICK MAPHOTO

of dollars there Warner Amex sold the franchise to TCI for a bargain $93 million in 1984 Malone told the Pittsburgh city fathers that his company would supply only a bare-bones system The city agreed and TCI dismantled expensive equipment, closed showcase studios and slashed payrolls by 47% The posh downtown headquarters was moved to a former tire warehouse the number of channels was cut from 60 to 49

Only four years later the Pittsburgh system is producing about $14 million a year in cash flow Despite rate hikes, the city is pleased TCI used the same formula in franchises it launched or bought in Washington St. Louis and Chicago

Despite the status he has won Malone doesn't frequent the Denver social scene Business and political functions leave him cold. A devoted family man, Malone often drives eight miles home for lunch and avoids working weekends so he can spend time with his wife and two children The 6-ft. 1-in executive prefers a casual air at work, too—he despises memos, red tape and office politics. He is apt to wear slacks and knit shirts instead of suits. A passionate sailor he has decorated his office with ship models and a brass ship's wheel

Malone lives comfortably at his A frame house near Denver with a pool, pond, and indoor riding ring for his horses His collection of antique cars includes Gary Cooper's old Mercedes He pulls down a modest $350 000-a year salary but his TCI stock is worth $40 million. Malone owns resort homes in New Mexico and on the coast of Maine An Easterner at heart, Malone regularly retreats to his 200-acre hilltop property above Boothbay Harbor where he's restoring a New England-style house built early in this century Malone pilots a 59-ft. Hinckley Sou'Wester sailboat and is not above turning a penny by operating a small marina and boatyard near his vacation home

Friends and business associates say Malone loves dealing even more than he loves sailing His extensive network of associates in the industry suggest the 20 to 30 deals he considers each month. Usually he'll call colleagues and investment bankers for information, but he often finds he knows more than they do

John can reel off details about a little system he hasn't seen in two years says William J Bresnan president of one TCI subsidiary

Malone's dealmaking skills and patience were tested over the three years he courted Robert and Marshall Naify the reclusive brothers who controlled United Artists Communications Inc. Finally, in late 1985 when they decided to sell their 55% stake in UA Malone was ready to write the check—but there was a hitch. The Naifys eager to avoid a big tax bite refused cash But after several months of negotiations the Naifys took $150 million in cash and $270 million in debentures convertible into TCI stock starting in 1988. For just $150 million down Malone won 65% control of the nation's largest theater chain operator with 2,200 screens and a 750 000-subscriber cable system. It cost him $1 100 per subscriber half the going price today

That deal opened up new opportunities for Malone especially after Stewart D Blair the close associate he put in charge of UA went off on a modest buying spree of his own Blair bought theaters with 614 movie screens an operation that sells mobile radios and a radio station in Grand Rapids Blair wants to put together package deals for advertisers and consumers UA recently set up a team comprising representatives from its cable theater and radio operations to study cross-promotion possibilities

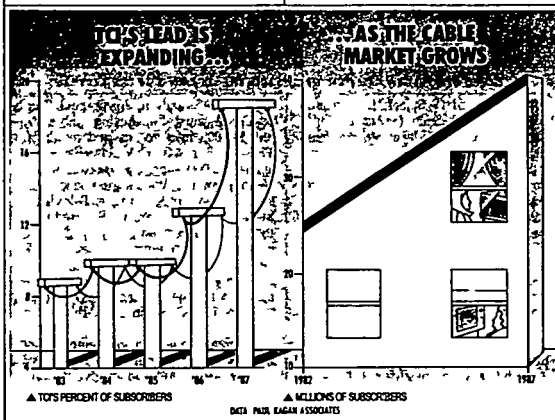
Malone has pretty much stayed on the sidelines this year as record numbers of cable systems have changed hands He seems crouched to pounce on Storer Communications whose owner—Kohlberg Kravis Roberts & Co—is getting ready to entertain bids Investment banking sources tell BUSINESS WEEK that four big names including TCI and Time Inc are considering a joint bid for Storer and its 1.3 million subscribers The consortium has not yet decided how to handle the acquisition if it goes through. It probably will be left intact to avoid huge tax levies No decision can be made until the bidders sort through Storer's complex finances and layers of debt. Malone wants Storer but says there's a limit to what he'll spend for it.

GODFATHER. It's in such situations that Malone's record is worth its weight in cable companies Small operators know they have a lot to gain by being in the champ's corner TCI is a minority partner at 35 cable companies and that entitles its operators to the price discounts that the cable giant has negotiated with program suppliers Services such as HBO often set rates for TCI that are as much as 30% lower than other cable operators pay With extra cash to spend the cable operators can grow more rapidly They also become intensely loyal to Malone

He's a sort of Godfather of the industry says broker J Patrick Michaels Jr chairman of Communications Equity Associates in Tampa Everybody owes something to John

Critics use the Godfather analogy too With lower program costs TCI-connected operators can spend more building their own little empires And when a system is for sale TCI can outbid competitors who pay more for their programming Commenting on the advantage TCI gets from the lower price it pays programmers Frank Biondi CEO of Viacom, says It drives the whole acquisition machine

When program suppliers try to deny Malone the low rates he wants he becomes a fierce opponent. ESPN discovered that unhappy fact in 1984 when it tried to raise Malone's rates Malone threatened to drop the service a potentially devastating blow When MTV tried



ROB CONLOW

THE TED TURNER SHOW: SHORTER REINS, BUT A STEADIER RIDE

By most accounts it has been the worst of times for flamboyant cable industry entrepreneur Ted Turner In the past two years he lost a house in a fire separated from his wife dropped $26 million on a pseudo Olympics in Moscow, and failed in a bid for CBS Inc. He became the laughing stock of Hollywood, too, for assuming $1 5 billion in debt to buy a library of classic, yet overly worn MGM movies And to top it off Turner was effectively forced this summer to give up control of his Turner Broadcasting System Inc. to a group of cable industry operators led by John C Malone president of Tele-Communications Inc.

But what s bad for Turner may yet be good for his TBS empire. With an equity infusion of $562 5 million from the cable community, including industry powerhouses TCI and Time Inc. TBS has been temporarily bailed out of the financial mess created by Turner's overly ambitious purchase of MGM. Even more important, TBS is forging a potentially powerful new alliance with the operators The new investors will give TBS a built in market of more than half the 43 million cable-subscribing U S homes 'The risks are probably the least in our history ' says longtime Turner confidant Terence F McGurk a TBS vice-president.



However Ted Turner and his new crew of cable operators still must navigate some rough water TBS has to replace $1 4 billion in debt, much of it pricey junk bonds with lower-cost capital. If it can't, Turner will be forced next year to give up even more control. The operators who now hold seven seats on the new 15-member TBS board, or Time a big investor could possibly wind up directing TBS

OVERNIGHT SENSATION. Whatever the future holds right now TBS is doing just fine Its Cable News Network Inc. continues to add new subscribers rack up higher revenues and profits earn praise and boost ratings Even ad sales at SuperStation WTBS are outperforming the company's expectations this year Although analysts think it may be years before TBS sees a profit, losses in the first six months of 1987 narrowed to $65.8 million, an improvement from the $77.1 million lost in the same period last year And TBS stock, boosted mostly by the investment from the cable operators has doubled in the last year, to about $13.25.

TBS is laying the groundwork for a cable channel to replace SuperStation WTBS, one which would allow operators to sell local ads. Although it may be difficult to pull off insiders say it s likely to be a cable channel that would carry many of the classic movies in MGM's library major sporting events, and original programming Says McGurk: "The cable industry is looking for the big-event network."

TBS also is exploring the possibility of adding other channels. Industry sources say TBS is having preliminary discussions about acquiring other basic programmers, such as American Movie Classics, Discovery Channel, or Cable Value Network. TCI s Malone is even toying with the idea of having TBS use the programming expertise of Time s Home Box Office Inc. While TBS may just be looking for ideas, a launching pad, or a base of programs for its new channel, the result could very well be the start of what both Malone and Turner have envisioned as another contender for the title of America s fourth television network.

But if Turner does hop back on the acquisition trail, don t expect a rerun of his fiasco with MGM. New TBS board members vow to rein in the Atlanta cable magnate, who has a tendency to be impractical. While some TBS watchers say that Turner will find it difficult to live with such tight new control, no one is expecting him to exit the cable industry soon. Although Turner may not be the powerful fixture in the industry that he was before, his show at TBS is looking very much as if it s back for a return engagement.

By Scott Ticer in Atlanta

to get a higher price from TCI in 1984 Malone vowed to help Ted Turner start a competing service Both ESPN and NTN abandoned their efforts to raise rates And NBC after months of negotiations with Malone in 1985 decided it wasn t worth the company s while to start its own all news cable show when it took a look at the low rates he demanded if he were to carry the channel

The once-icy relations between operators and programmers are thawing It s increasingly clear that the cable industry needs more original programming if it hopes to attract new business and compete for more national advertising dollars Besides the investment in Ted Turner s bailout, Malone has put money in several home-shopping and movie channels as well as in entertainment programming that caters to black audiences He s urging other operators to join TCI in developing a war chest that will be used to launch a new network quality channel possibly using the Turner Broadcasting System as its base Says John E. Sie TCI s senior vice-president. 'Now that we've shown we can band together anything s possible

OVERRUN *Malone isn t staring at a television screen while he waits for his fellow cable operators to come up with the cash He s busy dabbling in newer kinds of cable services He invested $5 million in X Press an information service that provides news entertainment, and financial data to home-computer users via cable The service launched in May on TCI s systems has 3 300 subscribers and Malone expects steady growth Malone owns two-thirds of the enterprise the remaining third belongs to McGraw Hill Inc publisher of* BUSINESS WEEK.

Malone has a lot riding on such investments Without new services cable can be overrun by advances in other technologies such as direct satellite broadcast, which would allow programmers to skip cable operators and beam directly to dish owners Malone is concerned that new rivals such as utility and telephone companies will fight for cable business in well to-do neighborhoods Federal restrictions now bar the Baby Bells from cable operations but the phone companies are fighting to have them lifted

If they succeed they still must contend with Malone His power brains and cash have already made him an equal of the networks and Hollywood studios as they wrestle for control of the entertainment business And those who have seen Malone in action know that it s dangerous to tangle with the king of cable

By Mark Ivey in Denver with Frances Seghers in Washington, Matt Rothman in Pittsburgh, and bureau reports

ANDREW POPPER

EXHIBIT J

RADIO TELEVISION CABLE SATELLITE

Broadcasting Oct 12

Vol 113 No 15

TOP OF THE WEEK

Mimi Dawson to leave FCC for Transportation Department

If all goes well Mimi Weyforth Dawson will go from regulating the broadcasting cable and telephone industries to regulating the airline trucking and railroad industries within the next few months

President Reagan tapped the 43-year-old Republican who has served on the FCC since July 1981 to become deputy secretary of transportation Reagan named the current deputy James H Burnley (left) to succeed Elizabeth Dole as secretary Dole resigned last month to help her husband Senator Robert Dole (R-Kan) in his run for the Republican presidential nomination



I know that Jim and Mimi will push ahead even further on such critical issues as airline safety privatization of public transportation space commercialization and industry and general transportation safety Reagan said at a White House ceremony last Thursday And that list represents a tall order for both of them

The two have not yet been formally nominated but once they are they are expected to win Senate confirmation within a few months Burnley may have some trouble because he antagonized key members of Congress during his four years as deputy secretary

Following the announcement Dawson praised her colleagues particularly Chairman Dennis Patrick, and said she "would miss them dearly She acknowledged that her stint at DOT will be a short one—it will last no longer than the Reagan Administration—but that it should not be an uneventful one I think a lot of things need to be accomplished It's not likely to be a sleepy year, believe me

Dawson's appointment could result in a three person FCC The FCC is supposed to comprise five commissioners but it has been one short since Mark Fowler stepped down as chairman last April Bradley Holmes a former aide to Patrick and now head of the FCC's Mass Media Bureau's policy and rules division has reportedly been tapped to take Fowler's slot, but the White House has yet to nominate him.

According to FCC officials a three person FCC is not preferable but it is workable Under the FCC charter, three commissioners constitute the quorum necessary to take actions

Speculation of who would replace Dawson began even as she accepted the President's praise in the White House rose garden before her colleagues family friends and a roped-off gang of reporters and television cameras

Two of the names being mentioned were on the short list for

Continues on page 32

Turner's TNT adds spark to Atlantic Cable Show

New basic cable network, planned for March launch still needs board approval on the wish list major sports events including the Olympics Academy Awards Grammys pageants

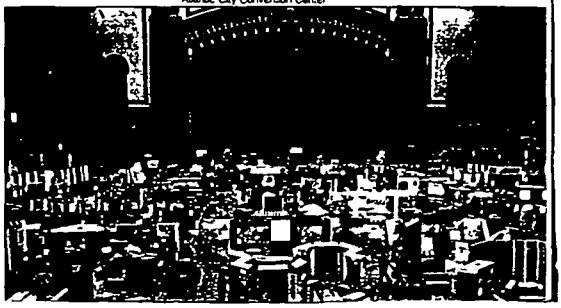
Ted Turner in a keynote address opening the Atlantic Cable Show revealed details about his planned basic cable network Turner Network Television which he said would be a cable-exclusive program service built around major television events The service which needs the approval of the Turner board which is scheduled to take up the matter at a meeting on Friday Oct 16 would be supported by both advertisers and cable operators

Turner's superstation WTBS(TV) Atlanta "has gone about as far as it can go " Turner said "I need to get subscriber fees so we can go to the next level The fees he envisions would begin at 10 cents per month per subscriber in March 1988 and would increase to 20 cents in March 1989 He also said the network would carry 10 minutes of advertising an hour with three to four minutes turned back to the cable operator

The events Turner wants to go after include Major League Baseball the National Basketball Association NCAA basketball all the college football bowl games and associated parades the Olympics the Kentucky Derby the Daytona 500 the Indianapolis 500 the PGA U S Open golf the Masters the British Open Wimbledon U S Open tennis Miss USA Miss Teen USA Miss Universe the People's Choice Awards the American Music Awards the Kennedy Center Honors the Academy Awards the Tony Awards and the Grammys Turner's Good will Games would also appear on the new network

Turner made it a point to claim that making the new service cable-exclusive was his idea And he said his legal counsel has advised him that because TNT would be a start up service it would not run afoul of antitrust laws Cable programers have come under

Atlantic City Convention Center



Continues from page 31

the seat now tentatively set aside for Holmes—Susan Wing an attorney at the Washington law firm Hogan & Hartson and Allen Moore minority chief of staff of the Senate Commerce Committee

Also being mentioned last week were Robert Pettit a former aide to Dawson who is now practicing law at Wiley Rein & Fielding and Rodney Joyce a former deputy at the National Information and Telecommunications Administration who is an attorney with Finley Kumble Wagner Heine Underberg Manley & Casey

According to one FCC source Patrick is sitting this one out Patrick will concentrate on getting Holmes seated the source said and avoid politicking for any replacement for Dawson

There was no word from the White House on Holmes's status last week But the more time that elapses without a nomination the more talk there is about a recess appointment which would give Holmes the seat until the 100th Congress adjourns late next year Congress is currently expected to recess by Thanksgiving

If Burnley's attitude toward Congress is confrontational Dawson's is conciliatory During her six years at the FCC she helped assuage congressional concerns over the FCC's deregulatory initiatives Having spent 12 years working on Capitol Hill she probably understands Congress better than any other member of the FCC

Dawson was considered the FCC's expert on common carrier matters Some of the other commissioners who didn't follow common carrier in such detail listened to her very carefully said FCC Commissioner James Quello I was among them

Dawson went along with most the the FCC's deregulatory moves in broadcasting matters, but was more than a follower When the FCC was liberalizing its multiple ownership rules in 1984 she persuaded the FCC to temper the new rules by placing a cap on on the percentage of homes any one broadcaster may reach

She did cable a favor by insisting on a five-year sunset on the FCC's new must carry rules but she has expressed concerns about the monopoly power of cable systems

Represenatives of the industries she has regulated had good things to say about her last week

"We think she has been an extremely good commissioner said National Association of Broadcasters President Eddie Fritts Her views have been fair and balanced She's always willing to listen and consider our proposals although she has not always voted with us She has an expansive view of the communications landscape We will miss her at the commission

Said National Cable Television Association President James Mooney She has been fair and knowledgeable and it's hard to ask for any more than that

Andy Schwartzman executive director of the Media Access Project which has resisted many of the FCC's deregulatory efforts had a considerably different view "We wish her well he said But if she does for air travelers what she has done to TV and telephones we will all be stacked up over Chicago at first class fares

Speculation that Dawson would leave the FCC for a higher government post has waxed and waned ever since Dennis Patrick beat her out last January to succeed Mark Fowler as FCC chairman (BROADCASTING Jan 26)

Dawson has some valuable Washington connections Between 1973 and 1981 she was an aide and at the end chief of staff to Senator Robert Packwood (R-Ore) who helped get her the FCC seat in 1981 "The senator was spectacular He went to bat for me she said in a 1984 interview Packwood also pushed her for the chairmanship in 1986

Her husband Rhett B Dawson the former staff director of the Senate Armed Services Committee has worked in the White House since April as the assistant to the President for operations overseeing the offices of staff secretary administration and military (BROADCASTING April 6)

fire from noncable constituencies that claim they are not getting a fair chance to obtain cable programing

The new service would premiere in March with an exclusive showing of "Gone with the Wind which Turner bought with the MGM film library Turner said he hoped the service would present original dramatic programing in addition to the major events To fill the void on Turner s superstation WTBS(TV) Atlanta once the sports programing moves over more movies would be scheduled he said As to where operators could find room on crowded systems for the new service Turner said "You ll have to make room where you can "

In his speech Turner said the cable industry needed to improve in four functions to move ahead He said cable has adequately covered niche programing It now needs to develop "dramatic first run programing that competes with the networks " Second the cable industry is "way behind in [its] ability to promote Third penetration should reach 70% in the next five to seven years an achievable goal " And fourth cable needs to "dramatically improve its share of advertising dollars " He said television broadcasting had a five to one advantage over cable in ratings but a 10 to one advantage in ad billings He said advertisers are playing the basic cable networks against one another and inventories need to be constricted to increase rates He saw no reason why cable cannot get 30% to 40% of local TV sales in the future

Turner said the industry shouldn t compromise away things that are important to consumers " referring to action in Washington that would reinstitute syndicated exclusivity Broadcasters and Hollywood as chief proponents of reinstitution are "doing it for their own selfish interests " he said and not for the benefit of the public He also said he was not happy with the must-carry compromise although he did not challenge the latest set of rules But he said they were still discriminatory "I never asked for must carry for CNN " he said Automatic carriage "is not their God given right " □



Turner

Broadband s Kahn plans fiber optic overbuild on NYT Cable system in Southern New Jersey

Irving Kahn wants to put a little fiber into cable s diet

To prove that fiber optics is an economical reliable alternative to conventional coaxial technology the chairman of Broadband Communications plans to build a fiber optics cable system in southern New Jersey which is already served by cable installations belonging to the *New York Times* Kahn who sold the *Times* the system that he now intends to overbuild revealed his plans at the Community Antenna Television Association open forum during last week s Atlantic Cable Show

A long time supporter of fiber optic technology Kahn said he decided to put into practice today what we ve been yelling about for a long time Kahn hopes to have a full scale cable staff on board in 60 to 90 days and to explore the feasibility of establishing fiber optic systems in other parts of the state and the country

Kahn believes that declining prices of fiber optic technology make it just as feasible to install fiber optics as to build a 550 mhz coaxial cable plant

Kahn said fiber optic costs are running five cents a foot He predicted that with increased use of fiber optics in the next few years systems could be built for $500 per home Maintenance costs of fiber optics are much lower than that of coaxial he assert

ed

Kahn said one key benefit of fiber optics is its ability to provide greatly expanded channel capacity which he said would give cable an opportunity to become the local soapbox in the community " Fiber optics would allow cable operators to program 100 channels while using only 25% of the system s capacity

Systems could use such capacity for such services as electronic mail which Kahn said have been largely ignored by the cable industry He predicted that the "downtown revenue" could one day equal the revenue from all of the entertainment services

Expanded channel capacity could more easily accommodate high-definition television which Kahn believes needs 12 to 18 mhz of bandwidth Stereo television could also be more easily implemented with fiber optics

Fiber optics could also provide home owners with gas electric and water meter readings he said

To carry out his plans for fiber optics Kahn is applying for franchises in areas where NYT Cable operates .(Kahn built the original system of 35 channels and two-way interactive services in 1967 He sold it to the Times company in the early 1980 s His consultancy and noncompete agreement with the company expired last March)

Kahn said he chose the NTY system because of the low channel utilization and his belief that there should be more subscribers and more homes taking interactive pay per view services (Roughly half of the NYT system is equipped with Sprucer interactive technology)

"If the existing cable operator has done his job that s not the system that can be easily overbuilt " he said But the key he added was fiber optics If a 550 mhz coax is overbuilt by a 300 mhz coax he said "everybody is going to lose

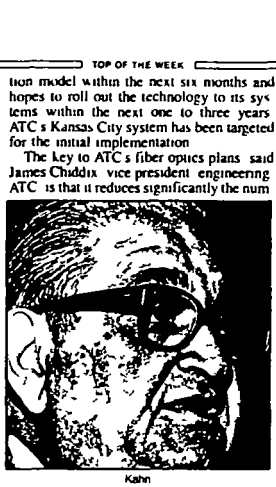
Although his initial system will be a hybrid of fiber optics and coaxial he has plans for the entire system eventually to be constructed with fiber optics Initial financing will be his own Kahn said adding that he does not plan to bring in outside investors until the system is proved

Kahn also warned cable operators about competition from direct broadcast satellites and telephone and electrical utilities A number of phone companies already have moved heavily into fiber optics "Very frankly it s almost too late for cable to get into fiber he said At the same time he predicted dire consequences if it did not "If you don t understand your possible competitors you re doomed " Kahn said

He believes the telephone companies have refined technology so that fiber optics is easier to split in the field and is cheaper to repair Except for a smattering of efforts by a number of operators American Television & Communications is the only player that is making a major push with fiber optic technology

ATC is developing a system of using fiber optics from headend to fiber nodes where it would be integrated with the existing coaxial plant that carries channels into the home ATC hopes to have a laboratory demonstration model within the next six months and hopes to roll out the technology to its systems within the next one to three years ATC s Kansas City system has been targeted for the initial implementation

The key to ATC s fiber optics plans said James Chiddix vice president engineering ATC is that it reduces significantly the num



Kahn

ber of amplification points in a system ATC will overlay its existing coaxial plant said Chiddix but only a fraction of the system would be fiber optics Applying what ATC is developing to its Honolulu system Chiddix said only 100 to 200 miles of the 1 600 miles of plant would be a fiber optic overlay ATC hopes the expense of fiber node electronics can be reduced to the point that fiber optic plant could get within one half of a mile of the home

ATC for now sees no need to extend fiber optics technology all the way into the home Chiddix said coaxial is more compatible with existing consumer electronics is already in place and with fiber optics delivery more and better signals to node points a very good broadband pathway capable of handling expanded channel capacity for such services as HDTV

Cable and broadcasters at odds over Bryant repositioning bill

The Atlantic Cable Show served as the first open forum for debate on the channel repositioning bill introduced by Representative John Bryant (D-Tex) with cable officials roundly denouncing the bill and broadcast lobbyists describing it as necessary because of continued channel changes by cable operators

The bill which picked up the endorsement of the Motion Picture Association of America last week (see page 79) would grant local officials the power to mediate disputes over channel realignments John Summers senior executive vice president National Association of Broadcasters said the bill was needed "based on immediate past history" of channel changes by cable operators Broadcasters spend hundreds of thousands of dollars on channel promotion which he said can "go down the drain overnight" if a cable operator moves a broadcaster from his FCC assigned location to another channel

James Mooney president of the National Cable Television Association countered by asking whether Summers was comfortable with local governments which may come under the investigative scrutiny of local television broadcasters deciding where their channels should be placed What asked Mooney prevents a mayor from moving a VHF affiliate to a much higher channel position because he has a grudge against the station? Summers said he assumed the local cable official and not the mayor would be making that decision and the situation Mooney described was a worst-case scenario "I don t see any other resolution to that problem " Summers said in referring to the Bryant bill The FCC is unlikely to do anything about the problem he said but he acknowledged that legislation is probably a long shot

Shaun Sheehan vice president Tribune Broadcasting told the cable operators that the solution in great part is in your hands " He emphasized the importance to Tribune of channel assignments that reflect the broadcast dial It s important to us to come up on channel 11 he said referring to Tribune s WPIX(TV) New York

Bert Carp vice president for government affairs Turner Broadcasting said the broadcasters position on the bill threatens the improved relations between the industries He called the Bryant bill a very ugly episode " In referring to his boss who successfully challenged the must-carry rules Carp said it will be "tougher for Ted to pull back when the next compromise is reached because of broadcasters support for the bill He also said the legislation is a UHF bill to keep the competitive advantage UHF obtained when carried on VHF channels on cable systems

Summers retorted that the bill doesn t violate the provisions of the must-carry compromise All it says he said is that disputes must be worked out on the local level It doesn t mean a mandate for broadcasters to be on-channel he said But of concern to some cable operators in the audience were the number of jurisdictions that could be involved in alignment questions NYT Cable s system in southern New Jersey it was pointed out has 55 different franchise authorities all of which could be involved in a challenged channel shift It could be a bureaucratic nightmare

The Bryant bill got another airing the next day when Preston Padden president of the Association of Independent Television Stations and Michael Soper senior vice president development Public Broadcasting Service squared off against Stephen Effros president of the Community Antenna Television Association and Gerry Lenfest president of the Lenfest Group

Padden said the bill was a reasonable and moderate" solution to a problem that despite publicity has not gone away My phones are ringing off the hook he said from members with channel repositioning horror stories In many instances he charged shifts were made without notice and during crucial ratings periods He also said in many instances second sets in the home are not cable ready so if an independent has been moved above channel 13 it cannot be viewed The ratings that indepen-

dents are getting under the peoplemeter 24% of the total audience according to Paid den prove that consumers like independent programing and that cable operators should not move channels thinking that only small audiences are involved

Soper said the 152 reported shifts of pub lic broadcasting stations in 1987 has affected 44% of all public stations We re worried about the trend he said in explaining pub lic broadcasting s support of the Bryant bill All the panelists agreed with one point made by Soper that lack of communication has helped to exacerbate the situation (Indeed public broadcasters from New York and New Jersey took out an exhibit booth at the Atlan tic show to explain their side of the reposi tioning question [see page 83])

Effros in raising many of the points Mooney had raised was blunt about the legisla tion It is unconstitutional he said and the stupidest idea the broadcasters have ever come up with He questioned whether broadcasters understood the First Amend ment applications of local governments de ciding channel alignments When affiliation changes have taken place in a market he said viewers were able to find the program ing they wanted to watch without govern ment help

Lenfest said his systems serving over 240 000 subscribers had not moved any sta tions and it was his view the problem was "more imaginative than real " There are oc casions where channel shifts are justified but over all he said any changes create all sorts of headaches His advice was to leave the VHF s where they are and keep as many UHF s as possible on their on-channel as signments

Lenfest called for regional cooperation be tween broadcasters and cable operators and also thought it would be valuable if both sides could agree upon guidelines on where chan nels should go Padden responded that no sin gle plan would solve the problem saying it is our hope to work it out on a local basis

Mooney and company also discussed must carry and syndicated exclusivity Sum mers said he hoped the must-carry rules would survive court review but if they did not an open marketplace would result If that happened he said the compulsory li cense would be eliminated soon afterward He also doubted whether the cable industry could be pulled together for another crack at the rules and speculated that maybe Jack Valenti [president of the Motion Picture As sociation of America] will be the winner when the dust settles But Summers did not believe the local portion of the compulsory license would be thrown out "There are very pragmatic people on the Hill he said And it is in the best interest of broadcasters and cable operators he said to preserve the compulsory license for carriage of local sig nals

Carp said the defenders of the rules have their work cut out for them and he doubted whether they could succeed As for what happens if the rules are struck down he hoped that "interindustry bitterness" could be avoided but with broadcasters support of the Bryant bill "I just don t know "

Carp saw the FCC s consideration of revival of syndicated exclusivity as "a solution seek ing a problem He said it would be "bad consumer relations due to the "enormous dis ruption" in schedules that would result

Summers said broadcasters have always supported program exclusivity and saw an opportunity to bring back the rules when Dennis Patrick became FCC chairman He said the Ferris commission went too far in throwing out the rules in 1980 Mooney asked Summers what would happen if rein stitution of the rules caused Hollywood to increase program prices Summers said that was a possible scenario but that broadcast ers could handle that situation

Summers s personal view was that syndex would be adopted but challenged in court At that point he said maybe cable and Hollywood would get together and solve their copyright problem which spills over into the program exclusivity debate

Cable executives, mindful of phone companies and reregulation say industry needs to concentrate on programing marketing and technology

Top executives from three MSO s plus one independent operator identified programing marketing and technology as the key driving forces cable needs to stay a step ahead of future competition The biggest hazards ca ble faces the Atlantic Cable Show partici pants said are reregulation intrusion by phone companies a revival of syndicated exclusivity for broadcast carriage and fail ure as an industry to live up to its promises

James Cownie president of Heritage Communications and chairman of the Na tional Cable Television Association said we have a lot of ground to defend He said cable needs adequate channel capacity to of fer the new services coming on board and in development That will stand the industry in good stead Cownie said against DBS telcos and overbuild competition He also urged operators to embrace the new pro gram services and develop cable-exclu sive programing which he said is a source of protection against competition Customer service also needs work he said Cownie s biggest concern was direct and indirect com petition from telephone companies Cross subsidization is something we can t toler ate he said

Kenneth Bagwell president Storer Ca ble urged improvements in marketing tech nology and advertising sales He also said cable should capitalize on high definition television which is going to come a little faster than we think He called local adver tising the most underrated source of rev enue He said cable operators ought to have the courage to turn business down in order to squeeze inventory and increase prices Storer he said has separated cable ad sales from the cable operation itself preferring to let ex broadcast sales personnel handle cable ad sales Bagwell urged cable operators to be careful how they conduct themselves I fear most reregulation Bagwell said

Charles Dolan chairman of Cablevision Systems said the driving force in the cable industry will be the increase in skill and energy with which we perform the basic tasks of our services He identified those as service programing and marketing Dolan said Cablevision was improving service with greater feedback from customer service re presentatives intersystem competitions to increase penetration and improved installa tion task force training He said cable opera tors need the subscriber to say I cannot get along without cable Dolan saw no future threats only challenges The one menace he said was failing to do everything we could do

Joe Gans president Cable TV Co ar gued for greater commitment to technology and urged operators to support the creation of a cable technology laboratory We ve gone flat Gans said We could have done HDTV eight to 10 years ago

Scrambling also should have been done years ago he said Somebody has to take the leadership The bottom line Gans said is that technology made this industry Gans also was fearful of the costs to smaller operators if syndex is reinstituted and opera tors are forced to drop segments of program ing and insert others

On overbuilds Cownie said cable opera tors will have to build areas with lower homes per mile ratios than in the past Bag well blasted the greenmail and cherrypick ing overbuilds but said he had no sympathy for operators who provide few channels and poor service and are overbuilt Dolan said cable should take a very open attitude to ward competition wherever it may arise □

Fairness imbroglio

As anticipated House passage of an FCC authorization measure (H R 2961) stalled last week in a dispute over Democrats attempt to inject in an accompanying commit tee report a criticism of the FCC's repeal of its fairness doctrine Commerce Commit tee members came to a standoff over the draft of the report a week earlier (In Brief Oct 5) The Democratic criticism of the FCC's action caught Republicans by sur prise but by late last week they reportedly succeeded in excluding the language The report was to be filed late last Friday (Oct 9) and was said to contain no mention *of fairness The bill could come up for action this week*

Originally the report was said to debunk the FCC's justification for elimination of the doctrine and to instruct the FCC not to participate in any judicial appeal if the doctrine is codified by Congress Committee reports are not binding and it is unclear what effect the fairness section would have had on the FCC The bill's primary purpose is to establish funding levels for the agency in fiscal year 1988-89

EXHIBIT K

FOX WEINBERG & BENNETT
1714 MASSACHUSETTS AVENUE N W
WASHINGTON, D C 20036

NICHOLAS W ALLARD

TELEPHONE 202 778 0800
TELECOPIER 202 778 0330

RECEIVED
MAR 4 '88
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March 4, 1988

Hand-Delivered, Return Receipt Requested

Mr H. Walker Feaster
Acting Secretary
Federal Communications Commission
1919 M Street, N W
Room 222
Washington, D C 50554

RE. Transfer of Control of Earth Stations Licenses WK42, E7990 -- Your Reference #039-DSE-TC-88(2) and License E4599 -- Your Reference #1038-DSE-TC-88

Dear Mr Feaster.

Enclosed are the original and five copies of the Wireless Cable Association's comments on the application for transfer of control of Tempo Enterprises' FCC licenses, which are referenced above

I would be happy to respond, should you require any additional information

Sincerely,

Nicholas W Allard

Nicholas W Allard

NWA/rd
Enclosures (6)
cc Curt Bradley
James M Theroux

WIRELESS CABLE ASSOCIATION COMMENTS
ON THE APPLICATION FOR TRANSFER OF
CONTROL OF TEMPO ENTERPRISES' FCC LICENSES

In connection with the acquisition of Tempo Enterprises, Inc. ("Tempo") by Tele-Communications, Inc ("TCI"), applications have been filed for the transfer of control of the licensees of earth stations WK42, E7990, and E4599. The licensee of common carrier satellite uplink Earth Stations WK42 and E7990 is Southern Satellite Systems, Inc. ("Southern Satellite"), a wholly-owned Tempo subsidiary. Southern Satellite is in the business of retransmitting television broadcast Station WTBS, Channel 17, Atlanta, Georgia to approximately 41.6 million cable television subscribers. The licensee of satellite transmit Earth Station E4599 is Tempo Television, Inc. ("Tempo TV"), a 99.2%-owned Tempo subsidiary. Tempo TV is in the business of providing originated television programming to approximately 12 5 million cable television subscribers TCI, which would assume control over these two licensees, is the nation's largest cable television operator, with control of or interests in approximately 8 million subscribers

The Wireless Cable Association is highly concerned about the potential repercussions of the transfer of control of these two licensees. While such a transfer may raise numerous communications policy issues, these comments will focus on its effect on competition in the retail market for satellite-delivered programming This transfer represents a vertical integration that will put the nation's largest cable

operator in control of two of the nation's most important sources of satellite-delivered programming The wireless cable industry has been restrained from competition with cable operators due to its inability to obtain satellite-delivered programming. Wireless Cable's view is that programmers refuse to deal with wireless cable (1) if they are leery of alienating cable firms or (2) if the programmers are owned in whole or in part by cable The refusals to deal bolster cable's power in the market for the delivery of satellite programming to the degree that if the transferee of these two licensees adheres to the typical pattern and the subject programming is not offered to competitors of cable such as wireless cable, then the competition in the delivery of satellite television programming to consumers will be gravely diminished. Wireless Cable asks that TCI respond by stating its intention to make the subject programming freely available to distributors such as wireless cable firms

A. The Wireless Cable Industry

The wireless cable industry consists primarily of firms possessing FCC authorization (or leasing capacity) to deliver programming received from satellites and retransmitted on microwave frequencies to small antennas on individual homes.1/ Currently, wireless cable firms are

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1/ The Wireless Cable Association is a trade association of firms and individuals that are providing or intend to participate in the retail distribution of programming through one or a combination of the following services: Multipoint Distribution Service ("MDS"), Multichannel Multipoint Distribution Service ("MMDS"), Instructional Television Fixed Service ("ITFS"), and Operational

operating in Cleveland, Detroit and New York, among other places. Many entrepreneurs are attempting to bring wireless cable to other markets but have been hindered in both their attempts to secure funding and to start their businesses by the lack of assurances of programming availability

Wireless cable firms typically can deliver satellite television programming[2/] to homes at lower costs than those incurred by cable franchisees. The principal reason is that cable wiring expenses are high and cable must wire an entire street to deliver programming to any individual home on a street. Wireless cable's fixed costs are smaller, and the marginal costs of each new subscriber -- the costs of installing an antenna on a particular home -- are less than the pass-by charges incurred by cable.

B. The Denial of Programming to Wireless Cable

Many programmers are refusing to deal with wireless cable.[3/] The programmers' stated reasons include the view

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Fixed Service ("OFS") It also includes many others involved or potentially involved in this business, such as antenna and other equipment suppliers.

2/ Satellite programming includes news (including weather, financial, sports, local, and general), sports (both regional and national), variety shows, movies, and shopping.

3/ Cable franchisees typically market a basic service to their customers of 12 to 36 channels of programming, including local broadcasts Generally, customers can also subscribe to one or more premium services, such as movies. Most cable and wireless cable firms believe that in order to attract subscribers it is necessary to provide at least the major premium services and certain preferred aspects of the basic package, such as live sports and continuous news

that wireless cable firms are not well run, the claim that wireless cable technology delivers a poor signal and is subject to theft; and the contention that future market penetration of such programming should be entrusted to cable. None of these alleged reasons has a sound factual basis. Wireless Cable has reason to believe, based on private conversations with programmers, that the programmers' motivation for refusing to deal is their unwillingness to alienate cable.

Moreover, two years of operating experience by the Cleveland wireless cable system reflects the spuriousness of any criticism of the technology of wireless cable. The marketplace is an efficient mechanism for sorting the merits of various technologies, assuming it is permitted to function freely. The fact is that programmers and cable operators have stymied the development of numerous other alternative technologies, such as DBS, backyard dishes, and Ku-band satellites.4/ Finally, programmers and cable operators have aimed their efforts towards preventing the development of "overbuilds" for cable, i.e., "second franchises" that use the cable technology.5/ This demonstrates that established cable franchisees oppose not only alternate delivery

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4/ See e.g., Cable in Lead in Hill Home Dish Fight, Broadcasting, Sept. 29, 1986, at 31 (cable opposing Gore bill to make programming available to backyard dish owners).

5/ See, e.g., Shooshan, Cable's Changing Tune on Competition, Cablevision, Feb 1, 1988, at 15 (cable industry "seeks program exclusivity for itself against SMATV, MMDS, DBS and competing cable systems")

technologies (regardless of their engineering merits) but any competitive retailer of satellite programming.

In reality, the inability of wireless cable to obtain programming is the result of exclusive dealing arrangements between cable operators and programmers, and vertical integration between cable and programmers pursuant to which the acquired programmer refuses to deal with wireless cable. Individual cable franchisees are local monopolies[6/] that have enormous national power when acting in concert. TCI is the most salient example.[7/] In some instances, cable franchisees demand exclusive contracts by which programmers agree not to make their product available to competitors of cable In other instances the cable operators are indulged by programmers who refuse to deal with wireless cable firms. In still other instances programmers will sell to wireless cable firms only if the firms promise not to distribute the programming in competition with cable.

Finally, even when programmers do offer their wares to wireless cable, they typically charge discriminatorily high prices, for no apparent reason other than, probably, a desire to please cable. All these practices have the effect of restraining competition at the retail level between cable

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6/ See Central Telecommunications, Inc. v TCI Cablevision, Inc., 800 F.2d 711 (8th Cir. 1986), cert denied, 107 S. Ct. 1358 (1987).

7/ See The King of Cable TV, Business Week, Oct. 26, 1987, at 88 (head of TCI is "possibly the most powerful man in television" -- not only cable) TCI's cash flow is expected to hit $1 billion in 1988, Multichannel News, Feb 29, 1988, at 1.

operators and competitors such as wireless cable The biggest losers are the consumers. As a result, the United States Senate has begun to express its concern over the denial of access to programming. Senator John Kerry recently noted that "efforts to promote one method or kind of retail distribution [of satellite-delivered programming] over another . . . can frustrate competition and ultimately harm consumers."8/

The ultimate weapon for cable operators to preclude retail competition is the acquisition of preferred programming for the purpose of exclusively distributing it through cable. This weapon has been used with increasing frequency. There are approximately 80 different satellite television programming services in existence, and more than half of such services are owned in whole or in part by cable. Indeed, even as the number of programming services has burgeoned, the pace of vertical integration has increased, so that cable's ownership percentage has remained constant during the last several years. TCI, the largest cable operator in the country, already holds equity interests in the following programming sources. WTBS, CNN, and Headline

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8/ Letter from Hon. John Kerry to Michael Fuchs, Chairman, Home Box Office, Inc. (Feb. 11, 1988) (attached hereto), requesting information regarding exclusive dealing arrangements. Senator Kerry states that such arrangements raise "fundamental antitrust and communication policy issues," particularly, "in light of recent reports by the National League of Cities and the National Cable Television Association of significant increases in the price of basic service in a deregulated cable market."

News, all owned by Turner Broadcasting System (14.16%); Cable Value Network (20%); American Movie Classics (50%); Black Entertainment TV (16%); Event TV (10%), Discovery (14%), and Fashion Channel (10.5%). As one senior cable executive put it, the denial of access to programming creates "real potential public policy problems."9/

The anticompetitive potential of vertical integration is exemplified by the recent case of New York Citizens Committee on Cable TV v. Manhattan Cable TV, Inc.,10/ involving cable television services in lower Manhattan. The defendant, Manhattan Cable TV, Inc. ("MCTV") has a cable franchise agreement with New York City. While the agreement itself is not exclusive, no other company has a franchise. MCTV is owned by Time, Inc. It offers 31 channels as its basic service and three premium services, two of which (HBO and Cinemax) are owned by Time. The plaintiff, a citizens group, charged MCTV and Time with monopolizing the market for pay cable movie and non-sports entertainment programming service in lower Manhattan, in violation of Section 2 of the Sherman Act. This charge was based

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9/ Vertical Integration: The Business Behind the Boom in Cable Programming, Broadcasting, Nov. 23, 1987 at 40, 68. With respect to some of these sources, TCI may have the opportunity to acquire more equity up to 25 66% of Turner Broadcasting System, and up to 14% of QVC See id at 42 Indeed, Ted Turner has conceded that cable operators led by TCI have de facto control over Turner Broadcasting System Turner Talking TNT, Broadcasting, Feb. 29, 1988, at 40.

10/ 651 F Supp. 802 (S D N Y. 1986)

primarily on the allegation that Showtime, the Movie Channel, and Bravo had all unsuccessfully sought channel access from MCTV.

The plaintiff sought injunctive relief making channel capacity available to pay cable programmers unaffiliated with Time. The case ended in settlement when MCTV agreed to make available to its subscribers a single additional pay programming service not affiliated with Time, and to introduce one or more additional non-affiliated pay programming services when it upgraded its system in the future.11/

Just as a vertically integrated cable company can deny channel access to programmers in competition with programmers it owns, it can deny programming to retail distributors in competition with its cable services. If TCI acquires control of Southern Satellite and Tempo TV, it might refuse to make WTBS and Tempo programming available to wireless cable at a fair price in those areas where wireless cable is in direct competition with a cable operator (which might or might not be owned by TCI). Indeed, one programmer that is partially owned by TCI, the Fashion Channel (10 5%), has instituted a policy of distributing its programming only to cable. The possibility of such a restriction of competition at the retail level with respect to Southern Satellite and Tempo TV as well is particularly troubling due

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11/ New York Citizens Committee On Cable TV v. Manhattan Cable TV, Inc , No. 86 Civ. 0859 (RSW) (S.D N Y Dec 2, 1987).

to the very significant nature of the programming provided by these two licensees, and TCI's history of anticompetitive behavior.

C. The Importance of WTBS and Tempo TV as Sources of Programming

Southern Satellite and Tempo TV are extremely important sources of satellite-delivered programming. Southern Satellite is the only company that presently retransmits WTBS, which has the second largest number of subscribers for satellite television programming in the United States. This programming is on the short list of services preferred by every retailer of programming. It would be very difficult for a retailer to compete without such programming -- just as, for example, a grocery store could not complete without milk and eggs to sell. Obviously, if TCI denied wireless cable access to WTBS programming, the injury to wireless cable would be severe.12/

Tempo TV is also a significant source of programming. Besides the fact that it already has 12 5 million subscribers, it is widely anticipated that "Tempo TV could serve another purpose a launch platform for Turner Network Television (TNT)."13/ TCI is interested in starting a new network-quality satellite-delivered channel, as is

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12/ Southern Satellite currently operates as a common carrier and, as such, apparently makes WTBS programming available to all retail distributors. See Tempo Deal Expands TCI Reach, Cablevision, Nov. 23, 1987, at 12

13/ A Dynamite Tempo For TCI, Cable TV Programming, Nov 30, 1987 at 4 See also Tempo Deal Expands TCI Reach, Cablevision, Nov. 23, 1987, at 12.

Turner Broadcasting System 14/ TCI and Turner could build such a channel by starting from the existing Tempo TV subscriber base. While Tempo TV has previously been available to wireless cable, Turner has explicitly proposed making TNT a cable-exclusive service 15/ If TCI denied wireless cable access to TNT, the anticompetitive effect would be even greater than a denial of access to the existing Tempo TV.

D. TCI's History of Anticompetitive Behavior

While it is disturbing to see any major source of programming fall under the control of cable operators, with the resulting potential for denial of access to wireless cable, it is particularly troubling to consider that these two sources could be controlled by a company with a history of anticompetitive behavior. In Central Tele-Communications, Inc. v. TCI Cablevision, Inc., 16/ TCI was found to have violated the federal antitrust laws in taking illegal anticompetitive actions to preserve its monopoly over the Jefferson City, Missouri cable television market. TCI was assessed $35.8 million in damages. The Jefferson City case may not be an isolated incident. For example, in H R M ,

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14/ The King of Cable TV, Business Week, Oct 26, 1987, at 88, 96.

15/ Turner's TNT Adds Sparks to Atlantic Cable Show, Broadcasting, Oct. 12, 1987, at 31.

16/ 800 F 2d 711 (8th Cir. 1986), cert. denied, 107 S Ct 1358 (1987)

Inc. v Tele-Communications, Inc.,[17] TCI has been accused of violating the federal antitrust laws in connection with cable television services in Kearney, Nebraska.

TCI's anticompetitive behavior does not appear to be limited to the context of local cable franchisees. TCI has been accused repeatedly of reducing competition at the national level in the programming context.

> The [Motion Picture Association of America] has charged that TCI extracts "monopsony" rents from cable programmers and that it has acted as a "bottleneck" to the introduction of new programming services. Monopsony is buying power -- the opposite of monopoly, which is selling power . . . Indeed, at least a few economists view TCI's situation as posing potential problems.[18]

E. Conclusion

The pending applications for transfer of control of Southern Satellite and Tempo TV raise serious public policy problems, which will be exacerbated if TCI continues to pursue its apparent business plans. The FCC should consider whether there is a way to assure that such vertical integration will not lead to a denial of access to programming for retail competitors of TCI such as wireless cable. Specifically, TCI should provide assurances that it will sell all its wholly or partly acquired programming to wireless cable firms at non-discriminatory prices.

17/ 653 F. Supp. 645 (D. Colo. 1987)

18/ Kahn, Concentration and Power in Cable TV U S Seen Unlikely to Intervene Now, Cablevision, May 18, 1987, at 86, 92-94

Dated: March 4, 1988

Respectfully submitted,

WIRELESS CABLE ASSOCIATION

By. James M. Theroux /pd
James M. Theroux
Chairman, Regulatory
Affairs

DANIEL K. INOUYE, HAWAII
WENDELL H. FORD, KENTUCKY
DONALD W. RIEGLE, JR., MICHIGAN
J. JAMES EXON, NEBRASKA
ALBERT GORE, JR., TENNESSEE
JOHN D. ROCKEFELLER IV, WEST VIRGINIA
LLOYD BENTSEN, TEXAS
JOHN F. KERRY, MASSACHUSETTS
JOHN B. BREAUX, LOUISIANA
BRUCE ADAMS, WASHINGTON

JOHN C. DANFORTH, MISSOURI
BOB PACKWOOD, OREGON
NANCY LANDON KASSEBAUM, KANSAS
LARRY PRESSLER, SOUTH DAKOTA
TED STEVENS, ALASKA
BOB KASTEN, WISCONSIN
PAUL S. TRIBLE, JR., VIRGINIA
PETE WILSON, CALIFORNIA
JOHN MCCAIN, ARIZONA

RALPH B. EVERETT, CHIEF COUNSEL AND STAFF DIRECTOR
W. ALLEN MOORE, MINORITY CHIEF OF STAFF

United States Senate

COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION

WASHINGTON, DC 20510

February 11, 1988

Mr. Michael Fuchs, Chairman
Home Box Office, Inc.
1100 Avenue of the Americas
New York, New York 10036

Dear Mr. Fuchs:

I am writing to you with a number of questions I have about Home Box Office, Inc.'s offer of "wireline exclusivity" to cable systems and multiple system operators ("MSO's") which carry HBO's programming. As a member of the Communication Subcommittee of the Senate Commerce Committee, I have been particularly interested in competition in the developing market for satellite-delivered television programming.

HBO's wireline exclusivity proposal has been dubbed "overbuild protection" in the trade press and described by some consumer advocates as "monopoly maintenance" based on concerns over its potential impact on home viewers. The wireline exclusivity proposal is also opposed by smaller or independent cable systems which are providing -- or plan -- competitive service in communities currently served by only one cable television system. Non-cable distributors may see the proposal as just another effort, this time directed at part of the cable industry, to deny access to programming that is necessary to compete with the established cable system or franchise area. I understand that HBO has undertaken other exclusivity arrangements, as evidenced by reports, for example, that HBO is offering to make cable operators exclusive Ku-band satellite distributors within their service areas.

HBO is, of course, not the only programmer engaged in activities which raise such fundamental antitrust and communication policy issues, and I am well aware that HBO is affiliated with one of the major cable MSO's, American Television & Communications Corporation (ATC), through its mutual parent Time, Inc. While your corporate parent may not wish to have competitors use HBO to compete in ATC's own

franchise areas, your policy as announced, does not seem to be limited to just such franchise areas. I am troubled by the appearance that HBO may be involved in efforts to promote one method or kind of retail distribution over another, efforts which can frustrate competition and ultimately harm consumers. Accordingly, I would appreciate your response to the following questions:

1. What benefits do home viewers derive from arrangements such as HBO's wireline exclusivity proposal, and what will it cost them?

2. Would the 25 cents per subscriber fee, apparently to be charged by HBO for exclusivity be collected "up front" when a cable operator agrees to purchase one of HBO's services, or would this fee only be collected in the event an overbuilder competes or threatens to compete with the existing cable operator within a franchise area?

3. Is HBO's wireline exclusivity proposal a policy developed by or directed by HBO's parent company or cable affiliate to advance its own interest?

4. If the wireline exclusivity proposal is not really a strategy developed or directed by HBO's parent company or cable affiliate, why is it not in HBO's interest, and also why is it not in the home viewer's interest, for HBO to promote competition among different retail distributors of its programming, including cable distributors, such as wireless cable, SMATV, and DBS?

5. To what extent do exclusivity arrangements, such as HBO's wireline exclusivity proposal, effectively limit the number of households that HBO can reach, increase prices, and impede competition among those distributors seeking to sell satellite-delivered programming within any local market?

6. To what extent is HBO's programming available now at fair terms and conditions, and will be available in the future, to cable overbuilders and any non-cable distributors who seek to compete with cable distributors for whom HBO is or will be available?

I am particularly interested in your response in light of recent reports by the National League of Cities and the National Cable Television Association of significant price increases in the price of basic service in a deregulated cable market. As you know, Consumer Reports has quantified consumer dissatisfaction with existing cable services. These issues are similar to those raised late last year when the Committee considered S. 889, the Satellite TV Fair Marketing Act. During the Senate Commerce Committee's consideration of that measure, I raised the question of whether there is fair and adequate competition among alternative distributors and technological means of delivering such programming to home viewers. I will be grateful for your assistance in examining this subject as I prepare for further Senate action on S. 889 and related legislation this Spring.

I look forward to hearing from you.

Sincerely,

John Kerry
United States Senate

cc: Hon. Ernest F. Hollings
Hon. Daniel K. Inouye

James P. Mooney, President,
National Cable TV Association (NCTA)

MultiChannel News

The Newspaper of the Changing Television Industry

EXHIBIT L

HBO Offers MSOs Overbuild Protection

By Lee Luchter and Thomas P Southwick

NEW YORK CITY—Home Box Office Inc. last week began offering multiple systems operators the chance to gain "wireline exclusivity" in the residential distribution of HBO services, said company vice president of corporate affairs David Pritchard.

The new policy essentially means overbuilders seeking to build a second cable system in an area would not be able to offer HBO services if the existing operator is covered by the HBO exclusivity contract. HBO runs three premium services: Home Box Office, Cinemax and Festival.

The policy would not prevent multichannel multipoint distribution services, private cable systems or direct broadcast satellite services from offering HBO services in areas served by covered cable systems.

To gain "wireline exclusivity," Mr Pritchard said, multiple systems operators would have to meet certain performance standards such as participation in HBO marketing campaigns and extension of penetration by HBO services in the covered systems. Those performance standards would vary from company to company.

In addition participating operators would be required to pay an additional fee of 25 cents per subscriber per month for each HBO service covered.

Mr Pritchard said the new policy would not affect any existing HBO contracts. In situations where two companies are now offering HBO services to the same customers, they will be allowed to continue to do so, he said.

But companies signing on for "wireline exclusivity" would be guaranteed that future overbuilders would not be able to gain contracts with HBO.

Mr. Pritchard said the exclusivity provisions do not present any legal problems because "exclusivity is a regular and standard practice in the entertainment industry." He noted that broadcast networks grant exclusivity to their affiliated stations and that movie studios sell theaters exclusive rights to run films.

Mr. Pritchard said the new policy was a way of rewarding those cable operators who have been strongly marketing HBO services. The policy he said, "makes good business sense to us."

Reaction among multiple systems operators to the HBO plan was generally positive last week, with many top executives saying that they wanted to study the plan further. The HBO policy "is certainly attractive," said one chief executive at a multiple systems operator. "There would be markets where I would like exclusivity."

Reaction from overbuilders was less enthusiastic. Harry Cushing president of Telesat, which is overbuilding several Florida cable systems, said the HBO policy demonstrates "the length the incumbent MSOs and NCTA (National Cable Television Association) members will go to block development of competitive cable."

Mr. Cushing pointed out that the vertical integration of the cable industry—with Time Inc. owning both HBO and American Television & Communications Corp.—is an obstacle to competitive cable.

Irving Kahn whose Choice Cable Co. has proposed to overbuild the NYT Cable systems in New Jersey would say only that "at this point in time we're assuming HBO and the other programming sources will treat us fairly and within the law."

Rainbow Offers Ops Exclusivity Contracts

By Debbie Harrod

WOODBURY, NY—Rainbow Program Enterprises last week unveiled its version of exclusivity contracts for pay TV operators carrying Rainbow's sports channels.

The "Marketing Incentive Program," as Rainbow is calling its plan, gives qualifying operators exclusive rights to the sports service in their area as well as the right to license the service to other like operators within a specified territory, if that operator reaches houses the MIP-qualified operator cannot. The MIP, said Rainbow president and chief executive officer Marc Lastgarten, is available to all pay-TV technologies: cable, multichannel multipoint distribution services, satellite master antenna television systems and direct broadcast satellite.

"The principle is that the sports channels are trying to become more widely distributed," Mr. Lastgarten said.

He acknowledged that a cable operator, though, would be interested in the program largely because of the possibility of overbuilds.

To qualify for the MIP, an operator has to be widely available in an area, have wide penetration of the sports channel in that area, and agree to several terms relating to viewership, promotional money to be spent and the area's rate card. Mr. Lastgarten said that the program was structured region by region, and some operators may pay more than they currently do for the channel but others will stay the same.

Rainbow has five regional sports services: SportsChannel New York, SportsChannel New England, SportsChannel Florida, SportsVision Chicago and PRISM of Philadelphia. Some of the channels are pay and some basic, also contributing to the differences in MIP qualifications.

Rainbow also owns Bravo and American Movie Classics. Mr. Lastgarten would not say whether similar programs would be implemented for them, noting it was "easier to get at this (the sports channels) because it is geographic." □

Cool response to exclusivity offers

MSOs have demanded overbuild insurance but now look askance at plans by HBO, others

By John Wolfe

WASHINGTON—Home Box Office s unique "overbuild insurance " which lets cable affiliates purchase exclusive wireline distribution rights for HBO s pay networks likely will be the first of several such proposals from programmers responding to cable operators calls for exclusivity At least three other programmers—Showtime/The Movie Channel Rainbow Program ming Enterprises and The Nashville Network—actively are considering ex clusivity offers network officials con firm

Meanwhile operator response to HBO s offer has been decidedly lukewarm While HBO has received "a number" of signed agreements from operators, most major MSOs "want to have more in-depth conversations with us " according to one HBO official As a result, HBO s Feb 15 deadline for the offer is "flexible " the official indi cated

HBO s offer announced in a letter to affiliates from HBO President Joe Collins requires affiliates to pay a surcharge of 25 cents per subscriber per month for the exclusive rights to distribute via cable HBO Cinemax or Festival The three-year agreement runs from March 1 1988 to March 1 1991

The proposal clearly is aimed at wireline overbuilds and does not apply to competitive distribution via satellite or microwave according to HBO "In the wake of cable deregulation there is a growing concern about overbuilds particularly as franchises become more broadly interpreted " Collins wrote

"Not only have overbuilds demon strated little or no long term financial viability " he wrote "but we at HBO also question whether overbuilds are an effective environment for the long term growth of our programming serv ices " The exclusivity offer Collins said will give affiliates "an incentive to continue to aggressively market and promote our brands "

Exclusivity will not be offered in already overbuilt areas or where a franchise is shared by more than one operator HBO said The agreement also sets forth a number of conditions which operators must meet For exam ple affiliates must participate in HBO s promotional campaigns must pass 95 percent of the homes within their franchise area and must maintain penetration levels of 12 percent for HBO 6 percent for Cinemax and 1 percent for Festival

Affiliates also "may not hold exclu sive cable distribution rights for any other pay or basic programming service whose programming consists primarily of theatrical films " HBO said

Operators recently have placed cable exclusivity high atop their lists of priorities and programmers in addi tion to HBO are beginning to respond Showtime may announce its version of an exclusivity proposal late this month a network spokesman said

"We are still very much in the midst of discussions with our affiliates " said the spokesman who would not reveal details of the proposal "We re cer tainly not going to shoot from the hip on this one " he said "This is very much a decision based on affiliate input."

Rainbow already has announced an exclusivity program for its regional sports services (*CV* 2/15/88 p 11) Rain bow s plan also would enable affiliates to sublicense the networks to TVRO SMATV and other distributors

The Nashville Network is consider ing a proposal in which affiliates by paying a one cent/subscriber/month surcharge would obtain exclusive ca ble distribution rights TNN s plan is in response to a request from Comcast which has led the industry s call for exclusivity a TNN spokesperson con firmed

But despite the industry s increas ingly vocal call for exclusivity most major MSOs have not rushed to em brace the HBO offer—with one excep tion American Television and Commu nications HBO s sister subsidiary of Time Inc said it is "all for" HBO s offer

"There is no doubt in our mind that exclusivity is important in a competi tive environment " stressed Fred Dressler ATC vice president of programming "To the extent that (HBO s plan) provides exclusivity" Dressler said "we re going to take it "

Other MSOs were less committal Comcast Chairman Bob Clasen termed HBO s offer "a nice gesture to try to be responsive" to affiliates concerns "We think it is an interesting effort on their part " he said

"The concept in its general form has some appeal " said a Tele Communica tions Inc spokesman But "it s obvious that some additional negotiation on the particulars may be necessary before any agreement can be reached " he said

A Continental executive was more direct "We suggested that they need to rethink the whole thing " the official said "The terms weren t right nor was the price " The official added that if HBO "wants me to pay a lot for this protection " it would have to be for a much longer period of time

But "the whole concept of exclu sivity is important to the operators and all the programmers are going to have to focus on this " he continued "And HBO s got to refocus on this They don t have the right answer yet "

American Cablesystems involved in several overbuilds in Florida likely will not take HBO up on the offer "I don t think there is much there that is going to be attractive for us " one company official said "It s going to end up in the courts " he predicted "and that s not something we want to be involved with "

HBO s proposal has attracted keen interest from another source Sen John Kerry D Mass Kerry who sits on the Senate communications subcommittee said that HBO s plan has been "described by some consumer advocates as monopoly maintenance "

In a Feb 11 letter to HBO Chairman Michael Fuchs Kerry said he was "troubled by the appearance that HBO may be involved in efforts to promote one method or kind of retail distribu tion over another efforts which can frustrate competition and ultimately harm consumers "

Kerry asked Fuchs how the plan would benefit home viewers and whether the plan came from HBO Time Inc or ATC And "if the wireline exclusivity proposal is not really a strategy di rected or developed by HBO s parent company or cable affiliate " he asked "why is it not in HBO s interest to promote competition among different retail distributors of its programming?"

An HBO spokesman said the com pany has not responded to Kerry s letter ■

FORUM

Making the case against overbuilds

Most have been financial or operating failures and usually lead to buyouts

By Richard Berman

It shouldn t come as news to anyone that a franchising authority is generally empowered to decide how many cable franchises will be awarded within its particular franchise area The vast majority of existing cable franchises are by their terms "non exclusive" The House Report accompanying the franchising provisions of the Cable Communications Policy Act of 1984 states that the act grants the franchising authority "the discretion to determine the number of cable operators to be authorized to provide service in a particular geographic area" Such "discretion" is part and parcel of the cable business territorial non-exclusivity is in part a check and balance on the operator s performance

It is similarly not surprising that throughout the history of the cable industry significant lasting overbuilds have been few and far between Overbuilds have been financial or operating failures usually giving rise to a buyout by one operator of the other Despite some recent sound and fury and despite the record high system sales prices this is unlikely to change Current studies such as those by Touche Ross and Malarkey—Taylor confirm what many cable operators already believe namely that overbuilds give rise to increased operating costs and over the long run cause upward pressure on rates The weight of experience and authority is that overbuilds may not only be harmful to the incumbent and the overbuilder but they are likely also to work a hardship on the customer by increasing subscriber rates Thus contrary to an often stated justification for overbuilds the customer ultimately loses

If simple economics were not enough to dampen overbuild enthusiasm the most elemental reading of the political tea leaves should be This is a crucial time for the cable industry Cable operators post-cable act behavior is being closely watched by regulators by legislators and by long time cable industry antagonists Cable s increasing consumer acceptance and economic well being are the envy of its adversaries In short this is the time for

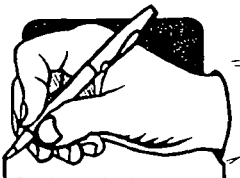


Richard Berman is a communications attorney and partner in the New York office of LeBoeuf Lamb Leiby & MacRae He was general counsel executive vice president and a director of Warner Cable Communications from 1978 through 1986 as well as serving as general counsel and secretary of MTV Networks from 1983 through 1986

building the case *against* overbuilds not for it Here it is

- Most overbuilds serve no valid public purpose They lead to economic inefficiencies in the form of increased operator costs and increased subscriber rates
- The cable act says cities have discretion with respect to issuing multiple franchises but it does not say they are required to issue more than one franchise While the case law is still evolving in the courts appropriate consideration should be given to such factors as an overbuild s impact on rates the ability of existing poles and conduits to accommodate additional cable and so forth
- Municipal overbuilds waste taxpayers money and move government into a realm where it doesn t belong—namely editorial control Utility overbuilds may entail cross subsidization and predatory pricing
- Poor operator service can generally be avoided by relying upon meaningful criteria such as past operating experience and financial capability in awarding franchises it can be remedied by governmental jawboning franchise non-compliance proceedings and if ultimately warranted non renewal
- The cable marketplace is already competitive Consumers may turn elsewhere—or off—if the cable operator fails properly to do his job
- The Constitution (equal protection clause) mandates that an overbuilder have the same burdens as the incumbent
- Incumbents have the right to petition their local franchising authority and argue against a second franchise They have the right also to resort to the courts when they are legally aggrieved

In sum for the cable operator who does his homework and provides good service the case against being overbuilt is compelling ■



Readers with strong views on topics of general interest are invited to submit manuscripts for publication Manuscripts should be no longer than nine or 10 typed double spaced pages Send manuscripts to *CableVision* attention Linda J Johnson 600 Grant St Suite 600 Denver CO 80203

Broadcasting Magazine, March 14, 1988

Senator raises concerns about HBO exclusivity

Kerry sends letter to pay programer asking questions about plans for deals with noncable distributors

Senator John Kerry (D-Mass) apparently still concerned about distribution deals between cable operators and programers that may discourage competition and inflate subscripuon fees has sent Home Box Office a second round of questions on the pay programer s policies toward noncable distributors" like SMATV and wireless cable operators and on the impact of vertical integration of cable operators and programers on competition

Kerry s new questions were sent to HBO Chairman and Chief Executive Officer Michael Fuchs who a Kerry aide said may receive a phone call from the senator The aide also said last week that other programers will be getting similar letters They include Viacom s Showtime/The Movie Channel and Rainbow Programing Enterprises owned by cable MSO Cablevision Systems

The letter to HBO went out after Kerry received a four page letter from Fuchs with responses to the lawmaker s Feb 11 question about HBO s offer to make cable operators the exclusive wireline distributors of HBO s services (HBO Cinemax and Festival) within their franchises (Closed Circuit Feb 15)

In the March 4 letter Kerry said he remains deeply concerned about whether there are impediments to competition in the developing market for satellite-delivered television programing Referring to Fuchs first letter Kerry said I wish that I could share your confidence that exclusivity will not generate higher consumer prices "

Kerry s second batch of questions 1) "Whether HBO and other important programing is currently available to noncable distributors and will be available in new contracts 2) whether programing is sold to noncable distributors and cable overbuilders on discriminatory prices and conditions and 3) whether competition is threatened by the increasing horizontal and vertical concentration that permits a few MSO s to increasingly control satellite-delivered programing

Kerry s Feb 11 letter was prompted by press reports that HBO s "wireline exclusivity" was intended to protect existing cable operators from competition from other cable operators or so-called "overbuilders " Among other things Kerry wanted details about the offer its purpose and its effect on competition and consumer prices for cable programing

In his response Fuchs said the offer was not intended to provide "overbuild protection" as the reports suggested It "was devised as a means of protecting our program services in an overbuild environment " he said "Our concern is that in head to-head competition cable operators promote those services that are unique to their own system We want to assure ourselves that our program services would continue to receive the local marketing and promotional efforts that have historically contributed to our success "

The implication that the offer is intended primarily to benefit operators is "untrue and judging from the mixed response of our distributors to date not so perceived by the industry itself " Fuchs said

"In fact a continued lack of affirmative response from our best distributors " Fuchs said "could well result in our withdrawing the proposal entirely "

Kerry s second letter was apparently prompted by Fuch s terse response to a question about HBO s distribution policy toward noncable distributors of cable programing not directly affected by the wireline exclusivity offer "Availability of our programing to noncable distributors varies with the particular technology and will remain unchanged as a result of the exclusivity proposal " Fuchs said ❑

Wireless cable group asks TCI for assurances of programs at fair prices

Challenge comes in comments to FCC on MSO s proposed $46-million buy of Tulsa, Okla-based Tempo

Wireless Cable Association the budding trade association representing operators of so-called wireless cable systems has challenged Tele-Communications Inc to provide assurances that it will make the programing of Tempo Enterprises Inc and other cable programers in which it has interests available to wireless cable operators at nondiscriminatory prices

The challenge was issued in WCAs comments to the FCC on nation s largest MSO s proposed $46-million purchase of Tempo Enterprises a Tulsa based owner of Tempo Television and satellite distributor of Turner Broadcasting System s superstation WTBS(TV) Atlanta Because Tempo s assets include licenses for three satellite earth stations the deal is subject to FCC approval

WCA stopped short of asking the FCC to deny the transfer But it said the FCC "should consider whether there is a way to assure that such vertical integration will not lead to a denial of access to programing for retail competitors of TCI such as wireless cable " it said "Specifically TCI should provide assurances that it will sell all its wholly or partly acquired programing to wireless cable firms at nondiscriminatory prices "

James Theroux president of Metropolitan Cablevision a wireless cable operator serving Cleveland and chairman of WCAs regulatory affairs committee said WCA believes filing a petition to deny would have been a "misuse" of the FCC s license-transfer process However he said the process provides a good forum "We are looking for public places where we can make our point "

WCAs point is that the market power of cable operators and the vertical integration of operators and programers are making it difficult for wireless cable operators to obtain rights to cable programing and compete with cable operators

"Individual cable franchisees are local monopolies " WCA said "In some instances cable franchisees demand exclusive contracts by which programers agree not to make their product available to competitors of cable In other instances the cable operators are indulged by programers who refuse to deal with wireless cable firms In still other instances programers will sell to wireless cable firms only if the firms promise not to distribute the programing in competition with cable Finally even when programers do offer their wares to wireless cable they typically charge discriminatorily high prices for no apparent reason other than probably a desire to please cable

"The ultimate weapon for cable operators to preclude retail competition is the acquisition of preferred programing for the purpose of exclusively distributing it through cable WCA said "This weapon has been used with increasing frequency There are approximately 80 different satellite services and more than half of such services are owned in whole or in part by cable TCI it said owns a piece of Turner Broadcasting System (WTBS CNN and CNN Headline News) Cable Value Network American Movie Classics Black Entertainment Television Event TV Discovery Channel and Fashion Channel

"If TCI acquires control of Tempo it might refuse to make WTBS and Tempo programing available to wireless cable at a fair price in those areas where wireless cable is in direct competition with a cable operator (which might or might not be owned by TCI) " WCA said ❑

Multichannel News — March 14, 1988

HBO Seen Scrapping Wireline Exclusivity

By Larry Jaffee

NEW YORK — Home Box Office Inc will withdraw its "wireline exclusivity" offer for overbuild environments due to a lack of interest from operators, sources said last week.

An HBO spokesperson said the company had no comment on rumors circulating in the industry that such a decision had been made.

However, Michael Fuchs, HBO chairman and chief executive officer, noted in a March 3 letter to Sen. John Kerry (D-MA) that "a continued lack of affirmative response from our best distributors could well result in

HBO

Continued from page one

our withdrawing the proposal entirely.

Since the proposal was introduced in January, many operators said they had problems with the contract's terms, which included that all of an operator's systems would be covered by the contract whether or not overbuild situations exist locally (see *Multichannel News*, Feb. 15, page 8).

HBO's withdrawal of the offer will probably mean that Showtime/The Movie Channel Inc. will shelve its exclusivity plan, offered last month, which would be system-specific rather than operatorwide, according to a Showtime spokesperson.

"The timing is bad, there couldn't be a worse time to do this," the spokesperson said. "The company is concerned in light of everything — the reaction (to HBO's offer) and the environment," he continued, referring to a Senate antitrust subcommittee hearing this week in Washington that will look at effective cable competition. He noted that cable oversight hearings in the House are scheduled for March 30.

(HBO president Joseph Collins is scheduled to testify at the Senate hearing.)

HBO originally had extended a Feb. 15 deadline to give operators more time to consider the offer. An HBO spokesperson said late last week that the company "received a few commitments," but would not reveal from which operators.

Several weeks ago the Community Antenna Television Association, representing small operators, said it would oppose the HBO policy because a clause in the contract did not fully protect some operators against several operators who already have agreements allowing them to carry HBO in any system they

HBO

Continued from page one

build

Continental Cablevision Inc chairman Amos Hostetter said he doesn t like the HBO offer because it's "too expensive and the time is too short "

"I don't think it was a very well thought-out plan,' Mr Hostetter said, adding that his company was concerned that if the contract was challenged, we would want a refund " HBO was not prepared to make such a commitment

Robert Thomson, Tele-Communications Inc vice president of governmental affairs, said TCI's position was unchanged on the HBO offer

While there are some intriguing aspects, a lot of negotiations back and forth must take place before any proposal would be seriously considered, ' he said

Ernest Olson, vice president of marketing of Metrovision Inc , said the Atlanta-based operator found the additional 25-cent per subscriber per month not worth the expense since the company might not be faced with overbuilders

HBO s Mr Fuchs responded in writing to questions that Sen Kerry had posed regarding the exclusivity proposal, which the senator said he thought might raise antitrust questions (see *Multichannel News*, Feb 22, page 1)

Sen Kerry also asked Tony Cox, Showtime/TMC president, and Marc Lustgarten, president of Rainbow Program Enterprises, about their exclusivity proposals

In his letter Mr Fuchs pointed out that press characterization of the proposal as ' overbuild protection is both inaccurate and misinformed," adding that the offer was made to promote brand awareness and maintain its identity in the marketplace He noted that the proposal has received a ' mixed response from our distributors "

Our offer of exclusivity was not designed or intended to protect cable operators from competition, it was devised as a means of protecting our program services in an overbuild environment," Mr Fuchs said "Our concern is that in head-to-head competition cable operators promote those services that are unique to their own system

"We wanted to assure ourselves that our program services would continue to receive the local marketing and promotional efforts that have historically contributed to our success as a provider of premium entertainment to the home viewer," he said

Although HBO has no control over operators' retail pricing, Mr Fuchs said HBO did not expect 'the modest surcharge associated with exclusivity will not result in higher subscription fees to the home viewer "

The HBO chief also said availability of HBO programming to non-cable distributors varies with the particular technology and will remain unchanged as a result of our exclusivity proposal " □

EXHIBIT M

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franchise areas, your policy as announced, does not seem to be limited to just such franchise areas. I am troubled by the appearance that HBO may be involved in efforts to promote one method or kind of retail distribution over another, efforts which can frustrate competition and ultimately harm consumers. Accordingly, I would appreciate your response to the following questions:

1. What benefits do home viewers derive from arrangements such as HBO's wireline exclusivity proposal, and what will it cost them?

2. Would the 25 cents per subscriber fee, apparently to be charged by HBO for exclusivity be collected "up front" when a cable operator agrees to purchase one of HBO's services, or would this fee only be collected in the event an overbuilder competes or threatens to compete with the existing cable operator within a franchise area?

3. Is HBO's wireline exclusivity proposal a policy developed by or directed by HBO's parent company or cable affiliate to advance its own interest?

4. If the wireline exclusivity proposal is not really a strategy developed or directed by HBO's parent company or cable affiliate, why is it not in HBO's interest, and also why is it not in the home viewer's interest, for HBO to promote competition among different retail distributors of its programming, including cable distributors, such as wireless cable, SMATV, and DBS?

5. To what extent do exclusivity arrangements, such as HBO's wireline exclusivity proposal, effectively limit the number of households that HBO can reach, increase prices, and impede competition among those distributors seeking to sell satellite-delivered programming within any local market?

6. To what extent is HBO's programming available now at fair terms and conditions, and will be available in the future, to cable overbuilders and any non-cable distributors who seek to compete with cable distributors for whom HBO is or will be available?

I am particularly interested in your response in light of recent reports by the National League of Cities and the National Cable Television Association of significant price increases in the price of basic service in a deregulated cable market. As you know, Consumer Reports has quantified consumer dissatisfaction with existing cable services. These issues are similar to those raised late last year when the Committee considered S. 889, the Satellite TV Fair Marketing Act. During the Senate Commerce Committee's consideration of that measure, I raised the question of whether there is fair and adequate competition among alternative distributors and technological means of delivering such programming to home viewers. I will be grateful for your assistance in examining this subject as I prepare for further Senate action on S. 889 and related legislation this Spring.

I look forward to hearing from you.

Sincerely,

John Kerry
United States Senate

cc: Hon. Ernest F. Hollings
Hon. Daniel K. Inouye

James P. Mooney, President,
National Cable TV Association (NCTA)

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Michael J Fuchs
Chairman
Chief Executive Officer

March 3, 1988

Honorable John Kerry
United States Senate
Washington D C 20510

Dear Senator Kerry

I am writing in response to your letter of February 11 concerning HBO's offer of exclusivity to our cable distributors Although my schedule has prevented me from responding sooner, I welcome the opportunity to clear up any misconceptions or confusion which may have been engendered by press reports concerning this matter HBO has been a leader in developing distribution technologies for pay television transmission and uses many different methods to deliver its services to subscribers and distributors Starting in the 70's HBO used microwave transmission both multi-point distribution service (MDS) and point-to-point microwave to deliver its programming In 1975 HBO was the first regular user of satellite transmission to distribute its service This step led directly to the emergence of the many television services that exist today Recently HBO was the first to scramble its service and by adopting an inexpensive technology available to all programmers HBO has helped make service to TVROs practicable Not all of these technologies have been successful for HBO, however For instance there have been collection and theft problems with the MDS business and the number of MDS subscribers to HBO is half what it was a few years ago Nevertheless HBO continues to be committed to using innovative technologies to deliver its services

Before providing specific responses to the numbered questions in your letter I would like to clarify several preliminary matters The press' reference to our exclusivity proposal as "overbuild protection" is both inaccurate and misinformed Our offer of exclusivity was not designed or intended to protect cable operators from competition It was devised as a means of protecting our program services in an overbuild environment Our concern is that in head-to-head competition cable operators promote those services that are unique to their own system We wanted to assure ourselves that our program services would continue to receive the local mar-

Home Box Office Inc
1100 Avenue of the Americas New York NY 10036 (212) 512-1364

keting and promotional efforts that have historically contributed to our success as a provider of premium entertainment to the home viewer We believe that exclusivity coupled with the marketing and promotion obligations which a cable operator undertakes in accepting our proposal, best serves our business needs

I would also like to take issue with the characterization of HBO as "programming that is necessary to compete " Unfortunately, that is an overstatement The fact is that much of our programming -- theatrical motion pictures -- has already been available to the home viewer on cassettes or pay-per-view for many months prior to its exhibition on HBO and is contemporaneously available on other pay television services And, although we take pride in the quality and appeal of our original programming, concerts and made for television movies are available to the home viewer on an ever-increasing number of cable services and, of course, on broadcast stations as well If HBO were as compelling a product as you have suggested we would not be spending the millions of dollars a year that we devote to marketing advertising and promotion, and we would not feel it necessary to provide the incentives typified by our exclusivity proposal in order to ensure that our distributors support our efforts on a local level.

The following numbered paragraphs respond to the questions posed in your letter:

1 Program exclusivity is fundamental to the motion picture and television industries and is premised on the belief that in this highly competitive environment a quality of uniqueness is necessary to attract consumer patronage To the extent that we are successful in continuing to acquire and retain subscribers to our services it will enable us to improve the quality and quantity of the programming available to the home viewer Although we have no control over the retail pricing of our distributors it is our expectation that the modest surcharge associated with exclusivity, will not result in higher subscription fees to the home viewer

2. A cable operator's decision to "purchase" one of our services is independent of an election to accept our exclusivity proposal If a cable operator does accept our offer of exclusivity, the fee would apply from the outset of our agreement irrespective of any overbuild activity.

3 HBO developed its exclusivity proposal on its own to advance its own business interests Of course we discussed our proposal with some of our cable distributors before finally determining to proceed However the implicit assumption in your question -- that our proposal is at the behest of and primarily for the benefit of the cable industry -- is both

untrue and, judging from the mixed response of our distributors to date, not so perceived by the industry itself In fact, a continued lack of affirmative response from our best distributors could well result in our withdrawing the proposal entirely

4 HBO is currently available to the home viewer via each of the technologies identified in the question. Moreover, our exclusivity proposal applies only to cable delivery -- it will not effect competition from other delivery means Insofar as competition between cable distributors will center on the services unique to each of them we believe that our proposal furthers that competition for the reasons stated above

5 HBO's exclusivity proposal will have no impact on distributors of satellite-delivered programming other than cable overbuilders nor will it limit the number of households that HBO can reach In order to assert exclusivity, a participating cable operator must demonstrate that it has (or will within three years) extended its cable plant to 95% of the homes in its franchise area We believe that the net effect will be to expand rather than limit the reach of HBO to cable households Again we do not anticipate that our proposal will negatively impact retail prices for our services

6 Our programming is currently available for distribution at standard terms and conditions to any cable operator In the future, it will not be available to a cable overbuilder in any area in which the incumbent operator accepted our exclusivity proposal and is in compliance with the performance standards contained therein Availability of our programming to non-cable distributors varies with the particular technology and will remain unchanged as a result of our exclusivity proposal

As I stated at the outset our programming services are hardly essential The competition for viewership includes at least, all forms of cable and broadcast television videocassettes and movie theaters If we believed that making our services available to every prospective distributor regardless of technology and area of service would maximize our revenues then we would surely do so Many companies in industries ranging from cosmetics to consumer appliances to automobiles have concluded that making their products available on a selective basis meets their business objectives in a manner superior to being treated as a nameless commodity available to and from all competitors We firmly believe that our interests are best served by promoting brand awareness and maintaining our identity in the marketplace

If you have any further questions regarding our distribution policies and practices, please call me. I would be glad to respond as promptly as possible.

Sincerely,

Michael J. Fuchs

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ERNEST F. HOLLINGS, SOUTH CAROLINA, CHAIRMAN

United States Senate

COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION

WASHINGTON, DC 20510

March 4, 1988

Mr. Michael Fuchs
Chairman
Home Box Office, Inc
1100 Avenue of the Americas
New York, New York 10036

Dear Mr. Fuchs.

Thank you for your detailed and thoughtful reply to my letter concerning the potential impact on competition and consumers of HBO's wireline exclusivity proposal. Be assured that I am writing to other programmers who have proposed exclusivity arrangements and I would hope their response to be at least as forthright as your very helpful letter.

I continue to be deeply concerned about whether there are impediments to competition in the developing market for satellite-delivered television programming. I wish that I could share your confidence that exclusivity will not generate higher consumer prices. And I note, your response to my last question strongly suggests that HBO has different policies for non-cable distributors regarding pricing and availability of your programming Notwithstanding your letter, there are a number of issues I would like to explore further, and would hope my colleague, Senator Metzenbaum, will address in his upcoming Antitrust hearings on this subject.

These include, for example, (1) whether HBO and other important programming is currently generally available to non-cable distributors and will be available in new contracts; (2) whether programming is sold to non-cable distributors and cable overbuilders on discriminatory prices and conditions; and (3) whether competition is threatened by the increasing horizontal and vertical concentration which permits a few MSOs to increasingly control satellite-delivered programming.

Again, I am very grateful for your reply which I will take the liberty of forwarding to Chairman Metzenbaum.

Sincerely,

John Kerry

JFK:jbd

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ERNEST F. HOLLINGS, SOUTH CAROLINA, CHAIRMAN

United States Senate

COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION

WASHINGTON, DC 20510

March 3, 1988

Marc Lustgarten
President
Rainbow Program Enterprises
150 Crossways Park Drive
Woodbury, New York 11797

Dear Mr. Lustgarten:

I am writing to you with a number of questions I have about Rainbow Program Enterprise's offer of "exclusivity" to cable systems and other satellite delivered television retailers which carry Rainbow's sports programming. As a member of the Communications Subcommittee of the Senate Commerce Committee, I have been particularly interested in competition in the developing market for satellite-delivered television programming.

