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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

July 31, 1998

BY HAND

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, D.C. 20554

Re: Comments of Ameritech New Media, Inc. in CS Docket No. 98-102

Dear Ms. Salas:

Enclosed for filing please find the original and nine (9) copies of the Comments of Ameritech New Media, Inc. in the above-referenced docket.

Please stamp and return to this office with the courier the enclosed extra copy of this filing designated for that purpose. Please direct any questions that you may have to the undersigned.

Respectfully submitted,

Lawrence R. Sidman

Lawrence R. Sidman

Enclosures

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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JUL 31 1998

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of	)	
	)	
Notice of Inquiry	)	
Annual Assessment of the	)	CS Docket No. 98-102
Status of Competition	)	
in Markets for the Delivery	)	
of Video Programming	)	

COMMENTS OF
AMERITECH NEW MEDIA, INC.

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July 31, 1998

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I. OVERVIEW AND SUMMARY

The state of competition today in the multichannel video programming distribution ("MVPD") market is like a tale of two cities. In relatively few areas of America, there are discrete pockets of meaningful competition to the incumbent cable industry. In such communities, including those served by Ameritech New Media, Inc. ("Ameritech"), consumers are realizing the benefits of robust competition: more choice, better service and price discipline. Happily, the type of direct, head-to-head competition Ameritech is providing as a cable overbuilder, regulated under Title VI of the Communications Act of 1934, is working in precisely the way Congress hoped when it enacted the Cable Television Consumer Protection and Competition Act of 1992 and the Telecommunications Act of 1996.

Everywhere else, however, the picture is bleak. Cable rates paid by consumers continue to skyrocket, increasing annually about 8 percent, or roughly four times the overall rate of inflation since enactment of the Telecommunications Act of 1996.[1/] Competition from direct broadcast satellite ("DBS") service is not constraining cable rates. The largest, vertically integrated cable companies, TCI, Time Warner, Comcast, MediaOne and Cox, are expanding their reach horizontally and vertically, consolidating their control over cable subscribers, cable programming, assets (such as sports teams) which feed cable programming, and new technologies which are the gateways to the digital video marketplace of the 21st Century. Disturbing trends in the MVPD marketplace flagged by Ameritech and other competing MVPDs in last year's Commission assessment of MVPD competition have grown progressively more serious and

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1/ Testimony of Gene Kimmelman, Co-Director, Consumers Union, before the United States House of Representatives, Committee on the Judiciary, June 24, 1998 (Hearing held on the effect of consolidation on competition in the telecommunications industry).

threatening in the intervening year.

The problems which inhibit the development of more robust, nationwide competition to incumbent cable operators and cast an even darker cloud over the future of competition in the MVPD marketplace are largely familiar but have some new and vexing permutations.

Competing MVPDs, such as Ameritech, continue to experience difficulty in obtaining quality programming. Remarkably enough, some of the difficulty still involves refusals to deal or exclusive contracts relating to vertically integrated satellite cable programming, necessitating the commitment of precious time, effort and resources to prosecute program access complaints which never should have had to be brought in the first place.[2/] The past year, however, has witnessed the continued use of exclusive contracts between cable operators and unaffiliated cable programming vendors which also threaten the programming line-ups of competing MVPDs. The FCC has compiled a record in several proceedings which attests to the enormous pressure large cable MSOs are exerting on non-vertically integrated programmers to provide them exclusive distribution rights.[3/] In some instances, the effect of such exclusive contracts is particularly anticompetitive because, if permitted, they would force new entrants to drop popular cable

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2/ *See Echostar Communications Corporation v. Fox/Liberty Networks, LLC; FX Networks, LLC,* 13 FCC Rcd 7394 (1998); *Corporate Media Partners d/b/a Americast, Ameritech, BellSouth Interactive Media Services, Inc, GTE Media Ventures Incorporated, and SNET Personal Vision, Inc. v. FX Networks, Fox/Liberty Networks, and TCI,* 13 FCC Rcd 8573 (1998).

3/ *Id. See also In the Matter of Petition of Exclusivity of Outdoor Life Network and Speedvision Network,* DA 98-1241, released June 26, 1998, *Memorandum Opinion and Order* in CSR 5044-P, ¶ 6 (1998) [hereinafter *Outdoor Life/Speedvision Order*].

programming they currently are offering to their customers.[4] Additionally, new entrants are encountering problems gaining access to terrestrially delivered cable programming, even if it is vertically integrated, because Section 628 of the Communications Act, by its terms, applies only to satellite delivered cable programming.[5] Clustering of franchises and the acquisition of interests in local sports teams enhance the likelihood for greater terrestrial delivery of cable programming in the future.

