customer, the viewer, who chooses what he/she will watch, not the MVPD. The real imperative behind exclusivity is a business imperative: beat back the competition. Cable operators are advertising the fact that consumers have program choices unavailable on any other cable system as a way to attract new subscribers, as well as retaining current ones. For example, in its promotional campaigns waged directly against Ameritech, Time Warner highlights its exclusive carriage of programming such as TV Land.[45]

The negative impact of such exclusive distribution agreements on Ameritech's ability to assemble the most competitive and attractive program offerings is not to be dismissed. Ameritech has been denied cable programming owned by broadcasters, such as MSNBC, Fox News Channel and Eye on People, because of exclusive distribution arrangements with incumbent cable operators. CBS was quite direct, announcing that Eye on People "will be available to cable operators on a terrestrially exclusive basis, which means that it will be available to satellite services but not to telephone or wireless distributors that compete with cable operators".[46] Moreover, Ameritech has been denied access to TV Land, a Viacom-owned cable network growing in popularity. Since Viacom spun off its cable systems, much more popular Viacom programming such as MTV and Nickelodeon at least theoretically could become subject to exclusive contracts, with far more serious anticompetitive consequences. In the same vein, there has been significant confusion regarding AT&T's intentions regarding cable programming owned by TCI through its affiliate, Liberty Media. If Liberty Media is spun off, suddenly a huge amount

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[45] *See* Copy of Time Warner advertisement for its exclusive programming, appended as Attachment 5 to these Comments.

[46] Linda Moss & R. Thomas Umstead, *TCI Gives Eye on People a Boost*, MULTICHANNEL NEWS, Aug 18, 1997, at 10.

of cable programming would cease to be vertically integrated and could be subject to exclusive distribution agreements.[47] Such a scenario highlights the potential surpassing importance of this issue and the need for the statutory and regulatory regime to keep pace with marketplace developments.

Very recently, Ameritech experienced directly this emerging marketplace shift and its harmful effect on new competitors, compelling it to file a formal Program Access Complaint with the Commission against MediaOne, Inc. Notwithstanding the fact that Ameritech has been carrying Classic Sports Network ("CSN") on a nonexclusive basis since the launch of Ameritech's cable operations, MediaOne entered into an exclusive carriage agreement which, if permitted, would force Ameritech to drop CSN from its programming line-up as of January 1, 1999. Ameritech alleges that this arrangement violates Section 628(b) by perpetrating the purest and most pernicious form of anticompetitive exclusivity --- depriving Ameritech, a new market entrant, of popular programming it already is offering with the predictable effect of causing customer dissatisfaction and potential loss of customers to the incumbent cable operator.[48] The *CSN* case demonstrates just how out of control exclusive contracts with unaffiliated programmers can become unless the Commission finds that this egregious conduct is prohibited by Section 628(b).

47/ *See* Seth Schiesel, *AT&T Chief Says He Can Defend Deal*, NEW YORK TIMES, June 29, 1998, at C9; John M. Higgins and Price Coleman, *John Malone Explains It All*, BROADCASTING AND CABLE, July 13, 1998, at 26, 28, 30.

48/ *Ameritech Program Access Complaint* at ¶¶ 18-19. Although Time Warner and Comcast also had exclusive distribution agreements with CSN, they agreed not to assert those rights against Ameritech.

3. Foreseeably Worsening Problems Obtaining Access to Terrestrially Delivered Cable Programming.

Currently, Section 628, by its terms, does not apply to non-satellite delivered cable programming. Thus, for example, cable programming delivered by fiber optic wire is exempt from the protection conferred by Section 628.[49/] As fiber-optic technology improves and costs continue to drop, the efficiency of terrestrial distribution of programming makes it increasingly likely that vertically-integrated programmers will alter their means of delivery to circumvent Section 628. Last year, in comments for the Fourth Annual Report, Ameritech and other MVPDs warned that cable operators were busily engaged in developing business plans that would have the effect of evading the program access rules, thereby permitting the programming distributed by terrestrial means to be tied-up in exclusive contracts and kept from competitors like Ameritech.[50/] This year, the threat is not merely theoretical but very real and present.

For example, Rainbow Media Holdings, Inc. recently revealed plans to distribute cable-exclusive "hyperlocal" regional channels: MSG Metro Guide, MSG Traffic and Weather, and MSG Learning Center, via fiber in the tri-state area of New York, Connecticut, and New Jersey.[51/] Competitors in the tri-state area are likely to be disadvantaged because customers are likely to

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49/ Competitive MVPDs have asserted before the Commission that evasions of Section 628 achieved by switching delivery methods from satellite to terrestrial are actionable under Sections 628 and 4(i) of the Communications Act of 1934. *See DIRECTV, Inc. v. Comcast Corp.*, Program Access Complaint in CSR-5112 P (filed Sept. 23, 1997).

50/ Comments of Ameritech New Media, Inc., *In the Matter of Annual Assessment of the Status of Competition in the Markets for the Delivery of Programming* (*Notice of Inquiry* in CS Docket No. 96-133, 11 FCC Rcd 7413 (1997)), at 18, 19.