Trade press reports about Rainbow's exclusivity proposal and other recent exclusivity arrangements raise concerns over their anticompetitive effect and detrimental potential impact on home viewers. The exclusivity proposals are also opposed by some cable operators, including small and independent cable systems which are providing -- or plan to provide -- competitive service in communities currently served by only one cable television system. Non-cable distributors may see this proposal, even though Rainbow's proposal is ostensibly "available" to non-cable technologies, as just another effort, because of requirements that they cannot hope to satisfy, to deny access to programming that is necessary to compete with the established cable system in franchise areas.

Rainbow is, of course, not the only programmer engaged in activities which raise such fundamental antitrust and communication policy issues, and I am well aware that Rainbow is controlled by a major cable operator, Cablevision Systems Corporation. While your controlling shareholder may not wish to have competitors use Rainbow to compete in Cablevision's own franchise areas, your policy as announced does not seem to be limited to just such franchise areas. I am also troubled by the appearance that Rainbow may be involved in efforts to promote one method or kind of retail distribution over another, efforts which can frustrate competition and ultimately harm consumers. Accordingly, I would appreciate your response to the following questions

1. What benefits do home viewers derive from arrangements such as Rainbow's exclusivity proposal, and what will it cost them?

2. Is Rainbow's exclusivity proposal a policy developed by or directed by Rainbow's controlling shareholder to advance its own interest?

3. If the exclusivity proposal is not really a strategy developed or directed by Rainbow's parent company, why is it not in Rainbow's interest, and also why is it not in the home viewer's interest, for Rainbow to promote competition among different retail distributors of its programming, including cable overbuilders and non-cable distributors, such as wireless cable, SMATV, and DBS?

4 To what extent do exclusivity arrangements, such as Rainbow's Rainbow's exclusivity proposal, effectively limit the number of households that Rainbow can reach, increase prices, and impede competition among those distributors seeking to sell satellite-delivered programming within any local market?

5. What are the eligibility requirements and are they such that such that Rainbow's exclusivity offer will be, in practice, available to all pay TV technologies: namely, cable, multichannel, multipoint distribution services; satellite master antenna television systems, and direct broadcast satellite?

6. To what extent is Rainbow's programming, including American movie classics and bravo, available now and in the future, to cable overbuilders and any non-cable distributors who seek to compete with cable distributors for whom this programming is or will be available?

I am particularly interested in your response in light of recent reports by the National League of Cities and the National Cable Television Association of significant price increases in the price of basic service in a deregulated cable market As you know, Consumer Reports has quantified consumer dissatisfaction with existing cable services. These issues are similar to those raised late last year when the Committee considered S. 889, the Satellite TV Fair Marketing Act. During the Senate Commerce, Committee's consideration of that measure, I raised the question of whether there is fair and adequate competition among alternative distributors and technological means of delivering such programming to home viewers. I will be grateful for your assistance in examining this subject as I prepare for further Senate action on S. 889 and related legislation this Spring.

Sincerely,

John Kerry
United States Senate

JFK/meg

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[illegible]

United States Senate

COMMITTEE ON COMMERCE, SCIENCE AND TRANSPORTATION

WASHINGTON, DC 20510

March 3, 1988

Tony Cox, President
Showtime/The Movie Channel
1633 Broadway, 37th Floor
New York, New York 10019

Dear Mr. Cox

I am writing to you with a number of questions I have about Showtime/The Movie Channel offer of "wireline exclusivity" to cable systems and multiple system operators (MSO's) which carry Showtime/TMC's programming As a member of the Communications Subcommittee of the Senate Commerce Committee, I have been particularly interested in competition in the developing market for satellite-delivered television programming.

Reports in the trade press about Showtime/TMC's wireline exclusivity proposal and other recent exclusivity arrangements raise concerns over their anticompetitive effects and detrimental potential impact on home viewers The wireline exclusivity proposal is also opposed by small and independent cable systems, which are providing -- or plan to provide -- competitive service in communities currently served by only one cable television system. Non-cable distributors may see this proposal as just another effort, this time directed at part of the cable industry, to deny access to programming that is necessary to compete with the established cable system in franchise areas. I understand that Showtime/TMC has undertaken other exclusivity arrangements, as evidenced by reports, for example, that Showtime/TMC is offering to make cable operators exclusive Ku-band satellite distributors within their service areas.

Showtime/TMC is, of course, not the only programmer engaged in activities which raise such fundamental antitrust and communication policy issues, and I am well aware that Showtime/TMC is owned by one of the major cable MSO's, Viacom International While your corporate parent may not wish to have competitors use Showtime/TMC to compete in Viacom's own franchise areas, your policy as announced does not seem to be limited to just such franchise areas. I am also troubled by the appearance that Showtime/TMC may be involved in efforts to promote one method or kind of retail distribution over another, efforts which can frustrate competition and ultimately harm consumers. Accordingly, I would appreciate your response to the following questions:

1. What benefits do home viewers derive from arrangements such as Showtime/TMC's wireline exclusivity proposal, and what will it cost them?

2. Is Showtime/TMC's wireline exclusivity proposal a policy developed by or directed by Showtime/TMC's parent company to advance its own interest?

3. If the wireline exclusivity proposal is not really a strategy developed or directed by Showtime/TMC's parent company, why is it not in Showtime/TMC's interest, and also why is it not in the home viewer's interest, for Showtime/TMC to promote competition among different retail distributors of its programming, including cable overbuilders and non-cable such as wireless cable, SMATV, and DBS?

4. To what extent do exclusivity arrangements, such as Showtime/TMC's wireline exclusivity proposal, effectively limit the number of households that Showtime/TMC can reach, increase prices, and impede competition among those distributors seeking to sell satellite-delivered programming within any local market?

5. To what extent is Showtime/TMC's programming available now at fair terms and conditions, now and in the future, to cable overbuilders and any non-cable distributors who seek to compete with cable distributors for whom Showtime/TMC is or will be available?

I am particularly interested in your response in light of recent reports by the National League of Cities and the National Cable Television Association of significant price increases in the price of basic service in a deregulated cable market. As you know, Consumer Reports has quantified consumer dissatisfaction with existing cable services. These issues are similar to those raised late last year when the Committee considered S. 889, the Satellite TV Fair Marketing Act. During the Senate Commerce Committee's consideration of that measure, I raised the question of whether there is fair and adequate competition among alternative distributors and technological means of delivering such programming to home viewers. I will be grateful for your assistance in examining this subject as I prepare for further Senate action on S 889 and related legislation this Spring.

Sincerely,

John Kerry
United States Senate

JFK/meg

EXHIBIT N

OPENING THE BROADBAND GATEWAY
THE NEED FOR TELEPHONE COMPANY ENTRY
INTO THE VIDEO SERVICES MARKETPLACE
REBUTTAL TO REPLY COMMENTS OF TELE-COMMUNICATIONS, INC

Shooshan & Jackson Inc
1990 M Street, N W., Suite 450
Washington, D C 20036
(202) 887-0550

January 20, 1988

In our paper "Opening the Broadband Gateway,"[1] we showed that the cable industry is earning large monopoly/monopsony profits These profits represent a transfer of wealth from cable subscribers to owners of cable systems They also represent misallocation of economic resources

We argued that the Federal Communications Commission (FCC) should facilitate competition in the cable industry Encouraging competition is good public policy in any event Pursuing this policy is urgent with regard to the cable industry in order to alleviate the negative effects of cable's market power [2]

The Commission can facilitate competition by assuring that satellite-delivered cable network programming is made fully available to cable's competitors at non-discriminatory rates It can also take important steps to reduce government-imposed barriers to entry in the cable business Finally, a case can be made for removing or relaxing the cross-ownership restrictions that prohibit entry by telephone companies

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[1] Shooshan & Jackson Inc., "Opening the Broadband Gateway The Need for Telephone Company Entry Into the Video Services Marketplace," Washington, D C., October 1987 See Appendix to Comments of the United States Telephone Association before the Federal Communications Commission in Connection with Telephone Company/Cable Television Cross-Ownership Rules, Sections 63 54-63 58, CC Docket 87-266, November 1987

[2] Shooshan & Jackson Inc., "Opening the Broadband Gateway," pp 18-20

REPLIES

Our study was filed with the Commission on November 2, 1987 as an appendix to Comments of the United States Telephone Association (USTA) On December 16, 1987, cable interests responded to our arguments Interestingly, the National Cable Television Association (NCTA) did not challenge our demonstration of cable's monopoly/monopsony profits The procedures and peripheral assumptions relating to our analysis were vigorously attacked by Tele-Communications, Inc (TCI)[3] However, TCI fails to argue that cable's monopoly/monopsony power is not excessive, nor does it adduce any evidence on this point

This paper rebuts TCI's arguments We show that TCI's reply does not diminish the accuracy or the force of the conclusions in our original filing Indeed, the numbers that TCI proposes as alternatives to our numbers simply provide further evidence of cable's excessive monopoly/monopsony profits

Furthermore, we show that, in a number of instances, TCI's Reply Comments deliberately distort the truth To err is human, but to err so frequently tends to diminish an advocate's credibility[4]

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[3] See Reply Comments of Tele-Communications, Inc before the Federal Communications Commission in the Matter of Telephone Company-Cable Television Cross-Ownership Rules, Sections 63 54-63 58, CC Docket No 87-266, December 16, 1987 Our analysis was also attacked by Continental Cable et al We rebut some of those comments in this paper See Reply Comments of Continental Cablevision, Inc, Harron Communications Corporation, Prime Cable Limited Partnership, the Illinois Cable Television Association, and Cooke CableVision before the Federal Communications Commission in the Matter of Telephone Company-Cable Television Cross-Ownership Rules, Sections 63 54-63 58, CC Docket No 87-266, December 16, 1987

[4] For some reason, TCI continues to mischaracterize a statement we made in a study we performed for the Motion Picture Association of America in July 1986 ("Economic Analysis of Concentrated Ownership of Cable Systems") In that study, we stated in the opening paragraph that the Federal Communications Commission (FCC) and Congress had concluded that competition from over-the-air broadcasting and other sources justified deregulation of the rates charged by cable systems in most geographic areas However, we expressly stated that "(w)e do not address that issue here" Rather, our paper focused on the cable industry's monopsony power in the programming input market

In its reply comments in the matter of "Rules and Regulations Relating to Multiple Ownership of Cable Television Systems" filed on August 5, 1986, TCI quoted portions of (continued)

TCI'S ARGUMENTS

TCI's arguments fall into three general categories

1 It generally criticizes the use of the q ratio

2 It asserts that the q ratio is not applicable to service providers, such as cable companies.

3 It challenges various aspects of our (Shooshan & Jackson's) numerical estimates of the q ratio

Let us consider each of these arguments in turn

General Criticism of the q Ratio

TCI argues as follows

> Q ratio theory suggests that in purely competitive markets with complete flexibility and knowledge this fraction should equal 1 this kind of highly theoretical model cannot serve as the foundation for reversing Commission regulation much less recommending Congressional action [5]

If we understand this argument correctly, TCI is criticizing the use of the q ratio precisely because it has a theoretical foundation We need only note that many useful insights for practical economic policy come out of this same "highly theoretical" model of pure competition These insights include the advantages of competition in promoting

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[4](...continued)
that opening paragraph out of context -- omitting our disclaimer about not addressing the issue of competition in the output market

It was largely in anticipation of this fast and loose scholarship on the part of TCI that we quoted this same paragraph, including the disclaimer, which we even emphasized, in footnote 3 of our USTA study "Opening the Broadband Gateway"

We were amazed that TCI in its reply comments in this proceeding used the same quote out of context and omitted the same sentence What is even more intolerable is that TCI cites the very footnote in our USTA study in which the disclaimer is emphasized, rather than the original work, as its source (See TCI Reply Comments, n 8, at 10)

Perhaps TCI believes that the only difference between being "ingenious" and being "disingenuous" is a few letters here and there

[5] TCI Reply Comments, p 11

economic efficiency and the benefits of marginal-cost (or Ramsey) pricing Needless to say, these insights have value, even though the real economy does not satisfy all the assumptions of pure competition

Similarly, the q ratio provides useful insights for practical economic policy In particular, it provides a methodology for using data from financial markets in order to detect monopoly profits The q ratio is especially helpful because noted economists have severely attacked the use of accounting data to detect monopoly profits[6] Recent articles have also questioned the use of the concentration ratio as an index of acquisition of monopoly rents[7]

Prominent, refereed economics journals have published a number of articles that discuss the q ratio as an indicator of monopoly profits All the articles that we could find regard the q ratio as useful for this purpose Consider the following

> This article uses Tobin's q, the ratio of the market value of a firm to the replacement value of its physical assets, to measure monopoly power and to examine the relationship between market structure and profitability Tobin's q is a better measure of monopoly profits than indices of single-period profitability because it measures long-run monopoly power In addition, it is subject to less measurement error and it contains an adjustment for risk The relationship between q and long-run monopoly power is established Provided that all inputs are supplied competitively, q should be highly sensitive to even small amounts of monopoly power[8]
>
> Professor Michael A Salinger
> Columbia University

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[6] See, for example, F Fisher, and J McGowan, "On the Misuse of Accounting Rates of Return to Infer Monopoly Profits," American Economic Review, 73, March 1983, pp 82-97

[7] See Steven Lustgarten and Stavros Thomadakis, "Mobility Barriers and Tobin's q," Journal of Business, vol 60, no 4, The University of Chicago, 1987, p 535 See also Mark Hirschey, "Market Structure and Market Value," Journal of Business, vol 58, no 1, The University of Chicago, 1985, p 89

[8] Michael A Salinger, "Tobin's q, Unionization, and the Concentration-Profits Relationship," Rand Journal of Economics, Vol 15, No 2, Summer 1984, p 159 (abstract)

> The primary purpose of this paper has been to test the hypotheses found in the industrial organization literature regarding the structure-performance relationship A secondary purpose has been to empirically demonstrate the usefulness of, and extend, the introduction given by Lindenberg and Ross of Tobin's q in the industrial organizational area
>
> To consider the second purpose first, we have argued that Tobin's q can provide a more appropriate measure of firm rents than more standard measures such as accounting profit rates q bounds total rents that accrue from either market efficiency or monopoly By relying on market valuation, we avoid many of the shortcomings of accounting rates of return Further, the use of q is suggestive of the general value of capital market data to investigate issues in industrial organization [9]
>
> Professor Michael Smirlock
> The Wharton School, University of Pennsylvania
>
> Professor Thomas Gilligan
> California Institute of Technology
>
> Professor William Marshall
> Washington University

Dr Henry McFarland of the U S Department of Justice, Antitrust Division, Economic Analysis Group, concluded his study of the railroad industry as follows

> The data presented in this study indicate that railroads do not earn supracompetitive profits In fact, values of q for the railroad are substantially below the average value for other nonfinancial firms The results suggest that the competition that railroads face is sufficient to protect shippers and that stricter regulation is unnecessary [10]

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[9] M Smirlock, T Gilligan and W Marshall, "Tobin's q and the Structure-Performance Relationship," American Economic Review, 74 (December), p 1058

[10] Henry McFarland, "Did Railroad Deregulation Lead to Monopoly Pricing? An Application of q," Journal of Business, vol 60, no 3, The University of Chicago, 1987, p 396

This paragraph clearly indicates that Dr McFarland regards the q ratio as useful for detecting monopoly profits[11] Thus, it appears that TCI's evaluation of the q ratio is at variance with that of the economists who have published in this area

TCI argues further

> In spite of its purported objectivity, the valuation and replacement cost elements of the Q ratio reflect numerous subjective judgments yielding substantially different Q ratios[12]

As a general proposition, it is true that estimates of q reflect subjective judgments and can vary, depending on those judgments However, the monopoly/monopsony profits of the cable industry are so large that they can be detected by any reasonable procedure for calculating the q ratio Indeed, we show below that the numbers that TCI itself proposes indicate an excessively high q ratio

TCI also argues

> More importantly, the numerical Q ratio itself may be interpreted in as many different ways as there are "experts" calculating it[13]

There are certainly alternative ways to interpret the q ratio We acknowledge that it should be interpreted carefully and not mechanically However, that is no reason for discarding the entire concept Indeed, if concepts had to be discarded because they could be interpreted differently by different persons, no concept in the law or social science could survive

However, TCI deliberately distorts our interpretation of the q ratio TCI states "Shooshan & Jackson argue that a Q ratio greater than one necessarily demonstrates

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[11] Notably, Dr McFarland's analysis is analogous to our analysis of the cable industry However, the numbers turn out very differently in the two industries We find that the competition that cable companies face is not sufficient to protect consumers

[12] TCI Reply Comments, p 11

[13] Id

concentration and monopoly or monopsony power"[14] In reality, we considered five different interpretations of cable's high q ratio

1 Excessive market power (pp 8, 16)
2 Workable competition with some market power (p 8)
3 Disequilibrium with competition growing (pp 8, 15-16)
4 Superior management (p 16)
5 Macroeconomic fluctuations in the q ratio (pp 8-9)

We were able to discard interpretations (2) and (5) by comparing cable's q ratio to that of other non-financial corporations in the United States economy We discarded interpretation (3) by observing that competition to cable companies is not rapidly growing, except for videocassette recorders (VCRs) which compete primarily with pay services and provide relatively little competition to basic cable services Overbuilds still affect a small fraction of the cable industry, and none of the alternative technologies (pay TV, DBS, or MMDS) have been doing well We discarded interpretation (4) because the high prices paid for cable systems apply across the board -- not just to exceptionally well-managed companies We are left with the interpretation that cable has excessive market power

In its replies, TCI proposes some alternative interpretations We demonstrate below that these alternative provide no plausible escape from the conclusion that cable has excessive market power

Marketing TCI correctly argues that some of the benefits of past marketing expenses are capital assets that are not reflected in the q ratio As a result, firms that are marketing-intensive tend to have higher q ratios than firms that are not marketing-intensive

The problem with this argument (from TCI's point of view) is that cable is not a marketing-intensive industry TCI states that "marketing costs currently associated with building new systems are approximately $40 per subscriber"[15] This amount is so small that it makes only a trivial difference in our analysis of the q ratio In our

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[14] Id., p 12

[15] TCI Reply Comments, pp 13-14

numerical analysis below, we add $40 per subscriber to our estimates of cable's replacement costs It should be noted that we do not add any marketing costs to the replacement costs of other non-financial corporations Thus, this procedure tends to the bias the comparison, showing too low a q ratio for cable, relative to that of the rest of the non-financial economy

Anticipated Growth TCI argues, "To the extent that purchasers of the systems considered by Shooshan & Jackson have anticipated growth in the number of subscribers and the services which those subscribers will purchase, market value increased, and the Q ratio is inflated "[16]

On a theoretical level, this argument is simply wrong In a contestable market, even with growth, the q ratio equals unity in a steady state (By steady state, we mean an economic state in which there are no incentives for entry or exit, nor are there expected to be any incentives for entry or exit in the future This is not a static equilibrium if the market is growing)

Proof Suppose the opposite, i e , the q ratio exceeds unity in a contestable steady state This means that investors value the firm at more than replacement cost It follows that the firm must be expected to earn more than a competitive return on replacement cost during some periods in the future Otherwise investors would not value the firm so highly But under these circumstances, entrants would be able to come into the market during those periods and earn more than a competitive return Such expected opportunities cannot exist in a steady state Hence, the q ratio cannot exceed unity in a contestable steady state End of proof

It follows that growth cannot explain a q ratio in excess of one We must look to the other interpretations discussed above to explain a high q ratio

Notably, growth does increase the q ratio if the firm is earning monopoly profits Under these circumstances, purchasers of cable systems will bid up the prices of cable

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[16] TCI Reply Comments, p 14

systems in the expectation of extracting monopoly profits from a larger subscriber base in the future [17]

Favorable Financing TCI argues that the high q ratio for cable systems is partially attributable to the availability of favorable financing In particular, TCI argues that an existing cable system can get financing on more favorable terms than can an overbuilder [18]

Indeed, favorable financing may partially explain cable's high q ratio However, unfavorable financing for potential competitors is simply an entry barrier (or reflective of other entry barriers) that supports the cable industry's market power The fact that potential competitors are ipso facto poor business risks is the very essence of excessive market power

Applicability of the q Ratio to Service Providers

TCI asserts that applying the q ratio to service providers is inappropriate because of "intangibles," e g , long-term subscriber relationships and loyalties In making its case, TCI deliberately misreports the academic literature on the q ratio TCI asserts "The few subsequent [to Tobin's original article on the q ratio] studies which have analyzed the Q ratio in terms of market power have purportedly done so in the context of 'the industrial sector' or for 'manufacturing' companies"[19] Contrary to this misstatement,

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[17] Continental Cablevision et al introduce a variant of the growth argument in their Reply Comments (op cit , p 9) They cite a recent article ("Mobility Barriers and Tobin's q") by Lustgarten and Thomadakis "Firm-specific expectations, proxied here by past sales growth, are a significant determinant of q" Continental et al then go on to misinterpret this result completely They assert, "In a growth industry, therefore, one would expect the q ratio to exceed unity And the existence of a q ratio greater than unity in such a situation does not necessarily reflect market power"

The whole point of Lustgarten and Thomadakis is that structural variables can serve as useful proxies for entry and exit barriers, which may change over time In particular, rapidly-growing firms may earn monopoly/monopsony profits, because competitors cannot enter and/or expand rapidly enough to eliminate those profits Thus, rapid growth can be associated with entry barriers Lustgarten and Thomadakis do not argue that a q ratio in excess of unity does not reflect market power They simply seek to explain the source of that market power and how it changes over time

[18] TCI Reply Comments, p 14-15

[19] TCI Reply Comments, p 13

the pioneering work in this field estimated q ratios for AT&T and several electric utilities and firms in retail trade as well as industrial firms[20] The McFarland study, cited by TCI in another context,[21] uses the q ratio expressly to analyze market power in a service industry, namely, the railroad industry

In general, service industries are not the only ones that have "intangibles" Industrial firms also rely on customer relationships and customer loyalty Furthermore, cable systems do not have the face-to-face contact that many service firms -- and many industrial firms -- have on a day to day basis with their customers Hence, there is no reason to think that the market values of cable systems include numerous "intangibles" that market values of other firms in the economy do not also include Notably, in "Opening the Broadband Gateway," we compared the q ratio of the cable industry to that of all non-financial firms -- not just industrial or manufacturing firms

Numerical Issues in Calculating the q Ratio

Empirical studies always involve numerous assumptions, any of which can be challenged in adversarial proceedings Our estimate of the q ratio is no exception, and TCI has fully availed itself of the opportunity to challenge virtually every aspect of our estimation procedure

In this section, we briefly defend our procedures against TCI's attacks The critical point, however, is that niceties of estimation do not affect the general result that the q ratio for the cable industry is excessive -- much larger than the q ratio for other non-financial corporations Indeed, the numbers that TCI proposes in its reply comments support this general conclusion Let us now consider each of TCI's criticisms in turn

Marketing Costs We previously discussed TCI's argument that some past marketing costs are properly included in replacement costs Inclusion of marketing costs is not entirely appropriate, since we do not include previous marketing costs in the q ratios

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[20] Eric B Lindenberg and Stephen A Ross, "Tobin's q Ratio and Industrial Organization," Journal of Business, vol 54, no 1, The University of Chicago, 1981

[21] TCI Reply Comments, n 15, p 18

of other non-financial corporations Nevertheless, let us accept TCI's view arguendo We therefore add $40 per subscriber to our estimate of replacement cost (It makes no material difference)

Prices for Which Cable Systems Sell We estimated that in December 1986, cable systems sold for an average of $,1732 per subscriber [22] TCI cites a Kagan estimate that the average price in the first quarter of 1987 was $1,712 per subscriber [23] In general, Kagan's estimates are based in part on value allocations for sales that included assets other than cable systems Such allocations may not reflect true market values For this reason, we constructed a database that excluded transactions involving substantial assets other than cable systems We believe that market prices in our database are more reliable than market prices based on value allocations

Nevertheless, let us accept the TCI figure arguendo According to our analysis, the per-subscriber prices for which cable systems sold at that time was rising about $30 per month Thus, a price of $1,712 in the first quarter of 1987 is equivalent to a price of $1,650 in December 1986 We use this figure in our calculations below

Intangible Assets

In "Opening the Broadband Gateway," we considered only tangible assets and not intangible assets in our estimate of replacement costs for the q ratio TCI challenges this procedure, observing that intangible costs are often substantial

Nevertheless, our procedure is correct, including intangible assets in replacement cost would be incorrect Intangible assets consist primarily of goodwill, which is the accounting entry used to balance the books when a cable company (or other asset) is bought for more than book value Goodwill often consists primarily of capitalized monopoly/monopsony profits of the purchased company If goodwill is included in

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[22] Shooshan & Jackson Inc "Opening the Broadband Gateway," p 10

[23] P Kagan, Cable TV Banker/Broker, 10 (October 22, 1987) in TCI Reply Comments, p 16

replacement costs, the q ratio can equal unity in equilibrium, even though the firm earns substantial monopoly/monopsony profits [24]

TCI observes that franchise values of cable systems, which are intangible assets, are often substantial However, the franchise is simply a barrier to entry to potential competitors [25] Money expended to erect such a barrier is not properly included in replacement cost in the q ratio Otherwise the q ratio would be less than unity in a purely competitive or contestable equilibrium (where there are no barriers to entry)

value of being lost?

Cost to Replace with New Plant

In "Opening the Broadband Gateway," we estimated the replacement cost of cable systems in two steps We first estimated the cost of replacing embedded cable plant with new assets We then adjusted our estimates to reflect the fact that embedded plant is not as good as new plant In this subsection we consider TCI's criticisms of our estimates of the cost of replacing embedded plant with new plant The next section considers TCI's criticisms of our adjustments

TCI correctly observes that there is not a single per-subscriber replacement cost that applies to all cable systems We took account of several reasons why costs may vary in our sensitivity analysis In particular, we considered possible cost differences between using aerial, as opposed to buried, construction We examined cost differences, depending on the type of converter used e g , addressable or not We also considered a range of per mile construction costs for outside plant This range reflects among other things, the effect of varying density of subscribers (per square mile) on costs [26] Density of subscribers depends on both population density and penetration level

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[24] The excerpt from Professor Salinger's article, supra , explicitly acknowledges that the q ratio should be based on the replacement cost of physical assets

[25] Notably, the right to use streets and public rights-of-way does not in itself convey commercial value Commercial value is conveyed only because potential competitors are denied these rights No commercial value is conveyed if rights are conveyed to everyone, e g , the right to drive trucks on city streets

[26] Shooshan & Jackson Inc , "Opening the Broadband Gateway," pp 12 13, Tables 1 3

According to our database, the average book value of tangible assets of cable systems is about $499 per subscriber We also estimated that cable plant is 27 5 percent depreciated This means that cable plant is, on average, about three years old TCI does not challenge these estimates

It follows from the above numbers that the original cost of the assets of the cable systems in our database is about $688 per subscriber We would expect the cost to replace the embedded assets with new assets to be somewhat higher than $688 per subscriber, because the assets are on average three years' old We must add about three years' inflation to the original cost, less the cost savings caused by technological change

Our benchmark estimate of the cost to replace the assets with new plant is $758 per subscriber This amount consists of $519 per subscriber for plant and $239 for other assets ($499 per subscriber for book value of total assets less $260 per subscriber for book value of plant) Thus, our estimate allows 10 percent appreciation from three years' inflation This estimate is quite reasonable Inflation has been moderate in recent years, and the electronic equipment used by cable companies is subject to rapid technological progress [27]

TCI provides an alternative estimate of replacement costs of $1,000 per subscriber This estimate seems unreasonably high It implies an unrealistically high inflation rate of about 10 percent per year (In our database, assets that are, on average, three years' old had an original cost of $758 per subscriber) Perhaps, the TCI estimate is not based on the number of subscribers of a mature system, perhaps, the cost estimates were inflated by TCI's engineers, or, perhaps, they have no basis at all

In any event, let us accept arguendo TCI's estimate of replacement costs Even with this high estimate, we can show that the q ratio of the cable industry is far higher than for other non-financial corporations in the U.S economy

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[27] In "Opening the Broadband Gateway," we cited a study by Malarkey-Taylor Associates (Economic Analysis of Cable System Overbuilds, Washington, D C , January 1987) to support our cost estimates We show here that such cost estimates are reasonable, apart from the Malarkey-Taylor study

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Depreciation

In "Opening the Broadband Gateway," our estimates of replacement costs are reduced by the amount of depreciation of the embedded plant TCI questions this procedure, claiming that it "does not appear to be consistent with the economic literature upon which they rely"[28]

In reality, economic theory requires that replacement cost be reduced by the amount of economic depreciation If depreciation is not taken into account, the q ratio is less than unity in a purely contestable steady state

Proof Assume the opposite That is, suppose that in calculating the q ratio, we define replacement cost as the cost of replacing embedded plant with new plant (with no adjustment for depreciation) Suppose further that in a purely contestable market, the q ratio, so calculated, is unity It follows that the embedded firm must be expected to earn a competitive rate of return on new replacement cost Under these circumstance, an entrant could expect to earn supracompetitive returns by entering the market using new plant The new firm would have lower long-run costs than the incumbent firm, because new plant has a longer remaining life than does embedded plant The entrant might also have greater revenues if the new plant has greater channel capacity than the embedded plant Such opportunities for expected supracompetitive returns cannot exist in a purely contestable steady state
End of proof

It follows that the replacement cost used in the q ratio must be adjusted for depreciation In "Opening the Broadband Gateway," we used book depreciation as a proxy for the theoretically correct economic depreciation This is a reasonable procedure

Nevertheless, in our numerical analysis below, we accept arguendo the procedure suggested by TCI That is, we make no adjustment whatever for depreciation The q ratio still turns out to be excessive

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[28] Shooshan & Jackson Inc., "Opening the Broadband Gateway," p 17, n 14

Estimate of q Ratio Using TCI's Numbers

Although TCI attacked our numbers and suggested numbers of their own, TCI failed to complete the analysis by calculating the appropriate q ratios Let us now calculate the q ratio based on the numbers and procedures proposed by TCI

Price for which cable systems sell	$1,650 per subscriber
Cost to replace with new plant.	$1,000 per subscriber
Additional "investment" in marketing	$ 40 per subscriber
Adjustment for depreciation	$ 0
Resulting q ratio	$1,650/($1,000 + $40 - $0) = 1 59

This q ratio can be compared to the q ratio of 0 805 for all non-financial corporations [29] Thus, the q ratio for the cable industry, even using TCI's proposed numbers and procedures, is almost twice that of the rest of the non-financial economy Given our rejection of alternative explanations for the high q ratio, we conclude that the cable industry is earning excessive monopoly/monopsony profits Indeed, even with TCI's numbers, expected monopoly/monopsony profits are about 60 percent of the book value of the industry's tangible assets

Furthermore, while TCI's own numbers prove our point, we must emphasize that we believe 1 59 is a gross underestimate of the q ratio for the cable industry For the reasons discussed above, our original benchmark estimate of 2 81 is a more accurate and defensible figure

Rate Increases Since Deregulation

In "Opening the Broadband Gateway," we cited the large cable rate increases that have occurred this year as further evidence of monopoly/monopsony profits We cited a Kagan study that found that rates increased 23 8 percent and a study by the National League of Cities that found rate increases of 27 5 percent [30]

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[29] Lawrence H Summers, "Stock Prices, Inflation and q," Harvard University (Massachusetts), updated October 1987

[30] Shooshan & Jackson Inc , "Opening the Broadband Gateway," pp 16-17

TCI observes that the Kagan number applies only to cable systems that changed rates during 1987.[31] According to National League of Cities, over 82.6 percent of cable systems in their study raised rates during the first six to seven months of 1987. Hence, the average rate increase for all cable systems -- those that changed rates and those that did not -- was 19.7 percent (23.8 percent X 0.826). These rate increases occurred during a period in which the aggregate inflation rate was only 2.7 percent. This strongly confirms our general point that cable rate increases have been excessive and indicate excessive market power.

TCI further cites a study conducted by the National Cable Television Association.[32] According to that study, cable rates increased by 10.6 percent in the first six months of 1987.

Unfortunately, the methodology used by NCTA has debilitating weaknesses. The response rate was only 23 percent. Managers of cable companies that are proud of their records in keeping down rate increases were probably more likely to respond than those that just had embarrassingly large rate increases. Hence, the NCTA estimates probably contain a substantial negative bias. Furthermore, apparently no attempt was made to verify that cable companies accurately reported rate increases. For these reasons, the NCTA study provides no reliable evidence on cable rate increases.[33]

Conclusions

In "Opening the Broadband Gateway," we adduced evidence that cable has excessive market power. TCI strongly attacked our analysis.

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[31] TCI Reply Comments, p. 19.

[32] NCTA, "Rate Deregulation: Cable Industry Pricing Changes and Service Expansion in a Deregulated Environment," in TCI Reply Comments, p. 19.

[33] For more detailed discussion of the NCTA study, see Shooshan & Jackson, Inc., "Review of NCTA Study, Rate Deregulation: Cable Industry Pricing Changes and Service Expansion in a Deregulated Environment," prepared for the United States Telephone Company (December 16, 1987).

In this paper, we have refuted TCI's criticisms as well as the criticisms made by other cable commenters We showed that the TCI filing contains a number of deliberate distortions and mischaracterizations of evidence We also showed that even using TCI's numbers and recommended procedures, one obtains evidence of excessive market power in the cable industry

* * *

Does Cable Television Really Face Effective Competition?

Janusz A. Ordover
Professor of Economics
New York University

with the assistance of

Yale M. Braunstein
Professor
University of California at Berkely

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Does Cable Television Really Face Effective Competition?

Janusz A Ordover[1/]

Introduction

Is cable television a local monopoly or does it face effective intramodal and intermedia competition? An answer to this question must be given before sound public policy toward cable television can be devised. In 1985, the FCC concluded that cable television faces effective competition from broadcast television in those local communities where there are at least three off the air television signals available to television viewing households in any portion of a cable community. The Commission found that the availability of three broadcast television signals is enough to ensure an effective competitive constraint on the ability of a local cable system operator (CSO) to charge "noncompetitive" rates and to offer a less than desirable programming mix to subscribers [2/] This "three signals" conclusion was used to implement the rate deregulation provisions of the 1984 Cable Act,[3/] that is, where effective competition in the form of three broadcast signals exists, cable firms may charge as much as they wish for basic service.

1/ Janusz A Ordover is a Professor of Economics at New York University. Yale M Braunstein, Professor, University of California at Berkeley contributed to the preparation of this analysis

2/ Implementation of the Provisions of the Cable Communications Policy Act of 1984, 50 Fed. Reg 18637 (1985)

3/ The Cable Communications Policy Act of 1984, Publ L. 98-549, 98 Stat. 2779 (1984).

We have been asked to review critically the Commission's findings regarding the extent of effective competition between cable and broadcast television Our analysis has two main purposes. First, to ascertain whether the methodology used by the FCC to reach its findings is consistent with widely accepted precepts of economic analysis, based on current conditions, and reflective of a sufficiently broad range of considerations Second, to review the scant data from the deregulated cable markets in order to gauge the likelihood that cable faces competition where three broadcast signals are available.

We do not aim here to provide a rigorous statistical test of intermedia competition or to provide a detailed forecast of the likely effects of deregulation on the cable industry Such an exhaustive undertaking would be impossible in the limited amount of time available to prepare this report. Nevertheless, we have reached certain conclusions. These are summarized as follows

First, the analytic methodology used by the FCC to gauge the extent of effective competition between cable and broadcast television did not conform to widely-accepted economic methodologies

Second, the cable industry has been undergoing rapid structural and other changes which potentially cast doubt on the validity of the "three signals" finding (which was based on data from 1984 and earlier)

Third, presumably because of its perception of broadcast TV as the main constraint on cable television, the FCC has understated the social value of alternative video technologies, such as wireless cable or MMDS, SMATV, and DBS.

Fourth, the available, albeit scant data indicates that the only unambiguous gainers from cable

rate deregulation have been holders of local franchises

Fifth, future analysis of competition issues requires substantially more fact-finding and sounder methodologies than employed by the FCC

1. FCC's Analysis of Effective Competition Suffers From Fundamental Methodological Problems

A scrutiny of the analytic approach adopted by the Commission in support of its "three signal" rule reveals significant methodological flaws. These flaws cast grave doubt both on the validity of the conclusions and on the desirability of the rule itself. We shall argue that the methodology adopted by the Commission in deriving criteria for "effective competition" in the cable television market is not based on standard economic indicia or substitutability among various entertainment/information services.4/ In fact, it appears that the Commission first formulated the desired policy conclusion and then sought to develop data that, if it did not prove the conclusion, at least would not undermine the conclusion.

The Commission's major premise apparently is that cable television competes in a broadly defined "home video market" in which cable, over-the-air television, STV, MDS, SMATVs, and DBS, "all offer alternatives that appear to be perceived as substitutes."5/ This approach would be based

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4/ Thus, we concur to some degree with the comments filed by the U.S. Dept. of Justice. See Comments of the U.S Dept. of Justice, MM Docket No. 84-1296, January 28, 1985

5/ This is a view advanced by economists Jonathan D Levy and Peter K. Pitsch in their article "Market Delineation, Measurement of Concentration, F C.C. Ownership Rules," p. 203, in V. Mosco (ed.), Policy

essentially on the observation that a variety of media deliver "information and entertainment" to the public. Thus, the FCC's approach hypothesizes a broad market in which cable television allegedly competes for the viewers' attention and dollars against VCRs, AM-FM radio, movie theaters, print media, and so on. It appears, furthermore, that in constructing the relevant product market, the FCC failed to give adequate consideration to such important considerations as the multichannel capacity of cable systems and cable's ability to provide packages of programming to subscribers.

The Commission's approach begs a fundamental question which goes to the heart of public policy toward cable television. This is: Do alternative technologies for delivering video programming actually provide effective competition to cable? Effective competition cannot be engineered by assumption. Strength of competition has to be assessed using sound economic methods, such as those outlined below, which conform to the criteria suggested by the Department of Justice.

Instead, in its analysis the FCC merely assumed a broad product market in which cable television competes with broadcast television (and other media). It then proceeded to determine how much competition is needed in that product and

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Research in Telecommunications, Ablex Publishing Corp (1984), pp. 201-212. See also Levy and Pitsch, "Statistical Evidence of Substitutability Among Video delivery Systems," in E. Noam (ed.), Video Media Competition: Regulation, Economics, and Technology, Columbia University Press, (1985), pp. 56-92.

geographic market to offer effective competitive constraints on the market power of cable system operators The Commission concluded that the theoretical presence of three broadcast television signals of adequate quality reception would sufficiently restrain whatever market power a cable system operator ("CSO") might have

Apparently the number three was reached on the basis of empirical studies showing that adding a fourth broadcast TV station to a market does not have a statistically perceptible effect on basic cable subscription levels.6/ This approach was pioneered some time ago by John Kwoka.7/ He demonstrated that in certain instances the creation of a strong third-ranked firm out of two lesser-ranked firms could cause prices to fall despite an increase in measured market concentration. Regardless of the econometric and analytic merits or demerits of Kwoka's study,8/ it is certain that his work did not answer what

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6/ The Commission's order refers to a study by NCTA/CATA "providing factual support for a standard based on fewer than three signals." ¶ 97 It also cites Arbitron data showing that in two signal markets cable viewership of off-air signals was equal to or greater than off-air viewership of such signals. The opposite was found to be true of three signal and greater markets. ¶ 99. The report assumes that cable itself is the fourth competitor in a three-signal market. Interestingly, none of these findings goes directly to the issue of effective competition between cable and broadcast TV.

7/ See J.E. Kwoka, "The Effect of Market Share Distribution on Industry Performance," The Review of Economics and Statistics, 1, 1979, pp. 101-109.

8/ For a criticism of Kwoka's study, see W F. Meuller and D.F. Greer, "The Effect of Market Share Distribution on Industry Performance Reexamined," The Review of

should be the key question whether the presence of three broadcast television stations in a geographical market ensures that prices and "clusters" of cable services offered by a CSO reasonably well approximate the social ideal Kwoka showed only that a current level of price may fall following the creation of a strong third or fourth player. Kwoka's findings necessarily apply only to markets (or industries) that deviate from a fully competitive ideal[9/] so that the current level of price generates rents to the leading firms This is because if the market were highly competitive (or fully contestable), the price could not fall any further as a result of increased concentration.

The relevance of the Kwoka-type analysis to the public policy issues regarding media market power is very limited. This analysis fails to consider whether three broadcast stations and one cable operator actually make for an adequately competitive market Instead, it merely suggests that the presence of a fourth broadcast TV station does not necessarily make for a comparatively more competitive market than a market comprising three broadcast TV stations and one cable system

The FCC's conclusion regarding effective competition is thus troubling It is also surprising in

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Economics and Statistics, 2, 1984, pp. 353-357

9/ Kwoka's results also apply to markets which are not perfectly contestable. Baumol, W.J., J.C. Panzar, and R.D Willig, Contestable Markets and the Theory of Industry Structure, Harcourt Brace Javanovich, 1982

light of the availability of an appropriate conceptual method of analysis developed by the Antitrust Division of the Department of Justice in the 1982 Merger Guidelines 10/ In fact, this is the very methodology that the Department urged the FCC to adopt in implementing the Cable Act.

Conceptually, the Guidelines methodology can be readily applied to the problem of determining the degree of effective competition between cable television, on the one hand, and broadcast television (or other media) on the other hand 11/ In essence, following the Guidelines methodology,

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10/ DOJ Merger Guidelines methodology for constructing relevant product and geographic markets can be summarized in a sequence of steps. Step 1: determine a product or service whose pricing and quality are to be analyzed. Here, the relevant product or service may be basic cable or cluster of services provided by cable systems. Step 2: Determine the relevant suppliers in a given geographic area. Here, the relevant supplier will be the monopoly cable franchise, in most cases. Step 3 Determine which products or services constrain the ability of firms identified in Step 2 to profitably elevate the relevant prices above some chosen benchmark level by a small but significant amount for a nontransitory period of time. In most situations examined by the Antitrust Division, the hypothesized price increase used has been 10 percent and the nontransitory period of time has been pegged at two years However, in some limited circumstances, the Division used smaller (5%) and larger (15%) price increases. Step 4: Construct the relevant market comprising firms identified in Steps 2 and 4. See, J.A Ordover and R.D. Willig, "The 1982 Department of Justice Merger Guidelines: An Economic Assessment," 71 California L. Rev. 535 (1983), for a more detailed analysis of the pertinent methodology 1982 Merger Guidelines, 47 Fed. Reg. 28,493 (1982) and 1984 Merger Guidelines, 49 Fed. Reg 26,823 (1984).

11/ For an example of application of the Merger Guidelines in video markets, see Lawrence J White, "Antitrust and Video Markets: The Merger of Showtime and the Movie Channel as a Case Study," in E. Noam (ed), Video Media Competition: Regulation, Economics, and Technology,"

we would say that the availability of broadcast television contemplated under the Commission's standard offers effective competition to cable television if, following decontrol of basic rates, cable system operators would find it unprofitable to elevate basic rates by 10 percent and maintain them at this higher level (in real terms) for at least two years. It is theoretically possible, of course, that such a rate increase might be unprofitable in markets with three or more broadcast television stations (as the Commission asserts) and profitable in franchise areas in which there are fewer than three broadcast television stations. However, the analytic studies that are available suggest that the Commission's definition of effective competition is probably wrong.12/

Columbia University Press, (1985), pp. 338-363

12/ A study by G. Kent Webb, The Economics of Cable Television, Lexington Books, (1983), found that basic cable penetration increases with the number of off-the-air channels it carries, suggesting that to some extent basic cable services and broadcast television are complements However, improvements in the quality of broadcast television tend to reduce basic's penetration, other factors remaining the same. Thus, on this score, the two media are substitutes, at least to a limited extent. Webb's study strongly suggests that it is pay cable which competes with broadcast television. Obviously, to the extent that the potential subscriber must pay basic rates before obtaining premium services, the price of basic affects demand for premium services It is difficult to know what one should make of Webb's results. From our standpoint, however, the key question is the price elasticity of demand for cable services as a "function of" the number and quality of broadcast television stations. Webb's results suggest that no matter what is the actual numerical value of this elasticity, it is likely to be small. A recent study by Browne, Bortz and Coddington, as reported in Cable TV Franchising, Paul Kagan Assoc , July 20, 1986, p 3,

Indeed, the Commission may have misunderstood the most basic phenomenon of the cable industry Namely, it is possible that broadcast TV viewers have been defecting to cable TV,[13/] so that cable may be constraining broadcast TV, as the Commission appears to believe. Yet it does not follow necessarily that broadcast is effectively constraining cable television at current cable rates and program offerings.

How realistic is it that a price increase of a magnitude of ten percent in current subscription rates would prove unprofitable to a cable system operator? Some important insights can be obtained by making an assumption about a representative CSO's mark-up on average subscriber charges, that is, CSO's variable cost to price margin.[14/] Straightforward calculations used for illustrative purposes show, for example, that when the cost to price ratio margin is one over three, a 10% rate increase would be unprofitable if it were to induce as much as fifteen percent reduction in penetration. The one over three cost to price ratio means that the variable cost (averaged among all disconnecting subscribers) would be a third of the average subscription

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supports this suggestion.

13/ See, for example, M.O. Wirth and H. Bloch, "The Broadcasters: The Future Role of Local Stations and the Three Networks," p. 121-122, in E. Noam (ed.), Video Media Competition: Regulation, Economics, and Technology, Columbia University Press (1985), pp. 121-137

14/ Note that an increase in a basic rate may induce some disconnections among those subscribers who also purchased pay tiers. It is for this reason that we must focus on an average mark-up

rate.[15/] Inspection of the mathematical formula indicates that the higher the cost-price ratio, the less likely it is that a 10% price increase would prove unprofitable because of the number of disconnects it induced. [See Appendix A1 for calculations based upon various cost - price ratios and rate increases.]

The available data indicate that the variable cost components for basic services are a small percentage of revenue from basic, perhaps as low as 9%.[16/] On the other hand, these costs can be as high as 50% for premium programming services. In light of these facts, our illustrative ratio is not unreasonable. The available evidence also tends to suggest that price increases of this magnitude did not cause a substantial reduction in cable's penetration in those communities that already have cable, although the real magnitude of these price increases must be adjusted in some cases by accounting for changes in the offerings included in various basic (or first) tiers. (See

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15/ The mathematics are as follows. The change in profits, denoted by dL = p q[(dp/p) + (dq/q)(1-[variable cost/p])], where p denotes subscription rates and q the number of subscribers. We fix dp/p at 0.1 or 0.15 and fix the price-cost ratio at some appropriate level and then calculate (dq/q) that would cause the change in profits to be negative.

16/ Two caveats are necessary here. First, the variable costs are low because most of the investment is either sunk or fixed. Consequently, long-run variable costs may be higher than those postulated in the text Second, as discussed in section 1(b)(1), basic is undergoing an unprecedented transformation in the present marketplace.

section 2a infra) As shown in Table 1, nationwide cable penetration increased in the first quarter of 1987.

2. FCC's Analysis of Effective Competition is Outdated In View of Significant Programming and Structural Changes in the Cable Industry

The FCC's 1985 conclusion is also potentially flawed because the market it examines is already antedated A new picture of that market suggests strongly that cable has the ability to obtain monopoly rents. The most important elements of the new picture are "tier meltdown" and structural changes in the degree of horizontal and vertical integration.

a. Tier Meltdown.

During the last few years, CSOs have tended to include more attractive programming choices in the basic tier This is in contrast with the early days of classic 12-channel cable systems when the basic service included principally (1) must-carry stations (the locally available broadcast TV signals), and (2) some locally originated programming. In fact, in many early systems only a single basic tier was available to subscribers.

Subsequently, cable operators began using microwaves to import distant television signals for retransmission. With the advent of satellites, additional program offerings, such as HBO, The Movie Channel, Showtime, etc , were made available in cable systems on pay-per-channel basis. Cable systems acquired greater channel capacity which enabled them to increase their offerings. In turn, growing

channel capacities stimulated new programming Ironic, but pertinent for public policy, is the fact that channel space for new offerings is now scarce in some cable systems

During that period, which lasted until quite recently, the economics of cable television pricing were driven by the presence of demand-interdependencies among various offerings of cable services. In particular, a CSO had to allow for the fact that changing the price of basic service increased the actual price (thereby reducing demand) for premium services. CSOs thus employed sophisticated price discrimination strategies that enabled them to maximize revenue from subscribers of different tastes. In addition, and perhaps of equal importance, because subscription rates for pay tiers were by the mid 1970s almost totally deregulated and were often not included in the base for franchise fees, the CSOs sought to shift as much programming as possible into higher (premium) tiers to maximize their pricing freedom and net revenue.

In the wake of the 1984 Cable Act, cable operators have begun to increase the number and variety of offerings that are included in basic. As a result of this new marketing strategy, the basic tier now offers not only retransmission (i.e., higher quality reception of broadcast TV), and local programming, together with a "right" to purchase higher tiers, but also increasingly varied and better quality programming. The ongoing simplification of the pricing of basic and premium services by cable systems is

due to a combination of factors The most important of these are

(i) customer resistance to and confusion with complex tiering of services,

(ii) changing offerings as program suppliers enter and exit the supply side of the distribution chain, resulting in periodic realignments of tiers,

(iii) vertical integration of cable and program suppliers,

(iv) increased power of cable system operators in negotiations with franchising authorities This has resulted from two events: (a) the end of the "franchising wars," and (b) deregulation and preemption by Congress.

Overall, through increased clustering of offerings in basic tiers, the trend has been to reposition these tiers in the product space of information and entertainment services. It is difficult to determine with precision the consequences of that repositioning on effective competition among the providers of video-based entertainment and information. In our opinion, repositioning potentially has eased the constraint, if any, that broadcast television imposes on basic cable This is because strategies designed to reposition products (here cable offerings) are primarily motivated by the desire to reduce the degree of head-on competition, not to enhance it. In brief, basic cable still subsumes broadcast, but its reshaping has made it a distinguishable product

As a product, basic cable now is the availability 24 hours a day and seven days a week of all of the following news (including the specialties of financial, sports,

weather, headline, feature, live, local, and general national news), sports (of different sports and multiple games within most major sports), children's variety, adult variety, religious offerings, shopping (ranging from fashionable clothes to bizarre geegaws), and movies. In terms of the continuous availability of this smorgasbord of programming, no three broadcast stations, even taken as a group, can compare; basic cable offers a distinct product.

Thus the product market that was considered by the FCC prior to its deregulatory rulemaking has changed. It is probably less competitive than it was then,17/ but at least the Commission ought to re-examine the marketplace. In doing so, the Commission should use better methodologies, and should determine the implications of product repositioning and tier meltdown on the degree of effective competition among different modes of reaching the television-viewing public.

b. Structural Changes.

Perhaps of even greater consequences for public policy are the structural changes in the cable industry since the passage of the Cable Act of 1984 and the FCC's 1985 deregulation ruling. These structural changes include both

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17/ In the DOJ Comments, it was concluded at 18 that " . . broadcast television is generally not a good substitute for the full range of programming and other services distributed by cable television. These reasons include the large variety of video programming usually carried on cable systems (.) and the inability to market 'pay' services successfully over broadcast television " DOJ at 18

increasing concentration in cable ownership and increasing vertical integration between CSOs, program distributors, and production companies Concurrently with this trend towards increased horizontal concentration and tighter vertical links in the programming-distribution chain, cable system operators have at times implemented programming practices whose impact on competition is potentially suspect.

(1) Horizontal Integration

Some consolidation of the ownership of cable systems took place prior to deregulation. It seems, nevertheless, that deregulation -- combined with favorable merger policy and a rising stock market -- greatly spurred the trend towards consolidation of ownership in the cable industry Recent estimates indicate that of all cable subscribers (more than 40 million households), 46 percent are directly or indirectly controlled by 5 companies 18/ In 1985, the top 50 companies accounted for 70 percent of the nation's nearly 35 million subscribers. The two major MSOs, Tele-Communications Inc. (TCI), and American Television and Communications Corp. (ATC), now control approximately over 30 percent of all subscribers, with TCI alone controlling 22 percent. The biggest MSO is TCI which owns 600 cable systems with approximately eight million subscribers in 44 states The second largest MSO, ATC (a subsidiary of Time, Inc), owns 660 cable companies with 3 5 million subscribers in 32

18/ These figures are culled from various issues of Cablevision

states TCI alone has spent nearly $3 billion acquiring over 150 cable systems in the last three years

It has been estimated that, in 1986, approximately nine billion dollars was spent on mergers and acquisitions by the largest MSOs. One industry official has commented that it would not be surprising to see as many as five to eight of the top 20 companies disappear through horizontal integration of the next five years.19/

This trend towards increasing concentration has not been appreciably slowed by the rising prices of the transactions. In 1986, the average per subscriber value of one company's acquisitions, for example, was $1399 and the cash flow multiple on a projected first year basis was 10 5. For another company, the average value per subscriber was $1254. In some key targeted cable areas, i.e , Florida and California, prices of $2000+ per subscriber are not uncommon Prices in 1986 generally averaged between $1200 and $1300 per subscriber. However, prices ranged widely from $900-$1200 for the very few remaining classic (i.e., older systems with only small capacities which typically offer only broadcast stations) cable systems to $1500+ for large or underdeveloped systems. And by 1987, the per subscriber prices have gone into the $2000+ range, according to trade press reports. In contrast, in 1984 (prior to cable deregulation), cable systems could typically be acquired for $800-$900 per

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19/ These estimates were reported in Cablevision, January 19, 1987.

subscriber As of late 1985, the going price was reported to be $1100-$1200 The strong per subscriber prices were also reflected in the average projected first year cash flow multiple paid for systems in 1986, the average of which ranged from 10.5 to 11 5.

There is very strong reason to suspect that deregulation made it possible for CSOs to better extract profits from their local franchises. To the extent that there is no evidence that, on average, CSOs were unprofitable (on a replacement cost basis) prior to deregulation, deregulation must be strongly considered as an important explanatory variable behind the increases in per-subscriber prices paid by the purchasers.

The available financial data on the sales prices of cable franchises can indirectly be used to obtain some estimates of the degree of monopoly power held by local cable franchises One analysis looks at the ratio of the value of the productive asset in the financial market to its replacement value This ratio is high when the asset has market power attached to it. In particular, in highly competitive markets the ratio -- denoted as the q-ratio -- should approximately equal one Based upon an analysis of 153 recent sales of cable systems, Shooshan and Jackson Inc. have calculated q-ratios for 1986.[20/] Their study estimates

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20/ Shooshan and Jackson, Inc , "Opening the Broadband Gateway The Need for Telephone Company Entry into the Video Services Marketplace," (1987), Washington, DC, submitted in FCC CC Docket No. 87-266.

the q-ratio for the cable industry as of December 1986 at 2 81 [21/] Obviously, in light of additional increases in the per subscriber acquisition prices in 1987, the value of the q-ratio has increased substantially as well.[22/] The study concludes that the explanation for the high q-ratio is that the cable industry has excessive market power. Thus, these analysts conclude that although there are many potential and actual alternatives to cable, these alternatives do not adequately constrain the monopoly power of cable systems

(ii) Vertical Integration

Another dramatic manifestation of structural changes in the cable industry is the growing degree of vertical integration. "Forward" and "backward" vertical integration has been taking place. Thus, MSOs have been integrating into programming.

Vertical integration by major MSOs into programming services is linked with the concentration of system ownership [23/] This is because large MSOs have assured

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21/ This ratio is what Shooshan and Jackson call their middle-of-the-road estimate They also calculate two other estimates· one with a high adjusted replacement cost and the other with a low adjusted replacement cost The q-ratios for these estimates are 2 27 and 3 28, respectively. The q-ratio for a competitive market is equal to one Higher q-ratios occur in concentrated industries where there are barriers to entry and there are few mechanisms to reduce monopoly profits.

22/ As we pointed out, however, the general increase in stock market prices over the 1984-87 period contributed to the increases in the calculated q-ratio.

23/ See, e.g Lawrence J. White, "Antitrust and Video Markets· The Merger of Showtime and the Movie Channel as a Case Study," in E. Noam (ed), Video Media

captive subscribers which reduces the risks of substantial investments in programming.

Interestingly, for a programmer the audience base provided by cable is more secure than is the audience when the programming is delivered via broadcast. An advertising-supported delivery technology must be sensitive to the size of the viewing audience for every minute of programming By contrast, the analysis for a CSO of the value of any programming turns on whether a particular service increases penetration, not how much (or even whether) anyone watches that service. Another way of making this point is to note that the product delivered by cable to consumers is the continuous availability of a range of programming, but the product broadcast TV claims to its advertisers that it delivers to consumers is an audience measured by the number that actually watches a given program. The audience size obviously fluctuates more widely than does the number of subscribers

At the same time, vertical integration may be welcome to a programmer that has experienced the substantial buying power (monopsony power) of large MSOs, with their unchallenged grip over cable subscribers. Indeed, it is well-known that large MSOs frequently pay dramatically lower per subscriber fees than those paid by smaller systems

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Competition Regulation, Economics and Technology, Columbia University Press, (1985), pp 338-363.

This is not the place to explore in detail the extent of vertical integration in the industry and the ongoing changes However, as can be seen from Tables 2 and 3, several of the largest MSOs are owned by media corporations who are among the largest cable programmers Many of the cable system operators and the program packagers also have interests in program production and other aspects of distribution. Furthermore, data indicate that subscribers to the cable systems operated by vertically integrated firms are most likely to subscribe to each firm's jointly-owned pay service.24/

Economists generally presume that vertical integration and vertical business practices are driven by efficiency considerations.25/ However, whether a quest for efficiencies fully explains vertical integration in the cable industry, as well as some other programming practices, has yet to be fully explored. Indeed, economists have recently

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24/ See B M Compaine, Who Owns the Media, Second edition, White Plains: Knowledge Ind. Publ. (1982) See also, Shooshan and Jackson, Inc., Economic Analysis of Concentrated Ownership of Cable Systems, Washington, D C , 1986, and "Cable TV The Issues," Consumer Reports, September 1987.

25/ See, e.g., M.K Perry, Vertical Integration Determinants and Effects, Bell Corporation (Belcore) Research Paper (June 1987) and M.L. Katz, Vertical Marketing and Franchising Agreements, UC Berkely Bus. School (September 1987) both forthcoming in R Schmalensee and R Willig, Handbook of Industrial Organization, North-Holland Publishers (1988)

pointed out that, at least in principle, vertical practices can have anticompetitive horizontal consequences 26/

Thus, for example, through vertical integration MSOs may deny programming to alternative cable technologies, such as MMDS ("wireless cable"), which constitute a head-on threat to cable's control of the local market.27/ Such anti-competitive tactics are easier to carry out when a distributor (a large MSO, for example) also owns an important programming source 28/ In addition, as the MSO becomes larger, the more credible become its threats to disadvantage the program vendor at the distribution level if it refuses to cooperate with the distributor's programming tactics Such a disadvantage could be produced, for example, by placing the vendor's program on a high channel, where it is less likely to be viewed by subscribers, or by refusing to carry the service. Other tactics could include overpricing a particular program or not including it in the optimal tier.

26/ See T.G. Krattenmaker and S.C. Salop, "Anti-competitive Exclusion· Rising rivals' costs to achieve power over price," 96 Yale L J. 209-295, (1982), and J A Ordover et al., "Non-price anti-competitive behavior by dominant firms toward the producers of complementary products," in F. Fisher (ed.), Antitrust and Regulation, MIT Press (1985).

27/ See, "Cable Television v The Alternatives A Study in Antitrust," prepared by the Office of Congressman Charles E Schumer (Sept. 14, 1987), for an argument that incumbent MSOs have prevented entry of new cable distribution technologies

28/ D.T. Scheffman and P.T. Spiller, "Buyers and Entry Barriers," Federal Trade Commission, Bureau of Economics Working Paper No 154, August 1987

Another business strategy of CSOs is, in effect, the sale of channel placement to programmers by means of obtaining from program vendors a discount from the price in exchange for preferential placement. Because broadcast television stations cannot sell their programming to cable at any market-related price, they do not have at present an efficient mechanism for competing with other programmers for valuable channel assignments.

To the extent that the FCC may be correct that independents actually compete for viewers and advertising revenue with cable systems,[29/] the decisions to move these stations to higher channels should at the very least raise some concern. This is because the need to ensure that the pursuit of legitimate business objectives -- which includes maximization of profits from distribution of programming -- by cable systems should not undermine the public policy objective of securing a wide range of programming choices for cable subscribers and other television audiences. On the other hand, to the extent that broadcast television programming is valuable to cable systems, perhaps it should be placed on equal footing with other programming products in its ability to compete for valuable channel location This is especially important for the local stations that are no

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29/ National cable advertising revenues, although small in proportion to those of broadcast networks, have been increasing rapidly. Revenues were $546 million, $735 million and $930 million from 1984 through 1986 respectively Estimates for 1987 advertising revenues are $1.142 billion, a 10 percent increase over 1986

longer protected by must-carry rules and for whom exclusion or suboptimal channel placement could amount to a financial death sentence

It is not our view that regulation of the MSOs' programming decisions is necessarily a desirable public policy. It is our opinion, however, that in light of the structural changes in the cable industry, such programming decisions can assume consequences which did not previously exist. To the extent that they do, they raise serious public policy concerns.

3. The FCC Has Paid Insufficient Attention to Alternate Delivery Technologies

It seems clear that aside from direct head on competition from another wired cable system -- as it exists in overbuilds --- the most plausible constraint on the market power of local cable franchises should come from alternative delivery technologies such as MMDS or wireless cable, SMATV, and DBS.30/ The available evidence suggests that these alternative cable technologies have not yet made significant inroads into the "video marketplace." The troublesome possibility, however, as recent developments in the cable industry strongly suggest, is that entry impediments have increased rather than decreased in the post-deregulation marketplace

30/ Direct competition from cable systems owned and operated by fiber-optics-using telephone companies has yet to materialize Its future is mired in complex legal and regulatory battles

Interestingly, the FCC has expressed little interest in facilitating entry of these technologies Indeed, having found that broadcast television offers an effective constraint on cable in many local franchises, the Commission paid mere lip service to alternative technologies which allegedly are inferior from the engineering standpoint to standard cable. The Commission's stance however, confuses economic benefits with engineering assessments. From the social standpoint, the relevant benefits from those alternative technologies have to be related to the associated costs. For example, the fact that some of these technologies can offer fewer channels of programming than state-of-the-art cable systems is not enough to dismiss them from the marketplace. In many respects, these technologies entail fewer sunk costs, are less expensive to install, and are cheaper to maintain than are standard cable systems. In addition, their presence in the marketplace would afford additional competition to incumbent CSOs which could inure to the benefit of cable subscribers.

4. The Effect of The 1984 Cable Act on The Cable Industry: Who Has Benefitted?

It is too early to render a definitive judgment on the social benefits engendered by the FCC's implementation of the effective competition provisions of the 1984 Cable Act. However, the available data indicate that so far the only unambiguous beneficiaries of the Act have been the owners of cable systems. The advantages for consumers are unclear, at best.

The owners of cable systems plainly have benefitted through increased prices paid by buyers for the existing cable systems Cable system owners have also benefited from the ability to raise basic subscription rates without interference from regulatory authorities Subscribers have suffered as a result of these price increases, at least to the extent that these price increases exceed the benefits from additional programming that the operators are now increasingly including in the basic tier.31/

Tables 4 and 4a show the history of average monthly basic cable rate increases since 1979 32/ During the period 1979-1985, the average rate increase granted to operators requesting rate increases was between 13.6 percent and 17.8 percent (with an average increase of 15 3 percent over the period) above the old rates. In 1986, the average basic cable rate had increased 20 percent above the old rates for those operators that had increased their basic rates. For the first half of 1987, cable operators, no longer subject to rate regulation, have increased their basic cable rates by approximately 24 percent In a 1986 survey of 282

31/ A recently released study by National Cable Television Association (NCTA) shows that from December 1986 to June 1987, basic subscribers in a surveyed sample received an additional 1 6 channels in their basic package, going from 27.3 to 28 9 channels "Rate Deregulation· Cable Industry Pricing Changes and Service Expansion in a Deregulated Environment," NCTA, Washington, D.C. (November 1987)

32/ The data are estimates of Paul Kagan Associates as reported in their publications, Cable TV Franchising and the Kagan Census

cable operators, the Cable Television Administration and Marketing Society found that 75 percent of those surveyed planned rate increases ranging from relatively low increases to more substantial increases (30 percent) On average, the expected increase would be 18 5 percent.33/

In a more recent survey conducted by the National League of Cities of 233 franchising authorities covering 274 franchises serving 4.68 million subscribers, it was found that 82.6 percent of the cable operators surveyed increased their basic rates. In 40 4 percent of the rate increases, the number of services included in basic services also increased. In the other 42.3 percent where the number of services was not increased, the average increase of basic rates was 27.5 percent Of the 42 3 percent that did not increase the number of services, however, 17.3 percent decreased their pay service rates. Of the remaining cable operators surveyed, 14 4 percent did not change their basic service rates while only 2 percent reduced their rates 34/ Even a recently released study of the deregulated cable industry by National Cable Television Association found that, in a sample of 598 responding cable systems35/ which reach

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33/ This is reported by Laura Landro, "Cable TV's New Freedom Promises Higher Prices - but More Services," Wall Street Journal, p 31, C4, Dec. 12, 1986.

34/ National League of Cities, Impact of the Cable Act on Franchising Authorities and Consumers, Washington, D.C , September 18, 1987

35/ The overall response rate was 23% There is no evidence one way or the other whether the responding cable sysiems were significantly different from those which

16% of cable households, the average basic rate increased by 10.6% since January 1987. NCTA's estimates appear to be very low in comparison with those reported by other sources

Table 4 also compares annual industry average basic cable rates to the average rate increases for those systems granted increases in the same year (See also Figures 1-3) During the period 1979-86, rate increases for the average system obtaining a rate increase were approximately 3 percent to 5 percent higher than the industry average. In 1985, the average system that obtained a rate increase was almost equal to the industry average. While 1987 figures are not yet available, it seems likely that the rate increases for those operators raising their rates will be higher than the industry average as the number of rate changes has also increased significantly. In 1986, for example, there were rate changes in 566 communities in 40 states In contrast there have already been 968 rate changes in 45 states in the first half of 1987.36/

Accompanying the relative price changes, a survey by the National League of Cities also shows that there was a reduction in the number of basic service tiers in 1987. Approximately 17 percent of the MSOs surveyed reduced their basic service tiers; 80.8 percent offered no change; and only 2.3 percent actually increased the number of basic service

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failed to respond to the questionnaire

36/ Estimates of Paul Kagan Associates, Cable TV Franchising News Roundup, September 31, 1987, p. 2.

tiers Prior to deregulation, 57 7 percent of the cable operators offered only one basic service tier 25 7 offered 2 tiers, 11 3 percent offered 3 tiers, and 5 4 percent offered 4 or more tiers. After deregulation, 71.2 percent offered one basic tier; 18.1 percent offered two tiers, 6.2 percent offered 3 tiers and 4 percent offered 4 or more tiers

Thus, the available evidence strongly points to increased basic rates in the deregulated marketplace. In addition, as Paul Kagan observes, CSOs pushed through substantial rate increases in anticipation of full deregulation in January of 1987. As stated in The Pay TV Newsletter, "[w]ith anticipation of full deregulation in January 1987, cable operators took the lid off basic rates in 1985. According to KAGAN CENSUS data, operators hiked basic rates by a record 11%... "37/ And, as we noted in Table 4, substantial rate increases took place in 1986 Indeed, over the past two and a half years, basic rates increased by about a third, substantially in excess of increases in the CPI

It is important to note that it is not possible to use the surveyed data on prices to test whether the FCC's "three signal" rule for estimating effective competition is valid First, neither the National League of Cities nor the NCTA relates price changes in particular franchises to the number of available broadcast television signals, which is the key issue here Second, the NCTA study neglects the fact

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37/ The Pay TV Newsletter, Paul Kagan Associates, May 30, 1986, p 4

that basic rates increased rapidly during 1985 and 1986 Third, the studies do not indicate whether the basic rates in the regulated environment were substantially below monopoly levels Indeed, if these rates were close to monopoly levels, deregulation would not have a significant impact on basic rates. Nevertheless, the fact that rates have been increasing rapidly suggests that some previously unexploited pricing power is now available to CSOs.

5. The FCC Can And Should Do Better Analysis Than That Which Resulted in The "Three Signals" Finding

This synopsis suggests that the short history of the deregulation of cable is far from a picture of unambiguously procompetitive behavior. Deregulation was not required to bring financial health to a sickly business, as it did for the railroad industry for example. In fact, prior to deregulation cable companies were in sound financial positions (especially if they were able to renege on promises made during franchise bidding wars). Also, deregulation did not bring lower prices to a mass of cable subscribers, as it did in the airline industry.38/ In fact, subscription prices appear to have risen substantially even after making allowance for expansion of programming included in basic service And, finally, deregulation did not induce the entry of new competitors as it did in the airline industry In fact, the alternative cable technologies are finding the

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38/ See, e.g., S. Morrison & C Winston, "The Economic Effects of Airline Deregulation," The Brookings Institution (Washington, DC), 1986

deregulated environment largely inhospitable to entry and expansion Under these circumstances, as implemented by the FCC, the 1984 Cable Act may have been unwise legislation In any event, the radical changes in the marketplace to which the Act has contributed demonstrate that the Commission's conclusions about competition for cable are, at a minimum, based on out-of-date information and poor methodology

Table 1
U S Cable Penetration
(1985 1987)

	Total Systems	Percent Increase	Basic Subscribers	Percent Increase	Pay Units	Percent Increase	Homes Passed	Percent Increase	Total Franchised Homes	Percent Increase
1985	6675		30759556		25599448					
1986	7546	0 13	36931375	0 20	27042372	0 06	52171078		47023634	
1987	7836	0 04	38762246	0 05	28637268	0 06	55477512	0 06	49890122	0 06

* As of April 1 _1987

Source Television and Cable Factbook 1985 1986 and 1987 Editions

Table 2

Pay Cable Packager--Cable System Operator Ties
(1979-80)

Corporate Owner	Pay Cable Packager	Number of Affiliates	Subscribers	Cable MSO	Number of Systems	Subscribers
Time, Inc	Home Box Office	800	2,000,000	ATC[1]	94	714,000
(Joint Venture)	Showtime	260	650,000	Teleprompter	110	1,110,000
				Viacom	30	300,000
Warner	Star Channel	17	105,000	Warner	140	576,000
TOTALS		1077	2,755,000		374	2,760,000
% OF NATIONAL TOTALS[2]			84%			19%

Source: Braunstein (1980)

Notes:

[1]Does not include Manhattan Cable (97,400 subscribers)

[2]Based on 14,200,000 cable subscribers and 3,200,000 pay subscribers

Table 3

Pay Cable Packager - Cable System Operator Ties
(1984 Data)

Corporate Owner	Pay Cable Packager	Number of Affiliates	Subscribers	Cable MSO	Number of Systems	Subscribers
Time, Inc	Home Box Office	5,000	12,500,000	ATC	463	2,400,000
(Joint Venture)[1]	Showtime/	3,100	5,000,000	Viacom	19	752,000
	The Movie Channel	2,750	3,000,000	Warner Amex	n/a	1,783,000
TOTALS		11,000	20,500,000			4,535,000
% OF NATIONAL TOTALS[2]			100%			15%

Sources: Broadcasting Cablecasting Yearbook and Television & Cable Fact Book

Notes:

[1]Owners of combined Showtime/The Movie Channel joint venture

Viacom	50%
Warner Amex	31%
Warner Communications (one of the owners of Warner-Amex)	19%

[2]Based on 30,000,000 cable subscribers and 70,500,000 pay subscribers

TABLE 4

Year	(1) Average Old Rate	(2) Average Rate Increase Granted*	(3) Average Percent Increase (By Year) [(2) (1)]/(1)	(4) Rate of Increase of Basic Rates	(5) Industry Average Basic Rate	(6) Industry Percent Increase (By Year) [(5) (1)]/(1)	(7) Rate of Increase Industry Rates	(8) Percentage of Difference [(2) (5)]/(5)
1979	6.75	7.76	14 96	-	7 53	11 56		3 05
1980	7 03	8 08	14 94	4 12	7 85	11 66	4 25	2 93
1981	7.32	8.36	14 21	3 47	8 14	11 20	3 69	2.70
1982	7 70	8 88	15 32	6 22	8 46	9 87	3 93	4 96
1983	7.92	9 22	16 41	3 83	8 76	10 61	3 55	5 25
1984	8.31	9 79	17 81	6 18	9 20	10 71	5 02	6 41
1985	9 00	10.23	13 67	4 49	10 24	13 78	11 30	0 10
1986	9.51	11 41	19 98	11 53	11 08	16 51	8 20	2 98
1987 **	10 26	12 70	23.78	11 31	N/A	N/A	N/A	N/A

* For 1979 through 1986, rate/system increases granted by local authorities
In 1987, basic rate increases were deregulated

** First six months of 1987 only

(1) Rate/system
(2) Includes tiers
(5) Rate/subscriber

Source Paul Kagan Associates, Cable TV Franchising, various issues

TABLE 4A

Year	(1) Average Old Rate	(2) Average Rate Increase Granted*	(3) Average Percent Increase (By Year) [(2) (1)]/(1)	(4) Rate of Increase of Basic Rates	(5) Industry Average Basic Rate	(6) Industry Percent Increase (By Year) [(5)-(1)]/(1)	(7) Rate of Increase Industry Rates	(8) Percentage Difference ((2) (5)]/(5)
1986	9.51	11.41	19.98	11.53	11 08	16 51	8 20	2.98
1987(i) **	10.26	12.70	23.78	11.31	12 70	23 78	14 62	0 00
1987(ii) **	10.26	12.70	23.78	11.31	12 27	19 59	10 74	3 50
1987(iii)**	10.26	12.70	23.78	11.31	12 10	17 89	9 16	5 00

1987(i) Estimated 1987 industry average equal to average rate increase
1987(ii) Estimated 1987 industry average 3.5 percent less than the average rate increase
1987(iii) Estimated 1987 industry average 5.0 percent less than the average rate increase

* For 1979 through 1986, rate/system increases granted by local authorities.
In 1987, basic rate increases were deregulated.
** First six months of 1987 only

(1) Rate/system
(2) Includes tiers.
(5) Rate/subscriber.

Source: Paul Kagan Associates, Cable TV Franchising, various issues

Notes to accompany Table 4

The table compares annual average basic cable rates (rate/subscriber) to the average rate increases for cable systems that were granted rate increases (rate/system) in the same year

Columns 1-4 summarize data for just those cable systems that were granted rate increases Column 1 shows the average basic rate prior to the rate increases, Column 2 shows the average rate increase that were granted for 1979-1986 Column 3 shows the percentage increase in basic rates in any year for those systems that had rate increases granted Column 4 calculates the percentage change of the average rate increase granted by local authorities over time

Column 5 shows the annual average basic cable rate (rate/subscriber) for the period 1979-1986 Column 6 shows the percentage increase of annual average cable rates for each year calculated using the average old rate as the standard of comparison This calculation will differ slightly from that in Column 3 since it calculates the average basic rate of all cable systems (i e including those which did not have rate increases granted and those which had not applied for a rate increase in any particular year) Column 7 shows the increase of the annual average basic rate over time

Column 8 shows the difference between the average rate increase granted to cable systems (Column 3) and the annual average basic rate (Column 6) It shows that between 1979 and 1986 the average cable system that was granted a rate increase charged approximately 3 - 5 percent more than the industry average

Table 4A uses the data in Table 4 to calculate estimates of the annual industry average basic cable rate in 1987 Using the average rate increase of those cable systems that had increased their basic rates in the first six months of 1987 as a benchmark we calculate three estimates of the average basic rate for 1987 The different estimates depend upon assumptions of how much the annual average basic rate will differ from the average rate increase for those cable systems that increased their rates Since this difference averaged between 3 and 5 percent throughout the period 1979-1986, the first estimate is made on the assumption that the annual basic rate will be the same as the average rate increase of those systems that raised their rates, the second is that the annual average rate will be less than the average rate increase by 3 5 percent, and the third is that the annual average rate will be less than the average rate increase by 5 percent These estimates seem reasonable in light of the increasing number of rate increases that have already taken place in 1987 In 1986, for example, there were rate changes in 566 communities in 40 states and the average cable system that was granted a rate increase charged roughly 3 percent more than the industry average basic rate In contrast there were 968 rate changes in 45 states in the first half of 1987 [1] Therefore the larger percentage of all cable systems increasing their rates would tend to make the average rate increase by cable systems that have raised their rates closer to the industry average in 1987

In a recent survey of cable rate deregulation by the National Cable Television Association (NCTA) [2] the average basic service rate that an

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1 Estimates of Paul Kagan Associates Cable TV Franchising News Roundup September 31 1987, p 2

2 National Cable Television Association Rate Deregulation Cable Industry

average subscriber paid in July 1987 was found to be $13 11 The NCTA study shows that the rate increase for the cable systems surveyed had increased by 10 6 percent between December 1986 and July 1987 Using their estimate of the average basic rate in July 1987 the increase of the industry annual average basic rate over that which prevailed in 1986 would then be 18 3 percent (significantly higher than our relatively conservative estimates) In contrast in 1985-1986 the industry annual average basic rate had increased by only 8 2 percent

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Pricing Changes and Service Expansion in a Deregulated Environment, November 1987

Figure 1. Average Rate Increases Granted
Versus Changes in the
Consumer Price Index (CPI)
By Year (1979-1987)

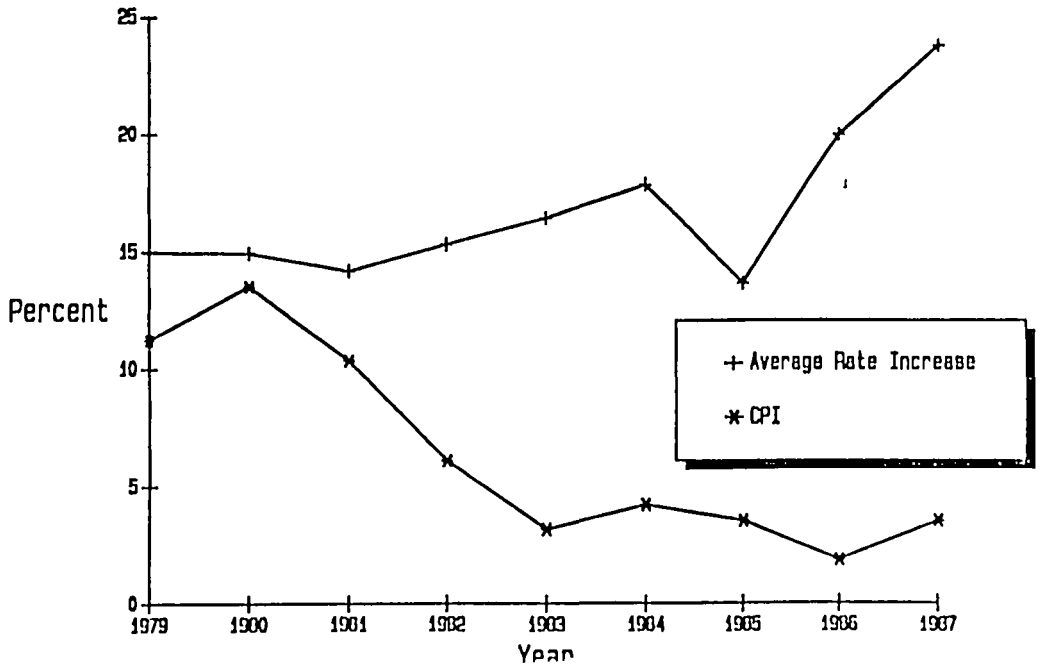


Figure 2. Industry Average Rates/Subscriber
(1979-1987)

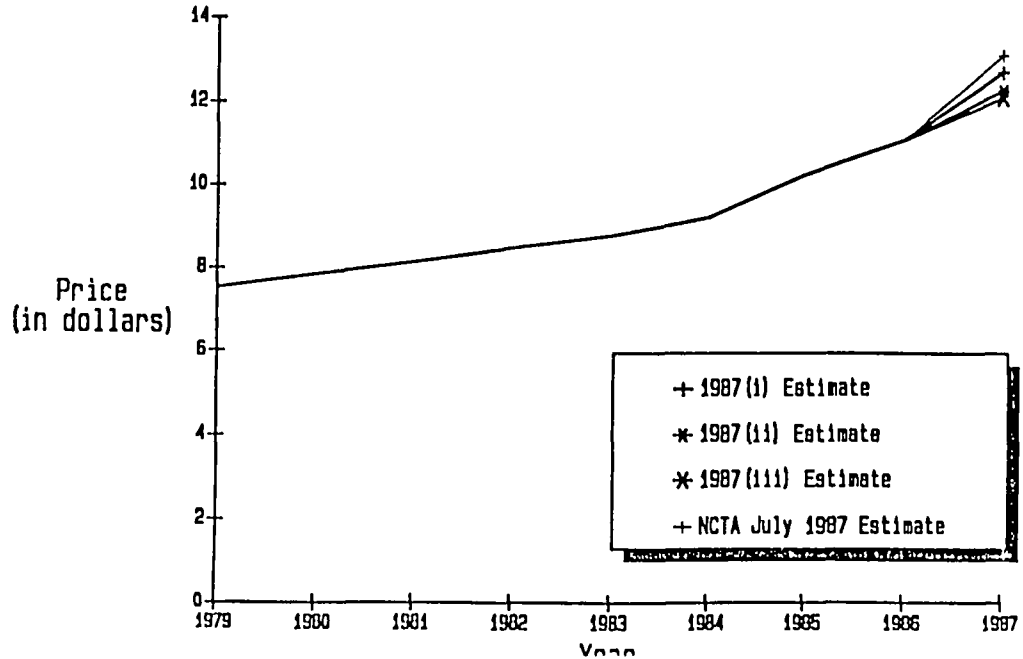
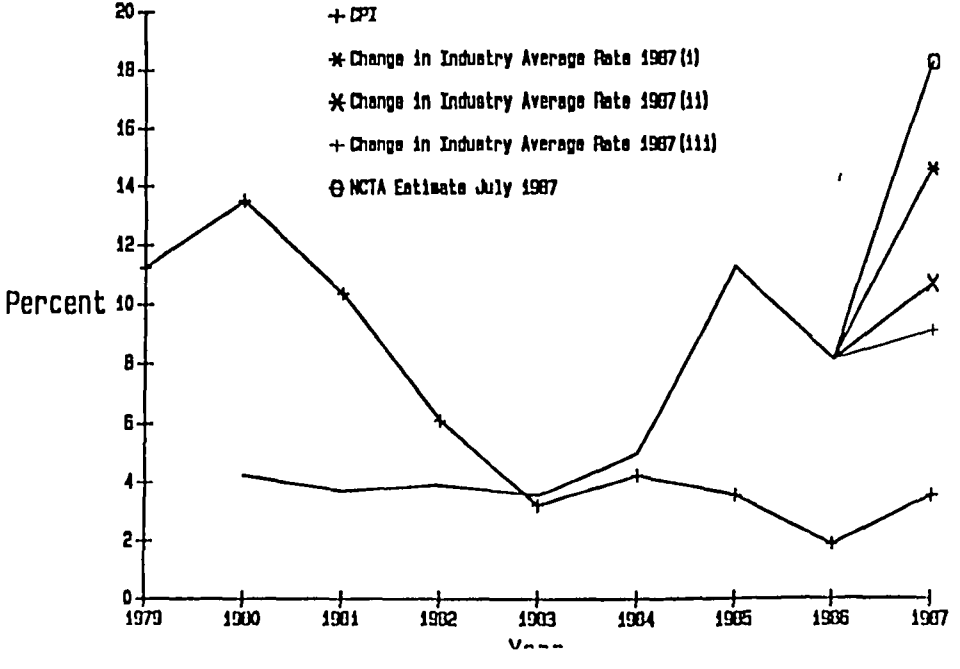


Figure 3: Percentage Increase of the Industry Average
Basic Rate Using Different Estimates of the 1987 Industry Average
(1979-1987)



Appendix A1

Rate Increase (Percentage)	Cost/Price Ratio					
	1/1.5	1/2	1/3	1/4	1/10	1/20
1	3	2	1.5	1.3	1.1	1.1
10	30	20	15.0	13.3	11.1	10.5
25	75	50	37.5	33.3	27.8	26.3
50	150	100	75.0	66.7	55.6	52.6
75	225	150	112.5	100.0	83.3	78.9
100	300	200	150.0	133.3	111.1	105.3

To read this table, the first column represents various rate increases. Reading horizontally for each respective rate increase are the percent reductions in market penetration required to make the rate increase unprofitable. For example, a 10 percent rate increase would be unprofitable if it were to induce a 20 percent reduction in market penetration with a cost/price ratio equal to 1/2. $(20 = (10/[1 - [1/2)]) = (10/[1 - (vc/p)])$.