Even when competing providers are able to obtain desirable programming, there is mounting evidence that they are paying discriminatorily high prices for such programming,[6] in some cases more than 50 percent higher for some cable networks. Indeed, were the Commission to have access to pertinent programming rate data, Ameritech believes that the Commission would conclude that the differential for programming paid by new entrants and the largest cable MSOs would be unjustified. The magnitude of such discounts, which cannot be cost justified, place new entrants at a significant competitive disadvantage.

There is a compounding anticompetitive impact associated with new entrants having to pay vastly higher sums for programming than their entrenched, vertically integrated MSO competitors. In addition to the higher costs of programming acquisition, an independent cable operator, like Ameritech, is paying those discriminatory prices, in a majority of instances, to a

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4/ *See Ameritech New Media, Inc. v. Media One and Time Warner,* Program Access Complaint in CSR-5273 P (filed July 1, 1998) [hereinafter *Ameritech Program Access Complaint*].

5/ Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, § 19, 106 Stat. 1460, 1494 (1992) [hereinafter *1992 Cable Act*]; 1992 Cable Act § 628, 47 U.S.C. § 548.

6/ *See, generally, Cable's Hold on America,* THE ECONOMIST, Jan. 24, 1998, at 61-62.

programming affiliate of the large, vertically integrated MSO with which it is most likely directly competing. Thus, this revenue outflow strengthens the incumbent cable company at the very moment it is weakening the aspiring competitor. When vertically integrated cable operators plead that spiraling consumer cable rates are attributable to steeply increasing programming costs, their tears are really bitter-sweet because their programing arms are enjoying the benefits of this transfer of wealth.[7]

The core problem of aspiring competitors being unable to acquire high quality cable programming at nondiscriminatory rates, terms and conditions is exacerbated by ominous trends toward ever increasing horizontal concentration and vertical integration.

In 1985, 29 percent of all cable households were served by the five largest cable MSOs. In 1997, 67 percent of all cable subscribers were served by the top five MSOs. The recent phenomena of clustering, franchise swaps and localized joint ventures is augmenting the market power of the largest MSOs. For example, once all of the various transactions already announced by TCI are completed, it is projected that TCI will have an attributable interest in cable systems serving approximately 36 percent of this nation's cable subscribers.[8] AT&T's Chairman has stated publicly that TCI systems pass roughly one-third of American homes[9] and indicated that more cable system purchases are planned if AT&T's announced acquisition of TCI is approved. This

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7/ David Lieberman, *Operators Pad Channel List to Pad Bills*, USA TODAY, Mar. 16, 1998, at 1B.

8/ Ted Hearn, *FCC Moving on Cable: Ownership Rules,* MULTICHANNEL NEWS, June 8, 1996, at 48.

9/ *'What Talks?' TCI Caps Months of Rumors with AT&T Merger Plan*, CABLEFAX DAILY, June 24, 1998, at 1.

increasing horizontal concentration, enhanced further by ownership interests in other MVPDs, such as Primestar, and programming distributors such as NetLink, give TCI and other large MSOs enormous market power through which they can extract very favorable terms from unaffiliated programmers, including exclusivity and deep discounts, all with the effect of suppressing competition.

Vertical integration also is tilting the playing field against new entrants. Although the percentage of vertically integrated programming has decreased since enactment of the 1992 Cable Act, much of the programming truly indispensable to a new entrant's success remains vertically integrated.[10] Eight of the top 20 cable programming networks are still vertically integrated, including 3 of the 5 cable programming networks with the highest number of subscribers. Moreover, 3 of the top 4 premium services are vertically integrated. Remarkably, TCI alone has an attributable interest in more than 70 cable programming networks.

In addition to interests in cable programming, however, the vertical integration of the largest MSOs is veering in new directions, all of which coalesce to increase the dominance of these large, vertically integrated companies in the MVPD marketplace. The largest MSOs are acquiring interests in professional sports teams which provide the sports programming indispensable to the channel line-ups of MVPDs. They also are acquiring major stakes in the technologies and services which will drive the future of cable in the digital era; cable set-top boxes; interactive, electronic program guides; and cable modem Internet access services. To the extent that a handful of large cable MSOs can exercise monopsony control over these emerging

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[10] *In the Matter of Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming,* 13 FCC Rcd 1024, 1122 at ¶ 158 (1998) [hereinafter *Fourth Annual Report*].

key technologies and gateways, the prospects for competition in the digital MVPD marketplace are even more clouded.