51/ R. Thomas Umstead and Jim Forkan, *Rainbow Keeps New Services Exclusive*, MULTICHANNEL NEWS, July 6,1998, at 1.

demand the programming after Rainbow Holdings, Inc. aggressively markets it at Madison Garden and through the other venues of its parent, Cablevision.

In Ameritech's own service area, it is experiencing the anticompetitive effects of exclusive agreements for terrestrially delivered cable programming by CLTV, a popular 24-hour news channel owned by Tribune Broadcasting. CLTV reaches 1.7 million cable subscribers in the Chicago metropolitan area, as well as part of Indiana. Ameritech cannot obtain CLTV programming because of an exclusive arrangement with TCI.[52] In addition to the attractive localized news coverage desired by many viewers, Tribune this year moved 52 Chicago Cubs games from WGN to CLTV. While Ameritech has been able to negotiate access to the Cubs games via an unused channel, it is unable to gain access to CLTV, which has become one of the largest 24-hour news channels in the country.[53] CLTV is both terrestrially delivered and not vertically integrated (because it is owned by a broadcaster), and therefore, on two counts, is not covered by the express language of the program access rules.

As discussed in Section IV of these Comments, the likelihood of cable programming either migrating to terrestrial delivery or commencing through fiber is substantially increased as a consequence of several other important marketplace trends, clustering and acquisition of sports teams by vertically integrated cable companies. Both Cablevision and Comcast have engaged in franchise swaps and clustering arrangements which have strengthened their position in large metropolitan areas, New York and Philadelphia, respectively, and also have acquired interests in

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52/ Laura Zahn Pohl, *CLTV Carves Niche in Local News*, THE BUSINESS LEDGER, July 1998, at 1, 35. *See* Attachment 6 to these Comments.

53/ *Id.*

key professional sports teams and sports arenas in those cities. It comes as absolutely no surprise in light of these business activities that Cablevision and Comcast are leading the way in terrestrial delivery of cable programming. Similarly, it is rumored that Cablevision, which has been clustering systems in the Cleveland area, is interested in acquiring an ownership interest in the Cleveland Browns professional football team, perhaps intending to replicate the New York pattern in Cleveland.

An additional factor heightening the likelihood of more terrestrial delivery of cable programming is the cross-ownership interests in cable companies and competitive access providers such as Teleport. With AT&T's acquisition of Teleport and its announced acquisition of TCI, there will be more fiber available for transporting cable programming.

The Congress should expeditiously close this loophole, which will only increase in size as technology develops and further concentration and integration occur. The means of delivery is irrelevant to the anticompetitive effect of the conduct at issue and does not justify a sanctioned evasion of the procompetitive safeguards contained in Section 628. Section 628 protections should be extended to all programming, regardless of the means of delivery used by programmers. H.R. 4352, introduced by Congressmen Tauzin and Markey, seeks to do just that.

B. Ameritech and Other Competitors to Incumbent Cable Operators Experience Gross Discrimination In Prices Which Adversely Impacts Competition In the MVPD Market.

While Ameritech successfully demonstrated that it was a victim of price discrimination in at least one instance,[54/] and there recently have been additional favorable rulings by the

54/ *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).

Commission on other price discrimination complaints,[55] Ameritech believes that the problem of price discrimination is much more widespread, the recent rulings by the Commission only being the tip of the iceberg.[56] However, the shroud of secrecy currently enveloping programming pricing, including rate cards, makes it difficult to ascertain the extent of price discrimination, either globally or on a case-by-case basis.[57]

Rate card information, while not a panacea, can provide useful insights into discriminatory pricing practices. Rate cards set forth benchmarks from which discounts are taken. The few instances where Ameritech has been provided access to rate card information leads Ameritech to conclude that it is paying significantly but unjustifiably more for programming than its larger competitors, creating a marked and unlawful competitive disadvantage. These rate cards evidence some rate differentials of at least twenty (20) percent, and over fifty (50) percent in a few

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55/ To illustrate, the Commission recently found Turner Home Satellite in violation of Section 628(c) because it was unable to justify the higher prices it charged competitors to TCI cable systems for its popular cable programming, Cable Network News ("CNN") and Headline News. *Turner Vision, Inc. Satellite Receivers, Ltd., Consumer Satellite Systems, Inc. And Programmers Clearinghouse, Inc. v. Cable News Network*, in CSR-4676-P; CSR-4677-P; CSR-4678-P; CSR-4706-P (Memorandum Opinion and Order in DA 98-1295), released June 30, 1998. While Ameritech is pleased with the decisions rendered in these proceedings, it took almost 2½ years to render them. Throughout that protracted period, the defendant continued to reap benefits from violating the program access rules. Again, the Commission's failure to impose fines or award damages under such circumstances serves to encourage rather than deter Section 628 violations.

56/ *See* Reply Comments of World Satellite Network, Inc., *Program Access NPRM* (filed Feb. 19, 1998).