National League of Cities
1301 Pennsylvania Avenue NW
Washington D C
20004
(202) 626 3000

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EXHIBIT O

September 18, 1987

IMPACT OF THE CABLE ACT ON FRANCHISING AUTHORITIES AND CONSUMERS

The National League of Cities (NLC) has compiled the results of a survey sent to cable regulators around the nation in July. The purpose of the survey was to begin the process of assessing the impact of the Cable Communications Policy Act of 1984 on regulation of the cable television industry.

SAMPLE

Responses were received from 233 franchising authorities and covered 274 franchises and 4,681,318 subscribers. While the respondents were primarily municipal franchising authorities, a small number of state (8) and county (33) franchises were also included in the sample.

The average number of subscribers for each cable system was 22,615 and the median number was 12,000 The systems represented in the sample were primarily urban (42.4 percent) and suburban (51.9 percent) Rural communities made up only 5 6 percent of the sample, suggesting that the data does not reveal much about current cable conditions in small communities in isolated areas of the country

RATES

Since deregulation took effect on December 30, 1986, 82 6 percent of the cable operators covered by this study increased their rates. However, the significance of this number is diminished by the fact that 40 4 percent of the time the increases in basic service rates were accompanied by increases in the number of services included in basic service. In most cases, these increases in the services provided were considered to be equivalent in value to the rate increase

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Thus, there was clearly an effective increase in basic service rates in 42.3 percent of the cases (i e , increased rates and no additional services or increased rates and reductions in the number of services). In these cases, there was a counterbalancing reduction in pay service rates in only 17.3 percent of the cases

The average rate increase in situations where there was an effective increases in rates was 27.5 percent (the median was 18 5 percent).

In 14.4 percent of the cases, the cable operator did not change basic service rates. Only in 2 percent of the cases were basic service rates actually reduced.

Basic Service. In 16.9 percent of the cases the number of basic service tiers was reduced following deregulation. In 80.8 percent of the cases, the number of basic service tiers was not changed, while in 2.3 percent of the cases the number was increased

(With respect to the smaller (but more relevant) sample of 91 systems where two or more basic service tiers were provided before deregulation, the number of basic service tiers was reduced in 40.6 percent of the cases, unchanged in 56 percent of the cases, and increased for 3.3 percent of the systems.)

Before deregulation, 57.7 percent of the cable operators covered by the survey provided one tier of basic service, 25.7 percent provided two, 11.3 percent provided three, and 5.4 percent provided four or more. After deregulation, there was a clear tendency to collapse multiple tiers of basic service into a smaller number of basic service tiers in a much greater percentage of the cases -- 71.2 percent -- there was only one tier of service (18.1 percent provided two tiers, 6.2 percent provided 3 percent, and 4.0 percent provided 4 or more).

After deregulation, the average number of services included in basic service increased from 24.6 to 30 channels (the median also showed an increase, going from 24 to 28 channels of programming).

SUBSCRIBER SATISFACTION

The survey results on subscriber satisfaction do not provide a clear indication of whether the Cable Act has helped or hurt consumers. In a majority of cases -- 58.3 percent -- no change in the level of subscriber satisfaction was reported. In 22 percent of the cases, however, it was reported that subscriber satisfaction actually went up after deregulation. On the other hand, in an almost equal percentage of the cases -- 19.7 percent -- the level of subscriber satisfaction was judged to have declined.

REPOSITIONING AND PROGRAM CHANGES

In a large percentage of cases -- 73 5 percent -- cable operators were reported to have repositioned channels by changing their numbers. Further, where the franchise included valid programming requirements (44 9 percent of the franchises covered by the survey), cable operators were reported to have made unilateral changes in programming without the approval of the franchising authority in 33.5 percent of the cases while no unilateral changes were made in 66.5 percent of of the cases

FRANCHISE COMPLIANCE

In 26 percent of the cases, the cable operator was reported to be in total compliance with the franchise. In the remaining 74 percent of the cases, the degree of compliance ranged from technical to substantive violations. In 47.9 percent of the cases, tne franchise violations were primarily technical in nature and the operator was considered to be in substantial compliance with the franchise In 19.2 percent of the cases, there were significant violations and in 6.8 percent of the cases non-compliance was extensive.

TECHNICAL STANDARDS

In 82.9 percent of the cases, the cable system was subject to technical standards of some sort Only 31 3 percent of the franchises which included technical standards have been amended to include the guidelines established by the Federal Communications Commission (FCC) in 1985 The remaining had locally-established standards (46 2 percent) or some other type of standard (22.5 percent)

CONTRACT MODIFICATION

The contract modification provisions of the Cable Act were invoked in only 10.7 percent of the cases. In the 22 cases in which section 625 was used to seek amendments to the franchise, the proposed changes were approved in whole in 37.5 percent of the cases and in part in 50 percent of the situations, for a total of 87.5 percent. The franchising authority made no changes in the franchise in only 12.5 percent of the cases.

FRANCHISE FEES AND TAXES

The franchise fee rate has remained the same since the effective date of the Cable Act in a substantial majority of the cases -- 75.1 percent. The fee rate increased in 22 2 percent of the cases, and decreased in 2.7 percent of the franchises. In 88.1 percent of the cases, the franchise fee was levied on all revenues derived from the operation of the cable system. In 7.8 percent of the cases, it was assessed only on basic service revenues, and in 4.1 percent of the cases some other indicator was used (e g , an annual per-subscriber charge).

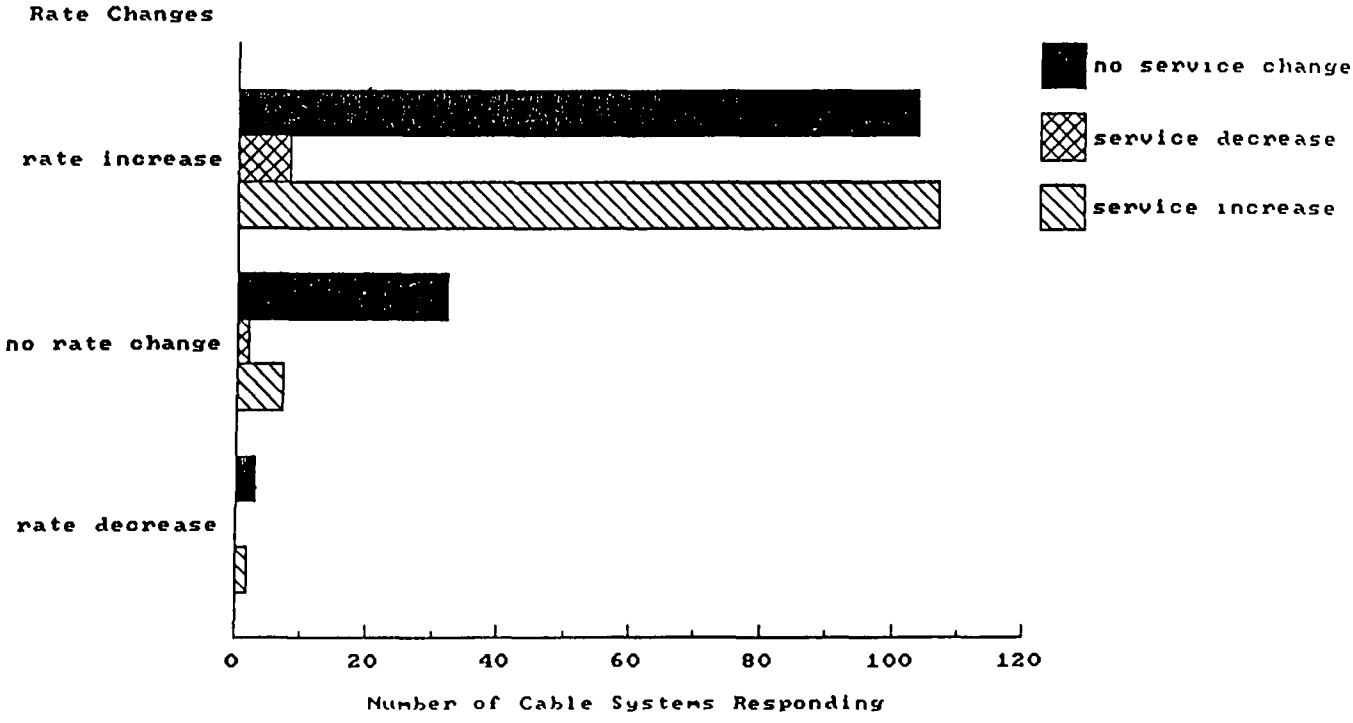
For 65.7 percent of the franchises where a percentage franchise fee was used, the rate was 5 percent (or more in a handful of cases). In the other cases, the rate was 3 percent for 23.6 percent of the franchises, 4 percent in 5.1 percent of the cases, and 1 percent for 4.1 percent of the franchises. A small number (0.5 percent in each category) had no franchise fee, a 2.5 percent rate, or a 4.5 percent rate. The average rate for franchise fees was 4.3 percent.

License fees were paid by 51.3 percent of the cable operators to the franchising authority, property taxes by 69.4 percent, utility taxes by 14.3 percent, and sales taxes by 20.7 percent.

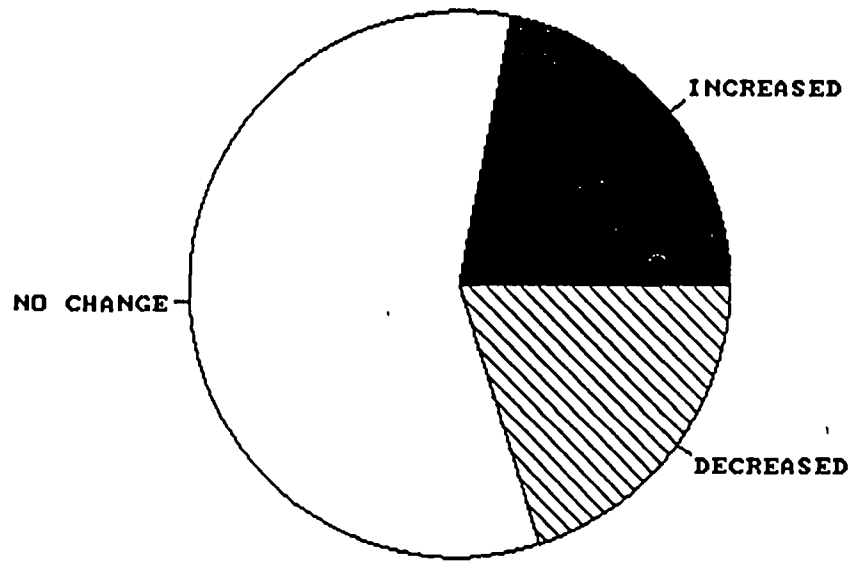
ACCESS SUPPORT

Since the Cable Act's effective date, there has been no change in the operator's financial support for public, educational, and government access in 69.6 percent of the cases In 15.7 percent of the cases, such financial support has increased while it has decreased in 14.7 percent of the cases.

RATE CHANGES SINCE DEREGULATION



SUBSCRIBER SATISFACTION AFTER THE CABLE ACT



CHANNEL REALIGNMENT:
Has the cable operator repositioned channels?

CABLE TV

Our survey shows some 60 percent of our readers are hooked up and watching. But do they like what they see?

The channels

What does cable television have to offer that regular TV doesn't? We asked subscribers to judge the quality of the programming on the major cable channels, both pay and basic You'll find the Ratings on page 551

The service

Cable systems' service and rates vary widely around the country Is cable worth the $275 a year that the average reader pays? How does your system measure up? We contrast three pairs of local cable companies from three parts of the country on page 552

The issues

Cable continues to flourish and to distinguish itself from "regular" TV, yet it remains mired in sticky legal issues charges of monopoly, interlocking ownerships, runaway deregulation These issues affect what you see and what you pay See page 553

Sometime this year cable TV will overtake broadcast TV More than half of all American homes that have TV sets will get their picture through privately owned wires instead of over the air

It s been a banner year for cable TV in other ways, too. This year the industry expects to top $1-billion in advertising revenues for the first time—a fraction of the ad money that broadcast TV takes in, but a milestone nonetheless. It s the first full year that Congress has allowed rate deregulation, cable companies, not municipalities now determine how much to charge for basic service. And this year the Government gave cable TV a new and hefty weight in the formula used to calculate the Consumer Price Index—a bureaucratic solemnization, so to speak, of cable TV's coming of age.

Cable TV has taken 40 years to entrench itself this firmly in America s living rooms and consciousness. In the beginning, cable TV wasn't even called that. It was community-antenna television, or CATV and its sole purpose was to bring broadcast channels to places that otherwise couldn't get them.

In 1948, an appliance salesman named John Walson strung a cable—a stretch of twin-lead antenna wire—from a mountaintop aerial to his store below in the Appalachian coal-mining town of Mahanoy City Pa. The wiring was strictly a ploy to sell television sets, then a new-fangled invention. Walson put three sets—one tuned to each network—in his store window and delighted passersby with shows pulled in from Philadelphia, almost 90 miles away The TV sets sold like hotcakes, but buyers demanded to be hooked into the antenna since their sets were useless without it. The appliance salesman obliged, for a monthly fee—and cable TV was born.

CATV systems sprouted around the country But law and technology presented two formidable obstacles.

The Federal Communications Commission, at the behest of movehouse owners and television networks, clamped severe regulatory curbs on the movies and sports that cable TV could carry and forbade cable from carrying advertising. Movehouse owners and television networks had recognized the new technology as potential competition when some CATV systems started "importing" distant stations for their subscribers. As part of the campaign against cable, those interests lobbied the FCC for protection, raising the spectre of eventual "pay TV" for all Americans.

The growing cable industry battled back in court and before the FCC. By 1980 the regulatory curbs were overturned.

Meanwhile, technology had caught ca-

ble TV in another snare In the early days of cable the way to relay distant signals was with microwaves transmitted and received with ground-based antennas. That sort of transmission worked well but wasn t practical for long distances. *Home Box Office* developed in the early 1970s, first transmitted from the top of a sky scraper in New York City and reached only into Pennsylvania with its signal—clearly limiting any visions of large-scale national cable networks.

When RCA launched its Satcom I communications satellite in 1975, the picture brightened considerably A cable channel like *HBO* could beam its microwave transmissions to Satcom and relay them back to virtually anywhere on the ground. Dish antennas at local cable systems could pluck the signals from the air then amplify them and shunt them over coaxial cables directly to subscribers television sets. Nationwide distribution of cable channels became a reality

HBO signed on to Satcom in 1975 The industry never looked back. Today nine satellites orbit the Earth beaming more than 50 cable channels to the 7800 cable systems that dot the U.S The programs range from TV dramas that first aired more than 30 years ago to the most contemporary of rock videos. They include the flatly commercial such as nonstop home-shopping And they include a good deal of programming that has difficulty finding a home on broadcast channels supported solely by advertising Specials based on CONSUMER REPORTS have appeared on *HBO* for example and *CU* is currently developing children s programming for *The Disney Channel*

If the channels and their programs are cable TV's product the local cable systems are the pipeline. On our 1986 Annual Questionnaire we asked CONSUMER REPORTS readers to rate both. Nearly 150 000 subscribers, 9 in 10 of them current cable customers, responded. They detailed their life with cable TV—the channels the service the rates, the changes that the medium has wrought at home Much of this report, including our Ratings of the most popular cable channels is based on their answers.

Readers get hooked up—and get hooked

The TV habits of CONSUMER REPORTS cable customers differ from the national norm in a couple of important ways. Our readers, who are largely suburban and well off subscribe to cable TV at a high rate- 60 percent of our readers subscribe, but only about 50 percent of all Americans do

But readers families watch less TV than average—about 30 hours a week compared with the national average of 50 or 60 hours So our survey results while they give a clear picture of a typical reader s TV habits may not translate well to the typical American s TV habits

Still, cable TV has had the same effect on our readers that it has had on most folks Being hooked up makes you watch more television, close to half our readers say

How do you make room in a busy life for all those new channels? The majority of our readers have curtailed other leisure-time activities, like going to the movies. About one in four now reads less. Concerts, hobbies, and other pastimes have also suffered, but to a lesser extent

Most of those who took part in our survey were seasoned observers, having been hooked up longer than two years. Most also received at least one pay channel like *HBO* or *Showtime*, which costs perhaps $10 or $12 a month over the basic rate

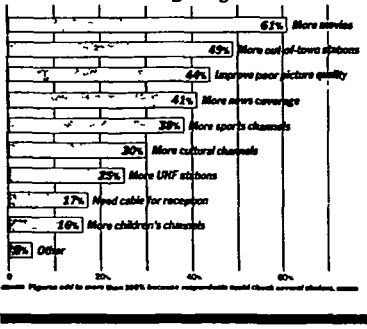
Each month the average reader writes out a $23 check to the cable company a fee that may have gone up this year with rate deregulation. Add up the checks for a year and you could buy a basic video cassette recorder or rent quite a few feature films if you already own a VCR

So why sign up for cable?

Most readers, we learned, don t really need cable for reception. Only one out of six told us that watching broadcast TV was "impossible without cable, though a substantial minority—44 percent—wanted the improved picture that cable could deliver in their area.

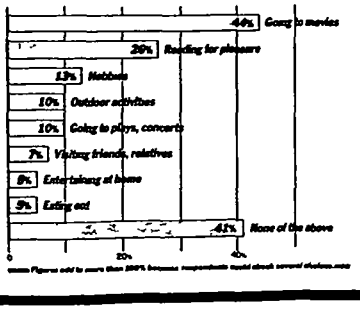
The main reason for taking cable more movies. Readers likewise relished all the other extra programming that cable brings as the graph below shows Almost half wanted to get the so-called superstations—ordinary TV from out of town. All told, our cable customers usually receive at least 10 channels more than they can get with an antenna.

Reasons for getting hooked



How hooked are you?

Leisure activities curtailed since receiving cable TV



Charts by Corinne Abbate Hekker

Cable TV: The channels



It's no secret that ABC, CBS, and NBC have been losing audience share. The percentage of viewers who were watching the networks in prime time shrank by about 20 percent between 1977 and 1985, according to advertising-industry data. The networks' loss—part of it, at least—is cable TV's gain. But the days of easy growth for cable TV are over.

Apart from cities slow to approve cable systems—New York, Philadelphia, and Washington, D.C., are three—most of the areas that will ever be wired for cable have already been wired. Now the industry can grow mainly by selling cable to people who have so far chosen not to subscribe. To lure them—and to hold onto its 43 million current customers—cable must offer more, better, and different programming than what you find on "regular" television.

So the industry has begun to produce more and more of its own programming. Pay channels, which charge a monthly fee but carry no advertising, can use their cut of that fee to help finance their programming. *HBO*, for instance, takes a bit more than half of what the local cable company charges you, the subscriber.

Each "basic" cable channel—channels included as part of the standard cable service—earns revenue from commercials and from monthly fees paid it by the cable-system operators. Such fees range from 5 to 25 cents per household. The nickels and quarters add up. Last year basic channels spent more than $1-billion on their programming, much of it on original material.

Cable's strongest suit was supposed to have been "narrowcasting"—the medium's ability to cater to specific interests and audiences that broadcast stations consider too limited. Cable could take a chance on new ideas, it was reasoned, because it has virtually unlimited channel capacity and lower production costs. Where broadcast TV carried sitcoms, cable could carry opera, where broadcast TV carried football, cable could carry chess.

The promise of programming with something less than mass appeal dimmed when the failure of certain channels (*CBS Cable* and *The Entertainment Channel* in particular) showed that even cable channels need a sizeable audience to remain economically viable. But cable is still thriving, with channels like *The Fashion Channel* and *Black Entertainment Television*. Such channels carry a volume of special-interest programming you'd never see on broadcast television.

Channels and choices

Here's a rundown of the kinds of channels you can expect to find as you flip through the dial:

Pay movie. These channels staple is fairly recent films unedited and uninterrupted by commercials. *HBO* is the biggest by far, with almost three times as many subscribers as its rival *Showtime*. Both air scores of movies every month (with some overlap) and both offer occasional concerts and comedy specials. *HBO* also covers sports like the Wimbledon tennis tournament and World Championship Boxing.

Cinemax, a sister to *HBO* (both are owned by Time Inc. and share films), pitches its movies to a younger "yuppier" set; a spokesman said *Festival*, a new *HBO* sibling, will show movies that are rated G and PG, not R. *The Movie Channel*, a sister to *Showtime* (both are owned by Viacom, an entertainment conglomerate), shows only movies, old ones included. *American Movie Classics* features just that.

Cultural. These channels aim for the highbrow. The movies they show are apt to be foreign films or other repertory-house fare. *Bravo*, a pay channel, airs theater, opera, music, and dance as well. *Arts & Entertainment*, a basic channel, imports similar programming, including series from the British Broadcasting Corporation.

Sports. Sports have long been a mainstay of broadcast TV, and they're found all

over the cable dial. Ted Turner has promoted the Atlanta Braves as America s team on his superstation *WTBS. The Nashville Network* shows tractor pulls Some of the channels devoted to sports are pay channels *ESPN* a basic channel covers everything from cheerleading championships to yacht racing Its cover age of the America s Cup live from Australia last winter helped turn that elite activity into a spectator sport for the first time *ESPN* truly ascended to the big time when it signed a deal to cover NFL Sunday foot ball this fall.

Children. *The Disney Channel* a pay channel, shows a mix of original films, new features and series, and old-time favorites from the Disney Studios *Nickelodeon* a basic channel, offers reruns along with new programming—talk cartoons and educational game shows. Both channels try to present shows that the entire family can watch together

Music. *MTV Music Television* pioneered the music video and offers rock videos concerts and related programs 24 hours a day Other formats presently offered include country and western from *The Nashville Network* and soft rock from *VH-1 (Video Hits One).*

News and weather Ted Turner s *Cable News Network (CNN)* bills itself as "the world s most important network " The channel offers news and features 24 hours a day often filling gaps in coverage left by the networks (live gavel-to-gavel coverage of the summer s Iran/Contra hearings for instance) A spinoff service *CNN Headline News* gives a fast paced news update every half-hour The *Financial News Network (FNN)* covers business and the stock-market beat. *The Weather Channel* prognosticates

Special audience. *Lifetime* features shows on health fitness, fashion, and family aimed at a female audience. *The Playboy Channel* aims at men, with soft-core "adult entertainment " (That channel is offered on relatively few systems, which generally will provide subscribers with a lock-out device to limit who watches.) Other special-audience channels include *The Discovery Channel* (it features programs on science and nature) *Black Entertainment Television* and *National Jewish Television*

General audience. These cable networks appeal to the broadest audiences with diverse programming—movies action series, sitcoms, sports. Cable networks include *USA Network* and *CBN Cable Network* owned by the Christian Broadcasting Network. (Three-fourths of *CBN s* programming is nonreligious fare, especially reruns of old television series.)

Superstations. The "super" in superstations refers to their wide reach, not to anything special in their programming They are ordinary independent broadcast stations, piped in from out of town They include Atlanta s *WTBS* Chicago s *WGN* and New Jersey s *WWOR* If you come originally from their broadcast area the local news and announcers' accents may make you homesick. Look for lots of sports, syndicated shows and old movies.

Public affairs. *C-SPAN* broadcasts Congressional hearings press conferences panel discussions and call-in shows with public officials and newsmakers. About one-fifth of the country s cable systems also offer public access channels that televise council meetings and other area events such as Little League games festivals, even homework hotlines

Home shopping More than a half dozen channels devote themselves to selling—essentially nonstop direct merchandising—and others (such as *The Travel Channel*) use home-shopping as part of their appeal On some personable hosts demonstrate the goods—cubic zirconium rings and Italian glass figurines are hot—and chat up callers on the air Others resemble endless low-budget commercials with plenty of "buy now—this offer won t be repeated incentives Cable operators have good reason to offer shopping channels They typically pocket a 5 percent sales commission on the orders

Pay-per-view Cable systems with PPV show recent films when they first appear in videocassette typically six to nine months before they appear on the pay-movie channels For about $5 the company sends a movie to your TV at a specified time Such channels also offer sports and other specials So far relatively few subscribers can get PPV which requires "addressable circuitry so operators can control channels to individual homes.

And the envelope, please

Our Annual Questionnaire listed the biggest cable channels and asked readers to rate them. We expected readers to be more critical of pay channels than basic channels. In general, they were After all, pay channels do cost extra money

The four big pay-movie channels—*Cinemax, HBO Showtime* and *The Movie Channel*—drew a lukewarm response The survey s lowest marks went to *Playboy* Indeed, more than half our readers who d sampled the channel have since dropped it.

But a pay channel, the family-oriented *Disney Channel* bested every other pay and basic service—by quite a margin.

Among the 15 "free" channels rated, *CNN* and its sidekick *Headline News* led the way News is apparently a widespread taste and much appreciated.

Music however has a narrower appeal among our readers (typical age 42) They rated *The Nashville Network* and *MTV* at the bottom of the heap

The Ratings also note which channels appealed to any special audience among our readers And we asked readers to nominate particularly distinctive channels—those with shows or movies not usually seen on other cable or broadcast channels Only 5 of the 23 channels garnered an appreciable number of votes for distinctiveness They included the three top-rated pay channels and the lowest rated one *Playboy* Only one basic channel made the list—*Arts & Entertainment* Significantly none of the big pay movie channels did

Indeed the pay-movie channels have been fretting over their lack of distinctiveness Competitors are trying harder than ever to avoid showing the same titles Rivals *Showtime* and *HBO* have each signed exclusive movie deals with different studios *Showtime* will buy films only from Cannon, De Laurentiis Touchstone and Paramount (the last was recently stolen away by *HBO* in a new exclusive agreement that takes effect in mid 1988) As a matter of policy *Showtime* does not deal with studios that sell to *HBO HBO s* contracts cover Columbia Orion, and Tri-Star Warner and 20th Century Fox also supply *HBO* but have no special agreement *HBO* says it has de facto exclusivity from the two since *Showtime* now avoids their films

Such arrangements will mean a minimum of duplication across the channels this fall (though siblings *HBO* and *Cinemax* will continue to share films as will *Showtime* and *The Movie Channel*) You can expect Hannah and Her Sisters (from Orion) and "The Color Purple (from Warner) to turn up on *HBO* not *Showtime* Expect Crocodile Dundee and Top Gun (both from Paramount) only on *Showtime.* If you want to see all those movies you'll just have to pay for both channels

Of course you could also rent the movies if you have a VCR, an invention that has seriously stunted the growth of pay movie channels You can rent three or four movies for the price of the monthly fee And many public libraries loan out movies for free

To help fend off defections, the big pay channels now stress their compatibility with VCRs and encourage subscribers to "time-shift as they sleep *The Movie Channel* for instance runs a "VCR Theater" at 3 each morning

Our survey revealed that readers do tape a good deal from cable Most readers own a VCR, and most tape a movie at least once a month.

Guide to the Ratings

Listed by groups, within groups, listed in order of overall quality score based on responses to CU's 1986 Annual Questionnaire. Differences of 3 points or more in score are meaningful.

1 Channel. Pay channels were rated by at least 2800 of their current and former subscribers; most were rated by more than 15,000. Basic channels were rated by at least 25,000 of their current subscribers; most were rated by more than 50 000.

2 Type. CU's categorization of a channel's typical programming.

3 Overall Score. Readers rated overall quality on a five-point scale from excellent to poor. We've summarized those judgments as the Overall Score. Had everyone judged a channel excellent, its score would have been 100; had everyone judged it poor, its score would have been 0. Results pertain only to CONSUMER REPORTS readers, who generally watch less television than Americans overall.

4 Readers' rating. The three-part bars give a breakdown of how readers rated channels on the excellent-to-poor scale.

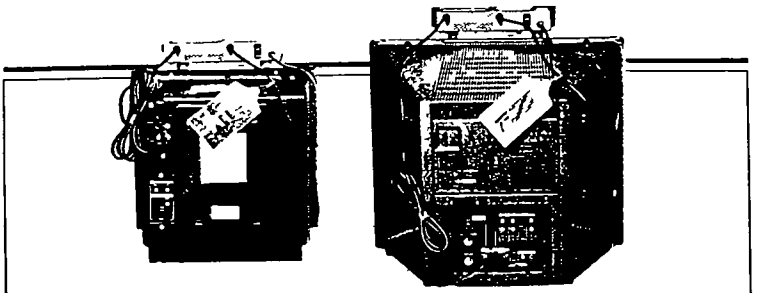
5 Distinctive. Readers indicated the channels "whose shows or movies are so unique you'd be unlikely to see them on other cable or broadcast channels." For the channels checked, roughly one-third or more judged them distinctive.

6 Special appeal. If M is listed, men rated the channel's quality significantly higher than women did—generally by 5 or 6 points. In Overall Score. If W is listed, the opposite occurred. If O is listed, readers aged 45 and over rated the channel significantly higher than younger adults did; if Y is listed, the opposite happened. If C is listed, at least half the respondents who have children at home called the channel a favorite with their youngsters.

Ratings

Cable-TV Channels

1 Channel	2 Type	3 Overall Score	4 Readers' rating: Excellent/ Very good	Good	Fair/poor	5 Distinctive	6 Special appeal
Pay channels							
The Disney Channel	Children	70				✔	W Y C
Bravo	Cultural	66				✔	O
American Movie Classics (AMC)	Pay movie	64				✔	W
Home Box Office (HBO)	Pay movie	49				—	Y
Showtime	Pay movie	48				—	Y
Cinemax	Pay movie	47				—	—
The Movie Channel (TMC)	Pay movie	47				—	—
The Playboy Channel	Special audience	27				✔	M
Basic channels							
Cable News Network (CNN)	News and weather	64				—	—
CNN Headline News	News and weather	62				—	—
Arts & Entertainment (A&E)	Cultural	56				✔	W O
ESPN	Sports	55				—	O
WTBS	Superstation	55				—	—
WGN	Superstation	54				—	—
The Weather Channel	News and weather	54				—	—
Nickelodeon	Children	52				—	W Y C
USA Network	General audience	48				—	—
Lifetime	Special audience	46				—	W
Financial News Network (FNN)	News and weather	43				—	O
C-SPAN	Public affairs	42				—	O
CBN Cable Network	General audience	42				—	W
The Nashville Network	Music	36				—	O
MTV	Music	35				—	W Y



Cable TV: The service

When subscribers gripe about their cable system, it's a good bet they're griping about unreliable service. The most sophisticated cable operation doesn't amount to much if you're frequently blacked out or if you can't get the company on the phone.

Three out of five readers in our cable-TV survey reported that they had experienced one or more service disruptions in the past year: one in five in the month before the survey. An unlucky one in 10 said they had endured more than a half-dozen such disruptions.

Judging from our readers' most recent problems, service outages tend to be fairly short. Half lasted three hours or less. Still, about one in eight of the outages lingered for two days or longer. Worse, all channels on the system were usually affected.

What about picture quality, when the system is up and running? Nearly all readers were satisfied. Yet close to half also re-

How cable service compares in three areas

Virginia suburbs

	Media General Cable Fairfax County	Storer-cable TV Arlington County
Start-up year	1983	1978
Subscriber count	139,500	37 000
Costs		
Hookup (cable-ready set)	$39 95 [1]	$39 95
Basic service (monthly)	12.95 [2]	15.25
HBO (monthly)	9 95	11 50
Channels		
System capacity	120	36
Included in basic service	77	31
Pay channels offered	10	5
Pay-per-view offered?	Yes	No
Survey findings		
Outage of 2 days or longer	4%	8%
Very satisfied with picture quality	84%	45%
Picture quality variable	22%	47%
Hard to reach company	22%	39%
Had billing problem	21%	28%
Overall satisfaction (on scale of 0 to 100)	71	57

[1] *$10 less if house has aerial*
[2] *"Limited" service for $4 95 a month includes 43 channels.*

New York City

	Manhattan Cable TV Lower Manhattan	Paragon Cable Manhattan ☐ Upper Manhattan
Start-up year	1967	1966
Subscriber count	228 000	124 000
Costs		
Hookup (cable-ready set)	$29 95	$19 95
Basic service (monthly)	13 95	13 95
HBO (monthly)	12.95	13.95
Channels		
System capacity	35	28
Included in basic service	31	22
Pay channels offered	3	6
Pay-per-view offered?	No	No
Survey findings		
Outage of 2 days or longer	22%	15%
Very satisfied with picture quality	34%	31%
Picture quality variable	55%	58%
Hard to reach company	47%	52%
Had billing problems	27%	36%
Overall satisfaction (on scale of 0 to 100)	53	50

☐ *Company formerly owned by Group W. Cable survey done before sale to Paragon.*

San Diego

	Cox Cable San Diego South of river	Southwestern Cable TV North of river
Start-up year	1961	1964
Subscriber count	280 000	103 000
Costs		
Hookup (cable-ready set)	$30 00 ☐	$30 00 ☐
Basic service (monthly)	15 70	14.84
HBO (monthly)	10 95	11.95
Channels		
System capacity	35	35
Included in basic service	34	27
Pay channels offered	7	6
Pay-per-view offered?	Yes	Yes
Survey findings		
Outage of 2 days or longer	5%	5%
Very satisfied with picture quality	36%	41%
Picture quality variable	40%	38%
Hard to reach company	62%	53%
Had billing problem	41%	27%
Overall satisfaction (on scale of 0 to 100)	54	60

[1] *$15 if house is already wired.*

Based on information from companies and CU's survey findings of readers' experiences in 1985-86. Figures for those finding it "hard to reach company" are based on only those who tried.

ported that picture quality varied from channel to channel, with some channels looking worse than others.

A sizable minority—one in three—complained about the billing. Their biggest peeves: the high cost of adding or dropping pay channels, confusing or inaccurate bills, and the hard-to-fathom package deals that their company promotes.

Most readers told us that they had tried to reach their cable company in the past year. Easier said than done. Half of those who called said that getting through was downright difficult—a poor record for a service-oriented business.

Readers had a chance to sum up their overall satisfaction on a five-point scale. One-sixth called themselves "dissatisfied" or "very dissatisfied." Only one-third gave the company high marks, saying they were "completely" or "very satisfied." Judging from past surveys of other services that's a lackluster showing.

A tale of six systems

But perhaps lackluster service is what you get when a company enjoys a monopoly. Fewer than 1 percent of cable-TV systems operate with any direct competition. If you want—or need—cable, you must get it from the company that holds your area's cable franchise.

The quality of service may be just a matter of where you live. Sometimes the crazy quilt of thousands of cable companies leads to glaring disparities in service from one neighborhood to the next. Alerted by industry experts to areas likely to show such contrasts, we pulled survey questionnaires to take a closer look at three San Diego, Manhattan, and the Virginia suburbs of Washington, D.C. In San Diego, the San Diego River divides the companies. In Manhattan, it's a major cross-town streets. In Virginia, it's the line between Fairfax and Arlington counties.

One of the sharpest differences was the systems' channel capacity. In Arlington, Metrocable offers only 31 channels with basic service. In neighboring Fairfax, Media General offers 77 channels. One of the most sophisticated cable systems in the U.S., Media General includes in its lineup 17 broadcast channels from Washington, Maryland, and Virginia, dozens of cable services; and 10 community channels. The system even boasts a "four-in-one" channel, which displays the three major networks and a Public Broadcasting Service station simultaneously in four quadrants of the screen—a TV junkie's dream. For all that, Media General customers pay $2 a month less than their Arlington neighbors.

Media General started up only a few years ago. Older cable systems, such as those in Manhattan, often lack channel capacity. Old equipment wasn't designed to carry many channels, since there weren't many channels to carry 20 years ago. New York's 21 year-old Paragon system delivers the fewest channels of these six companies—a mere 26; its basic service gives only 22. New Yorkers who live farther downtown get nine more channels from Manhattan Cable, though it's almost as old as Paragon.

Systems cope with limited capacity by letting different channels share the same slot on the dial at different times of day. This spring, Paragon added the highly rated *Arts & Entertainment* channel for its customers—but only from 8 A.M. to 7 P.M. At night, it substitutes a pay-movie service. Manhattan Cable subscribers get to watch *A&E* around the clock. As for pay channels, neither New York system offers *Disney* or *Bravo*, the channels that topped our Ratings. The cable-channel lineup available to Manhattanites is among the most limited we've seen.

San Diego's two systems are even older than New York's. They've kept up with the times, however; each offering 35 channels, including pay per view movies. The Cox system includes a few more channels with its basic service than neighboring Southwestern Cable.

How did our readers rate the service of these companies? Fairfax's spiffy Media General system won hands down, at least for the period in 1985 and 1986 that our survey covered. The system's superiority likely reflects itself in residents' eagerness to sign up. About two-thirds of Fairfax's homes subscribe; fewer than half in neighboring Metrocable's territory do so. Readers also reported big differences in picture quality between the Virginia systems. Almost two-thirds of Media General's customers praised its picture with highest marks, but fewer than half of Metrocable's customers did likewise. Virginia readers also judged it appreciably easier to reach Media General on the phone.

By contrast, San Diegans had a far tougher time getting their companies on the line. Cox was especially bad, with 62 percent of the readers who'd tried to call reporting that it was difficult. And Cox's customers had good reason to call. The company had one of the worst scores on billing problems—much worse than its neighbor. New York's Paragon also came off poorly compared with its downtown counterpart.

New York's two cable systems had the longest outages, based on readers' most recent service disruption. Paragon, however may have improved under its new management at the time of our survey. It was owned by Group W Cable.) According to our survey, more than one-fifth of Manhattan Cable customers had experienced outages that lasted two days or longer. Paragon's performance was somewhat better, but far from good. Figures from the other systems revealed far fewer disruptions that severe.

Cable TV: The issues

As cable television gains an ever-stronger foothold in America's homes, an army of cable's critics has begun to muster. Its ranks include consumer advocates, cities, broadcast television (particularly independent and Public Broadcasting Service stations), the motion-picture industry, even the operators of small cable systems, who feel increasingly squeezed by the biggest cable companies.

They contend that cable has grown into a monopolistic "electronic gatekeeper" to half the nation's households, that a handful of corporate giants control programming, service, and prices to their own benefit and to the detriment of the public.

For decades the cable industry has tried to deflect the public's say in its affairs. Cable programs travel into your home over private wires rather than the public airwaves. So the industry has long contended that, under the First Amendment, it should be as free from regulation as newspapers or magazines.

Here's a rundown of the most important issues surrounding the growth of cable.

Local monopoly or not?

Most cable companies operate under a franchise granted by a city or county government with local monopolies the usual result (and corruption sometimes a prob-

lem as New York and other cities have learned) In return for the franchise a municipality can set rules benefiting its citizens—insuring that the company will wire the entire area rather than just the neighborhoods likely to produce the most subscribers for instance Franchises also commonly guarantee local-access channels as well as a share of revenues for the municipality

Places where two cable companies compete head-to-head are rare Allentown, Pa is the largest city in which two companies compete for the same residents business The competition there appears to have brought customers better than average service and equipment If the cable conks out after business hours one of Allentown s systems has service people on the road till 11 P M 365 days a year its vice president told CU The other company offers even more 24-hour service Both systems offer more than 40 channels (36 is standard in the industry) including a pay per view service for recent movies and sports events. And both offer relatively low rates for basic service—about $1 a month less than the industry average One company also boasts a new broadcast-quality studio for its local-origination programming

But Allentown is unusual in that almost every household in the city subscribes to cable—reception otherwise is impossible Places in which fewer homes subscribe might not be able to support two competing operators.

A city s power to grant a monopoly is being challenged in several cities In Los Angeles for instance a cable operator has sued the city to let it compete against the systems that currently hold franchises The company argues that wiring a city is like distributing a newspaper and that under the First Amendment a cable company can string wires anywhere it wants That thinking taken to its extreme would permit selective wiring—the cherry picking of affluent neighborhoods and the redlining of poor ones.

In Springfield Ore residents have taken another tack They ve launched an initiative to have their utility board take over their system (now run by Tele-Communications Inc) and operate it as a utility—or compete against it They re angered by rate hikes of 50 percent over the past two years.

Big versus small

The cable TV industry is becoming concentrated in two ways First individual cable systems are being bought up by big multiple-system operators Last year for instance a handful of the big companies went on a $9-billion spending spree scooping up cable systems that serve roughly one in six subscribers in the U S Second the distinction has blurred between the corporations that run the systems and those that produce the programming Indeed the biggest system operators often own the very cable channels that their systems show Those developments are concentrating power over what viewers can watch into fewer and fewer hands



The biggest multiple-system operator is Tele-Communications Inc (TCI) based in Colorado The company owns more than 600 cable systems which bring TV to some six million households in 44 states The second largest operator is American Television & Communications (ATC) a subsidiary of Time Inc Its subscriber count is 3 5 million spread over 660 cable companies in 32 states

The power of systems like that to pull the plug on channels for millions of subscribers has been called "dictatorial" by Jack Valenti a spokesman for the motion picture industry Earlier this year for example Tele-Communications Inc dropped the *PTL Network* from its systems Likewise the two million subscribers of the now-defunct Group W Cable (it was broken up and sold last year) were not given a chance even to refuse *The Playboy Channel* since the company s head reportedly wouldn t carry *Playboy* on any of Group W's systems

The interlocking ownerships between cable systems and cable channels also affect which channels you see—and which you don t see Consider Time Inc. which owns cable systems through its ATC subsidiary Time owns *HBO* and *Cinemax* two pay movie channels as well Time s cable systems might choose to offer only Time s movie channels and not say *Showtime* and *The Movie Channel* (which are owned by another multiple system operator Viacom) That s the charge over which a group of subscribers is suing Manhattan Cable TV a New York cable system owned by Time through its subsidiary

Manhattan Cable s sole pay movie channels are *HBO* and *Cinemax* Subscribers who are suing say they want more choice and assert that the system is deliberately keeping off competitive channels

According to industry data obtained by CU more than 90 percent of Time s systems nationwide carry *HBO* and about 75 percent *Cinemax* By contrast fewer than 60 percent of Time s systems carry *Showtime* and only 25 percent *The Movie Channel*

A vice president of Manhattan Cable told CU that there was no desire to keep channels off his system. He said that the problem was too few slots on the dial Eventually he said the suit will become moot as his system s channel capacity is expanded Curiously Manhattan Cable has managed to find room on its current dial for three home-shopping channels

Besides owning *HBO* and *Cinemax* Time has a stake in *Black Entertainment Television Cable News Network* and *WTBS* Viacom whose systems serve one million customers has a stake in *Lifetime* and owns *MTV VH 1 Nickelodeon Showtime* and *The Movie Channel* (Viacom in turn, is owned by a company called National Amusements Inc) Tele-Communications Inc has a stake in seven cable channels.

"Must carry" rules

The Federal Communications Commission which oversees cable television wanted to insure that cable customers would still be able to receive local television So in the mid 1960s the FCC ordered cable systems to carry the broadcast stations in their area Systems located between big cities had to carry duplicate network stations and a host of independents. The industry considered the rule a burden—channel slots are precious—and fought the must carry rule in court. It argued that the First Amendment gives cable systems the right to pick and choose programming the way a magazine or newspaper picks and chooses articles Eventually the original sweeping rule was declared unconstitutional

As soon as they could cable systems around the country started dropping stations. Some were stations that duplicated programming (duplicate Public Broadcasting Service stations were a particular target) but some were local independent stations—stations that often run community programming not available elsewhere Some of those stations have charged that the cable operators dropped them in order to pick up the local advertising such stations typically carry

Recently the FCC adopted a compromise must-carry rule (already under court challenge) The new regulation still requires that certain channels be carried but it lets cable systems with the smallest channel capacity carry only one noncommercial broadcast channel Systems with a 50-channel capacity must offer a dozen broadcast channels

Deregulation

Congress substantially deregulated the cable industry with the Cable Act of 1984 The act allows cable companies starting this year to set their own rates for basic service (Previously such rates had to be approved by local governments) Along with rate deregulation the Cable Act made the renewal of cable franchises almost automatic Consumer advocates say that both provisions rob local governments of ways to safeguard the interests of cable subscribers in the price and quality of the service

Congress intended rate deregulation to occur only in areas where cable companies face effective competition —namely in places where people receive sufficient over the air TV The lawmakers wanted to keep local officials in charge of cable in places where residents have little choice but to subscribe It fell to the FCC to sort out which communities have good enough reception to warrant deregulation

The FCC ruled that deregulation could proceed in any place that can get three on air channels But the rules the Commission adopted allow for very snowy pictures and a 30-foot high antenna Further if as many as half the people can receive broadcast stations only on the clearest days the area still qualifies for deregulation under the FCC s rules

Consider Dubuque Iowa a city of 63 000 surrounded by 1000-foot bluffs rich in lead deposits The mountains and metal cut Dubuque s reception significantly Yet the FCC maintains that the city can get eight broadcast channels The city s cable administrator says Dubuque barely receives one which is why more than four of five homes there get cable We re a classic example of markets that are truly a captive audience for cable he said

Or consider Manhattan, where many people live in the shadows of skyscrapers Nearly half our survey sample from Manhattan said TV reception was impossible without cable—about three times the proportion in the survey overall Yet cable was deregulated in New York City as it was in Dubuque and most places Under the FCC s rules cable was deregulated for 90 percent of customers

New York and Dubuque joined other cities in a suit over the FCC s guidelines A verdict handed down in July requires the FCC to issue new criteria to gauge the quality of local reception but new rules probably won t be issued soon. ■

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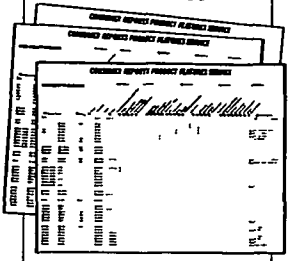

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Report downplays rate increases

NCTA study puts average increase in monthly bills at $1 45 since deregulation

By John Wolfe

WASHINGTON—The average cable subscriber s monthly bill increased just 6 7 percent in the first six months follow ing federal rate deregulation, accord ing to a National Cable Television Association spon sored survey of nearly 600 cable systems serving 16 per cent of the nation s cable homes.

NCTA working with Arthur An dersen and Co prepared the report in anticipation of upcoming House Telecommunications Subcommittee oversight hearings on how the cable industry has fared in the wake of the 1984 Cable Act. Those hearings likely will not con vene until early next year

According to the study previewed by NCTA board mem bers on Nov 16 and publicly released Nov 23 basic rates have increased an average 10 6 percent, or $1 26 since last December, but have been offset by an average 2.5 percent decrease in rates for premium services. As a result, average monthly total revenue per subscriber grew by 6 7 percent, from $21 59 to $23 04 NCTA said.

The report confirms what many cable officials predicted would occur. As basic rates went up many operators elimi nated multiple tiers and instead offered an expanded basic service The number of basic service channels received by the average subscriber increased by 5 9 percent, from 27.3 to 28 9 channels, NCTA said.

For the study NCTA mailed surveys to 2,577 systems chosen at random, 598 or 23 percent, responded NCTA said the response represented a "high return rate for a mail survey of this complex ity"

But cable adversaries were quick to question NCTA s results "Their study does not seem to comport with the numbers anywhere else " claimed Cynthia Pols, legislative counsel to the National League of Cities. A recent NLC survey found that rates increased by 27 percent, while Paul Kagan Associates puts the figure at approximately 24 percent, she noted.

"I don t think it will have too much of an impact" on Capitol Hill Pols predicted. "Too many people will question its validity " she explained, claim ing that many operators may not have responded to NCTA s survey because they did not want to present an unfa vorable picture to Congress

"We urged that all systems respond no matter what they had done " coun tered Cynthia Brumfield, NCTA vice president, research and policy analysis

NLC's survey "was very different from ours" because it focused only on systems which raised rates without offer ing additional channels, another NCTA official retorted The official noted that NCTA s results closely mirror those of the Bureau of Labor Statistics, which would "be much more neutral" than the League BLS reported a 5.3 percent increase in the average price of cable service for the first six months of 1987

NCTA s results also suggested that the rate increases "were very well accepted by cable subscribers," Brum field maintained Both the number of homes passed by cable and the number of subscri bers increased by 3 3 percent from De cember to June according to the study while the pen etration of subscri bers to homes passed remained constant at 56 7 percent.

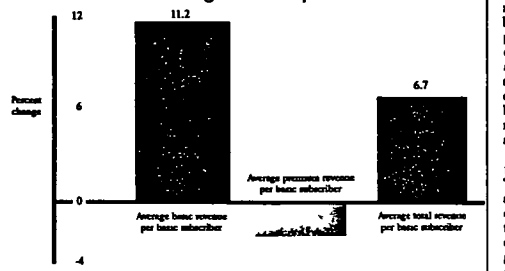
Also basic and pre mium churn "which can be con sidered measures of custor.. r satisfac tion wi n cable have declin ed since dere gulation went into effect," NCTA said. The average annual basic churn rate re ported by particpat ing systems dropped from 20 percent in 1986 to 18.8 percent in 1987

Many industry officials had claimed thet the freedom to raise basic rates would take the pressure off artificially high-priced premium services, and accord ing to the survey the pay services are rebounding Brumfield said she was surprised by the "incredible resurgence in premium network subscriptions" in the six months after rate deregulation. Among responding systems the total premium units sold grew by 3 7 percent, according to the study

Moreover, the pay-to-basic ratio which has declined industry-wide over the past couple of years, increased from 81 6 percent to 82 percent for participating systems NCTA said

NCTA also noted that since dere gulation, the cable industry's invest ment in plant, equipment and customer service has increased. ■

Percentage change between December 1986 and June 1987 in average revenue per basic subscriber



NCTA reports that although monthly basic revenue per subscriber increased by approximately 11 percent premium monthly revenues per subscriber dropped by 2.3 percent Total monthly revenues per subscriber, reflecting all revenues from subscriber services, grew by 6 7 percent from $21.59 to $23.04

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Cable-TV Systems, Since Deregulation, Are Selling at Increasingly Higher Prices

By Laura Landro
Staff Reporter of The Wall Street Journal

LAS VEGAS Nev —Five months after deregulation of the cable-television industry cable systems are changing hands at increasingly higher prices and industry executives say there is no end in sight

It s a supply and demand situation says John Malone president of the nation s largest cable company Tele-Communications Inc The industry has good cash flows people want to expand and there are limited opportunities so if you want to buy you have to pay these prices

A half-dozen cable systems with between 50 000 and 450 000 subscribers each have been sold recently at prices ranging between $1,500 and $2 000 per subscriber The continuing strength of system prices is a dominant topic among executives attending the National Cable Television Association convention which ends here tomorrow

Prices will go higher before they plateau predicts Paul Kagan a Carmel California based media consultant

But it isn t just large public companies such as Denver based Tele-Communications that are in the market now In addition it s the small and medium sized companies who are propping up prices says John Waller III a leading cable-system broker

Although the big companies are still interested in properties they seem reluctant to pay top dollar Trygve Myhren chief executive officer of Time Inc s 80%-owned American Television & Communications Inc says We wouldn t pay $2 000 (per subscriber) for everything but we re willing to do it for things that make sense for example systems that are geographically contiguous to existing American Television markets Mr Myhren says that since last August his company has bought cable systems serving 80 000 subscribers at prices ranging between $1,200 and $2 000 per subscriber

Handsome Profits

Sellers are making handsome profits even in marginally attractive markets For example former Capital Cities/ABC Inc executive William James last week sold to First Carolina Communications Inc for $170 million cable systems that he purchased last year for $100 million The sale price is the equivalent of about $1 700 per subscriber Executives of Burlington Vt based Mountain Cable are said to be negotiating the sale of their 56 000-subscriber system—acquired for $42 million 2½ years ago—for about $115 million

A number of major cable-television companies say prices are too high now William Elsner chief financial officer of Denver based United Cable Television Inc told analysts here that current high prices "took us out of the acquisition business" He said that unless a cable system is in a key geographic area near other United systems we aren t going to stretch that far to get it.

Mr Elsner said it is "tough to make a return on a $2,000-per-subscriber investment Cable systems are generally sold on the basis of their cash flow—12 to 13 times cash flow is the going rate—but industry executives often use per subscriber figures as well

Completed Spending

Deregulation has permitted cable systems to increase their cash flow by raising prices to consumers Cash flow also is benefited because most of the heavy capital expenditures for laying systems have been completed

John Kornreich an analyst at Wasserberger & Berman acknowledges that current prices are hard to justify but he notes that cable systems cash flow is growing *20% annually because of rate increases*

If the price isn t right for this year it for next year he says A lot of strategic players are saving we have a window of opportunity now we better get in

Mr Kornreich notes that buyers willing to pay high prices even for small systems in economically unexciting areas For example Adams Russell Inc recently outbid about 25 rivals to buy P R Dooley & Sons Co s Rockford Ill cable system for about $90 million or about $1,000 per subscriber Adams Russell also expects to rebuild the system at a cost of about $200 per subscriber

While local economics are important cable thrives almost anywhere says Mr Kornreich

John Reidy an analyst at Drexel Burnham Lambert Inc says an increase in interest rates could damp cable s attractiveness compared with other investments But according to Mr Kornreich It would take a big run up in interest rates to significantly reduce the appeal of cable systems

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Rouge plant, notes that, because the system collapsed its tier structure and added VH 1 and American Movie Classics when it raised its basic rate from $10 95 to $14 95 last April, the local daily *The State Times—Morning Advocate* bannered its story "Cablevision to add new channels " "We were waiting for the other shoe to drop and it never did," Michel notes. "The local TV station didn't even do a story on it."

Colony Communications President Charles Townsend sums up the situation neatly for operators in general. "Our business is going gangbusters. We're seeing, on average, a growth of 2 to 4 percent in homes passed, and an increase in basic penetration of a like amount. That, combined with rate hikes, is giving cable systems a revenue growth of about 10 percent, against an average of 5 percent for the Fortune 500 companies."

But, he adds, storm clouds lie ahead. "At some point, the homes-passed and basic-penetration growth will slow down. And that's when you'll start to need price increases in the 10 percent range. I think that will happen in three to five years."

To meet this challenge, Townsend says the development of pay-per view and the local advertising sales market will be essential. Colony is an example of an MSO that essentially has been sitting on the sidelines with PPV watching it develop, but Townsend observes that it is absolutely essential that operators develop these two revenue streams now to avoid antagonizing customers later. Colony is going to "go heavily into pay-per-view" he vows, with 75 percent of the company's systems now addressable. Colony should gross $7 million in advertising revenue this year, about 10 percent of total revenues, and Townsend sees ad sales continuing to grow at the present rate of 15 percent to 20 percent a year.

Operators from across the industry seem almost stunned by the way good fortune appears to be smiling on them in this first year of deregulation, but they agree with Townsend that it's important to avoid any pricing and packaging measures that could alienate customers. An instructive example is provided by Cablevision Systems. The large Long Island-based MSO had been characterized before deregulation by "exceptionally low basic rates," and had been compensating in many systems with exceptionally high pay charges, notes Peter Low, director of programming

In its Norwalk, Conn. system, Cablevision raised its "entry-level" price to $19.95 in March. The system had been charging a steep $14.50 for single pay channels, and that has been reduced to $10 closer to the industry average As a result, the single-pay category has grown by 25 percent since March, the month the lower price was instituted, Low states. In some systems, Cablevision has attempted to grow customers out of single pay by offering a choice of The Disney Channel or American Movie Classics "for a nominal fee " Low adds.

Cablevision considers the changes to be an unqualified success, he notes,



because basic disconnects have been "nominal, in the 1 to 2 percent range," while downgrades and sign-ups to basic only have been sharply reduced.

Marketing does pay

TKR Cable s central New Jersey system also has added customers at the same time it was raising basic rates, and the system is a good example of how effective marketing and good community relations can pay off. According to spokesman Patricia Dunsmore, the system now has 105 000 basic subscribers, up from 97,200 at this time last year. In May TKR raised the basic price $1 to $12.95 announcing at the time that two more services (The Travel Channel and The Discovery Channel) would be added in July The system also had scheduled a similar-

See **Package** *page 42*

Do high prices for systems mean rates must rise?

Some think so, and worry about marketplace reaction

By Virginia Munger Kahn

With cable systems trading at escalating prices, industry executives and regulators are expressing concern that those steep pricetags will impose upward pressures on rates for pay and basic services That has serious implications for cable s goals of increasing penetration and avoiding reregulation of the industry by either federal or local authorities.

"I've seen projections by brokerage firms (that show basic rates) past the $20 mark in five years," says Bob Lewis, a long-time industry player and now vice president for corporate development at Tele-Communications Inc. "I think that s on the high side We believe that when you reach $15 or $16 for basic, (increases) beyond that should be inflationary only "

TCI has been notable for its lack of acquisition activity on the system level in recent months The same can be said for many of the top 10 MSOs and some industry observers postulate that perhaps those companies know something the entrepreneurs and middle-level companies that are making the deals these days don't know

"I'm making bids,"says Lewis, "but they're not successful. My fear is that (these high-priced systems) may have to increase rates to the point where they become unreasonable" in the future he says.

It is a sentiment reflected by at least a few regulators. William Finneran, chairman of the New York State Commission on Cable Television, says the high prices in the marketplace now and the proportion of the acquisition cost that is being financed with debt "can only be effected in higher rates " Concerned that service and maintenance will suffer as profit margins are squeezed, the commission is thinking of developing a formula to assess a system s ability to meet the technological needs of the future and the needs

See **Prices** *page 43*

Price *from page 39*

of the community taking into consider ation the requirements for debt down the road

Most industry observers say the problem is particularly acute in classic cable systems where the ability to increase penetration and add services may be limited. "The more classic properties will depend more on rate increases for revenue growth in the future than newer systems where there is a wider potential for growth," notes Jay Bush, senior vice president at *Daniels Investment Services*.

Industry executives point to a number of recent transactions as prime examples of what they consider excessive prices with little upside potential other than in rate increases, including the Rockford, Ill. deal the Horowitz properties transaction, and the Mountain Cable acquisition. On that last deal specifically where 59 000 subscribers went to Adelphia Cable for $117 million, one operator said, "we couldn't come near those prices. The company has already rebuilt and remarketed the system and raised rates." Continuing to increase rates will be the new operator's only option, said this executive.

The same type of statement was made about the Horowitz properties which also went to Adelphia. "I felt the price was way out of line," says one operator. "There's not that much growth potential there."

Gold mine for the taking

However, what is one operator's "tapped-out" system is another's gold-mine just waiting to be exploited. The Mountain Cable deal was viewed by at least one other industry executive as having plenty of upside potential especially with tier meltdowns and future growth in Burlington, Vt.

> 'There is no trend of new owners increasing rates above original owners. It's been a pretty balanced approach'
>
> —Susan Herman
> L.A. Dept. of Telecommunications

The same is true for the Rockford transaction. Last spring that deal was the subject of intense industry discussion about runaway system prices when it was announced that Adams-Russell would pay more than $90 million for the 50 000-subscriber classic system. Since that time Cablevision Systems has agreed to acquire Adams-Russell itself for what many observers consider a "full" price.

Yet, according to Neil McHugh president and chief operating officer of *Adams-Russell* the company predicted rates would increase about $1 the first year of the acquisition, $1.50 the second year and between $1 and $1.50 over the next three years. The company wanted to be able to move up cash flows substantially in the short to medium term "without having to just bang the rates," says McHugh. The deal worked not only at the $90 million price tag he says but also at the more recent $104 million price.

While rate increases of $1 to $1.50 a year represent price hikes of between 6 and 10 percent, well in excess of inflation most industry executives consider such dollar increases reasonable and according to McHugh the basic rate will still be below $20 in five years. The Rockford basic rate now is $12.15 per month and the system generates $18 a month in revenues per subscriber.

Where Adams-Russell figured it could make substantial gains in contributions to cash flow was in increasing pay penetration and cutting costs. HBO for example was penetrated at just 27 percent, while overall pay units represented just 42 percent penetration. Moreover the system was operating at 39 percent margins which Adams-Russell figured it could improve to 45 percent to 50 percent fairly quickly. The result would be a doubling in cash flow from $4 million a year to $8 million within just two years, said McHugh.

Penetration on the rise

In fact, many operators are counting on improving margins and increasing overall penetration to help carry the debt burden taken on in these expensive acquisitions. Most operators are calculating that basic rates will rise to the mid to upper teens over the next two years and that penetration also will increase 1 or 2 percentage points per year.

The validity and importance of maintaining such growth rates is underscored in a recent report written by Bear Stearns media analyst Mary Kukowski. In that report, Kukowski concludes that over the next 10 years operators can expect to earn comfortably 15 percent returns on their investments in new acquisitions even though they are paying 12 times 1988 projected cash flows.

In her analysis Kukowski assumes that revenues will increase 8 percent per year and that unit growth will equal only 1 percent or 2 percent per year. That revenue growth figure is a combination of price increases only in line with inflation of 5 percent per year and the growth in the number of subscribers. "I would be surprised if operators passed on those (system) prices to subscribers," says Kukowski, when they will be able to depend on margin increases and increases in services to cushion any increase in

See **Price** *page 44*



> 'In the deals we've looked at, operators are looking to raise basic rates from $11 to $15 over four or five years. That's a reasonable range'
>
> —John Waller
> President, Waller Capital

Prices *from page 43*

rates and meet the requirements for debt service

That type of flexibility and the difficulty in pinpointing rate increases as tied specifically to high system prices already is evident. Operators have been extremely successful in cushioning rate increases by eliminating tiers and adding new services. Moreover, during the past six months, rate increases have been couched in terms of deregulation and the attempt to reach "market level prices" for cable services, particularly basic.

Mixed record

Looking back on acquisitions that were considered expensive at the time of their consummation shows a mixed record on rate increases. At one end of the spectrum, the Chapel Hill N.C., acquisition by Prime Cable for $1,900 per subscriber in August 1986 bolsters the argument that high prices result in high rates. While the system has not raised rates since May 1986 according to one city official, the most widely bought basic service of 29 channels costs $17.50 per month, substantially above industry averages of $11 to $13 per month. A 17-channel basic service costs $13.30 and the lowest tier of 12 channels costs $11.25. Those rates were put into effect by the seller as a part of the acquisition agreement.

In the future, according to John Waller, president of Waller Capital Corp. which brokered the deal Prime will not be able to depend on rate increases to bolster cash flows. "The upside is in the growth" of the city itself, says Waller.

At the other end of the spectrum, last spring American Cablesystems paid $1,723 and almost $1,900 a subscriber for two systems in the Los Angeles market—the Communicom and Culver City properties—but the company has not raised rates more than any other new or existing operator in the market, according to Susan Herman, general manager of the Los Angeles Department of Telecommunications. "There is no trend of new owners increasing rates above original owners. It's been a pretty balanced approach," she says. In general, operators have increased rates about $1 so that most subscribers are paying between $12 and $13 a month for basic service. As Herman notes, penetration rates are notoriously low in the L.A. market, suggesting there is substantial upside revenue growth just in increasing the number of subscribers.

In Tampa, Fla., where Jones Intercable acquired the former Tribune Cable system at a price estimated at $1,416 per subscriber in the spring of 1986, local regulators report that while rates have increased substantially over the past year—33.5 percent—Tribune's rates had been frozen since the company started construction in 1983. The result is that spread over the four years, rate increases in general have averaged about 5 percent, said Bob Sepe, director of cable communications for Tampa.

Stiff price

Heritage Communications similarly paid a stiff price to acquire the Dallas cable system from Warner-Amex in November 1985—$1,325 per subscriber, yet according to Randy Morgan, compliance investigator for the city there has been "little affect on rates overall" since the acquisition. Under Warner basic rates were $12.95. This past spring Heritage raised basic rates 15 percent to $14.95 but pay rates declined $1 or 8 percent to $11.

Moreover while Heritage instituted a $3.95 charge for remotes once it switched out the old Qube system and put in place a scrambled signal system requiring a Tocom converter it stopped charging subscribers double and triple for the additional services they received on additional sets. Now there is only a $7 flat fee for additional sets. Moreover subscribers that receive two or more pays receive a free remote.

Waller contends that operators simply are willing to take smaller rates of return in order to complete the deals they're targeting these days. "They're willing to take a 15 or 20 percent return," he says. "In the deals we've looked at, operators are looking to raise basic rates from $11 to $15 over four or five years. That's a reasonable range," says Waller.

Despite such assurances, Edward Kearse executive director at the New York State Cable Commission, says he cannot see how the revenues that are predicted for these systems and the prices being paid for them work out. Not only do he and Finneran express their concerns about what a rise in interest rates could do to the economics behind these acquisitions but also what the re-emergence of regulation of the cable industry could do to the fundamentals behind the system market.

The results could throw a real "monkey wrench" into the business they say. "We haven't begun to see the rate increases that will be needed to pay for these systems," Kearse predicts. ■



'I'm making bids but they're not successful. My fear is that (these high-priced systems) may have to increase rates to the point where they become unreasonable in the future.'

—Bob Lewis
Vice President, TCI

'We haven't begun to see the rate increases that will be needed to pay for these systems.'

—Edward Kearse
N.Y. State Cable Commission

tions was part of the logic behind its recent $20 million unwired deal with Procter & Gamble (BROADCASTING Oct 26)

Bill Breda senior vice president and general sales manager at Blair Television said that the Blair stations accepted the unwired network concept with Bristol Meyers because it would bring in fresh dollars to national spot and also because the "rates were good." The Bristol deal with Blair also involves an examination of the top 25 markets for the placement of advertising in medical/health programing Bristol has set aside a fund to support programing of community interest in local markets

Cable pricing—one year later

Many are sticking to pattern begun last year of increasing prices for basic services and lowering pay fees

Nearly a year ago the cable industry was freed from rate regulation and operators proceeded to raise basic rates while keeping pay rates flat or reducing them Although operators were unsure what the net effect would be it turned out to be a win-win situation A survey by the National Cable Television Association (BROADCASTING Nov 30) database statistics compiled by the Cable Television Administration & Marketing Society (BROADCASTING Aug 24) and individual reports from cable companies show that basic and pay penetration increased in 1987

As cable operators look to 1988 it appears they are following patterns established earlier this year. A random survey of multiple system operators and individual systems finds many will be raising basic rates on Jan 1 while at the same time reducing or keeping pay figures unchanged In some markets the price of basic is nearly double the charge for a pay service indicating the widening disparity between the two services

Comcast Cable raised basic rates between $2 and $3 in 1987 while keeping pay rates the same or dropping them $1 said President Robert Clasen The company plans to raise basic rates between $1 50 and $2 and "be much more aggressive in pay discounting" in 1988 said Clasen *For instance in* Comcast's new build in Philadelphia Disney is being sold at $7 50 and HBO at $6 95

Clasen said the company added about 100 000 basic subscribers in 1987 30 000 coming from Philadelphia and the rest from internal growth He said pay grew in direct proportion to basic in Comcast's owned and managed systems

By the end of 1988 Clasen said most Comcast subscribers will be paying $13 50 to $14 for basic with most of the rate restructuring taking place in the first quarter.

An example its Paducah Ky system raised basic rates from $9 95 to $12 on Jan 1 1987 Pay prices in the system stayed flat averaging $10 10 and showed no growth throughout the year Basic subscribers increased slightly 400 being added to the 18,500-subscriber base but Clasen said the system already has a basic penetration of 67% Comcast will be dropping the average price of pay services $1 and Disney $2 in an attempt to increase the system's 9 000 pay subscribers

Cablevision Industries will raise the price of basic early in 1988 but the increases will be smaller than in 1987 Michael Egan vice president programing said Cablevision raised basic rates between $1 50 and $2 in 1987 while dropping pay rates $1 The average basic price ran about $13 while pays averaged about $8 50 Egan said Because the company acquired a number of systems in 1987 Egan said it was difficult to quantify basic's growth although he said "we gained in penetration." Pay remained flat he said although that was an improvement over 1986

Egan said Cablevision will institute a basic rate increase of between 50 cents and $1 in the first quarter of 1988 Any remaining tiers in the company will be collapsed said Egan and those subscribers will see a $1 increase Pays will remain the same except for Disney which Egan said will be dropped $3 from $11 95 to $8 95 Egan estimated 35% of Cablevision's systems won't have any increase at all

Times Mirror saw healthy growth in both basic and pay penetration throughout 1987 said Larry Higby senior vice president of marketing while it raised basic rates an average of 10% and dropped pay rates slightly For 1987 Higby said Times Mirror added 70 000 basic subscribers and 92 000 pay units the latter a 16% increase all through internal growth "We've been marketing like there's no tomorrow" Higby said

The company will roll out a "modest" 8% increase in basic throughout the year said Higby and will keep pay prices flat The pay unit growth in 1987 said Higby was a signal to Times Mirror not to alter a successful formula But he doesn't see 8% basic increases as necessarily automatic in the next few years "Depending on inflation the amount of the increases will go down" he said

TeleCable which serves over 500 000 plans no rate increases in 1988 said Dan Dasnight director of marketing "We think we're high enough" he said "and we don't want to be going back every year for a rate increase" TeleCable continues to use a tier structure charging $11 for a 23-channel basic services and $18 for expanded 35-channel basic which includes the more prominent cable-delivered services such as ESPN CNN and USA Network The company phased in a $1 rate increase for both basic and pay throughout 1987 The average pay price is $9 said Dasnight factoring in package discounts The a la carte pay prices are $11 Dasnight said pay was flat and basic rose slightly— 5% in 1987—although that small increase can be attributed to the overall high penetration the company has achieved 62% with the lowest tier and in the mid to high 50's with the expanded tier

Dasnight said the company chose not to raise rates in 1988 because "we didn't want to get past the pain threshold We're pretty happy with our pricing where it is" he said

He said the company has been looking at melting down its two tiers but said that is a difficult decision He said the company is content with its present penetration figures and merging the two tiers would require a substantial capital upgrade because half of its subscribers would need addressable converters But as local ad sales pick up providing another stable revenue stream a tier meltdown may be a possibility he said

In Atlanta Prime Cable plans to raise its basic rates $2 10 on Jan 1 while dropping its pay $1 55 Allan Barnes vice president and general manager of the system said basic rates will rise from $14 85 to $16 95 for 45 channels, while pay rates will drop from $10 50 to $8 95 for the first service The overall rate increase for most subscribers Barnes said will be 6% Prime operates two franchises in the area and serves 147 000 subscribers One franchise sold basic for $13 20 in 1986 the other $14 85 Prime standardized those rates to $14 85 for both on Jan 1 1987 while keeping the pay rates at $10 50 Basic penetration increased 2% in 1987 Barnes said while pay penetration remained flat although the unit numbers increased because overall penetration widened

During the year Prime added the Discovery Channel C SPAN Viewer's Choice and a local shopping channel to its lineup and it plans to add another PPV channel next year The system plans to abandon its package discounts and sell all its pays on an a la carte basis for $8 95 Barnes hopes that downward rate adjustments will increase pay penetration

In Salem Ore Viacom folded in two basic tiers in April and instituted a rate increase from $11 95 to $13 45 in August According to Bert Rios the Salem general manager the system tries "not to tie rate increases to any other business decisions" There will be no rate hike in January but a $1 increase in basic is in the budget said Rios for August 1988 "Costs go up each year" he said and the company "tries to maintain regularity" in its pricing

On Jan 1 1987 the company's 22 basic channels sold for $11 95 with a three-channel extra tier of Arts & Entertainment Weather Channel and the Nashville Network selling for $3 95 The company folded that tier into the $11 95 tier in April and continued charging $11 95 until the August increase At the same time the company dropped its second set hookup fee from $3 50 to $3 In October the system put A&E Nickelodeon and C SPAN on their own channels and added two access channels and the Discovery Channel

The system added 2,500 basic subscribers

in 1987 the best year in three said Rios The area has been slow to recover economically since the recession of the early 1980s he said

Pay rates remained the same throughout 1987 (Playboy $9 95 Showtime/Disney $10 95 Movie Channel $11 95 and HBO $12 95) and 1 624 units were added throughout the year Rios said pay rates will remain the same in 1988 but his margins will grow smaller as costs levied by the programmers rise

Steve Fry the general manager of Warner Cable s Akron Ohio system said basic rates will rise $1 to $15 95 for its 38-channel system while pay rates will stay the same in 1988 The system raised basic rates from $12 95 to $14 95 last Jan 1 while dropping its pay rates from $12 95 to $11 95 Fry said basic penetration increased 4% in 1987 and although pay penetration remained flat the number of units sold increased slightly because of packaging

The first quarter of the year has been the strongest for pay and basic increases said Fry despite the negative effect of Christmas VCR sales on pay channels Fry said the system is adding Viewer s Choice and a barker channel to promote the pay-per view service

In Manhattan the two cable systems owned partially or outright by American Television & Communications are increasing basic rates $1 while dropping some pay rates ATC's Manhattan Cable system (35 channels 45 programers) will charge $14 95 for its basic service on Jan 1 which duplicates a $1 increase that went into effect on Jan 1 1987 The system is also charging for the first time 50 cents for second set hookups The prices of the pay services—HBO and Cinemax $12 95 and Sportschannel $13 95—will remain the same The company recently settled out of court an antitrust suit that had been brought by a citizen committee which requested a non Time Inc -owned pay service be made available The company plans to comply by adding one within the next months and others as the system s five-year, 70-channel rebuild is completed

In northern Manhattan Paragon Cable jointly owned by ATC and Houston Industries basic rates reflect those of Manhattan Cable Paragon plans to drop its rate for HBO from $13 95 to $12 95 in line with its charges for Showtime

Robert Benya vice president marketing and sales said the system went full-time with ESPN WTBS(TV) Atlanta and BET in 1987 and plans to add USA Network Discovery and Arts & Entertainment (full time) in 1988 The Travel Channel will be added overnight and the Cable Value Network has been reduced from 24 hours to eight hours to make room for the changes Paragon is gradually upgrading the system from 28 to 54 to 72 channels that will use fiber optics

The new norms in the industry's service pricing are also reflected in smaller independent operators

In United s Grand Junction Colo system general manager Tom Worster said the system adjusted basic and reduced pay pricing on April 1 which resulted in an increase in basic penetration and decrease in pay units The company added two services to its 12-channel basic tier, and increased the price from $11 to $11 95 Penetration for that tier increased from 17 600 to 18 949 The 10-channel expanded basic tier to which four cable services were added in April was reduced from $2 75 to $1 80 Its subscriber count jumped from 9 642 to 11 913 Pay pricing was adjusted to $11 95 for the first pay $7 95 for the second and $5 95 for those thereafter. Pay units dropped 140 in 1987 said Worster, as the area continued to experience slow economic growth Worster said the company is examining whether to melt down tiers but has not decided what basic rate adjustments it will make in 1988 Pay pricing he said will remain the same

At Cable TV of Coral Springs (Fla) manager Tom Horne said his system will raise basic rates 50 cents in April to $13 50 while pay service pricing will remain the same in 1988 Last April the system raised the price of its 30-channel basic from $12 to $13 and penetration increased from 62% to 65% The company added A&E and the Home Shopping Network to coincide with the April rate increase Although pay rates ($10 for HBO $9 for the others) stayed flat in 1987 the system s pay-to-basic ratio dropped from 137% to 131% Horne said "The demand is lessening" for pay services (he sees the VCR as the chief culprit) but he is unsure whether he would follow the lead of other operators and drop the price The 50/50 split between program supplier and operator he said is shifting in favor of the latter That squeezes the margin on pay services even further Horne said □

Bottom Line

Universal language. Former public broadcasting executive at WNET(TV) Newark, N.J. Paul Stadkus has formed new company in New York to place foreign-language programs and advertisements on U S television. Foreign-language advertising commitments have already been gained from Anheuser-Busch, which will air Italian-language ads during Italian soccer coverage fed to U S cable systems and from Columbia Pictures which plans Chinese-language ads for its new release "The Last Emperor"

□

Latin sounds. Spanish-language TV group Telemundo has been awarded exclusive multi-year advertising contract worth at least $5 8 million from subsidiary of Brazil's largest network, Rede Globo Television and Radio



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NCTA Study Finds Cable Bills Rose 6.7 Percent in First Half of 1987

By Larry Jaffee

WASHINGTON—The average cable subscriber's bill rose 6.7 percent during the first half of 1987, according to a survey conducted by the National Cable Television Association.

Basic cable rates during the period, the first under the rate-deregulation provisions of the 1984 Cable Act, jumped 10.6 percent, the survey found, but prices for pay networks and ancillary services declined.

But deregulation has also resulted in a 2.5 percent decrease in premium-network prices, increases in the number of channels offered on basic service and consolidation in the number of basic service tiers offered to subscribers, the study found.

The random-sample mail survey conducted by the independent public accounting firm Arthur Andersen & Co. included responses from 598 cable systems representing 8 percent of all cable systems and serving 16 percent of the nation's cable households. The survey compared rates from December 1986 with those of June 1987.

The results of the NCTA survey were consistent with the findings of a survey of 282 operators conducted by *Multichannel News* and the Cable Television Administration & Marketing Society last year (see *Multichannel News*, Dec. 1 1986, page 1). That survey found that operators were planning to increase rates during 1987 by an average of about 11 percent, with many of them also planning to expand service and reduce prices for pay networks and ancillary services.

According to Cynthia Brumfield, NCTA vice president of research and policy analysis, the survey was commissioned because there has been a lack of nationwide data on the effects of deregulation, which took effect Dec. 29 1986.

NCTA was surprised by the resurgence in pay subscriptions, Ms. Brumfield said at a news conference here last week.

Of the 2,577 survey forms sent out to randomly chosen systems culled from A.C. Nielsen's Cable On-Line Data Exchange, 23 percent were returned, a high return rate considering the complexity of the survey. Ms. Brumfield said, adding that the survey took about 2½ hours to complete. The sample represented 33 percent of all systems nationwide.

Ms. Brumfield said NCTA does not plan to use this data to combat forces in Congress seek

See Rates, page 140

Margaret Durborow New CTAM President

WASHINGTON—The Cable Television Administration & Marketing Society Inc. has selected as its new president Margaret Durborow vice president of marketing and programming for United Cable Television of Los Angeles Inc., industry sources said last week.

Ms. Durborow replaces Victor Parra, who resigned as executive director on Aug. 31 to pursue other opportunities in the association management and cable television fields.

According to United/LA president Bill Cullen, she will assume her new responsibilities at CTAM at about the second week of January. "Our loss is the industry's gain. In my opinion, she was absolutely the best qualified person," he said.

Ms. Durborow, who joined United in March 1985, was on vacation in Hawaii and unavailable for comment.

At United, she was responsible for all of the system's marketing and programming. In addition, she was very instrumental in developing the Southern California Cable Marketing Council, which achieved a common channel lineup for the area's 88 cable systems, Mr. Cullen said.

Ms. Durborow, who worked at CommuniCom (now American Cable in Los Angeles) before coming to United, also chaired a committee that established an advertising interconnect for Los Angeles, he added. □



Rates

Continued from page 9

ing to reinstate rate regulation, by showing that basic rates have not increased astronomically. Systems usually make rate changes in January of the year, she noted.

She added that NCTA does not have plans to do another survey.

The characteristics of the respondents indicate the sample contained a higher proportion of larger systems, NCTA said. Survey respondents have an average 12,180 subscribers in their systems, while the national average is 5,628 subscribers, according to Paul Kagan Associates Inc.

Other than system size, the sample is representative of cable systems nationwide, NCTA said.

The survey found that the total number of premium unit subscriptions increased for all but one service—The Movie Channel—and total number of premium units for the sample systems as a whole grew by 3.7 percent. In addition, total monthly revenues per subscriber, reflecting all revenues from subscriber services, grew by 6.7 percent from $21.59 to $23.04.

According to NCTA, the penetration of subscribers to homes passed by cable has not changed since deregulation. "Moreover the survey results indicate that the rates of both basic and premium service disconnections, which can be considered measures of customer satisfaction with cable, have declined since deregulation went into effect," the report stated.

Average revenue (including hookups but excluding advertising) per basic subscriber increased from $12.17 in December 1986 to $13.53 in June 1987 while average premium revenue decreased $7.88 to $7.70 during the same period.

The number of basic service channels received by the average subscriber increased by approximately two channels, or 8.9 percent, from 27.3 channels to 28.9 channels.

The number of cable systems offering two or more tiers of basic service dropped from 180 in December 1986, or 30.1 percent of the sample, to 151 in June 1987 or 25.3 percent of the sample, the study found.

Bob Scott, an AAC managing partner, said his firm did not figure out out the percentage or number of cable system respondents that experienced basic rate increases of more than 20 percent because the purpose of the survey was to determine a profile of the average subscriber. "The data is there, but hasn't been summarized," nor are there plans to do so, he said.

A Connecticut Cable Television Association study earlier this year on the effects of deregulation on all 26 cable systems in the state found that basic rates went up 14.6 percent, while premium rates decreased 14 percent. Revenue per subscriber rose 7.8 percent—from $23.42, average cost all of 1986, to $25.13 for the first seven months of 1987.

Cynthia Pols, National League of Cities counsel, criticized the 23 percent response rate for the NCTA study and said a recent NLC study that showed rate increases of 27 percent was more likely to reflect the result of deregulation.