Beyond these overarching issues, there remain other impediments to a fully competitive MVPD marketplace. The multiple dwelling unit ("MDU") market is far less competitive than it should be, and the FCC's recently adopted home run wiring rules have not ameliorated the problem. The cable franchising process remains slow and fraught with opportunities for incumbent cable operators to create mischief and delay.

The Commission can and should respond to these behavioral and structural problems in the MVPD marketplace. The Commission should strengthen its rules for resolving program access complaints by adopting deadlines for decisions, providing a right to discovery and clarifying that it will levy fines and grant damage awards for violations of Section 628, all as requested by Ameritech in its Petition for Rulemaking[11/] which is the subject of a pending Notice of Proposed Rulemaking ("NPRM").[12/] The Commission should not relax its horizontal ownership and attribution rules in the pending NPRM on that subject.[13/] The Commission also

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11/ *See Petition for Rulemaking of Ameritech New Media, Inc., to Amend 47 C.F.R. § 76.1003 -- Procedures for Adjudicating Program Access Complaints*, RM No. 9097, filed May 16, 1997.

12/ *In the Matter of Implementation of the Cable Television Consumer Protection and Competition Act of 1992; Petition for Rulemaking of Ameritech New Media, Inc. Regarding Development of Competition and Diversity in Video Programming Distribution and Carriage, Notice of Proposed Rulemaking* in CS Docket No. 97-248, 12 FCC Rcd 22840 (1997) [hereinafter *Program Access NPRM*].

13/ *In the Matter of Implementation of Section 11(c) of the Cable Television Consumer Protection and Competition Act of 1992 (Horizontal Ownership Limits)*, FCC 98-138, released June 26, 1998, *Memorandum Opinion and Order on Reconsideration and Further Notice of Proposed Rulemaking* in MM Docket No. 92-264 [hereinafter

(continued...)

should construe broadly its authority under Section 628, particularly under Section 628(b), to reach, on a case-by-case basis, anticompetitive conduct involving exclusive contracts with unaffiliated cable programming vendors or terrestrially delivered cable programming. Concurrently, the Commission should recommend to the Congress that it amend Section 628 to clarify generally that its reach extends to all cable programming, regardless of the delivery method, and to address explicitly exclusive contracts for programming in which a cable operator does not have an attributable interest. In the same vein, the Commission should recommend that the Congress tighten the price discrimination provisions of Section 628 to eliminate ambiguities which could be construed to allow unjustified discounting practices for large cable MSOs. Finally, the Commission, in conjunction with the Department of Justice, should closely monitor transactions in new technologies such as cable set-top boxes and electronic programming guides to safeguard against anticompetitive acquisitions.

Congress and the Commission should be commended for recognizing many of these problems and commencing the process of addressing them. Just this week, on July 29, 1998, Congressmen Billy Tauzin (R-LA) and Ed Markey (D-MA), the Chairman and Ranking Member of the House Telecommunications and Consumer Protection Subcommittee, introduced H.R. 4352, the "Video Competition and Consumer Choice Act of 1998," extending Section 628 to cover terrestrially delivered programming and exclusive contracts with unaffiliated cable programmers. Three months earlier, Congressman Henry Hyde (R-Ill), Chairman of the House Judiciary Committee, introduced H.R. 3559, the "Antitrust Video Competition Improvement Act

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13/ (...continued)
Horizontal Ownership NPRM].

of 1998," which clarified the reach of antitrust law to address the use of market power to extract exclusive contracts and discriminatory terms and conditions. For its part, the Commission is about to issue a Report and Order in the Program Access NPRM issued in response to Ameritech's Petition for Rulemaking filed 14 months ago. Ameritech is hopeful that the coming year will see the successful culmination of these initiatives, so necessary for the reasons described in these Comments.

II. GENERALLY, THE NATIONAL MVPD MARKET IS ENCOUNTERING UNRESTRAINED PRICE INCREASES EXCEPT IN THE MARKETS WHERE AMERITECH AND OTHER CABLE OVERBUILDERS ARE DOING THEIR PARTS TO RESTRAIN PRICES AND ENSURE THAT COMPETITION IS WORKING.

