

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554**

In the Matter of: )  
 )  
Nondiscrimination in the Distribution of ) CS Docket No. 01-7  
Interactive Television Services Over Cable )

To: The Commission

**COMMENTS OF  
THE ASSOCIATION FOR MAXIMUM SERVICE TELEVISION, INC.**

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## SUMMARY

The Association for Maximum Service Television, Inc. (“MSTV”) commends the Commission for initiating an inquiry into the issue of nondiscrimination with respect to the distribution of new interactive television (“ITV”) services. ITV, which allows for two-way interaction between a subscriber and the ITV service provider, is an important new communications tool whose significance will only increase in the coming months and years. But these services can develop to their fullest potential only if vertically integrated MVPD/ITV service providers are not permitted to use their control of the gateway to the MVPD platform to deny or condition unfairly access to the content and services of unaffiliated ITV service providers.

In keeping with the Commission’s ongoing commitment to preserving openness and fairness in the terms and conditions of access to bottleneck facilities, MSTV urges the FCC promptly to (1) adopt general nondiscrimination requirements for DTV, ITV, and related services, such as those advanced by MSTV in its recent filing in the Commission’s open access inquiry; and (2) issue a ruling in its ongoing navigation devices proceeding, to ensure the widespread availability of non-proprietary ITV set-top boxes. Because it is not possible to anticipate all the potential uses for and developments with respect to ITV and in order not to discourage or foreclose innovation in this field, the Commission should also adopt a broad definition of what constitutes an ITV service. In doing so, the Commission will be acting well within its jurisdiction and will be meeting its responsibility to ensure that the public’s interest is served through the development of an open, innovative, and competitive marketplace for incipient ITV services.

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The Association for Maximum Service Television, Inc. (“MSTV”)<sup>1</sup> submits these comments in response to the Commission’s *Notice of Inquiry* in the above-captioned proceeding.<sup>2</sup> MSTV files to emphasize the importance of adopting a nondiscrimination principle that will prohibit vertically integrated MVPD/interactive television (“ITV”) service providers from discriminating against unaffiliated providers with respect to the content and distribution of nascent ITV services to the detriment of the public interest. The Commission can best do this by expeditiously: (1) adopting the general nondiscrimination requirements for DTV, ITV, and

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<sup>1</sup> MSTV represents nearly 425 local television stations on technical issues relating to analog and digital television services. It has frequently commented on the need for the FCC to ensure that DTV signals can pass undegraded through the cable plant to the consumer. *See, e.g.*, Comments of MSTV, *Carriage of the Transmissions of Digital Television Broadcast Stations*, CS Docket No. 98-120 (Oct. 13, 1998); Reply Comments of MSTV, *Carriage of the Transmissions of Digital Television Broadcast Stations*, CS Docket No. 98-120 (Dec. 22, 1998); Joint Broadcasters Comments, *Review of the Commission’s Rules and Policies Affecting the Conversion to Digital Television*, MM Docket No. 00-39 (May 17, 2000); Comments of MSTV, *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, GEN Docket No. 00-185 (Dec. 1, 2000) (“*MSTV Open Access Comments*”).

<sup>2</sup> *See In re Nondiscrimination in the Distribution of Interactive Television Services Over Cable, Notice of Inquiry*, CS Docket No. 01-7 (released Jan. 18, 2001) (“*NOI*”).

related services advanced by MSTV in its recent filing in the Commission's open access inquiry;<sup>3</sup> and (2) ruling in its ongoing navigation devices proceeding.<sup>4</sup>

ITV, the convergence of broadcasting and the Internet via a multichannel video programming distribution platform, represents the future of television because of its potential to bring innovative new services to the American public. Although the *NOI* focuses on the cable platform, the Commission should not foreclose the possibility that ITV services may also be delivered over other MVPD platforms, such as wireless or direct broadcast satellite ("DBS").<sup>5</sup> However, ITV services will not develop freely in the marketplace if a vertically integrated MVPD/ITV service provider is able to use its control of the broadband pipeline – the gateway to a consumer's home – to deny access to the content and services of unaffiliated ITV providers. It is precisely to prevent this kind of anti-competitive behavior that MSTV supports prompt adoption of nondiscrimination requirements. If the Commission does not set the rules of the road now, while development of ITV is in its initial stages, it will be faced with having to roll back the clock later – a much more difficult, and perhaps even impossible, task.

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<sup>3</sup> See *In re Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities, Notice of Inquiry*, GEN Docket No. 00-185 (released Sept. 28, 2000); *MSTV Open Access Comments* at 8-10.

<sup>4</sup> See *In re Implementation of Section 304 of the Communications Act of 1996, Commercial Availability of Navigation Devices, Further Notice of Proposed Rulemaking and Declaratory Ruling*, CS Docket No. 97-80 (released Sept. 18, 2000) ("*Navigation Devices FNPRM*").

<sup>5</sup> For example, AOL intends to distribute ITV services via cable, DSL, and DBS; Microsoft, Thompson, RCA, and DirecTV have announced plans to offer an ITV service over DBS; and a number of other cable and satellite MVPDs plan to launch their own ITV services. See *In re Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations by Time Warner Inc. and America Online, Inc., Transferors, to AOL Time Warner Inc., Transferee, Memorandum Opinion and Order*, CS Docket No. 00-30 ¶¶ 229, 232-35 (released Jan. 22, 2001) ("*AOL Time Warner Merger Approval Order*").