In the NLC study, 450 (52 percent) of its members were asked a wide variety of questions, including some on cable regulation. "If you're in the cable industry and raised your rates 60 percent, you're probably not going to respond to a survey," she said.

NCTA spokesperson Lynn McReynolds said comparing the NLC and NCTA surveys is "like comparing apples with oranges."

John Mansell, senior analyst with Paul Kagan Associates Inc., said he conducted an unscientific survey looking at the effects of rate deregulation.

"Over 900 systems had increases in the first half of 1987 that averaged 34.5 percent," he said, conceding that certainly there were other systems that raised rates and were not included in the survey.

Ms. Pols said that because the Kagan and NLC surveys results were close it was more likely that they were more accurate. □

Op-Owned PPV Network Set To Launch

NEW YORK—Home Premiere Television, the operator-owned pay-per-view consortium, will launch in December with films from Columbia Pictures, Tri-Star Pictures and at least six other distributors, but Warner Bros. Inc. Universal Pictures and Paramount Pictures Corp. still have declined to make deals with the fledgling PPV operation, according to information released by Home Premiere last week.

Vice president of programming Jim English expressed optimism that HPTV will eventually make a deal with at least two of the holdouts.

"Why would they cut out a third of their market?" Mr. English said. HPTV has commitments from its multiple systems operator owners for at least 2.3 million subscribers. HPTV is a joint venture of American Television & Communications Corp. Continental Cablevision, Cox Cable Communications, Newhouse Broadcasting and Telecable Corp.

HPTV will program 22 hours a day, about 11-15 titles per month. □

Stereo Television Makes Little Difference, Advertisers Say

By Joanelma Averna

WASHINGTON—High-tech soothsayers three years ago pointed to the emerging technology of stereo television and wrung their hands in happy anticipation. Advertisers will jump to have their messages broadcast in stereo, broadcasters will feed off this advertising frenzy and everyone from set manufacturers to program and commercial producers will want to tap the concept, they said.

Special Report on Stereo Television

But what was touted as the biggest change to commercial television since color has yet to meet those expectations, and broadcasters and advertising experts, although they are not sure why.

While more than 400 TV stations broadcast in stereo, perhaps only a handful, if that many broadcast commercials in stereo, estimate engineers and television production people. One leading explanation for this is there's not an abundance of commercials produced in stereo, they said. But the decision to go stereo vs. mono in a commercial message is left to the hands of advertisers or their agencies.

Rod Abernathy, a producer, writer and arranger at Videotones Inc. in Raleigh, NC, and many advertisers and many of his clients don't think about having a stereophonic commercial until it's pointed out to them. "I'll ask them if they want stereo or mono, and they don't know," he said. "But I'll sit them down and play it and they'll say, 'Oh, yes, stereo.'"

Mr. Abernathy has written and arranged national radio spots for McDonald's Corp. and has composed, arranged and recorded 10 TV spots for Honda Motor Co. Videotones is a production house and a recording studio.

"A lot of clients are not thinking about (stereo), and that's a shame," said Mr. Abernathy, who said that from a creative viewpoint, he'd prefer to have his spots broadcast in stereo. "I'd like to push stereo; it's a 10 years overdue," he said.

The Television Bureau of Advertising, the Association of National Advertisers and other ad groups are not sure why advertisers are not latching on to stereophonic commercials.

TvB and ANA said they have not conducted research on stereo television and did not know how many commercials nationally have been broadcast in stereo.

Dana Christon, marketing specialist at Levi Strauss & Co. in San Francisco, said music is a "very important" theme in most Levi advertising campaigns, particularly the "501 Blues" television spots for its jeans. He said having spots run in stereo is a "nice thing to have," but added that stereo television does not figure into Levi's media buying formula.

"Will it make or break our decision to buy advertising spots? Not really. It's not a buying decision," Mr. Christon said.

Echoing comments of advertising agencies, Mr. Christon said it would be just as difficult for advertisers to keep track of commercials broadcast in stereo. "They're not noted in our media reports," he said.

Other big television advertisers agree that stereophonic commercials sound great, but don't influence advertisers to buy time on stations that have the capability to broadcast in stereo vs. stations that don't.

H.J. Heinz Co. for example, just launched a new advertising campaign for its ketchup, where music is a key part of the company's pitch. The spots are running prime time on TV stations across the country and feature a newly released rock tune, *Jane's Getting Serious*.

Harry Carroll, a spokesman for Heinz U.S.A. a division of H.J. Heinz, said the new commercials are not running in stereo and that Heinz, like other advertisers, is concerned about the commercial's reach. "We don't at all consider whether a station can broadcast in stereo when placing an advertisement. We really do not consider that an issue," Mr. Carroll said.

Most broadcasters said that if advertisers considered stereo an issue they would not have to pay more to have their messages broadcast in stereo or have to pay more for ad time that is next to a program broadcast in stereo vs. a program without stereo sound.

KIRO-TV the CBS affiliate in Seattle, was one of the first TV stations in the country to go stereo three years ago. Officials said stereo hasn't increased the station's advertising sales.

"I can assure you no one (advertiser) is asking us if we have the ability to broadcast in stereo. At this point in time, it is not a buying criteria at all," said Michael Poth, vice president and director of sales for KIRO.

Mr. Poth said stereo television has to build its penetration before it can become a component in ad buys. That means more people need to either hook their sets up to stereo receivers or buy stereo TVs. □

Orbis Sets Expansion With $30 Million Fund

By Andrew Grossman

NEW YORK—Orbis Communications Inc. last week signaled its intention to become a major player on two fronts—first-run syndication and made-for-television movies—using an infusion of $30 million from its new parent company, Carolco Pictures Inc.

Orbis signed an agreement with Roger Gimbel and Ken Locker to produce movies, miniseries and eventually series for broadcast network television under the banner of Carolco/Gimbel Productions with Mr. Gimbel serving of president of the new company and Mr. Locker as executive vice-president.

In its syndication division, Orbis said it will market two new shows for the fall of 1988. *Love Court*, a strip comedy court show targeted for late afternoon, and *Public People/Private Loves*, a weekly magazine/entertainment barter show hosted by Sarah (*Real People*) Purcell.

Love Court is described as a hybrid of *People's Court*, *The Newlywed Game* and *Love Connection* where couples with romantic problems will appear before a judge. They will be questioned by a panel of comedians and celebrities who will help settle the conflicts. Jenifer Lewis, an actress, is cast as the judge. The cash/barter show returns one minute to Orbis.

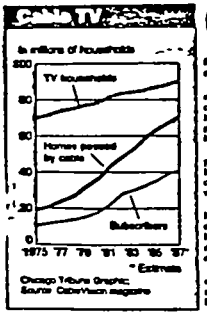
The show, which Orbis President Bob Turner described as "a unique blend of reality and comedy," is the second comedy court show to be introduced recently. Blair Entertainment is developing *Celebrity Courtroom*.

Public People/Private Loves will center on the personal lives of celebrities who will be interviewed and filmed in America and abroad. Orbis will pitch the show for either weekends, or prime time on weekdays which affiliates can use to pre-empt the network, Mr. Turner said.

Pilots have been shot for both programs, and Orbis will begin the week peddling the shows to stations.

BUSINESS

Gannett Westchester Newspapers/Friday, March 6, 1987



Cable rate hikes spreading

By Brian Donnelly
staff writer

Most of the 197,000 Westchester-Putnam area households that subscribe to cable television will have one new thing in common by April 1 — they'll be paying more than they did last December.

Six of the seven cable television companies which service the two counties have either increased their monthly charge for basic service since Jan. 1, or will do so at the end of this month.

Group W, with 7,700 customers in Mount Vernon, has so far kept its basic monthly rate at $13.80. The only thing it has changed is its name, becoming Paragon Cable this month to reflect new ownership.

Locally, the six companies in Westchester-Putnam which have announced rate increases have changed their rates by roughly $3.10 a month, from a previous composite rate of $9.97 to $13.35.

There are wide ranges, however in the rate increases; sometimes even among subscribers of the same company. The largest price increases are for subscribers who were previously paying about $8 or $9 monthly for basic and who now will pay around $13 to $14.

However almost all subscribers in the area will be paying a new basic rate within the range of $13.45 to $13.85.

The exceptions: subscribers in Port Chester and Harrison who received a March 1 increase from $4.30 to $6.30 and any new subscribers to Cablevision in Yonkers. Cablevision is charging existing subscribers a new rate of $12.85 for basic service but new customers must pay $19.50. The former rate in Yonkers was $8.80.

UA Columbia Cablevision, the largest system in the area, increased its basic monthly rate from $10.75 to $13.80 effective Feb. 15 for all 80,000 customers in 30 communities of southern and central Westchester.

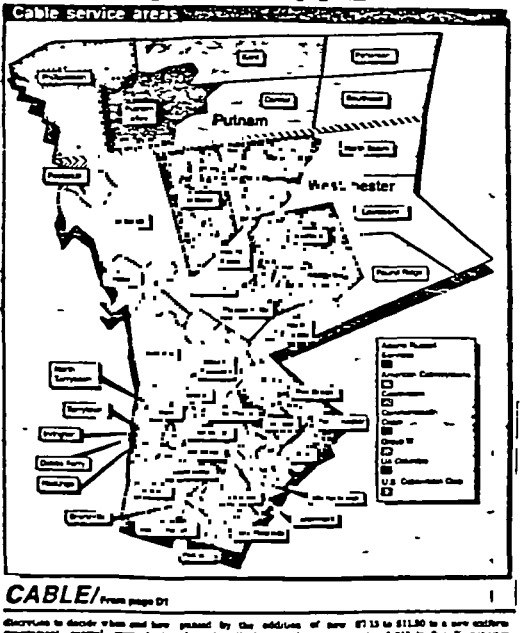
"I think it's a very reasonable price, said Ira Rothstein, UA Cablevision's system manager. "We have looked at our area and what people are charging for comparable service in the metropolitan area.

Deregulation of rates was effort in January at the direction of the Federal Communications Commission.

Previously a local cable television franchiser was required to seek approval from the local town board or city council in order to increase its fees for basic service. The rates charged for premium channels such as Home Box Office and Showtime/The Movie Channel have not been regulated for several years.

Under legislation passed by Congress in 1984, the FCC was given the

Please see CABLE on page 03



CABLE/ From page 01

discretion to decide when and how government control over basic monthly subscription rates would be removed.

Although a federal lawsuit has been filed challenging the manner in which the FCC took action, the lifting of controls has gone ahead.

In New York, most of the state's 104 cable television companies have instituted rate hikes since Jan. 1, according to Alan Dalton, a senior analyst who is task for the state Commission on Cable Television.

The majority, 85% have a surcharge to some of the subscribers, but the increases in fact have been fairly modest, said Dalton.

The state agency has no estimate of what the average monthly increase has been, but Dalton said, "It can be as little as a dollar and in a few places it's been as much as seven dollars.

He said that most often the large increases have been accompanied by the addition of new channels to the basic package.

Ben Perry, a lawyer for the American Civil Liberties Union who is monitoring the FCC's action in the U.S. Court of Appeals for the District of Columbia, said Thursday he is concerned that the rate increases will be "unwarranted.

"I think you are seeing the consumer nothing," said Perry, estimating that the number of companies which have raised rates has grown somewhat nationwide from a previous level of 40 a month.

The ACLU has been joined by the city of New York, the National League of Cities and several other parties in contending, in part, that the FCC did not conduct adequate research before it took action.

The following is a summary of the other local increases:

□ Adams-Russell Co., from $4.30 to $6.30 for customers in Port Chester and Harrison effective March 1. From a previous range of $7.13 to $11.80 to a new uniform rate of $13 in five Westchester and two Putnam communities effective April 1.

□ American Cablesystems, from an old rate of $10.45 as a January rate of $13.45 in nine communities of central and northern, from $8.40 to $13.45 in others.

□ Commonwealth Cable, from a previous range of $8.40 to $11.46 to a new rate of $13.85 for four Putnam towns.

□ U.S. Cablevision increased the basic rate from a range of $8.34 to $13 in the unincorporated part of Phillipstown and Peekskill, and from $8.75 to $13 in Cold Spring.

Consumers with questions about their cable television service can use telephone the state commission at 1-800-342-3330.

EXHIBIT P

WEST VIRGINIA CABLE MATERIALS

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of

Amendment of Parts 1, 63 and 76 of the Commission's Rules to Implement the Provisions of the Cable Communications Policy Act of 1984	MM Docket No. 84-1296

COMMENTS OF THE STATE OF WEST VIRGINIA

The State of West Virginia, by its attorneys, respectfully submits these comments in response to the Further Notice of Proposed Rule Making, FCC 87-307, released September 28, 1987 ("Further Notice") in the above-captioned proceeding initiated to consider revisions to the "signal availability standard" in the Commission's cable rate regulation rules. 47 C.F.R. § 76.33(a)(2).

Since January of 1987, cable television consumers in West Virginia have been experiencing a host of negative effects produced by the FCC rules promulgated under the Cable Communications Policy Act of 1984. 47 U.S.C. § 521 et seq. ("Cable Act"). Primary among these negative effects, from the consumer viewpoint, have been the exorbitant increases in rates imposed by cable operators in West Virginia who believed they fell under the Commission's definition of "subject to effective competition." These rate increases, for the most part, have not paralleled any new capital expenditures by the cable operators, nor have they been adequately explained through any other industry rationale.

Faced with a situation which was worsening almost daily, the State of West Virginia welcomed the decision by the United States Court of Appeals for the District of Columbia in the ACLU v. FCC case to remand to the Commission its definition of "signal availability." American Civil Liberties Union v. FCC, 823 F.2d 1554, 1571-73 (D.C. Cir. 1987). The ACLU decision has offered all parties concerned a chance to reexamine the original goals of the Cable Act and the rules promulgated to meet those goals. In this spirit of arriving at a more realistic regulatory structure for the cable television industry, the state of West Virginia welcomes the present opportunity to point out its particular critiques of the Commission's previous "signal availability" standard and its previous waiver procedure.

I.

INTRODUCTION

Section 623(b)(1) of the Cable Act of 1984 required the Commission to "prescribe and make effective regulations which authorize a franchising authority to regulate rates for the provision of basic cable service in circumstances which a cable system is not subject to effective competition." 47 U.S.C. § 543(b)(1).

In April 1985, the Commission adopted rules declaring that a cable system faced "effective competition" in providing basic cable service whenever three off-the-air broadcast signals were "available" in the cable community. Report and Order in MM Docket No. 84-1296, adopted April 11, 1985, 50 Fed. Reg. 18,637, 18,648-50 (1985) ("Report and Order"). Under the Commission's rules, a broadcast signal would be deemed "available" off-the-air in the cable community if: (1) the signal placed a predicted Grade B contour over any

portion of the cable community; (2) the signal was "significantly viewed" in the community; or (3) the signal was a translator station licensed to serve the community and did not already carry a Grade B contour or significantly viewed signal. Id. at 18,650-51.

The D.C. Circuit upheld, in large measure, the Commission's rules, including its three-signal standard of "effective competition." ACLU, 823 F.2d at 1571-73 (D.C. Cir. 1987), Petition for cert filed, sub nom. State of Connecticut v FCC, ___ U.S.L.W. ___ (U.S. Oct. 15, 1987), No 87-671.[1] While recognizing that "the measures of signal availability chosen by the Commission are highly imperfect," the court declined to hold that use of either measure was itself arbitrary and capricious. Id. at 1572. Because the court found certain aspects of the signal availability standard to be arbitrary and capricious, it remanded to the Commission the signal availability standard for further explanation or development of a new standard.

On remand, the Commission proposes to continue using the Grade B contour and "significantly viewed" status as measures of broadcast signal availability. Further Notice at ¶ 6. The Commission, however, proposes certain revisio- to each measure. Id. at ¶¶ 7-10. Finally, the Commission proposes several modifications to its waiver procedures designed to remove the substantial economic barriers that the current waiver system poses to franchising authorities Id. at ¶¶ 12-16.[2]

II.

THE COMMISSION SHOULD ADOPT THE GRADE A CONTOUR AS THE ONLY MEASURE OF BROADCAST SIGNAL AVAILABILITY.

Although the court in ACLU v. FCC upheld the Commission's selection of the Grade B contour and "significantly viewed" standards as measures of broadcast signal availability, it hardly gave the Commission's selection of those measures a ringing endorsement. Indeed, as noted, it observed that those measures are "highly imperfect " 823 F.2d at 1572. West Virginia believes that an ample number of reasons exist for the Commission to replace both measures with another measure--the Grade A contour of a broadcast signal.

The Grade B contour of a broadcast signal is merely a predictive measure of signal strength. It simply defines a geographic area surrounding the broadcast station in which a specified field strength designed to yield a reasonably clear picture is predicted to be available to 50 percent of the households near the outer limit of the contour 90 percent of the time. 47 C.F.R. § 73.884(c).[3] Using this prediction, the probability that a randomly selected television household situated on the outer limit of a single Grade B contour of a certain broadcast signal, will receive a reasonably clear picture of that signal at any given time is only 45 percent.[4] The probability that such a television household will not receive a reasonably clear picture of the broadcast signal is, therefore, 55 percent.

The folly of relying on the Grade B contour is represented clearly when one considers the possible outcomes under a three-signal standard. If the probability is only 55 percent that a randomly selected television household near the outer limit of one Grade B contour will actually receive a reasonably clear picture 90 percent of the time, then the probability that a randomly selected television household near the outer limits of three Grade B contours will actually receive three reasonably clear pictures 90

percent of the time is only 12 percent.[5] In other words, the odds are eight-to-one against a randomly selected household receiving reasonably clear pictures from all three signals 90 percent of the time.[6]

If we remember that the original purpose of employing a signal contour standard was to establish a measure of "effective competition" for the cable industry and local regulatory bodies, then the use of the Grade B contour, with its incumbent low probabilities, appears especially ill-reasoned. After all, it is hard to conceive of the FCC seriously arguing that a cable operator who serves a community which lies on the outer reaches of three Grade B contours, where the odds of independently receiving reasonably clear pictures of three broadcast signals 90 percent of the time are eight to one, is somehow subject to competition from those three signals. A quick response might be that the community on the rim of only three Grade B contours is a hypothetical example and one not likely to be found in practice. An equally quick glance at the Grade B contour map of West Virginia will refute such a critique. Many of the smallest and most rural cities and townships of West Virginia, especially those in the eastern part of the state lie in the outer sections of three or even fewer Grade B contours, including cities and townships in the counties of Hampshire, Mineral, Hardy, Grant, Pendleton, Tucker, Randolph, Pocahontas, Webster, Nicholas, Fayette, Raleigh, Wood, and Wyoming. Even some of the larger cities in West Virginia, such as Parkersburg, Oak Hill, and Beckley, fall in the outer limits of three or fewer Grade B contours.[7]

Given the realities of the Grade B contour probabilities--which apparently were not presented to the court in ACLU v FCC--it can no longer be assumed that the Grade B contour "bears a reasonable relationship to actual

signal availability " 823 F.2d at 1572. While the court in ACLU v. FCC noted that another panel had previously referred to the Grade B contour as indicating "satisfactory off-the-air viewing," id., citing Tele-Media Corp. v. FCC, 697 F.2d 402, 404 n.4 (D.C. Cir. 1982), that was merely a passing reference, constituting dicta in the opinion. The suitability of the Grade B contour as a measure of broadcast signal availability was never an issue in that case. Moreover, that panel's passing reference was contrary to a prior Commission pronouncement stating that the Grade B contour was not a reliable indication of actual signal availability. See, e.g., Protection of Coverage of TV Broadcast Stations, 22 FCC 2d 359, 358 (1970).

If we are going to have to live with the probability-based, signal contour standard as one of the measurements of "effective competition," then the Commission should at least utilize a signal contour which produces a much higher probability of actual reception by each television household. To this end, West Virginia suggests that the Commission replace its use of the Grade B contour with the use of the Grade A signal contour standard. The Grade A contour defines a geographic area surrounding a broadcast station . which a specified field strength designed to achieve a reasonably clear picture is predicted to be available to 70 percent of the households on the outer limit of the contour 90 percent of the time. 47 C.F.R. § 73.684(c). The probability that any given television household on the outer limit of the Grade A contour of three broadcast signals will receive a reasonably clear picture of all three signals 90 percent of the time is 34 percent.[8] The Grade A contour thus bears a much closer relationship to actual broadcast signal availability than does the Grade B contour, assuming that the odds against a randomly selected household

receiving reasonably clear pictures from all three signals are at least reduced to three-to-one.[9]

The Commission should also discard the "significantly viewed" status as a measure of broadcast signal availability because, like the Grade B contour, it bears little relationship to the actual availability of a broadcast signal in a cable community. The Commission's "significantly viewed" standard was created 15 years ago for a purpose entirely unrelated to its use by the Commission here. Cable Television Report and Order, 36 FCC 2d 143, 174 (1972). Under the Commission's rules, whether a broadcast signal is "significantly viewed" depends upon its "share" and its "net weekly circulation," which are defined as follows:

> As used here the term net weekly circulation is a measure of the number of households that viewed a station for five minutes or more during an entire week, expressed as a percentage of the total television households in the community. Share of viewing hours is a measure of the total hours all television households in the community viewed a station during the week, expressed as a percentage of the total hours these households viewed all stations during the period surveyed.

Id. at 175. A network station is considered to be "significantly viewed" if it obtains a three percent share and a net weekly circulation of 25 percent; an independent station is considered to be "significantly viewed" if its share is two percent and its net weekly circulation is five percent. Id.; 47 C.F.R. § 76.54.

That a certain broadcast signal meets these minimum standards for "significantly viewed" status in a given cable community hardly provides reasonable assurance that the signal is actually available to television households in

that community. A net weekly circulation of 25 percent, for example, strongly suggests that the broadcast signal is actually unavailable to the 75 percent of television households in that community which did not view the signal for even five minutes during the entire week. Similarly, that suggestion becomes even stronger if the net weekly circulation is only five percent. Yet the latter figure, coupled with a two percent viewing share, would qualify an independent station's broadcast signal for "significantly viewed" status.

Use of the "significantly viewed" standard to measure broadcast signal availability would also result in an anomaly because of the separate threshold figures for network and independent station signals. For example, an independent station signal having a two percent viewing share and an eight percent net weekly circulation would be deemed available, but a network station signal having three times as large a viewing share (six percent) and net weekly circulation (24 percent) would be deemed unavailable.

While the court in ACLU v FCC declined to hold that the Commission's use of the "significantly viewed" standard was arbitrary and capricious, 823 F.2d at 1572, it did note certain "potential difficulties" in applying this standard. Id. at 1573 n.38. Although it only discussed the problems created because "significantly viewed" statistics are compiled on a county-by-county basis, id., this in no way suggests that it deemed all other aspects of the "significantly viewed" statistics to be free from "potential difficulties."

In sum, the Commission should discard both the Grade B contour and "significantly viewed" measures of broadcast signal availability. Simply stated, these loose and outdated

estimations bear no legitimate relationship to the actual availability of broadcast signals within a cable community and, therefore, provide a wholly inaccurate reflection of the actual level of competition in each local broadcast reception market. Moreover, the Commission's continued use of the Grade B contour and the "significantly viewed" standards, combined with a waiver procedure requiring expensive engineering studies paid for by the franchisor municipalities, will in practice force a large number of communities in West Virginia, which have no other competitive options in their local broadcast signal market, to accept the establishment of FCC-sanctioned monopoly pricing as a cost of receiving cable television service. In lieu of these two signal measures, the Commission should at least consider replacing the Grade B contour with the Grade A contour as a measure of broadcast signal availability.

III.

THE COMMISSION MUST ADOPT A FLEXIBLE WAIVER PROCEDURE.

As the court in ACLU v. FCC observed, the Grade B contour does not take into consideration geographic terrai which may prevent reasonably clear reception in a televisi household:

> A "predicted Grade B contour" is a measurement of the anticipated strength of a broadcast signal. Use of the Grade B contour enables the FCC to predict the "approximate extent" to which a signal is viewable in the community covered by this contour. See 47 C.F.R. § 73.683(a) (1985). The predicted contour . . . is based on general engineering principles, and does not take into account site-specific factors that could affect the actual broadcast strength in a community. Thus, the predicted contour does not take into account the extent to which "terrain" or

> "interference" disturbs the ability of viewers to receive a clear picture. Id.

823 F.2d at 1560-61 n.8. This observation is particularly apt to broadcast signals and television households in West Virginia.

As the Commission may know, West Virginia is known as the "Mountain State" because of its rugged terrain. While the average elevation in West Virginia is 1,500 feet above sea level, there is a range of 4,863 feet between the highest and lowest points in the state. Most of the state, especially the eastern portion, consists of heavily forested mountain ridges separated by narrow valleys. Needless to say, many of the cable communities located in those valleys experience severe broadcast signal reception problems notwithstanding their coverage by the Grade B contours of various broadcast signals. Even West Virginia's largest urban center, its capitol city of Charleston, is surrounded by steep, 800-1000 ft. valley walls.

With an accurate knowledge of West Virginia's inhospitable topography in mind, it is very conceivable that many cities and towns located within the state will apply for waivers on the ground that three broadcast signals are not actually available off-the-air in their communities. Yet, because of the rural nature and small tax base of most of these cities and towns, and because West Virginia's economy as a whole, has fared relatively poorly in recent years, most potential waiver candidate municipalities in the state will have little or no resources to expend on the expensive requirements of the waiver process as it is presently constituted. West Virginia, therefore, supports the Commission's decision to reform the waiver process, as it was urged to do by the court in ACLU v. FCC. Id. at 1573,

nt.37. But at the same time, the state believes that the Commission's proposals fail to realize the full potential for reform of the waiver process in at least two respects

A. A Penetration Level of 65 Percent Should Trigger a Shift of Burden of Producing Field Strength Measurements to the Cable Operator.

Because high cable penetration rates are often thought to be a reliable bench mark of broadcast signal reception problems, the Commission proposes to shift the responsibility for obtaining signal strength measurements to the cable operator when cable penetration falls in the range of 80 to 85 percent. West Virginia concurs with the FCC's proposal to shift responsibility for the studies to cable operators when a certain threshold penetration level is reached, but the state also urges the Commission to set the level at a more reasonable 65 percent. In addition, we urge the Commission to create an irrebuttable presumption of off-the-air broadcast signal unavailability when the penetration level exceeds 90 percent.

Despite the Commission's reservations, cable penetration is generally a reliable indicator of off-the-air broadcast reception problems. Further Notice at § 15 n.18 The Commission's suggestion that a high penetration may instead reflect superior service or low rates is belied by recent experience in West Virginia and elsewhere. Id. A high penetration level surely cannot be attributable to low rates since cable penetration has remained unchanged in the face of a 10.6 percent average increase in the price of basic cable service during the first six months of 1987.[10] In Charleston, West Virginia, where the penetration rate is at 75 percent, the price of basic cable service shot up overnight by 67 percent in January of 1987. High penetration is likewise unattributable to cable operators' superior

service since recent surveys have shown that cable subscribers generally do not give their cable operators high marks in customer relations.[11] Again, using Charleston as an example, despite an overnight 67 percent increase in price, the local operator has not made any new capital expenditures, nor implemented any improvements to customer service, nor offered any new programming to its cable subscribers. This pattern has been repeated again and again in many West Virginia communities where the penetration rate is in excess of 65 percent. Thus, it is clear, once having disproved the hypothesis of better service and lower rates, that cable penetration is at least a reliable warning of off-the-air broadcasting reception problems. Certainly cable penetration is no less speculative a measure than is the Grade B contour.

The Commission, however, proposes an unduly high threshold level of penetration in order to trigger the shift of responsibility for obtaining field strength measurements to the cable operator. The average nationwide penetration level, after all, is only 50 percent. This statistic suggests that in a typical television market, served by both cable and other reliable off-the-air signal sources, one out of every two consumers will choose the cable product. However, it does not follow that as the off-the-air signals become less and less reliable, depending on the community assessed, the cable penetration rises evenly to meet that unreliability Rather, we can assume that if a consumer in a more isolated community is receiving off-the-air signals full of "noise," that consumer is either going to purchase cable or go without television altogether.

The analogy would be to concepts of "market power" in antitrust law, the ultimate point being that each percentage point of increase in a community's cable penetration rate

above the 50 percent national average represents a geometric increase in the affinity of the consumer for the clear reception offered by cable. In other words, the graph comparing signal reception difficulties with cable penetration rates is not likely to be represented by a gentle slope. Instead, West Virginia would argue, after its own informal comparison of the state's penetration statistics to the signal contour and topographical maps of the state, that at a penetration level well below the Commission's suggested level of 80-85 percent the attendant problems with off-the-air signal availability in a community increase dramatically This lower threshold appears, using an informal basis for conclusion, to be in the range of a 65 percent cable penetration rate.

Given the possibility that a more detailed and far-reaching study of the geometric progression, which West Virginia theorizes above, might prove the 80-85 percent figure an arbitrary boundary, and assuming the 80-85 percent figure was chosen by the Commission without reference to its own empirical data, the state requests that the FCC consider adopting the 65 percent limit and the 90 percent presumption or, in the alternative, conduct a study which compares cable penetration rates in individual communities to the difficulties with off-the-air signal reception experienced in those communities before adopting any percentage indicator

B. Cable Subscriber Surveys Should Suffice to Establish Off-The-Air Broadcast Reception Problems.

The Commission proposes several alternative methods for field strength measurements that are less expensive than traditional methods but nevertheless provide adequate information on the field strength coverage of broadcast signals. Further Notice at ¶ 14. Because of the highly

technical issues posed by each of these methods, West Virginia reserves its comment in this area until it has had an opportunity to review the comments of other interested parties on these proposals.[12]

West Virginia, however, urges the Commission to consider one other alternative that would greatly simplify the burden on cities and towns seeking waivers while simultaneously providing the Commission with adequate information as to broadcast signal availability. Cities and towns should be permitted to justify waiver requests with cable subscriber surveys, conducted in their communities, which would present the opportunity to discover whether significant numbers of cable subscribers face broadcast reception problems. Such surveys would, of course, have to follow sound statistical sample principles, but assuming such principles are applied there is no good reason why such cable subscriber surveys could not serve to justify waiver requests. In the past, individual television markets have been proven especially amenable to this type of specific survey. In fact, this amenability is borne out by the Commission's own use of the cable penetration rate, a figure often arrived at through the analysis of specific cable viewing data requested by the Arbitron and Neilson corporations on each of their household surveys.

The goal set by Congress in the Cable Act was to assure market growth in the cable industry while maintaining consumer sovereignty over the forces in that market. With this goal in mind, it would be disingenuous for the Commission to continue its requirement that highly technical and expensive studies of field strength measurements be conducted to determine competition levels in each market. This requirement favors the inherent resources of the cable industry and individual cable operators when simpler, less

expensive and equally valid consumer surveys could provide all the information necessary for a proper waiver determination.

CONCLUSION

The Commission should discard its two current measures of signal availability--the Grade B contour and "significantly viewed" standards--because they bear only a remote relationship to the actual availability of broadcast signals in a cable community. In lieu of those two measures, the Commission should promulgate a more legitimate measure of broadcast signal availability--the Grade A contour of the broadcast signal. In addition, the Commission should implement a shift in the burden of obtaining field strength measurements of broadcast signals to the cable operator whenever cable penetration exceeds 65 percent in the cable community. As part of this shifting of the testing burden, the Commission should also permit a presumption of broadcast signal unavailability whenever cable penetration in a given cable service area exceeds 90 percent. Finally, the Commission should reconsider its current procedure for waiver or the signal availability measure of effective competition and consider instead permitting cities and towns to justify their waiver requests with cable subscribers surveys showing

that significant numbers of cable subscribers face broadcast reception problems.

Respectfully submitted,

THE STATE OF WEST VIRGINIA

By Counsel

CHARLES G. BROWN
ATTORNEY GENERAL

MARK D. KINDT
DEPUTY ATTORNEY GENERAL

DANIEL N. HUCK
ASSISTANT ATTORNEY GENERAL
State Capitol, Room 26-E
Charleston, West Virginia 25305

FOOTNOTES

[1] Although the court upheld the Commission's three-signal standard, it was not overly impressed by the empirical evidence supporting that standard and thus instructed the Commission to "carefully monitor the effects of its regulations and make adjustments where circumstances so require." ACLU v. FCC, 823 F.2d at 1565.

[2] West Virginia notes with dismay that the Commission does not propose to review its three-signal standard of "effective competition" in light of the empirical evidence that has now become available on the effects of rate deregulation. Since basic cable service rates were deregulated throughout most of the United States on December 29, 1986, the price of basic cable service has increased 10.8 percent on the average, according to a recent study by the National Cable Television Association ("NCTA"). "NCTA Study Finds Cable Bills Rose 6.7 Percent in First Half of 1987," Multichannel News, Nov. 30, 1987, at 3. Despite this significant price increase, the NCTA found that cable subscribership has remained unchanged thus suggesting little, if any cross-elasticity of demand between basic cable service and competitive alternatives. The NCTA survey further showed that the average number of channels included within basic cable service has slightly increased from 27.3 to 28.9 channels. Id. This latter finding, coupled with a recent Neilson survey that showed the nonbroadcast component of basic cable service commanded significant viewing shares in cable households casts substantial doubt on the Commission's hastily formed predictive judgment that three off-the-air broadcast signals provide effective competition for basic cable service. The Commission's failure to begin to re-examine the three-signal standard of "effective competition" in light of this recent empirical evidence is contrary to the court's remand instructions to the Commission to "carefully monitor the effects of its regulations and make

adjustments where circumstances so require " ACLU v. FCC, 823 F.2d at 1565.

[3] West Virginia purposely omits any discussion of the other 50 percent of the households who receive the same signal some unspecified amount less than 90 percent of the time. After all, it is hard enough already to swallow the use of the Grade B contour, which only provides a guarantee of reception 90 percent of the time, as a measure of competition for cable television, which provides a 100 percent guarantee of reception.

[4] This probability is easily derived using elementary probability analysis. According to the definition of the Grade B contour, 50 percent of the television households located near the outer limit of the Grade B contour can receive a reasonably clear picture 90 percent of the time Let "U" represent the event that a particular household located near the outer limit of the Grade B contour of some broadcast signal falls within the group of households situated to receive a reasonably clear picture of the signa 90 percent of the time. By definition, the probability of U, denoted P(U), is .5. Let V represent the event that a randomly selected household located near the outer limits the Grade B contour receives a reasonably clear picture at any given time. If the household falls in the best situat group, the probability, denoted as P(V/U), is 9 because households in that group receive a reasonably clear picture of the signal 90 percent of the time. The probability that V occurs is the sum of P(V/U)P(U).

$$P(V) = P(V/U)P(U)$$
$$= (.9)(.5)$$
$$= .45 \text{ or } 45 \text{ percent}$$

[5] Let U_1, U_2 and U_3 represent the events that a randomly selected household near the outer limits of the Grade B contour falls within the 50 percent of households situated so that they receive a reasonably clear picture 90 percent of the time of the first, second and third signals, respectively. Assuming complete independence of these events (see note 5 supra), this probability, denoted by $P(U_1U_2U_3)$, is computed as follows:

$$P(U_1U_2U_3) = P(U_1)P(U_2)P(U_3) = (.5)(.5)(.5) = .125$$

Our assumption that these three events are independent is, no doubt, reasonable since the three signals will operate on different frequencies and thus have different propagation characteristics. They may even originate from broadcast stations that are widely dispersed and whose signals thus do not traverse the same geographic terrain or face the same potential interference.

[6] [Deleted]

[7] In many instances, the cable community is so small relative to the size of the Grade B contour that the entire community will be located near the outer limits of the contour. Indeed, the entire community may also be situated such that all of its television households fall within the 50 percent of households located near the outer limits of the Grade B contour which do not receive a reasonably clear signal 90 percent of the time.

[8] Let U_1, U_2 and U_3 represent the event that a randomly selected household near the outer limits of the Grade A contour falls within the 70 percent of households situated so that they receive a reasonably clear picture 90 percent of the time of the first, second and third signals,

respectively. Assuming complete independence of these events (see note 5 supra), the probability of all three events occurring simultaneously, denoted by $P(U_1U_2U_3)$ is computed as follows

$$P(U_1U_2U_3) = P(U_1)P(U_2)P(U_3) = (.7)(.7)(.7) = .34$$

[9] While much less imperfect than the Grade B contour as a measure of signal availability, the Grade A contour is nevertheless an imperfect measure of signal availability. First, 30 percent of the households located near the outer limit of the Grade A contour will not receive a reasonably clear picture 90 percent of the time. Secondly, the Grade A contour does not take into account geographic terrain that may cause interference of the broadcast signal and prevent its clear reception near the outer limits of the Grade A contour. For these reasons, the Commission must adopt a flexible waiver procedure even if it adopts the Grade A contour as a measure of signal availability

[10] See note 2, supra.

[11] "Cable TV," Consumer Reports (9/87), pp. 552-53.

[12] We note, however, that the third modification proposed by the Commission--reduction in the number of grid locations at which measurements would be made (Further Notice at ¶ 14)--would actually make it more difficult for cities and towns seeking waivers to establish actual unavai.- ability of broadcast signals.

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

STATE OF WEST VIRGINIA ex rel.
CHARLES G. BROWN, Attorney
General,

Plaintiff,

v. Civil Action No. 87-C-65

AMERICAN TELEVISION & COMMUNI-
CATIONS, INCORPORATED, doing
business as Capitol Cablevision,

Defendant.

In Kanawha Circuit Court
Clerk's Office
FEB 19 1987

COMPLAINT

PARTIES

1. Plaintiff State of West Virginia is a sovereign state, in whose name this action is brought by, and upon the relation of, Charles G. Brown in his official capacity as the Attorney General of the State of West Virginia.

2. Relator Charles G. Brown is the duly elected, qualified, and acting Attorney General of the State of West Virginia and is entitled to bring this action in the name of the State by virtue of the provisions of W. Va. Code §§ 46A-7-108, 46A-7-110, and 47-18-8.

3. Defendant American Television & Communications, Incorporated, is a corporation organized under the laws of the State of Delaware, authorized to do business in the

State of West Virginia, and which does business in the State of West Virginia under the name of Capitol Cablevision.

JURISDICTION AND VENUE

4. This complaint is filed and the jurisdiction of this Court invoked by plaintiff pursuant to the provisions of W. Va. Code §§ 46A-7-108, 46A-7-110, and 47-18-8.

5. Venue in this Court is proper pursuant to the provisions of W. Va. Code §§ 46A-7-114 and 47-18-15.

BACKGROUND

6. All the allegations in this complaint concerning the defendant are intended to refer to the defendant's operations conducted under the name Capitol Cablevision, and to activities of the defendant, its subsidiaries, agents, employees, and executives necessary to carry out such operations.

7. The defendant provides services, referred to hereinafter as "cable TV services," consisting of the reception of video signals and the re-transmission of those signals through high-quality, closed-path transmission lines to consumers, termed "subscribers," in return for a monthly service fee.

8. The defendant provides cable TV services to residents of the cities of Dunbar, West Virginia, South Charleston, West Virginia; and Charleston, West Virginia, under franchises granted by the respective municipal governments of those cities.

9. Defendant is the only business entity currently holding a franchise to provide cable TV services in the city of Dunbar, West Virginia.

10. Defendant is the only business entity currently holding a franchise to provide cable TV services in the city of South Charleston, West Virginia.

11. Defendant is the only business entity currently holding a franchise to provide cable TV services in the city of Charleston, West Virginia.

12. Prior to January 26, 1987, and beginning at a time unknown to the plaintiff, the defendant offered three categories or tiers of cable TV service described as follows

a. "Basic service" consisting of the reception and re-transmission of signals primarily from local television stations, broadcasting at very high frequency (VHF) and ultrahigh frequency (UHF) wavelengths, and from some additional, nonlocal stations or networks;

b. "Tier service" consisting of the reception and re-transmission of signals, originating outside the State of West Virginia, from specialized networks or stations which derive a portion of their revenue from commercial advertising and whose signals are broadcast at microwave frequencies through a network of relay stations and communications satellites; and

c. "Premium services" consisting of the reception and re-transmission of signals, originating outside the State of West Virginia, from premium networks, i.e., Home Box Office, Cinemax, and the Disney Channel, which do not carry

commercial advertising and which are broadcast at microwave frequencies through a network of relay stations and communications satellites.

13. The majority of signals or channels included in the Basic service may also be received by consumers with conventional television antennas.

14. Consumers can not receive any of the signals or channels included in the Tier service with conventional television antennas, although some of those signals may be received with parabolic reflector, microwave antennas, commonly known as satellite dish antennas.

15. None of the signals or channels offered by the defendant as Premium services may be received with conventional television antennas; nor can such signals be received for viewing with parabolic reflector, microwave antennas unless the viewer uses special decoding equipment under license from the originators of those signals.

16. Use of unlicensed decoding equipment to view premium, "pay cable" signals is a violation of federal law.

17. Prior to January 26, 1987, subscribers to the Basic service could view all signals provided in that service on a conventional television set.

18. Prior to January 26, 1987, subscribers to the Tier service could only view signals provided in that service with the aid of a cable "converter box."

19. Prior to January 26, 1987, the defendant charged a deposit fee to all subscribers using converter boxes.

20. The defendant currently charges, and has charged throughout the preceding year, a fee of $7.16 per month for subscription to its Basic service and an additional fee of $4.95 for subscription to its Tier service.

21. Prior to January 26, 1987, the defendant provided cable TV services to approximately 30,000 subscribers in its franchise areas, reaching more than seventy-six percent (76%) of the households in the combined areas.

22. Of the defendant's 30,000 subscribers, more than fifty percent (50%), or 15,000 subscribers, chose not to subscribe to the Tier service.

23. On January 26, 1987, the defendant rearranged the assignment of individual signals to various television channels in order to promote and carry out a change in its services, combining the previous Basic service with Tier service to create one category of service termed "Expanded Basic service," eliminating the consumers' option of subscribing to Basic service only.

24. Beginning January 26, 1987, and continuing thereafter, subscribers to the previous Basic service have been unable to receive all of the signals provided in that service on conventional television sets.

25. On various dates, including January 26, 1987, and thereafter, the defendant has advertised, through newspapers of general circulation and through direct mailings to consumers, that the combined service is a "better" version of the previous Basic service and that the fee for the combined service would be $11.95 per month.

26. The defendant has advertised that it will bill subscribers to its previous Basic service at the new, combined rate beginning March 1, 1987.

27. The defendant is taking and has taken steps, such as the distribution of converter boxes and the rearrangement of its signals corresponding to various television channels, to effect the change to the "Expanded Basic service" for all of its subscribers regardless of the subscribers' preferences for the various categories of services.

COUNT I

28. Plaintiff State of West Virginia, by its Attorney General, Charles G. Brown, repeats and re-alleges the facts set forth in paragraphs 1 through 27 above.

29. By its actions, the defendant has unfairly and deceptively consolidated its services to limit and reduce consumer product options and by incorporating its Basic service and Tier service into one combined service, the defendant has unfairly and deceptively forced a substantial number of consumers to purchase a product which they do not wish to buy.

30. By incorporating its Basic and Tier service into one combined service, the defendant has unfairly and deceptively raised the price of its Basic service to approximately 15,000 consumers.

31. The defendant's actions, set forth in paragraphs 6 through 30 above, are unfair and deceptive acts and practices detrimental and injurious to the public interest and in violation of W. Va. Code § 46A-6-104.

COUNT II

32. Plaintiff State of West Virginia, by its Attorney General, Charles G. Brown, repeats and re-alleges the facts set forth in paragraphs 1 through 27 above.

33. On various dates on and about January 26, 1987, the defendant has advertised, published, and distributed, and caused to be advertised, printed, displayed, published, distributed, and broadcast, statements and representations with regard to the sale of cable TV services, stating that its new "Expanded Basic service" will cost "only $11.95" per month, that this is an "adjusted" rate for the Basic service, that the change to "Expanded Basic service" expands viewer choices while maintaining the same cost per channel and that this charge will mean a lower bill for those who had subscribed to both the Basic and Tier services.

34. The statements referred to in paragraph 33 above are misleading and deceptive in that they fail to state that the $11.95 monthly charge represents a price increase for subscribers to the previous Basic service, that the amount of the increase is $4.79, which is 66.7% more per month than the previous rate and that the corresponding decrease for subscribers to the Basic and Tier services is only a nominal sixteen cents ($0.16) per month.

35. The actions of the defendant described in paragraphs 6 through 27 and paragraphs 33 and 34 above are unfair and deceptive acts or practices as defined in subsections (12), (13), and (14) of W. Va. Code § 46A-6-102(f), detrimental and injurious to the public interest and in violation of Code 46A-6-104.

COUNT III

36. Plaintiff State of West Virginia, by its Attorney General, Charles G. Brown, repeats and re-alleges the facts set forth in paragraphs 1 through 27 above.

37. On various dates on and about January 26, 1987, the defendant has advertised, published, and distributed, and caused to be advertised, printed, displayed, published, distributed, and broadcast, statements with regard to the sale of its cable TV services, stating that converter boxes would now be provided to subscribers "free."

38. The statements referred to in paragraph 37 above are false, misleading, and deceptive because they fail to state that subscribers who wish to use a remote control with their television sets must pay four dollars ($4.00) per month for a special converter box and because the defendant has expressed an intention to increase its rates in the future to recoup its costs in providing the thousands of converter boxes necessary to effect the change to the "Expanded Basic service."

39. The actions of the defendant described in paragraphs 6 through 27 and paragraphs 37 and 38, above, are unfair and deceptive acts or practices as defined in subsections (5), (11), (12), (13), and (14) of W. Va. Code § 46A-6-102(f), detrimental and injurious to the public interest and in violation of Code 46A-6-104.

COUNT IV

40. Plaintiff State of West Virginia, by its Attorney General, Charles G. Brown, repeats and re-alleges the facts set forth in paragrapns 1 through 27 above.

41. The defendant is the sole business entity providing video reception services of premium channel signals within the cities of Charleston, South Charleston, and Dunbar, West Virginia.

42. Premium channel signals are encoded, "scrambled," so that they may only be received by consumers who subscribe to defendant's Premium services.

43. Beginning at a date unknown to the plaintiff and continuing to the present, the defendant has provided its Premium services only upon the condition that the consumer also subscribe to the Basic service.

44. By virtue of the defendant's exclusive position in the market for premium channel reception, the defendant has substantial market power to force consumers of the Premium service to subscribe to the Basic service as well.

45. Defendant's Basic service and Premium service are distinct products for which the defendant charges separate fees and for which there are distinct differences in consumer demand.

46. Tying the purchase of Premium services to the purchase of the Basic service distorts competition in the market for reception of local broadcast signals and restrains trade in consumer alternatives to Basic service such as conventional television antennas and related equipment.

47. Tying the purchase of Premium services to the purchase of Basic service adversely affects more than 5,000 consumers and involves more than $100,000.00 per month in subscription fees

48. By conditioning the sale of its Premium services upon the additional purchase of the Basic service, the defendant has created and maintained unlawful "tie-in" contracts in restraint of trade and competition in violation of W. Va. Code § 47-18-3(a).

COUNT V

49. Plaintiff State of West Virginia, by its Attorney General, Charles G. Brown, repeats and re-alleges the facts set forth in paragraphs 1 through 27 above.

50. Prior to January 26, 1987, defendant's Tier service consisted of the following special-programming format, microwave networks: Cable News Network, The Nashville Network, Eastern Sports Network (ESPN), Home Shopping Network, Arts and Entertainment Network, Music Television, Christian Broadcasting Network, and Lifetime Health Network.

51. With the exception of the Cable News Network, which uses an electronically scrambled signal, the signals from the networks included in defendant's Tier service may also be received through the use of satellite dish antennas.

52. Under ordinances of the City of Charleston, the City of South Charleston, and the City of Dunbar, West Virginia, businesses and residents in those communities are severely restricted as to where they may have satellite dish antennas.

53. Signals from special-programming format, microwave networks are products distinct from signals from locally broadcast, conventional television frequency stations providing general programming.

54. Defendant's Tier service consists entirely of the reception and re-transmission of signals from special-programming format, microwave networks.

55. Defendant's Basic service consists primarily of the reception and re-transmission of signals from local, conventional television frequency stations providing general programming.

56. Defendant's Tier service and Basic service are distinct products for which the defendant has charged separate fees and for which there are distinct differences in consumer demand.

57. Beginning at a date unknown to the plaintiff and continuing to the present, the defendant has provided its Tier service only upon the condition that the consumer also subscribe to the Basic service.

58. By virtue of the defendant's position as the sole commercial reception service for special-programming format, microwave network signals the defendant has substantial market power in the cities of Dunbar, South Charleston, and Charleston, West Virginia, to force consumers of the Tier service to subscribe to the Basic service as well.

59. Tying the purchase of Tier service to the purchase of Basic service distorts competition in the market for reception of local broadcast signals and restrains trade in consumer alternatives to Basic service such as conventional television antennas and related equipment.

60. Tying the purchase of satellite Tier service to the purchase of Basic service adversely affects more than 12,000 consumers and involves more than $14,340.00 per month in subscription fees.

61. By conditioning the sale of its Tier service upon the additional purchase of Basic service, the defendant has created and maintained unlawful "tie-in" contracts in restraint of trade and competition in violation of Code 47-18-3(a).

COUNT VI

62. Plaintiff State of West Virginia, by its Attorney General, Charles G. Brown, repeats and re-alleges the facts set forth in paragraphs 1 through 27 above.

63. Plaintiff State of West Virginia, by its Attorney General, Charles G. Brown, repeats and realleges the facts set forth in paragraphs 41 through 47 above.

64. Plaintiff State of West Virginia, by its Attorney General, Charles G. Brown, repeats and realleges the facts set forth in paragraphs 50 through 60 above.

65. By conditioning the sale of its Premium services and the sale of its Tier service upon the additional purchase of the Basic service, the defendant has engaged in unfair methods of competition in the market for the reception of local broadcast television signals in violation of W. Va. Code § 46A-6-104.

COUNT VII

66. Plaintiff State of West Virginia, by its Attorney General, Charles G. Brown, repeats and re-alleges the facts set forth in paragraphs 1 through 27 above.

67. The defendant provides discrete services, referred to herein as cable TV services, as its primary business.

68. The defendant is the only provider of commercial cable TV services in the cities of Charleston, South Charleston, and Dunbar, West Virginia.

69. The defendant has announced that it will raise the price of its Basic service by 66.7% and that, after expenses resulting from a change of services, the defendant expects to maintain a reasonable margin of profit.

70. The defendant has substantial power over the price of its services because consumers do not consider other reception products or services to be acceptable substitutes.

71. The defendant maintains a monopoly over the supply of cable TV services within the cities of Charleston, South Charleston, and Dunbar, West Virginia.

72. The imminent restructuring of prices for defendant's Premium services and the imminent increase in the price of its Basic service constitutes use of a monopoly for the purpose of controlling prices in violation of W. Va. Code § 47-18-4.

PRAYER

WHEREFORE, plaintiff State of West Virginia prays that this Honorable Court will grant the following relief:

1. A preliminary order enjoining the defendant from violating the provisions of W. Va. Code §§ 46A-6-104, 47-18-3(a), and 47-18-4 as described in Counts I through III and Count VI of this complaint, including completing the combination of Basic service and Satellite Tier service into "Expanded Basic service," charging subscribers to the Basic service for the combined service, and all acts, including

advertising, in furtherance thereof during the pendency of this action;

2. Permanent injunctive relief enjoining the defendant from violating the provisions of W. Va. Code §§ 46A-6-104, 47-18-3(a) and 47-18-4 by unlawfully combining its services or conditioning the purchase of one service upon the additional purchase of another service and thereby preventing consumers from making independent purchase choices and forcing consumers to purchase services which they do not desire;

3. Full restitution to each consumer adversely affected by defendant's violations of W. Va. Code § 46A-6-104 described in Counts I-III of this complaint;

4. Appointment of a receiver for the sequestration of liquid assets and to preserve restitution for consumers found to have been damaged by defendant's actions;

5. Civil penalties in the amount of $5,000.00 for each violation of W. Va. Code § 46A-6-104 as set forth in Counts I, II, III, and VI of this complaint;

6. Civil penalties in the amount of $100,000.00 for all violations of W. Va. Code §§ 47-18-3 and 47-18-4 as set forth in Counts IV, V, and VII of this complaint;

7. An award of plaintiff's costs in this action, including, but not limited to, filing fees, witness fees and expenses, and costs related to the production of non-testimonial evidence;

8. An award of reasonable attorney fees and investigative costs for time involved in the investigation and pursuit of this action; and

9. All other orders and judgments the Court shall deem just and proper to effectuate the purposes of the West Virginia Antitrust Act, W. Va. Code § 47-18-1 et seq., the West Virginia Consumer Credit and Protection Act, W. Va. Code § 46A-1-1 et seq., and other general laws of the State of West Virginia.

STATE OF WEST VIRGINIA ex rel.
CHARLES G. BROWN, Attorney General,
Plaintiff,

By Counsel



CHARLES G. BROWN
ATTORNEY GENERAL



MARK KINDT
DEPUTY ATTORNEY GENERAL
State Capitol, Room 26-E
Charleston, West Virginia 25305

Counsel for Plaintiff

STATE OF WEST VIRGINIA,

COUNTY OF KANAWHA, to-wit:

VERIFICATION AFFIDAVIT

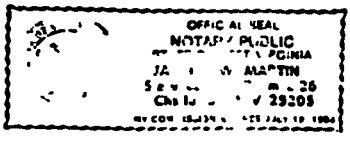
The undersigned, Charles G. Brown, after being duly sworn, deposes and says:

I hereby verify that the allegations set forth in the foregoing complaint are true, except insofar as they are therein stated to be upon information and belief, and insofar as they are stated to be upon information and belief, I believe them to be true.

Charles G. Brown
CHARLES G. BROWN

Taken, subscribed and sworn to before me this 19th day of February, 1987.

My commission expires July 19, 1994.



Janice K. Martin
Notary Public

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

STATE OF WEST VIRGINIA ex rel. CHARLES G. BROWN, Attorney General, Plaintiff,	Civil Action No 2 87-0203
v.	
AMERICAN TELEVISION AND COMMUNICATIONS CORPORATION, doing business as Capitol Cablevision, Defendant.	

MEMORANDUM IN SUPPORT OF MOTION OF AMERICAN TELEVISION AND COMMUNICATIONS CORPORATION TO DISMISS THE COMPLAINT

Defendant American Television and Communications Corporation ("ATC") respectfully submits this memorandum in support of its motion pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure to dismiss the complaint herein.

PRELIMINARY STATEMENT

This action, brought by the State of West Virginia, alleges that ATC's marketing of cable television

programming to consumers violates various provisions of West Virginia's antitrust and consumer protection laws.

ATC seeks the dismissal of the action on the following grounds: (i) five of the seven counts in the complaint (Counts I, IV, V, VI and VII) purport to allege state causes of action that have been expressly pre-empted by federal law; (ii) four of the counts alleging violations of the state antitrust and consumer protection law (Counts IV, V, VI and VII) fail to state claims for relief; and (iii) the counts alleging deceptive practices (Counts I, II and III) are inadequately pleaded under Federal Rule of Civil Procedure 9(b).

ARGUMENT

POINT I

COUNTS I, IV, V, VI AND VII SHOULD BE DISMISSED BECAUSE THE STATE CAUSES OF ACTION ALLEGED HAVE BEEN PRE-EMPTED BY FEDERAL LAW

Under the Supremacy Clause of the United States Constitution, art. VI, cl. 2, the enforcement of a state law is pre-empted by federal law either (i) "when Congress, in enacting a federal statute, has expressed a clear intent to pre-empt state law," Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691, 699 (1984), or (ii) "when the state law 'stands as an obstacle to the accomplishment and

execution of the full purposes and objectives of Congress," Id. at 699 (quoting Hines v. Davidowitz, 312 U.S. 52, 67 (1941)). See New York State Commission on Cable Television v. Federal Communications Commission, 669 F.2d 58, 62 (2d Cir. 1982).

Under either of these principles, five of the seven state claims asserted in this action should be dismissed because they purport to allege state causes of action that have been recently and explicitly pre-empted by federal law: (i) the Cable Communications Policy Act of 1984 (the "Cable Act"), 47 U.S.C. §§521-559 (Supp. 1987), and (ii) the regulations promulgated thereunder by the Federal Communications Commission (the "FCC"), 47 C.F.R. pts. 1, 63, 76, 78 (1986), as amended, 52 Fed. Reg. 37,461 (1987) (to be codified at 47 C.F.R. § 76.5). Under the scheme of federal and state regulation that this statute establishes for the cable television business, West Virginia (and every other state) is pre-empted from applying its antitrust and consumer protection laws in the manner here attempted.

A. State Regulation of Cable Television Pricing and Packaging is Pre-empted by the Cable Act

The Cable Act was enacted to "establish a national policy concerning cable communications," to

"establish guidelines for the exercise of Federal, State, and local authority with respect to the regulation of cable systems," and to "minimize unnecessary regulation that would impose an undue economic burden on cable systems." 47 U.S.C. §521(1),(3),(6).

One of the primary purposes of the Act is the encouragement of the growth of cable systems, and the promotion of the diversity of their offerings, by "significantly deregulat[ing] the provision of cable service." FCC, Implementation of the Provisions of the Cable Communications Policy Act of 1984, 50 Fed. Reg. 18,637, 18,650 n. 69 (1985).

In furtherance of these goals, the Act establishes a strict allocation of regulatory authority among federal, state and local entities. All state and local law inconsistent with the provisions of the Act is expressly pre-empted:

> "any provision of law of any State, political subdivision, or agency thereof, or franchising authority, or any provision of any franchise granted by such authority, which is inconsistent with this Chapter shall be deemed to be preempted and superseded." 47 U.S.C. §556(c).

Under the regulatory scheme that the Act establishes, a broad category of cable systems is now exempted from any state or local regulation of either (i) the rates

charged to cable television customers, or (ii) the manner in which a cable system combines programming for sale to such customers. This is the very kind of conduct to which West Virginia here seeks to apply its laws.

Rate deregulation is governed by Section 623 of the Cable Act. 47 U.S.C. §543. Under the scheme of rate deregulation that the Act establishes, and empowers the FCC to implement through regulations, a cable system is exempted from any rate regulation after December 28, 1986 if it is a cable system found to be subject to "effective competition." 47 U.S.C. §§521 note, 543. As explained in more detail below, the three ATC cable franchises at issue here are subject to "effective competition" within the meaning of the Cable Act, and the FCC regulations promulgated thereunder, and plaintiff has not alleged to the contrary in the complaint.

Pursuant to the scheme of deregulation established by the Cable Act, the regulation of cable rates is permitted for only a limited category of cable systems. See 50 Fed. Reg. 18,654 (1985) ("the majority of cable systems will be exempted from all rate regulation"). It is clear that Congress intended that this deregulation not be frustrated by inconsistent state law. In addition to the Act's general pre-emption of inconsistent state law,

47 U.S.C. §556(c), the section governing rate deregulation expressly provides that a state "may not regulate rates for the provision of cable service except to the extent provided under this section." 47 U.S.C. §543(a).

The rate deregulation effected by the Act was implemented according to a carefully defined timetable. During the first two years following the Act's effective date -- December 29, 1984 -- limited regulation of rates was allowed. 47 U.S.C. §543(c). After this period -- in other words after December 28, 1986 -- rate regulation is allowed only for those cable systems that fall within the regulations issued by the FCC. 47 U.S.C. §543(b).

The Act instructed the FCC to (i) promulgate regulations to "define the circumstances in which a cable system is not subject to effective competition," 47 U.S.C. §543(b)(2)(A), and (ii) "prescribe and make effective regulations which authorize a franchising authority to regulate rates for the provision of basic cable service in circumstances in which a cable system is not subject to effective competition." 47 U.S.C. §543(b)(1). Pursuant to this regulatory framework, a cable system's rates are -- after December 28, 1986 -- exempted from any rate regulation if the system falls within the category, as defined by the FCC, of cable systems subject to "effective

competition." 47 U.S.C. §543. If rate regulation is permissible because the cable system is not subject to "effective competition," it is only the "franchising authority" that is granted the power to conduct such regulation. See 47 U.S.C. §543(a); 47 C.F.R. § 76.33 (1986).* A state, in other words, cannot conduct such regulation if it is not the franchising authority.

The policy of deregulation established by the Cable Act also guarantees cable systems the freedom to rearrange the packaging of their cable programming. The Act defines any of the packages of cable television programming that a cable system offers to its customers -- for example, a package combining both network programming and a premium channel, like HBO -- as a "service tier." 47 U.S.C. §522(14). The Act expressly provides that if a cable system is not subject to rate regulation, it is also not subject to regulation concerning the composition of

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* The provision governing rate deregulation expressly provides that it is only the "franchising authority" which "may regulate the rates for the provision of cable service . . . to the extent provided under this section." 47 U.S.C. §543(a). It also provides that "[a]ny Federal agency or State may not regulate the rates for the provision of cable service except to the extent provided under this section." 47 U.S.C. §543(a). See also 47 U.S.C. §541(c) ("Any cable system shall not be subject to regulation as a common carrier or utility by reason of providing any cable service.").

the service tiers it offers its customers. 47 U.S.C. §545(d). See 50 Fed. Reg. 18,654 (1985) (explaining that "[§545(d)] gives cable operators complete freedom to retier and repackage programming services among the tiers that are exempted from rate regulation").

It is clear that under this careful allocation of regulatory authority established by Congress, the State of West Virginia is pre-empted from regulating either the rates or the program packaging of the three ATC franchises at issue in this lawsuit.

1. The ATC Franchises at Issue Are Exempted From Any Regulation of Rates and Packaging

The FCC has issued regulations that allow cable systems to determine whether they are subject to "effective competition," and thus exempt from any regulation of either the rates charged to customers or the manner in which their products are packaged. 47 C.F.R. §76.33 (1986).

The three ATC cable franchises whose practices are challenged by the complaint in this action qualify, under the FCC's current regulations, as subject to "effective competition." They are accordingly, under the scheme of the Cable Act, exempt from regulation of either (i) the rates charged to their customers or (ii) the manner in

which their programming is packaged for sale. See 50 Fed. Reg. 18,654 ("When the Commission's rules become effective after the two-year transition period, the majority of cable systems will be exempted from all rate regulation. Most cable operators will, therefore, have complete freedom to retier and repackage all of their 'basic' and 'pay' programming services.").*

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* The current FCC regulations provide, in substance, that a cable system is subject to effective competition if three or more broadcast signals, not duplicative of one another, serve the community. 47 C.F.R. §76.33 (1986). This standard is satisfied if three or more signals "place a Grade B contour . . . over any portion of the cable community." Id. The concept of a "Grade B contour" refers to a manner of plotting the predicted strength of a broadcast signal over the geographic area that it serves. See 47 C.F.R. § 73.683(a). Neither the Act, nor the regulations, require a cable system to receive FCC confirmation of its determination that its community is served by a sufficient number of signals. Indeed, the FCC favors a "presumption that competition does in fact exist." 50 Fed. Reg. 18,651. If the franchising authority believes that "such signals are not in fact available within the community," 47 C.F.R. §76.33(a)(2), it "may petition the Commission for relief." 47 C.F.R. §76.33(e).

Under the Grade B contours for West Virginia that are filed with the FCC, the three cable franchises at issue in this lawsuit qualify as subject to "effective competition." See Television Digest's Cable & Station Coverage Atlas, map 103 (1987). None of the franchise authorities have requested the FCC to classify them otherwise.

In American Civil Liberties Union v. Federal Communications Commission, 823 F.2d 1554 (D.C. Cir. 1987), the Court of Appeals for the District of Columbia Circuit found that because of the inherent difficulties of measuring signal availability, it was incumbent upon the FCC to

2. The Cable Act Pre-empts the State of West Virginia from Regulating Cable Rates and Packaging

Even if the three ATC cable franchises at issue in this lawsuit were not subject to "effective competition" as defined by the FCC regulations, and thus were not exempt from some regulation of rates or program packaging, the State of West Virginia would still be pre-empted -- under the careful allocation of regulatory authority created by the Cable Act -- from conducting such regulation itself.

Pursuant to the strict regulatory scheme established by the Cable Act, it is only the "franchising authority" which is granted the authority to regulate the

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craft a standard that would "ensure that a signal is at least theoretically available over the entire cable community or at least some significant portion of the cable community." 823 F.2d at 1572. Accordingly, the Court remanded the issue to the agency for either "a reasoned explanation of its chosen standard or the development of a new standard." Id. at 1573.

Responding to the court's concerns, the FCC, in a notice of proposed rulemaking, has announced that it proposes to amend its current regulations to provide that "a cable system faces effective competition if at least 75 percent of the cable community" is covered by the Grade B contours of three or more broadcast signals. 52 Fed. Reg. 36,802 (1987). If this new standard is adopted to replace the current standard, the three cable franchises at issue in this lawsuit will continue to qualify as subject to "effective competition."

rates and program packaging of a cable franchise. See 47 U.S.C. §§543 and 545.

Plaintiff's complaint does not -- and cannot -- allege that it is the "franchising authority" for any of the three franchises at issue in this lawsuit. See Compl. P8 (alleging that the franchises were "granted by the respective municipal governements" of Dunbar, South Charleston and Charleston). Since it is not the franchising authority, the State of West Virginia is pre-empted by the Cable Act from regulating the rates or program packaging of these franchises.

B. Application of West Virginia's Antitrust and Consumer Protection Laws to ATC's Pricing and Tiering is Pre-empted

Under the regulatory scheme established by Congress in the Cable Act, five of the seven causes of action asserted in the complaint in this action should be dismissed because they are pre-empted by federal law. They represent West Virginia's effort to regulate the rates and program offerings of ATC's three cable franchises in contravention of the Cable Act by applying state law to pricing and packaging conduct that Congress

has declared shall be exempt from state regulation.*

Counts I and VII address the prices which ATC's three cable franchises are charging their customers. Count VII, for example, alleges that "the imminent increase in the price" of one of ATC's cable television products, and the "imminent restructuring of prices" for others, constitutes a violation of the West Virginia antitrust laws. The charge, in short, is that the prices are too high. Plainly, this is an effort to apply state law to regulate cable television pricing -- conduct that the Cable Act, and the FCC's regulations thereunder, have exempted from state regulation.**

Counts I, IV, V and VI address the manner in which ATC's three cable franchises have combined cable television programming into packages -- or service tiers -- for sale to their customers. Count VI, for example, charges that the West Virginia consumer protection law is

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* Two of the seven causes of action -- Counts II and III -- allege violations concerning ATC's advertising of its cable television products and are not pre-empted under the scheme of regulatory authority established by the Cable Act. 47 U.S.C. §558.

** Count I represents a similar effort to regulate cable television pricing by alleging that the manner in which ATC has incorporated its Basic and Tier service into one combined service has "raised the price of its Basic service" in violation of West Virginia's consumer protection laws. Compl. ₱ 30.

violated by ATC's "conditioning the sale of . . . its Tier service upon the additional purchase of the Basic service." As the factual allegations of P23 of the Complaint elaborate, this violation has allegedly been accomplished by "combining the previous Basic service with Tier service to create one category of service termed 'Expanded Basic service.'" Once again, this plainly represents an effort to apply state law to regulate the packaging of cable television products -- conduct that the Cable Act has also exempted from state regulation.*

Pursuant to the well developed principles of pre-emption under the Supremacy Clause, these applications of state law have been pre-empted by federal law.

First, Congress, in enacting the Cable Act, "has expressed a clear intent to pre-empt state law." Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691, 699 (1984).

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* Counts I, IV and V represent a similar effort to regulate the manner in which ATC has combined its television programming into packages. Count I alleges that ATC has violated West Virginia's consumer protection laws by "incorporating its Basic service and Tier service into one combined service." Compl. P29. Count IV alleges that ATC has violated West Virginia's antitrust law by "conditioning the sale of its Premium services upon the additional purchase of the Basic service." Compl. P48. Count V alleges that ATC has violated West Virginia's antitrust laws by "conditioning the sale of its Tier service upon the additional purchase of Basic service." Compl. P61.

The Act unequivocally provides that there shall be no regulation of the pricing and packaging of cable television products provided by cable systems, such as ATC, that are subject to effective competition, and it expressly pre-empts inconsistent state law. See 47 U.S.C. §§543(a), 556(c). It is clear that Congress contemplated that the state laws pre-empted would include not only laws directed to cable television alone, but also laws of general applicability -- like antitrust and consumer protection laws -- that, although valid in many other applications, might be subsequently applied to cable television. Section 632 of the Act, for example, provides that: "Nothing in this subchapter shall be construed to prohibit any State or any franchising authority from enacting or enforcing any consumer protection law, to the extent not inconsistent with this subchapter." 47 U.S.C. §552(c) (emphasis supplied).

The Act also provides that it is only the franchising authority -- which, in this case, is not the State of West Virginia -- that may conduct such regulation even when regulation is permissible. See 47 U.S.C. §§543 and 545.

Second, it is well established that the Supremacy Clause prohibits applications of state law that

would frustrate federal policy. See, e.g., Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691, 699 (1984); New York State Commission on Cable Television v. Federal Communications Commission, 669 F.2d 58, 62 (2d Cir. 1982); Brookhaven Cable TV, Inc. v. Kelly, 573 F.2d 765, 767 (2d Cir. 1978), cert. denied, 441 U.S. 904 (1979). In Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691 (1984), for example, the Supreme Court held that the application to cable television of an Oklahoma statute banning liquor advertising was pre-empted by the clear federal policy "to allow unfettered importation of distant broadcast signals." 467 U.S. at 704. "[T]he full accomplishment of such objectives," the Court reasoned, "would be jeopardized if state and local authorities were now permitted to restrict substantially the ability of cable operators to provide these diverse services to their subscribers." 467 U.S. at 704.

The application of these West Virginia statutes to ATC's cable television business would stand "as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691, 699 (1984) (quoting Hines v. Davidowitz, 312 U.S. 52, 67 (1941)). Plainly, application of West Virginia's antitrust and consumer

protection laws to attempt to control ATC's pricing and packaging policies would have the effect of regulating the very conduct that Congress has specifically deregulated, and thus would nullify the key provisions of the Cable Act. Since Congress has decided that West Virginia can no longer regulate ATC's pricing and packaging directly, West Virginia cannot be allowed to do so indirectly through the application of its antitrust and consumer protection laws.

Accordingly, Counts I and VII should be dismissed because they rely upon state antitrust and consumer protection law to regulate the price of ATC's products and such an application of state law has been pre-empted by the Cable Act. Similarly, Counts I, IV, V and VI should be dismissed because they rely upon state antitrust and consumer protection law to regulate the manner in which ATC has combined cable television programming into packages and such an application of state law has also been pre-empted by the Cable Act.

POINT II

COUNTS IV, V, VI AND VII SHOULD BE DISMISSED BECAUSE THEY FAIL TO STATE CAUSES OF ACTION UNDER THE WEST VIRGINIA ANTITRUST ACT AND CONSUMER PROTECTION ACT

Counts IV, V, VI and VII should be dismissed for the additional reason that they fail to state causes

of action under the governing authorities.

Plaintiff has alleged, in Counts IV, V and VII of the complaint, that ATC has violated the West Virginia Antitrust Act, W.Va. Code §47-18-1 - §47-18-23 (1986), by (i) the manner in which it has packaged its programming for sale to cable television customers, and (ii) the rates which it is charging cable television customers.

These allegations -- although framed as violations of West Virginia antitrust law -- are governed by the well developed principles of federal antitrust law. The West Virginia Antitrust Act expressly provides that it shall be construed "in harmony with ruling judicial interpretations of comparable federal antitrust statutes." W.Va. Code §47-18-16. Under the well established principles of federal antitrust law, the allegations in Counts IV, V and VII should be dismissed because they fail to state a cause of action.

A. ATC's Packaging of its Cable Television Programming is Not An Illegal Tying Arrangement

Plaintiff charges in Counts IV and V that ATC, by requiring customers to subscribe to Basic Service before they can receive Tier service or Premium service, has created an illegal tying arrangement. See Compl.

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PP48, 61. These claims should be dismissed because they fail to state a cause of action under the well established body of law defining the types of tying arrangements that violate the antitrust laws.

The Supreme Court has explained that a tying arrangement may raise concerns about competition because a tying arrangement -- that is, the requirement that a customer who desires to purchase a first product (referred to as the tying product) must also purchase a second product (referred to as the tied product) -- may, in some circumstances, result in a restraint on "competition on the merits in the market for the tied item." Jefferson Parish Hospital District No. 2 v. Hyde, 466 U.S. 2, 12 (1984). Competition is lessened, in other words, because customers are denied an alternative choice and competitors selling the tied product are denied an opportunity for a sale.

Consistent with this rationale, courts have required that an anticompetitive effect in the market for the tied product -- here, the sale of basic cable service -- be demonstrated before a tying arrangement will be found illegal under the antitrust laws. See Northern Pac. Ry. Co. v. United States, 356 U.S. 1, 6 (1958); Crossland v. Canteen Corp., 711 F.2d 714, 722 (5th Cir. 1983); B.C.

Recreational Indus. v. First Nat. Bank, 639 F.2d 828, 832 (1st Cir. 1981).

The courts have recognized that where there are no competitors selling the tied product, an alleged tying arrangement does not violate the antitrust laws because no customers or competitors are injured and no competition is thus restrained. See, e.g., Friedman v. Adams Russell Cable Servs. - New York, Inc., 624 F. Supp. 1195 (S.D.N.Y. 1986); see also Community Builders, Inc. v. City of Phoenix, 652 F.2d 823, 830 (9th Cir. 1981); Coniglio v. Highwood Services, 495 F.2d 1286, 1291-93 (2d Cir.), cert. denied, 419 U.S. 1022 (1974); Driskill v. Dallas Cowboys Football Club, Inc., 498 F.2d 321, 323 (5th Cir. 1974).

In Friedman v. Adams Russell Cable Services - New York, Inc., 624 F.Supp. 1195 (S.D.N.Y. 1986), the court relied upon these principles to dismiss a tying claim identical to that alleged here. In that case the defendant cable television company had the same policy as the one alleged here: it required customers who desired to receive a premium cable service to also subscribe to an additional tier of cable service. 624 F. Supp. at 1196. The plaintiff contended that this policy violated the Sherman Act by creating an illegal tying arrangement. Id. The Court held that the Sherman Act was not violated

because the cable company had a lawful monopoly and thus there was no anticompetitive effect in the sale of the tied product. Id. It explained that because the defendant "enjoys an absolute lawful monopoly in the relevant geographic market for the tied product," there were no competitors providing cable services in that community to be harmed by the arrangement; thus, the Court concluded, "the elements of a cause of action are not made out." Id.

Under these principles, the tying allegations set forth in the complaint in this action cannot, as a matter of law, establish an antitrust violation because there are no competitors in the specific tied product at issue -- basic cable service -- to be injured. The complaint alleges that ATC is the only company offering cable television services in the three communities at issue. Complaint, PP 9, 10, 11. In view of the facts alleged, there are no competitors offering cable service who are harmed by the challenged conduct and no customers who are denied the choice of an alternative cable service.*

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* Plaintiff cannot avoid these well developed principles by suggesting that it is the providers of "conventional television antennas and related equipment" who are harmed. Compl. PP46, 59. A tying violation requires a showing that the challenged practice will "restrain free competition in the market for the tied product." Northern

Since plaintiff cannot state a claim under West Virginia's Antitrust Act, Counts IV and V of the complaint should be dismissed.*

B. ATC's Price Increase is Not Monopolizing Conduct

Plaintiff charges in Count VII that ATC, by raising the prices it charges cable television customers, has violated the antitrust laws by using "a monopoly for the purpose of controlling prices." Complaint P72.

This claim should be dismissed because, under the well recognized principles of antitrust law, plaintiff does not allege -- nor could it allege -- that ATC has engaged in any conduct which could be held to constitute illegal monopolization.

It is well established that the "monopolizing"

Pacific Railway Co. v. United States, 356 U.S. 1, 6 (1958) (emphasis supplied). Conventional television antennas are not the tied product that plaintiff has identified. The tied product at issue here is a tier of cable television service. No consumer, in other words, is alleged to have been required to purchase a particular television antenna as a result of the challenged practice.

* Plaintiff also charges, in Count VI, that the alleged tying arrangement violates the West Virginia Consumer Protection Act. The West Virginia legislature has indicated that this Act is also to be construed in harmony with federal law, see W. Va. Code §46A-6-101(1), and thus Count VI should also be dismissed for the reasons set forth above.

behavior which is proscribed by the antitrust laws is the achieving or maintaining of monopoly power by an "exclusionary practice" -- that is, by conduct that is immoral or predatory or otherwise not "honestly industrial." III P. Areeda & D. Turner, Antitrust Law P 613 (1978). See United States v. Grinnell Corp., 384 U.S. 563, 570-71 (1966); United States v. Griffith, 334 U.S. 100, 106-7 (1948).

Plaintiff has made no allegation that ATC has succeeded as the sole provider of cable services in the communities at issue by illegal conduct. ATC has been granted its position in the provision of cable television in the communities it serves pursuant to franchise agreements whose validity plaintiff does not even question.

Plaintiff has also made no allegation that ATC has maintained its position in these communities by illegal conduct. The kind of pricing policy that has been held to constitute illegal monopolization is only predatory pricing -- that is, price decreases which unfairly destroy or eliminate competitors. See, e.g., William Inglis & Sons Baking Co. v. ITT Continental Baking Co., 668 F.2d 1014, 1035 (9th Cir. 1981), cert. denied, 459 U.S. 825 (1982). The only allegation which plaintiff has made -- that ATC increased its prices -- is not an

allegation of such predatory or exclusionary conduct and will not support a claim that ATC has engaged in illegal monopolization. If plaintiff's theory were accepted, no cable system, or any other firm with a legitimately obtained market position, could ever increase its prices for any reason.

In sum, Count VII should be dismissed because plaintiff has failed to allege any predatory or exclusionary conduct. The federal courts have long recognized that a competitor who has achieved a successful position in the marketplace has not, by virtue of that position alone, illegally monopolized the marketplace. See, e.g., Union Leader Corporation v. Newspapers of New England, Inc., 284 F.2d 582, 584 (1st Cir. 1960), cert. denied, 365 U.S. 833 (1961).

POINT III

PLAINTIFF'S CONSUMER PROTECTION ACT CLAIMS IN COUNTS I, II AND III SHOULD BE DISMISSED AS INADEQUATE UNDER FED. R. CIV. P. 9(b)

Rule 9(b) of the Federal Rules of Civil Procedures requires that "[i]n all averments of fraud . . . the circumstances constituting fraud . . . shall be stated with particularity." The allegations in plaintiff's complaint regarding ATC's purportedly "deceptive" business

and advertising methods -- set forth in Counts I, II and III -- are required to meet the rigors of Rule 9(b). See Hayduk v. Lanna, 775 F.2d 441, 443 (1st Cir. 1985); Felton v. Walston & Co., 508 F.2d 577, 580 (2d Cir. 1974). Plaintiff's allegations must be dismissed because they fail to meet this standard.*

Rule 9(b) mandates that the party pleading fraud must, at the least, "specify the time, place and content of any allegedly false representation." 2A J. Moore, Moore's Federal Practice P9.03, at 9-20 through 9-23 (1987); see also Owen v. Commercial Union Fire Ins. Co., 211 F.2d 488, 489 (4th Cir. 1954); Copiers Typewriters Calculators, Inc. v. Toshiba Corp., 576 F. Supp. 312, 327 (D. Md. 1983); Robinette v. Griffith, 483 F. Supp. 28, 31 (W.D. Va. 1979).

Plaintiff's complaint utterly disregards these obligations. Nowhere in the complaint does plaintiff disclose the time or place at which ATC disseminated its allegedly misleading statements or the complete content of those statements.

ATC has the right to know what, if any, state-

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* Although state law governs the burden of proving fraud at trial, the procedure for pleading fraud in federal courts is governed by Rule 9(b). Hayduk v. Lanna, 775 F.2d 441, 443 (1st Cir. 1985).

ments plaintiff would point to as the basis for its charge of unfair and deceptive practices, and without such information, ATC is unable to respond or prepare effectively should it be required to do so. See Greenwood v. Dittmer, 776 F.2d 785, 789 (8th Cir. 1985) ("One of the primary purposes of [Rule 9(b)] is to facilitate a defendant's ability to respond to and to prepare a defense to a plaintiff's charges."); Ross v. A.H. Robins Co., 607 F.2d 545, 557-58 (2d Cir. 1979) ("A defendant is entitled to a reasonable opportunity to answer the complaint and must be given adequate information to frame a response."), cert. denied, 446 U.S. 946 (1980).

Plaintiff's deficient pleading, for example, causes ATC particular hardship in responding to the allegations of Count III. There plaintiff charges that ATC's statement that it will provide free converter boxes is misleading and deceptive because ATC has "expressed an intention to increase its rates in the future to recoup its costs in providing the thousands of converter boxes necessary to effect the change to the Expanded Basic Service." Compl. P38. Since plaintiff fails to specify just when ATC expressed this intention, ATC is obviously unfairly disadvantaged in answering or defending against the allegation.

Where the pleading requirements of Rule 9(b) are not met, dismissal of the complaint is an appropriate response, and one that should be applied in this case. See, e g , Hayduk v. Lanna, 775 F.2d 441, 445 (1st Cir. 1985); Barry v. St. Paul Fire & Marine Ins. Co., 555 F.2d 3 (1st Cir. 1977), aff'd, 438 U.S. 531 (1978); Robinette v. Griffith, 483 F. Supp. 28, 31 (W.D. Va. 1979).

CONCLUSION

Plaintiff's complaint should be recognized for what it is, a blatant attempt to avoid the clearly expressed will of Congress. For all of the reasons set forth above, the motion by American Television and Communications Corporation to dismiss the complaint should be granted.

Dated: New York, New York
December 18, 1987

Respectfully submitted,

By 

Larry A. Winter
Spilman, Thomas, Battle
& Klostermeyer
P.O. Box 273
Charleston, West Virginia 25321
(304) 344-4081

By _____
Arthur F. Golden
Davis Polk & Wardwell
One Chase Manhattan Plaza
New York, New York 10005
(212) 530-4000

Of Counsel:

Daniel J Danser
American Television and
Communications Corporation
Englewood, Colorado

Attorneys for Defendant
American Television and
Communications Corporation

IN THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF WEST VIRGINIA

At Charleston

STATE OF WEST VIRGINIA
ex rel. CHARLES G. BROWN,
Attorney General,

Plaintiff,

v. CIVIL ACTION NO. 2.87-0203

AMERICAN TELEVISION AND
COMMUNICATIONS CORPORATION,
doing business as Capitol
Cablevision,

Defendant.

PLAINTIFF'S RESPONSE TO DEFENDANT'S
MOTION TO DISMISS

I.