Despite concerns expressed repeatedly by both the Congress[14] and the Commission,[15] cable rates continue their skyrocketing trend, increasing by approximately four times the rate of inflation. During the past year, from July 1, 1997, to June 30, 1998, cable rates rose 7.3 percent compared to 1.7 percent for the overall Consumer Price Index. Last month alone, cable prices jumped seven times more than the underlying rate of inflation.[16] Incumbent cable operators

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14/ *See* Hearings on Competition to Cable Among Video Delivery Systems before the United States Senate Committee on Commerce, Science and Transportation, July 28, 1998; Hearings on the State of Competition Among Video Delivery Systems before the United States House of Representatives Committee on Commerce, Subcommittee on Telecommunications, Trade and Consumer Protection, July 29, 1997; Hearings on the State of Competition in the Cable Television Industry before the United States House of Representatives Committee on the Judiciary, September 24, 1997.

15/ Statements of Chairman William E. Kennard and Commissioners Susan Ness and Gloria Tristani, *Fourth Annual Report*, 13 FCC Rcd 1034, 1238-1247 (1998).

16/ According to the Bureau of Labor Statistics' Consumer Price Index Summary for June 1998, cable rates increased 0.7 percent in June verses the inflation rate of 0.1 percent for the same time. *Cable Rate Figures Could Provide Fodder for Hearing*,

(continued...)

attempt to defend these spiraling rate hikes on the grounds that their programming costs have increased substantially and that major capital expenditures are required for network upgrades.[17] Both defenses are extremely weak.

In the case of rising programming costs, much of the prized programming is vertically integrated. While incumbent cable operators may be paying more for such programming, they are paying more, in many cases, to their own programming affiliates, akin to an intracorporate transfer of wealth.[18] To the extent they are attributing these increased programming costs to sharply higher licensing fees charged by professional sports, the defense grows yet more spurious, because many of the largest cable MSOs have moved aggressively to acquire interests in professional sports teams.[19]

The notion that cable rate hikes can be justified because they are needed to finance network upgrades is equally dubious. As Congressman Markey observed in the press conference introducing H.R. 4352, "If cable wants to compete in the Internet business, it should attract venture capital as other industries do".[20] The idea that the costs of infrastructure improvements to provide new services and enter new businesses should be passed through automatically to consumers is foreign to both regulated and unregulated industries. If this is one of the key

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16/ (...continued)
COMMUNICATIONS DAILY, July 15, 1998.

17/ Lieberman, *supra* at note 7.

18/ *See Cable's Hold on America*, THE ECONOMIST, Jan. 24, 1998, at 61.

19/ For a full discussion of this phenomenon, *see* Section V.B. of these Comments, *infra*.

20/ *Tauzin and Markey Introduce Alternative Cable Bill*, COMMUNICATIONS DAILY, July 30, 1998.

defenses of incumbent cable operators, consumers had better hang on tight because AT&T's chairman has indicated that network upgrades are high on his agenda if AT&T's acquisition of TCI is approved.[21]

If the present cable rate picture is not pretty for consumers, the outlook after cable rates are deregulated on March 31, 1999 is even more unpleasant. The most likely scenario is that there will be fierce price competition in communities served by Ameritech and other cable overbuilders where there is direct, head-to-head competition. In the vastly more numerous communities across the nation devoid of meaningful competition, cable rates likely will zoom upward, with consumers in those markets subsidizing rate cuts in competitive markets.

Persisting and prospective cable price increases, combined with a lack of choice among MVPD providers, underscore the need for action to protect consumers from the harms suffered as a result of the dearth of competition in the MVPD market. In most parts of the country, consumers simply are not experiencing any of the benefits associated with genuine competition -- more choice, better service, reasonable prices, and innovative products. Markets served by Ameritech and other cable overbuilders are striking and hopeful exceptions to this rule. In these areas, competition from Ameritech has translated directly and instantaneously into tangible and quantifiable benefits for consumers.

21/ *See* Seth Schiesel, *AT&T Chief Says He Can Defend Deal*, NEW YORK TIMES, June 29, 1998, at C9.

A. Ameritech Is Doing Its Part To Ensure That Competition Works In Parts Of the MVPD Market.

Ameritech continues to be the very best example of what happens when competition takes hold in a market. Over the past year, Ameritech has continued its successful penetration of numerous local video markets. Ameritech now provides cable service to more than 150,000 subscribers, offering them more channels and better service, all at competitive prices. One out of every three cable subscribers in areas where Ameritech is marketing is now watching Americast™ -- Ameritech's cable service. In the areas served by Ameritech, competition is working.