57/ One impediment to a better understanding of the nature and magnitude of the price discrimination problem is failure of the Commission's rules to provide complainants with a limited right to discovery, so that they can access relevant documents, critical to proving successfully allegations of price discrimination. Ameritech supports a limited change to the rules to provide such a right. *See*, Comments of Ameritech New Media, *Program Access NPRM*, at ¶¶ 13-18.

instances. The discounts provided in some instances range from a five (5) percent discount per million subscribers up to a twenty (20) percent discount per for four (4) million subscribers. These discounts obviously benefit only the nation's largest cable MSOs, the companies that need these benefits the least. Competing MVPDs, like Ameritech with smaller subscriber bases, cannot take advantage of these discounts. Moreover, while the FCC rules permit price differences, they must be justified by specific enumerated factors, and there is no such justification here.

The Achilles heel of discounting practices in the cable industry is the absence of cost-based justification. Costs of delivering satellite delivered cable programming do not vary with the number of subscribers. These costs are constant. The only difference in costs that can justify a discount are administrative, i.e., the cost of handling the account. However, Ameritech knows of no such costs that could justify a twenty (20) percent, much less a 50 percent, discount in programming prices. Moreover, there is no reason why small cable operators should have to bear marketing support costs of large cable operators.

Other MVPDs are also concerned about price discrimination. For example, in a recent FCC filing, World Satellite Network,[58] the country's largest packager and distributor of programming to SMATV and MMDS operators, stated that the largest SMATV and MMDS operators are paying at least thirty-three (33) percent more for programming from Netlink,[59] than the rate paid by the National Cable Television Cooperative ("NCTC")[60] for the same period.

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[58] *See* Reply Comments of World Satellite Network, Inc., *Program Access NPRM* (filed Feb. 19, 1998) at 1.

[59] Netlink is a buying group owned by TCI.

[60] NCTC is a buying group that sells programming exclusively to franchised cable operators.
(continued...)

Moreover, Ameritech understands that in some instances the disparity in programming prices can reach a variance of more than fifty (50) percent. Ameritech is concerned that this already great disparity between programming fees paid by smaller competitors and NCTC is likely to increase even more when compared to the programming fees paid by TCI and other large operators.

Ameritech is encouraged by the fact that the Commission continues to pay attention to pricing issues,[61] and indeed, has expressed growing concern with it.[62] It is critical that the Commission expand its focus from simply ***ensuring*** MVPDs access to programming to ensuring that ***how*** the competitor is acquiring the programming -- on what prices, terms, and conditions -- complies with the law. Price discrimination violations are critically important because they impede the development of robust competition by forcing competitors to pay more for programming than they should or than the incumbent does.

The anticompetitive impact of such price discrimination is magnified because so much of the most popular cable programming continues to be controlled by vertically integrated cable companies. Thus, not only does Ameritech have a higher cost of doing business than TCI or

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60/ (...continued)
While NCTC purchases for a group of cable operators serving, in aggregate, millions of subscribers, World Satellite also is a bulk purchaser. There is no cost-based justification for anything remotely approaching this price differential.

61/ *In the Matter of Implementation of Section 3 of the Cable Television Consumer Protection and Competition Act of 1992 (Statistical Report on Average Rates for Basic Service, Cable Programming Services and Equipment)*, DA 98-1439, *Order* in MM Docket No. 92-266, released July 21, 1998.

62/ Statement of William E. Kennard, Chairman of the Federal Communications Commission, *before the U.S. House of Representatives Committee on Commerce, Subcommittee on Telecommunications, Trade and Consumer Protection,* June 10, 1998 (Hearing held on the reauthorization of the Federal Communications Commission), at 28, 29.

Time Warner because of higher programming costs, not benefitting from discounts, but the increased sums flowing into these companies' cable programming networks serve to subsidize the operations of these incumbent operators. In short, there is a compounding effect associated with price discrimination which creates a severe, unfair and unlawful competitive disadvantage. It is a real and formidable barrier to the development of a truly competitive MVPD marketplace. Much more attention needs to be focused on this issue by the Congress and the Commission.

IV. THE MARKETPLACE TREND TOWARD INCREASED HORIZONTAL CONCENTRATION THREATENS EMERGING COMPETITION.

Notwithstanding Ameritech's substantial contributions to the creation of a significantly more vibrant and competitive MVPD market, certain market realities threaten the ability of competition truly to take root. Foremost among these are increasing levels of horizontal concentration among cable operators, both nationally and locally, and more sweeping vertical integration, extending to new technologies and assets, that are integral to cable programming. Significantly, the very same few companies that are extending their reach over growing numbers of subscribers also are becoming progressively more vertically integrated and diversified. The result is an enormous concentration of market power among the largest cable MSOs, particularly TCI and Time Warner, that imposes real burdens on new entrants, like Ameritech, if they are to provide consumers with a competitive choice in the MVPD marketplace. Notwithstanding Ameritech's success story, the power of these largest cable operators in the nation is growing quickly. It is for this reason that more aggressive action by the FCC is needed to ensure that blossoming competition is not nipped in the bid.

A. The Increasing National Reach of the Largest MSOs Creates Vast Purchasing Power over Programming to the Detriment of New Entrants into the MVPD Market.