INTRODUCTION

For most of the past year, the State of West Virginia has attempted to convince this Court of the full force and weight of that mandate which requires a federal court to discover its removal jurisdiction solely on the face of a well pleaded complaint or in the plain language of a statutory grant of exclusive jurisdiction to the federal courts over the particular subject matter of the litigation. As

federal courts are courts of limited jurisdiction, these basic but imperative considerations are absolute prerequisites for permitting state claims to enter the federal forum. To date, the defendant has not met its burden of proof on the existence of removal jurisdiction, nor has the Court ruled on the pending petitions for remand argued by the State

Given the continuing delay in the Court's decision on the pending remand petitions, both the State of West Virginia and defendant have sought to postpone the application of a time frame order to this litigation However, despite the best efforts of both parties, the Court has now required, pursuant to that order, that defendant file its motion to dismiss under Rule 12(b) of the Federal Rules of Civil Procedure. The State of West Virginia files its response herein to the defendant's instant motion without conceding the jurisdiction of this Court to preside over the present case or to rule upon the motion to dismiss now pending before it.

The State further objects to the concurrent consideration by this Court of a procedural motion to remand and a substantive motion to dismiss. The former deals with basic preliminary and necessary elements of jurisdiction The latter seeks to plumb the substantive legal merits of the State's case See, Section II, infra In short, the State files this response simply to avoid any appearance of disrespect for the otherwise legitimate power of this Court, and to avoid any prejudice to the State's claims which might result if it chose to remain silent in the face of a pending motion to dismiss

The law and argument presented here will demonstrate to the Court that it is without removal jurisdiction to hear

the pending motion to dismiss. This lack of federal jurisdiction will become obvious as the Court ponders the jurisdictional defects which will result from any failure to remand the case to state court. For good cause shown, the State of West Virginia respectfully requests that the instant case, along with the pending motion to dismiss, be remanded to the only forum where jurisdiction lies, the Circuit Court of Kanawha County, West Virginia.

II.

THE PRACTICE BY THE COURT IN THE PRESENT CASE, OF PROCEEDING TO CONSIDER MOTIONS TO DISMISS WITHOUT FIRST HAVING ESTABLISHED ITS REMOVAL JURISDICTION THROUGH A RULING ON PENDING MOTIONS TO REMAND, IS INCORRECT AND CONSTITUTES VACATABLE ERROR.

The Court's requirement in the present case, that defendant file, and that the State respond to, a motion to dismiss before the most fundamental of all elements of federal jurisdiction has been established, stands in direct contravention of the basic principles of federalism and judicial restraint on which the limited jurisdiction of the federal courts has always rested. See, Marbury v Madison 5 U.S (1 Cranch) 137 (1803). The highest of authorities modern federal civil procedure have long recognized the fundamental error inherent in this specific combination of the removal jurisdiction decision and the decision of whether to dismiss based on the merits.

Professor Moore makes the distinction clear when he states that "remand is appropriate when the federal court lacks subject matter jurisdiction over the proceeding, while dismissal involves an act of power in relation to the proceeding when the federal court has subject matter jurisdiction." 1A Moore's § 0.168 [4. - 1], p. 649 (1987).

Therefore, in "applying §1447(c), a distinction must be made between the federal court's lack of jurisdiction and the plaintiff's failure to allege a claim upon which relief can be granted," and once removal jurisdiction is established, "the federal court with [removal] jurisdiction can order dismissal of the claim " Id., § 0.169[1], p 681 [1] Wright & Miller reinforce this analysis of the distinct dichotomy between the removal and dismissal decisions when they state that "[a] federal court presented with a motion to remand is limited solely to the question of its authority to hear the case pursuant to the removal statute." 14A Wright & Miller, § 3739, p. 580. Therefore, "the court must be certain that federal jurisdiction is proper before entertaining a motion by defendant to dismiss plaintiff's complaint for failure to state a claim upon which relief may be granted." (Emphasis added) Id , § 3739, pp. 572-573 (1985).

Beyond secondary sources, well defined legal authority at the federal appellate level has also long held that visiting the merits of a claim, through a motion to dismiss, prior to determining a pending remand petition, is an incorrect and wasteful procedure At least five federal circuits have faced this issue on review and each time the have vacated a district court's dismissal order whenever it has been muddled together with an otherwise dispositive remand decision. The clearest appellate court case on

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[1] 28 U.S.C. 1447(c) reads as follows

(c) If at any time before final judgment it appears that the case was removed improvidently and without jurisdiction, the district court shall remand the case, and may order the payment of just costs. A certified copy of the order of remand shall be mailed by its clerk to the clerk of the State court. The State court may thereupon proceed with such case.

point, and one which has often been cited by subsequent federal courts faced with the same issue, is In re Bear River Drainage District, 267 F.2d 849 (10th Cir. 1959).

The Bear River case concerned a proceeding instituted by the State Engineer of Utah, in the Utah state courts, to determine the use of all the waters within the Bear River drainage in Utah Id., at 849. The United States was served as a party to the case and it in turn filed for removal to the federal district court. Id. In response, the State Engineer moved to remand the case to state court while the United States filed a motion to dismiss. Id , at 850 The Tenth Circuit, on review, put the matter plainly when it stated, "[w]hile the questions involved in the two motions were necessarily related, the better practice would have been to rule first on the motion to remand and if granted to have sent the motion to dismiss back to the state court." Id., at 851. Of course, in the present case defendant's Rule 12(b) motion is not one challenging jurisdiction, which would otherwise serve to parallel the remand decision as in the Bear River case, but instead seeks to open the merits of the State's claim. Therefore, as precedent for the present case, the Bear River language takes on an even greater imperative.

Opinions in other circuits have indeed put the matter in more jussive terms. In a case which predates Bear River by more than thirty years, the Second Circuit also addressed the problematic practice of a federal court's assertion of jurisdiction to hear motions with substantive effect on the litigation prior to establishing its basic removal jurisdiction. Marchant v Mead-Morrison Mfg. Co., 11 F.2d 368 (2nd Cir. 1926). Marchant involved an appeal by a bankruptcy trustee whose application for appointment of an arbitrator had been dismissed by the federal district court at the same

time that the court had ordered the case remanded to state court. Id., at 368-369. In nullifying the district court's order to dismiss the application, the Second Circuit noted that, "[t]he motion to remand raised a question of jurisdiction, decision was against jurisdiction; therefore proper practice was to send the matter at once, and as it was [prior to consideration of the application], to the place where jurisdiction existed [i.e., the state court]. The second part of the order under review [dismissing the application] was improper." Id., at 369.

The First Circuit has faced the remand/dismissal question in a suit by a divorced husband arising out of a dispute with respect to his obligations under a memorandum of understanding with his former wife. Armstrong v. Armstrong, 508 F.2d 348 (1st Cir. 1974). In its decision, which vacated the district court's order of dismissal and instructed the district court to enter an order remanding the action to state court, the First Circuit held that where the district court, after removal of the case to a federal forum, had determined that the action could not be entertained within the limits of federal jurisdiction, the case should have been remanded to state court rather than dismissed Id., at 351, citing 1A Moore's Federal Practice § 0 169[1].

The Ninth Circuit has recently taken the opportunity to address, at least in passing, the issue of remand-versus-dismissal and found that remand is preferable to the unnecessary complication brought to the task of appellate review and future litigation by a synthesis of the two disparate decisions. Chism v. National Heritage Life Ins. Co., 637 F 2d 1328 (9th Cir. 1981). In Chism, the Ninth Circuit reviewed a district court's grant of dismissal for failure by the plaintiff to answer two sets of interrogatories.

Id., at 1329. Subsequently, the plaintiff filed a motion to remand. Although the circuit court found that the district court's assertion of removal jurisdiction was proper, it took the time to deliver the district court a terse message about jurisdiction and proper procedure in the federal courts "Although appellant presented [a remand motion] to the district court, it was not acted upon there. We granted permission to present the motion here. It would have been well had the district court acted upon the challenge to its jurisdiction before exercising it by dismissal." Id., at 1330, n. 3.

In the most recent court of appeals case on point, the Seventh Circuit reviewed a district court's order of dismissal for lack of subject matter jurisdiction which was considered and granted by the lower court prior to its ruling on a pending remand motion. Allen v. Ferguson, 791 F.2d 611 (7th Cir. 1986) In reversing the lower court's order, the Seventh Circuit pointed out that when faced with both a remand and a dismissal motion, "[F]ederalism concerns tip the scales in favor of initially ruling on the motion to remand. In passing on [the defendant's 12(b)] motion, the district court was required to delve into difficult questions of [state law] It should not have considered these issues when it was presented with a federal question of at least equal, if not less, difficulty relating to [federal subject matter jurisdiction under the removal statute]." Id., at 616.

The most recent update of Bear River by the Tenth Circuit has incorporated a long-standing Supreme Court rationale to reinforce the need for remand prior to dismissal. In City of Waco v. United States Fidelity & Guaranty Co., 293 U.S. 140 (1934), the United States Supreme Court reviewed a case where the district court had granted a motion to

dismiss a party to the action which resulted in a destruction of the diversity basis for federal subject matter jurisdiction. Lacking diversity after the dismissal, the district court then remanded the action to state court. Id. In overturning the Fifth Circuit's decision to uphold the lower court's actions, the Supreme Court was concerned with the confusion produced by a dismissal followed by a remand. This confusion arose from the case law rule which holds that a federal court's order to remand is not appealable, meaning that the cause of action would return to state court with a federal dismissal of some undefined legal force floating on the periphery of the case. Id., at 143.

The Tenth Circuit, in Kromer v. McNabb, 308 F.2d 863 (10th Cir. 1962), characterized the Waco ruling as being concerned with maintaining the original state court case "intact" after removal is complete. Id., at 865. In other words, the decisions in Waco and Kromer show the convolution in the process of federal court adjudication when remand a dismissal are lumped together. These appellate courts were forced to vacate the district courts' orders of dismissal, not on the merits of such orders, but simply in order to maintain the continuity of issues when the cases were remanded to state court for lack of removal jurisdiction Of course, both cases would have remained "intact" if the district courts in each case had addressed the respective remand petitions in an exclusive and timely manner.

Most federal district courts over the past half centu when faced with the same issue, have remanded with no hesitation about whether to reach the dismissal question. In the Matter of the Marriage of Smith, 549 F. Supp. 761 (D.C.W.D. Tex. 1982) ("The proper remedy is not to dismiss, but to remand to state court"); Cannon v. United Insurance

Company of America, 352 F. Supp 1212 (D.S.C 1973) ("Jurisdiction should never be dependent on the speculation of the trial court as to the final outcome. . . The removal statutes were never intended or designed to enlarge Federal jurisdiction"); Oil Well Service Co v. Underwriters at Lloyd's London, 302 F. Supp. 384 (D.C C.D. Cal 1969) ("Upon motion to remand to the State Court, the Federal Court is limited solely to the question of jurisdiction [cites omitted] If Federal jurisdiction is doubtful, the case will be remanded [cites omitted]"); Jacobs v District Director of Internal Revenue, 217 F. Supp 104 (S.D.N.Y. 1963) ("While dismissal of the complaint is the usual procedure where a court lacks jurisdiction over the subject matter, the better course in a removed action is to remand the suit to the state court from which it was removed "), Babb v Paul Revere Life Ins Co , 102 F Supp 247 (W D S C. 1952) ("I may not pass upon the sufficiency of the allegations as upon demurrer or upon motion to dismiss for failure to state a cause of action, since I am limited solely to the question of jurisdiction If it should be held by the state court that the allegations are not sufficient to sustain a charge of joint liability against all three defendants, it would be the prerogative of the state court to dismiss upon demurrer, and not the prerogative of this court."), Arcady Farms Milling Co v Northcutt, 87 F. Supp. 373 (E.D.S C. 1949) ("It is my duty to study the record to be sure that federal jurisdiction exists before determining the motion [to dismiss for failure to state a claim] of these defendants."); Johnson v. Marsh, 49 F. Supp. 137 (D. Neb. 1943) ("This is not the time, nor, unless and until jurisdiction is retained, is this the place for the consideration of infirmities in the pleading of the plaintiffs, or even whether it adequately states a cause of action under the state law, or under the federal rules a claim upon which relief may be granted, against the removing defendant."); Hoge v. Fort Smith Gas Co , 37 F. Supp. 71

(D C.W.D Ark. 1941) ("While it is the duty of the federal court to hear the evidence on the question of fraudulent joinder [for purposes of deciding remand], it is not the duty of the court to go into the merits of the case."), Metcalf v. Bardo Coal Co., 28 F. Supp. 1 (D.C.E.D. Kentucky 1939) ("The merits of plaintiffs' claims in law or in fact are not here open for consideration. The challenged right of removal calls only for a [jurisdictional] appraisal of the case as declared upon the pleadings."); Maruska v. Equitable Life Assurance Society, 21 F. Supp. 841 (D.C.D. Minn. 1938) ("The court cannot, in disposing of a motion to remand, permit itself to be swayed by its opinion as to the real merits of the suit."); Forrest v. Southern Ry. Co., 20 F Supp. 852 (D.C.W.D. S.C. 1937) ("'This court may not pass upon the sufficiency of the allegations as upon demurrer since we are limited solely to the question of jurisdiction If it should be held by the State Court that the allegations are not sufficient to sustain the charge of joint liability, it would be the prerogative of the State Court to dismiss upon demurrer and not the prerogative of this court.'")

Among the more often cited district court opinions on the issue of remand versus dismissal is that in Kerbow v Kerbow, 421 F. Supp. 1253 (D.C N.D. Tex. 1976). The Kerbow case presented the district court with an action by two ex-wives against their ex-husbands and their ex-husbands' mutual corporate employer for recovery of employee benefits reserved for their ex-husbands by the corporate defendant but not shared with the ex-wives as part of their respecti - divorce settlements. Id., at 1255-1257. The cases were originally filed in state court but the corporate defendant petitioned for removal to federal court where the corporate defendant then filed a motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure while the plaintiffs filed their respective motions to remand. Id.

In stating the law regarding the propriety of ruling on the defendant's motion to dismiss prior to ruling on the plaintiff's motion to remand, the Kerbow court incorporated the same language from the Wright & Miller text which the State cited earlier, supra, in the present brief "Once a motion to remand is filed, the federal district court is limited solely to the question of its authority to hear the case pursuant to the removal statute. . . Thus, the court must be certain that federal jurisdiction is proper before entertaining a motion by defendant to dismiss plaintiff's complaint for failure to state a claim upon which relief may be granted." Id., at 1258, citing 14A Wright & Miller § 3739, at pp 757-758, 760, and 760 at n.14.

Yet, despite its recognition of the clear jurisdictional mandate which requires that a motion for remand be ruled on prior to probing the sufficiency of the original complaint, the district court in Kerbow nonetheless refused to remand those claims dealing with ERISA-covered benefits and instead granted the corporate defendant's 12(b)(6) motion as to those claims. Id , at 1260. In explaining this deviation from proper ruling practice, the Kerbow court noted that the corporate defendant had relied for its removal on the civil enforcement of ERISA, 29 U.S.C. 1132(e)(1). Id , at 1259 - "Unfortunately," the Kerbow court states, "29 U S.C. 1132(e)(1) is one of those specific statutory grants of

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[2] 29 U.S.C 1132(e)(1) reads as follows.

(1) Except for actions under subsection (a)(1)(B) of this section, the district courts of the United States shall have exclusive jurisdiction of civil actions under this subchapter brought by the Secretary or by a participant, beneficiary, or fiduciary. State courts of competent jurisdiction and district courts of the United States shall have concurrent jurisdiction of actions under subsection (a)(1)(B) of this section.

jurisdiction where questions of jurisdiction are hopelessly intertwined with questions of standing and failure to state a claim." Id. Relying on the specific statutory grant of subject matter jurisdiction to the federal courts in 29 U.S.C. 1132(e)(1), the Kerbow court was able to assume removal jurisdiction for the further purpose of ruling on the corporate defendant's motion to dismiss. Id., at 1259-1260. However, even despite its dismissal of the ERISA claims, the Kerbow court went out of its way, in the interests of federalism, to order a remand to state court of those remaining state law claims which were unrelated to ERISA and the specific statutory grant of jurisdiction in 29 U.S.C. 1132. Id., at 1260.

If this Court has begun to recognize, in the State's discussion of the Kerbow decision, an argument it has heard before, it is because 29 U.S.C. 1132(e)(1) is the same statutory section which was at issue in the Supreme Court's decision in Franchise Tax Board of the State of California v. Construction Laborers Vacation Trust for Southern California, 463 U.S. 1 (1983), an opinion which the State has already analyzed fully in its earlier brief on the inability of a preemption defense to provide the foundation for federal removal jurisdiction. See, Plaintiff's Response to Defendant's Memorandum in Opposition to Plaintiff's Second Motion for Remand, Sections I and II. In other words, the Kerbow decision, and the State's discussion of it, represent more than just another district court citation in the remand/dismissal litany. The significance of Kerbow to the present case is that the district court there, like the Southern District in the present case, faced both the remand/dismissal issue and the issue of whence the district court derived its removal jurisdiction in an area overshadowed by federal regulation. When presented with both

issues at once, the Kerbow court was careful to not only point out that proper procedure normally required it to consider the plaintiff's remand arguments separately without entertaining the defendant's dismissal analysis, but the court was also careful also to be certain that, in an effort to "scrupulously limit" its removal jurisdiction, the district court could discover its otherwise narrow removal jurisdiction in a specific statutory grant of federal jurisdiction over the particular subject matter of the action Of course, as the State has already pointed out in its earlier briefs, the Southern District has been given no such statutory authority in the Cable Communications Policy Act of 1984. Id.

Thus, Kerbow should provide the cognitive bridge, in the present case, between this Court's remand/dismissal analysis and its decision of whether removal jurisdiction exists at all on the face of the State's complaint. Such a connection should finally serve to point out the procedural confusion and jurisdictional absurdity which can result fro the ministerial application of a time frame order to a case like the present one, which still remains in the jurisdictional limbo created by a pending motion for remand

III.

THE COURT LACKS ANY BASIS FOR EXERCISING ITS REMOVAL JURISDICTION OVER THE PRESENT CASE AND THEREFORE SHOULD REMAND THE ACTION TO STATE COURT WITHOUT RULING ON DEFENDANT'S MOTION TO DISMISS

The State of West Virginia will not expend the limited resources of its taxpaying citizens to once again, and for the third time, detail the full scope of the law and argument which establish that this Court has no jurisdiction to

remove the present case, especially when such jurisdiction appears to be predicated solely on the speculative and spurious federal preemption defense argument previously asserted by the defendant. See, id., and Plaintiff's Memorandum in Support of Plaintiff's Second Motion for Remand. However, in the interest of absolute thoroughness, the State believes a return to a fundamental statutory analysis of federal removal jurisdiction may at last produce a ruling on the pending motion for remand.

Since a preemption defense provides no basis for removal under 28 U.S.C. 1441, this Court must discover some other foundation in that statute for its removal jurisdiction before the Court may proceed to a substantive analysis of the case through consideration of a motion to dismiss. See, Section II, supra; see also, United States Constitution Article III, section 1; Ex parte McCardle, 74 U.S. 506 (1869). Since the right to remove a case from a state to a federal court is purely statutory, that alternative foundation will be found, if at all, in the specific and limited legislative grants of jurisdiction to the federal district courts. Martin v. Hunter's Lessee, 1 Wheat. (14 U.S) 304, 349 (1816).

The first consideration under the removal statute is whether the Southern District has original jurisdiction over the present case, as founded on a claim or right arising under the Constitution, laws or treaties of the United States. 28 U.S.C. 1441(a). Even the most cursory review of the State's complaint in this case will bear out that it consists solely of state law claims which arise under state law and do not arise under, nor implicate the Constitution, laws, or treaties of the United States as an essential element of any of the complaint's causes of action. 28 U.S.C. 1441(a); Phillips Petroleum Co. v. Texaco, Inc., 415

U.S 125 (1974). Again, the State has already fully addressed this question in the briefs previously filed in this case However, since the tests under 28 U.S.C. 1441(a) (removal jurisdiction) and 28 U.S C. 1331 (federal question jurisdiction) are precisely the same, a straightforward legal analogy should serve to lay to rest any notion of this Court's federal question removal jurisdiction by widening the benefit of doubt in favor of the defendant.

To shift this benefit to defendant, one might hypothesize that the State originally filed the present case, with the same claims, in the Southern District. This sufficiency test of the State's complaint, unlike the now defunct derivative jurisdiction rule, strips away the complex case law which surrounds 1441(a), and instead analyzes the pure federal question elements present in the State's claims. This is possible since the rudimentary test of federal jurisdiction, whether under § 1441 or § 1331, is the same--does the face of plaintiff's "well pleaded complaint" identify a federal question.

The "well pleaded complaint" rule emerged to aid in t[illegible] interpretation of the "arising under" limitation in Article III, section 2 of the United States Constitution, and later in 1441(b) as a statutory embodiment of that limit. Osbor[illegible] v. Bank of United States, 9 Wheat. 738, 6 L. Ed. 204 (1824) Phillips Petroleum Co. v. Texaco Inc., 415 U.S. 125, 94 U.S 1002, 39 L. Ed. 2d 209 (1974); Pan American Petroleum Corp v. Superior Court, 366 U.S 656, 81 S. Ct. 1303, 6 L. Ed 2[illegible] 584 (1961). Of course, as a general matter, "[a] suit arises under the law that creates the cause of action." American Well Works Co v. Layne & Bowler Co., 241 U S. 257, 260, 36 S. Ct. 585, 586, 60 L Ed. 987 (1916). However, when state law "creates the cause of action," the well

pleaded complaint rule's face-of-the-complaint test serves as a severe limit on the federal court's jurisdiction Franchise Tax Board of the State of California v Construction Laborers Vacation Trust for Southern California, 463 U S. 1, 10-11, 103 S Ct. 2840, 2846, 77 L. Ed. 2d 420 (1983).

The State of West Virginia's complaint in the present case, which on its face only alleges violations of state antitrust and consumer protection statutes, offers no federal question "hook" on which the Southern District can hang its jurisdiction: Count I of the State's complaint pleads a violation of W. Va. Code 46A-6-104, alleging "unfair and deceptive trade practices" by defendant in its attempts to force consumers to buy a product they did not want; Count II pleads violations of W. Va. Code 46A-6-102(f)(12), (13), and (14), alleging "unfair and deceptive trade practices" by defendant in its use of misleading advertising to encourage consumers to accept a new product; Count III pleads violations of W. Va Code 46A-6-102(f)(5), (11), (12), (13), and (14), alleging "unfair and deceptive trade practices" by defendant when it claimed that certain converter boxes were "free" when in fact defendant intended to recoup the cost of such boxes through hidden pricing; Count IV pleads a violation of W. Va. Code 47-18-3(a), alleging the past and continued tying of defendant's premium and basic programming products Count V of the State's complaint pleads a violation of W. Va. Code 47-18-3(a), alleging the past and continued tying of defendant's tier and basic programming products, Count VI of the State's complaint pleads a violation of W. Va. Code 46A-6-104, alleging "unfair and deceptive trade practices: by defendant in conditioning the sales of various of its programming services on the purchase of other of its

products, and, Count VII pleads a violation of W Va Code 47-18-4, alleging the use by defendant's market power to control the market for its product.

After the microscopic observation given, supra, to the plain language of the State's complaint, the Southern District would be hard pressed to find a federal question which would permit it to assume jurisdiction, even under § 1331 standards None of the violations pleaded by the State even comes close to "arising under" the Constitution, laws or treaties of the United States Moreover, there are no amorphous sections of the complaint, or sections which plead a state common law remedy, either of which might be the subject of speculation as to federal subject matter jurisdiction. Rather, each count of the State's complaint attaches itself firmly to the specific language and citation of West Virginia statute

Just as the Southern District cannot discover its removal jurisdiction from the face of the State's complaint, even when employing a § 1331 analysis, the Court will also find no alternative source of that jurisdiction from the remaining statutory grants in 28 U.S.C. 1441. Defendant has already conceded that 28 U.S.C. 1441(b), the statute allowing removal jurisdiction based on diversity, does not apply to the present case. Memorandum of American Television and Communications in Opposition to the Motion to Remand, at p 2. Nor will the Court be able to base its removal jurisdiction over the present case on a pendent or ancillary jurisdictional analysis under 1441(c) since, as detailed supra, the State's complaint provides no "separate and independent claim or cause of action which would be removable if sued upon alone" (i.e., an "arising under" question) The only other recourse under the removal jurisdiction

statute, section (d) of 1441, is not available to defendant since defendant is not a foreign state Of course, the present case does not involve a federal officer (28 U S.C. 1442), a member of the United States armed forces (28 U.S C 1442(a)), a federal civil rights action (28 U.S.C 1443), or a foreclosure action against the United States (28 U.S.C 1444).

With no adequate explanation based on the language of the removal statute, and with a preemption defense unable to serve as the basis for removal, this Court's apparent exercise of removal jurisdiction over the present case seems clearly in error. This legal conclusion was long ago argued for this Court by the State, and herein the State's analysis has served to further and, hopefully, exhaust all discussion of the subject. However, the continued delay by the Court in addressing the State's ongoing jurisdictional contention has produced, in combination with the filing of a court-required motion to dismiss, more than simple inconvenience, impatience and expense--it now threatens to warp the precise jurisdictional boundaries established for a judicial system based on federalism.

The dictates of stare decisis have produced, supra, a legal critique of the Court's present action in abstaining from issuing a remand ruling until the time for a dismissal decision. However, since such protraction at the remand stage is more the aberration than the rule, a brief equitable account of the dangers, both constitutional and otherwise, inherent in the present hybrid procedure should assist in persuading this Court to rule on the remand issue without concurrently reaching defendant's dismissal motion.

The State of West Virginia believes the central negative ramification implicit in this Court's temporization on the remand ruling will be to send future corporate defendants in the State of West Virginia, who are looking for an opportunity to stall and frustrate state enforcement authorities, a clear, two-part message. The first part of the message states, "whenever faced with antitrust or consumer protection suits under West Virginia law, which suits allege violations in an area regulated to any degree by federal statutes or rules, remove such cases under a claim of a federal preemption defense " The second part of the message sent to defendants reads, "and if you remove, you will have the opportunity to view the State's case during an attendant consideration of the merits of the State's complaint through a 12(b)(6) motion " In short, despite the clear case law denying the use of a preemption defense as a basis for removal and the case law which stands against the joint consideration of remand and dismissal, defendants will come to understand that setting up such a defense, and participating in a conjoint remand/dismissal procedure, can buy them twelve months on the Southern District's docket.

The publication of such messages is not dangerous because of the expense and frustration it places on the State of West Virginia in its attempts to enforce its own sovereign laws. Rather, the danger of a timid approach to the question of remand will be to undermine the basic precepts of the federal system. If the federal courts begin to implicitly expand their constitutionally limited jurisdiction through the creation of remand-related procedural tangles, then the antitrust and consumer protection laws of West Virginia, and every other state, will become watered down versions of the strong enforcement structures dictated by the state legislatures. Such state laws will come to be

dead letters, undercut by stall and obfuscation in the guise of the removal petition. Moreover, the proverbial floodgates protecting federal jurisdiction will be opened wide to every state complaint which theoretically impinges on an area regulated by the federal government.

Proof of removal jurisdiction then, should constitute a threshold through which each complaint must pass before entering within the procedural and substantive boundaries of the federal courts. Congress, in passing 28 U.S.C. 1441, never intended to spawn a separate species of federal case which would carry with it the label of "pending removal." Yet, the Southern District, through its actions in the present case, proposes to create just such a species. In the future, state defendants will come to believe that there is a reservoir set aside in this Court's docket for cases presenting a preemption defense basis for removal, and that those cases will be carried along until they are convenient- complicated by the initiation of substantive proceedings

Whether or not this Court is prepared to disregard a century of United States Supreme Court precedent on the scope of removal jurisdiction, and whether or not this Cour is ready to bypass the district and circuit court precedent which refuse to allow consideration of the dismissal question prior to a remand ruling, this Court must still at least illuminate those alternative statutes or precedents which provide the basis for its federal question jurisdiction before asking the State of West Virginia to consent to a potentially mistaken consideration of defendant's motion to dismiss. After all, the State of West Virginia is not relieved, by the application of a time frame order, from its duty to the people of West Virginia to defend their sovereig- control over the enforcement and interpretation of the

their laws. That defense, in the present case, necessarily takes the form of the State's insistence on the establishment by this Court of its removal jurisdiction prior to its entertaining motions or argument under Rule 12 of the Federal Rules of Civil Procedure Once that jurisdiction has been legitimately established, the people of West Virginia will be adequately assured that their sovereign rights are not being usurped by an improper assumption of federal power. Only at that juncture will the State of West Virginia be at liberty to begin considering the substance of defendant's 12(b)(6) arguments [3]

IV.

CONCLUSION

FOR THE REASONS STATED ABOVE, the State requests that this Court forbear consideration of any motions or arguments for dismissal presently pending before the Court under Rule 12(b) of the Federal Rules of Civil Procedure, and instead that the Court grant the State's pending motion for remand

IN THE ALTERNATIVE, if the State's motion for remand is denied, the State requests that any order incorporating such denial be crafted to meet the requirements of 28 U S.C 1292(b) and that proceedings on the present case in the Southern District, including those related to defendant's pending motion for dismissal under Rule 12(b)(6), be stayed

[3] The State certainly comprehends defendant's 12(b)(6) arguments, and the State feels confident that it can rebut the same. However, the State will not delineate these arguments other than in a forum where subject matter jurisdiction has been definitively established

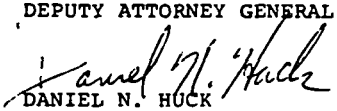
pending appellate review pursuant to a denial order so crafted.

STATE OF WEST VIRGINIA ex rel.
CHARLES G. BROWN, Attorney General,
Plaintiff,

By Counsel



MARK D. KINDT
DEPUTY ATTORNEY GENERAL



DANIEL N. HUCK
ASSISTANT ATTORNEY GENERAL
State Capitol, Room 26-E
Charleston, West Virginia 25305

87-568 O - 88 - 12

CERTIFICATE OF SERVICE

I, Mark D. Kindt, Deputy Attorney General for the State of West Virginia and counsel for plaintiff, do hereby certify that a true copy of the foregoing Plaintiff's Response to Defendant's Motion to Dismiss was served upon Larry Winter, Esquire, counsel for defendant, by hand delivering said copy to him at the offices of Spilman, Thomas, Battle & Klostermeyer, 500 Virginia Street, Charleston, West Virginia, on the 8th day of January, 1988.



Mark D. Kindt



ATTORNEY GENERAL
CHARLIE BROWN

EXHIBIT Q

March 15, 1988
Contact: Marc Dann
304/343-8800

Statement

by

West Virginia Attorney General Charles G Brown

Today, West Virginia Attorney General Charles G. Brown announced he is forming a multistate antitrust task force to investigate anticompetitive practices in the market for satellite delivered programming. General Brown made the announcement in Washington, D. C. where he was attending meetings of the National Association of State Attorney Generals (NAAG) from the Association headquarters

General Brown chairs the NAAG Antitrust Committee where he has been a leader in pursuing vigorous enforcement of antitrust law. The task force assembled by General Brown includes five states: West Virginia, Ohio, Texas, New York and Maryland.

POST OFFICE BOX 888
CHARLESTON, WV 25321

General Brown hosted a workshop meeting in the United States Capitol Monday night, March 14. The meeting was attended by Attorney Generals and staff from several states as well as key Congressional staff involved in upcoming cable television hearings.

"The workshop provided an opportunity for us to discuss whether there is adequate competition among cable, wireless cable, and other retail distributors of satellite-delivered programming," General Brown said.

General Brown commended Senator Howard Metzenbaum (D-OH) for holding antitrust hearings on this subject in Washington, D. C. on March 17, 1988. He also noted the leadership Senator John Kerry (D-MA) has exercised in investigating anticompetitive practices in the industry, such as recent wireline exclusivity proposals by programmers affiliated with big cable interests.

Last year, General Brown brought an antitrust action against a local cable television company operating in the State Capitol of Charleston. In the future, General Brown plans to develop an effective state-level strategy through his multistate task force and work closely with Congress as it addresses problems with the cable television industry.

NATIONAL ASSOCIATION OF ATTORNEY GENERALS ("NAAG")
Wireless Cable "Working Group" of
Antitrust Multistate Task Force

STATE	ATTORNEY GENERAL	STAFF CONTACT
OHIO	Anthony J Celebrezzi Jr.	Greg Young, Esq Assistant Attorney General Antitrust Section State Office Tower 15th Floor 30 E Broad Street Columbus, OH 43215 (614) 466-2677
TEXAS	James Mattox	Alene Evans, Esq Assistant Attorney General Chief of Antitrust Division Supreme Court Building P O Box 12548 Austin, TX 78711 (512) 463-2185
WEST VIRGINIA	Charlie Brown	Daniel Huck, Esq Assistant Attorney General Antitrust Division State Capitol Building Charleston, WV 25305 (304) 348-2021
NEW YORK	Robert Abrams	Lloyd Constantine, Esq. Assistant Attorney General Antitrust Bureau Chief 120 Broadway Suite 2601 New York, NY 10271

MARYLAND	J. Joseph Curran, Jr.	Michael Brockmeyer, Esq. Assistant Attorney General Antitrust Division Chief or Alan M. Barr, Esq Assistant Attorney General Office of the Attorney General The Munsey Building Seven North Calvert Street Baltimore, MD 21202

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LENGTH: 723 words

HEADLINE HBO Withdraws Exclusivity:
NATIONAL ATTORNEYS GEN ANTITRUST COMMITTEE STARTS CABLE PROBE

BODY:
Allegations of anticompetitive practices by cable will be investigated by new working group created by W Va Attorney Gen Charles Brown chmn of Antitrust Committee of National Assn of Attorneys Gen (NAAG) Brown said at news conference at NAAG Washington hq Tues that cable is unregulated monopoly restricting access by would-be competitors to satellite-delivered programming As result of lack of competition, he said, cable has instituted outrageous price increases and retiered its program offerings at will.

Multichannel multipoint distribution service (MMDS) and cable integration issues will be addressed March 17 at hearing before Senate Antitrust Subcommittee 9 30 a m , Rm. 226, Dirksen Bldg Added as witnesses (CD March 11 p8) are NCTA Pres James Mooney, N.Y. Cable Commission Chmn William Finneran, Home Satellite TV Assn spokesman George Kocian List includes 2 representatives of MMDS businesses -- Microband Pres. Mark Foster and Cleveland MMDS system Pres James Theroux Witnesses will be divided into 4 panels

Brown said NAAG Cable Antitrust working group includes attorneys gen from Md N Y Ohio, Tex , W Va Group held work session March 14 with staff representing Antitrust Subcommittee members Chmn Metzenbaum and Glenn (both D-O), and Sens Byrd and Rockefeller (both D-W Va), Kerry and Kennedy (both D-Mass) Hollings (D-S C), Dodd (D-Conn), Pressler (R-S D)

NCTA said that FCC has examined scrambled satellite-delivered program market "extensively" and found it developing competitively Assn also said that Justice Dept has conducted similar inquiry and "thus far appears not to have found reason for concern. We have no reason to believe that any further investigations will turn out differently

Brown said he was concerned particularly that so-called wireless cable or MMDS, is being frozen out of access to programming through cable vertical integration He said working group was formed in part to fill gap left by what he described as lack of action by DoJ in examining vertical integration for antitrust He said his group is collecting data that could lead to (1) Private litigation (2) DoJ or FTC action (3) Congressional review of 1984 Cable Act (4) Legal action brought by state

Factor that Brown repeated as pivotal to his starting probe was series of complaints he received in W Va when prices "practically doubled after cable rate-setting was deregulated in Jan 1987. He said related issue was cable retiering last year He criticized NCTA study of rate increases last year (CD Nov 24 p4) as nothing more than a PR document NCTA said its 1987 national study found cable bill rose 6 7% and basic rate 11% W Va is conducting its own rate survey according to W Va Deputy Attorney Gen -Antitrust Mark Kindt

What Brown hopes to derive from multistate working group is cooperative effort in which states may examine national issues He listed as examples recent cases involving Chrysler's rolling back odometers on cars and Minolta's overcharging for its cameras In both instances, several states pursued legal cases that resulted in benefits to all states, he said Brown has been active in W Va recently won ruling in U S Dist Court case against ATC affiliate challenging whether federal Cable Act preempts state antitrust and consumer protection laws Federal judge remanded case to state courts

Meanwhile HBO announced Tues it was in process of withdrawing its overbuild protection plan "based on lack of signed commitments " Only about 2 dozen small cable operators -- and no big MSOs -- had signed agreements to participate, spokesman said "We don't have anywhere near the commitments we need to make it work he said In order to have exclusive franchise cable rights for HBO or Cinemax, MSOs would have had to pay 2S cents per subscriber in all its systems and agree to do more marketing of services, and they couldn't have deal for exclusivity with Showtime/Movie Channel or American Movie Classics/Bravo

Reasons for lack of MSO participation "were across the board, HBO spokesman said MSO officials had told us they thought plan was too expensive and too restrictive (CD Feb 19 p6) HBO spokesman said company found interest in concept and may introduce another plan in future

EXHIBIT R

CENTRAL TELECOMMUNICATIONS INC., Appellee,

v

TCI CABLEVISION INC., Community Telecommunications, Inc. and Telecommunications, Inc., Appellants

No 85-1805

United States Court of Appeals, Eighth Circuit.

Submitted March 10, 1986

Decided Aug 26, 1986

Rehearing and Rehearing En Banc Denied Oct. 16, 1986

Unsuccessful applicant for city's exclusive cable television franchise brought suit against incumbent franchisee asserting antitrust claims and pendent state law claim for tortious interference with business expectancy The United States District Court for the Western District of Missouri, Scott O Wright, Chief Judge, 610 F.Supp 891, entered judgment on jury verdict for applicant and incumbent appealed. The Court of Appeals, Heaney, Circuit Judge, held that. (1) city could properly offer de facto exclusive franchise in order to create competition for its cable television market, (2) jury instruction describing extent of *Noerr-Pennington* doctrine was proper; (3) finding that incumbent's coercive tactics went beyond mere lobbying was sufficiently supported by evidence, (4) incumbent had monopoly power; (5) applicant made sufficient preparations to enter cable television business to recover antitrust injuries to business, and (6) applicant could recover under Missouri's tortious interference law

Affirmed.

1 Monopolies ⇐12(6)

Even if cable television company had First Amendment right to remain in city's cable television market with or without franchise from city, company was not insulated from antitrust liability to competitor who failed in bid to obtain exclusive franchise, where company did not seek to simply remain in market but rather sought to continue its monopoly U S C A Const Amend 1

2 Monopolies ⇐12(6)

'Natural monopoly characteristics of city cable television market justified city in offering de facto exclusive franchise in order to create competition for cable television market and thus unsuccessful bidder for franchise had protectable interest under federal antitrust law Sherman Anti Trust Act, §§ 1, 2 15 U S C A §§ 1 2

3 Monopolies ⇐12(16 5)

Jury instruction, that *Noerr Pennington* doctrine protects all "genuine lobbying efforts but does not protect threats intimidation, coercion, or other unlawful acts" which were 'not genuine efforts to influence public officials' was proper in action against cable television company seeking to retain its exclusive city franchise

4 Monopolies ⇐28(7 4)

Finding that incumbent holder of cable television holder of cable television franchise had exceeded balance of legitimate lobbying activity in seeking renewal of its franchise, and thus was not protected by *Noerr-Pennington* doctrine, was sufficiently supported by evidence of incumbent's heavy handed and coercive tactics against city officials

5 Federal Civil Procedure ⇐1970

Court's allowance of 90 minutes per side for closing arguments was not abuse of discretion in antitrust action concluded after 31 days of trial

6 Monopolies ⇐12(6)

Incumbent holder of exclusive city cable television franchise possessed monopoly power, despite fact market was regulated, where it had the power to raise price of "premium" channels without approval of city and used its entrenched position and various unethical or illegal practices to exclude competition in bidding for new exclusive contract.

7 Monopolies ⇐28(7 4)

Finding of conspiracy between incumbent holder of city's exclusive cable television franchise and city officials, in awarding renewal contract to incumbent was sufficiently supported by evidence that incumbent coerced and pressured city officials into anticompetitive position

8 Monopolies ⇐12(1 6)

Bidder for city's exclusive cable television franchise made sufficient preparations to enter cable television business to recover for injury to "business", under § 4 of Clayton Act, where bidder had secured financing commitments in excess of 2 million dollars, had submitted detailed feasible plans for cable system in city, and had secured vote of city council for operating franchise Clayton Act, § 4, 15 U S C.A § 15

9 Torts ⇐10(3)

Debtor for city's exclusive cable television franchise sufficiently proved it suffered damage to protectable interest, under Missouri's law of tortious interference with business expectancy, where damage award was based on best evidence available and estimate of loss was reasonable

10. Monopolies ⇐28(9)

Award of 10 8 million dollars to precluded bidder for city's exclusive cable television franchise was sufficiently supported by precluded bidder's uncontradicted evidence of fair-market value of franchise

11 Damages ⇐94

Award of $25 million dollars in punitive damages on tortious interference claim of precluded bidder for city's exclusive cable television franchise was sufficiently supported by substantial evidence of incumbent cable company's intentional tortious conduct in preventing award of franchise to bidder

Stuart W Gold New York City for appellants

R Lawrence Ward, Kansas City, Mo , for appellee

Before HEANEY and FAGG, Circuit Judges, and WOODS,* District Judge

HEANEY, Circuit Judge

This antitrust-monopolization case arises out of competition between TCI, Cablevision, Inc (and two related corporations, collectively TCI) and Central Telecommunications, Inc (Central), for a defacto [1] exclusive cable television franchise in Jefferson City, Missouri (the City)

I FACTS

TCI managed the City's cable television system for the Athena Cablevision Corporation from 1973 to 1978 In 1978, it acquired the assets of Athena in the City and was then awarded a three-year exclusive cable television franchise Three months before TCI's franchise was scheduled to expire, the City initiated a "Request for Proposals" (RFP), or bidding process, to solicit bids to determine the recipient of the next franchise

Two companies—Central and Teltran—submitted bids for the franchise [2] TCI refused to participate, arguing that it had a first amendment right to continue to provide cable television services in the City, and that the City thus had no right to award an exclusive franchise to another company The City contended that its cable television market was a "natural monopoly" and that it could not create competition for its cable TV market without offering an exclusive franchise

TCI then began a campaign, accompanied by numerous unethical and illegal acts, to

* The Honorable HENRY WOODS, United States District Judge for the Eastern District of Arkansas, sitting by designation.

1 Although the franchises at issue in this case were nominally termed "nonexclusive," they were in practical operation, exclusive. Accordingly we generally term the de facto exclusive franchises simply "exclusive"

2. TCI ultimately also submitted an application, but the City determined that the application could not be considered because it failed to comply with the RFP

coerce the City to grant it the exclusive franchise Nonetheless, after a preliminary vote in January of 1982 in favor of Central, the City Council voted in April, 1982, to grant the exclusive franchise to Central Central was obligated under this franchise to provide substantially expanded services to subscribers at a cost less than they had been paying The mayor immediately vetoed this ordinance and the City Council was unable to override it. An ordinance was promptly submitted which proposed renewal of TCI's franchise The Council deadlocked at a five-to-five vote and the mayor then cast the tie-breaking vote in favor of TCI The TCI proposal provided fewer viewing channels and inferior picture quality at a higher monthly rate than did the Central proposal

Central then brought this action against TCI, alleging that TCI had unlawfully interfered with the RFP process to deny Central the franchise and to retain an exclusive franchise for itself After thirty-one days of trial, the court granted Central's motion for a directed verdict on TCI's counterclaims, and submitted the case to the jury on three theories 1) that TCI had unlawfully conspired with the mayor and other City officials to retain its exclusive franchise in violation of Section One of the Sherman Antitrust Act, 2) that TCI had undertaken illegal anti-competitive actions to retain its monopoly of the Jefferson City cable TV market in violation of Section Two of the Sherman Antitrust Act, and 3) that TCI had tortiously interfered with Central's business expectancy in violation of the laws of the State of Missouri The jury ruled in favor of Central on all three claims and awarded $10,800,000 in actual damages on its antitrust and state law claims and $25,000,000 in punitive damages on the state law claim The court trebled the $10,800,000 award, and entered judgment for $32,400,000 on the antitrust claims and, in the alternative, $35,800,000 on the state law claim TCI appeals, raising seven issues, each of which we deal with in turn

II DISCUSSION

A First Amendment Challenge to Exclusive Franchising Scheme

[1] TCI's first contention is that it has a first amendment right to remain in the City's cable television market with or with out a franchise from the City, and that, therefore, Central could not have been damaged when it lost the exclusive fran chise We reject this argument. Before reaching the merits of this argument, we note that there is a significant factual problem with it. The district court found

> Defendants enjoyed every opportunity to produce evidence and make arguments to persuade the jury that they were at all times in favor of head to-head competition in the market place * * * [However] the jury [was not] swayed by any of these arguments [and] factual find ings implicit in [its] verdict confirm that TCI's endorsement of head-to-head com petition lacked sincerity * * * There was substantial evidence that defendants were engaged in a calculated scheme to prevent plaintiff from entering the Jefferson City market and to maintain a *de facto* exclusive franchise for themselves * * * The jury's conclusion that defendants * * * were responsible for plaintiff's exclusion from the Jefferson City market * * * completely undermines any attempt to pass the blame on to the city by way of an amorphous "First Amend ment defense"

Central Telecommunications, Inc. v TCI Cablevision, Inc., 610 F Supp 891, 903 (W D Mo 1985)

Because we find substantial evidence in the over 7,000–page record in support of this conclusion by trial judge and jury, we think that TCI's first amendment defense fails on its facts because it did not seek to simply remain in the market but to continue its monopoly [3]

3. Under the Supreme Court s decision in *Associated Press v United States*, 326 U.S 1, 19–20 65 S.Ct. 1416, 1424, 89 L.Ed. 2013 (1945), a member of the communications industry who conspires or engages in predatory conduct for the

Assuming arguendo that TCI was willing to compete head-to-head with any competitor, we find TCI's first amendment defense to be without legal merit. The district court held

> [T]he grant of a single cable franchise is permissible only if the physical and economic conditions of the relevant market give rise to a "natural monopoly" situation. The theory is that, where physical and economic factors render a market incapable of accommodating more than one cable television system, the local governing body is in the best position to determine which proposed system offers the best service to the public for the lowest cost. Since only one competitor can survive in the market, it makes sense to allow the local government to choose the best[4] applicant.

Central Telecommunications, 610 F.Supp. at 899–900 (footnotes omitted), *citing Tele-Communications of Key West, Inc. v. United States*, 757 F.2d 1330, 1338 (D.C. Cir. 1985), *Omega Satellite Products Co. v. City of Indianapolis*, 694 F.2d 119, 127 (7th Cir. 1982), and *Community Communications, Inc. v. City of Boulder*, 660 F.2d 1370, 1378–80 (10th Cir. 1981), *cert. dismissed*, 456 U.S. 1001, 102 S.Ct. 2287, 73 L.Ed.2d 1296 (1982).

The Supreme Court has not directly addressed this issue. In *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 94 S.Ct. 2831, 41 L.Ed.2d 730 (1974), it rejected an argument that the natural monopoly characteristics of the newspaper market gave rise to a duty to provide public access to the press. However, it has approved "far more intrusive regulation of broadcasters than of other media [such as newspapers] * * * because of the inescapable physical limitations on the number of voices that can simultaneously be carried over the electromagnetic spectrum." *Quincy Cable T.V., Inc. v. F.C.C.*, 768 F.2d 1434, 1448 (D.C.Cir. 1985), *citing, e.g., FCC v. League of Women Voters of California*, 468 U.S. 364, 104 S.Ct. 3106, 82 L.Ed.2d 278 (1984). Thus, the question is whether cable television should be analyzed under the standards applicable to newspapers or those applicable to broadcasters.

TCI contends that cable television is entitled to "coextensive protection" with the press media. In its recent decision in *Los Angeles v. Preferred Communications, Inc.*, — U.S. —, 106 S.Ct. 2034, 90 L.Ed.2d 480 (1986), the Court suggested that the cable medium may be distinguishable from the newspaper medium and that more government regulation of the cable medium may be permissible because cable requires use of public ways and installation of cable systems may disrupt public order. There, a cable television company sued the City of Los Angeles and its cable franchising department, alleging that the City violated its first amendment rights by refusing to grant it a cable television franchise or to allow it access to cable facilities on the ground that it had failed to participate in an auction for a de facto exclusive franchise in the area. The district court dismissed the complaint for failure to state a claim. The United States Court of Appeals for the Ninth Circuit then reversed and remanded for further findings on whether the City's exclusive franchising scheme violated the first amendment where there was economic and physical capacity for more than one franchise. It stressed that the City's only defense was that allowing more than one cable operator would overly burden and disrupt public property and order. The Supreme Court affirmed, "on a narrower ground than the one taken by [the Ninth Circuit]," 106 S.Ct. at 2036, and refused, without development of a more detailed factual record, to set forth the legal standard for assessing first amendment challenges to cable-franchising schemes. The Court simply held that, given that the Los Angeles cable market was not a natural monopoly and that the only alleged justification for limiting the num-

purpose of eliminating its competitors is fully liable under the antitrust laws.

4. We note that there is no question here of content regulation in determining who would be the "best" applicant.

ber of cable operators in the Los Angeles area entailed the use and disruption of public property and order, a remand was necessary for determination of whether the petitioner's first amendment rights outweighed the disruptions alleged by the city. Justice Blackmun, with whom Justices Marshall and O'Conner joined, concurring, emphasized

> I join the Court's opinion on the understanding that it leaves open the question of the proper standard for judging First Amendment challenges to a municipality's restriction of access to cable facilities. Different communications media are treated differently for First Amendment purposes. Compare, *e.g.*, *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 94 S.Ct. 2831, 41 L.Ed.2d 730 (1974), with *FCC v. League of Women Voters*, 468 U.S. 364, 381, 104 S.Ct. 3106, 3118, 82 L.Ed.2d 278 (1984). In assessing First Amendment claims concerning cable access, the Court must determine whether the characteristics of cable television make it sufficiently analogous to another medium to warrant application of an already existing standard or whether those characteristics require a new analysis. As this case arises out of a motion to dismiss, we lack factual information about the nature of cable television. Recognizing these considerations, *ante*, at 2037, the Court does not attempt to choose or justify any particular standard. It simply concludes that, in challenging Los Angeles' policy of exclusivity in cable franchising, respondent alleges a cognizable First Amendment claim.

106 S.Ct. at 2038–39.

The Tenth and Seventh Circuits have held that, on the facts before them, cable television is more analogous to broadcasting than to newspapers, and that a "natural monopoly" situation may justify an exclusive franchising scheme. In *Community Communications v. City of Boulder*, 660 F.2d 1370 (10th Cir. 1981), Community Communications Corporation (CCC) had been operating an exclusive cable television system in certain neighborhoods of Boulder, Colorado, for many years. After several other companies expressed interest in operating cable TV franchises in other areas of the City, the City imposed a moratorium on CCC's expansion in order to provide other companies the opportunity to make bids to service the remaining parts of Boulder before CCC became so entrenched that new entry would be impracticable. CCC alleged that the moratorium violated the first amendment. The City contended that cable television is a natural monopoly and that if it was unable to grant de facto exclusive franchises for various neighborhoods, CCC would remain the only cable television operation in Boulder and its citizens would be denied access to diversity and state-of-the-art programing. The Court of Appeals reversed the district court's order enjoining the City from enforcing the ordinance, and ordered that all parties be frozen in their current circumstances until trial on the merits. The Court applied a balancing analysis, weighing the first amendment concerns against the asserted justifications for the exclusive franchise scheme and held that "natural monopoly is a constitutionally permissible justification for some degree of regulation of cable operators." 660 F.2d at 1379. The Court emphasized that the extent of regulation permissible is narrowly limited by, among other possible factors,

> differences in (1) the degree of natural monopoly or "scarcity" characterizing the medium, (2) the pace and potential for technological change, or (3) the uses and possible uses of the medium such as two-way cable communications or even interconnection, [which] might make kinds of regulations constitutionally permissible in one medium that would be forbidden in another. But we caution the power to regulate is not one whit broader than the need that evokes it. [Footnote omitted.]

Id.

The next year, the United States Court of Appeals for the Seventh Circuit also found that where a relevant cable television market is a natural monopoly, an

exclusive franchise may be permissible consistent with the first amendment. In *Omega Satellite Products v City of Indianapolis*, 694 F.2d 119 (7th Cir 1982), the City of Indianapolis awarded two de facto exclusive cable television franchises for certain sections of the City. A third cable operator also serviced certain apartment complexes in the City. Because it operated simply by installing satellite dishes at the complexes, and thus did not use any public way, it was not subject to the City's franchising ordinance. This company then sought a franchise so it could interconnect apartment complexes without the need to install new satellite dishes at each complex. After the City failed to act on its application, the company connected two complexes with a cable through a drainage culvert. The City ordered the company to remove the cable and the company refused and sought an injunction, on Sherman Act and First Amendment grounds, forbidding the City from removing the cable or enforcing its franchising scheme. The district court denied the request for an injunction and the Court of Appeals affirmed, holding that on the First Amendment challenge, "If Chapter 8½ is invalid under the First Amendment (a question we emphatically do not decide) it is so because it lacks adequate standards and procedures, not because a city may not limit the entry of cable television companies." *Id.* at 129. It distinguished cable television from newspapers on the ground cable requires use of public ways and because television enjoys "universal access to the home * * * and [there is] a resulting felt need to protect children." *Id.* at 127–28. Accordingly, it stated that although natural monopoly is not a justification for exclusive franchising for newspapers, "The apparent natural monopoly characteristics of cable television provide * * * an argument for regulation of entry." *Id.* at 127–28. *See also Tele-Communications of Key West v United States*, 757 F.2d 1330 (D.C. Cir. 1985) (Holding that if cable company could show that there were no practical reasons why two cable operators could not serve Air Force base, Air Force's exclusive franchising scheme would violate the first amendment.) *But cf. Preferred Communications v City of Los Angeles*, 754 F.2d 1396, 1404–05 (9th Cir. 1985), *aff'd and remanded on other grounds*, — U.S. —, 106 S.Ct. 2034, 90 L.Ed.2d 480 (1986) (Although the Court did not reach the argument that natural monopoly justifies government regulation of cable television because it assumed that competition for cable services is economically feasible in the Los Angeles area, it implied that "natural monopoly" is not a justification for exclusive franchising.)

We recognize that there are profound first amendment implications inherent in the regulation of cable operators. Changes in technology such as were presented in the *Omega* case may require a different approach to exclusive franchising schemes. We are also aware of the difficulties inherent in the regulation of cable television programming. *See, e.g., Quincy Cable TV, Inc. v FCC*, 768 F.2d 1434 (invalidating *FCC*'s "must carry" cable television regulations on first amendment grounds). *Cf. FCC v Midwest Video Corp.*, 440 U.S. 689, 99 S.Ct. 1435, 59 L.Ed.2d 691 (1979) (invalidating as beyond F.C.C.'s jurisdiction rules requiring cable operators to make channels available for local access). Thus, we make clear, as did the Supreme Court in *Preferred Communications*, that we are unwilling to decide any question which is not squarely before us and on which there has not been a full development of the record. We are not faced here with a challenge to the details of Jefferson City's franchise regulations,[5] and we, of course,

5. Inherent in the City's authority to choose the "best" cable operator for the City is the issue of how the City may reach this conclusion. In this connection, we note that the RFP terms are directed toward providing the widest array of programing at the lowest cost and do not seek to prohibit the communication of any message. Thus, the RFP deals primarily with rates, quality and geographic breadth of service and states:

> The City is establishing few requirements as it desires that all applicants have maximum freedom to develop their own innovative proposals. * * * The City is interested in receiving proposals for a system with the capacity

consider the 'natural monopoly' question only in terms of the competing technologies offered by TCI and Central TCI's brief states the First Amendment issue to be "Did plaintiff, which was seeking an exclusive cable television franchise that would deny others equal access to speak through the cable medium, have a protectable interest under federal antitrust or state tort law when it was not awarded the exclusive franchise?"

[2] We hold that Central did have a protectable interest because it proved, to the satisfaction of the jury and the trial judge, that the "natural monopoly" characteristics of the Jefferson City cable market justified the City in offering a de facto exclusive franchise in order to create competition for its cable television market. There is substantial support in the record for these factual findings [6] TCI gained its monopoly through an earlier grant of a de facto exclusive franchise Unless the City opened up competition *for* the market, TCI would have remained entrenched in its monopoly position. TCI refused to provide other than an outmoded limited channel system whereas Central proposed a state-of-the-art system with far more channels at a lower cost, and, accordingly, more variety of programming for the public. It is difficult for us to see how, on this record, TCI's position enhances First Amendment values It is true that TCI has a First Amendment interest in remaining as a cable television "speaker," but Central has a similar interest. Because the evidence shows that given the technology offered by the competing companies, there was economic capacity for only one speaker, it seems clear that Central's proposal went further in advancing the First Amendment interests of the viewing public in the greatest variety of programming obtainable

In sum, we reject TCI's First Amendment challenge for two reasons First, the evidence reveals that TCI was not sincere in advocating competition in the market but simply sought to retain a monopoly originally gained through the grant of a de facto exclusive franchise Second, the evidence reveals that the City's cable television market is currently a natural monopoly which, under present technology, offers room for only one operator at a time Thus, we hold that the City could properly offer a de facto exclusive franchise in order to create competition for its cable television market.

B Noerr-Pennington Defense

TCI contends that all but two of its allegedly anticompetitive actions, the threats of its corporate vice president to the City's consultant and a similar threat to a competitor, are protected activity within the purview of the *Noerr Pennington* doctrine This doctrine, derived from the cases of *Eastern R.R. Presidents Conference v Noerr Motor Freight, Inc.*, 365 U.S. 127, 81 S.Ct. 523, 5 L.Ed.2d 464 (1961), *United Mine Workers of America v Pennington*, 381 U.S. 657, 85 S.Ct. 1585, 14 L.Ed.2d 626 (1965), and *California Motor Transport Co v Trucking Unlimited*, 404 U.S. 508, 92 S.Ct. 609, 30 L.Ed.2d 642 (1972), exempts from antitrust liability [7] activities

of delivering at least 50 channels to subscribers and with * * * technical standards which exceed current FCC requirements. * * * The City is not interested in proposed capacity which will not be used or which will necessitate unreasonably high subscriber rates The City is interested in a flexible system which can best accommodate the present and future needs of institutional users without unduly burdening the average subscriber

6. *See, e.g.*, plaintiff's exhibit (PX) 400 (Touche Ross study), 19 T. 86 (Testimony of John Clair Smith, summarizing Touche Ross study "The basic conclusion is that * * * a direct house-to-house competition between two cable companies would not be financially feasible in Jefferson City that the market would not support sustained house-to-house competition")

7 The district court stated that "[a]lthough the *Noerr Pennington* defense is most often asserted against antitrust claims, it is equally applicable to many types of claims which seek[ ] to assign liability on the basis of the defendant's exercise of its first amendment rights." *Central Telecommunications*, 610 F.Supp. at 896 n. 7 Although the United States Supreme Court has not directly confronted this issue this Court has indicated that it agrees with the principle stated. *See, e.g. In Re IBP Confidential Business Documents Litigation*, 755 F.2d 1300 1312 (8th Cir

which are specifically designed to procure favorable governmental action, even when the underlying motivation and effect of the activities is anti-competitive *See generally* 7 Von Kalinowski, Antitrust Laws and Trade Regulation, § 46 04 (1982)

In early 1980, the City considered holding out its cable franchise to competitive bidding Shortly thereafter, TCI met with the mayor and attempted to persuade him to renew its franchise without a competitive bid process, so as to avoid a "frontal attack" by competitors In December, 1980, the City issued its RFP, inviting any company, including TCI, to bid Thereafter, the City hired Elmer Smalling as a cable television consultant to evaluate the various bids TCI, upon learning that the City had hired Smalling, publicly attacked his qualifications in a defamatory manner

On several occasions, from January of 1981 to the summer of 1981, Paul Alden, TCI's vice president and national director of franchising, telephoned Robert Brooks, chief operating officer of Teltran, a company which submitted a bid for the City's franchise, and threatened him that unless Teltran withdrew from the bidding process, TCI would make trouble for Teltran in Columbia, Missouri, where it operated a cable television franchise Teltran subsequently dropped out of the bidding process on the ground there was a "distasteful environment" in Jefferson City

In February, 1981, Alden and Harold Farrow, TCI's attorney, met with City officials and attempted to pressure them to abandon the RFP process and negotiate exclusively with TCI In March of 1981, Alden called the mayor and threatened to turn the system off unless TCI's franchise was renewed That same month, TCI filed a lawsuit against the City challenging the RFP process During the litigation, TCI served on officials of the bank from which Central sought financing a subpoena seeking a very wide range of potentially confidential records Central alleges that this was designed to destroy its financing

In June of 1981, Alden approached Smalling and expressed TCI's displeasure with Smalling's participation in the RFP process Alden threatened Smalling with statements like "We know where you live, where your office is and who you owe money to We are having your house watched and we are going to use this information to destroy you You made a big mistake messing with T C I We are the largest cable company around[ ] We are going to see that you are ruined professionally" PX 83 Smalling understood these statements to be a threat to the lives of himself and his family At this same time, Warner-Amex (another large cable company) was a client of Smalling's Alden contacted Warner-Amex about Smalling Following the threats, Smalling lost Warner-Amex as a client. Smalling told City Attorneys Christopher Graham and Thomas Utterback about Alden's threats PX 83 On July 6, 1981, Utterback wrote the mayor and suggested that the RFP process be abandoned because some of the parties were interfering with the competitive bid process PX 84 Utterback also expressed these concerns in a memorandum to the City Council in which he described TCI as a "relentless corporate bully" DX 17, T 128

In the fall of 1981, TCI met with Utterback and agreed to negotiate privately for renewal of its franchise, although this secret agreement and the subsequent private negotiations violated the RFP, which specified that all negotiations would be open,[8] as well as Missouri's "sunshine law" Mo Rev.Stat. §§ 610 010–030 After the City Council voted on January 25, 1982, to provisionally grant the franchise to Central, TCI refused to pay and withheld the prior year's franchise fees which were due and owing to the City in an amount exceeding $60,000 It had no basis for this withhold-

1985) We reiterate our agreement with this position—which is not challenged on appeal—at least with respect to the tortious interference claim at issue.

8. The RFP provides that "to insure that all negotiations will be open no applicant shall contact any City Councilman or the Mayor outside the Council Chambers." PX 84A at 20(a)

ing other than an attempt to subvert the RFP process.

Throughout this period, TCI continued to publicly announce that it would cut off service if it was not awarded the franchise, and it announced that it would not sell "one bolt" of its system to whoever received the new franchise and that it would "rather have [its system] rot on the pole" than sell it to a competitor at any cost. Further, TCI's system manager in Jefferson City told elderly residents of a senior citizens' home that TCI would cut off service if denied a franchise, and the residents would be without television for two years pending construction of a new system because the concrete walls of their residence would not allow reception of over-the-air stations.

Additionally, TCI accompanied its franchise battle with misstatements of fact. For example, in one City Council meeting, Alden misrepresented to the council that TCI was the largest distributor of satellite dishes in the county, with an "exclusive" in Missouri, both "facts" he later admitted were untrue. TCI implied that only it could protect the City's cable system from destructive competition from satellite dishes. The district court also stated that an implication of this statement was that TCI would flood the City with satellite dishes unless it received the franchise. 610 F.Supp. at 895.

By April 5, 1982 the City reached an agreement to award the franchise to Central. At that point, the mayor, who had recused himself from the cable television issue for over a year due to an alleged conflict of interest, announced that he was reentering the cable television controversy, and he privately advised council members that he would veto any ordinance awarding a cable television franchise to Central. TCI and certain City officials, including the mayor, then met privately to negotiate a franchise for TCI. As part of the agreement, the mayor agreed to veto any award of a franchise to Central.

On April 20, 1982, the City Council passed the ordinance awarding a franchise to Central. The vote was six in favor and four against. The mayor vetoed the ordinance. The council then deadlocked five-to-five on awarding a franchise to TCI and the mayor cast the deciding vote in favor of that company.[9] The next day, TCI dismissed its lawsuit against the City and paid the withheld franchise fees.

TCI's initial argument is that even though its agent, Alden, may have made coercive threats to Smalling and Teltran, which are not protected under *Noerr-Pennington*, these threats did no harm to Cen-

9 The differences between Central's and TCI's proposals are outlined in PX 285. The Central proposal was superior in numerous respects. A few of the more significant advantages are summarized in the following chart:

COMPARISON OF CENTRAL TELECOMMUNICATIONS, INC. PROPOSAL WITH REQUIREMENTS OF FRANCHISE ORDINANCES NO. 9777 and NO. 9778
[Awarding franchise to TCI]

ITEM	CENTRAL TELECOMMUNICATIONS, INC. PROPOSAL	ORDINANCE No. 9777 & No. 9778
ADDRESSABLE CONVERTERS	Provided to All Subscribers	Provided only to Subscribers Taking Expanded Service
EQUIPMENT FOR INTERACTIVE SERVICES	Head end Equipment Installed	None
SYSTEM DESIGN	Single Residential Cable (42 Channels Downstream Capacity 4 Channels Upstream Capacity)	Present System Expanded From 12 Channels to 21 Channels Downstream Capacity Within 12 months
	Single Institutional Network Cable	No Institutional Cable
	2 Satellite Earth Stations	1 Satellite Earth Station
SERVICES AND PROGRAMMING	Imported TV Stations—13	Imported TV Stations—11
	Pay TV Services—4	Pay TV Services—2'
	FM Radio Service—23 Stations	FM Radio Service—"In Excess of" 15 Stations

tral and thus cannot serve as a basis for imposing liability We disagree The jury was given a proximate cause instruction and informed that it could only base liability on acts which were not genuine efforts to influence City officials Giving Central the benefit of all reasonable inferences to be drawn from the record, the jury may have concluded that TCI's heavy-handed tactics frightened the mayor and some members of the City Council into awarding the franchise to TCI

Additionally, TCI contends that even if Alden's threats harmed Central, the verdict must be set aside because we have no way of knowing whether the jury relied on these threats or on protected conduct in assessing liability against it. We reject this argument for several reasons

First, the parties agreed to submit the case to the jury on a general verdict instruction and form, and there is evidence on the record as a whole to support the verdict. *Ybarra v Burlington Northern, Inc.*, 689 F.2d 147, 150 (8th Cir 1982), *Bio-Rad Laboratories, Inc. v Nicolet Instrument Corp*, 739 F.2d 604, 607 (Fed.Cir 1984), *cert. denied*, 469 U.S 1038, 105 S Ct. 516, 83 L.Ed.2d 405 (1985) ("In the absence of special interrogatories we presume the existence of factual findings and legal conclusions necessary to support the verdict reached by the jury ")

Second, TCI was under no obligation to continue to provide service to the residents of Jefferson City after its franchise expired, and it certainly had the right to inform City officials, its customers and the public at large of its intent not to do so Likewise, TCI was under no obligation, except as required by the franchise agreement, to sell its cable television system to its successor, and it had a clear right to inform City officials, its customers and the public at large that it would not do so *Cf United States v Otter Tail Power Co*, 331 F Supp 54, 61 (D Minn 1971), *aff'd*, 410 U.S 366, 368, 93 S Ct. 1022, 1025, 35 L.Ed 2d 359 (1973), *Aspen Highlands Skiing Corp v Aspen Skiing Co*, 738 F.2d 1509 (10th Cir 1984), *aff'd on other grounds*, 472 U S 585, 105 S Ct. 2847, 86 L Ed 2d 467 (1985), *Hecht v Pro-Football, Inc*, 570 F.2d 982, 992 (D C Cir 1977), *cert. denied*, 436 U.S 956, 98 S Ct. 3069, 57 L.Ed 2d 1121 (1978)

Had TCI made a simple clear request that the jury be so instructed, it would have been error to refuse the request. But it appears from the record as a whole that TCI was not satisfied with this approach It rather wanted and requested a broader instruction that would have immunized other conduct which the jury could well have found unlawful [10] The district court refused to give TCI's overly broad, long and

COMPARISON OF CENTRAL TELECOMMUNICATIONS INC., PROPOSAL

WITH REQUIREMENTS OF FRANCHISE ORDINANCES NO 9777 and NO 9778—Continued

[Awarding franchise to TCI]

ITEM	CENTRAL TELECOMMUNICATIONS, INC. PROPOSAL	ORDINANCE No. 9777 & No. 9778
INITIAL RATES	Basic TV Service:	Basic TV Service:
	Tier I (21 Channels)—$6.00/Month	Tier I (12 Channels) $6.55/Month
	Tier II (38 Channels)—$8.00/Month	Tier II (21 Channels) $8.55/Month
	Pay TV Service:	Pay TV Service:
	Home Box Office $7 95/Month	Home Box Office $9 95/Month
	Showtime $8.45/Month	Showtime $9 95/Month
	Cinemax $9 45/Month	—
	Movie Channel $7 95/Month	—

10. TCI proposed the following *Noerr-Pennington* instructions:

NOERR-PENNINGTON—GENERAL

The Constitution ensures the right of all persons and corporations, whether acting individually or in concert, to petition government for political action, recognizing that persons in the exercise of these constitutional rights naturally will petition government for political action that is favorable to their particular interests and unfavorable to the interests of others. The Supreme Court has declared that this right to petition government for political action is paramount, and that the concerted effort of various

confusing *Noerr Pennington* instructions preferring more concise and understandable instructions and allowing TCI to argue at length before the jury that all of its activities were genuine lobbying efforts protected under *Noerr* and the threat to turn off service was lawful because TCI could not continue to provide service without a franchise. Under these circumstances it is difficult to fault the district court judge for instructing the jury as it did and in permitting TCI to argue that it was simply exercising its first amendment rights when it engaged in the course of conduct that it did.

[3] Third, the trial court's jury instructions adequately informed the jury of the

parties genuinely to influence public officials does not in any way violate the law regardless of intent or purpose. Joint efforts truly intended to influence public officials to take official action do not violate antitrust laws even though the efforts are intended to eliminate competition.

Similarly the Constitution protects a person's right of access to the courts for resolution of disputed issues. The antitrust laws are not violated when a person files a suit even if he hopes and intends that the judge or jury will enter verdicts which will injure his competitors.

In short, activity which is intended to influence or cause official governmental action—whether by an individual such as a mayor by a legislative body such as a City Council, or by judges and juries—does not violate the law regardless of the intentions of the persons engaging in such activity.

NOERR–PENNINGTON—APPLICATION TO THIS CASE

To the extent that you find that defendants engaged in legitimate efforts to influence governmental action or to seek redress for its grievances through the courts, you are directed that you cannot find the defendants liable for any of the claims asserted by plaintiff based upon such activity. For example if you were to find that all of defendants actions about which plaintiff complains fit into this category of legitimate attempts to influence official action or to vindicate rights through the courts, then you could not find defendants liable for any of the offenses charged. That is, if you should conclude from a review of the evidence that defendants did nothing more in this case than take actions for the purpose of persuading the City to award them a cable television franchise on some basis, then you may not find that defendants committed any of the offenses charged, even if you believe that the purpose or necessary effect of such actions was to exclude plaintiff from obtaining a franchise. On the other hand if you were to find that none of defendants actions fit into that category then you would simply assess those actions under the standards we have already discussed and without regard to this instruction. Finally if you find that some of defendants actions were legitimate attempts to influence governmental action but that some were not, then when you decide whether the evidence establishes that defendants committed any of the charged offenses, you must exclude from your consideration those actions which you find did in fact fall into that category for they may not form the basis—in whole or in part—for any liability.

NOERR–PENNINGTON—EXCEPTIONS

However the activity we are discussing must consist of genuine efforts to influence governmental action or to vindicate rights through the courts. Protection does not extend to purported petitioning that is a mere sham to cover what actually is nothing more than an attempt to interfere directly with the business of a competitor. That is protection does not extend to activities that are merely a pretext for inflicting on plaintiff an injury not caused by any government action. Thus, you must consider whether defendants' activities were not really an attempt to influence an official to take official action but instead were an attempt to interfere directly with the business of plaintiff. When deciding this question you must consider the intent of defendants in taking such actions. If you find that their intent was to obtain some governmental action no matter what the action was, then these activities were genuine. The success of defendants efforts is evidence of their genuineness.

In the context of defendants lawsuit against the City about which you have heard some evidence you must decide whether defendants filed the suit with the hope of obtaining a judicial ruling in their favor, or whether the suit was only intended to directly injure plaintiff in some manner. The extent to which a lawsuit involves legitimately disputed issues is circumstantial evidence of the genuineness of the suit. The knowledge that defense of the litigation might impose burdensome costs upon the City would *not* be sufficient to establish that defendants brought the suit in bad faith, in an attempt to injure plaintiff.

Finally the Constitution does not protect attempts to influence governmental action by methods which are illegal in and of themselves, for example by bribery of government officials. Such actions are not legitimate attempts to petition the government.

In sum you must decide whether all or some of defendants activities were legitimate and genuine efforts to obtain a franchise from the City. All such efforts must be excluded from your consideration of this case because they cannot—as a matter of law—form the basis of liability for any of the offenses charged.

Noerr-Pennington doctrine and that it could find that TCI's activities were protected activities within the parameters of this doctrine Instruction Number 15 informed the jury that it could "not consider TCI's 1981 lawsuit against Jefferson City to have been unlawful conduct even if it was designed to eliminate competition" Instruction Number 14 informed the jury

> In deciding whether defendants engaged in any unlawful conduct in this case, you are instructed that you may not consider defendant's legitimate lobbying efforts with the Jefferson City officials The defendants are entitled under the law to use genuine efforts to influence public officials but if in fact defendant's lobbying activities included threats, intimidation, coercion or other unlawful acts, then you may find that such activities were not genuine efforts to influence public officials and you may consider those acts to have been unlawful conduct.

TCI contends that Instruction Number 14 allowed the jury to base its verdict on activities which were lawful under *Noerr-Pennington*. We reject this argument because we find that the instruction's statement that *Noerr-Pennington* protects all "genuine" lobbying efforts but does not protect "threats, intimidation, coercion, or other unlawful acts" which were "not genuine efforts to influence public officials" was proper under the case law, the facts of this case, and in light of the instructions submitted by the parties

In *Noerr*, the Court stated that when a "campaign, ostensibly directed toward influencing governmental action, is a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor • • • the application of the Sherman Act would be justified" *Noerr*, 365 U.S at 144, 81 S Ct. at 533 [11]

In *Pennington*, 381 U S 657, 85 S Ct. 1585, 14 L.Ed 2d 626 however, the Court cautioned

> Joint efforts to influence public officials do not violate the antitrust laws even though intended to eliminate competition Such conduct is not illegal, either standing alone or as part of a broader scheme itself violative of the Sherman Act. The jury should have been so instructed.

Id. at 670, 85 S Ct. at 1593

In *California Motor Transport*, 404 U.S 508, 92 S Ct. 609, 30 L.Ed 2d 642 the Court first applied the so-called "sham exception" to the *Noerr-Pennington* doctrine There, the defendants maintained a trust fund which they used to oppose all license applications by their competitors with or without probable cause and regardless of the merits of the applications The Court affirmed the Ninth Circuit's reversal of a district court order dismissing plaintiffs' antitrust action on *Noerr-Pennington*

11 The *Noerr* Court noted, however that the defendants activities—even though they included misrepresentations and unethical conduct—were not covered by the Sherman Act at least insofar as those activities comprised mere solicitation of governmental action with respect to the passage and enforcement of laws. 365 U.S. at 140–42, 81 S Ct. at 531–32. The unethical conduct referred to involved the defendants' use of the so-called "third-party technique"—a misrepresentation through which the railroad defendants' attempts to gain passage of laws favorable to railroads and unfavorable to the plaintiff trucking companies were made to appear as originating from independent parties. However, even though the use of this third-party technique involved misrepresentation as to the source of the petitioning, the position advanced by the defendants—essentially that trucks were harmful to the state's highways and interfered with motorists rights—was a legitimate one "conducted along lines normally accepted in our political system" *id.* at 145, 81 S.Ct. at 533 even though anti-competitive. The case before us is distinguishable in that the jury could properly have found, based on the facts and the court's instructions, that TCI's activities, more than being simply anti-competitive, were not genuine lobbying activities at all but instead were heavy-handed attempts to directly interfere with the business relationships of a competitor to disturb the political process and to coerce the City into extending TCI's monopoly position, even though Central offered a superior cable system at lower cost. Much of TCI's "lobbying" made no attempt to provide the City with information on which to base a reasonable choice but, instead, sought to subvert the franchising process.

grounds because it found that the defendants activities may not have been genuine efforts to influence the government but instead may have been simply a "combination of entrepreneurs to harass and deter their competitors from having 'free and unlimited access' to the agencies and courts, to defeat that right by massive, concerted, and purposeful activities" 404 U.S at 515, 92 S Ct. at 614

In *Otter Tail Power Co v United States*, 410 U S 366, 93 S Ct. 1022, 35 L.Ed 2d 539 (1973), the Court described *California Motor Transport* holding

> that the principle of *Noerr* may also apply to the use of administrative or judicial processes where the purpose to suppress competition is evidenced by repetitive lawsuits carrying the hallmark of insubstantial claims and thus is within the "mere sham" exception announced in *Noerr*

Id. at 380, 93 S Ct. at 1031

This Court has on numerous occasions explored the meaning of the *Noerr-Pennington* doctrine and its "sham" exception For example, in *Mark Aero, Inc. v Trans World Airlines, Inc.*, 580 F 2d 288, 296-98 (8th Cir 1978), we summarized the facts and holdings in *Noerr, Pennington* and *California Motor Transport* and then examined the meaning of the "sham" exception.

> [T]he essential element of the sham exception, whether employed in an adjudicative or nonadjudicative setting [is] an absence of a genuine effort to influence government but, rather, an intent to injure a competitor directly
>
> • • • •
>
> The fundamental question presented in each case involving the "sham" exception, whether argued in a nonadjudicative or an adjudicative setting, is the question of intent • • • As always in deciding questions of intent the court considers all of the surrounding circumstances and assigns to each circumstance an appropriate weight, dependent upon the function and significance of each Thus in *California Motor* the Court considered the "manner of exercise of the right of association and petition," the defendants' other activities against competitors, and the adamant stand taken in defendants' opposition to other applications, all to ascertain whether there was a true intent to injure competitors directly rather than to influence governmental action. The distillation of all of the applicable factors in each case governs the decision as to true intent whether it is to directly injure competitors rather than to influence governmental action In *California Motor* a consideration of all of the factors lead the Court to conclude that the allegations came within the sham exception in the *Noerr* case, "as adapted to the adjudicatory process" in that the defendants' purpose was to deny a competitor "free and meaningful access to the agencies and courts" [12]

We also quoted with approval from an antitrust commentator that "[c]onstruing the sham exception as enunciated in *Noerr* to include all activity not genuinely designed to influence the government is more consonant with the Court's central ruling" 580 F 2d at 296, *citing D Fischel, Antitrust Liability for Attempts to Influence Government Action. The Basis and Limits of the Noerr-Pennington Doctrine*, 45 U Chi.L.Rev 80, 105 (1977)

In *Westborough Mall v City of Cape Girardeau*, 693 F.2d 733 (8th Cir 1982), *cert. denied*, 461 U.S 945, 103 S Ct. 2122, 77 L.Ed 2d 1303 (1983), we again elaborated on the "sham" exception to the

12. The plaintiff in *Mark Aero* was an air taxi operator who wanted to reopen the Kansas City Municipal Airport for commercial flights. Two of the plaintiff's competitors opposed the reopening by conducting a publicity campaign and by exerting pressure on public officials. No illegal activities were alleged, as in the case before us, although Mark Aero did allege that the defendants "induced others to make false and misleading statements" and used "economic coercion" on City officials. We hold that the defendants activities were protected by *Noerr Pennington* because "none of the defendants alleged wrongful acts constitute more than joint efforts to influence the City officials' decision in the airport controversy" 580 F.2d at 296.

Noerr-Pennington doctrine There we held

> [T]he defendants may not be protected by *Noerr* because their legitimate lobbying efforts may have been accompanied by illegal or fraudulent actions *See Sacramento Coca-Cola Bottling Co v Chauffeurs, Teamsters & Helpers Local 150*, 440 F 2d 1096, 1099 (9th Cir), *cert. denied*, 404 U.S 826, 92 S Ct. 57, 30 L.Ed.2d 54 (1971), *Woods Exploration & Producing Co v Aluminum Co of America*, 438 F 2d 1286, 1296–1298 (5th Cir 1971), *cert. denied*, 404 U.S 1047, 92 S Ct. 701, 30 L.Ed 2d 736 (1972) The *Noerr-Pennington* doctrine was not "intended to protect those who employ illegal means to influence their representatives in government." *Sacramento Coca-Cola Bottling Co v Chauffeurs, Teamsters & Helpers Local 150, supra*, 440 F 2d at 1099 *See generally* 7 Von Kalinowski, Antitrust Laws and Trade Regulation, *supra*, § 46 04[3] at 46–55 In *Gorman Towers, Inc. v Bogoslavsky*, [626 F 2d 607 (8th Cir 1980)] *supra*, we recognized that actions beyond "traditional political activity" may not be protected by the *Noerr* exemption *Id.*, 626 F 2d at 615 Because the plaintiffs have presented facts that support an inference of unlawful conduct—city officials may have been induced by the May-Drury defendants by means other than legitimate lobbying to illegally revert plaintiffs' C–4 zoning—the *Noerr* doctrine may not be relied upon to support the district court's grant of summary judgment. *See Federal Prescription Service, Inc. v Pharmaceutical Ass'n*, 663 F 2d 253, 266 (D C Cir 1981) *cert denied* 455 U S 928 102 S Ct 1293 71 L Ed 2d 472 (1982) [13]

693 F 2d at 746

In the *Sacramento* decision cited in *Westborough Mall*, the United States Court of Appeals for the Ninth Circuit stated

> [I]t does not seem to this Court that the doctrines of *Noerr* and *Pennington* were intended to protect those who employ illegal means to influence their representatives in government. These doctrines were enunciated to see that the antitrust laws did not impede the free flow of communication between the people and the government. But there can be little reason to extend the special immunity of *Noerr* and *Pennington* to a type of "communication" which includes threats and other coercive measures There is no room for such tactics in a democratic system
>
> In the case before us it was alleged that the defendant unions influenced the State Fair officials by means of threats, intimidation and other coercive measures The doctrines of *Noerr* and *Pennington* are not, therefore, applicable

440 F 2d at 1099

See also In Re IBP Confidential Business Documents Litigation, 755 F 2d 1300, 1313 (8th Cir 1985) (*Noerr-Pennington* doctrine cannot be extended to "activities which, although 'ostensibly directed toward governmental action,' are actually nothing more than an attempt to harm another" or to "false communications" or to tortious, violent, defamatory or other illegal acts [citations omitted])

We think that the trial court's jury instruction adequately informed the jury of the *Noerr-Pennington* doctrine and the sham exception [14] The instruction does not

13. TCI alleges that the defendants in *Westborough Mall* attempted to bribe public officials. However, our reading of that case reveals that it did not invoke the sham exception on grounds of bribery but on the ground that the plaintiffs might be able to prove an illegal conspiracy between defendants and the City which included illegal private negotiations such as those at issue in the case before us.