Since its launch in May, 1996, Ameritech has successfully secured franchises in 78 communities having a total population of more than 3 million people living in over one million homes. Ameritech currently operates cable systems in 61 communities. That represents a gain of 30 franchises and more than a doubling of communities actually served by Ameritech in the last year alone. In these areas, viewers have a choice among competing MVPD providers, and enjoy attractive programming packages, offered by Ameritech at reasonable prices. In addition, they are experiencing the unique benefits of Express Cinema™, an eighteen (18) channel movie offering, providing "near video-on-demand" to Ameritech's customers.

Ameritech's provision of dynamic, head-to-head competition in MVPD markets has spurred incumbent cable operators into action, causing them to modify their service and respond with their own version of improved, higher quality service offerings at more affordable prices. These incumbents are working to retain their customers and also "win back" customers that have migrated to Ameritech, by providing one or more of the following service improvements: upgrading networks; adding channels; offering free channels; offering discounts on monthly bills;

creating value packages and competitive promotions; refraining from charging for set top boxes; offering discounts on expanded tiers; offering free monthly service; offering community coupons redeemable at local restaurants, grocery stores and other merchants; offering free line and wire maintenance; offering free installation; offering two premium channels for the price of one; offering free digital service for a limited time; offering "checks" to pay for cable service; moving a la carte premium service channels to be part of expanded basic tier; and providing free pay-per-view coupons.[22]

By way of example, in Berea and North Olmsted, Ohio, prior to Ameritech's entry into the market, Cablevision offered the following service to customers: forty-three (43) expanded basic channels; eight (8) premium channels; and 2 pay-per-view channels. Expanded basic cost $19.63 or slightly more than 45¢ per channel; a la carte premium service for the Disney Channel cost $9.95; and premium service cost an additional $9.95 per channel, for a total package worth $39.53.

After Ameritech's entry, Cablevision initially changed its service offerings by significantly increasing its channel offerings, with a net decrease in price. It added twenty-one (21) channels to its expanded basic service, including shifting the Disney Channel to expanded basic, for a total of 64 channels at a total cost of $21.95 or an average price of 34¢ per channel. It also upgraded its cable system to 750 MHZ; offered the new expanded basic tier channels free to subscribers for the first six months, upon expiration of this offer maintained its price for its expanded basic tier in both communities, resulting in a $2.97 per month savings for the additional channels; and

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[22] A chart providing a more comprehensive examination of the competitive response to Ameritech's market entry is appended as Attachment 1 to these Comments.

introduced a new advanced converter box with an Interactive Programming Guide.

In the past year, in addition to continuing to restrain its prices and add channels, Cablevision has undertaken dramatic competitive promotions in response to Ameritech's penetration of these markets. For instance, it credited all current customers $15 to their bill as a "goodwill" gesture last August. It has instituted an "Options Card" campaign, valued at $250, redeemable for discounts at area restaurants, retailers, and ticket vendors. Every quarter a new "Options Card" and list of participating retailers are mailed out to all current Cablevision customers. It is offering several months of free service based upon what package a customer bought. Moreover, Cablevision is attempting to retain their "high-value" customers by using door-to-door salesmen and telemarketers.[23/]

Not surprisingly, Cablevision has not extended these benefits to its subscribers in the adjacent community, Strongsville, Ohio, where it is the only provider of cable service. There, Cablevision charges $23.44, or 7 percent more than in Berea for an expanded basic channel tier containing twenty-one fewer channels. It also charges separately for the Disney Channel, providing it on an a la carte basis for an additional $10.45 each. It charges $10.45, or 5 percent more than the neighboring competitive communities, for eight (8) premium channels, three fewer than what it offers in the communities of Berea and North Olmsted.