It is a well-accepted principle that high levels of horizontal concentration have the potential to harm the growth of nascent competition in the MVPD market:

> For example, if a cable MSO controlled a large fraction of the MVPD capacity or subscribers on a national level, it might be able to control the development of new programming networks, influence the content and limit the diversity on existing networks and might be able to exercise buying power that would restrict the upstream national market for the provision of programming networks to all MVPDs.[63/]

The Commission's horizontal ownership rules, established pursuant to the 1992 Cable Act, provide that "no person or entity shall be permitted to reach more than 30% of all homes passed nationwide through cable systems owned by such person or entity or in which such person or entity holds an attributable interest," which is five (5) percent.[64/] While the Commission is currently contemplating revisions of its horizontal ownership rules and methods by which such ownership is calculated[65/], there is no doubt that such rules are needed to preserve competition and protect the public interest, with leaders in the cable industry concurring on their necessity.[66/]

The marketplace reality is that to break even, cable programmers must reach a certain critical mass of viewers. It has been estimated that they need ***at least*** twenty (20) million

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63/ *Fourth Annual Report*, at ¶ 149.

64/ 47 C.F.R. § 76.503. As specified under 47 C.F.R. § 76.503, note 1(c), "attributable interest" is defined by reference to the criteria set forth in the notes to the Commission's cable cross-ownership rules, which are laid out in 47 C.F.R. § 76.501.

65/ *Horizontal Ownership NPRM.*

66/ H.Rep. No. 102-628, 102nd Cong., 2d Sess. 43 (1992).

subscribers to break into the "Big Leagues." Hence, unaffiliated cable programmers are at the mercy of the large MSOs who are the only ones who can provide this type of large scale access to homes across the country. As a result, large MSOs possess great negotiating leverage regarding terms of carriage, including inhibiting the ability of their competitors to obtain this programming by extracting exclusivity from an unaffiliated programmer.

Moreover, by virtue of their sweeping horizontal market reach, the largest cable MSOs can command huge discounts from the customary prices paid for programming. Such discounts lower their cost of doing business, especially relative to non-vertically integrated new entrants, such as Ameritech. In turn, these large MSOs can utilize the savings derived from such discounts in a number of ways, including increasing its ownership stakes in programming or expanding into new technologies critical to the future of digital cable, which harm competitors such as Ameritech both directly or indirectly. Importantly, consumers are suffering as well. Consumers are not reaping the benefits of these cost savings in the form of lower monthly bills. Rather, incumbent cable operators apparently are using the savings to finance expensive upgrades of their facilities, something no other industry has the luxury to do, whether due to regulatory restrictions or the forces associated with a competitive environment.

1. The National Reach of TCI Bodes Ill for Competition in the MVPD Marketplace.

TCI, the largest cable company in the nation, provided cable TV service to 13.9 million customers last year.[67/] TCI has announced that it has completed or will be involved in numerous transactions with fellow cable operators that will result in a reduction in the national reach of

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[67/] *See Fourth Annual Report*, Table 7B.

cable systems 100 percent owned by TCI by thirty (30) percent, down to 10.5 million subscribers.[68] However, this statistic is completely deceptive. As a consequence of a torrent of transactions, franchise swaps, and joint ventures, cable systems in which TCI has an attributable interest will actually serve more than 21 million cable subscribers, or approximately 36 percent of all cable subscribers nationwide. According to Michael Armstrong, Chairman of AT&T, TCI systems already pass roughly one-third of all American homes.[69]

A brief examination of several of these transactions illustrate how they are enhancing TCI's reach. For instance, TCI gained access to 501,800 additional subscribers when it entered a joint venture in the city of Los Angeles. Prior to this transaction, TCI had access to 245,000 subscribers in Los Angeles. TCI and Century combined their cable systems in that city, forming a new joint venture with TCI owning 25% and Century owning 75% of the cable systems. TCI has also entered into a joint venture with fellow powerhouse, Cablevision, in the states of New York, New Jersey and Connecticut. In so doing, TCI gained a thirty-six (36) percent interest in Cablevision, increasing its access from 850,000 to 3.5 million New York area customers.[70]

To appreciate the enormity of TCI's market power in program distribution alone, it is necessary to aggregate TCI's attributable interests resulting from swaps, joint ventures, and other transactions with fellow cable operators, its 100 percent ownership of numerous cable systems, its

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[68] *See* <http//www.tci.com/tci.pgs/corpfram.html> for an explanation of TCI's strategy for growth by concentrating its resources in the top cable markets.

[69] *'What Talks?' TCI Caps Months of Rumors with AT&T Merger Plan*, CABLEFAX DAILY, June 24, 1998, at 1. (Quoting Mr. Armstrong, "...But it's worthwhile for a 'very solid cable business' passing one-third of American consumers.")

[70] John M. Higgins, *TCI Looks to the Rainbow*, BROADCASTING AND CABLE, April 20, 1998, at 14.