14. TCI also alleges that the trial court's conspiracy instruction "essentially negated" the *Noerr-Pennington* defense. We reject this argument. First of all, TCI did not specifically raise this objection below and thus we could order a new trial on this basis only if the alleged error is "plain error" In any event we find TCI's oblique argument to be completely without merit. We find nothing in the conspiracy instruction which negates the *Noerr Pennington* instruction. The jury was informed that "each * * * instruction is equally binding upon you." Conspiracy Instruction Number 11 read along with Instruc

the problem that the instruction which disapproved in *Pennington* had It not state that legal petitioning activ- can be illegal if accompanied by anti- petitive intent. Instead, it describes essence of the "sham" exception—were ndant's petitioning activities genuine mpts to influence government action, ere they designed to directly interfere the business relationships of a compet-

] Finally, our review of the record als full support for the jury's and trial e's conclusion that TCI overstepped boundaries of *Noerr-Pennington* pro- on Much of TCI's campaign was not ted at informing public officials or the ic of TCI's position Instead, TCI ht to distort the process by refusing to icipate in the RFP process, by threaten- the City's consultant and one of its petitors, by withholding the past due chise fee, by attempting to interfere Central's financing, and by coercing ity into holding private negotiations in tion of the RFP terms and Missouri's hine laws Indeed, TCI's argument ld effectively repeal the sunshine laws administrative laws prohibiting *ex e* contacts TCI's argument that *r-Pennington* allows them to engage excessive and intimidating conduct ed too much for the trial judge and and it proves too much for us [15]

C. State Action Defense

TCI contends that Central could not have a cause of action under the antitrust laws because the City is immune under the state action doctrine Central contends that this argument is without merit because there is no clearly and affirmatively expressed policy of the Missouri legislature directing the City to displace competition, and TCI's agreement with the City is not in furtherance of any such policy Central also argues that, in any event, TCI did not raise its "state action" argument in its answer, motion to dismiss, motion for summary judgment, pretrial filings, or its statement of issues in this Court. It points out that, in fact, TCI took precisely the opposite position below, stating in its j n o v motion that the City's actions were not "state action." Although we doubt that TCI's "state action" argument has merit, we decline to reach it because "defenses not raised or litigated in the trial court cannot be urged for the first time on appeal" *Gardner v Meyers*, 491 F.2d 1184, 1190 (8th Cir 1974)

D. Evidentiary Rulings.

[5] TCI raises numerous objections to the trial court's evidentiary rulings and contends that the trial court gave improper and confusing instructions to the jury Af-

is Number 21 and Number 14 (*Noerr Pen gton*) fully informed the jury that before any itrust liability could be imposed, it had to d that TCI "knowingly entered into a combi ion or conspiracy" and that in determining ility, it could not consider TCI's "legitimate buying efforts."

Central raises several other reasons why I's conduct was not protected under *Noerr nington*. Although some of these arguments y have merit, we need not reach them here. ntral argues that the *Noerr-Pennington* doc- e is inapplicable here because this case in- ves a municipality acting in an essentially nmercial rather than in an executive, legisla- or adjudicatory capacity *See, e.g., Sacra nto*, 440 F.2d at 1099; *Hecht v Pro-Football*, ., 444 F.2d 931, 941–42 (D C.Cir 1971), *cert. ued*, 404 U.S. 1047, 92 S.Ct. 701, 30 L.Ed.2d (1972); *George R. Whitten, Jr v Paddock l Builders, Inc.*, 424 F.2d 25, 33 (1st Cir) *cert. denied*, 400 U.S 850 91 S Ct 54 27 L.Ed.2d 88 (1970) Central also argues that TCI's con duct cannot be described as merely "political" in nature because the ultimate act it sought from the City, the award of a cable television franchise is not protected "state action" because there is no clearly and affirmatively expressed policy in Missouri authorizing cities to displace competition in the cable television industry *See, e.g., Community Communications Co. v City of Boulder*, 455 U.S 40 102 S Ct 835 70 L.Ed.2d 810 (1982) Finally, Central argues that the *Noerr-Pennington* doctrine is inapplicable because the jury found that there was an illegal conspiracy between TCI and certain City offi cials, including Utterback and the mayor *See, e.g., Affiliated Capital Corp. v City of Houston*, 735 F.2d 1555, 1566–67 (5th Cir 1984) *cert. de nied*, — U.S. — 106 S.Ct. 788 88 L.Ed.2d 766 (1986) *Duke & Co. v Foerster*, 521 F.2d 1277 1281–82 (3d Cir 1975)

ter a thorough review of the record the jury instructions as a whole, and the trial court's lengthy explanation of its evidentiary rulings and jury instructions, we find that many of TCI's objections were not properly preserved for appeal and, in any event, that the trial court did not abuse its discretion in its evidentiary rulings, that the jury instructions adequately stated the law, and that the court's allowance of ninety minutes per side for closing arguments was not an abuse of discretion

E. Monopoly Power in a Regulated Market.

[6] TCI contends that, as a matter of law, it could not have possessed monopoly power because Jefferson City regulated price and entry in the cable television business We reject this argument. Monopoly power is the power to control prices or exclude competitors *United States v Grinnell Corp*, 384 U.S 563, 571, 86 S Ct. 1698, 1704, 16 L.Ed 2d 778 (1966) Here, TCI had the power to raise the price of "premium" channels without the approval of the City Most significantly, TCI used its entrenched position and the various unethical or illegal practices outlined in our *Noerr-Pennington* discussion to exclude competition

TCI miscites our decision in *National Reporting Co v Alderson Reporting Co*, 763 F 2d 1020 (8th Cir 1985), as establishing that a company cannot possess monopoly power in a regulated market. There, the United States Tax Court contracted on a yearly basis for court-reporting services The court allowed contractors who performed satisfactorily to renew their contract at the previous year's rate If, however, the contractor wanted to raise his price, the court put the contract out for bid When National Reporting Company, which had the current contract, requested a price increase, the court let the contract out for bid. Alderson Reporting Company submitted a bid more than 300 percent lower than National's bid, and received the contract. National then brought an antitrust action against Alderson, alleging that Alderson submitted a predatory below-cost bid with the intent to drive competitors out of the market and create a monopoly We reversed a district court judgment in favor of National, and held that Alderson could not possess monopoly power because it did not have the power to control prices or exclude competition National's theory was that Alderson submitted a predatory bid and then would increase prices the next year However, we pointed out that as soon as Alderson raised its price, the contract would be put out for bid and that "[c]ompetition is alive and well in the relevant market." *Id.* at 1023

That factual situation is completely inapposite to our case Unlike TCI, Alderson had not threatened competitors into not submitting bids, and it took no other action to destroy the competitive bidding process The mere fact that the Jefferson City cable market is regulated cannot hide the fact that TCI had monopoly power in the market, and it used that power and other methods other than superior ability to exclude competition As the United States Supreme Court stated in *Otter Tail Power Co v United States*, 410 U.S 366, 372, 93 S Ct. 1022, 1027, 35 L.Ed 2d 359 (1973), "Activities which come under the jurisdiction of a regulatory agency nevertheless may be subject to scrutiny under the antitrust laws"

F. Sufficiency of the Evidence on the Conspiracy Count.

[7] TCI contends that we must overturn the jury's verdict on Section One of the Sherman Act because there is insufficient evidence of a conspiracy or combination. Central contends that TCI is merely repeating an argument rejected by the jury, and it argues that if there is any evidence supporting the jury's finding of a conspiracy, the finding must be upheld. *Citing Weiss v York Hospital*, 745 F 2d 786, 814 (3d Cir 1984), *cert. denied*, 470 U.S 1060, 105 S Ct. 1777, 84 L.Ed 2d 836 (1985) TCI contends that it was selected because this was the "best" business decision for the City, even though Central offered a state-

of-the-art system with a greater number of channels and better picture quality at a lower price TCI stresses that there would have been an interruption in service if Central had been chosen, and that the mayor and other City officials were merely responding to this eventuality "An inference of conspiracy is not warranted where the conduct is at least as consistent with legitimate business decisions * * * as with [anti-competitive joint action]" *Admiral Theatre Corp v Douglas Theatre Co*, 585 F 2d 877, 884 (8th Cir 1978)

Central contends that TCI's argument "emphasizes the innocuous and ignores the ominous" *Corey v Look*, 641 F 2d 32, 35 (1st Cir 1981) (holding that concerted action by city officials and a parking lot operator designed to subvert normal commercial bidding and exclude the plaintiff violated Section One of the Sherman Act) Central contends that the record reveals abundant evidence that various City officials were coerced and pressured into an anti-competitive position We find this a difficult question Nonetheless, after reviewing the lengthy record in detail, we believe that overturning the jury's conspiracy verdict would require us to review the evidence *de novo* and to accord little respect for the verdict of what the trial judge termed was "an extremely attentive jury" *Central Telecommunications*, 610 F Supp at 894

G Damages

1 *Fact of Damage*

TCI contends that under *Duff v Kansas City Star Co*, 299 F 2d 320 (8th Cir 1962), an unestablished business cannot recover for injury to "business" under section 4 of the Clayton Act There we stated that a plaintiff may not recover antitrust damages by reason of loss of anticipated profits in an anticipated business' *Id* at 323 However, this statement must be read in light of the facts in *Duff* Duff had operated a small weekly newspaper in Kansas City, Missouri After eight years of non publication due to a newsprint shortage during World War II, he unsuccessfully sought to reenter the newspaper business He claimed that his inability to start up a newspaper again was due to an attempt by defendant to monopolize the market. The district court dismissed his antitrust action on the ground he had no "business or property" which could have been injured This Court affirmed, finding: After eight years of non-publication appellant possessed neither business nor property, including goodwill, which could have been damaged[ ]" *Id.* at 325 Stressing that Duff had not made any large capital expenditures, did not own a copyrighted name for a newspaper which had a value, and did not have subscription, advertising, or financing commitments, the Court stated that Duff "was in no different position than any stranger who might arrive in Kansas City with the desire or wish to enter the newspaper publishing field and who claimed that because of appellees' monopoly he was prevented from doing so" *Id.* at 323

Although neither the Supreme Court nor this Court has had occasion to expound on the meaning of *Duff*, at least seven of the Circuit Courts of Appeal,[16] as well as numerous district courts,[17] and the Supreme Court by implication[18] have ruled that an

16. *Parks v Watson*, 716 F.2d 646 659–60 (9th Cir 1983) *Grip-Pak, Inc. v Illinois Tool Works, Inc.*, 694 F.2d 466 475 (7th Cir 1982) *cert. denied*, 461 U.S 958, 103 S.Ct. 2430 77 L.Ed.2d 1317 (1983) *Huron Valley Hospital Inc. v City of Pontiac*, 666 F.2d 1029 1033 (6th Cir 1981) *Hayes v Solomon*, 597 F.2d 958 973 (5th Cir 1978), *cert. denied*, 444 U.S. 1078 100 S.Ct. 1028 62 L.Ed.2d 761 (1980); *Hecht v Pro-Football, Inc.*, 570 F.2d 982, 987–88 (D C.Cir 1977) *cert. denied*, 436 U.S 956, 98 S.Ct. 3069, 57 L.Ed.2d 1121 (1978), *Triangle Conduit & Cable Co. v National Electric*, 152 F.2d 398 400 (3d Cir 1945) *Pennsylvania Sugar Ref Co v American Sugar Ref Co.*, 166 F 254 (2d Cir 1908)

17 *See, e.g., Bowl America, Inc. v Fair Lanes Inc.*, 299 F.Supp 1080, 1095 (D Md 1969) *Denver Petroleum Corp v Shell Oil Co* 306 F.Supp 289 307 (D Colo 1969)

18. *Zenith Radio Corp. v Hazeltine Research, Inc.*, 395 U.S. 100 126–28 89 S Ct. 1562, 1578–79, 23 L.Ed. 1562 (1969) (On the related question of whether the plaintiff as a condition of maintaining a treble-damage action, must prove

unestablished business can recover future lost profits under the federal antitrust laws if a sufficiently advanced state of preparation for entering a market has been achieved For example, the same year that *Duff* was decided, the United States Court of Appeals for the Fifth Circuit rejected a contention that *Duff* established that a business in the planning stage may never recover anticipated profits under the federal antitrust laws

> Defendant's argument necessarily presupposes that when Congress authorized treble damage suits it meant to distinguish between the rights of persons who are put out of business and the rights of persons who are kept out of business by a conspiracy It is unreasonable to suppose that such a distinction was intended by Congress The purpose of the antitrust laws is to promote competition and to prevent its restraint. This purpose is no less thwarted when a person who intends and is prepared to embark in trade is stopped at the outset, than it is when a going business is brought to a standstill It is as unlawful to prevent a person from engaging in business as it is to drive him out of business *Thomsen v Union Castle Mail S S Co*, 2 Cir, 1908, 166 F 251, 253 The restriction which defendants would place upon the meaning of the word "business" is unwarranted in the context of its Clayton Act usage
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> We see no conflict in the holding of the Duff case with the decision reached here First, the Duff case presents facts entirely different from those under consideration here Indeed, the trial court likened the plaintiff in Duff to a stranger who might enter Kansas City "with the desire or wish" to enter the newspaper publishing field, which is to say that the "desire or wish" is all the stranger had No property was involved In effect the court held that there was no established business (good will) to which the name or trademark there involved attached
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> [By contrast, the plaintiff here] was guilty of no lethargy or speculative assertion of a mere wish, desire or intention to engage in business In July he bound himself by the terms of a contract, which the evidence indicates would have been in performance in December The alleged conspiracy stopped him cold in November It is our opinion that Young was "injured in his business or property"

North Texas Producers Association v Young, 308 F 2d 235, 243 (5th Cir 1962), *cert. denied*, 372 U S 929, 83 S Ct. 874, 9 L.Ed 2d 733 (1963)

A respected commentator has aptly summarized the now-established majority view

> The plaintiff will be deemed to have an existing "business" if he has an intention to do so and has made a sufficient degree of preparation toward entering the market or industry The four elements that the courts have considered in determining the degree of intention and preparedness are
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> (1) the plaintiff's background and experience in his prospective business,
>
> (2) affirmative action on the plaintiff's part to engage in the proposed business,
>
> (3) his ability to finance the business and to purchase the necessary equipment and facilities to engage therein, and
>
> (4) His consummation of contracts

10 Von Kalinowski, Antitrust Laws and Trade Regulation, § 115 02[3][1] (1986) (footnotes omitted) *See also e.g*, *Parks*, 716 F 2d at 660

that he made a demand for the excluded product or service, the Court stated. "The issue is whether, once the embargo was lifted, Zenith wanted to enter, had the capacity to do so, and was prevented from entering by its inability to secure a patent license and by other operations of the English patent pool. Section 4 of the Clayton Act required that Zenith show an injury to its 'business or property by reason of anything forbidden in the antitrust laws.' If Zenith's failure to enter the English market was attributable to its lack of desire, its limited production capabilities, or to other factors independent of HRI's unlawful conduct, Zenith would not have met its burden under § 4" (Footnote omitted.)

We agree with the conclusion of the United States Court of Appeals for the Fifth Circuit in *North Texas Producers Association* that *Duff* is consistent with this majority view, but simply holds that Duff had not shown sufficient business or property interests to recover for injury to "business or property" under section 4 of the Clayton Act.

[8] The district court tracked this view by instructing the jury that "[i]t is necessary that plaintiff cause you to believe from the evidence an intention and preparedness to enter the cable television market in order to recover for its loss in this case." TCI does not challenge this instruction on appeal. Our review of the record supports the jury's conclusion that Central had made sufficient preparations to enter the cable television business to recover for injury to "business" under section 4 of the Clayton Act. Central had experience and expertise in the cable field, had raised over $300,000 in capital with commitments of an additional $200,000 in capital, had secured financing commitments in excess of $1.5 million, had submitted detailed feasible plans for its cable system in Jefferson City and had secured the vote of the City Council for an operating franchise.

[9] TCI also contends that the tortious interference verdict must be reversed because under Missouri's tortious interference law, an unestablished business cannot recover anticipated profits unless plaintiff proves past income and expenses as the basis for computing them. *Citing Coonis v Rogers*, 429 S.W.2d 709, 713–14 (Mo 1968). However, our review of Missouri law reveals that this argument is too extreme. A more detailed, accurate and recent description of Missouri law was provided in *Budget Rent-A-Car v B & G Rent-A-Car*, 619 S.W.2d 832, 836–37 (Mo App 1981), where the court wrote:

> [T]he loss of profits, whether past or future, claimed to arise out of exclusion from a market is customarily not susceptible of detailed or direct proof, and * * * unless proof of an inferential character is permitted, the result would be to immunize a defendant from the consequences of his wrongful acts. That principle has been frequently enunciated by the Supreme Court of the United States in the context of actions to recover damages resulting from violations of the Federal antitrust laws. * * * The principle is equally applicable where the claim of lost profits arises from a violation of fiduciary obligations or breach of contract. * * *
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> * * * "The assessment of damages by a trial court sitting without a jury will not be set aside unless manifestly erroneous, and may be upheld if it falls within the range of estimates given by expert witnesses."
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> [There has been an] evolution away from the demand for proof of certainty in damages in actions of this nature in * * * Missouri. * * * Anticipated profits were generally not recoverable. *Coonis v Rogers*, 429 S.W.2d 709, 714 (Mo 1968), but note the further quote, "'They [anticipated profits] may be recovered only when they are made reasonably certain of proof of actual facts, with present data for a rational estimate of their amount; and, when this is made to appear, they may be recoverable.'" * * * "[T]he law is also well settled that damages may be recovered for loss of profits due to the breach of a contract if the evidence is sufficiently certain and definite to warrant the jury in estimating their extent." * * * "It has been said, however, that the amount of estimated loss of earnings (and the same would apply to loss of prospective profits) should, in the event of uncertainty, at least be supported by the best evidence available." * * *
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> * * * *
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> * * * "Where computation of damages is made uncertain by the nature of the breach of contract, '[t]he most elementary conceptions of justice and public policy require that the wrongdoer shall bear the risk of the uncertainty which his own wrong has created.' * * * [ ]" [Citations omitted.]

Similarly, in *Coach House of Ward Parkway v Ward Parkway Shops*, 471 S.W.2d 464, 472–73 (Mo 1971), the Court stated.

Defendant relies on a line of cases exemplified by *Coonis v Rogers*, Mo, 429 S W 2d 709, and *Anderson v Abernathy*, Mo, 339 S W 2d 817, for the general proposition of law to the effect that recovery of anticipated profits of a commercial business are too remote, speculative to warrant recovery except where they are made reasonably certain by proof of actual facts with present data for a rational estimate of their amount. This is and has been the rule in Missouri However, in *Hargis v Sample*, Mo, 306 S W 2d 564, 569, also cited by defendant, this court in speaking of the certainty with which loss of profits must be shown said "True, in some cases all that can be required is to produce all the relevant facts tending to show the extent of damage and one is not to be excused for a breach of contract resulting in damages simply because those damages may not be established with exact certainty *Wright v. Ickenroth*, Mo App, 215 S W.2d 43, 45 It has been said, however, that the amount of estimated loss of earnings (and the same would apply to loss of prospective profits) should, in the event of uncertainty, at least be supported by the best evidence available *Moss v Mindlin's, Inc.*,, Mo, 301 S W 2d 761, 773"

> We believe this case comes within [this] rule * * * where if the breach exists, the experience of mankind is convincing that a pecuniary loss has occurred while at the same time the exact amount of damage is not susceptible of being ascertained with certainty

The Court in *Coach House* then held that damages for lost profits could be recovered, on remand, on the basis of the testimony of an expert witness on the estimated loss of business due to the violation at issue.

We think this is the type of case where the damage award was based on the best evidence available, and where the estimate of loss is reasonable and thus is not too speculative under Missouri law In sum, we hold that Central has sufficiently proved that it suffered damage to a protectable interest under the federal antitrust law and the State of Missouri's law on tortious interference with a business expectancy

2 *Measure of Damages*

TCI contends that Central's damage theory was "irrational" and overcompensatory because it allegedly failed to deduct all the "start-up" costs of the business Central's theory was that it should receive the fair market value of the lost franchise, and this value was ascertainable through use of an "industry rule of thumb"—ten times cash flow in Central's proposed third year of operations Central cites controlling authority that the fair market value of a business has long been a recognized measure of damages for a precluded plaintiff in antitrust cases, *see, e g Arnott v American Oil Co*, 609 F 2d 873, 887 (8th Cir 1979), *cert. denied*, 446 U S 918, 100 S Ct. 1852, 64 L.Ed 2d 272 (1980), *Albrecht v Herald*, 452 F 2d 124 (8th Cir 1971) *See also Affiliated Capital Corp v City of Houston*, 519 F Supp 991, 1011 (S D Tex 1981), *rev'd on other grounds*, 735 F.2d 1555 (5th Cir 1984) Central also cites to *Malley-Duff & Associates, Inc. v Crown Life Ins Co*, 734 F 2d 133, 148 (3d Cir.), *cert. denied*, 469 U S 1072, 105 S Ct. 564, 83 L.Ed 2d 505 (1984) where the Court approved the use of an industry rule of thumb—a multiplier times vested renewal income—to determine fair market value

Central introduced a detailed damages study and extensive supporting testimony The jury arrived at an actual damage amount of $10 8 million Central points out that TCI itself suggested that the fair market value of the Jefferson City cable franchise was between $7 7 and $15 million Although the damage award is large, we have concluded that we are obligated under controlling authority and the facts of the case to affirm First of all, the Supreme Court has repeatedly made clear that once the fact of damage is established, the amount of damages requires a lesser degree of proof *See, e.g, J Truett Payne Co v Chrysler Motors Corp*, 451 U.S 557, 565–67, 101 S Ct. 1923, 1929, 68 L.Ed.2d 442 (1981) ("Our willingness to accept a degree of uncertainty in these cases

rests in part on the difficulty of ascertaining business damages as compared, for example, to damages resulting from a personal injury * * * The vagaries of the marketplace usually deny us sure knowledge of what plaintiff's situation would have been in the absence of the defendant's antitrust violation") For example, in *Zenith Radio Corp v Hazeltine Research, Inc.*, 395 U.S 100, 123–24, 89 S Ct. 1562, 1576–77, 23 L.Ed.2d 129 (1969), the Court held that antitrust damages could be awarded on the basis of plaintiff's estimates of sales it could have made absent the violation.

> [D]amage issues in these cases are rarely susceptible of the kind of concrete, detailed proof of injury which is available in other contexts The Court has repeatedly held that in the absence of more precise proof, the fact-finder may "conclude as a matter of just and reasonable inference from the proof of defendants' wrongful acts and their tendency to injure plaintiffs' business, and from the evidence of the decline in prices, profits and values, not shown to be attributable to other causes, that defendants' wrongful acts had caused damage to the plaintiffs"

A respected commentator has summarized the law on the measure of antitrust damages as follows

> The amount of damages may be established by evidence of facts from which some calculation may be logically and legally inferred. If the inference upon which the award is based is reasonable, the plaintiff may recover a sum in damages even if it is merely an approximation.

10 Von Kalinowski § 115 02[2] (1986) (footnotes omitted)

Similarly, the United States Court of Appeals for the Seventh Circuit has recently reiterated, in a decision affirmed by the Supreme Court. "Because a plaintiff can seldom prove the exact amount of antitrust damages, he may sustain his burden with circumstantial evidence and estimates of damage based on reasonable assumptions." *Spray-Rite Service Corp v Monsanto Co*, 684 F.2d 1226, 1242 (7th Cir 1982), *aff'd in part, rev'd in part on other grounds*, 465 U.S 752, 104 S Ct. 1464, 79 L.Ed.2d 775 (1984) The law of the State of Missouri is similar with respect to damages for tortious interference with business expectancy *See, e.g., Budget Rent-A-Car*, 619 S W.2d at 836–37

[10] Central presented an estimate of damages based on reasonable industry assumptions, and the jury was entitled to infer from the evidence actual damages in an amount of $10.8 million. Our review of the award fails to reveal any error,[19] and we could reduce the award only by acting as the *de novo* fact-finder This we may not do

Perhaps most significantly, Central's damage study and its expert's testimony was admitted without objection. TCI failed to introduce evidence on damages, and did not argue damages in its final argument before the jury It is apparent that TCI made a conscious decision to "go for broke," claiming that Central could simply not receive any damages at all because TCI was not liable. The jury rejected this argument and was forced to base its damage award on the evidence before it. TCI first objected to the damages award and its method of calculation in its post-trial motion. This was too late. Accordingly, the actual damages award of $10.8 million on the antitrust (before mandatory trebling) and tortious interference claims is affirmed.

19 TCI contends, in an argument not raised before the jury, that Central's damage estimate failed to adequately account for Central's start-up costs. However, our review of the damages study reveals that start-up costs of $1.6 million were accounted for If TCI believed this figure understated start-up costs, it should have introduced evidence on this. Given that TCI failed to raise this argument before the jury, and that there is no evidence to suggest that Central's estimate is unreasonable, we assume that $1 6 million in estimated start-up costs is reasonable.

TCI also suggests in passing that Central's damages theory erroneously uses its third year of operations as the base for determining fair market value. However, TCI failed to object to this method at trial. Moreover, the third year coincided with the date of trial, and thus had a reasonable basis.

[11] The jury also awarded $25 million in punitive damages on the tortious interference claim TCI does not challenge this award on appeal other than contending that if the actual damages award is reversed, the punitive damages award must also be reversed Accordingly, although the punitive damages award is large, the award was based on a jury instruction on punitive damages which was not objected to at trial or on appeal and which, in any event, accurately sets forth the law of the State of Missouri. The record reveals substantial evidence of intentional tortious conduct on which the punitive damages award was based. Accordingly, we affirm the jury's award

Affirmed



C.H. BETTERTON, Appellant,

v.

FIRST INTERSTATE BANK OF ARIZONA, N.A., a National Banking Association and Paula Stiles, Appellees,

v.

C.H BETTERTON, Appellant.

C.H BETTERTON, Appellee,

v

FIRST INTERSTATE BANK OF ARIZONA, N.A., a National Banking Association and Paula Stiles, Appellants,

v

C.H. BETTERTON, Appellee.

Nos. 85-2410, 86-1213

United States Court of Appeals, Eighth Circuit.

Submitted June 9, 1986

Decided Aug 29, 1986

Rehearing Denied Sept. 26, 1986

Debtor brought action against bank alleging breach of contract, fraud, conversion, breach of security agreement and tortious violation of duty of good faith arising out of bank's repossession and sale of tractor and trailer The United States District Court for the Eastern District of Missouri, George F Gunn, Jr, J, 615 F Supp 72, granted defendants' motion for summary judgment and debtor appealed The Court of Appeals, Arnold, Circuit Judge, held that repossession of tractor and trailer after bank promised to forego repossession, in exchange for promise by debtor to have his broker subtract money owed bank from his paycheck and transferred to bank, established cause of action against bank for breach of contract, fraud and conversion

Affirmed in part, reversed in part and remanded

1 Contracts ⇐54(1)

Under Arizona law debtor's promise to have his broker subtract money owed him from his paycheck and transfer it to bank supplied consideration necessary to make bank officer's promise to forego repossession binding

2 Fraud ⇐12

Under Arizona law bank officer's representations, which induced debtor to arrange with his broker to have his broker subtract money owed from his paycheck and transfer it to bank in exchange for bank's promise to forego repossession on debtor's tractor and trailer, which debtor was not obligated to make, established cause of action for fraud on the part of bank and bank officer

3. Trover and Conversion ⇐5

Under Arizona law debtor who promised to have his broker subtract money owed him from his paycheck and transferred to bank in exchange for bank's promise to forego repossession established cause of action for conversion after bank repossessed property and failed to return certain items of personal property taken from debtor when truck was repossessed

in these transactions are the *New York Dock* conditions imposed in the 1982 orders and not the *Mendocino Coast* conditions which are usually imposed on exempt lease transactions The ICC decisions on Plaintiffs' petitions are currently pending

Plaintiffs devote their extensive argument to the merits of their contentions The Court, however, does not reach these merits but begins instead with an analysis of its jurisdiction over the dispute.

[1] Plaintiffs argue that jurisdiction is proper under 49 U.S C § 11705, which enables Plaintiffs to bring a civil action to enforce ICC orders Because the recent ICC Notices of Exemption do not include an order regarding the appropriate employee protective conditions, Plaintiffs argue that they are attempting to enforce the 1982 orders which imposed *New York Dock* conditions Although Plaintiffs have the right to bring an action in this Court to enforce the 1982 orders, 49 U.S C. § 11705, the Court also has the right to refer questions or issues to the ICC for determination 28 U.S C § 1336(b)

Before the Court can enforce the 1982 orders or grant Plaintiffs' present request for relief, the Court must first determine whether the transactions contemplated by Guilford probably fall within the scope of those orders This determination, however, must be made in the exceedingly complex regulatory context of an ICC-supervised merger The Court finds that this determination is best made by the ICC

[2] In addition, the Court *sua sponte* determines that the doctrine of primary jurisdiction applies to the controversy before it despite Plaintiffs' ability to bring a civil action in this Court under 49 U S C § 11705(a) *Cf Hansen v Norfolk & Western Ry*, 689 F.2d 707, 709–11 (7th Cir 1982) (applying doctrine under section 11705(c)(1)) The ICC, and not the Court, should be given the opportunity to evaluate Plaintiffs' claims and determine the applicability of its 1982 orders to the leases in question. *See Zapp v United Transportation Union*, 727 F.2d 617, 625 (7th Cir 1984) (invoking doctrine so ICC could clarify plaintiffs' rights), *Anderson v United Transportation Union*, 557 F 2d 165, 169 (8th Cir 1977) (affirming dismissal of action for damages and injunctive relief where ICC had primary jurisdiction to determine compliance with its prior order), *Augspurger v Brotherhood of Locomotive Engineers*, 510 F.2d 853, 857 (8th Cir 1975) Moreover, deference to the administrative agency is particularly appropriate here as the issue is currently pending before the agency in the context of its Notices of Exemption.

Accordingly, the Court DENIES Plaintiffs' Application for a Temporary Restraining Order and DISMISSES Count I of the Complaint for lack of subject matter jurisdiction, or in the alternative, DECLINES jurisdiction as to Count I and refers the issue to the ICC for determination.

So ORDERED



H.R.M., INC., doing business as Kearney Cablevision, Plaintiff,

v

TELE-COMMUNICATIONS, INC., TCI North Central, Inc., Horizon Tele-Communications, Inc., Defendants.

Civ A. No 86-A-2534.

United States District Court, D Colorado

Jan. 30, 1987

An antitrust action was filed against a parent corporation and its subsidiaries, which were in the business of providing cable television programming A motion to dismiss was filed. The District Court, Arraj, J., held that: (1) sister subsidiaries could not conspire with their parent or with each other for purposes of Sherman Act;

(2) an allegation that the parent and subsidiaries conspired with "others" was insufficient to withstand a motion to dismiss for failure to state a claim, and (3) the provision of cable television programming was a "service," not a commodity within the meaning of the statute prohibiting price discrimination in the sale of commodities

Motion to dismiss claims granted

1. Federal Civil Procedure ⇐1784

Standard to be applied on motion to dismiss for failure to state claim is even more stringent in evaluation of antitrust claims, where proof is in hands of alleged conspirators, and dismissals prior to giving plaintiff ample opportunity for discovery should be granted very sparingly Fed Rules Civ Proc Rule 12(b)(6), 28 U.S C A

2. Federal Civil Procedure ⇐1784

Conclusory allegations which merely recite litany of antitrust will not suffice to withstand motion to dismiss for failure to state claim. Fed.Rules Civ Proc.Rule 12(b)(6), 28 U.S C.A

3. Monopolies ⇐12(1 16)

Subsidiaries which shared common purpose with their parent corporation could not conspire in violation of Sherman Act. Sherman Anti-Trust Act, § 1, 15 U S C.A. § 1

4. Monopolies ⇐12(1 16)

Sister subsidiaries could not conspire with one another in violation of Sherman Act. Sherman Anti-Trust Act, § 1, 15 U S C.A. § 1

5. Monopolies ⇐12(1 16)

Rule that parent corporation and its wholly owned subsidiaries must be viewed as single enterprise forecloses claim of conspiracy to monopolize in violation of Sherman Act. Sherman Anti-Trust Act, § 2, 15 U.S C.A. § 2.

6. Monopolies ⇐28(6.4)

Allegation that parent corporation and its subsidiaries conspired with "others" was too vague to withstand motion to dismiss for failure to state claim. Sherman Anti Trust Act, § 1, 15 U S C A § 1, Fed Rules Civ Proc Rule 12(b)(6), 28 U S C A.

7. Trade Regulation ⇐911

Provision of cable television programming is "service," not commodity within meaning of statute prohibiting price discrimination in sale of tangible commodities Clayton Act, § 2(a), 15 U S C A § 13(a).

See publication Words and Phrases for other judicial constructions and definitions.

Sheldon E. Friedman, David H Wollins, Cortez & Friedman, P.C , Englewood, Colo., for plaintiff

Robert E Youle, Brian G Eberle, Sherman & Howard, Denver, Colo , for defendants

MEMORANDUM OPINION AND ORDER

ARRAJ, District Judge

INTRODUCTION

This matter is before the court on the defendants, Tele-Communications, Inc. (TCI), TCI North Central, Inc. (North Central), and Horizon Tele-Communications, Inc. (Horizon's) motion to dismiss the third and fifth claims of plaintiff's complaint for failure to state a claim upon which relief can be granted The parties have submitted briefs in support of their respective positions on this motion, and after review of the materials submitted by the parties, I find that oral argument would not be helpful in the resolution of these issues

BACKGROUND

Plaintiff H R M., Inc., d/b/a Kearney Cablevision, is a Nebraska corporation in the business of providing cable television services to consumers and organizations in Nebraska. Defendant TCI, a Delaware corporation, is a national communications organization in the business of providing cable television services to consumers and organizations through its operating groups and subsidiaries Defendants North Cen-

tral and Horizon are wholly-owned subsidiaries of TCI, and provide cable television services to subscribers in Kearney, Nebraska and the surrounding communities

On December 17, 1986, Kearney filed a complaint against defendants, alleging five violations of the federal antitrust laws and five pendent state law claims Defendants filed the present motion on January 6, 1987, seeking dismissal of plaintiff's Third Claim (Conspiracy to Monopolize) and Fifth Claim (Price Discrimination) under F R Civ P 12(b)(6) for failure to state a claim upon which relief can be granted

DISCUSSION

[1] On a motion to dismiss a complaint under F R Civ P 12(b)(6), the court must consider the complaint's factual allegations as true and give the plaintiff the benefit of all reasonable inferences *Mitchell v King*, 537 F.2d 385, 386 (10th Cir 1976) As a rule, "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief" *Conley v Gibson*, 355 U S 41, 45–46, 78 S Ct. 99, 102, 2 L.Ed.2d 80 (1957) This standard is even more stringent in the evaluation of antitrust claims, where the proof is in the hands of the alleged conspirators, and dismissals prior to giving the plaintiff ample opportunity for discovery should be granted very sparingly *Poller v Columbia Broadcasting System, Inc.*, 368 U S 464, 473, 82 S Ct. 486, 491, 7 L.Ed 2d 458 (1962), *Hospital Building Co v Trustees of Rex Hospital*, 425 U S 738, 746, 96 S Ct. 1848, 1853, 48 L.Ed.2d 338 (1976)

[2] However, conclusory allegations which merely recite the litany of antitrust will not suffice This court retains the power to insist upon some specificity in pleading before allowing a potentially massive factual controversy to proceed. *Associated General Contractors of California, Inc. v California State Council of Carpenters*, 459 U.S 519, 528 n. 17, 103 S Ct. 897, 903 n. 17, 74 L.Ed.2d 723 (1983)

A Count Three. Conspiracy to Monopolize

Plaintiff's Third Claim for relief alleges that the defendants have conspired with one another and with "others" to monopolize cable television services in the Kearney Market in violation of sections 1 and 2 of the Sherman Act, 15 U.S C § 1, § 2. Section 1 of the Sherman Act provides

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal

[3, 4] Plaintiff's claim that defendants conspired with each other in violation of section 1 of the Sherman Act is foreclosed by the Supreme Court's decision in *Copperweld Corp v Independence Tube Corp*, 467 U.S 752, 104 S Ct. 2731, 81 L.Ed.2d 628 (1984) In *Copperweld*, the Supreme Court held that a parent corporation and its wholly-owned subsidiaries are legally incapable of conspiring with each other in violation of section 1 of the Sherman Act. The court expressed as the basis for its decision the unity of purpose shared by the parent and its subsidiary

> A parent and its wholly owned subsidiary have a complete unity of interest. Their objectives are common, not disparate, their general corporate actions are guided or determined not by two separate corporate consciousnesses, but one With or without a formal "agreement," the subsidiary acts for the benefit of the parent, its sole shareholder

Id at p 771, 104 S Ct. at p 2742. Therefore, North Central and Horizon share a common purpose with TCI and cannot conspire with their parent in violation of section 1 of the Sherman Act. *See also Deauville Corp v Federated Dept. Stores, Inc.*, 756 F.2d 1183, 1192 (5th Cir 1985), *Russ' Kwik Car Wash, Inc. v Marathon Petroleum Co*, 772 F.2d 214, 216 (6th Cir 1985), *Zimmerman v Board of Publications of the Christian Reformed Church, Inc.*, 598 F.Supp 1002, 1010 (D Colo 1984) By the same token, neither can North Central and Horizon conspire with one another Al-

though the Court's holding does not explicitly preclude allegations of a conspiracy between two sister corporations, such as North Central and Horizon, the Court's rationale does apply to such situations *Hood v Tenneco Texas Life Ins. Co*, 739 F 2d 1012, 1015 (5th Cir 1984), *Carl Hizel & Sons, Inc v Browning-Ferris Industries, Inc.*, 590 F.Supp 1201, 1202 n 2 (D Colo 1984), *Satellite Financial Planning Corp v First National Bank of Wilmington*, 643 F Supp 449, 451 (D Del 1986)

[5] Plaintiff's conspiracy claim under section 2 of the Sherman Act is also foreclosed by the rationale of *Copperweld*. 15 U.S C § 2 provides that.

> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony .

Although section 2 does make illegal purely unilateral conduct, *Copperweld Corp v Independence Tube Co., supra*, 467 U.S at p 767 n. 13, 104 S.Ct. at p 2740 n 13, a claim under section 2 for conspiracy to monopolize, like a claim under section 1, requires at least two participants 2 E Kintner, *Federal Antitrust Law*, § 9 2 at p 6, n 20 (1980), 3 J Von Kalinowski, *Antitrust Laws and Trade Regulation*, § 9 02[2] at p 9–37 (1986) Therefore, the Court's rationale in the *Copperweld* decision—that a parent and its wholly-owned subsidiaries must be viewed as a single enterprise—also applies to foreclose a claim of conspiracy to monopolize under section 2 of the Sherman Act. *See Sadler v Rexair, Inc.*, 612 F.Supp 491, 494 (D Mont.1985), *Stepp v Ford Motor Credit Co*, 623 F.Supp 583, 593 (E D Wis 1985), *Marathon Petroleum Co v LoBosco*, 623 F.Supp 129, 133 n 2 (N D Ill 1985)

[6] Finally, plaintiff's allegation in its third claim that the defendants conspired with "others" is too vague to stand. Such a pleading is inadequate to give the defendants fair notice of plaintiff's claim *Sadler v Rexair, Inc*, *supra*, *Garshman v Universal Resources Holding, Inc*, 641 F Supp 1359, 1370 (D N.J 1986) A conclusory allegation of conspiracy to restrain trade will not survive a motion to dismiss *Lombard's, Inc. v Prince Manufacturing, Inc*, 753 F 2d 974, 975 (11th Cir 1985), *cert. denied*, — U S —, 106 S Ct. 851, 88 L.Ed 2d 892 (1986)

B Count 5 Price Discrimination.

[7] Plaintiff's Fifth Claim for relief alleges that defendants have discriminated in the pricing of cable television services in the Kearner market in violation of section 2 of the Clayton Act, 15 U S C § 13(a), which states in part that "[i]t shall be unlawful for any person engaged in commerce .. to discriminate in price between different purchasers of commodities .. "

Section 13(a) of the Clayton Act relates only to the sale of tangible commodities and not to services *Baum v Investors Diversified Services, Inc.*, 409 F.2d 872, 874 (7th Cir 1969) In this case, plaintiff's complaint alleges price discrimination only with respect to "cable television services" nowhere in plaintiff's complaint is reference made to sale of tangible commodities. This court finds the provision of cable television programming to be a service, and not a commodity *See Tri-State Broadcasting Co v United Press International, Inc.*, 369 F 2d 268, 270 (5th Cir 1966); *Satellite Television and Associated Resources, Inc v Continental Cablevision of Virginia, Inc.*, 714 F 2d 351, 358 (4th Cir 1983), *cert. denied* 465 U.S 1027, 104 S Ct. 1285, 79 L.Ed 2d 688 (1984); *American Telephone and Telegraph Co v Delta Communications Corp*, 408 F.Supp 1075, 1114 (S D.Miss 1976), *affirmed* 579 F 2d 972 (5th Cir 1978), *modified on other grounds* 590 F 2d 100 (5th Cir 1979), *cert. denied* 444 U.S 926, 100 S Ct. 265, 62 L.Ed.2d 182 (1979) Therefore, since no sale or purchase of any tangible commodity is involved, plaintiff's fifth claim for relief will be dismissed.

Accordingly, it is

ORDERED that the defendants' motion to dismiss the third and fifth claims set forth in plaintiff's complaint is GRANTED



James DAVENPORT, Charles Richmond, Hector Rivera, Carl Lucas, Roger Pennie, Charles Terry, and Mark McBride, Plaintiffs,

v

Richard W DeROBERTIS, Michael Lane, and Michael O'Leary, Defendants

No. 83 C 4392.

United States District Court, N D Illinois, E D

Jan 30, 1987

Inmates brought class action on behalf of all present and future inmates at maximum security prison confined to segregation for 90 or more consecutive days, alleging deprivation of their constitutional rights, against present and former wardens of prison and Director of Illinois Department of Corrections and seeking injunctive relief The District Court, William T Hart, J held that (1) evidence supported jury's finding of cruel and unusual punishment, (2) award of nominal damages was proper; (3) defendants were entitled to qualified immunity from compensatory or punitive damages as sued in their individual capacities and (4) inmates confined in segregation in maximum security prison for period of 90 or more consecutive days were entitled to injunctive relief ordering that they be allowed, except during temporary emergencies and lock downs, three showers per week and five hours of out-of-cell exercise per week

Order accordingly

1 Criminal Law ⇐1213 10(4)

Testimony that general practice in maximum security prisons in civilized countries is to permit all inmates 5 to 7 hours of exercise per week, that permitting segregation inmates only one hour of out-of-cell exercise and one shower per week is "medically unacceptable," that prolonged idleness and isolation can cause mental illness and physical deterioration, and that inmates confined to segregation had experienced skin disorders, head and back pains, and musculo-skeletal problems they had not had before segregation, which problems improved when they were released from segregation, supported finding that permitting inmates confined to segregation in maximum security prison only one shower per week and only one hour of out-of-cell exercise per week, constituted cruel and unusual punishment. U.S.C.A. Const. Amend 8

2. Civil Rights ⇐13.13(3)

Jury in civil rights action was entitled to believe testimony of segregation prisoners that they suffered emotional distress, humiliation, personal indignity, and dejection as a result of denial of adequate out-of-cell exercise and showers

3 Civil Rights ⇐13 17(5)

Emotional distress, humiliation, personal indignity, and dejection, which segregation inmates testified that they suffered as a result of denial of adequate out-of-cell exercise and showers were compensable actual injury under § 1983 42 U S C A § 1983

4 Civil Rights ⇐13 17(5)

Isolation in solitary confinement can cause compensable emotional damages even when there is no evidence that it caused mental or physical deterioration

5. Civil Rights ⇐13 17(2)

Jury could award nominal damages of one dollar to segregation inmates who testified that they suffered emotional distress, humiliation, personal indignity, and dejection as a result of denial of adequate out-

EXHIBIT S

sentence waived the right to reincarcerate him.

[11, 12] These claims challenge the execution of Johnson's sentence by federal prison authorities, not the validity of the sentence as imposed. They therefore do not provide a basis for relief under § 2255, but should be raised in a petition for a writ of habeas corpus under 28 U.S.C. § 2241. *See, e.g., United States v. Brown*, 753 F.2d 455, 456 (5th Cir.1985); *United States v. Giddings*, 740 F.2d 770 (9th Cir.1984); *United States v. Grimes*, 641 F.2d 96, 99 (3d Cir.1981). *See also United States v. Addonizio*, 442 U.S. 178, 99 S.Ct. 2235, 60 L.Ed.2d 805 (1979) (§ 2255 encompasses only errors which affect the lawfulness of the judgment or sentence itself); *Kiendra v. Hadden*, 763 F.2d 69 (2d Cir.1985) (granting relief under 28 U.S.C. § 2241 on grounds similar to those alleged here). A habeas petition, however, must be filed in the district in which there is jurisdiction over the prisoner or his custodian. *Brown*, 753 F.2d at 456; *Grimes*, 641 F.2d at 99 n. 7. Because Johnson is incarcerated in Ray Brook, New York, I lack jurisdiction to consider his claims regarding the execution of his sentence.

Johnson's motion to vacate, set aside or correct his sentence under 28 U.S.C. § 2255 will be denied.



Arthur FRIEDMAN, Plaintiff,

v.

ADAMS RUSSELL CABLE SERVICES—NEW YORK, INC., Defendant.

No. 84 Civ. 8109 (PNL).

United States District Court, S.D. New York.

Jan. 15, 1986.

Cable television subscriber brought action against cable television company for damages and injunctive relief under the antitrust laws alleging that company had abused its monopoly power by illegally tying together its provision of two levels of cable service. On company's motion for summary judgment, the District Court, Leval, J., held that cable television company's policy in making available "premium channels" only to those subscribing to its mid-level tier of programming and not to those subscribing to its basic service was not an illegal tying arrangement, company enjoyed an absolute lawful monopoly in relevant geographic market for the tied product, and thus there were no competitors harmed by arrangement.

Motion granted.

Monopolies ⇐17.5(9)

Cable television company's policy in making available "premium channels" only to those subscribing to its mid-level tier of programming and not to those subscribing to its basic service was not an illegal tying arrangement, company enjoyed an absolute lawful monopoly in relevant geographic market for the tied product, and thus there were no competitors harmed by arrangement. Sherman Anti-Trust Act, § 1 et seq., 15 U.S.C.A. § 1 et seq.

Kassner & Haigney, New York City, for plaintiff.

Choate, Hall & Stewart, Boston, Mass., for defendant.

OPINION AND ORDER

LEVAL, District Judge.

This is an action for damages and injunctive relief under the antitrust laws. The plaintiff, Arthur Friedman, alleges that the defendant, Adams Russell Cable Services, the holder of the cable television franchises in Harrison and Port Chester, New York, has abused its monopoly power by illegally

tying together its provision of two levels of cable services All material facts are undisputed The defendant contends that plaintiff's claim fails as a matter of law, and it has accordingly moved this court for summary judgment pursuant to Rule 56(b) Fed R Civ P The motion is granted

In 1982 the defendant acquired the cable television franchises in Harrison and Port Chester, New York, and it has been the sole provider of cable television to these communities ever since The plaintiff is a resident of the township of Harrison, and is a subscriber of defendant's cable system The defendant offers three tiers of cable services to its subscribers Basic, Super-Cable, and Premium Basic service includes primarily station signals which may also be received with a traditional VHF antenna, as well as some additional channels Super-Cable is comprised of satellite-delivered programming such as Cable News Network, MTV, and USA Network. The Premium tier, also commonly known as "pay cable", includes Home Box Office, The Disney Channel, Sports Channel, and other movie and sports channels

Although the various tiers are separately priced, they are not made available in all combinations A subscriber may choose to receive only Basic service (at $4 per month), Basic and Super-Channel (for an additional $9 50 per month), or Basic, Super-Cable, and one or more of the Premium channels (at approximately $9 95 per Premium channel) Plaintiff desires to obtain certain Premium channels without subscribing to Super-Cable The defendant will not permit this, although it admits that such a combination would present no technological problems, the Premium channels are only made available to those subscribing to Super-Cable It is this arrangement, linking the sales of Premium channels to the sale of Super-Cable, that the plaintiff attacks as a violation of the Sherman Antitrust Act.

Superficially, the facts in this case resemble an illegal tying arrangement. As explained by the Supreme Court, "a tying arrangement may be defined as an agreement by a party to sell one product but only on the condition that the buyer also purchases a different (or tied) product " *Northern Pacific Railway v United States*, 356 U S 1, 5, 78 S Ct 514, 518, 2 L Ed 2d 545 (1958) In many circumstances the finding of a tying arrangement will be considered a *per se* violation of the antitrust laws However, as explained by the Second Circuit in *Coniglio v Highwood Services*, 495 F 2d 1286 (2d Cir), *cert. denied*, 419 U S 1022, 95 S Ct 498, 42 L.Ed 2d 296 (1974), the elements of an unlawful tying arrangement are not present here

The plaintiff in *Coniglio* contested the practice of the Buffalo Bills football team requiring season ticket purchasers to also buy tickets to a number of pre-season games In denying this claim, the court ruled that there are four elements to an "illicit tying arrangement." The plaintiff must show "(1) two separate and distinct products , (2) sufficient economic power in the tying market to coerce purchases of the tied product, (3) *anticompetitive effects in the tied market*," and (4) a requisite volume of interstate commerce *Coniglio, supra* at 1289 (emphasis added) Because there were "neither actual nor potential competitors to the Bills in the [Buffalo] professional football market" *id.* at 1291, the Court of Appeals concluded that there were, and could be, no anti-competitive effects of the tying arrangement. Consequently, the court denied relief under the antitrust laws

The same hurdle proves insurmountable to the plaintiff in the instant action The defendant enjoys an absolute lawful monopoly in the relevant geographic market for the tied product (Super-Cable) There are no competitors providing cable services in Harrison, New York, and none are likely for the remaining six years of the present franchise agreement. Thus, exactly as in the Buffalo Bills case, no competitor is harmed by the arrangement, the elements of the cause of action are not made out.

Plaintiff makes several attempts to elude the force of *Coniglio*, but none are suc-

cessful He argues that defendants conduct should not be evaluated solely within the narrow parameters of an illegal tying arrangement, but should be seen more broadly, as an abuse of monopoly power The same argument, however, was also made in *Coniglio*, and the court concluded that since the defendant "has not used the tying arrangement either to prevent competition or destroy it, its ticket sale practice does not represent an unlawful abuse of its monopoly power" *Coniglio, supra*, at 1293 Similarly, in *Berkey Photo v Eastman Kodak*, 603 F 2d 263, 275 (2d Cir 1979), *cert. denied*, 444 U S 1093, 100 S Ct. 1061, 62 L Ed 2d 783 (1980), the Court of Appeals made it clear that as to a claim of abuse of monopoly power predicated on the extension of that power into other markets, the relevant inquiry is whether the monopolist is "using its monopoly power in one market to gain a competitive advantage in another " Where the monopolist already possesses a lawful monopoly in both markets no competitors exist to suffer any ill effects

The plaintiff alleges in his brief that the anti-competitive effects of defendant's conduct is felt in other towns where the defendant is able to use its inflated monopoly profits to "low ball" the competition and thus acquire additional franchises I doubt that this argument is economically sound It is the value of the additional franchise, as perceived by the bidders for it, that determines what each will bid and not the amount of money a bidder has earned from other ventures If a bidder pays more for the new franchise than it is worth, he will have made a bad investment. But even if the argument were sound, it would not avail plaintiff in this cause of action Any resulting injury would be to the competitors for those other communities and not the plaintiff He would lack standing to prosecute their claims *See Triple M Roofing v Tremco*, 753 F 2d 242, 247 (2d Cir 1985)

Plaintiff also suggests that *Coniglio* was an aberration and should no longer be considered good law There is nothing to support this claim Within the last year the Second Circuit has required a showing of anticompetitive effect in the tied market in order to make out an illegal tying arrangement. *See Power Test Petroleum Distr v Calcu Gas* 754 F 2d 91 96 (2d Cir 1985) Moreover, recent Supreme Court decisions are fully consistent with the position of the Second Circuit. While examining a tying arrangement challenged in *Jefferson Parish Hospital v Hyde*, 466 U S 2, 104 S Ct 1551, 1560, 80 L.Ed 2d 2 (1984), the Court explained that "application of the per se rule focuses on the probability of anticompetitive consequences " The Court further stated that where, as in the instant case, "a purchaser is 'forced' to buy a product he would not otherwise have bought even from another seller in the tied product market, there can be no adverse impact on competition Without a showing of actual adverse effect on competition, [plaintiff] cannot make out a case under the antitrust laws " *Id.*, 104 S Ct. at 1560, 1568 It appears the rule of *Coniglio* has been strengthened

Finally, the plaintiff claims in his brief that the defendant acquired its franchises in Harrison and Port Chester through misrepresentation and fraud This issue is not advanced in the complaint, nor is it a claim for which relief lies under the federal antitrust laws

Because of the absence of any possible anti-competitive effects, the tie defendant imposes between its provision of Premium channels and Super Cable is not illegal under the Sherman Antitrust Act. Neither is it an abuse of defendant's monopoly power Accordingly, defendant's motion for summary judgment is granted

SO ORDERED



Senator METZENBAUM Thank you, Mr Theroux Let me ask you, have you tried to get HBO programming? You now carry Showtime Why do you need HBO?

Mr THEROUX We have Showtime as a result of a lawsuit, Senator Other wireless cable operators like mine do not have Showtime and do not have HBO either So that is obviously a death knell altogether

But my problem is that——

Senator METZENBAUM Why can you not get HBO?

Mr THEROUX HBO just will not do business with us They just say no

Senator METZENBAUM Have they told you any conditions? They told me that it is a problem of collecting the bills and some of the wireless operators are not that collectable, responsible Is that a fact?

Mr THEROUX Wireless cable is a brandnew technology It has never existed in the past We do not have a history of not paying our bills because we are a new company and a new technology Now they may want to try to compare us to other businesses, but we are new

Senator METZENBAUM Are there other kinds of programming that you have tried unsuccessfully to purchase?

Mr THEROUX Disney, the USA Network, the Weather Channel, the Fashion Channel Other wireless——

Senator METZENBAUM They all turned you down?

Mr THEROUX Other wireless cable operators who did not get going as soon as I did cannot get CNN, they cannot get ESPN The list is really endless And again, without the milk and eggs, there is no way that we can provide consumers with a competitive choice

Senator METZENBAUM ESPN is owned by ABC Have you tried to get it?

Mr THEROUX My particular company was able to get ESPN although we have certain restrictions imposed upon us that I am not at liberty to divulge, because the restrictions are part of a confidential contract But we are restricted, unlike the cable operators

Senator METZENBAUM Are there any restrictions on your ability to delivery Showtime?

Mr THEROUX Yes, we have severe restrictions there But again, I cannot discuss them because the restrictions are contractual So without Showtime available in an unrestricted way, we are in a fix And who gets stuck? It is the consumer

Senator METZENBAUM Why can you not discuss them because they are contractual?

Mr THEROUX My attorneys have advised me that the terms of my contracts are confidential But you, Senator, have asked me to divulge the nature of these restrictions?

Senator METZENBAUM Yes

Mr THEROUX Showtime will not let me sell their service in a number of Cleveland suburbs

Senator METZENBAUM I see Senator Humphrey, any questions?

Senator HUMPHREY No

Senator METZENBAUM Thank you very much, Mr Theroux

Mr Foster, I am going to have to say to you that the first two witnesses did not seem to understand that 5 minutes was 5 minutes

and each of them fudged a bit—some a little bit more than others Please try to—I will give you a 1-minute notice, all of the witnesses, so you will know you have got one minute left to go

STATEMENT OF MARK FOSTER

Mr FOSTER Thank you, Mr Chairman, good morning

Senator METZENBAUM The only reason I am doing this is because we have so many witnesses and I do not want to keep any of them from having an opportunity to be heard because the time has run out Please proceed

Mr FOSTER Thank you, Mr Chairman Good morning, Senator Humphrey My name is Mark Foster I am chairman of Microband, the largest wireless cable company in the Nation We have about 130,000 subscribers on single-channel systems in New York, Detroit, and Washington New York and Detroit are now in the multichannel mode and Washington will be shortly Our company was financed last year with a $72 million financing to help establish the business

The 1984 Cable Act deregulated the cable industry on the assumption that marketplace competition would replace Government regulation and benefit the consumer Unfortunately, that competition has yet to fully bloom Today cable subscribers are far worse off than in 1984, suffering price increases, deteriorating services, and capricious programming decisions Cable now unrestrained has flexed its economic muscle to prevent wireless cable and other technologies from competing on fair and equal terms

Exactly what is wireless cable? Simply stated, it is cable television It is cable television without digging up the streets for wires To the public, it is cable TV

One basic fact is obvious, people buy programs, not technology It is what is on the screen that counts, not how it gets there Our evolution has been similar to cable's itself As cable evolved from its start as merely a relay mechanism for distant broadcast signals, undercapitalized CATV promoters were replaced with sophisticated businessmen Poor quality distribution improved and signal theft was corrected

Wireless cable has followed a similar path from its genesis in MDS Its early promoters have been replaced with stable, financially sound companies like Microband Old transmission and reception equipment has been discarded for state of the art A new generation of secure, addressable technology eliminates piracy

Today's wireless cable gives the consumer a choice of all local TV channels, VHF and UHF, combined with satellite-delivered name brand channels that are transmitted via SHF, or super high frequency channels And most important, wireless cable is lower priced than coaxial cable

All this sounds great, does it not? Except, our efforts to serve the public have been constantly hampered by the cable MSO's, who view us as a threat which must be eliminated First they tried to stop us by preempting the early MDS business Then they opposed licensing of the super high frequency channels Now they attack

our Achilles heel by pressuring the name brand services to withhold necessary programming from us

Vertical integration and horizontal concentration are the coaxial cable corporate philosophies Many name brand programmers are now owned by large MSO's The few independent suppliers all know the enormous market power of the MSO's and they know they can curry favor with those MSO's by refusing to deal with us on fair and equal terms

Yet, how insidious is this practice? Although Microband has enough programs to go into business, many name brand services appear to have retained the same antitrust lawyer, who told them to stall and stall and stall For example, the Disney channel claims they have been considering selling to us each quarter for the past 2 years, but so far all we hear are "goofy" answers

We were successful in obtaining the rights to Black Entertainment Television in New York and Detroit, but here in the Nation's capital, we were denied the service Why? Because BET is controlled by the local cable company

In Detroit, we cannot obtain direct affiliation with the popular sports service called PASS Why? Because exclusive rights have been granted to the cable company And even if that service should become available, we will have to pay a substantial premium

In New York, the Yanks and Mets fans will not be able to see SportsChannel this summer because SportsChannel will not sell to us except at an outlandish rate which we cannot pass through to the subscribers

When we do get programming, it is often under restrictive conditions that bar us from serving those areas already wired for cable

Mr Chairman, we need the subcommittee's help We need legislation to stop the practices which prevent so many millions of people from seeing the brand name cable programming their friends and relatives see The big bully cannot be allowed to block the little fellow who is trying to serve the unserved Our society encourages the underdog Let us compete

Thank you very much, Mr Chairman

[The prepared statement of Mr Foster follows]

TESTIMONY OF MARK FOSTER

CHAIRMAN AND CO-CHIEF EXECUTIVE OFFICER

THE MICROBAND COMPANIES INCORPORATED

BEFORE THE

UNITED STATES SENATE

COMMITTEE ON THE JUDICIARY

SUBCOMMITTEE ON ANTITRUST, MONOPOLIES AND BUSINESS RIGHTS

MARCH 17, 1988

Mr Chairman, members of the Subcommittee, on behalf of The Microband Companies Incorporated ("Microband"), I would like to thank you for affording me this opportunity to appear before you today. Although executives of Microband have frequently testified before committees and subcommittees of both houses of Congress, this is our first opportunity to appear before your Subcommittee I certainly hope that with today's testimony and in the future Microband will be able to provide constructive information in aid of your continuing efforts to monitor and improve the competitive workings of the communications marketplace

My company is the nation's largest wireless cable operator Microband today provides a single channel of pay television programming to approximately 135,000 subscribers in the New York, Detroit and Washington metropolitan areas Recently, Microband has been able to expand its service offerings in New York and Detroit into multiple channel wireless cable systems, and plans on expanding its Washington system shortly Microband has recently concluded a $72,000,000 00 financing to help fuel this expansion

Simply stated, wireless cable <u>is</u> cable, except that over-the-air frequencies deliver the full complement of broadcast

and satellite-delivered program services to our subscribers [1] Using our state-of-the-art technology, we can deliver our service more rapidly than cable, at a lower cost than cable, with better signal quality than cable, and with greater security than cable

At today's hearing, the Subcommittee is investigating the workings of the marketplace for the retail marketing of satellite-distributed video programming services This is a marketplace that has seen phenomenal change since the coaxial cable industry was largely deregulated two years ago as a result of the Cable Communications Policy Act of 1984 I am sorry to report that the public is not yet enjoying the benefits that the coaxial cable industry promised would flow from the 1984 Cable Act Indeed, the public is far worse off today than it had been prior to the Act Congress unleashed the coaxial cable operators in the expectation that marketplace competition would replace government regulation But Congress did not foresee what has actually happened, the large coaxial cable operators have attempted to frustrate the development of competitive alternatives

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1/ This Subcommittee may be hearing today about the difficulties many broadcast stations have had in securing carriage on coaxial cable systems Coaxial cable systems all over the country that suffer from limited channel capacity are dropping broadcast stations in favor of other services Wireless cable systems have no incentive to engage in such conduct Because we pick broadcast stations up directly at the rooftop, and do use our scarce SHF channels for retransmission, we have nothing to gain by not passing an available broadcast signal to our subscribers Regardless of what ultimately happens to the FCC's must carry rules, Microband's policy is one of "will carry", if the broadcaster provides a VHF or UHF signal to the rooftop, we will carry it through our cable to our subscribers

In addition, unlike many coaxial cable systems, Microband's wireless cable systems will carry all VHF and UHF stations on their assigned channels In other words, a Microband subscriber in New York desiring to watch the broadcast station that transmits over VHF Channel 2, WCBS-TV, will tune to Channel 2 on our channel selector box Our system has been designed so that the channels below 70 are reserved for the VHF and UHF stations, while the satellite services we market will appear on channels 70 through 99

For some time now Congress, the Federal Communications Commission, the National Telecommunications and Information Administration and other regulatory bodies have been receiving thousands of complaints from retailers to home satellite earth station owners and from satellite master television antenna operators about their inability to secure the rights to market the various name-brand programming services the public wants on terms that are fair and reasonable Unfortunately, Microband must today add its name to the growing list of companies unable to compete at the retail level on fair and equal terms

My testimony today will focus on the hurdles Microband must leap to compete with coaxial cable operators in the marketing of satellite-distributed video programming to the public Microband has a unique perspective on this marketplace as a result of its seventeen years in the field and its status as the largest of the wireless cable operators I hope that by sharing that perspective with you, Microband can cast a bright light on the practices that have prevented Microband and others in our wireless cable industry from fully and fairly competing with coaxial cable systems in the retail marketing of the name-brand video programming services which the public is anxious to obtain

Since today's hearing marks the first time that wireless cable system operators have appeared before this Subcommittee, it may be helpful if I digress for a moment to describe with greater detail how a wireless cable system functions, and how the industry developed

My guess is that when some of you first heard the phrase 'wireless cable", you viewed it as an oxymoron I can assure you it is not Rather, wireless cable operators combine both wireless, over-the-air technology and coaxial cable technology to

provide a service that is virtually indistinguishable by the consumer from an old-fashioned wired cable service

Again a wireless cable system is a cable system, except that it has eliminated the costly network of wiring that old-fashioned cable systems string or bury between their head-ends and subscribers homes Instead, a wireless cable system uses the Super High Frequency ("SHF") portion of the radio frequency spectrum -- above the VHF and UHF bands which are allocated for standard commercial television -- to transmit satellite programming services from a central transmission point directly to a special antenna mounted on the subscriber's rooftop At the rooftop, the SHF signals are coupled with the locally available VHF and UHF signals and relayed by coaxial cable to a 100 channel selector box atop the subscriber's television set, which box permits the subscriber to conveniently select from among the combined offering of local broadcast signals and satellite program service, the same as he would were he subscribing to a coaxial cable system A diagram of a typical wireless cable system is attached as Exhibit A

While the service we provide is virtually indistinguishable from that of an old-fashioned wired cable system, we do offer subscribers significant advantages Most importantly to those who today have no access to a coaxial cable, wireless cable is available today By eliminating the time consuming process of burying wires below the streets or stringing wires from telephone poles, wireless cable operators can rapidly bring service to the market

Wireless cable can be delivered at a lower cost than coaxial cable The fixed capital costs associated with constructing coaxial cable systems in urban areas are generally high, reflecting the need for extensive underground wiring,

difficulties encountered in hanging cable from congested utility poles, start-up losses arising from financing costs over an extended construction period during which no revenues are generated, and other factors

For the type of coaxial systems contemplated for the markets which Microband intends to serve, it is estimated that the fixed capital costs, including start-up losses, are no less than $300 per home passed Furthermore, experience in urban cable systems has shown that penetration rates -- the ratio of subscribers to homes passed -- are significantly lower in urban areas than in rural and suburban areas At a 25% penetration rate, an initial fixed capital cost of $300 per dwelling passed translates into an average fixed capital cost of $1,200 per subscriber Coupled with a variable capital cost estimated at about $200 per subscriber (for the converter box and installation), the total coaxial cable capital cost of about $1,400 per subscriber is four to five times that of wireless cable

Wireless cable operators deliver a signal as good, if not better, than that provided by today's coaxial cable systems And, our state-of-the-art Zenith scrambling and addressing system gives us better signal security than coaxial cable To quote the General Electric Company

> [Wireless cable] performance can meet and even exceed cable in fundamental performance areas like received signal level, carrier-to-noise ratio and nonlinear distortion products Also, [wireless cable] equipment can provide all of the bells and whistles of a cable system like addressability, scrambling and stereo broadcasts Combining comparable features and improved performance can make

[wireless cable] a very competitive alternative [2]

Cable television had its origins as community antenna television, or CATV, in the 1950's, when small coaxial cable systems were constructed in rural areas where VHF and UHF broadcast signals were too weak for standard residential television antennas to provide good reception For the first two decades of cable television, coaxial systems were little more than relays for television broadcast signals By the early-1970's, however, the very nature of coaxial cable service changed During that period, Home Box Office ("HBO") became the first of the specialized non-broadcast programming services, and drove a demand for coaxial cable service even in urban and suburban regions where viewers already had adequate reception of the broadcast channels, and thus, previously, had no need for cable

Wireless cable had its origins as the Multipoint Distribution Service, or MDS, in the early-1970's In those days, wireless cable systems were effectively limited to a single channel in the SHF band Although these systems were limited to a single channel, they were able to forge market niches in these urban and suburban areas by delivering all that many consumers really wanted, HBO or a similar movie service to supplement the readily available VHF and UHF signals [3]

2/ Attached as Exhibit B to this testimony is the report, "Wireless or Wired Cable Comparable Technologies?", prepared by the General Electric Company from which this quote is taken This report describes in detail the technical benefits of wireless cable

3/ In papers submitted to the FCC, Microband has demonstrated that several coaxial cable operators warehoused the single SHF channel available prior to 1983 in areas where they were, or hoped to be, the coaxial cable franchisee As a result, the development of competitive wireless cable systems was preempted in many markets

By the late-1970's, however, numerous other satellite-delivered programming services began to gain name-brand recognition from the public, and became de rigueur for wired cable systems Microband recognized that wireless cable could continue to provide a serious alternative to coaxial cable in urban areas, but only if it could provide its subscribers with the name-brand programming services that were becoming synonymous with the term "cable" In order to deliver those services, more SHF channels were necessary

Acting on proposals by Microband and others, in 1983 the FCC dramatically altered its rules and policies to make multiple channel wireless cable a possibility As a result of these rulemakings, up to 33 SHF channels are now available in each major market for use by wireless cable operators, supplementing the locally available VHF and UHF channels

If the Subcommittee comes away from today's hearing with nothing else, Microband hopes that it will come away with an appreciation that, to the consumer, wireless cable systems, coaxial cable systems, home earth stations and satellite master antenna systems are all in the same product market -- the retail distribution of satellite programming services Subscribers buy programming, not technology [4] Our experience in the marketplace confirms that so long as a retailer can provide the diversity of popular programming the public wants, and can provide that programming at a fair price and with a high quality of customer service, that retailer will achieve a market niche, regardless of how its programming is delivered

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4/ Note one critical difference between wireless cable and coaxial cable systems Because we do not retransmit local broadcast signals, but instead pick them up at the subscriber's rooftop, we view ourselves as complementary to, and not competitive with, the broadcast industry

In short, so long as wireless cable operators such as Microband have the name-brand programming the public demands, we can provide a service the public wants, when the public wants it, with a signal quality equal to, if not better than, that of coaxial cable, at prices that are below those charged by coaxial cable operators With that in our favor, only an inability to acquire the name-brand programming we need on fair and reasonable terms can stop wireless cable from serving as a viable alternative to the coaxial cable industry

To be sure, the marketplace for the retail distribution of name-brand programming is today dominated by the coaxial cable television industry Indeed, this dominance is so great that it severely hampers the ability of new entrants to gain a foothold

The problem we face, simply stated, is that a few large multiple system owners ("MSOs") now wield enormous power over the program suppliers or are themselves the program suppliers Mergermania has struck the coaxial cable industry like virtually no other sector of American business The big get bigger, and bigger, and bigger Just last week, it was announced that United Artists Communications, Inc and United Cable Television Corp will be merging to create the nation's third largest MSO, and that the new company will be owned in part by Tele-Communications, Inc , the nation's largest MSO Simply because these mega-MSOs control the sole video pipeline into the homes of so many, one or two of them can sign the death warrant for a satellite program service merely by refusing to carry it on their systems

Not only do these mega-MSOs have the power to destroy a program service, but they can exercise that power at little or no cost At the present time, there is a plethora of satellite-delivered program services, but a dearth of channel capacity on

most systems As a result, most cable systems are free to replace program services at will, as there is always a substitute waiting in the wings Indeed, things have gotten so bad that, according to Broadcasting magazine's November 23, 1987 issue, "in the past 18 months, cable operator ownership and equity participation -- the footsoldiers of vertical integration -- have rapidly become the quid pro quo for launching new services "[5]

I believe that Microband s inability to secure programming from certain suppliers on equitable terms is a direct result of the horizontal concentration and the vertical integration of the coaxial cable industry Many of the name-brand program suppliers are now owned by the mega-MSOs And, the few remaining independent program suppliers all know the enormous power the mega-MSOs have, and they all know that they can curry favor with those mega-MSOs by refusing to deal with competitive wireless cable operators

For Microband's wireless cable systems to succeed, Microband must have access on fair and reasonable terms to the name-brand program services demanded by the public It cannot be repeated often enough that consumers buy programming, it is the essence of the marketplace in which we compete Without the *name-brand programming*, we simply *cannot* compete with coaxial cable systems

Obtaining that name-brand programming has been far from easy Microband has been refused access to certain programming, has been offered other programming only at prices and on terms so onerous as to make the offer tantamount to no offer at all, and

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5/ A copy of the article from which this quote is taken, and which describes in more detail the growing vertical integration of the cable industry, is attached as Exhibit C

has had to accept some programming under conditions that unreasonably discriminate against wireless cable.

Mr Chairman, the Subcommittee will hear today from the Wireless Cable Association about the difficulties its members are encountering in securing any rights to market popular programming services Therefore, I will keep my comments on that point brief Although Microband has made some headway, even today many of the most popular programming services, including Showtime, The Movie Channel, The Disney Channel, Cinemax, Festival, The Discovery Channel, USA Network, Bravo, American Movie Classics, Lifetime, Cable Value Network and The Arts & Entertainment Channel still refuse to authorize us to retail their products

Somehow I get the feeling that these program suppliers all have the same antitrust lawyer counseling them By and large, they never outright refuse to sell to us, rather, they continually stall I've lost count of how many times a program supplier has advised Microband that it is "reconsidering" its policy regarding sales to the wireless cable industry They reconsider, and reconsider, and reconsider But, they never decide to sell

Based on our discussions with these programmers and with the program services that ultimately have entered into relationships with Microband, we believe that these refusals to deal are the result of express or implied pressures exerted by coaxial cable operators that are either large customers or owners of the programming services

Microband's experience with the Black Entertainment Network ("BET") represents a typical absurd example of anticompetitive conduct After much effort, Microband has

secured the right to market BET in Detroit and in New York However, Microband has been refused permission to retail BET in Washington! That may sound a bit odd, until I add one more piece to the puzzle, those who control the Washington coaxial cable franchisee also control BET BET has refused to explain why it will not allow Microband's wireless cable system in Washington to carry BET That is not surprising There simply is no valid excuse for depriving the residents of the nation's capital access to BET through wireless cable, especially since coaxial cable has barely penetrated the city

Our experiences with the Turner Broadcasting System are equally illustrative of the effect that cable investment can have on the programmers For years, Turner Broadcasting System urged us to carry CNN on our wireless cable systems once we began operations It is probably no coincidence that, once a consortium of cable operators (no doubt emboldened by the 1984 Cable Act) invested in Turner and began to take an active role in the management of the company, CNN decided it would enter into no new affiliation agreements with wireless cable operators As a result, our subscribers in New York and Detroit (many of whom are not served by coaxial cable) are being deprived of this unique program service

As unfortunate as Turner's about-face on CNN has been for the public, the recent news emanating from Atlanta regarding Turner Network Television ("TNT") is even worse Recent reports indicate that the consortium of cable operators that now controls such decisions for Turner has agreed to permit the launch of a new, satellite-distributed network by Turner Not surprisingly, that new network will be available only to coaxial cable systems, and not to wireless cable operators

This announcement is doubly troublesome for Microband,

for it suggests that a significant amount of the most popular programming on superstation WTBS will be shifted to TNT Because WTBS is today distributed by an independent common carrier, it is currently available to Microband and the rest of the wireless cable industry I have serious doubts that WTBS will be of much interest to our subscribers once the coaxial cable operators who dominate Turner strip WTBS of its most popular fare in order to bolster the cable-only TNT service

Indeed, there is some doubt in my mind as to how long the wireless cable industry will even have access to WTBS Just last month, Tele-Communications, Inc , the largest coaxial cable operator in the nation, applied to the Federal Communications Commission for permission to acquire control over the carrier that distributes WTBS to us Unless the FCC acts to assure our continued access to WTBS, our subscribers may soon lose access to that programming, too

I mentioned before that I thought most program services used the same antitrust lawyer, one who counsels delay On second thought, maybe there is a second antitrust lawyer out there, one who advises programmers to make wireless cable operators offers that include such onerous terms and conditions, the offers cannot practically be accepted Recent events involving our Detroit and New York wireless cable systems are indicative

One of the most popular types of programming services is the regional sports network In Detroit, Pro Am Sport Systems ("PASS") has exclusive rights to distribute certain Tigers baseball games, Piston basketball games, and Red Wings hockey games, among others When Microband recently met with PASS to negotiate an affiliation agreement that would permit us to market that name-brand programming to our subscribers in Detroit (a

substantial number of whom have no access to coaxial cable), we were told in no uncertain terms that we would have to purchase those rights from Barden Cablevision, the cable company which holds the Detroit franchise and our competitor PASS would not sell to us directly PASS had invited Barden to that meeting, and Barden made it quite clear that we would have to pay more for the program service than Barden does In addition, Barden insisted upon other onerous terms and conditions Although PASS has such tremendous marquee value that we may have no choice but to accede to Barden s demands, PASS's refusal to deal, coupled with Barden's control over the programming, is certain to have adverse financial implications for us

The situation is not much different in New York City, where SportsChannel holds exclusive contracts for the vast majority of the Yankees and Mets baseball games, Islanders hockey games, Nets basketball games and New York Racing Association thoroughbred racing SportsChannel's parent is a coaxial cable company, Cablevision Systems Corporation, which, through a subsidiary, has the sole coaxial cable franchise for large portions of New York City which Microband also serves Through this corporate chain, our coaxial cable competitor in the retail market has absolute control over whether Microband can provide residents of the New York metropolitan area (much of which is uncabled) with access to events to which SportsChannel has acquired exclusive rights

Not surprisingly, SportsChannel will not provide its name-brand programming service to Microband unless we enter into a contract with terms more onerous than those imposed on coaxial cable companies -- terms the coaxial cable companies would be unwilling to agree to if offered Microband simply cannot accept those terms As a result, our subscribers are denied access to the exclusive sports programming carried by SportsChannel

Other programming services refuse to deal with us on a basis which keeps our programming costs competitive with those offered to similarly situated coaxial cable systems We must pay for Headline News, which is generally available free of charge to coaxial cable systems The Christian Broadcasting Network has quoted us a rate twice that of its standard cable rates Coaxial cable systems are given VH-1 at no charge if they carry its sister service, MTV Microband has been asked to pay for VH-1, even if it carries MTV And, Microband must pay more for MTV than its coaxial cable competitors In effect, Microband pays more than double the cost of the MTV/VH-1 package in comparison to the rates charged coaxial cable systems Our rates for ESPN and BET are also higher than the standard coaxial rates

Our contract with ESPN also restricts our ability to market that service in certain neighborhoods within our coverage area ESPN limits our marketing efforts only to residents in specified areas where the local coaxial cable company has not yet constructed any part of its system

This pattern of protection of coaxial cable companies has a clear anticompetitive effect. We want to market quality programming at competitive prices -- but our coaxial competitors in the retail market appear to control the programmers' product, prices and market area, thereby frustrating our efforts to compete and serve the public

Mr Chairman, the public needs your help Legislative action is essential to assure that wireless cable and other technologies have an opportunity to compete with coaxial cable systems in the marketing of the name-brand programming services

Last week, the FCC released its final report on the competitive workings of the market for retailing satellite pro-

gramming to home satellite dish owners In that report, the FCC concludes that, to the extent problems in the retail marketplace stem from coaxial cable market power, the appropriate solution is to address that market power, rather than to regulate the program suppliers

In a perfect world, I would agree with that conclusion Unfortunately, it is far too late in the day for the approach suggested by the Commission There has already been too much horizontal concentration and vertical integration The programming services must be regulated because, absent regulation, they are unable to resist the economic power and control the coaxial cable operators exert today

Should coaxial cable operators be ultimately barred from owning programming services? I think so Should limits be placed on the number of subscribers a coaxial cable MSO can control? I think so But it will be quite some time before such restrictions can be imposed, and the necessary divestitures consummated Until then, the only way in which wireless cable and other alternative technologies can be assured a niche in the existing marketplace is for the Congress to provide a mechanism that guarantees that programmers do not discriminate on the basis of technology

Since the Cable Communications Policy Act of 1984, coaxial cable subscribers across the country have suffered rate increases, deteriorating service and capricious programming decisions Of course, those coaxial cable subscribers are lucky, at least compared to the citizens of major urban areas such as Cleveland, Detroit, New York and Washington, who today have no access to many name-brand programming services

Maybe the time has come to remind the monopolistic cable

industry that they were once in our position, of when they fought a broadcast industry which held all the cards Now that the coaxial cable MSOs are fat and rich, they cannot be allowed to run rough shod over the public interest It is obvious that the big bully doesn't want us to play on his field

Competition is good, it is basic to our free enterprise system The 1984 Act was premised on the development of a competitive retail market for the distribution of programming to the public Absent legislation that guarantees alternative technologies full and fair access to that programming free from the anti-competitive conduct of coaxial cable, there will be no competitive alternative to coaxial cable Absent legislation, coaxial cable's stranglehold on the retail market can only tighten

Thank you

EXHIBIT A

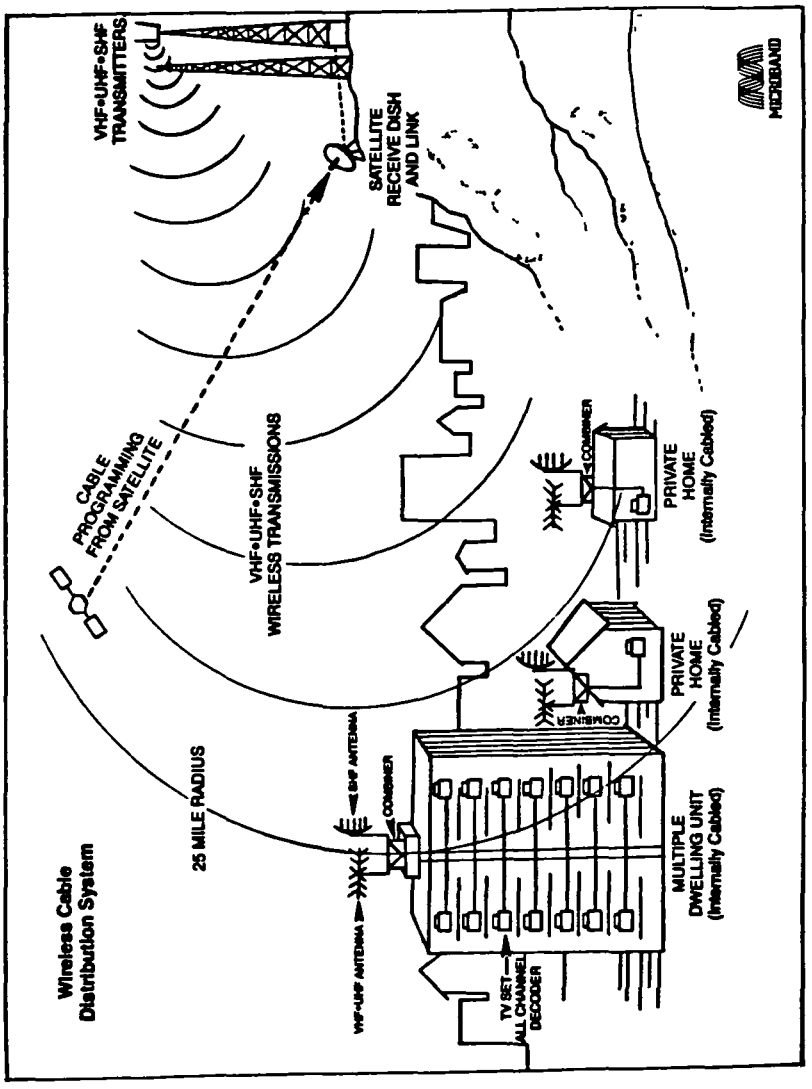

Wireless Cable
Distribution System
25 MILE RADIUS
VHF-UHF ANTENNA
SHF ANTENNA
COMBINER
TV SET
ALL CHANNEL
DECODER
MULTIPLE
DWELLING UNIT
(Internally Cabled)
PRIVATE
HOME
(Internally Cabled)
PRIVATE
HOME
(Internally Cabled)
COMBINER
COMBINER
CABLE
PROGRAMMING
FROM SATELLITE
VHF•UHF•SHF
WIRELESS TRANSMISSIONS
SATELLITE
RECEIVE DISH
AND LINK
VHF•UHF•SHF
TRANSMITTERS
MICROBAND

EXHIBIT B

Wireless or Wired Cable, Comparable Technologies?