The direct nature of the competitive response to Ameritech is illustrated by incumbent cable operators' efforts to match and, in some cases, undermine Ameritech's promotions. One

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23/ A summary of similar competitive promotions developed by incumbent cable operators in other communities now served by Ameritech is appended as Attachment 2 to these Comments.

such example is Ameritech's "Americhecks" campaign. "Americhecks"[24/] represents a creative, promotional approach to attract new cable customers to Ameritech. They are checks distributed to Ameritech customers to help pay for any service offered by Ameritech -- local phone, cable and wireless phone service, leaving it up to the customer's discretion as to what services they want the "Americhecks" to pay for. These "Americhecks" have proven popular with customers who enjoy both a price discount and ease of use and flexibility in application. For example, customers receive three $10 Americhecks every three months, totaling $120 per year. The success of "Americhecks" has contributed to jumpstarting competition in local cable markets. Significantly, incumbent cable operators in some of these newly competitive markets have resorted to copycat promotions, including "TCI-checks" and "Comcash" -- twelve coupons, each worth $10 off, to be applied to a subscriber's monthly cable bill. Moreover, incumbent cable operators or their trade associations have initiated proceedings before the state public service commissions in Michigan, Ohio and Illinois to prohibit the use of Americhecks to pay for local phone service.[25/] Of course, incumbent cable operators do not face regulatory restrictions on how they jointly promote their services -- telephony, cable and Internet.

Such vigorous responses to competition are precisely what Congress envisioned when it enacted the deregulatory, pro-competitive provisions contained in the Telecommunications Act of

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24/ Copies of advertisements featuring Americhecks are appended as Attachment 3 to these Comments.

25/ Ameritech has argued in favor of the most flexible utilization of Americhecks in all three jurisdictions because that approach confers the most benefits on its customers. To the extent that consumers have been prevented from choosing a complete range of Americheck payment options, incumbent cable operators have succeeded in denying consumers the full benefits of competition.

1996. However, Congress wants competition to flourish in all communities, not just select ones. The case studies discussed above vividly illustrate how consumers fortuitous enough to reside in areas in which Ameritech provides service are winners. Where competition is present, it is working. Equally clear, however, is the reality that consumers located in the far more numerous areas yet to experience competition remain hostage to unresponsive, entrenched cable providers. That is an unacceptable public policy outcome.

B. Cable Overbuilding Spurs More Competitive Responses Than DBS.

While DBS service competes nationally against incumbent cable operators, it is increasingly evident that its presence in the MVPD market fails to constrain cable price increases. Although DBS service has now increased to 6.8 percent of the national MVPD market,[26] cable operators do not appear to be cutting their prices as part of their competitive response to DBS, nor have they restrained prices since DBS service was launched almost four years ago. While Ameritech's presence has spurred incumbent cable operators into action,[27] the presence of DBS service nationwide has not prompted the same type of competitive response.

To understand better the role played by DBS in the MVPD marketplace, a study was undertaken by The Yankee Group, focusing on the decision-making process behind DBS purchases among customers who have subscribed to the service within the preceding three months. The study examined the profile of Direct-to-Home ("DTH") consumers and markets where consumers have choice among a panoply of service providers, including cable, DBS, digital

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26/ Alan Breznick, *Despite Digital Cable, DBS Growth Chugs Along*, NEW MEDIA, June 8, 1998, at 20. *See* Attachment 4 to these Comments.

27/ *See* discussion in II.A., *supra.*

cable and telecom service.[28] The study concluded that high up-front equipment and associated cost was the principal factor inhibiting the growth of DBS as a competitive alternative, significantly more important than the unavailability of local broadcast signals on DBS.[29]

In order to subscribe to DBS service, in addition to paying for monthly programming, customers must purchase or rent the satellite dish and a set-top decoder box. The costs associated with the DBS set-top box can be significant because, unlike cable, if there are two or more TV receivers in the household and family members want to view different DBS programming on each TV at the same time, it is necessary to purchase a separate set-top box for each TV receiver. In view of the large number of households having more than one TV set hooked to cable,[30] for DBS to provide commensurate service with cable, customers must incur substantial added expense for multiple set-top boxes.

Using Primestar prices to illustrate, while it costs $149 to install the equipment and $33 - $66 for monthly programming and equipment charges, the DBS price skyrockets to $224 for installation, and from $49 to $79 for monthly programming and equipment should the consumer

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28/ *See* Breznick, *supra* note 26.

29/ These findings were corroborated by a recently released *Consumer Reports* article (published by Consumers Union of U.S., Inc.) which concluded that cable was a better buy for many consumers than DBS, also citing the need for consumers to have a clear line of sight to the satellite to receive DBS service. *See Satellite TV. Test & Report. Satellite Dish v. Cable TV*, CONSUMER REPORTS, July 1998, Vol. 63, No. 7, Pg. 12.