36.8 percent interest in Primestar, and its ownership interest in Netlink. The result is that when TCI sits down to negotiate programming agreements, it could potentially negotiate an agreement on behalf of more than twenty-five (25) million subscribers. Programmers are left with little alternative than to accept TCI's terms and conditions, or risk losing access to a large, national audience, critical to their success. The Commission must not relax its horizontal ownership levels. Rather, it must maintain them and carefully monitor the continued activity of incumbent cable operators in regard to their horizontal concentration.

2. Clustering Further Enhances the Market Power of TCI and Other Large MSOs.

Not only are TCI and other large MSOs increasing their national reach, they also are clustering their cable systems through swaps or joint ventures with other cable operators so that they are becoming concentrated locally as well. Clustering provides for financial savings as a result of achieving economies of scale.[71] As described above, one of the potential byproducts of clustering is that it is conducive to terrestrial delivery of cable programming which is, for the most part, beyond the reach of Section 628, thereby possibly preventing competitors from gaining access to critical vertically integrated programming. To illustrate, Cablevision, which is busy clustering in the New York metropolitan area, is delivering programming in New York by using fiber-optic wiring as opposed to traditional satellite.[72] This business plan fortifies Cablevision's hold on the New York MVPD market while at the same time weakening the ability of competitors

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[71] Lorilyn Rackl, *TCI Takes Over In the Cable Market*, DAILY HERALD (Chicago), April 18, 1998, at 1, 7. *See* Attachment 7 of these Comments.

[72] *See* R. Thomas Umstead and Jim Forkan, *Rainbow Keeps New Services Exclusive*, MULTICHANNEL NEWS, July 6, 1998, at 83.

to enter.

No more powerful example of clustering exists than TCI's recently announced plans for the Chicago metropolitan area, where Ameritech provides head-to-head competition. The Chicago area was once home to seven cable operators -- TCI, Time-Warner, Media One, Jones Intercable, Triax, Multimedia, Prime, and Ameritech. Now due to swaps and purchases, all cable systems owned by Time-Warner, Media One, Jones Intercable, and Multimedia, will become TCI's by the second quarter of 1999.[73] At that juncture, TCI will own systems serving 93 percent of the cable subscribers in the Chicago market.[74]

The potentially anticompetitive harms that may be felt by aspiring competitors from the increases in horizontal concentration, on both the national and local levels, aptly illustrate why the Commission, in its pending NPRM, must preserve the current horizontal ownership levels, and stave off attempts to dilute them.

V. THE PACE AND DIRECTION OF VERTICAL INTEGRATION ALSO THREATENS EMERGING COMPETITION.

A. Abundant Cable Programming, Including Some of the Most Popular Cable Programming, Remains Vertically Integrated.

Section 628 remains indispensable to the efforts to promote competition to the incumbent cable industry because a substantial amount of cable programming is still owned by cable operators. In 1997, of the 172 national satellite-delivered cable programming services, sixty-eight

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73/ *See* Attachment 8 demonstrating the effects of swapping on the Chicago MVPD market.

74/ Rackl, *supra* note 71.

(68) or forty (40) percent were vertically integrated with at least one MSO.[75] Moreover, many of the jewels of cable programming remain vertically integrated and are considered the "must-haves" on a system's cable line-up -- such as Time Warner's CNN, HBO, TBS and TNT, and TCI's Discovery Channel.[76] This means that unaffiliated competitors, like Ameritech, must negotiate with incumbent cable operators for programming that is critical to their ability to attract subscribers and successfully penetrate the MVPD marketplace.

If a competitive cable system is unable to access these programs, at nondiscriminatory prices, terms and conditions, it is competitively disadvantaged as compared to the vertically integrated cable operators who are able to create attractive packages of programs at lower prices. Hence, the primary focus of the program access provisions of the 1992 Cable Act and its protections, are still extremely relevant and necessary, six years after their enactment.

The relationship between vertical integration and rising programming costs also is noteworthy because it operates to the competitive detriment of new entrants such as Ameritech. This year, in response to concerns expressed about cable rates continuing to outpace inflation, incumbent cable operators plead innocence, justifying the rate hikes as being necessary to cover sharply higher programming costs, among other things.[77] Cable operators maintain that they are merely passing these programming costs on to the subscriber. However, in the case of vertically integrated cable companies, it is the programming arm of these companies that is the source of the cable programming price increases. In 1997, the eight largest cable MSOs had a stake in all of the

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[75] *Fourth Annual Report*, at ¶ 158.

[76] TCI owns this programming with other entities, including Cox and Rainbow.