By George Harter
General Electric
Comband Division

Can the performance of a microwave Multichannel Multipoint Distribution Services (MMDS) meet or exceed cable system performance? The answer is yes MMDS performance can meet and even exceed cable in fundamental performance areas like received signal level, carrier-to-noise ratio and nonlinear distortion products. Also, MMDS equipment can provide all of the bells and whistles of a cable system like addressability, scrambling and stereo broadcasts Combining comparable features and improved performance can make MMDS a successful compliment to an existing cable system or a very competitive alternative

Performance

To begin, let us define a typical MMDS and cable system as shown in Figure 1 The MMDS system will utilize an omnidirectional transmitting antenna mounted 500 feet above ground level. For simplicity we will assume a constant receive antenna height of 20 feet and a flat earth, realizing the farthest practical receive site distance will be limited to approximately 40 miles by the radio horizon The detailed characteristics of the transmit and receive site equipment are listed in Table 1.

The cable system design is simple and consists of a series of feedforward trunk amplifiers with a generous 2600' of separation Each trunk amp breaks off into feeder legs consisting of a bridger amplifier and two line extenders The performance levels at the output of this second line extender will be compared with the MMDS performance levels at the block downconverter output. The characteristics of each of the amplifiers are listed in Table 2

Using the systems described above, the C/N was calculated for distances out to 40 miles (80 trunk amplifiers) and is shown in Figure 2. The perturbations in MMDS C/N from .5 to 1.5 miles out is caused by the elevational pattern characteristics of the transmitting antenna Now, 80 trunk amplifiers may not be practical for cable system operation, but 40 miles of coverage area certainly is practical for MMDS operation. As you can see from Figure 2, the MMDS system C/N with only 10 watts of transmitter output power exceeds the cable system performance out to a distance of approximately 28 miles (57 trunk amplifiers). Increasing the transmitter output power to 20 or 100 watts can potential increase the C/N margin even further.

Figure 2 describes the ideal situation where the C/N is only limited by the signal level received at each receive site For systems of 2 to 16 channels in size this level of performance is quite practical. However, when the number of channels increases to beyond 16, the downconverter dynamic range will typically limit the maximum allowable received signal level and thus will be the controlling factor for C/N This is especially true for clear line-of-site receive sites out to distances of 20 to 25 miles from the transmitting antenna.

Likewise, the downconverter dynamic range will usually be the controlling factor for the system nonlinear distortion performance The architecture of the MMDS transmitting system is optimized for minimum distortion generation An individual transmitter is used for each channel and channels are combined through the use of passive

waveguide combiners. Typical crossmodulation and intermodulation numbers of -60 db are very typical at the output of the transmitting antenna(s) Therefore, the downconverter is the only active element in the system handling the combined power of all channels Because of this, the downconverter input level must be kept within the specified dynamic range to insure optimum intermodulation and crossmodulation performance (typically -55 to -60 db) This adjustment of received signal level will ultimately affect the C/N ratio

Cable has a much more severe problem with nonlinear distortions because of the number of active devices handling all of the video channels Crossmodulation, intermodulation and compoaite triple beat will worsen through every amplifier The major contributor to nonlinear distortions in a cable system are the feeder lines containing the bridger amplifiers and line extenders. These amplifiers typically have 20 to 30 db worse distortion figures than the trunk amplifiers Because our model of a cable system contains only two line extenders and one bridger amplifier per trunk amp, the crossmodulation calculations result in excellent performance for both cable and MMDS However, unlike MMDS, the potential for distortion products to increase grows as a cable system expands

Limitations

As described above, MMDS can have significant performance advantages over cable However, there are limitations placed on MMDS because it is an over-the-air technology. Because of the frequency of the MMDS transmissions (2.1 to 2.7 GHZ) it is essentially a line-of-site technology. Receive sites with totally or partially obstructed views of the transmitting antenna may have tremendous variations in received signal strength Receive sites surrounded by foliage may experience large signal level fluctuations as the seasons change It is essential to insure clear line-of-site between transmit and receive sites in order to obtain consistent performance at all times.

However, these problems with terrain and obstructions can be managed There are signal strength contour studies available which will predict the amount of loss an MMDS operator can expect from terrain By combining these studies with intuitive reasoning regarding other structures in the propagation area and foliage, an MMDS operator can predict his coverage area very accurately

Other Advantages

Not only can MMDS offer performance advantages over cable, but also increased system reliability. Since there is no closed distribution system, the only equipment concerns are at the transmit site and the subscriber's home The current design trend for MMDS transmitting equipment is away from tube technology and towards solid state devices. Solid state technology is more reliable and less power consuming

The receive site antenna and downconverter are designed to reside on the subscriber's roof in a variety of weather conditions with excellent reliability. However, the potential weak link in the receive site installation can be the interconnections from the downconverter to the antenna and into the subscriber's home Care must be taken to insure all connections are sealed and weather tight. The ingress of moisture into these interconnections can have considerable impact on received signal quality.

Another significant advantage to MMDS is the speed at which a system can be built Once the construction of the system begins, it is not unusual to be ready to install subscribers 1 to 3 months afterwards This is significantly better than the typical start-up times for a cable system

Bells and Whistles

Currently available MMDS equipment also offers all of the operational features of cable systems and then some Signal security, addressability, stereo compatibility and spectrum space for ancillary data services are all available in MMDS.

Security wise, both audio and video scrambling techniques are available Current techniques consist of video inversion, sync suppression, bandwidth compression and combinations of these.

Addressability is performed through the use of in-band data transmission. Current techniques involve transmission in either the video or audio paths Along with addressability come features like pay-per-view capability, flexible tiering and combining of programming, channel mapping and increased deterrents to pirating of signals and converters

Since most MMDS equipment is designed to handle the additional audio bandwidth for BTSC stereo, the system is stereo transparent from the beginning With the addition of stereo encoders at the transmitter site and decoders in the home, subscribers can enjoy excellent quality stereo sound

Conclusions

A well designed and well managed MMDS system can exceed cable system performance in the fundamental areas which significantly impact subscriber satisfaction. Through careful and detailed system design, MMDS can achieve an excellent reputation as a high quality and high performance broadcast service. Also, since MMDS operators do not have an expensive distribution system to maintain, more attention can be paid to customer service and satisfaction However, it is important for an MMDS operator to understand the technical capabilities and limitations of his system With this understanding, an MMDS operator can build a successful and profitable business

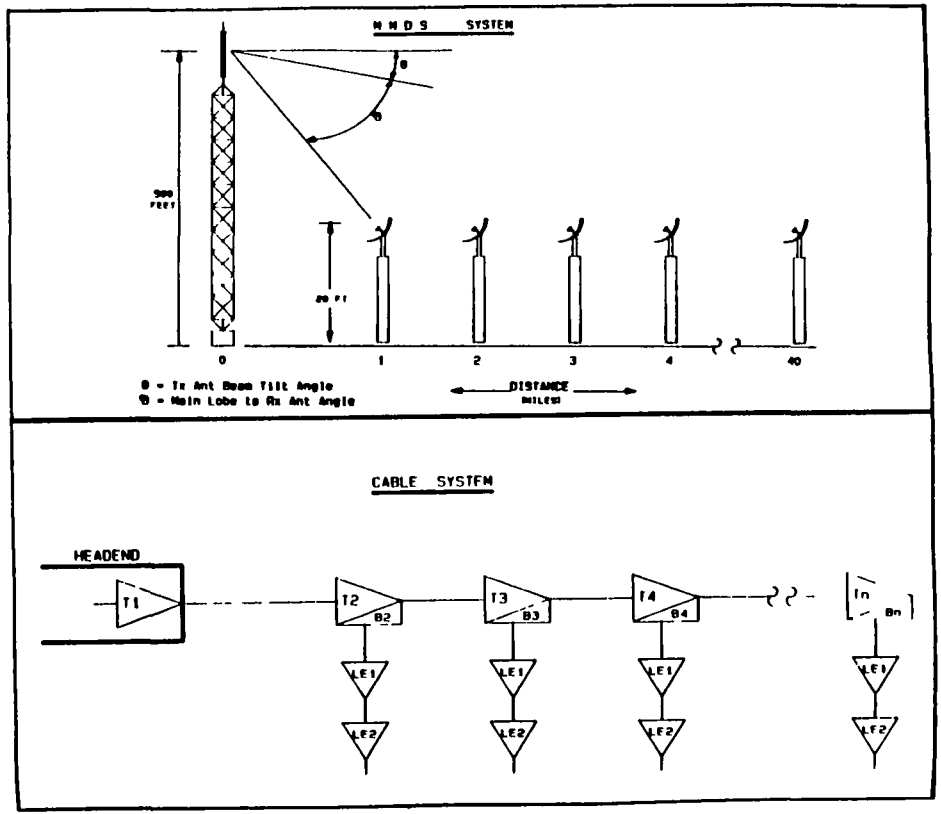


Figure 1. MMDS and cable system architectures

Freq (GHz) =	2.6
Tx Pwr (watts) =	10
Combining Losses (db) =	3
Tx Ant Gain (dbi) =	13
Rx Ant Gain (dbi) =	21
BDC Gain (db) =	20
Rx Ant TE (Kelvin) =	150
BDC NF (db) =	5 00
Tx Ant Height (ft) =	500
Tx Ant Tilt (degrees) =	0 5
Typ Rx Ant Height (ft) =	20

Distance (miles)	Path Loss (db)	Rx Level (dbm)	C/N (db)	Tx/Rx Ant Angle (degrees)	Elevation Pattern Attn (db)
0.5	98 88	-28.88	55.69	-9.80	-21
0.75	102.40	-26.90	57.67	-6.41	-15.5
1	104.90	-30.40	54.17	-4.69	-16 5
1.5	108.42	-21 22	63.35	-2.97	-3.8
2	110.92	-21.42	63.15	-2.10	-1.5
3	114 44	-23 94	60.63	-1.24	-0.5
4	116.94	-26.19	58.38	-0.80	-0 25
5	118.88	-28.13	56.44	-0.54	-0 25
6	120.46	-29.46	55.11	-0.37	0
7	121.80	-30.80	53.77	-0.24	0
8	122.96	-31.96	52.61	-0.15	0
9	123 98	-32 98	51.59	-0.08	0
10	124 90	-33.90	50.67	-0.02	0
15	128 42	-37.42	47.15	0.15	0
20	130 92	-39.92	44.65	0.24	0
25	132 86	-41.86	42.71	0.29	0
30	134.44	-43.44	41.13	0.33	0
35	135.78	-44.78	39.79	0.35	0
40	136.94	-45.94	38.63	0.37	0
45	137.96	-46.96	37.61	0.38	0
50	138.88	-47.88	36.69	0.40	0

Table 1. MMDS system characteristics used in analysis.

Trunk Amp #	Distance (miles)	Trunk Amp C/N	Line Ext C/N
1	0.49	59.10	54.49
2	0.98	56.09	52.20
3	1.48	54.33	52.20
4	1.97	53.08	51.40
5	2.46	52.11	50.72
6	2.95	51.32	50.13
7	3.45	50.65	49.61
8	3.94	50.07	49.15
9	4.43	49.56	48.73
10	4.92	49.10	48.35
15	7.39	47.34	46.82
20	9.85	46.09	45.70
25	12.31	45.12	44.80
30	14.77	44.33	44.06
35	17.23	43.66	43.43
40	19.70	43.08	42.88
50	24.62	42.11	41.95
60	29.55	41.32	41.18
70	34.47	40.65	40.53
80	39.39	40.07	39.97

Trunk Amp	
Gain =	26.00
NF =	10.00
C/N =	59.1
Bridger Amp	
Gain =	21.00
NF =	9.50
C/N =	59.60
Line Ext	
Gain =	20.00
NF =	8.00
C/N =	62.1

Table 2. Cable system characteristics used in analysis.

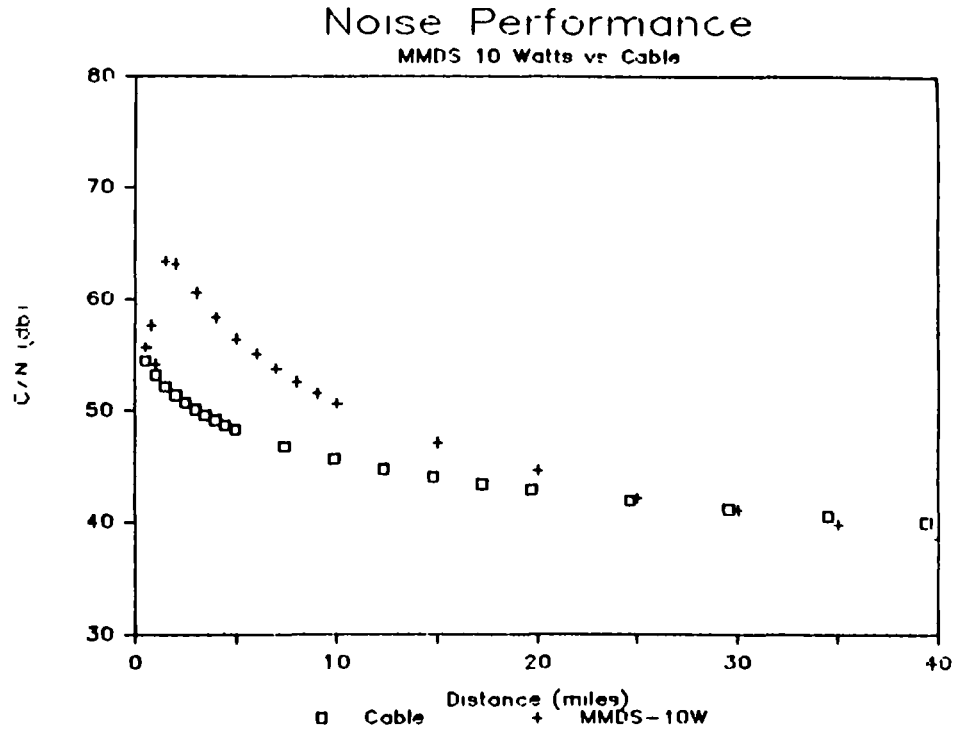
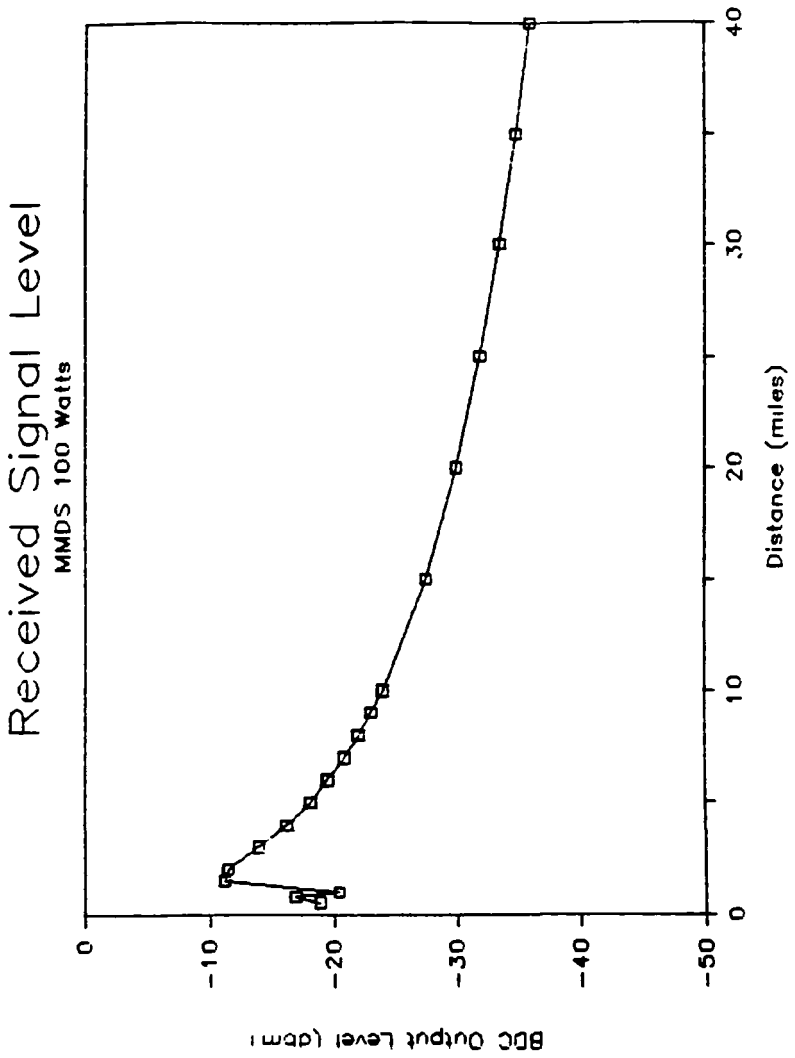
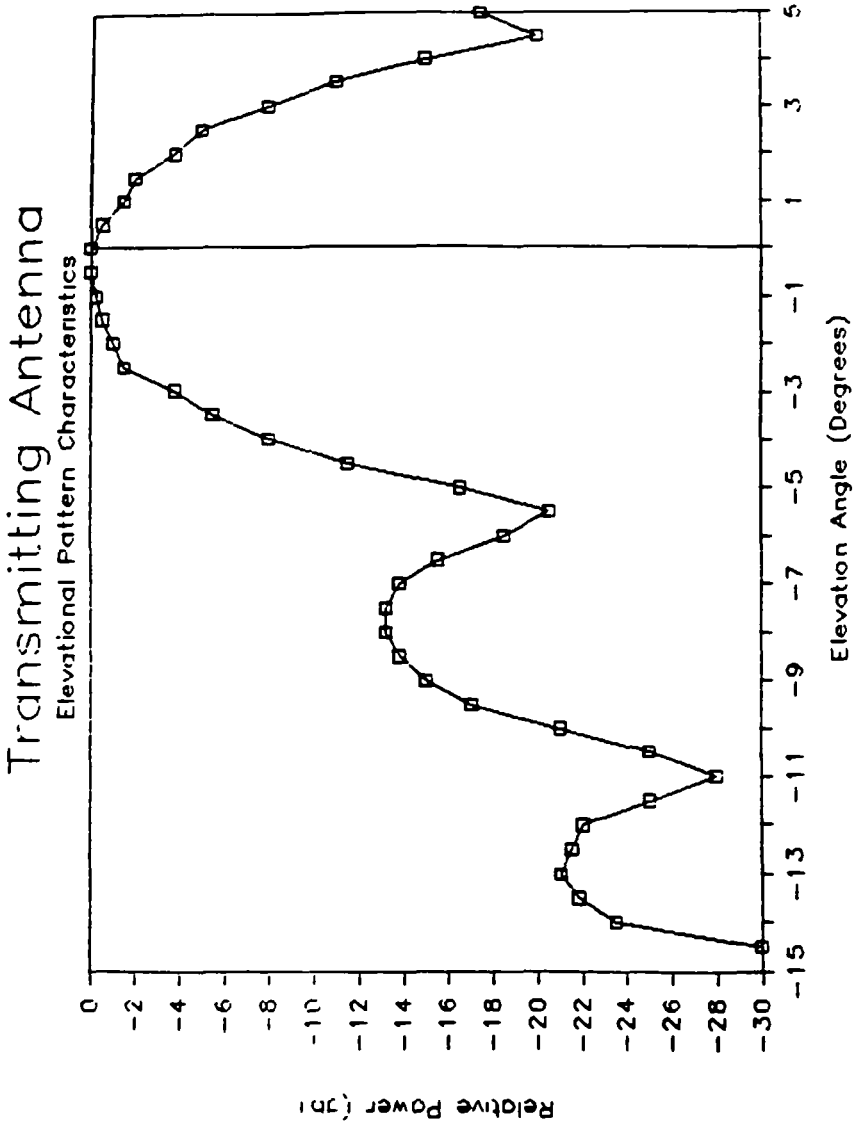


Figure 2. 10 watt MMDS versus cable carrier-to-noise performance.

Appendix A.
MMDS received signal level at 10 and 100 watts of transmitter power



Appendix B
Transmitting antenna elevational pattern characteristics



Appendix C.
MMDS performance with 100 watts of transmitter power

Freq (GHz) =	2.6
Tx Pwr (watts) =	100
Combining Losses (db) =	3
Tx Ant Gain (dbi) =	13
Rx Ant Gain (dbi) =	21
BDC Gain (db) =	20
Rx Ant TE (Kelvin) =	150
BDC NF (db) =	5 00
Tx Ant Height (ft) =	500
Tx Ant Tilt (degrees) =	0.5
Typ Rx Ant Height (ft) =	20

Distance (miles)	Path Loss (db)	Rx Level (dbm)	C/N (db)	Tx/Rx Ant Angle (degrees)	Elevation Pattern Attn (db)
0.5	98 88	-18 88	65 69	-9.80	-21
0.75	102 40	-16 90	67 67	-6 41	-15 5
1	104 90	-20.40	64 17	-4 69	-16.5
1.5	108 42	-11 22	73 35	-2 97	-3 8
2	110.92	-11.42	73 15	-2 10	-1 5
3	114 44	-13 94	70 63	-1 24	-0 5
4	116 94	-16 19	68 38	-0 80	-0 25
5	118 88	-18 13	66 44	-0 54	-0 25
6	120.46	-19.46	65 11	-0 37	0
7	121 80	-20.80	63 77	-0 24	0
8	122 96	-21 96	62.61	-0 15	0
9	123.98	-22 98	61.59	-0 08	0
10	124 90	-23.90	60 67	-0 02	0
15	128 42	-27.42	57.15	0 15	0
20	130 92	-29 92	54 65	0.24	0
25	132 86	-31 86	52 71	0.29	0
30	134.44	-33.44	51.13	0.33	0
35	135 78	-34.78	49.79	0.35	0
40	136.94	-35.94	48.63	0.37	0
45	137.96	-36 96	47.61	0.38	0
50	138 88	-37.88	46.69	0.40	0

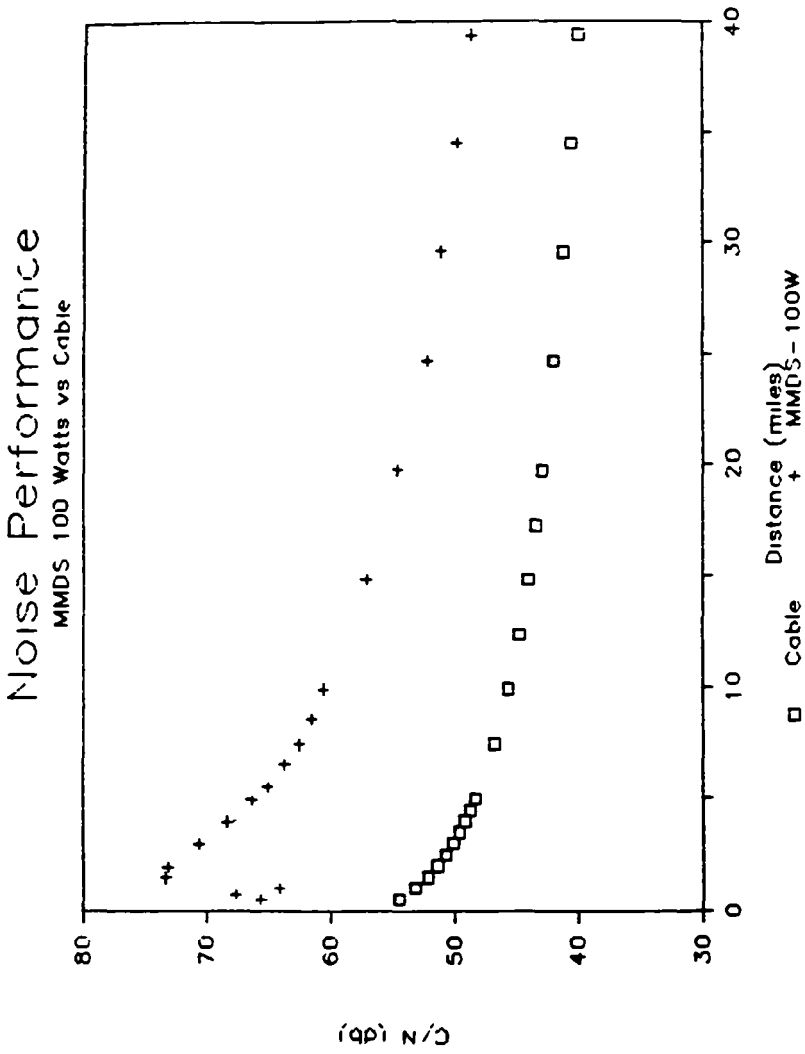

Noise Performance
MMDS 100 Watts vs Cable
C/N (dB)
80
70
60
50
40
30
0
10
20
30
40
Distance (miles)
Cable
MMDS-100W

EXHIBIT C

Vertical Integration

The business behind the boom in cable programing

The setting is the Denver office of the chief executive of a major MSO On the other side of the desk is some one with a "great idea" for a new ca ble programing service
Programer It's a goldmine
CEO Mmmmm
Programer Well we'll give opera tors an equity interest
CEO Mmmmm
Programer OK we ll give you 51% ownership but not a dime more
CEO Mmmmm
Programer OK OK you can have 80% but I ve got to have 20% to meet payroll

An exaggeration? Yes But in the past 18 months cable operator ownership and equity participation—the foot soldiers of vertical integration—have rapidly be come the quid pro quo for launching new services

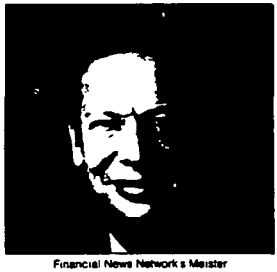
There are a number of reasons why this method of financing/distribution has come into vogue Cable operators see equity participation as a way to insure that services they feel their subscribers want will see the light of day It gives cable operators greater or in some cases total control over the service As industry proponents call for cable-exclu sive programing to differentiate them selves owning programing services takes on more allure For many years and to a lesser extent today the cable industry has been criticized for relying on warmed over network or syndication reruns Flush with cash from the com pletion of most system construction and freed from local rate regulation cable operators have the money to plow back into programing And they are using some of that money to take equity stakes in programing services

But although cable operators look at equity as a way to acquire a wider range of programing and much that otherwise might not be produced critics see the same development as an attempt by ca ble operators to hoard product and an example of an insensitivity to exclusiv ity arrangements that have helped cable prosper

Programers who have tried to launch services in the past 18 months have found the shelf space dwindling Chan nel capacity is as tight today on cable systems as it was in the early 80 s Al-

though the situation is expected to ease somewhat by the early 1990 s as the last of the major urban builds are finished and system upgrades continue cable op erators are wondering how many more services can be added since in the end consumers wind up paying for them

Today s capacity crunch which threatens to postpone the launch of the



Financial News Network s Meister



Fashion Channel s Herman



ATC's Dressler

one of the industry s most solidly backed services Turner Broadcasting System s Turner Network Television is causing potential programers to offer eq uity stakes to operators to insure car riage Most of the equity ventures that have launched in the last year and a half have a telemarketing feature such as the Travel Channel The Fashion Channel and the QVC Network But other serv ices have launched although on a much lower scale without equity offerings the Consumer Discount Network and Movietime for example You TV and Teleworld are also on the drawing boards for launch next year but neither came out of the blocks with equity par ticipation ast part of its company struc ture

An equity deal is wonderful for in itial distribution and it secures a lot of different fronts says Sheri Herman vice president sale and marketing Fashion Channel which launched with 65 equity cable operator partners But work still has to be done on a day to-day basis to make sure it s a working part nership If you don t have that the best equity deal in the world won t matter

David Meister Financial News Net work director has launched services with and without equity In reality what you have no matter what the piece of paper between the two entities is an inherent partnership in the promotion of a cable programing service to the con sumer says Meister In that process a deal is going be made whether you call it equity revenue sharing affiliate fee commission or whatever If it isn t a rea sonable and fair deal the whole thing breaks down

Cable operators although coming from a different perspective also find that the equity-carriage element is a very important part but that aspect alone won t carry a service Still some opera tors are more bullish than others when it comes to ownership or equity participa tion Bob Redella vice president pro graming and investments for Cox Cable lists what s important for getting a new service off the ground All the pieces really have to fit The service has to be quality It has to have a continuous flow of programing It has to have good man agement It has to have the necessary finances and finally it has to have car riage Cox has taken a strong position in program service ownership through the Discovery Channel Home Premiere Television and its own home shopping service America s Shopping Club But

the key question in launching a new service said Redella whether equity or ownership stakes are involved is Is the programming of quality value for the consumer?

Taking a bit more cautious approach is American Television & Communications the second largest MSO We are not out looking for equity positions in cable services said Fred Dressler vice president of programing We understand why people are offering equity but it s our position that we d rather make decisions on the value of the product and not the value of the investment

While we're on the subject

An extended discussion on the approaches of various MSO s to owner ship in program services and an examination into why programers offer equity in order to gain distribution continues on page 66 A list of the principal regional sports programing services many owned by cable MSO s appears on page 67

Who owns what with whom in cable networking

Basic services

Network	Subscribers	Ownership
ESPN	44 300	Capital Cities/ABC (80%) RJR Nabisco (20%)
WTBS	41 642	Turner Broadcasting (Ted Turner 65% Time Inc **(ATC)** 11 5% **TCI** 10 1% **UA** 4 8% **United** 3 2% **Warner** 1 8%)
CNN	41 642	Turner Broadcasting (Ted Turner 65% Time Inc **(ATC)** 11 5% **TCI** 10 1% **UA** 4 8% **United** 3 2% **Warner** 1 8%)
USA	39 000	MCA (50%) Paramount (50%)
MTV	37 100	MTV Networks Inc **(Viacom)**
Nashville	36 000	Gaylord Broadcasting
CBN	35 834	Christian Broadcasting Network
Nickelodeon	35 800	MTV Networks Inc **(Viacom)**
Lifetime	32 300	CC ABC (33%) **Viacom** (33%) **Hearst** (33%)
Weather Chan.	31 053	Landmark Communications (former parent of TeleCable)
Nick at Nite	31 000	MTV Networks Inc **(Viacom)**
Headline News	28 352	Turner Broadcasting (Ted Turner 65% Time Inc **(ATC)** 11 5% **TCI** 10 1% **UA** 4 8% **United** 3 2% **Warner** 1 8%)
FNN	27 000	Infotech (20%) Dr Earle Brian (15%)
A&E	27 000	CC ABC (33%) NBC (33%) **Hearst** (33%)
Discovery	25 600	**TCI** (14%) **United** (14%) **Cox** (14%) **Group W** (14%) **Newhouse** (14%) management New York Life Co Allen & Co (30%)
C-SPAN	23 000	**Cable operator supported**
VH-1	22 900	MTV Networks Inc **(Viacom)**
WGN	22 481	Tribune Broadcasting
Score	19 800	Infotech (20%) Dr Earle Brian (15%)
CVN	19 000	COMB Co (50%) **18 cable operators** (50%)
BET	15 000	Bob Johnson (51%) BET president **TCI** (16%) **HBO** (16%) **Taft** (16%)
HSN I	13 500	Home Shopping Networks Inc
C-SPAN II	12 500	**Cable operator supported**
Tempo TV	12 500	**TCI** (pending owner)
Telshop	11 000	Infotech (20%) Dr Earle Brian (15%)**
QVC Network	10 747	QVC Network (65%) **Comcast** (14%) **cable operators** (21%)
Inspirational	10 700	PTL Club
Learning Chan.	10 300	Infotech (40%) Appalachian Community Service Network (40%) officers and employes (20%)
WWOR	10 100	MCA
Silent Network	10 100	Silent Network Inc
Video Mall Net.	10 000	Video Shopping Mall (Goodway Marketing 80%)
Trinity	7 200	Trinity Broadcasting Network (nonprofit)
Eternal Word TV	7 100	Eternal Word Television (nonprofit)
Fashion Channel	7 000	Charlie Gee (32%) **85 cable operators** (25%) **TCI** (10 5%) **United** (10 5%)
Country Music Acts	6 700 6 000	Jim Guercio (principal owner) Southern Baptist Convention
Travel Channel	5 700	TWA Marketing (100%) after equity offering TWAM will hold 63% **cable operators** 37%
HSN II	4 200	Home Shopping Networks Inc
Movietime	3 200	Employes (30%) Mabon Nugent & Co SRK Management Loeb Partners and Hallmark (70%)
Shop TV	2 500	JC Penney (63%) STN (37%)
WPIX	2 471	Tribune Broadcasting
Hit Video USA	2 100	Wodlinger Broadcasting
KTVT	1 891	Gaylord Broadcasting
Nostalgia	1 400	**Cooke Cablevision** (9%) **TeleCable** subsidiary has small percentage largest single owners
Liberty	1 049	Liberty Broadcasting Network (nonprofit)
Consum. Disc. II	1 000	Entertainment Marketing Inc
Sky Merchant	1 000	Jones Int l (parent of **Jones Intercable**)
America's Shop.	1 000	**Cox Cable**
Galavision	900	Univisa
Gospel Music Net.	844	GMN Ltd
Motivation Net.	600	Rock Christian Network (nonprofit)
CDN I	526	Entertainment Marketing

Pay services

Network	Subscribers	Ownership
HBO	15 000	**Time Inc.**
AMC	7 000	Rainbow Program Enterprises (**Cablevision Systems**) 50% **TCI** 50%
Showtime	5 300	**Viacom**
Cinemax	4 100	**Time Inc.**
Disney	3 175	Walt Disney Co
Movie Channel	3 000	**Viacom**
Playboy	520	Playboy Enterprises
Bravo	500	RPE (**Cablevision Systems**)
Festival	30	**Time Inc**

Estimate Showtime does not breakout figures for Showtime/The Movie Channel

Pay-per-view services

View Choice I,II	4 000	**Viacom**
Request TV	2 500	**Daniels, United Cable, Comtel, Heritage American,** major motion picture studios
Home Premiere	2 300	**ATC Cox, TeleCable, Continental** and **Newhouse** 20% each
Cable Video Store	40	General Instrument

Bold face in right-hand column indicates cable operator ownership or ownership by company with cable systems in separate subsidiary

CVN—The ownership by **18 cable operators—American, ATC Adam Corp Cablevision, Colony Continental, Cooke Daniels & Associates, Heritage, Newhouse, Rogers Sammons, TCI Times Mirror United Artists, United, Viacom Warner**—is based on percentage of subscribers committed to service

Telshop—FNN is offering equity to **cable operators** (500 000 shares) FNN will retain two million shares

QVC Network—It is presenting owned by the public (65%) **Comcast** (14%) and **cable operators** (21%) When cable operators exercise warrants on 483 000 shares of preferred stock redeemable for 10 shares of common stock, another 4 83 million shares will be added to the approximately 10 million shares outstanding At that point cable operators would own approximately 8 5 million shares of the 15 million shares outstanding or 56% of the service The largest in that group would be **TCI** (2 150 000)

***Fashion Channel—Among the larger cable operators with an equity stake are **Adelphia, American, ATC Barden Bresnan Cablevision Industries, Comtel, Century Colony Commonwealth Cablesystems, Continental Cooke Cox, Daniels, Enstar First Carolina, Harron Hauser Heritage Lenfest, Maclean Hunter Marcus, Media General Newhouse Omega, Post Newsweek, Prestige Sammons, Scripps Howard, Simmons, Susquehanna, Sutton Capital Taft, TeleCable TCI Times Mirror Trlex, UA, United, United Video Cablevision Viacom** and **Warner**

Travel Channel—The final equity offering is to be placed by Dec 1 whereby TWA Marketing will retain 6 million shares and **cable operators** will be offered 3 5 million

Shop TV—It has equity commitments from **38 MSO** s representing 3 3 million subscribers MSO s will receive 1% equity in the service for each million homes they commit to Cable operators who have major stakes in other shopping programs such as TCI United and Comcast are not a part of Shop Among the MSO s whose systems are carrying Shop TV are Cablevision Systems Rogers Continental and Warner

Regional sports ownership

Pay services

Sportschannel New York	1 015 000	**Cablevision Systems**
Home Team Sports	720 000	**Group W**
Prism	400 000	**Cablevision Systems**
Pro-Am Sport Systems	317 000	Thomas Monaghan Detroit Tigers owner
New England Sports Network	210 370	Boston Red Sox (34%) Bruins (34%) **SCI Television** (30%) New Boston TV Inc (2%)

Basic and tier services

Madison Square Garden Network	2 120 000	Gulf & Western
Prime Ticket	1 800 000	Jerry Buss (50%) **Bill Daniels** (50%)
SportsVision Chicago	1 000 000	**Cablevision Systems**
Pirates on Cable	925 000	**TCI**
Sportschannel New England	725.000	**Cablevision Systems**
Home Sports Entertainment	574 400	Houston Sports Association
Sabres Network	500 000	Buffalo Sabres
Utah Jazz	325 000	Utah Jazz and **TCI** joint venture
Arizona Sports Programing Network	170 000	**Times Mirror Cable**
Trail Blazers	143 000	Portland Trailblazers
Sportschannel Florida	35,000	**Cablevision Systems**

Bold face denotes ownership by cable operator or company that operates systems through another subsidiary Subscriber figures are from Paul Kagan Associates

Senator METZENBAUM Thank you, Mr Foster Why do you think programmers have refused to deal with you? Would they not want the largest possible subscriber base?

Mr FOSTER That would seem to be the case, would it not, Mr Chairman You would think that the programmers would want to get as many "eyeballs" viewing them as they possibly could, especially the advertising-supported services However, if they were being pressured by the large MSO's not to introduce another competing technology, then they would not sell to us So, therefore, we believe the programmers are being pressured by the large MSO's

Senator METZENBAUM What is the difference between your concept of delivery and Mr Theroux's concept of delivery?

Mr FOSTER None, sir

Senator METZENBAUM Is it logical to think that the wireless industry could create its own programming?

Mr FOSTER If we were to grow as large as cable—and only when cable began to grow did it acquire its own programming—yes, then we could However, it is going to take millions and millions of dollars to do that We in the old MDS business carried HBO before cable did in some instances, and HBO did indeed utilize our system throughout the years So therefore, we have had access to HBO during that period of time

Senator METZENBAUM Do you still have it?

Mr FOSTER We do still have it We were grandfathered

Senator METZENBAUM Under your system, do you have to go only into one area of the community, or can you go into the affluent and the not so affluent? Cable goes into a particular segment of the community or the totality of the community depending upon the circumstances With your system, can you cover the entire community, or are there limitations on that?

Mr FOSTER We can cover the entire community Our medium, Mr Chairman, is a medium of homes reached not homes passed So therefore——

Senator METZENBAUM I am sorry?

Mr FOSTER Our medium is a medium of homes reached, not homes passed So, therefore, we do not have to wait until a wire goes down the street to serve an individual home We can serve any home within our coverage area, and we do We can serve it in the middle of the Bronx, we can serve it in the middle of Brooklyn, or we can serve it in Westchester We can serve wherever our signal goes, which is roughly a 20-mile radius

Senator METZENBAUM If you do not get the programming of some of the more desirable programming that is now on TV——

Mr FOSTER I am sorry, sir?

Senator METZENBAUM If you do not get, if you are not able to obtain the quality programming that is now available on cable TV, do you see an economic distress signal sometime in the future for the wireless operators?

Mr FOSTER Yes, sir, indeed I do As long as you sell half a loaf, you cannot sell the entire service I could give you one example of that If A&P were to sell only Jane Parker foods and not the name brand foods, I do not know how many people would go to A&P

Senator METZENBAUM Thank you very much

Senator Humphrey?

Senator HUMPHREY Mr Foster—and Mr Theroux may answer as well if he wishes—how do you compete with conventional cable? I mean, are you able to offer services more cheaply or what?

Mr FOSTER Our service is perceived by the subscriber, the consumer in exactly the same way as cable And we offer the tiering, the addressability We will be offering the pay per view We will be offering the volume control on our remote unit We will be offering the wide variety of services So, therefore, we do have a directly competitive service to regular coaxial cable The only difference is that our signal comes down from the roof

As far as price is concerned, our price is expected to be, and is now, approximately 15 to 20 percent less costly to the consumer than cable is

Senator HUMPHREY Why is that? Is it your operating——

Mr FOSTER Our capital cost is about one-fourth the cost of the capital cost involved in stringing cable

Senator HUMPHREY Mr Theroux?

Mr THEROUX We try to compete on a price basis And we can do it partly because our capital costs are lower, but also because the cable monopoly has now priced itself so high that there is plenty of room for us to price beneath them

But beyond that, we also compete by giving a more reliable service In cable, you may be familiar, there are what are called outages The cable just goes off when there is a storm or whatever But our technology is a broadcast technology that has backup power, backup everything We never have outages So that is a benefit that we give consumers

Senator HUMPHREY I take your potential—your signal is line of sight essentially, is that correct?

Mr FOSTER The signal is line of sight except that there are many, many instances where the signal does bounce We will reach in the city of Detroit, for example, about 96 percent of the homes I think that is extending line of sight pretty well

Senator HUMPHREY But your potential is limited pretty much to metropolitan areas

Mr FOSTER No, sir The potential for wireless cable goes throughout the United States Our current focus is in the urban markets because those are the areas where cable has not yet come So, therefore, we are trying to serve the unserved, the people who do not have access to old-fashioned cable Just as one of the former witnesses said, there are people in New York who are looking forward to seeing the Bronx Bombers, but they cannot see them because they don't have access to cable We could deliver it if we had the programming

Senator HUMPHREY Practically speaking, do you expect your industry to expand into the countryside?

Mr FOSTER No, sir, our industry is a niche business It is a business that can provide service to the many, many people who do want service We have not said that we are going to destroy cable in the slightest Cable has said they want to destroy us But we have never even had the temerity to think of destroying cable We are providing a service to people who cannot get it

Senator HUMPHREY That was my earlier question, that your potential is pretty much restricted to metropolitan areas, practically speaking

Mr FOSTER Yes, sir

Senator HUMPHREY In terms of economics

Mr THEROUX Senator, could I say that the members of our wireless cable association are right now, as we speak, planning to begin wireless cable in less densely populated areas as well It is going to be a national event

But let me say that, in the near future, as wireless cable grows, the cost of its equipment and transmitters could go down so far that even the smallest town could have a wireless cable operator This is perfectly possible and I think it will happen in the future

Senator HUMPHREY I see Thank you

Senator METZENBAUM The range generally is about 20 miles?

Mr FOSTER In general, the coverage area is about 20 miles depending on a number of local conditions And I do want to echo what Mr Theroux has said There are many pockets in the United States that do not have cable And there are millions of people in small towns as well as large towns who could have access to the cable programming through wireless cable

Senator METZENBAUM You are in business promptly as soon as you put an antenna on the property?

Mr FOSTER Yes, sir If you want to use that analogy, as soon as we have turned on our transmitters in the community, we immediately pass the homes of the community So therefore, we are in business immediately

Senator METZENBAUM If there is an apartment complex, do you need one antenna or 60 antennas?

Mr FOSTER Our intent is to provide service on an addressable basis to individual apartments within that building One master antenna, in effect, serves the building So, therefore, from the rooftop down we have a minicable system To the roof, it is transmitted by over-the-air transmission But within the building, it is a minicable system

Senator METZENBAUM Thank you very much, Mr Foster

Mr FOSTER Thank you, Mr Chairman

Senator METZENBAUM Mr Kocian, happy to have you with us, sir

STATEMENT OF GEORGE KOCIAN

Mr KOCIAN Thank you, sir Mr Chairman, members of the subcommittee and staff, thank you for the opportunity to appear before you to speak about issues which will impact directly on the ability of Americans to receive television information and entertainment from competitive sources I am the owner of Tiverton Dish Farm in Brinkhaven, OH I am also pleased to be the spokesperson for the Home Satellite Television Association, HSTA

HSTA is the trade association representing consumers and retail sellers of home satellite earth station equipment throughout the country Our members come from nearly all of the 50 States and several foreign countries Our members are extremely concerned

over the future viability of direct-satellite-to-home technology to provide a meaningful service to the public and competition to cable television

Our concern stems from the fact that cable television companies control the lifeblood of home satellite earth stations That lifeblood consists of programming Cable companies own and control all the major nonbroadcast satellite-delivered services

Many years ago the Standard Oil Co antitrust battle was waged because of the enormous amount of power and control that was found to be in the hands of but a few I can see in today's cable industry a similar pattern

When HBO first initiated its scrambling, the introduction was accompanied by a massive campaign of negative advertising fostered by one of the cable industries major trade associations It formed a consortium to ensure that services would be scrambled without delay and would be scrambled in a cable-friendly manner This meant that scrambling would be accomplished in a manner that would not harm the interests of the cable television companies

For example, when HBO and Showtime 2 years ago initiated their scrambling plans, a major portion of that plan was a kickback by each programmer to any cable television company of $5 per month for any sale the programmers made to a dish owner in the cable operator's area After the spotlight was turned on these activities in hearings before the Senate and House, they were abandoned

The technology exists to have real competition between cable television and home satellite earth stations A competition which our members believe would benefit the American consumer by giving choice and acting as an effective regulator of cable prices That robust competition does not exist today because the cable television industry discriminates and controls the source of programming, and opens the tap in such a manner so as not to harm its basic underlying business

Every home satellite earth station owner in a cable area is a potential loss of a cable subscriber whose book value is about $2,000, and thus the incentives exist for major cable television companies and the programming services which they control, to price programming in a cable-friendly manner And that is just what they have done

HSTA is not opposed to scrambling Consumers are willing to pay a fair price for what they choose to watch Satellite dealers expect to be paid for their product Competition exists in the earth station hardware business except decoders There is very limited competition in the marketing of satellite programming One look at the corporate makeup of virtually all of the major satellite programmers shows that they are owned or controlled by either TCI, ATC or Viacom, all cable television multiple-system operators

If discrimination did not exist and competition did, would one logically expect that there would have been no $5 kickback to the cable companies? Or having renounced that kickback, that dish consumers would have had their rates dropped by $5? This did not happen

When TCI, the Nation's largest cable company purchases, for example, CNN for its subscribers, it pays a rate of approximately 2 cents to 17 cents a month When it purchases the identical programming for viewing by home dish owners, it has agreed to pay the rate of $1 per month This is great disparity

And by paying such a higher wholesale rate, TCI ensures that the retail rate to the dish subscriber will be far higher than it would otherwise be By paying this higher rate, TCI, which is the largest purchaser of satellite programming, has also set a floor on what others will be charged for sales to dish owners

This differential cannot be explained by processing charges or backroom billing costs The major independent-of-cable would-be distributors, such as the National Rural Electric Co-op and the Amway Corp , have both stated they would cover those costs in their distribution of programming to home dish owners Yet neither service has been able to contract with the major subscription services for delivery of their programming to home dish owners The reason is because cable is in control

To help resolve these issues, we support passage of S 889 Should real fair competition still not exist for whatever reason, another solution would be the imposition of structural separations Keep cable out of the programming business

Mr Chairman, members of the committee, I would be happy to respond to your questions Thank you

[The prepared statement of Mr Kocian follows]

TESTIMONY OF GEORGE KOCIAN

BEFORE

THE SENATE SUBCOMMITTEE

ON ANTITRUST, MONOPOLIES & BUSINESS RIGHTS

OF THE JUDICIARY COMMITTEE

MARCH 17, 1988

ON BEHALF OF

THE HOME SATELLITE TELEVISION ASSOCIATION

Of Counsel
Brown, Finn & Nietert, Chartered
1920 N Street, N.W., Suite 510
Washington, D.C. 20036
(202) 887-0600

Testimony of George Kocian

Mr Chairman, members of the Subcommittee and staff — thank you for the opportunity to appear before you today to speak about issues which will impact directly on the ability of Americans to receive television information and entertainment from competitive sources I am the owner of Tiverton Dish Farm in Brinkhaven, Ohio I am also pleased to be the Chairman of the Home Satellite Television Association ("HSTA") HSTA is the trade association representing consumers and retail sellers of home satellite earth station equipment throughout the country Our members come from nearly all of the 50 states and several foreign countries We have been pleased to represent interests of consumers and dealers of home satellite earth station equipment before the Congress and the Senate on four separate occasions within the last year

Our members are extremely concerned over the future viability of direct satellite to home technology to provide a meaningful service to the public and competition to cable television Our concern stems from the fact that cable television companies control the life blood of home satellite earth stations That life blood consists of programming Cable companies own and control virtually all the major non-broadcast satellite-delivered services People buy home satellite dishes because they wish to view programming Since the very start of the direct-satellite-to-home transmissions, cable companies sought to prevent the growth of this potentially competitive technology by denying programming to it and, unable to achieve that result, to control its evolution by seeking to ensure that programming to dish owners would only be available in a "cable-friendly" manner

Consumers began purchasing home satellite earth stations in 1979 Today, nearly two million homes receive their television directly from the satellite by means of a home satellite antenna In most cases, those homes lie outside the reach of a full selection of over-the-air television stations or cable television However, in a growing number of

cases, consumers wishing to choose what services they receive and willing to pay a fair rate for such services, look to a satellite dish

When consumers first began purchasing home satellite antennas, the reaction was swift In 1980, then-Congressman Richardson Preyer introduced legislation which would have, had it passed, outlawed the use of home satellite antennas All the major subscription services refused to accept payment from dish owners taking the position that they would only sell to the public through cable companies The situation hasn't changed that much Today, Turner Broadcasting & HBO are still denying access to their new Festival and TNT services to dish owners In 1983, a major cable television multiple-system operator brought suit against the retail seller of home satellite earth stations in Federal Court in Witchita, Kansas, alleging that the sale of home satellite antennas was against the law While the cable system ultimately lost, the dealer went out of business Services such as Home Box Office wrote letters to manufacturers of home satellite equipment alleging that the manufacture and sale of that equipment was a violation of law Zoning ordinances were passed in communities from Plantation, Florida to Chicago, Illinois whose primary purpose was to protect the interest of the cable television companies from competition by direct-to-home satellite communications

When HBO first initiated its scrambling, one of its executives was widely quoted as saying "the skies would go dark for dish owners " The introduction was accompanied by a massive campaign of negative advertising fostered by one of the cable industry's major trade associations Original efforts to ensure that signals would be scrambled were orchestrated by the National Cable Television Association It formed a consortium to ensure that services would be scrambled without delay and would be scrambled in a "cable-friendly" manner

By "cable friendly," the cable industry meant that scrambling would be accomplished in a manner that would not harm the interest of the cable television companies For example, when HBO and Showtime two years ago initiated their

scrambling plans, a major portion of that plan was a "kickback" by each programmer to any cable television company of $5 per month for any sale the programmers made to a dish owner in the cable operator's area. The absurdity of this proposition may be seen when it is recognized that the reason that the consumer purchased his/her home satellite antenna was either that the cable company had not bothered to provide service to him/her or the service was of an inferior quality and the consumer chose instead to buy a dish Why should the cable company be rewarded for this? After the spotlight was turned on these activities in hearings before the Senate and House Communications Subcommittees, they were abandoned. These symptoms are gone. Others still exist, and the disease is getting worse

The technology exists to have real competition between cable television and home satellite earth stations, a competition which our members believe would benefit the American consumer by giving him/her choice and acting as an effective regulator of cable prices Unfortunately, that robust competition does not today exist It does not exist because one competitor, the cable television industry, controls the source of programming and opens the tap in such a manner so as not to harm its basic underlying business Cable television companies today value each subscriber at approximately $2,000 Every home satellite earth station owner is a potential loss of a cable subscriber Thus, the incentives exist for major cable television companies and the programming services which they control to price in a "cable-friendly" manner And that is just what they have done

HSTA is not opposed to scrambling Consumers recognize that subscription programmers must be paid for their product Satellite dealers are businessmen and they too expect to be paid for their product The difference is that there is competition in the manufacturing and sale of satellite earth station hardware (except decoders) There is very limited competition in the marketing of satellite programming This is because when one looks at the corporate makeup of all of the major satellite programmers (HBO,

Showtime, Turner Broadcasting, MTV, Nickelodeon, Cinemax, The Movie Channel, etc), one finds that they are owned or controlled by either TCI, A T C or Viacom, all cable television multiple-system operators While HBO and Showtime may compete for cable subscribers, they most definitely are not engaged in vigorous competition for home dish viewers If they were, one would logically expect that there would have been no $5 kickback to the cable companies or having renounced the kickback that dish consumers would have had their rates dropped by $5 This did not happened

Let us look at one example When TCI, the nation's largest cable television company purchases CNN for viewing by its cable subscribers, it pays a rate of approximately $ 02 - $ 17 per month When it purchases the identical programming for viewing by home dish owners, it has agreed to pay the rate of $1 00 per month This is a great disparity and by paying such a higher wholesale rate, TCI ensures that the retail rate to the dish subscriber will be far higher than it would otherwise be By paying this higher rate, TCI which is the largest purchaser of satellite programming, has also set a floor on what others will be charged for sales to dish owners This differential cannot be explained by processing charges or backroom billing costs The major independent-of-cable would-be distributors such as the National Rural Electric Coop and the Amway Corporation have both stated that they would cover those costs in their distribution of programming to home dish owners Yet, neither service has been able to contract with the major subscription services for delivery of their programming to home dish owners The reason for this is cable control.

The cable industry has argued that the rates for subscription programming to dish owners are about the same as those to cable subscribers This is misleading and an "apples" and "oranges" comparison Approximately 50% or more of the rate that a cable subscriber pays each month goes to pay off the cost of the cable plant and service required to get that consumer the signal A dish owner has already paid that cost when he/she has purchased a satellite dish So you are comparing different services You are

comparing apples on the tree and apple pie If a market existed, dish owners should pay substantially less than cable subscribers Also, such comparisons fail to mention a $400 decoder cost dish owners must pay

No independent-of-cable or "third-party" packagers have been able to develop a complete package of programming for sale to dish owners, although many have tried Absent the existence of such packagers that have a real incentive to aggressively pursue this market, real competition in the delivery of satellite services to residential consumers will never exist

Even the basic question of access of home dish owners to satellite programming is in question with the recent announcement that HBO's new KU-Band services and "TNT" proposed by Turner Broadcasting may not be offered to home dish owners Consumers are almost back to where they were a half decade ago — fighting for basic access to satellite programming

There is another form of exclusivity that is just as harmful and that is the exclusivity provision which the satellite packagers such as HBO obtain from the major Hollywood studios These contracts often give the satellite packagers an exclusive over the studio's product for delivery over a national satellite distribution network This exclusivity will severely restrict future would-be packagers of programming from being able to enter either the packaging for cable subscriber business or the packaging for the direct satellite-to-home market Cable is leveraging its control over access to existing cable homes into future control over access to all homes which can be served by satellite In the process it is unfairly restricting competition by denying consumer choice

One other area of anti-competitive action may be seen in the growing problem of piracy General Instruments Corporation has a de facto monopoly over manufacture and control of scrambling technology It has set prices for its hardware artificially high Unlike every other item of consumer technology, they have not been reduced over time

Despite assurances from that company, sometimes parroted by regulatory agencies, it has been unable to stop the growing problem of signal piracy Thousands of dish dealers have been faced with the alternative of going out of business or marketing illegal chip sets which allow viewing of programming without payment of it These chip sets are not cheap and may cost a thousand dollars or more HSTA does not support this activity It is firmly opposed to piracy HSTA does point out, however, that if the marketplace really did exist, prices would be reduced to a level that would minimize incentives to purchase illegal chips Black markets usually exist where there are no free markets and that is the situation with respect to satellite programming and decoders Efforts in the courts alone will not even come close to stopping this activity So long as the price of satellite programming is artificially high, there will be an incentive by some to engage in piracy While we favor aggressive anti-piracy campaigns, we are not naive enough to believe that this alone will solve the piracy problem

To remedy the problems which we see in the marketplace, HSTA has supported S 889 and continues to vigorously support this legislation By providing competition to cable television companies in the form of fostering independent-of-cable third-party packagers of programming, we believe that a competitive marketplace is most likely to exist If S 889 is not passed, and if the third-party packagers continue to be unsuccessful in their efforts to obtain marketing rights under terms and conditions no less favorable than cable operators are able to obtain satellite-delivered programming, then the future of the satellite-to-home communications will be in the hands of the cable television companies One solution would be the imposition of structural separations — separate control over programming from the means of its delivery Keep cable out of the programming business

There are many precedents for this action Forty years ago, the courts saw the potential for anti-competitive behavior and restricted the ability of the Hollywood studios to own movie theater outlets at an early stage of those industries'

developments Several decades ago, the FCC and more recently the Congress, saw the potential which a local broadcaster has to prevent competition from a cable company in its service area. They acted to prevent this cross-ownership These rules were codified in the 1984 Cable Act Broadcasters cannot own cable companies in their local service area These rules have worked well As a result, both industries have thrived

It is not too soon, in fact, we desperately hope that it is not too late to begin considering this type of structural remedy in the case of the sale of programming to home satellite antenna owners If independent-of-cable third-party programmers are not permitted to purchase at wholesale, for sale at retail the same way cable operators do for sale to their subscribers, then we believe that a separation's policy of hardware from software must be considered We reach this conclusion only reluctantly But we have waited since the beginning of this decade and have only seen more and more control exercised by the cable industry over the satellite-to-home industry to the detriment of the consumer The disease is spreading S 889 is one cure Structural separations is another

Thank you Mr Chairman and members of the subcommittee I would be happy to respond to any questions which you may have

Senator METZENBAUM I have some questions

But first, I think I would like to hear from Mr Burke, who I understand represents the United Satellite Industry Association, North Little Rock, AR Mr Burke?

STATEMENT OF THOMAS BURKE

Mr BURKE Thank you, Mr Chairman I have been a satellite dealer since 1979 And at one time in 1986, January of 1986, there were approximately 12,000 satellite dealers in the United States I have been a spokesman for the industry since the inception of the programming scrambling

In 1985, we were selling over 50,000 satellite systems per month Today, there is less than 2,000 satellite dealers left What has happened? Have we failed in the marketplace? Is there better competition that is selling systems for us? That is not true Have the prices risen in the satellite systems so that the consumer will not buy it? No, in fact, prices are half today what they were in 1985

The reason for the failure of the satellite systems was brought up when I testified before the Commerce Commission in 1986, and the same is true today The failure rate of the satellite dealer, distributor and the manufacturer is a direct result of an orchestrated conspiracy by the cable industry A conspiracy to effect control of our industry growth, to prevent a competitive market and thereby extend the monopolies they now enjoy into areas that they never intended to serve

As our technology progressed and prices became much lower than they were, people in the cities, for the first time, had an alternative to the cable programming Purchase a satellite system! The cable companies, realizing that they were in basically a dinosaur world and facing our high technology, concentrated their efforts In a concentrated industry, which exists, they shut off the supply of programming, leaving the dealers without anything to sell

In 1984, cable programmers were given authority to scramble and they did so But before they set up a distribution system for the TVRO In short, the cable industry correctly viewed the TVRO market as its strongest competitive threat and then shut off the supply of programming Even though the whole point in TVRO is so the consumer does not have to get his programming through the cable system, when you limit the competition, economics teaches you that prices stay high and consumers are hurt

Now we know that HBO and all the other programmers deserve to be paid for their programming services Neither I nor any of the other dealers that I represent support any illegal efforts to pirate cable satellite programming But the cable industry has used scrambling to squelch competition from our industry If you want to see programming with your satellite dish today, you must buy it from the cable industry

There are three reasons why I think there is a conspiracy First, virtually all major programmers scrambled at approximately the same time in 1986 and 1987 The lawyers tell me that concentration in a marketplace makes collusion easier, and it certainly appears that way in the cable industry

Second, all the programmers selected a single company to manufacture the necessary descrambling equipment and to operate the descrambling system The cable industry knew what it was doing there

Third, and overlooked by many people but brought up by these gentlemen, almost all of the major cable programmers are vertically integrated, are owned jointly or affiliated with MSO's When the cable systems scream, the programmers really jump

Now I do not have any absolute proof of a conspiracy I do not have a smoking gun document showing the members of this conspiracy, but I do think this evidence exists Now I understand the Justice Department reported last year that it had not found sufficient evidence to prove a conspiracy But given what I know about this administration on antitrust, I do not believe the Justice Department would recognize a conspiracy if it hit them on the head [Laughter]

Mr BURKE In 1986 I stated, 20 months ago, the cable companies, fearing competition from our high-tech distribution are denying us programming through manipulation of the cable programming association In a last-ditch effort in 1986 to salvage our business, we the dealers banded together and formed a satellite dealers co-op We wished to purchase at that time, and still do, a compatible decoder and market it with the programming

In summation, we the satellite dealers who sold all those dishes, we maintain them, we know the names of those people, their dogs, everyone else, they are on a friendly atmosphere with us We can provide rural America with programming and serviceable decoders Nobody else can do it in a friendly atmosphere

And somewhere in this mass of confusion I stated in 1986, a solution must present itself The solution to all the problems will not come easily But the dealers survival package can be obtained when wholesale distribution by qualified third-party distributors is accessible to the TVRO owner We are willing to work with the programmers and market their product We just want to be able to do it on an equitable, fair and reasonable, level playing field

In closing, Mr Chairman, the TVRO industry has been decimated, not because it could not compete but rather because it competed too well

[The prepared statement of Mr Burke follows]

STATEMENT OF

TOM BURKE

NORTH LITTLE ROCK, ARKANSAS

Mr Chariman - members of this committee.

Since 1979, I have served my community as a retail TVRO Satellite Dealer In addition, I serve as president of the United Satellite Industries Association - a retail dealer group encompassing forty-nine states

I have experienced the rise of the satellite industry from nothing to a viable multimillion dollar entity, and I have seen the demise of this same industry in a short 24 months.

The satellite industry is in shambles The TVRO dealers, distributors, and manufacturers are disappearing at an alarming rate There were approximately 12,000 dealers in 1985, selling more than 50,000 TVRO systems per month; today there are less than 2,000 dealers

The failure rate of the satellite dealer, the distributors, and the manufacturer is a direct result of an orchestrated conspiracy by the cable industry. a conspiracy to effect control of our industry growth, to prevent a competitive market, and thereby extend their monopoly they now enjoy into areas they never intended to serve

Have we been beaten in the market place by larger more efficient nationwide retailers NO Have equipment prices risen, so that consumers cannot afford our product NO Quite to the contrary, prices for TVRO systems today are half of what they were in 1985, and there are no "Montgomery Ward' type firms in our retail business

There are very large firms in the cable television industry, however Companies such as Time and Tele-Communications, Inc , were huge in 1984 and are vastly larger today Concentration in the cable business is steadily increasing, while the Federal Trade Commission, the Justice Department and the FCC stand by and do nothing. Cable MSO's are expanding horizontally, by buying more and more cable systems, and vertically, by integrating with cable programming services, and all at an alarming rate, it is hard to belive that with all the mergers and acquisitions over the past few years, none of them raised enough antitrust concerns to merit even an investigation by these federal agencies.

TVROs started as an alternative to cable television, allowing consumers in areas where cable had yet to reach to receive programming directly off the satellite As technology progressed and our prices fell dramatically, TVROs became a real competitive threat to local cable systems, because consumers -- for the first time -- had an economic alternative to subscribing to cable television.

The cable industry realized this and reacted in a manner typical of large, concentrated industries they shut off the supply of programming, leaving dealers without anything to sell By refusing to deal with the satellite market, cable programmers and cable systems have preserved their local monopolies and made it virtually impossible for satellite dealers to compete

This is not the first time this has happened. HBO, for example, for years refused to sell programming to SMATV systems, private cable systems in apartment complexes, and the like, to protect the cable systems of its sister company, ATC. In 1984, cable programers were given the authority by Congress to scramble their signals. They did so. But they scrambled before they had set up any distribution system for TVRO owners. And when they finally set up a distribution system, they refused to allow satellite dealers into the system, instead limiting distribution rights only to cable systems.

Now HBO refuses to sell to overbuild cable companies who install a second competitive system within a given area In short, the cable industry correctly viewed the TVRO market as its strongest competitive threat, and then shut off the supply of programming to that market Virtually across the board, TVRO owners must now pay the local cable system for their programming -- at prices higher than those charged to cable subscribers -- even though the whole point of TVROs is that the consumer doesn't have to get his programming through the cable system When you limit competition like this, economics teaches that prices stay high and consumers are hurt. Here, the TVRO consumer is being ripped off and the TVRO dealer isn't permitted to sell programming to his customer.

To be sure, Mr. Chairman, there is nothing wrong with scrambling; HBO and other programmers deserve to be paid for their programming services. Neither I nor any of the dealers I know support illegal efforts to "pirate" cable satellite programming. But the cable industry has used scrambling to squelch competition from the dish market. The programmers have kept prices high and preserved the monopoly that local systems enjoy over distribution of programming If you want to receive programming with your TVRO, you've got to buy it from the cable industry.

There are three reasons why I think cable scrambling policies are the result of a conspiracy First, virtually all major programmers scrambled at the same time, in 1986-87, and did so before they had any real plan for selling the programming to the dish market Lawyers tell me that concentration in a market makes collusion easier; that certainly is the case in the cable industry

Second, all of the programmers selected a single company to manufacture the necessary de-scrambling equipment and to operate the de-scrambling system. The shortage of de-scrambling equipment, which still continues, shows that the cable industry knew what it was doing.

Third, and overlooked by many people, almost all of the major cable programmers are vertically integrated, owned jointly or affiliated with MSOs. When the cable systems scream, the programmers listen If you go back and review the record, I am sure you will find that cable systems argued and pressured programmers into scrambling to protect the systems from competition from dishes. So, there was a vertical conspiracy (between systems and programmers) as well as a horizontal conspiracy (among programmers).

Mr Chairman, I don't have absolute proof of this conspiracy. I don't have a "smoking gun" document showing the members of the conspiracy I do think this evidence exists The Justice Department is still conducting an antitrust investigation into these scrambling issues. If they have the evidence, then their refusal to take action is an abdication of their responsibilities If they don't have the evidence, then their inability to get it is even worse.

I understand the Justice Department reported last year that is hadn't found "sufficient evidence" to prove a conspiracy. Given what I know of this Administration's antitrust policies, I don't think they would recognize a conspiracy if one hit them over the head.

In closing, Mr. Chairman, the TVRO industry has been decimated not because it couldn't compete, but rather because it could compete too well The cable industry sees satellite dishes and dealers as the major threat to their local cable system monopolies They have used scrambling to foreclose our access to programming and preserve those monopolies Consumers who bought dishes in order to avoid dealing with cable systems now must deal with them while the satellite dealers are left out in the cold. All this, I believe, is the result of a conspiracy among cable systems and cable programmers

Thank you for you attention. I remain available for any questions

Senator METZENBAUM Thank you, Mr Burke

Mr BURKE Thank you, sir

Senator METZENBAUM Let me be clear on the record As I understand it, your complaint is not that you cannot obtain the programs, but that the program is not made available on a fair basis Is that correct?

Mr BURKE Yes, sir, that is correct As a comparison, there is a Superstar Connection it is called, Mr Jack Riley operates it out of Tulsa, OK I think there is three major superstations there, WPIX, KTVT, and WGN On November 8, 1986, Mr Riley and I, we were with a group of people in Washington and he divulged to us that he was selling those three programs at that time to cable companies at 25 cents per month per subscriber, 10 cents, 8 cents and 7 cents if you took all three of them

We informed the co-op At that time, I offered him twice that amount, or $6 a year And we agreed—and I had thousands of pledges from dealers all over the country—we agreed to purchase hundreds of thousands of units at $6 per year Mr Riley refused at double the price of cable and on a volume basis At that time the price to us was $36 a year as compared to $3 a year So that is 12 times the amount

This is the reason, sir, that we are in the situation we are in right now, its disparity in the pricing! The cable company basically has control of those programmers and they refuse to allow distribution to a third party in competitive prices

Senator METZENBAUM Thank you, Mr Burke

HBO will testify, Mr Kocian, that it sells its HBO directly to home dish owners at a better price than cable subscribers pay Do you disagree?

Mr KOCIAN I would have to dispute that, sir, on the grounds of an equal comparison I feel they are not making an equal comparison It is rather a complicated formula, but just touching on the highlights of that comparison would be, first, a home dish owner has to pay $400 up front for the decoder that is needed to receive HBO on their satellite system This box is supplied by a cable

system at a buck, two bucks, or three bucks a month, monthly charge That is the first major disparity

Second is that the rates are not equal from the point of view of a home dish owner that this is his own cable system He is responsible for the equipment He is responsible for the service of that equipment Again, this is a service that the cable company supplies to its consumer, for which the consumer pays

A few other items along these lines add up to the fact that only about half of what a consumer of cable pays is directly responsible, in terms of programming The other half is for the cable plant, et cetera So that at that rate, a dish owner should pay exactly half or thereabouts what a cable consumer pays

Senator METZENBAUM In his testimony, Mr Thomson states that a home dish owner can buy cable programming from TCI for about $10 50 a month while TCI cable subscribers pay about $15 Is that true?

Mr KOCIAN It depends on how you read that I, myself, before I left yesterday to come to this hearing, called TCI, or at least I thought it was TCI It was from a full-page ad in a current "On Sat" magazine to home dish subscribers I believe that figure you quote is accurate

However, when I called, I found out I was not calling TCI, I was calling NetLink They told me that I would only be able to receive that package, one, if I was close to or in a cable company area And not only a cable company, TCI cable company area That is No 1

Number two, in that package, as a basic, which is what you are citing for the $10 plus figure, includes some network channels that TCI is presently, I understand, receiving free from the networks If I can receive that where I am, in Brinkhaven, OH, which I can and cannot, depending on what you want to call quality on the TV set, I will be cut out of those three channels Those are the network channels

However, that $10 95 will not be reduced to me I will continue to pay that

This and a few other comparisons add up to the fact that no, we are not being treated fairly or equally

Senator METZENBAUM Not all cable programming is owned by cable Is the programming any easier to obtain from noncable owned program companies?

Mr BURKE No, sir There are three at the present time, and only three, that is allowing renewals for third-party programming that they have now, which of course comes through them I think it is United Video and Prime Time 24, and there is one other

It would appear that, of course, the cable industry has told those programmers that if you are going to deal out there with the TVRO market, you are going to keep the pricing at a point that we can control the sales of those satellite systems We do not want that competition in the city

Mr Chairman, we welcome the wireless cable into the competitive field that we are in, delivering entertainment to these homes We are in some of the suburbs and certainly in the rural areas We would welcome the competition, but there can never be a competitive factor between us unless programming is available to all of us at a competitive price, or the same basically as the cable

Senator METZENBAUM Thank you very much I appreciate the cooperation of all the members of the panel Thank you

Our next panel consists of Mr James P Mooney, president, National Cable Television Association If your very distinguished counsel Bill Oldeker is with you, please be good enough to bring him to the table, as well Mr Joseph Collins, president of the Home Box Office, Inc , of Washington Mr Amos Hostetter, chairman and chief executive officer, Continental Cablevision, Inc , of Boston Mr Robert Thomson, vice president, Government Affairs, for TCI, Denver, CO

We are happy to have each of you with us

Mr Mooney, you are on

STATEMENT OF A PANEL CONSISTING OF JAMES P MOONEY, PRESIDENT, NATIONAL CABLE TELEVISION ASSOCIATION, WASHINGTON, DC, JOSEPH COLLINS, PRESIDENT, HOME BOX OFFICE, INC , WASHINGTON, DC; AMOS HOSTETTER, CHAIRMAN AND CHIEF EXECUTIVE OFFICER, CONTINENTAL CABLEVISION, INC , BOSTON, MA, AND ROBERT N THOMSON, VICE PRESIDENT, GOVERNMENT AFFAIRS, TCI, DENVER, CO

Mr MOONEY Thank you, Mr Chairman I had not understood that our distinguished counsel, Mr Oldaker was to be with me, so I did not bring him I hope you will forgive me for that

Senator METZENBAUM I know Mr Oldaker personally and I just thought that if he was with you, I would be very happy to have him with you, not because I thought it was necessary He is a personal friend

Mr MOONEY Thank you, sir

Mr Chairman, if it is agreeable to you, I will summarize my statement, knowing that you are short for time

It is well known that cable television had its origins as a community antenna service designed to bring broadcast signals to rural areas With the development of satellite communications, however, we got a chance to be something else

As cable began to build in more populated areas, it was required to come up with programming One of the gentlemen on the previous panel said something about people buying programming, and I agree with that I think that is what they do buy

We had to come up with programming that was sufficiently different from what was available free, off air, on conventional television in order to persuade people that there was value associated with paying a monthly fee And thus, the origins of Time, Inc , putting HBO up on the satellite for national distribution Similarly, that was the incentive for Viacom going ahead and putting services like MTV and Nickelodeon up on the satellite for distribution to cable systems all over the country

That, incidentally, was also the incentive for the cable industry inventing C-SPAN, which is the first instance of a public affairs network being put up in which public events, including the proceedings of the House and Senate, are transmitted unedited and uncommented on, in order to bring new understanding to the American public of how their government operates

Senator METZENBAUM I might say that it is interesting that only a limited number of cable stations carry C-SPAN and some carry just House, some just the Senate I just would make the point to you that, although I think the service is a superb one and I have heard great comments about it from people throughout my own State, and the country as well In my own State, I do not think that hardly any of the stations carry the Senate and a number of them carry the House, but not all of them, that is for sure

It is one thing to create a system It is another thing to see that once it is on the box, it is fine But if it is not being carried, what value does it have?

Mr MOONEY We understand your comment, Senator We encourage the carriage of C-SPAN The cable industry is undergoing one of its periodic shortages of channel capacity The average system today still has only 35 channels I think that as these systems are rebuilt and more capacity becomes available, you will see much more carriage, especially of C-SPAN II, which carries the Senate

Senator METZENBAUM C-SPAN II, my guess, is not carried in three areas in Ohio My opinion is that anything that can produce revenue gets a channel slot And C-SPAN, which is a public service and which is very much watched by many people who want to watch it, to see really what their public officials are doing, they do not have an opportunity to do so

I do not think you can get it in Washington, as a matter of fact, unless you pick up 56, which I think is Baltimore or some place

Mr MOONEY Cable in Washington is still under construction I think the fact that the House is on in more places in the Senate is simply an accident of which body went first in allowing television in But I think also that your comments in this forum will further help and encourage cable systems to put both of these services on, as I think they should be

Senator METZENBAUM We will give you extra time for my having taken yours [Laughter]

Mr MOONEY The point I am trying to make however, in general, is that cable has had to invent its own programming If we had not gone ahead with services like Nickelodeon, which is children's programming, and C-SPAN which we have discussed at some length, and Black Entertainment Television, and other of what might properly be described as specialty channels, it is highly unlikely that anyone else would have stood up on the outside and put up the risk capital to invent these services

But we had to For if we did not distinguish ourselves from free television, we were not going to get too far

Cable today, as has been said, is of course a much different phenomenon than was the case 10 years ago Yes, we do now serve slightly more than 50 percent of all TV households We wish that we served a higher percentage, however, and indeed a higher percentage than just the 57 percent of households which are able to take cable and actually do

This is going to spur and drive further investment in programming, so we can bring even more and especially better alternatives to the public and persuade that other 43 percent who do not sign up to do so

I was interested to hear Mr Kocian, on the former panel, say "keep cable out of programming" If you did that, there would not be half as much cable programming as there is

Many people believe that the Cable Act totally deregulated the industry, but this is far from accurate It is true, we did win rate deregulation, but Congress also confirmed the authority of local governments to decide how many cable companies may operate within a given franchise area

Senator METZENBAUM Is that not totally unrealistic? How many communities in this country have duplicative services or competitive services in the same area?

Mr MOONEY Senator, the point I am trying to make is that it is entirely within the jurisdiction and discretion of city councils to decide how many franchises they want to grant in a given area

Senator METZENBAUM Mr Mooney, I have to tell you Some of us feel that we were had when we passed that bill I think that, as I said in my opening statement, as loudly and as clearly as I can, this Congress in my opinion is ready to reexamine that whole issue, particularly with rates and with respect to availability of programming I cannot say it loudly enough

Mr MOONEY We are sensitive to your concerns about that, Senator I wish I had more than 5 minutes, so I could get it all out on rates

Senator METZENBAUM I am going to come back to rates in my question, so you will have a chance

Mr MOONEY Shall I pass rates, now? I am going to pass over rates

Senator METZENBAUM Give me a summary

Mr MOONEY The summary is that we commissioned Arthur Anderson to do a study of what happened to rates in the cable industry during the first 6 months of 1987 and, to my knowledge, that is still the most recent information available The Anderson study shows that while the average basic rate increased by 10 6 percent during the first 6 months of 1987, the average rate for premium services declined by 2 3 percent with the result that the average net subscriber bill increased by only 6 7 percent

These findings are confirmed by the Bureau of Labor Statistics figures, which show average net cable rates up by only 6 6 percent from 1986 to the end of 1987, and by similar studies conducted by Kagan Associates, the media analyst firm

[Material submitted by Mr Mooney follows]

TESTIMONY OF JAMES P. MOONEY, PRESIDENT & CEO, NATIONAL CABLE TELEVISION ASSOCIATION, BEFORE THE SUBCOMMITTEE ON ANTITRUST, MONOPOLIES, AND BUSINESS RIGHTS, COMMITTEE ON THE JUDICIARY, UNITED STATES SENATE, MARCH 17, 1988

Mr. Chairman and members of the Subcommittee, my name is James Mooney and I am president of the National Cable Television Association (NCTA). NCTA is the principal trade association of the cable television industry and represents over 2,700 cable systems serving more than 80% of the 45 million cable homes in the United States. We also represent 56 cable programming services which create, package and provide quality TV programming for cable subscribers.

I will confine my prepared statement to two points: a nutshell history of cable's development as a television medium, and a brief report on the industry's performance subsequent to the passage of the Cable Communications Policy Act of 1984. During the question period, of course, I will be happy to answer any questions touching these or other topics the Subcommittee may wish to raise.

Cable television has its origins as a community antenna service designed to bring broadcast signals to rural areas outside the ordinary range of conventional broadcast transmitters. With the development of satellite communications, however, there arose the possibility of developing nationally distributed made-for-cable programming networks which could easily be provided to cable systems across the country.

The cable industry's interest in developing such services is easy to understand. If cable was to become more than a rural phenomenon, and do business in heavily populated areas where free, over the air

broadcast transmissions were easily available, we would have to offer something more than a community antenna service. We would have to offer alternative television programming sufficiently attractive and different from what was available free, off-air to convince the public that cable service was worth the monthly subscription fee.

Thus Time, Inc in 1975 launched satellite distribution of its HBO sports and movie service, a service it previously distributed primarily over its Manhattan cable system. Within three years HBO had over two million subscribers on over 700 cable systems, and the pay TV era was born.

Similarly, in 1978 Viacom, a major cable operator, began satellite distribution of the Showtime movie service as an alternative to HBO. Viacom subsequently acquired both MTV and Nickelodeon, networks devoted to music videos and children's programming, respectively, both of which at the time were financially uncertain, but showed great promise as alternative TV formats.

To take another example, in 1979 a group of cable operators created an entirely new public affairs network unique to cable This, of course, is C-SPAN, the non-profit service which transmits gavel to gavel, unedited and uncommented-on proceedings of the House and Senate as well as other events of public importance.

All of these are primary examples of how the cable industry's own growth imperatives led it to create new forms of television to offer to the viewing public. Vertical integration, however, is not the only form in which cable programming has developed. ESPN, the sports network serving virtually every cable home is owned by ABC/Cap Cities,

a major broadcast company. USA Network, which reaches over 90% of cable homes, is owned by Universal and Paramount, two major movie studios. The Disney Channel, which is the fastest growing of the premium services, is owned by another major studio.

In any event, the world of television has been unalterably changed by cable. In 1975, when HBO was launched on satellite, "television" to most people meant ABC, CBS and NBC, which among them garnered about a 90% share of all viewing. Today, however, television means cable, too, and in households which take full cable service, including one of the premium channels, the cable networks actually get more viewing in all day parts than the three broadcast networks put together. To the degree that the breadth of choice the American society gets from television has been enlarged, cable has been responsible for it.

Public policy has a way of catching up to such developments, of course, and in 1984 Congress enacted the Cable Communications Policy Act to bring some order to the regulatory landscape in which cable has to live

Many people believe that the Cable Act totally deregulated the industry, but this is far from accurate. It's true that we did win rate deregulation, a decision we believe reflected Congress' understanding that basic rates had been artificially held down while premium rates had been pushed up too high. But Congress also confirmed the authority of local governments to decide how many cable companies may operate within a given franchise area, to impose a licensing fee of up to 5% of gross revenues, to require cable operators to set aside channels for public, educational and government

use, to support public access studios, to establish physical plant requirements, to prohibit redlining, and to consider signal quality, an operator's response to consumer complaints, billing practices and other criteria in deciding whether to renew an operator's franchise. We also are subject to special statutory EEO and privacy requirements.

These regulatory restraints are unique to cable in the video world, and some of them are unique to cable in the world of American business generally.

The Act is still new — it took full effect only 15 months ago — and much of it has not yet been interpreted by the courts.

In a general sense, however, we believe the Act is working well. Cable rates have not skyrocketed since deregulation occurred at the end of December, 1986; indeed, a study done for us by Arthur Anderson shows that while the average basic rate increased by 10.6% during the first six months of 1987, the average rate for premium services declined by 2.3%, with the result that the average net subscriber bill increased by only 6.7%. These findings are confirmed by the Bureau of Labor Statistics' figures, which show average net cable rates up by only 6.6% from 1986 to 1987, and by similar studies conducted by Kagan Associates, the media analyst firm.

Several other developments also are noteworthy:

- In 1987 the industry's investment in plant rebuilds was up by more than a third over the amount spent in 1984, and spending for new subscriber equipment doubled over the same period. The stability provided by the Cable Act is in important factor in this increased investment.

- Our disconnect rates are down somewhat from their 1986 levels, while penetration of the premium services is up, presumably reflecting price decreases for these services.

- A recent national survey of cable subscribers by The Barna Research Group concluded that the one aspect of cable subscription with which most people were "very satisfied" was the customer service they receive. Another national survey by Magid Associates found that 78% of cable subscribers think "they're getting their money's worth " Even a survey by the National League of Cities (with which we have some problems) showed that 80% of the cable regulatory officers responding believe that customer satisfaction with cable service has either stayed the same or increased since passage of the Act.