30/ Currently, the number of televisions connected to cable breaks down as follows: 35 percent of households have one television connected; 37 percent of households have two televisions connected; 19 percent of households have three televisions connected; 6 percent of households have four televisions connected; and 3 percent of households have five or more televisions connected to cable. *Market Facts: 10th Annual National Cable TV and Media Study.*

hook up two television sets. This cost structure of DBS suggests why DBS is not inhibiting cable rate increases in any measurable sense: DBS is not competing with cable primarily on cost but on quality of signal and service and quantity of programming.

The relative potential of DBS and cable overbuilders to provide truly meaningful competition to incumbent cable operators is illustrated by market penetration comparisons for DBS in communities where there is no local alternative MVPD and communities where a cable overbuilder, such as Ameritech, is present. In Ameritech's service area, DBS service penetration lags behind the national average.[31] These data suggest that where consumers are seeking an alternative to the incumbent cable operator, they will be strongly attracted by the more cost-competitive offering, on a total outlay basis, of a cable overbuilder such as Ameritech.

There is a regulatory corollary to these findings. Where a cable overbuilder is competing with DBS, it is critical that there be regulatory parity in the treatment of these competitors to the incumbent cable industry. For example, if Ameritech is subject to a retransmission consent/must carry regime for the carriage of broadcast signals, DBS providers also should be subject to those rules. The very point of competition is to provide consumers real choices. Regulations which skew consumer choice in a competitive market by favoring one technology over another, no matter how well intentioned, operate to undermine the very competition they are intended to promote.

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[31] *See*, Breznick, *supra* note 26.

III. CONTINUING BEHAVIORAL AND STRUCTURAL IMPEDIMENTS TO DEVELOPING A MORE FULLY COMPETITIVE MVPD MARKETPLACE.

A. Ameritech Continues to Experience Difficulty Obtaining Access to Programming Critical to its Success as a Strong Competitor to Incumbent Cable.

1. Continued Problems Obtaining Access to Vertically Integrated Programming.

The six year regime of the program access provisions of the 1992 Cable Act has yet to remove all barriers that prevent competitors to incumbent cable operators from obtaining access to vertically integrated programming. Such programming is absolutely essential if one is to become a strong, viable competitor in the MVPD market. For example, notwithstanding the clarity of the provisions of Section 628 with respect to exclusive contracts with vertically integrated cable programmers, FX[32/] refused to deal with Ameritech, Echostar and other MVPDs all over the country, relying on exclusive contracts which had been entered into prior to FX becoming vertically integrated. FX's refusals to deal were particularly egregious given the fact that only a little over two years earlier, the Commission decided a case that was virtually on all fours with FX with regard to whether or not previously non-vertically integrated programming falls within the protections of the program access rules once its programmer becomes vertically integrated with a cable operator.[33/] FX's audacious behavior forced competing MVPDs to file

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32/ FX is a wholly-owned subsidiary of Fox/Liberty, which in turn is a joint venture between Fox, Inc., a subsidiary of The News Corporation, Ltd., and Liberty Media Corporation, a wholly-owned subsidiary of TCI. Through its wholly-owned subsidiary, Liberty Media, TCI enjoys a 50% ownership interest in FX.

33/ *Cablevision Industries Corporation and Sci-Fi Channel*, 10 FCC Rcd 9786 (1995). "Although the matter was not discussed separately, the Cablevision Industries decision was clearly based on the understanding of the parties and the Commission that the (continued...)

program access complaints, which the Commission granted.[34]

Cablevision, which, through Rainbow Programming Holdings, Inc., owns interests in popular cable programing including Fox Sports Ohio, Chicago, and New York, American Movie Classics, Bravo, and the Madison Square Garden Network, also has been found to have repeatedly transgressed the program access rules. In 1995, Cablevision was found to have unlawfully denied access to Sports Channel New York (the predecessor to Fox Sports New York) to Cellularvision.[35] In 1997, Cablevision/Rainbow was found to be in violation of the program access rules for unlawfully refusing to sell its regional sports programing to Bell Atlantic.[36] Yet, again, in 1997, Cablevision was found to have violated Section 628 by engaging in unlawful price discrimination in the sale of programming to Ameritech.[37] It is difficult to imagine Cablevision continuing to act in violation of Section 628 were it subject to stiff fines and

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33/ (...continued)
prohibition against exclusive contracts was applicable." *Echostar Communications Corporation v. Fox/Liberty Networks, LLC; FX Networks, LLC,* 13 FCC Rcd 7394, 7414. (1998).