[77] Lieberman, *supra* note 7.

sixty-eight (68) national, satellite delivered vertically integrated services.[78] TCI had an interest in thirty-nine (39) of these national programming services, including Discovery, Fox Sports and BET.[79] According to one very recently issued report, TCI, through Liberty Media, has an attributable interest in more than seventy (70) national, regional and international cable programming services.[80] In addition, MediaOne, Comcast, Cox and Cablevision Systems, all have stakes in numerous other cable channels. When cable programming vendors increase their programming rates, they increase the rates charged to both affiliated and non-affiliated cable operating companies. However, the increases paid by their affiliated cable companies, in one sense, can be viewed as akin to an intracorporate transfer of funds -- from the cable distribution arm to the cable programming arm, ultimately funded by captive ratepayers. Since the money extracted from customers to cover the increases in programming costs remains in the vertically integrated cable company's coffers, the excuse that "[o]ur programming costs were up 22% last year" rings hollow.[81]

> Certainly, the cost of television programming has rocketed, with stars from such programmes [sic] as "Seinfeld" charging huge fees. But since TCI and Time Warner, the two biggest cable companies, making 23% and 12% respectively, their plea sounds self-serving. Indeed, the regulators worry that programme-makings [sic] cable companies, which are obliged to make their programming available to their competitors, are loading system costs on to their production arms, thereby passing them on to satellite broadcasters and other cable operators. The price of programming made by the cable companies rose by sixteen (16) percent last year,

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78/ *Fourth Annual Report*, at ¶ 161.

79/ *Id.*

80/ Paul Kagan Associates, *Cable Program Investor*, July 7, 1998.

81/ David Lieberman, *Rate Hikes: Justified by Costs or a Raw Deal?*, USA TODAY, March 16, 1998, at 3B.

whereas the price of programmes [sic] made by the broadcasters rose by only four (4) percent.[82]

These rising programming costs have a destructive impact on both consumers and competitors. Consumers experience them in the form of higher rates while competing MVPDs are forced to pay more for programming. For non-vertically integrated new entrants like Ameritech, which do not enjoy the benefits of programming revenues flowing into its pockets, escalating programming costs have a multiplier effect. Unlike the large, incumbent cable MSOs, new entrants lack the size to command large discounts from programmers in exchange for carriage, and as a result must pay significantly more to obtain programing. These higher programming fees, however, create an operating margin squeeze for new entrants attempting to compete with incumbent cable operators on pricing to consumers. The task of gaining market share becomes more difficult under these circumstances. Thus, with vertical integration, the competitive advantages enjoyed by the large, incumbent MSOs only increase, while competitors and competition are injured.

B. Control Over Sports Programming and Underlying Assets Such as Sports Teams and Arenas By Vertically Integrated Companies is a Concern.

While vertically integrated programming is critical to a cable operator's success, one genre of programming has emerged as the most sought after: sports programming. Sports is considered marque programming by which cable operators are able to attract viewers. "Without sports, cable's rivals will not survive."[83]

Increasingly, incumbent cable operators have secured interests in additional aspects of the

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

83/ *Behind Your Soaring Cable Rates*, NEW YORK TIMES, Dec. 29, 1997, at A18.

sports industry -- the teams playing and the arenas in which they play. Such growing domination of the sports industry, coupled with the incumbent cable operators' domination of the MVPD market, provides them with enormous leverage to dictate the terms by which a competitor may have access to sports programming.

To illustrate, TCI possesses ownership interests in the following arenas: Denver Arena and the Florida Bobcats Arena. It has also entered into agreements with Fox Sports Florida, allowing TCI customers to receive coverage of the NHL Florida Panthers, the NFL Miami Dolphins, Tampa Bay Buccaneers, University of Miami Hurricanes and other teams. It also has an agreement with Ascent Entertainment Group for cable rights to the NBA Denver Nuggets and former Stanley Cup champions, the Colorado Avalanche. While these ownership interests may not seem particularly strong, when they are combined with TCI's other interests, they become quite formidable.

TCI also has allied itself with other video behemoths to solidify its toehold in the sports field. For instance, TCI, Newscorp's FOX/Liberty Networks, and Cablevision's Rainbow Programming Holdings Inc. teamed up to create the new national cable sports network, Fox Sports Net, which now includes eight regional sports channels, among them Fox Sports Chicago, Florida, New England, New York, Northern California, and Ohio. It also includes Madison Square Garden (MSG) LP, the Knicks, the Rangers and the MSG Network with its more than 5.4 million subscribers. TCI has a 36 percent interest in Cablevision, which also operates one of the nation's largest cable system clusters with 3.5 million subscribers in the New York City area. This marrying of sports, programming and cable system strength creates a formidable presence and makes it extremely difficult for smaller competitors to gain a toehold.

TCI is not the only cable operator garnering ownership interests in the field of sports. In 1996, Comcast purchased a sixty-six (66) percent interest in an entity whose assets included the Philadelphia 76ers basketball and Philadelphia Flyers hockey franchises and two area sports arenas. The new entity, Comcast - Spectacor, in turn entered into a joint venture with the Philadelphia Phillies to create a new regional sports network, Comcast SportsNet. Sports Channel Philadelphia, which previously carried the 76ers, Flyers, and Phillies games, lost the sports rights to these teams and went out of business on September 30, 1997. Utilizing non-satellite transmission methods that enable it to fall within the loophole contained in the program access rules,[84] Comcast has refused to allow DirecTV, who previously carried Sports Channel Philadelphia, to carry Comcast SportsNet, resulting in 1500 DirecTV subscribers being denied Philadelphia regional sports programming.[85] In discussing the company's sports strategy and the apparent loophole in the program access rules, Brian Roberts, President of Comcast stated, "We don't like to use the words 'corner the market' because the government watches our behavior. Let's just say we've been able to do things before they're in vogue."[86] Comcast's anticompetitive intentions cannot be underrated.