Mr. Chairman, we don't take the position that cable is perfect or that we don't have any problems. It will be clear, too, as this hearing proceeds, that not everyone is pleased by cable's increasingly important role in the world of television. We do hope, however, that one fundamental point is not lost in the welter of controversy the communications industries frequently find themselves in. That fact is that cable has made a positive difference in the way this society uses television. Moreover, now that we have completed our great construction period, more and more money is going into programming. Cable operators are taking part of their cash flow and plowing it back into new programming to further make good on the promise of our medium. We think that's good for our industry, but more to the point, we believe it's good for the television viewing public as well.

National Cable Television Association

James P Mooney
President &
Chief Executive Officer

724 Massachusetts Avenue N W
Washington D C 20036
202 775 3655

April 8, 1988

The Honorable Howard Metzenbaum
Chairman, Subcommittee on Antitrust, Monopolies
and Business Rights
Committee on the Judiciary
U S Senate
Washington, DC 20510

Dear Senator Metzenbaum

In the course of the March 17, 1988 hearing on the cable industry held by your Subcommittee on Antitrust, Monopolies and Business Rights, several issues were raised which I was either specifically asked to respond to for the record or which I believe need additional explanation to complete the record These issues are

1) Allegations made regarding Coaxial Communications' (Columbus, Ohio) carriage of a Chillicothe, Ohio independent broadcast station,

2) Inquiries made regarding the number of cable systems in Ohio that carry C-SPAN and C-SPAN II,

3) Reference made to a list of cable systems which allegedly increased their rates by 50 percent or more during 1987,

4) Questions concerning satellite dish owners' access to cable programming, and

5) Concerns regarding cable systems' investment in cable programming companies (vertical integration)

1 Columbus/Chillicothe Situation

Joel S Rudich, President and Chief Operating Officer of Coaxial Communications, recently responded in a detailed letter to you to questions regarding Coaxial's carriage of WWAT-TV, Chillicothe, Ohio I have attached this letter, which I believe clarifies the facts, and ask that it be included in the hearing record (See attachment I) As Mr Rudich's letter explains WWAT had never been a must carry signal and carriage of WWAT would create a substantial copyright liability for Coaxial that WWAT acknowledges but fails to address satisfactorily

2 C-SPAN and C-SPAN II Affiliates in Ohio

In addition, Brian Lamb, Chairman and Chief Executive Officer of C-SPAN, also recently wrote to you regarding your inquiry about the number of C-SPAN and C-SPAN II affiliates in Ohio Again, I would respectfully ask that this letter and information, which is attached, be included in the hearing record (See attachment II)

3 Cable Systems with Alleged Rate Increases of 50 Percent or More

During the hearing, reference was made to a list of 93 cable systems that had increased rates by 50% or more in 1987 This list was culled from ten different issues of Paul Kagan's Cable TV Franchising News Roundups Kagan's News Roundups catalogue rate increases that are mentioned in press clippings that Kagan Associates receives from a press clippings service

Although there has not been sufficient time to verify every instance on the list, we have reviewed this list and have several observations regarding how well it represents the pricing changes that have taken place since deregulation of cable rates went into effect nationally on January 1, 1987 First, this list does not in fact reflect 93 systems At least thirteen of the 93 increases on the list are duplicates in so far as the same system is listed twice (such as Denver, where the price increase for two different tiers are listed), or multiple communities served by the same system are listed

Second, in a number of the remaining 80 instances cited on the list, the rates did not increase either by the amount or the percentage stated on the list For example, the cable system serving Norwich, CT was cited in this list as having increased basic rates by 116% in 1987 In fact, the system did increase its basic rate from $9 18 to $10 10 as stated on the list, but this increase only constitutes a 10% increase in basic rates not a 116% increase as stated in the list As another example, the rate increase for the cable system in Sonora, CA appearing on the list occurred in May 1986, seven months before deregulation went into effect nationally Moreover, the system increased its basic rate in May 1986 from $9 75 to $12 87 (not to $16 75 as stated on the list)

Third, in many instances, the basic rate increase was accompanied by a tier consolidation, and the subscribers involved experienced either a price reduction or service expansion after deregulation According to the list, the cable system serving Denver, CO raised its basic rates by 458%, from $2 50 to $13 95 in 1987 A more thorough examination of the system's rate increase shows that 75% of the system's 55,000 subscribers actually received a $1 00 price decrease in 1987 Prior to deregulation, the system offered its subscribers three tiers of service, the "Community" tier with all local

broadcast stations plus four cable channels for $2.50 per month, the "Budget" tier with all local broadcast stations plus ten cable channels for $7 95 per month, and the "Summit" tier, the choice of 75 percent of the system's subscribers, with fifty-four channels of local stations and cable channels for $14.95 per month In 1987, the system collapsed these tiers into a single fifty-four channel tier with the same offerings as the $14 95 Summit tier and reduced the rate to $13 95 per month -- a $1/month reduction for 75 percent of the system's customers.

Finally, in almost every circumstance, basic rate increases tell only part of the story of rate deregulation. For example, although the cable system in Ocean City, MD raised its basic rate from $8 75 to $13 95 after deregulation (not from $6.85 to $13.95 as stated on the list), the system did so only after it upgraded its system from 22 channels to 60 channels and after it reduced the prices of its premium networks by 9.1%

NCTA researched thoroughly as many of the rate increases as time allowed before the hearing record was to close A summary of the systems we have analyzed to date is attached (see attachment III) and I would ask that this summary be included in the hearing record. We will provide you with additional information once our review has been completed.

I would again emphasize Mr Chairman, as I did during your hearing, that three separate analyses of cable rate increases have concluded that the average net increase for consumers during 1987 has been substantially less than claimed by our critics. A nationwide sample that Arthur Andersen & Company conducted for NCTA found that the net increase in the average subscriber's total monthly bill was 6.7 percent from December 1986 to June 1987. Bureau of Labor Statistics' figures show average cable rates rose 5 3 percent over the same time period and a recent study by Kagan Associates revealed an average 5 percent increase in the average subscriber's monthly bill for the first nine months of 1987 While basic rates have indeed increased, as the 1984 Cable Act assumed they would after years of artificial restraint due to municipal rate regulation, premium network rates have decreased. Moreover, these basic rate increases have been accompanied, as the examples on the list of systems raised during the hearing illustrate, by increases in the number of channels offered, as well as by major investments by cable operators in plant and equipment and programming.

I would also acknowledge, however, that there have been systems that have raised their rates substantially above the national averages. But, on balance, I believe that these systems represent a small percentage of the more than 7,800 cable systems in the nation.

4 Satellite Dish Owners' Access to Scrambled Cable Programming

Several statements made at the hearing supported the need for legislation that would regulate the distribution, and ultimately the pricing, of scrambled cable programming NCTA believes, for several reasons, that such legislation is not necessary. First, dish owners have access to scrambled satellite cable programming at fair and reasonable prices The Senate Commerce Committee report on S 889 finds that "scrambled signals of cable programming are being made available to dish owners at prices comparable to those being charged cable subscribers "

In addition, the Federal Communications Commission's January, 1988 quarterly progress report on scrambling concludes that programming is available to dish owners at prices comparable to or less than the prices cable subscribers pay. And, according to data from independent cable industry sources, the average price of basic cable service in 1987 was $12 69 per month, and the average rate for basic cable plus one premium network was $22 02. By comparison, according to information published by the satellite dish industry, the basic cable package offered to dish owners by Viacom Satellite Network is available for as little as $10 per month, and the cost of a basic service package plus one premium network is as little as $16 per month

Second, dish owners can receive all the major cable networks that have been scrambled. In just over the past two years several networks delayed their scrambling plans until a mechanism was in place through which dish owners could subscribe to those services There also are about 100 services that are not scrambled and are available to dish owners at no cost, including nearly 50 cable networks that offer programming that cable subscribers must pay for

Additionally, the initial temporary decoder shortage, created largely by an unanticipated surge in demand for decoders, is over At the end of June 1987, there were 183,050 authorized Videocipher II decoders By year end there were 310,736 authorized Videocipher IIs, an increase of nearly 70 percent in six months General Instrument, the firm that owns the rights to the Videocipher II technology, now has the production capacity in place to manufacture 100,000 decoder modules per month

With the market working effectively legislation at this point would represent an unprecedented intrusion by the federal government into an industry's distribution and marketing practices In the absence of evidence of misconduct or harm to consumers, this is contrary to the principles on which the American economic system is built NBC-TV has the right to decide who will carry its signal in the local market, just as Chevrolet has the

right to choose who distributes its cars in each city. And the government does not tell J.C. Penney who will distribute its products.

Pending legislation would primarily serve the interests of those who want the federal government to create and sanction a new line of business - third party distributors of satellite signals. The fact that scrambled programming is available to dish owners at prices equal to or less than cable customers, the fact that dish owners can buy all scrambled programming, and the fact that dish owners can buy programming in numerous packages from several sources have all been acknowledged. In other words, consumers are not being harmed But some businesses (who want distribution rights for cable programming but have been unable to obtain those rights), are urging Congress to put them into business This legislation, therefore, now seems primarily designed to support a group that wants a federally mandated right to be programming distributors.

It is difficult to understand how requiring additional middlemen, who will have to take their profit out of the consumer's subscription fee, will result in lower prices for consumers when most of the programmers are already selling directly to consumers at prices comparable to or less than prices to cable subscribers.

5. Cable Systems' Investment in Cable Programming Services

During the hearing several critical comments were made regarding vertical integration in the cable industry which I wanted to address for the record

In discussing the issue of vertical integration in the cable industry -- that is, the investment by cable operators in cable programming — it is important to be very clear about exactly what vertical integration means, particularly from the perspective of television viewers. Historically the cable industry has had to invest in and create its own programming because the traditional broadcasters seldom departed from their standard fare of sitcoms and cops and robbers In order to meet the goal of offering cable viewers greater choice and improved quality in programming, cable began investing in programming

Today, cable's investment in its own programming has produced a rich and varied menu for American television consumers For television viewers, cable's vertical integration means

- Nickelodeon -- quality programming for children, an audience that commercial broadcasters have basically abandoned, as this Subcommittee knows

- o Black Entertainment Network -- the only 24-hour national black entertainment network
- o C-SPAN and C-SPAN II — the cable industry-supported public affairs channels that provide unique coverage of the U S Congress, as well as a wide range of public policy-related events
- o Bravo -- a network devoted to award-winning domestic and foreign films and performing arts specials ranging from opera to jazz.
- o The Discovery Channel -- an all science and nature documentary channel which was preserved due to cable operator investments.
- o Cable News Network (CNN) — the pioneering all-news network that now sets the standard for news reporting

In each of these and other instances, the cable industry's vertical integration has provided television viewers with programming choices, choices generally not otherwise available

Although vertical integration, until the 1930s, had been viewed as primarily harmful to competition, it has become widely accepted in legal, economic, and regulatory circles that vertical integration entails both costs and benefits to competition, and that vertical integration must be judged in terms of its net economic benefit [1] The costs of vertical integration can be increased market share, which may have the effect of making competitors' market entry or growth of their market shares more difficult The benefits of vertical integration can be certain efficiencies that can lead to more product at lower cost

An examination of the cable programming marketplace indicates that vertical integration by the cable industry has not erected barriers to entry by non-operators and that competition among programming services has been enhanced due to the increasing number of networks vying for channel capacity

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1. See Irwin M Stelzer and Richard Schmalensee, "Potential Costs and Benefits of Vertical Integration," 52 Antitrust Law Journal, Summer 1983, pp 249-259

(1) Programming Options Have Increased

In January 1985, when the Cable Act took effect, there were forty-three satellite-delivered video cable services Today, as the following table demonstrates, there are sixty such services, a 40 percent increase over the number in 1985 This figure includes attrition of some cable networks that are no longer in business There have been twenty-seven new networks started up since January 1985. In addition, at least a dozen more services are in various stages of development and should be available to customers in the near future.

(2) Cable Operator Investment Has Not Deterred Development of Networks Without Such Investment

As the following table also indicates, of the 95 national, regional, or planned cable networks, 37, or 39 percent, have or will have no operator ownership involvement whatsoever Three of the five largest (based on subscription counts) networks — ESPN, USA Network, and CBN Cable Network — have no operator investment And other popular, widely available networks, such as The Disney Channel and The Nashville Network also have no cable operator investment. (Two of these networks, USA and Disney, are owned by movie studios and one, ESPN, by a broadcast network)

CABLE PROGRAMMING NETWORKS
NUMBER OF NETWORKS WITH OPERATOR OWNERSHIP/EQUITY
AND WITHOUT OPERATOR OWNERSHIP/EQUITY

	Total Number of Networks	Total Number of Networks With Operator Ownership/Equity	Total Number of Networks With No Operators Ownership
National	60 (100%)	35 (58%)	25 (42%)
Regional	23 (100%)	14 (61%)	9 (39%)
Planned	12 (100%)	9 (75%)	3 (25%)
TOTAL	95 (100%)	58 (61%)	37 (39%)

As the numbers further demonstrate, of the sixty nationally delivered cable video networks, twenty-five, or 42%, have no ownership affiliation whatsoever with the operating side of the cable industry Moreover, nine, or 39%, of the twenty-three regional programming networks function with no operator ownership involvement In addition, of the twelve programming networks that are scheduled to be launched, three, the Preview Network (Penny Stock News), Wingtips (Global Broadcasting) and YOU TV (Health TV Corporation), are proceeding with no plans to attract operator investment

Further evidence that vertical integration has not foreclosed entry into the programming marketplace is the fact that seven, or 26 percent, of the twenty-seven national programming services that have been launched since January 1985, such as SCORE, have done so with no operator involvement

Conclusion

To the degree that the breadth of choice the American society gets on television has been enlarged and that there is diversity of programming available to consumers, cable has been responsible for it Cable has made a positive difference in the way this society uses television and now that we have completed our great construction period, more and more money is going into programming and the difference will become even greater Cable operators are taking part of their cash flow and plowing it back into new programming to further make good on the promise of our medium

As Jeff Greenfield wrote recently in TV Guide, "In one key sense, cable has made it possible to deliver fare that could not find a place on broadcast outlets, but that is immensely appealing to minority audiences Taken together, those minorities add up to millions of viewers for whom cable has become a leisure time lifeline " Or as John O'Connor of The New York Times wrote, "The increase in the quantity of commendable programs [on cable] is little short of startling "

We think that's good for our industry, but more to the point, we believe it's good for the television viewing public as well

I want to thank you, Mr Chairman, for including this information as part of the March 17, 1988 hearing record and allowing NCTA to present this additional information and analysis regarding issues and concerns raised at the hearing

Sincerely,

James P Mooney

Attachments

Attachment I

Coaxial Communications
Technology and Service through Cable Television

Executive Offices

March 22, 1988

Senator Howard Metzenbaum
1240 East 9th Street
Cleveland, Ohio 44199

Dear Senator Metzenbaum

My name is Joel S Rudich I am the President and Chief Operating Officer of Coaxial Communications Coaxial is an Ohio based cable television company employing approximately 300 people and servicing approximately 75,000 households in the Columbus and Cincinnati metropolitan areas

On Thursday, March 17, 1988, you chaired a public hearing that dealt with several cable issues One of these issues dealt with the carriage of independent broadcast signals on cable systems, and one of the panelists, Mr. Wendell Triplett, General Manager, WWAT-TV53, Chillicothe, Ohio, used this forum to unfairly disparage the name of our company, Coaxial Communications

Unfortunately, Mr. Triplett misstated the facts regarding his signal not being carried on Coaxial's Columbus, Ohio cable system. Because Mr. Triplett's statements are so overwhelmingly inaccurate, I hereby request the opportunity to set the record straight since the Committee did not hear the real facts. I respectfully request that this letter and attachments be included in the record of the hearing.

In his testimony, Mr. Triplett dwelt on his investment in his new UHF broadcast station. Yet, at the same time, Coaxial made a major investment and took a sizeable risk to offer new local Columbus oriented programming and minority and special interest programming

During 1986/1987, Coaxial spent several million dollars to expand the capacity of its Columbus system by adding five additional channels. At that time, it was our plan to add the following additional programming during the fall of 1988 The Discovery Channel, Black Entertainment Netwo. The Weather Channel, Electronic Program Guide and "Coax 36", a composite program

channel including local Columbus area high school, college and professional sports. Contract negotiations with all these program suppliers had begun well before the anticipated 1987 fall launch of these new services

While we were finalizing our fall marketing plans, we were formally notified by Mr Triplett that his new station, WWAT-TV53, Chillicothe, which, as you know, is located approximately 50 miles south of Columbus, was a "must-carry" station and demanded carriage on our cable system At that time, acting in good faith, we took Mr Triplett at his word that, in fact, WWAT-TV53 was a "must-carry" signal even though they were not a "local" Columbus signal and their programming was nothing more than 24 hours a day of shopping from America's Value Network. We began carrying WWAT as part of the Basic Service on our cable system on October 1, 1987

In December, 1987, when the U S Appeals Court overturned the "must-carry" rules, I personally contacted the local broadcast stations (both VHF and UHF) and informed them that, despite the court's decision, Coaxial had no plans to make any changes to our channel line-ups that would adversely affect them in any manner whatsoever. Indeed, we continued to carry TV53 into 1988.

However, on January 20, 1988, Coaxial was informed by its FCC counsel that, contrary to Mr. Triplett's claims, WWAT-TV53 was not, and had never been a must-carry signal under the FCC rules. In fact, carriage of WWAT would cause Coaxial to incur significant potential copyright liability which could range between $180,000 and $700,000 per year since WWAT-TV53 was a "distant" signal under the cable copyright law

Upon learning of WWAT-TV53's erroneous representations, Coaxial dropped WWAT from carriage on its cable system; and, we informed Mr Triplett, in writing, of the financial exposure to Coaxial. Mr Triplett then advised Coaxial that Channel 53 would assume total copyright liability. However, his assumptions as to the copyright fees grossly underestimated the amount that Coaxial would be liable for.

Since that time, Coaxial Communications has made repeated attempts to have Mr. Triplett clarify his assumption of copyright liability Contrary to Mr Triplett's testimony that WWAT would cooperate fully to protect Coaxial the attached letters from me to WWAT-TV53 clearly show that this statement is absolutely inaccurate. These letters represent only a few of the unanswered letters sent to WWAT-TV53 seeking clarification.

Senator Metzenbaum, as you know, the copyright laws specify that the carriage of any distant signal (regardless of whether

it is for one minute or for one month in any six-month accounting period) imposes significant copyright liability on a cable company. As a result of this law, the carriage of WWAT would impose a minimum $180,000 annual increase in copyright liability As Coaxial grows, this payment could increase to approximately $700,000 annually Thus, it is critical that we obtain from Mr Triplett guarantees that he would make specific arrangements to deposit the funds reimbursing us for this expense incurred solely due to the carriage of WWAT Coaxial will suffer this huge liability from the carriage of WWAT-TV53 regardless of whether Mr Triplett is unable to reimburse us after carriage is instituted. We have simply requested Mr Triplett insure that the station pay these costs. But, contrary to his testimony, the attached letters clearly show that Mr Triplett acknowledges the copyright liability that WWAT-TV53 would impose on Coaxial and that he has refused to respond to this issue.

To the extent Mr. Triplett got bad advice regarding WWAT-TV53's must-carry status in Columbus, the bottom line is that TV53 was never a must-carry signal under FCC rules. In fact, WWAT-TV53, as a distant station under the copyright law, imposed major potential copyright liability on Columbus cable systems. Having relied on Mr. Triplott's earlier erroneous statements regarding his must-carry status, Coaxial now wants more than empty, ambiguous and unenforceable statements that the station will take care of us.

In summary·

1) WWAT is not and has never been a must-carry signal for Coaxial Communications.

2) Carriage of WWAT by Coaxial Communications would create a copyright liability of $180,000 to $700,000 for Coaxial

3) Mr. Triplett has continually refused to respond to Coaxial's request regarding insuring Coaxial protection from the copyright liability related to WWAT's carriage.

4) Coaxial currently carries all local signals carried under the recently overturned must-carry rules and we have no plans to do otherwise. I personally contacted these local stations in December, 1987 and informed them of this fact

Senator Metzenbaum, I trust this provides both sides of the story regarding the signal carriage of WWAT on Coaxial's Columbus, Ohio cable system Mr. Triplett hoped to guarantee his success in the broadcast business based on his Chillocothe signal being carried on the Columbus cable systems 50 miles away regardless of the nature of the copyright laws. He did not fully understand the laws regarding cable's copyright liability in carrying

distant independent signals. As such, it is not accurate to blame Coaxial for Mr Triplett's mistake Coaxial has acted in complete good faith in its efforts to accommodate the carriage of WWAT.

I look forward to meeting with you on your next visit back home to either Cleveland or Columbus. In the meantime, if I can be of any further assistance to you on this matter, please let me know.

Sincerely,

Joel S Rudich
President and
Chief Operating Officer

/gg

Enclosures

cc. Preston Padden, President, INTV

Attachment II

C-SPAN
Suite 412
444 North Capitol Street, N W
Washington D C 20001
202/737 3220

March 18, 1988

Senator Howard Metzenbaum
U S Senate
140 Senate Russell Office Building
Washington, DC 20510

Dear Senator Metzenbaum

Amos Hostetter, chairman of Continental Cablevision, asked me to write you on his behalf concerning the number of C-SPAN and C-SPAN II affiliates in Ohio

According to our records 26 cable television systems, serving almost 600,000 households, have access to Senate proceedings via C-SPAN II in Ohio That represents 30% of the cable television households in Ohio Among those communities with C-SPAN II are Akron, Cincinatti, Cleveland, Dayton, Parma and Kettering I've attached our most current list of C-SPAN II affiliates in Ohio for your reference In addition, three more Ohio cable systems are planning to add C-SPAN II in the next four months

In the case of C-SPAN, which cablecasts the House of Representatives and other public affairs programming, 167 cable systems with almost 1 6 million subscribers, carry the service Those figures represent 82% of all cable households in Ohio including almost all the major cities in the state Our list of those affiliates is also attached

I hope this clarifies the situation in Ohio Please let me know if you require any additional information

Sincerely,

Brian P Lamb
Chairman & CEO

cc Amos Hostetter

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C-SPAN

Mailing List

No	MSO Name	Principle Community	St	Subs	Tier Subs
** Sort Key1 ===) OH					
1162	WARNER	AKRON	OH	72504	0
1235	POST-NEWSWEEK	AKRON SUBURBS/SUMMIT COUNTY (SOUTH)	OH	10365	8819
1816	TRIAX COMMUNICATIONS	ALLEN COUNTY	OH	905	0
2714	CONTINENTAL	AMHERST	OH	2502	0
1204	COONEY CABLE ASSOCIATES	ATTICA	OH	1705	0
2602	TCI	AURORA	OH	1564	0
2452	ARMSTRONG UTILITIES	ASHLAND	OH	6647	0
1163	TCI	ASHTABULA	OH	12433	3358
1164	CONTINENTAL	ATHENS	OH	5113	0
1925	ARMSTRONG UTILITIES	AUSTINTOWN	OH	17663	0
1165	CONTINENTAL	AVON LAKE/BAY VILLAGE	OH	6950	0
2591	TCI	BARNES/ILLE	OH	1560	0
1166	COMPLEXICABLE OF CUYAHOGA	BATH/CUYAHOGA VALLEY	OH	6312	0
1168	FIRST AMERICABLE	BAZETTA TWP (NEAR WARREN)	OH	2143	0
1169	SCOTT CABLE	BELLEFONTAINE	OH	3800	0
1170	CONTINENTAL	BELLE TE	OH	5514	0
2579	TCI	BELMONT	OH	617	0
1171	SHAMROCK CABLE	BEREA	OH	7011	0
1692	ARMSTRONG UTILITIES	BIRDSBORO	OH	15651	0
2563	TCI	BOLIVAR	OH	1834	0
1936	THREE SIXTY CORP/WOOD TV CORP	BOWLING GREEN	OH	6031	0
2332	CENTEL	BRADFORD	OH	178	0
2357	HI-TECH CABLE SYSTEMS	BRATENAHL	OH	254	0
1175	COMPLEXICABLE MGMT SERVICES	BRECKSVILLE	OH	2137	0
2516	TCI	BRIDGEPORT	OH	2500	0
1173	SHAMROCK CABLE	BROOK PARK	OH	4033	0
1174	SHAMROCK CABLE	BRUNSWICK	OH	5000	0
2530	TCI	CADIZ	OH	1043	0
2560	TIMES MIRROR	CANTON	OH	1717	0
1176	TIMES MIRROR	CARROLTON	OH	6220	0
1177	WARNER	CANTON	OH	58139	0
2872	HERITAGE	CELINA	OH	4665	0
1858	CABLEVISION SYSTEMS	CHAGRIN	OH	5203	0
1178	METROVISION	CHESTER	OH	1558	0
165	MCDONALD GROUP	CHILLICOTHE	OH	7003	0
1179	WARNER	CINCINNATI	OH	151[illegible]	137347
1180	VIACOM	CLEVELAND	OH	72209	0
2843	VIACOM/NORTH COAST CABLE	CLEVELAND (NEW BUILD)	OH	0	0
1184	COX	CLE ELUM WEST SIDE/ARS/PARMA	OH	12561	0
2555	TCI	COLUMBIANA	OH	2515	0
1187	ATC	COLUMBUS	OH	2[illegible]	27903
1185	TELE-MEDIA	COLUMBUS	OH	83 5	0
1186	WARNER	COLUMBUS	OH	70000	5,343
1188	TCI	CORNING	OH	61 0	0
2748	TIMES MIRROR	CORNUCOPIA	OH	6200	0
2078	TCI	CRESCENT	OH	2[illegible]9	0
2305	METROPOLITAN SATELLITE CORP	CUYAHOGA FALLS(PORTAGE TOWERS APTS)	OH	100	0
1190	VIACOM	DAYTON	OH	51345	0

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C-SPAN

Mailing List

No	MSO Name	Principle Community	St	Subs	Dig Subs
2180	TIMES MIRROR	CENTRE-BRUMFIELDSBURG	OH	5003	0
1191	ATC	DELAWARE	OH	1893	600
1192	UNITED VIDEO	DELHI	OH	8518	0
1635	WARNER	DELPHOS	OH	2047	0
2509	TRIAX COMMUNICATIONS	DESHLER	OH	761	0
634	PHOENIX CABLE INC	DUNKIRK/VANEMAN/BERLINE HGTS	OH	500	0
1238	TCI	EAST LIVERPOOL	OH	8000	0
2585	TCI	EAST PALESTINE	OH	2032	0
1860	TRIAX COMMUNICATIONS	EDON	OH	143	0
1134	CONTINENTAL	ELYRIA	OH	25750	0
1935	CONTINENTAL	ENGLEWOOD	OH	16500	0
2307	METROPOLITAN SATELLITE CORP	EUCLID (RIVIERA APTS)	OH	40	0
2308	METROPOLITAN SATELLITE CORP	EUCLID (WATERGATE APTS)	OH	248	0
1135	CONTINENTAL	FAIRBORN	OH	15161	0
2596	TCI	FAIRPORT	OH	726	0
1136	CONTINENTAL	FINDLAY	OH	14817	0
2592	TCI	FLORENCE	OH	268	0
1137	CONTINENTAL	FOSTORIA	OH	11300	0
2735	FREMONT CABLE	FREMONT	OH	6163	0
2637	WARNER	FT SHAWNEE	OH	2232	0
1138	CONTINENTAL	GALION	OH	3445	0
1139	TCI	GENEVA	OH	26532	0
1200	TCI	GOLF MANOR	OH	818	0
810	GRAFTON CABLE COMMUNICATIONS	GRAFTON VILLAGE/WELLINGTON VILLAGE	OH	1737	0
2212	METROVISION	GREEN TOWNSHIP	OH	11784	0
1900	TIMES MIRROR	GREENFIELD	OH	1921	0
1201	TCI	HAMILTON	OH	28511	0
2595	TCI	HOLLOWAY	OH	102	0
2594	TCI	HOPE DALE	OH	462	0
1202	CONTINENTAL	HUBER HEIGHTS	OH	16193	0
1203	CABLEVISION SYSTEMS	INDEPENDENCE	OH	1850	0
2581	TCI	IRONDALE	OH	109	0
1856	STAR CABLE	JACKSONTOWN	OH	500	0
2117	TELECABLE	JEFFERSON TOWNSHIP	OH	900	0
2593	TCI	JEWETT	OH	100	0
1932	TCI	KENT/RAVENNA	OH	15745	0
1636	WARNER	KENTON	OH	6850	0
1205	TCI	KIVERSVILLE	OH	110	0
1206	TCI	LAKE COUNTY (CONCORD TWP)	OH	12018	0
678	SCOTT CABLE	LAKEVIEW/RUSSELL POINT	OH	2079	0
2847	TELE-MEDIA	LIBERTY/HILLSBORO	OH	4237	0
1207	CENTEL	LIMA	OH	27132	0
1918	LANDMARK CABLEVISION ASSOCIATES	LISBON	OH	1202	0
1710	TIMES MIRROR	LORAIN	OH	2335	0
2153	CENTEL	LORAIN	OH	7013	0
1208	ADELPHIA	LORAIN	OH	16073	0
2442	TRIAX COMMUNICATIONS	LYONS	OH	571	0
1209	ADELPHIA	MACEDONIA	OH	2331	0
1217	TCI	MAHONING VALLEY/NILES	OH	21315	0

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C-SPAN

Marketing List

No	MSO Name	Principle Community	St	Subs	Tier Subs
2358	TIMES MIRROR	MARION	OH	11018	0
2514	TCI	MARTINS FERRY	OH	4500	0
1211	CENTEL	MARYSVILLE	OH	2526	0
2513	MASSILON CABLE TV	MASSILLON	OH	19725	0
2309	METROPOLITAN SATELLITE CORP	MAYFIELD HTS (GATES MILLS TOWERS)	OH	234	0
1212	CONTINENTAL	MENTOR	OH	31170	0
1213	TCI	MIDDLETOWN	OH	28034	0
1921	TCI	MINERVA	OH	3000	0
70	TCI	MINGO JUNCTION	OH	4696	0
2592	TCI	NEW MIDDLTON	OH	833	0
1902	TIMES MIRROR	NEW PHILADELPHIA	OH	15251	0
1216	TIMES MIRROR	NEWARK	OH	21737	0
1832	TIMES MIRROR	NEWCOMERSTOWN	OH	2033	0
1218	CONTINENTAL	NORTH OF DAYTON/ENGLEWOOD	OH	16431	0
1219	CABLEVISION SYSTEMS	NORTH OLMSTEAD	OH	11035	0
1220	CONTINENTAL	NORTH RIDGEVILLE	OH	5363	0
2360	CABLEVISION SYSTEMS	NORTH ROYALTON	OH	2723	0
1618	TRIAX COMMUNICATIONS	NORTHWOOD	OH	1963	0
1222	CONTINENTAL	NORWALK	OH	28134	0
2832	OBERLIN CABLE CO OP	OBERLIN	OH	237	0
1223	OLMSTED CABLE CO	OLMSTED TOWNSHIP	OH	400	0
2533	TCI	OREGON	OH	4518	0
2156	CENTEL	OTTAWA	OH	5000	0
1719	CENTEL	OXFORD	OH	1780	0
1224	CONTINENTAL	PAINESVILLE/MENTOR	OH	4311	0
2569	WORLD SATELLITE NETWORK	PARMA (PIMBERLY PARK APTS)	OH	50	0
2305	METROPOLITAN SATELLITE CORP	PARMA (PECENCY APTS)	OH	217	0
1226	METROPOLITAN SATELLITE CORP	PARMA HEIGHTS	OH	1434	0
2568	WORLD SATELLITE NETWORK	PARMA HEIGHTS (RIDGEWOOD PARK APTS)	OH	50	0
2310	METROPOLITAN SATELLITE CORP	PARMA HTS (NORTH CHURCH APTS)	OH	75	0
2304	METROPOLITAN SATELLITE CORP	PARMA(MIDTOWN APTS)	OH	207	0
2070	HERITAGE	PAULDING	OH	812	0
1824	TRIAX COMMUNICATIONS	PIONEER	OH	137	0
1227	CENTEL	PIQUA/ST PARIS	OH	7783	2832
1953	WARNER	PORTL	OH	81	0
1971	TCI	PORTSMO	OH	10500	0
2154	CENTEL	RICHWOOD	OH	750	0
1919	LANDMARK CABLEVISION ASSOCIATES	SALEM	OH	7300	0
1230	ERIE COUNTY CABLEVISION	SANDUSKY	OH	15103	0
2580	TCI	SCIO	OH	407	0
2515	TCI	SHADYSIDE	OH	1000	0
1231	CABLEVISION SYSTEMS	SHEFFIELD LAKE	OH	3013	0
1905	WARNER	SIDNEY	OH	5470	0
2361	CABLEVISION SYSTEMS	SOLON/BEDFORD HEIGHTS	OH	5567	0
1232	CONTINENTAL	SOUTH OF DAYTON/KETTERING	OH	55415	0
2340	APPALACHIAN UTILITIES	SOUTH POINT	OH	1065	0
1233	CONTINENTAL	SPRINGFIELD	OH	2705	0
2637	WARNER	ST MARYS	OH	3115	0
125	TCI	STEUBENVILLE	OH	7618	0

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C-SPAN

Marketing List

No	MSO Name	Principle Community	St	Subs	Tier Subs
2223	CABLEVISION SYSTEMS	STRONGSVILLE	OH	20003	0
1234	CENTURY COMMUNICATIONS	STRUTHERS	OH	7700	0
1815	TRIAX COMMUNICATIONS	SYMMES	OH	7225	0
1237	CENTEL	TIPP CITY/W MILTON	OH	4500	0
1238	COOKE CABLEVISION, INC	TOLEDO (SUBURBAN)	OH	7330	0
2331	CENTEL	TROY	OH	5850	0
2869	TIMES MIRROR	UHRICHSVILLE	OH	4672	0
2638	WARNER	UNION CITY	OH	1717	0
1240	CONTINENTAL	UPPER SANDUSKY	OH	2405	0
2071	HERITAGE	VAN WERT	OH	3008	0
1241	ADELPHIA	VERMILION	OH	2731	0
2536	WARNER	VIRGINIETA	OH	3152	0
2844	TRIAX COMMUNICATIONS	WATERVILLE	OH	5000	0
1901	TIMES MIRROR	WAVERLY	OH	2120	0
2441	COONEY CABLE ASSOCIATES	WAYNESFIELD	OH	516	0
1243	CONTINENTAL	WILLARD	OH	3270	0
2726	MASSILON CABLE TV	WOOSTER	OH	9212	0
1248	CONTINENTAL	XENIA	OH	8831	0
2155	CENTEL	YELLOW SPRINGS	OH	2650	0
1249	WARNER	YOUNGSTOWN	OH	18505	0
1250	ICI	ZANESVILLE	OH	17764	0
** Subtotal **				1587358	237303
*** Total ***				1597258	237303

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C-SPAN II

Marketing List

No	MSO Name	Principle Community	St	Subs	Tier Subs
** Sort Level ===	ON				
1162	WARNER	AKRON	OH	77601	0
1235	POST-NEWSWEEK	AKRON SUBURBS/SUMMIT COUNTY (SOUTH)	OH	10775	8819
2714	CONTINENTAL	AMHERST	OH	2500	0
1171	SHAMROCK CABLE	BEREA	OH	3011	0
1236	THREE SIXTY CORP/WOOD TV CORP	BOWLING GREEN	OH	6034	0
1173	SHAMROCK CABLE	BROOK PARK	OH	4033	0
1174	SHAMROCK CABLE	BRUNSWICK	OH	5000	0
1179	WARNER	CINCINNATI	OH	151029	135347
1180	VIACOM	CLEVELAND	OH	72700	0
2843	VIACOM/NORTH COAST CABLE	CLEVELAND (NEW BUILD)	OH	0	0
1184	COX	CLEVELAND WEST SUBURBS/PARMA	OH	43 51	0
1188	TCI	COLUMBUS	OH	6170	0
1190	VIACOM	DAYTON	OH	61330	0
1196	CONTINENTAL	FINDLAY	OH	13917	0
1202	CONTINENTAL	HUBER HEIGHTS	OH	16437	0
2153	CENTEL	LANCASTER	OH	7513	0
70	TCI	MIAMI JUNCTION	OH	4500	0
1218	CONTINENTAL	NORTH OF DAYTON/ENGLEWOOD	OH	16431	0
1219	CABLEVISION SYSTEMS	NORTH OLMSTEAD	OH	11035	0
2156	CENTEL	OTTAWA	OH	5000	0
2157	CENTEL	PICKAWAY	OH	700	0
1230	ERIE COUNTY CABLEVISION	SANDUSKY	OH	16401	0
1232	CONTINENTAL	SOUTH OF DAYTON/VETTERING	OH	5437	0
125	TCI	STEUBENVILLE	OH	7540	0
1237	CENTEL	TROY CITY/W MILTON	OH	4500	0
2155	CENTEL	YELLOW SPRINGS	OH	2570	0
** Subtotal **				598302	144766
*** Total ***				598302	144766

Attachment III

DETAILED DESCRIPTION OF THE RATE CHANGES IMPLEMENTED BY CABLE SYSTEMS APPEARING ON SENATOR METZENBAUM'S MARCH 17, 1988 LIST

o Greenbelt, MD

According to the list, the system in Greenbelt, MD raised its basic rate from "free" to $7 95 in 1987 Although this pricing change took place, the system dropped the price of this tier in January 1988 by 62% to $3 00 and at the same time it added WWOR to the channels offered on this tier

o Denver, CO (Duplicate same system also appears later on list under Denver, CO)

According to the list, the cable system in Denver, CO raised its basic rates from $2 50 to $13 95 in 1987 More accurately, 75% of the system's subscribers received a $1 00 price decrease due to tier consolidation Prior to deregulation, the system offered its subscribers three tiers of service, the "Community" tier with all local broadcast stations plus four cable channels for $2 50 per month, the "Budget" tier with all local broadcast stations plus ten cable channels for $7 95 per month, and the "Summit" tier with fifty-four channels of local stations and cable channels for $14 95 per month After deregulation, the system collapsed these three tiers into a single fifty-four channel tier with the same offerings as the $14 95 Summit tier, and reduced the rate to $13 95 per month

o Weston, CT (Duplicate Same system also appears later on list under Weston, CT)

According to the list, the cable system in Weston, CT raised its basic rate from $4 90 to $19 95 in 1987 However, these two prices reflect two different tiers of service Prior to deregulation, the Weston system offered two tiers of basic service One tier, a 35-channel tier, cost $4 90 per month for subscribers with a cable-ready set, or $6 45 for subscribers who need to lease a converter After deregulation, the price of this tier rose to $13 95 for subscribers who need to lease a converter

The second tier of service, which was not created until March 1987, after deregulation, contained an additional seven channels and cost an additional $6 per month Thus, subscribers who purchased both of these tiers paid $19 95 after deregulation.

In addition to these rate changes, the Weston system dropped the prices of ten premium networks by 31%, from $14 50 to $10 00 These premium networks are HBO, Showtime, Cinemax, The Movie Channel, Disney, Playboy, Bravo, American Movie Classics, and the SportsChannel

o Russell, OH

According to the list, the cable system in Russell, OH raised its rates from $5 00 to $16 00 in 1987 No such pricing change took place The cable system did increase its basic service tier from $5 00 to $8 50 in January 1987 At the same time, this system reduced its "family" service (expanded basic) tier from $10 to $7.50 Therefore, subscribers purchasing the expanded tier experienced a 6 7% increase in basic rates from $15 00 to $16 00.

o Corvallis, OR (Duplicate same system also appears on list under Albany, OR)

According to the list, the cable system in Corvallis, OR raised its basic rates from $6.05 to $15.00 in 1987 However, on March 1, 1987 the system combined a nine-channel tier priced at $6.05 per month with a seven-channel tier priced at $4 45 per month and added ten additional channels Thus, subscribers to the second tier of service received 63% more channels after deregulation and subscribers to the first tier of service experienced a 189% increase in the number of channels they receive.

o Long Beach, CA

According to the list, the cable system located in Long Beach, CA raised its basic rate from $6 45 to $14 95 in 1987 On March 1, 1987, the system consolidated its "economy" tier of basic service into another basic service tier This tier only contained the local off-air stations and public access channels. In fact, less than 2,200 of the system's 50,000 subscribers opted to take this tier of service The tier was eliminated because the cost of offering this separate service was greater than the revenues generated by the economy tier subscribers The remaining 48,000 basic subscribers were unaffected by this change.

o Norwich, CT

According to the list, the cable system in Norwich, CT raised its basic rates from $9.18 to $10 10 in 1987 In 1987, the system did indeed increase its basic rates from $9 18 to $10.10 as reported on the list. This rate increase represents, however, an increase of only 10%, not 116% as reported on the list.

o Ocean City, MD

According to the list, the cable system in Ocean City, MD raised its basic rates from $6 85 to $13 95 in 1987 No such pricing change took place. On October 1, 1987, this system raised its basic rates from $8.75 to $13 95 This was the system's first rate increase since the system completed its rebuild in 1986 At that time, the system spent $14 million to upgrade the system from a

22-channel one way system to a 60-channel two-way fully addressable system Moreover, effective January 1, 1987, the system reduced its rates for premium network services by 8 4%, from $11 95 to $10 95

o Denver, CO Duplicate See Denver, CO

o Sonora, CA

According to the list, the cable system in Sonora, CA raised its basic rate from $9 75 to $16 75 in 1987 The system, however, implemented no such increase, and has not changed its prices since May 1986 In May 1986, the system completed an upgrade of its system, expanding the channel capacity from 12 to 35 channels At that time, the system raised the price of its 12-channel basic tier from $9 75 to $12 87 The system also created an additional 16-channel tier, priced at $4 08 per month

o Mundelein, IL (Duplicate system also appears on list under Libertyville, IL)

According to the list, the system serving Mundelein, IL raised basic rates from $7 70 to $12 95 In actuality, on February 1, 1987, the cable system collapsed its $7 70 basic tier (36 channels) and its $4 95 expanded basic tier (6 channels) into a $12 95 basic service tier The system also added SportsVision, previously a $9 95 per month premium network, and superstation WWOR to the basic tier of service Therefore, subscribers purchasing the expanded basic tier prior to February 1, 1987 experienced only a 2 4% increase in price of basic service and received a premium network and a superstation as part of the basic package. Moreover, the system reduced its monthly rates for each of the five premium networks carried by the system The price for HBO, Showtime and Cinemax were reduced by 9 5%, from $9 95 to $9 00, and the price for Disney dropped by 10%, from $10 00 to $9 00.

o Acton, MA (Duplicate same system appears on list under Hudson, MA and Hudson-Maynard, MA)

According to the list, the cable system in Acton, MA raised its basic rates from $4 50 to $7 50 in 1987 Although this system did in fact implement this price increase in 1987, the system decreased the rates for the expanded basic tier (10 channels) by 16 7% from $9.00 to $7 50 In addition, the number of channels on the basic tier increased by 8 7%, from 23 to 25 channels, and the number of channels on the expanded basic tier increased by 10% from 10 to 11 channels. Therefore, subscribers purchasing the expanded tier experienced only an 11 1% rate increase accompanied by a 9 1% increase in the number of channels available in 1987

o Hudson, MA — Duplicate See Acton, MA

o Hudson-Maynard, MA — Duplicate See Acton, MA

o Buckland et al, MA (Duplicate same system also appears under Turner Falls, MA)

According to the list, the cable system serving Buckland, et. al, MA raised its rates from $8 25 to $13.95 in 1987 In actuality, on February 1, 1987, the system increased its rates for the basic tier of service (12 channels) by 12 1%, from $8 25 to $9 25 The system also increased the rates for the expanded basic tier (8 channels) by 1% from $4 70 to $4 75 On September 1, 1987, the system collapsed its basic and expanded basic tiers into one basic service tier (23 channels) priced at $13 95 Therefore, subscribers purchasing the expanded basic tier prior to January 1, 1987 experienced only a 7.7% increase in the cost of basic service but received 15% more channels Moreover, the subscribers who purchased only the basic tier of service prior to January 1, 1987 experienced a 91 7% increase in the number of basic channels received, from 12 to 23 basic channels

o Indian Lake, OH

According to the list, the cable system in Indian Lake, OH raised its basic rate from $8 00 to $13.00 in 1987 Although this system did implement this price increase in July 1987, the system had just completed a rebuild at an estimated cost of $3 million The old cable plant was a 12-channel (11 basic and one premium network) system while new cable plant is a 30-channel system. Therefore, subscribers saw a dramatic increase in the number of basic channels. In fact, the number of basic channels increased by 136%, from 11 to 26 channels

o Libertyville, IL — Duplicate See Mundelein, IL

o Lower Township, NJ (Duplicate same system also appears under Wildwood, NJ)

According to the list, the cable system in Lower Township, NJ raised its basic rates from $8 40 to $13 50 in 1987. In actuality, on January 1, 1987, the system consolidated its $8 40 basic tier (12 channels) and its $6 00 expanded basic tier (8 channels) into one basic service tier (22 channels) priced at $13 50 Therefore, subscribers purchasing the expanded basic tier prior to January 1, 1987 experienced a 6.25% decrease in cost of basic service Subscribers purchasing only the basic tier prior to January 1, 1987 experienced an 83 3% increase in the number of basic channels. Moreover, the system decreased its rates for three premium networks carried by the system The price for HBO, Showtime, and Disney

decreased by 28 7%, from $13 95 to $9 95, on an a la carte basis on January 1, 1987

o Wildwood, NJ — Duplicate See Lower Township, NJ

o Troy, OH

According to the list, the cable system in Troy, OH raised its basic rates from $9 40 to $14 99 in 1987 On January 1, 1987, the system consolidated its $9.31 basic tier (23 channels) and its $4.70 (including converter) expanded basic tier (6 channels) into a single 32 channel basic tier priced at $14 99 Therefore subscribers purchasing the expanded basic tier experienced a 7% basic rate increase from $14 01 to $14 99 Moreover, the system also decreased its rates for three premium networks on January 1, 1987 The price for The Playboy Channel, for example, decreased by 23.2%, from $12 95 to $9 95. Likewise, the price for Disney decreased by 30 2%, from $9 95 to $6 95 and the rates for Showtime decreased by 9 1%, from $10 95 to $9 95

o Walnut Creek, CA

According to the list, the cable system in Walnut Creek, CA raised its basic rates from $8.50 to $12.95 in 1987. The system, however, consolidated its tiers in February 1987 Prior to consolidation, the system offered a basic service package of 12 channels for $8 50, and an expanded tier of 10 additional channels for $5.00 After consolidation (which came after completion of system rebuild), the system offered a basic service of 29 channels for $12.95. Thus, the 45% of customers subscribing to the expanded basic tier actually received a price decrease of 4.1% (from $13.50 to $12.95) and an increase in the number of channels of 32% (from 22 to 29). Subscribers to the basic tier received a 142% increase in the number of channels (from 12 to 29). In addition, the price of HBO decreased 9 1% from $11 00 to $10 00, and multi-pay discounts were introduced

o Turners Fall, MA — Duplicate See Buckland et al, MA

o Weston, CT — Duplicate See Weston, CT

o Albany, OR — Duplicate See Corvallis, OR

- Downs, IL (Duplicate system also appears later on the list under Downs, IL)

According to the list, the Downs, IL cable system raised basic rates from $9 95 to $14 95 in 1987 Although this rate increase did take place in November 1987, the number of basic channels increased by 44% at the same time, from 9 to 13

- Broadview, IL Duplicate See Oak Park, IL

- Burnham, IL Duplicate See Oak Park, IL

- Downs, IL Duplicate See Downs, IL

- Oak Park, IL (Duplicate same system also appears under Broadview, IL, Burham, IL, River Forest, IL, and Lincolnwood, IL)

According to the list, the cable system in Oak Park, IL raised basic rates from $9 95 to $14 95 in 1987 This system, however, added SportsVision, previously an $11 50 premium network, to the basic tier effective January 1, 1987 Moreover, the system dropped the rate of its eight premium networks by 21.7%, from $11 50 to $9.00.

- River Forest, IL Duplicate See Oak Park, IL

- Beaver, PA

According to the list, the cable system in Beaver, PA raised its basic rates from $8 00 to $8.92 in 1987 The system's basic service rates did not change at all in 1987 The rate increase from $8.00 to $8.92 occurred prior to deregulation

- Lincolnwood, IL Duplicate See Oak Park, IL

Senator METZENBAUM Your time has run out Your time has run out I will come back to you with some questions We gave you 3 minutes extra because I interrupted you Let me ask you some questions

Mr MOONEY Certainly, sir

Senator METZENBAUM Let me tell you what my constituents are saying about the cable industry today From Cleveland Heights

For the time being I intend to disconnect from my local monopoly, until there is either some competition introduced into the market, or effective regulation is granted to State and local governments I find the whole thing appalling and would appreciate your review and indication of your willingness to seek some form of protection for the consumer

Another individual from Norwalk, OH, wrote

So many of us are on a fixed income, and with so many rates of the telephone and cable television being raised so often, we are finding it hard to keep up with the raises Those of us who live alone really need the telephone Also, the television is the only recreation many have There are many of us senior citizens who feel something should be done to curtail some of the rate raises and would appreciate anything you could do toward this end

According to you, Mr Mooney, the cost to consumers of deregulation has been a modest 6-percent rate increase But my information is quite different I have a list of 93 systems with rate increases of 50 percent or more in just the first year of deregulation

Let me ask you, what can possibly justify a rate increase of 458 percent, like the one in Denver, or a 220-percent increase, like that in Russell, OH?

Mr MOONEY I would like to have an opportunity to comment individually on all 90-some systems you have on your list, Senator I think in most instances, the facts were somewhat more complicated

In Denver, for example, most people now—as a result of tier consolidation—pay less on their total monthly bill than they did prior to what has been described as "rate increases" What has gone on in many of these places is that different tiers of service have been consolidated into one to make it easier for consumers to understand what they are going to get

And very frankly, in some places cable service, threshold service, was being sold for an unreasonably low rate, such as $2 or $3 or $4 And you know, you really cannot do it for that amount of money Some people, yes, I am sorry to say, have ended up having to pay more And people, of course, do not like having to pay more

But in most instances, in which I have heard anecdotal horror stories, upon looking into them, the facts tend to be a little bit more extensive than is often given in the horror story

Senator METZENBAUM It seems to me, Mr Mooney, that the tremendously high increase in the price per connection, which has soared since deregulation, pretty much confirms the fact that there has been a very, very substantial increase Deregulation occurred what, 1½ years ago?

Mr MOONEY At the end of December, 1986

Senator METZENBAUM So we have all of 1987 About 1½ years, something like that A little less than a 1½ years

As I understand it, the sale price of a system per subscriber has gone up from $1,200 to over $2,000, and I gather prices are continu-

ing to rise That would seem to confirm the fact that the owners and the buyers recognize that the potential for increases has not yet arrived I think that it is a problem that, as I said before, we in Congress are constantly urged not to intervene in the private sector

When the private sector does not do the right thing, with respect to labor relations, then we intervene sometimes on the side of labor, with the Wagner Act, and then we come back with the Landrum-Griffin Act, and then the Taft-Hartley Act, and we do intervene

We intervene in a number of other areas where the private sector does not self-police itself I am very concerned that the kind of self-policing that is called for is not occurring I was in the private business world I understand the fact that if you can charge $17 why should you charge $16, if you can get the $17, or whatever the figures may be

But I will tell you that you have those of us in Congress who, in retrospect, question now why we deregulated AT&T, broke it up, why we deregulated the trucking industry And now we are sort of questioning why we deregulated the right of cities to regulate your rates

The failure of the FCC to define effective competition adequately was just an absurdity on its face and an indication of a lack of public concern as I see it I think it was a very strained definition

I do not think time permits me to engage in a lengthy dialog with you, but since I do not think it is fair for me to have the last word, I give it to you, sir, briefly

Mr MOONEY Thank you, sir

It will not surprise you, Mr Chairman, if I do not agree as to the correctness of the FCC's judgment on effective competition

Senator METZENBAUM I am not surprised

Mr MOONEY But I would add, we tend not to be theological about these things We do not like to stonewall the Congress and insist that everything we do is fine and that all is milk and roses in our business I mean, that is never the case in anybody's business

We have tried to be as flexible as we can in all of our relationships with all levels of government The Cable Act itself was the product of a compromise between my organization and the National League of Cities and the U S Conference of Mayors

I heard must carry alluded to earlier in this hearing We have tried very hard to get together with the principal broadcast trade associations to put a new must carry rule back in, only to have it struck down again by the U S court of appeals I am on record as saying that we are willing to go back and try again

Similarly, we are sensitive to the expressions of concern by Members of Congress and other elected officials, as to what should be proper behavior in the marketplace I should say, Senator, that we think we have a good story to tell I would ask you to keep only one thing in mind As we continue to go through this process of evaluating the current state of communications law, including that which applies to us, we think we are putting something good on the table

We are expanding the ways in which this society uses the video medium, and in a net sense, making a positive contribution to the

American society late in this century We are willing to work with you and your colleagues in any way that we can to try and do even a better job

Senator METZENBAUM I think there is a lag period, but after the lag period expires, I think some of us will revisit the issue if there are not some changes made I am being as candid as I possibly can

Mr Collins, we are very happy to welcome you here today In doing so, as a spokesperson for Home Box Office, let me express my appreciation to you for being with us because Viacom, which also owns programming, Showtime, did not see fit to show up We consider that an uncalled for snub We resent it

We are happy that you are with us, sir, and we think when a committee of Congress wants somebody who has a public interest and uses the public airwaves, we think that they are obligated to show up for a hearing of this kind Viacom's conduct strongly meets with the Chair's disapproval

Happy to have you, sir

STATEMENT OF JOSEPH COLLINS

Mr COLLINS Thank you, Mr Chairman

I am pleased to be here today at the subcommittee's invitation to testify on the distribution policies that have made HBO available to virtually all American homes

Today's satellite-connected, national distribution network is a far cry from the initial transmission of HBO in 1972 to fewer than 400 homes in one Pennsylvania community In the early 1970's, we distributed HBO by microwave, an inherently limited distribution system It was clear that HBO had to find a new, broader, and more efficient distribution system if it was to extent the reach of its service

In 1975, we took the historic step of delivering television programming to cable systems by satellite The commonplace availability of satellite programming today sometimes obscures the extraordinary risk associated with that decision Nearly $30 million was invested in HBO before it began to break even in 1977

Satellite distribution revolutionalized the television business It created an economic underpinning that allowed us to pursue innovative, original programming focusing on important and controversial topics that are not addressed elsewhere Originally films like Sakharov, Murrow, Mandela, and Dear America Letters Home from Vietnam, are meeting the challenge of television to stimulate and inform, as well as entertain American consumers

The future of American television is bright and HBO is leading the way Our goal is to be in every home in America We have historically sought wide distribution of our programming through a variety of competing distribution mechanisms

HBO has used virtually every distribution technology that has been available since our inception in 1972 In many cases, we pioneered technological developments that were necessary to create new, competitive distribution systems

Our efforts to extend distribution of our services has not always been positive Some distribution alternatives have not succeeded in

the marketplace and, in some cases, these business failures have caused HBO to limit distribution of its programming through a particular distribution methodology

However, HBO is in an intensely competitive business There are numerous ways to see a movie, VCR's, over-the-air broadcasting, movie theaters We have to ensure that, at the very least, consumers have the option to see movies on HBO That is why it will continue to be our policy to use distribution technologies that are economically viable, technically sound, and provide quality distribution of our programming to consumers

Mr Chairman, selling pay television is a complicated business that requires constant attention to the consumer's shifting notion of what constitutes good entertainment American consumers are fiercely independent and, after 50 years of experience with television, quite sophisticated in their tastes

It takes a unique blend of statistical analysis, consumer research, intuitive feel, and just plain luck to be a successful pay program HBO has had a difficult and challenging task and we cannot afford to miss any opportunity to reach potential customers That is why we have always sought broad distribution of our services

This policy has worked well for HBO for the last 15 years We have become the largest brand-name subscription business in the world and we have not done this by artificially limiting distribution of our services We have done it by offering consumers quality services through a variety of distribution systems That is our policy today and that will be our policy tomorrow

[The prepared statement of Mr Collins follows]

TESTIMONY OF

Joseph Collins, President
Home Box Office, Inc

Good morning, Mr Chairman and members of the Subcommittee My name is Joseph Collins I am President of Home Box Office, Inc , a subsidiary of Time Incorporated HBO was the nation's first and today is its largest pay television company. Our satellite-delivered program services, HBO, Cinemax and Festival, serve over 21 million subscribers in all fifty states.

I am pleased to be here today at the Subcommittee's invitation to testify on the distribution policies that have made HBO available to virtually all American homes. Today's vast, satellite-connected, national distribution network is a far cry from the initial transmission of HBO in 1972 to fewer than 400 homes in one Pennsylvania cable system In the early years of its existence, HBO distributed its programming to cable systems by microwave links and each link required separate FCC approval

By 1975, HBO had grown to 195,000 subscribers, but it was clear that microwave distribution was inherently limited If HBO was to extend the reach of its services, it had to develop a new, broader and more efficient delivery system.

The necessity to broaden its distribution led HBO to the historic step of delivering television programming to cable systems via satellite The commonplace availability of satellite program services today sometimes obscures the extraordinary risk associated with that decision. Nearly $30 million was invested before HBO began to break even in 1977. Many people considered satellite television a pipe dream Obviously they were wrong. HBO has been one of the truly significant technological achievements of American business over the past 15 years

The decision to distribute HBO via satellite revolutionized the television business and made possible a wealth of program choices that were the stuff of dreams prior to 1975 Consumers, of course, have been the primary beneficiaries HBO has given consumers the ability to choose the programming they want to watch The monthly subscriber fee is in effect a vote, which the consumer casts every month for or against the programming HBO delivers

HBO's extensive national distribution system created an economic underpinning that has allowed us to pursue innovative, original programming, focusing on important and controversial topics that are not addressed elsewhere Films like Sakharov, Murrow, Mandela, and Dear America Letters Home from Vietnam, are meeting the challenge of television to stimulate and inform, as well as entertain American consumers The future of American television programming is bright and, as it has in the past, HBO is leading the way

From a distribution standpoint, HBO's goal has always been to be in every home in America Consistent with that goal, HBO has historically sought wide distribution of its programming through a variety of competing distribution mechanisms In fact, HBO has used every distribution technology that has been available since its inception in 1972 (The one exception is subscription television -- STV HBO was unsuccessful in obtaining the necessary copyright licenses from the motion picture studios to allow it to distribute movies by STV) In many cases, we pioneered technological developments that were necessary to create new, competitive distribution sources For example, HBO supported deregulation of small receive only "dishes" in 1977 That deregulation, coupled with HBO's decision in 1985 to scramble its services, resulted in distribution of satellite programming directly to home dish owners In other

cases, HBO has been a strong early supporter of new distribution technologies. In the 1970s, for example, HBO sought distribution of its services through MDS operations HBO continues today to offer distribution of its product through new technologies In the past few years, for example, HBO has become a substantial player in the video cassette business

Our efforts to extend distribution of our services have not always brought about positive business results Some distribution alternatives have not succeeded in the marketplace, as we will demonstrate below In some cases, these business failures have caused HBO to limit distribution of its programming through a particular distribution mechanism.

HBO is not an essential service. Although we think our program services are very good, they are simply not life-sustaining, like electricity or heat Moreover, Congress, the FCC and the courts have recognized that consumers can get similar programming to HBO's from a host of sources, including other pay services, broadcast television, basic cable services, pay-per-view and video cassettes

Nor is HBO an essential service for entities seeking to offer a package of program services to consumers Again, there are alternative program services available to such entities As a result, HBO has no obligation to make its services available to every distributor that seeks to acquire them HBO has been selective in choosing its distributors in those instances where it believes that selectivity results in improved efficiency and increased brand awareness Notwithstanding our clear right to select, and to limit, our distributors, HBO has used virtually every available video distribution technology It has always been in our interest to do so

And, it will continue to be in our interest to do so for one simple reason -- we are in a fiercely competitive business There are numerous ways to see a movie -- VCRs, over-the-air broadcasting and movie theatres We have to ensure that, at the very least, consumers have the option to see movies on HBO That is why it is and will continue to be our policy to use video distribution technologies that are economically viable, technically sound and provide quality distribution of our programming to consumers

Mr Chairman, HBO's record as a distributor of video programming, utilizing every distribution alternative available, is unmatched Our distribution policies are fully consistent with the antitrust laws and the Communications Act Below, in specific terms, I discuss the history and current status of each of the ways in which HBO has attempted to deliver its services to consumers

1 Cable Television Cable television is HBO's primary distribution source We have approximately 7,000 cable affiliates which account for nearly 20 million subscriptions As a member of this industry for over 16 years, I am in a position to know that cable is the superior video distribution technology available today The cable industry offers an efficient, nationwide distribution system which reaches the vast majority of homes in this country Cable operators understand the complex and dynamic nature of the pay television business and have an extensive knowledge of HBO's program services Cable is a solid business which offers HBO stable profitability and quality distribution of our services

Recently, HBO offered its cable affiliates the opportunity to purchase wireline exclusivity The offer was limited -- it did not apply against non-wireline technologies such as MDS or

home dishes. In addition, the offer required affiliates to meet marketing and promotional requirements with respect to the HBO services Program exclusivity is premised on the belief that in this highly competitive environment a quality of uniqueness is necessary to attract consumer patronage

Although our affiliates have expressed interest in exclusivity generally, they did not sign up for this exclusivity proposal in sufficient numbers to justify continuation of the offer Therefore, we have withdrawn our exclusivity proposal for further consideration

2 Video Cassettes Since 1984, HBO has been involved in the distribution and sale of video cassettes Through HBO Video, Inc , the largest independent video cassette distributor, we currently distribute video cassettes to wholesale distributors who in turn sell the cassettes to video retail outlets across the country Predominantly these video cassettes are feature films, including films that are carried on HBO's program services and some that are made for original exhibition on HBO

3 Home Dishes. Since January 15, 1986, when HBO began full-time scrambling, we have offered home dish owners three alternative ways to receive our services 1) directly from HBO through a toll free 800 telephone number, 2) through the local cable operator, and 3) from the dish retailer who can arrange an annual subscription for our services

Every dish owner in America can receive HBO's services. There is no denial of access

The prices for dish owners are very attractive A dish owner who subscribes to HBO and Cinemax on an annual basis (as over 80 percent of our dish customers do) can receive the

services for $7 48 per month That price is three dollars per month less than the average national price paid by a cable subscriber for HBO

HBO also offers dish owners the ability to create program packages, selecting from the following services HBO, Cinemax, CNN, Headline News, USA Network, Christian Broadcast Network, WWOR (NY), WSBK (Boston), KTLA (Los Angeles) The prices for these packages are comparable to that paid by cable subscribers for a package of program services

The response from dish owners has been quite favorable HBO now has over 250,000 dish subscriptions to its HBO and Cinemax services We have an additional 100,000 subscriptions to the other services that are part of our package offering We are currently adding between 14,000 and 18,000 new dish subscriptions per month

As you may know, Mr Chairman, there are proposals to create a federal right for any financially qualified entity to distribute our services and to regulate our prices HBO strongly opposes these proposals and sees no legal or public policy rationale for such an extensive and far-reaching regulatory scheme The record demonstrates that TVRO owners are being treated fairly We are committed to continuing that treatment

4 Satellite Master Antenna Television Systems (SMATV). HBO has provided its services through SMATV operations to commercial properties, such as hotels, motels and residential apartment buildings, since the early 1980s Some aspects of this business are thriving. For example, HBO has a large number of subscriptions from hotels and motels That segment of the SMATV business is profitable and growing.

SMATV distribution to commercial residential buildings has not been so successful HBO distributes its services through commercial residential SMATV operators in two ways 1) we have entered into direct affiliations with several large volume, broadly distributed SMATV operators, and 2) we actively encourage our cable affiliates to subdistribute our services to SMATV operators in their areas

The results from our direct affiliations have been disappointing We have entered into four such arrangements One of the four companies has gone bankrupt Another is in the process of selling off its SMATV properties on a piecemeal basis. The performance of the remaining two companies has been far below expectations. One of these companies projected 1987 year end HBO subscribership of 35,000 -- actual subscribers were only 13,000 The other company projected 1987 year end HBO subscribership of 90,000 -- actual subscribers were only 20,000

Approximately 550 SMATV properties have been authorized to sell HBO through our cable affiliates. These properties have generated over 41,000 subscriptions.

5. Multi-Point Distribution Service (MDS) HBO has been distributed via MDS since 1974 HBO was a pioneer in MDS and our involvement with the technology increased throughout the 1970s and early 1980s. By 1982, HBO had 32 MDS affiliates in 28 cities serving 372,000 subscribers

Beginning in 1982, however, the MDS business encountered serious reversals for a variety of reasons, including rampant theft of service and the growth of cable television The MDS signal was not secure and was easily intercepted by pirate MDS receivers From 1982 through 1985, HBO spent over $400,000 prosecuting theft of service cases

Notwithstanding HBO's efforts to support MDS, 14 MDS affiliates have declared bankruptcy or gone into receivership We have been forced to write off more than $5.9 million in receivables from MDS affiliates, a rate of delinquency unheard of among our cable affiliates By the middle of 1986, HBO had only 24 MDS affiliates in 16 cities serving 146,000 subscribers -- a decline in subscribership of over 61 percent in less than four years

Theft of MDS services continues to be an enormous problem for HBO HBO is distributed in an unscrambled form by MDS operators in seven large metropolitan areas We believe that as many as one million households per month are now illegally intercepting unscrambled MDS transmissions

As a result of our experience, and after careful review, HBO has decided not to expand distribution of its services by MDS into new areas However, we are continuing to distribute our services through our existing MDS affiliates and to provide whatever support we can to make these businesses viable.

Recently, multi-channel MDS (MMDS) has been authorized by the FCC Although MMDS is a very new and unproven distribution business, HBO has an agreement in principle with Microband, the largest MDS distributor, which has plans to include HBO in an MMDS service in three metropolitan areas -- New York, Washington, D C , and Detroit We believe MMDS faces certain inherent difficulties as a distribution technology, however, we are experimenting with Microband and we will assess any future distribution by MMDS after an appropriate period Finally, some of our existing MDS operators are offering HBO in an MMDS package

As this record demonstrates, HBO has always sought wide distribution of its services. There are circumstances, however, where it may be necessary to limit one's distribution. For example, if a particular distributor experiences poor economic performance or if a distribution technology encounters repeated business failures, a supplier might be forced to limit its exposure to such losses. Similarly, if a distributor or a distribution technology proves to be technically poor or inefficient, a supplier might make the business decision to limit distribution through that technology Chronically poor relations with consumers could also form the basis of a decision to limit distribution by a particular distributor or distribution technology Such problems could occur in the context of any technology, including cable television.

Ultimately, the key to HBO's success is its brand name and the ability to market that name as a unique, reliable and high-quality service of interest and value to consumers. That is why we zealously protect the integrity of our service, the distribution as well as the programming The best way to do that is to ensure that our distributors are technically and economically fit and that they maintain a high standard of customer relations The vast majority of our distributors meet these qualifications However, it is a simple business fact that not all distributors can do so In those instances where a distributor cannot, prudent business practice suggests that a supplier limit its distribution with that distributor

Mr Chairman, selling pay television is a complicated business that requires constant attention to the consumer's very ephemeral and shifting notion of what constitutes "good" entertainment American consumers are fiercely independent and, after 50 years of experience with television, quite sophisticated in their tastes It takes a unique blend of statistical

analysis, consumer research, intuitive feel, and frankly, luck, to be a successful pay programmer

Our task is all the more difficult because we have to make our sale every month The consumer can cancel at any moment by simply not writing out a check Moreover, as I have stated, there are a variety of ways for consumers to receive the movies and other programming we offer We cannot afford to miss any opportunity to reach a potential customer. That is why HBO, from its inception, has always sought broad distribution for its services We have used every video distribution technology that has been available We continue today to use every distribution technology that is economically and technically sound and offers quality service to consumers

Our distribution policies have worked well for HBO and for the American consumer In just 15 years since we first began service, HBO has become the largest brand name subscription service in the world We have not accomplished this Herculean feat by artificially limiting distribution of our services We have done it by offering consumers quality services through a variety of distribution systems That is our policy today and it will be our policy tomorrow

Senator METZENBAUM Thank you very much, Mr Collins
Mr Collins, does HBO have a corporate policy against selling to wireless?

Mr COLLINS No, sir, we do not have a corporate policy against selling to wireless cable, which we refer to as MMDS, or multi-channel MDS We do business with——

Senator METZENBAUM What is the difference in multi-channel—what do you call it?

Mr COLLINS Senator MDS stands for multipoint distribution service, and that technology has been around since the mid to early seventies By adding several more channels to the technology, so rather than one channel or two channels, it is three or more channels, that is referred to as MMDS, or multiple channel multipoint distribution service

Senator METZENBAUM Is that wireless?

Mr COLLINS That is called, from a marketing standpoint, to people who sell that, wireless cable

Senator METZENBAUM But is it wireless?

Mr COLLINS It is a microwave service It is distributed via a big broadcast microwave transmitter and microwave receive locations

Senator METZENBAUM But there are now wires? You do not have to wire for it?

Mr COLLINS No, sir, there are no wires There is no cable, either

Senator METZENBAUM And you sell to MMDC, or whatever it is called?

Mr COLLINS We, for many years, have been an extensive distributor through MDS, and I might add that it can only be described as a disastrous business experience for us

Senator METZENBAUM As a what?

Mr COLLINS A disastrous business experience

Senator METZENBAUM Why are you willing to sell it to these companies that testified here today?

Mr COLLINS Well, sir, in the case of Microband Corp, which does business in New York City, we have been a customer of theirs in New York for many years They have been the common carrier operator of the MDS system in New York

We have been discussing with them an arrangement, we have an agreement in principle, whereby our signal will be distributed over MMDS It has been a very difficult discussion because of our concerns primarily over security, where we are very afraid that we will have replication of what happened in the MDS business where our signal is widely available for nothing and stolen, and that has been very bad for our business

Senator METZENBAUM Mr Theroux said he cannot buy HBO Can he?

Mr COLLINS Well, sir, I believe Mr Theroux has had several contacts with people in our organization and he is not currently a customer of ours in Cleveland I think that in the case of MMDS, we have some places that we currently do business, like Milwaukee, and we are seeing how the business works and if we can be comfortable with the very real, we think, and large security questions Up until that point, we would be very reluctant to authorize additional transmissions

Senator METZENBAUM Have you seen any instances of your signal being pirated with the wireless?

Mr COLLINS Well, in fact, right now in Washington, as we sit here, our signal, HBO, is transmitted via MDS on an unscrambled basis If you were to go out and purchase a decoder which is not addressable, there is no protection on it, you could mount it on your house and get HBO and not pay for it

As I drove to the airport in New York yesterday, and it always saddens me, I can drive through portions of Queens where all you see are a forest of antennas of people who are watching HBO and not paying us for it

Senator METZENBAUM Mr Theroux says he scrambles Under those circumstances, why would you have any difficulty selling to him?

Mr COLLINS Well, sir, we are concerned that when you broadcast your signal in any form, which MDS is a form of broadcasting, that if there is any breach in the security, it is very difficult to get it back So we would want to have some experience before we felt secure with that technology

As an example, 10 years ago we all thought that single-channel MDS, because it was transmitted at microwave frequencies, was quite secure We found out, unfortunately, that that was not true

Senator METZENBAUM When do you think you will have an answer for the wireless industry as to whether you will or will not make the product available?

Mr COLLINS Well, sir, we have a major test of all this that is going to happen in New York We have one going on right now in Milwaukee I am sure we will be discussing with Microband what goes on in this market and in Detroit And we hope those are successful But at the same time, we are very wary of that

Senator METZENBAUM When do you think you will have an answer?

Mr COLLINS I would hate to try and set a date, Senator, as to exactly when It would be when we are sure that our signal will be secure and that the business is going to have a true financial underpinning that will keep us from having financial difficulty with those distributors

Senator METZENBAUM I will say the same to you Certainly, you cannot operate wireless or competitive medium without being able to obtain product And if the wireless companies cannot obtain product, they have to go under That is just the reality of fact It would seem to me that this is an issue that is not going to take a long time to resolve Either it is going to be resolved or I do believe Congress will direct its attention to this subject

I believe it is truly an antitrust issue that concerns us We believe in free competition and have difficulty in understanding how the wired cable homes are entitled to better service, more available product than the wireless

So I would say to you, Mr Collins, just as I said previously, our concerns are not going to stop at the conclusion of this hearing, but that we will wait to see what happens in the next several months If nothing happens, my guess is there will be a legislative proposal made to deal with the subject And I feel confident if there is, we would have the votes to pass it But I would much prefer to see the industry work out its own problems

Our next witness is Amos Hostetter, chairman and chief executive officer, Continental Cablevision, Boston, formerly from Ohio Happy to have you with us, Mr Hostetter

STATEMENT OF AMOS HOSTETTER

Mr HOSTETTER Mr Chairman, pleasure to be here It is a particular pleasure, as you note, because Continental Cablevision was founded in Ohio 25 years ago in the communities of Tiffin and Fostoria, which I know you know well

Senator METZENBAUM Very well

Mr HOSTETTER In 1963 my partner and I moved to those towns to begin what was then basically a reception service for an area that got very poor off-air television We were engaged in every aspect of the business at that point from installing, and I will even say disconnecting subscribers who failed to pay their bill, to sweeping the front steps

In the 25 intervening years, we have worked hard at it and the company has grown and prospered Today Continental Cablevision serves almost 300,000 families in Ohio and nearly 2 million nationwide We are now the third largest company in the cable industry

I would hasten to point out that being the third largest cable operator is not like being ABC, CBS, or NBC Being No 3 in our industry means that we serve 4 4 percent of the cable homes, or 2 2 percent of the national TV homes Our systems capacity ranges from 35 to 60 channels, and with the exception of local origination programming, we do not control a single programming service that we carry

Compare our position with ABC, the third largest broadcast network which has an average audience share of 19 percent of the TV households and which owns outright stations serving 24 4 percent of the American households The top three movie studios, Paramount, Disney, and Warner Brothers together have approximately 46 percent market share of the domestic box office revenues The top eight studios have 87 percent

In comparison, the top three cable companies, TCI, ATC, and ourselves serve 32 percent of the cable households, which is 16 percent only of national TV homes The top eight MSO's serve only 23 percent of the TV households It is a very different industry in its structure

The entire cable industry from TCI, the largest, to mom-and-pops in Ohio serving several hundred homes has annual revenue of approximately $11 billion I would point out to you that two of the Bell regional operating companies alone have revenue of greater than $11 billion

Senator METZENBAUM Give me that figure again

Mr HOSTETTER $11 billion is the total revenue of the cable television industry NYNEX and Bell South both gross more than $11 billion as single companies

Put another way, the Bell operating companies are 25 times the size of Continental Cablevision, of my company, the third largest——

Senator METZENBAUM What is the basic capital investment in those three companies as compared to the total capital investment of the cable companies?

Mr HOSTETTER I would say approximately the same relationships hold They have about the same revenue to asset investment basis as the cable industry does

To put it another way, any of those seven are 20 times larger than we are And in fact, any of them are eight times larger than the cable industry's largest company, TCI So I think it is important to keep in perspective, while this is an industry that has grown and prospered, it is far from a giant by U S industry standards No cable television company is among the Fortune 500

I have submitted a prepared text, and there are a number of issues that I touch on If I may, I would like to skip to ones that might interest you, and I would be happy to answer any questions you have It is your agenda

[The prepared statement of Mr Hostetter follows]

Statement of

Amos B. Hostetter, Jr

Chairman and Chief Executive Officer

Continental Cablevision, Inc.

Mr. Chairman and Members of the Subcommittee

I am pleased to have the opportunity to appear before you this morning. While I'm not expert in antitrust matters, I have spent most of my professional life in the cable television business and am happy to share with you my observations on some of the public policy issues which are of concern to your Subcommittee

On a personal note, Mr. Chairman, it is a special pleasure for me to participate in your hearings, as Continental Cablevision is a Company which I started in Ohio 25 years ago and today provides cable service to some 275,000 Ohio households.

In 1963, my partner and I moved to the Towns of Tiffin and Fostoria in the northwest part of the state and built our first cable system there From installing new subscribers to sweeping the front steps we were involved in every aspect of that fledgling operation. In those days cable television was essentially a service to enhance the reception of local broadcast stations. It was not until the advent of satellite technology and the development of special cable programming services in the mid-70's that our industry began to fulfill its real promise by providing consumers with a rich choice of programming services such as Cable News Network, ESPN, Arts and Entertainment, Nickledeon, Discovery, USA Network and C-SPAN.

With the additional choices cable now provides, half of the television households in the U.S. today subscribe to

cable. And even though network affiliates and independent stations still command 66% of audience share in cable households, consumers now tune to cable services a third of the time.

The chief reason cable has achieved popular acceptance is because of the special programming services which the cable industry itself has developed. As recently as 1975, the year HBO went up on satellite, cable penetration nationally was only 13%. What has caused the number of cable subscribers to multiply four-fold since then has been the additional programming choices we offer consumers.

Concentration of Ownership

From our modest start in Ohio, Continental Cablevision has grown to become the third largest company in the cable industry, serving approximately two million subscribers across the U.S. Outside of the mid-west, our largest operating region is New England where we serve 450,000 subscribers in Massachusetts and 100,000 in New Hampshire.

To be one of the three largest cable system operators in the U.S. is not like being ABC, CBS, or NBC. Being number three means we serve 4.4% of the cable households and 2.2% of the t.v. households in the U.S. Our systems' capacities range from 35 to 60 channels and with the exception of local origination, we do not control any of the programming services we carry. Compare our position with that of ABC, the third largest broadcast network which has an average audience share of 19% of t.v. households and which owns outright stations serving 24.4% of American households. Together, the three networks have an audience share of 64% of American t.v. households.

The top three movie studios, Paramount, Disney and Warner Brothers together have a 46% market share of domestic

box office revenues. The top eight studios have an 87% share.

In comparison, the top three cable operators, TCI, ATC and Continental serve 32% of all cable households and 17% of all t.v. households in the U.S. The top eight MSO's serve 47% of all cable households and 23.5% of all t.v. households.

Looking at the entire cable industry, from TCI, the largest operator with more than 8 million subscribers, to the smallest mom and pop operator with fewer than 500, total industry revenues for 1987 were $11 billion, less than those of several of the seven Regional Bell Operating Companies For example in 1987, NYNEX and Bell South each had revenues of over $12 billion. This was approximately 25 times our revenues and seven times those of TCI in 1987.

Telco Cross-Ownership

To suggest, as some have, that telco entry would promote greater competition, is sheer nonsense. Rather, we would soon see a cable industry dominated by the Bell Operating Companies, subsidized by telephone rate payers Our industry has had long and bitter experience with the phone company, leading the need for Congress to enact the Pole Attachment Act of 1979 to assure access to utility poles at fair and reasonable rates

If Congress were to mandate that programming developed by the cable industry be made available to all other distribution technologies, it would simply pave the way to telephone domination of this industry

Cable's uniqueness as a medium lies in the specialized programming services which those of us in the cable industry have nurtured and supported over the past 15 years C-SPAN, which brings this proceeding to 33 million cable households,

was created specially as a public affairs service by the cable industry. Nickelodeon, for children, has filled a programming void which only public television previously had recognized. Discovery has brought the wonders of science into millions of American living rooms. Likewise, Black Entertainment, Galavision and Arts & Entertainment have been created in response to minority tastes and needs.

Vertical Integration

While several major companies such as Time, Inc and Viacom are both program producers and cable system operators, the vast majority of cable operators are not programmers. In fact, most cable operators do not have any ownership interest in the programming services they carry However, when Turner Broadcasting experienced financial difficulties, cable operators responded in order to keep Cable News Network alive and independent. And when other cable programmers including Discovery and C-SPAN have encountered financial difficulties, we have voluntarily agreed to programming fee increases. Why have we done this? Not to become programmers but to maintain our identity as the medium of choice.

From the operator's point of view, the better a particular service is, the better all of cable looks as a mix. Cable operators want to see innnovative services survive. For new services, like Turner Network Television, operator investments and guarantees of exclusivity may be the only way to get early commitments to carry the new network at all.

Operator investment in programming is therefore a natural outgrowth of these forces But a responsible operator will not just carry those services in which he has a small investment interest If a service is not bringing

in customers and disconnects are high, he will not destroy his retail business in order to support a programming investment. Many businesses operate with a mix of their own labeled brands and independent brands Grocery stores, drug stores, clothing stores all operate in this manner. Safeway, CVS and Macy's could not make it just on generic brands, and must carry products that compete with their own products. The same is true for cable

Exclusivity

Having developed our own special programming services, is it unreasonable to want to maintain exclusivity of our product? Exclusive distributor relationships are common in the marketplace. From the automotive industry to the appliance industry to the broadcast industry, exclusive distributor relationships are part of the fabric of American business. You don't see Ford dealers selling GM cars any more than you see every appliance dealer selling Whirlpool and Maytag washers. And you won't see the NBC peacock strutting her stuff on CBS this fall.

Suppliers want assurance of quality distribution and service and aggressive local promotion. Distributors want the knowledge that their promotional efforts are going to accrue to their own benefit.

By their marketing and promotion, for example, cable operators have created brand name identification for HBO Indeed, many of our subscribers think cable t v. is synonymous with HBO In 1987 we paid HBO almost $1 million a week for the carriage of HBO and Cinemax. In addition, we spent millions of dollars in advertising and direct mail marketing to promote HBO's products We are, I understand, HBO's most successful customer in selling HBO services to our cable subscribers Having made this substantial

investment of time and money in promoting HBO is it unreasonable to seek exclusive distribution rights for HBO products in the markets we serve?

What programmers need today is affiliates who will conduct very aggressive promotional campaigns to differentiate their product and expand their distribution base. This promotion is essential to a cable network. Each one wants the public to sort out its brand name form among all the other channels. To do so, they must be given product indentification by their distributor Cable operators who do this deliver a valuable service to the program packager, and therefore should be their favored distributor.

Must Carry

Finally, Mr. Chairman, I'd like to change focus and address myself to the issure of must-carry which I understand will be the subject of the third panel this morning.

In the wake of the 1986 Quincy decision striking down the FCC's original version of the must-carry rules, the National Cable Television Association joined with the NAB, INTV and the Television Operators Caucus in reaching an intra-industry compromise to guarantee cable carriage of qualified local broadcast stations.

Unfortunately, in creating a new set of must-carry rules, the FCC changed the terms the parties had agreed upon, setting the stage for yet a second Court of Appeals decision declaring the new rules unconstitutional

In spite of the fact that there has not been any governmental must-carry requirement for almost two years, the vast majority of cable operators have voluntarily honored the terms of the intra-industry compromise.