34/ *See Echostar Communications Corporation v. Fox/Liberty Networks, LLC; FX Networks, LLC,* 13 FCC Rcd 7394 (1998); *Corporate Media Partners d/b/a Americast, Ameritech, BellSouth Interactive Media Services, Inc, GTE Media Ventures Incorporated, and SNET Personal Vision, Inc. v. FX Networks, Fox/Liberty Networks, and TCI,* 13 FCC Rcd 8573 (1998).

35/ *See Cellular Vision of NY, L.P. v. SportsChannel Associates, Memorandum Opinion and Order* in CSR 4478-P, 10 FCC Rcd 9273 (1995).

36/ *See Bell Atlantic Video Services Co. v. Rainbow Programming Holdings, Inc., and Cablevision Systems Corporation, Memorandum Opinion and Order* in CSR 4983-P, 12 FCC Rcd 9892 (1997).

37/ *See, Corporate Media Partners d/b/a Americast and Ameritech New Media, Inc., Memorandum Opinion and Order* in CSR 4873-P, 12 FCC Rcd 15209 (1997).

damages, as Ameritech has sought in the Program Access NPRM.

New entrants simply should not have to be committing substantial time and resources to prosecuting program access complaints at the Commission in order to acquire vertically integrated programming. The law on this issue is now well settled. Recidivist refusals to deal by vertically integrated cable programmers underscore the need for the Commission to punish program access violations through economic disincentives in the form of forfeitures or damages, thereby making it more economically injurious for vertically integrated cable operators and programmers to violate the law than to comply with it.[38]

2. Burgeoning Problems Obtaining Access to Non-Vertically Integrated Programming.

While Congress and the Commission historically have focused principally on exclusivity problems involving vertically integrated programming, shifts in the industry evidence the emergence of a trend toward greater use of exclusive distribution arrangements involving non-vertically integrated programming. Unless this trend is reversed, it could have a significant, adverse effect on the state of competition in the MVPD marketplace.[39]

The most eloquent testimony about the surging importance of exclusive distribution arrangements with non-vertically integrated programmers is contained, ironically, in the record compiled by the Commission during the past year in denying the *Petitions for Exclusivity of*

38/ *See* Comments of Ameritech New Media, Inc., *Program Access NPRM* (filed February 2, 1998), at ¶¶ 8-13, 18-24.

39/ Vertically and non-vertically integrated programming are in rough equilibrium: 24 of the 50 most subscribed cable networks; 7 of the top 15 cable networks, as measured by prime time ratings; and 8 of the 16 new networks launched between January, 1997 and January, 1998 are not vertically integrated. *Fourth Annual Report*, at ¶¶ 160, 163.

Outdoor Life Network and Speedvision Network.[40] These two vertically integrated programmers essentially contended that they were at a grave competitive disadvantage because they could not enter into exclusive contracts with cable operators.

> Time and time again, cable operators who were ready to affiliate with the networks, or to substantially increase the number of systems on which they carry the networks, have chosen instead to carry other, often lesser quality networks that were able to provide exclusivity.[41]

The raw market power of the largest cable MSOs to extract exclusivity is nowhere better illustrated than in the case of Fox's cable programming aspirations. In an FCC proceeding, News Corp, the parent company of Fox, admitted that in order to secure cable carriage of FX in 1994, it granted exclusive distribution rights to incumbent cable operators.[42] Indeed, the demise of News Corp's DBS venture, ASkyB, and its subsequent decision to team up with the large cable MSOs in the Primestar venture[43] is very much a tale of trading in competition to cable for carriage by cable.

Cable operators seek this exclusivity because it allows them to offer one-of-a-kind services to their subscribers.[44] This differentiation rationale is really mythic, however. It should be the

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[40] *Outdoor Life/Speedvision Order* at ¶ 6.

[41] *In the Matter of Outdoor Life Network and Speedvision Network, Petition for Exclusivity* in CSR-5044-P (filed July 15, 1997) at 2-3.

[42] *Consolidated Supplemental Reply of the News Corporation, Limited, In re Application of MCI Telecommunications Corporation and Primestar LHC, Inc.*, File No 106-SAT-AL-97, Feb. 20, 1998, at 5.

[43] *See* discussion of Primestar, *infra*, in Section V.C. of these Comments.

[44] *Outdoor Life/Speedvision Order* at ¶ 6.