The combined effect of these arrangements leaves unaffiliated competitors, like Ameritech, in vulnerable positions where their viability is dependent, in some measure, upon obtaining popular sports programming from their very competitors, who own the programming. To ensure

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84/ *See* full discussion of incumbent operators utilizing transmission methods that evade the reach of the program access rules in Section III.A.3 of these Comments.

85/ Program Access Complaint filed in *DirecTV, Inc. v. Comcast Corporation* (FCC Docket No. CSR-5112-P) at 3.

86/ *The New Establishment,* Vanity Fair, October, 1997, at 166.

that competitors are able to attract viewers, access to critical sports programming must be ensured.

C. The Largest MSOs Bid to Dominate the DBS Market is a Dire Threat to Competition.

TCI has teamed up with four other large cable MSOs -- Time Warner, Media One, Comcast and Cox, and operates Primestar Inc., a DBS company, in a concerted effort to control the DBS market, the most promising competitive, national, non-cable technology in the MVPD marketplace. Primestar, Inc., is currently attempting to acquire one of only three satellite slots suitable for DBS service covering the entire continental United States in a complex transaction pending before the Commission. The Department of Justice has filed suit to block the transaction on antitrust grounds, and a trial is now scheduled for early 1999.[87]

The proposed transaction would enhance Primestar Inc.'s competitive position in the MVPD marketplace. In addition to their individual strangleholds on the cable market, working as a consortium, the nation's largest vertically integrated cable operators currently offer medium power direct-to-home satellite service. Now they want to extend their reach to include control of a high-power DBS license to provide full continental United States coverage. Permitting the incumbent cable industry to control two of the three full-CONUS DBS orbital slots is untenable and would have a devastating effect on the aggressive development and use of DBS service as a competitor in the MVPD market.

The ability of consumers to enjoy a genuine choice among MVPD providers, in addition to their local incumbent cable operator, depends on the existence of other providers in the market.

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[87] *Trial Date for Satellite-TV Lawsuit*, N.Y. TIMES, July 1, 1998, at D7.

One of the few viable national competitors in existence today, as opposed to competitors like Ameritech who are not in every market, are DBS providers. However, if Primestar Inc.'s bid is approved, enabling cable operators to gain access to a critical finite resource -- a choice orbital slot -- the direct and immediate impact will be a severe restriction of the number of competitors in the market. The notion of DBS technology being dominated by incumbent cable operators is almost definitionally anticompetitive. It impedes the growth of genuine competition in the MVPD market and limits consumer choice.

Moreover, it would simultaneously preclude this DBS orbital slot's use as a platform for genuine competition to incumbent cable systems. If this transaction is approved, Primestar Inc. would control thirty-nine (39) of ninety-six (96) or approximately forty (40) percent of the full Conus coverage DBS channels. This would arm Primestar Inc. with the capability to beat down independent DBS providers, thereby weakening DBS as a competitive threat to cable. They could then use DBS to complement rather than compete with the incumbent cable industry. The consequences of such activity would dramatically harm the smaller competitors to incumbent cable operators, like Ameritech, and thwart competition.

D. TCI's Acquisition of an Interest in a Leading Cable Set-Top Box Manufacturer has Anticompetitive Implications.

Much as it has done with other cable systems through swaps and joint ventures and with cable programming, TCI has acquired a ten (10) percent ownership interest in General Instrument Corp. ("GI"), one of only two digital cable set-top box manufacturers in the U.S., as consideration for GI assuming control of TCI's Headend in the Sky ("HITS") data control center. Moreover, TCI's stake in GI is likely to rise to twenty (20) percent as a consequence of a $4.5

billion order for between 6.9 to 11.5 million DCT-5000 advanced digital set top boxes over the next three years. As part of that purchase arrangement from GI, TCI and other cable operators receive discounted shares of GI stock.

Set-top boxes are critical to the future of the cable industry because, in the digital environment, it is likely that most, if not all, cable signals will travel through the set-top box before being displayed on the television.[88] Cable set top boxes are, therefore, the last gateway to the digital cable subscriber, and if TCI owns an interest in one of only two digital set-top box manufacturers in the country, it strengthens its gatekeeper role. It gives TCI potentially great influence in establishing standards and technology for the cable set-top box which again gives it yet additional leverage in the marketplace over its competitors, especially new entrants.

Cable digital set-top box technology is of more than passing interest to Ameritech. Standards-setting is integral to the success of the digital future. Indeed, to ensure it enjoys a position in the digital era, Ameritech sought to join Cable Labs, a cable industry standards development entity, which is playing a leading technical role in the launch of digital cable services. Incredibly, Ameritech was not allowed to participate in Cable Labs and, as a result, Ameritech has been unable to participate in the "Open Cable" standards process, ostensibly designed to ensure open system architecture and non-proprietary standards in the digital set-top box marketplace. Given the importance of set-top box technology, Ameritech's exclusion raises serious concerns about this process, particularly whether it is being dominated by the largest, vertically integrated

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[88] The role of the cable digital set-top box is being subjected to close scrutiny in the Commission's pending rulemaking in its digital television "must-carry" proceeding. *In the Matter of the Transmission of Digital Television Broadcast Stations; Amendment to Part 76 of the Commission's Rules*, FCC 98-153, Released July 10, 1998 (*Notice of Proposed Rulemaking* in CS Docket 98-120).

cable companies.

E. TCI's Acquisition of Major Interests in Electronic Programming Guide Technology Also Raises Serious Concerns.

As we enter the digital era, electronic programming guides will become a critical element of cable service. Consumers will increase their reliance on interactive, electronic programming guides, as they try to maneuver through the maze of hundreds of channels. Programming guides will certainly be utilized more than traditional newspapers, which will likely need to utilize numerous pages just to print the complete programming schedules for hundreds of channels. They will also begin to provide consumers with their attached data services, providing additional information to accompany one's channel selection. For example, should a subscriber decide to watch a football game, with a couple of clicks of the remote control, he may enjoy access to accompanying data that includes team rosters, current win-loss records, and late-breaking news involving team members.

Electronic programing guides also will be considered a critical element of service because of their power to steer viewers to certain programs. The old saying "location, location, location" is particularly poignant in the digital information age because a program's listing location on the guide will determine if it enjoys the benefits of being "beach front property" -- on the first screen, or suffers the consequences of being relegated to the digital era's "Siberia" on the last screen. This affects competitors to traditional cable operators because the ability of a vertically integrated cable operator to steer viewers to its own programs via the programming guide will make its business more lucrative. With this understanding about the future importance of programming guides, the Commission should be deeply concerned about having all available programming guide technology in the control of one company. This is not a far-fetched scenario.

United Video Satellite Group ("UVSG") currently owns one of the leading electronic programming guide services, Preview Interactive, in use in approximately 13.5 million homes across the country, most of which subscribe to TCI. In addition, UVSG recently announced the purchase of TV Guide, a second major electronic programming guide service, from NewsCorp. Following completion of the TV Guide transaction, TCI will own a 44 percent interest in UVSG while NewsCorp will own a forty (40) percent interest in UVSG. Finally, very recently, UVSG launched and then dropped a hostile takeover bid for another major source of electronic programming guide services and technology. The spectre of TCI, through its stake in UVSG, having such a central position in major electronic programming guide technologies is daunting. TCI is positioning itself potentially to extract exorbitant licensing fees, engage in exclusionary licensing practices and favor advertisers and programmers with which it is affiliated or has agreements.

F. TCI's Stake in Cable Modem Internet Access Services Also has Anticompetitive Potential.

TCI also has a deal with @Home Network, a consortium including TCI, Cablevision, Comcast, and Cox, where @Home Network will develop e-mail and systems integration software for up to 11 million advanced digital set top devices for TCI's high-speed data services. Microsoft Corp[89/] and Sun Microsystems are also involved in the development of the advanced

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[89/] Microsoft Corp. has its own agenda that raises fundamental questions about competition and the need to have more players in any given market. In June 1997, Microsoft invested $1 billion in Comcast Cable Corp. to expedite the development of a broadband infrastructure that will access new TV and PC devices. In addition, by aggressively moving into the video marketplace through its acquisition of WebTV and through Windows CE as the platform for the cable digital set-top box, Microsoft has positioned itself at the very point of convergence between the television and the computer. Microsoft may soon have unprecedented control of the gateway to most consumers' access to

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digital set-top device. Microsoft is providing the operating system, while Sun Microsystems is putting its Personal Java programming language into the set-top device. TCI is to license a version of the Microsoft Windows CE operating system to serve as the platform for these digital set-top boxes. Once again, TCI would be in a commanding position to exercise inordinate control over pricing and types of service offerings which digital cable customers will demand. TCI's investments in companies that control technology essential to the digital video marketplace, when placed against this backdrop of its domination in both the cable distribution and programming markets, should cause the Commission to consider whether it deems this amount of concentration in one company to be fundamentally incompatible with the advancement of competition in the MVPD market.

VI. MISCELLANEOUS ISSUES THAT ADVERSELY IMPACT THE STATUS OF COMPETITION IN THE MVPD MARKETPLACE.

A. Protracting the Franchising Process by Incumbent Cable Providers Causes Needless Delays in the Introduction of Competition In the MVPD Market.

One of the impediments faced by Ameritech as it attempts to penetrate local markets arises in the franchising process. Incumbent operators, for the most part, obtained franchises many years ago when franchising authorities were anxious to bring any cable television service to their residents. In contrast, Ameritech, must convince franchising authorities that a second cable provider is in their and their residents' interest. Despite Ameritech's apparent success in obtaining seventy-eight franchises, its experience has been that it can take anywhere from five (5) to twenty-

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89/ (...continued)
information and entertainment in the 21st century. While the Department of Justice is investigating the company's activities in the computer industry for alleged antitrust violations, this Commission should be cognizant of its infiltration of the video market.