**I. THE COMMISSION SHOULD ADOPT A NONDISCRIMINATION REQUIREMENT WITH RESPECT TO THE PROVISION OF ITV SERVICES.**

As MSTV explained in its comments in the Commission’s open access proceeding, the well-documented willingness of cable operators and other MVPDs to wield bottleneck control to eliminate competition to their own content and services supports adoption of nondiscrimination requirements that encompass at a minimum access to the MVPD platform and the ability to provide ITV and digital programming and services, including electronic programming guides (“EPGs”).<sup>6</sup> Such a requirement is particularly important for ITV services because they represent a new technology with as yet untapped potential. While no one can at this time predict how ITV services will develop and be used in the future, what is clear is that such new services will not develop at all in the face of marketplace discrimination by dominant service providers – a problem that Congress and the Commission have recognized time and again.<sup>7</sup> For example, Congress has in the common carrier context required ILECs to open their facilities to CLECs<sup>8</sup> and in the cable context prohibited a franchising authority from “unreasonably refus[ing] to award an additional competitive franchise” in its jurisdiction.<sup>9</sup> The Commission has adopted cable rules,<sup>10</sup> as well as rules to ensure the compatibility of an

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<sup>6</sup> See *MSTV Open Access Comments* at 8-10.

<sup>7</sup> See, e.g., *AOL Time Warner Merger Approval Order* ¶ 183 (“Companies in communications markets have been known to acquire scarce facilities that their competitors need and deny the competitors equal or reasonable access to these facilities, and thus to give themselves anticompetitive advantages or monopolies.”).

<sup>8</sup> See 47 U.S.C. § 251.

<sup>9</sup> 47 U.S.C. § 621(a)(1).

<sup>10</sup> See *United States v. Southwestern Cable Co.*, 392 U.S. 157, 178 (1968) (holding that the Commission has authority to regulate cable television systems pursuant to Section 1 of the Communications Act).

independent set-top box provider's product<sup>11</sup> and to prevent exclusive content deals between vertically integrated cable operators and their affiliated programming providers.<sup>12</sup>

The potential for a vertically integrated MVPD/ITV service provider to discriminate against unaffiliated ITV service providers is both real and immediate. When the Commission approved the merger of AOL and Time Warner, it created a vertically integrated cable operator/ITV service provider by allowing the marriage of Time Warner's cable pipeline with AOL's AOLTV ITV service.<sup>13</sup> Such an integrated ITV service provider has the incentive and the ability to discriminate against unaffiliated providers in the terms and conditions of access to video programming, in the quality of upstream and downstream transmissions over the IP connection, and/or by preventing interactive triggers from reaching consumers by blocking them in the set-top box.

A vertically integrated ITV provider could use its control of the physical plant to disadvantage its competitors in subtle ways by, for example, isolating network traffic, prioritizing its own data packets, using higher bit rates for affiliated content, or preferring internal over external data. Such a provider could also discriminate in more overt ways, for example by disabling or refusing to carry an unaffiliated provider's interactive triggers, without which two-way interaction with a subscriber is impossible. While it is hard to know exactly how ITV services will develop, it is also possible to anticipate a situation in which a vertically

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<sup>11</sup> See 47 C.F.R. §§ 76.1200-76.1210; see also 47 U.S.C. § 629.

<sup>12</sup> See 47 C.F.R. §§ 76.1000-76.1004; see also 47 U.S.C. § 628.

<sup>13</sup> See *AOL Time Warner Merger Approval Order* ¶ 216 ("AOL is the world's largest aggregator of Internet content and interactive services, and Time Warner is the nation's second largest cable operator and owner of a significant number of the nation's most popular cable programming networks."). AOL and others also anticipate offering ITV services over platforms other than cable, such as DBS and DSL. See *id.* ¶¶ 228-236.

integrated ITV service provider might use its EPG – the tool subscribers use to navigate around the system – to advantage affiliated content by, for example, giving favorable placement to affiliated content and disfavoring or making it more difficult for consumers to access unaffiliated content. This is analogous to the way an ISP can use its “first screen” – the page customers see when they activate the service – to influence consumer choices and promote affiliated content. Even if the ISP does not make it technologically difficult or impossible to leave the first screen, many subscribers never leave the realm of the ISP’s affiliated content because that is what is most conveniently available to them. Thus, the combination of an integrated MVPD/ITV service provider’s control over content and distribution has unquestioned potential to deter competition and lessen consumer choice, which will stifle the growth and development of ITV.

It is essential that the Commission take swift action to prevent anti-competitive behavior while ITV is still in its embryonic, developmental stage. As the Commission recognized when it imposed an instant messaging (“IM”) condition on its approval of the AOL Time Warner merger, a small amount of nonintrusive regulation now is infinitely preferable to attempting to roll back the clock later, especially with respect to newly-emerging technologies like interactive services.<sup>14</sup> ITV is likewise a new service with both unrealized potential and the distinct possibility that a dominant, vertically integrated provider will have the ability and incentive to deny access to others. If the Commission declines to adopt a nondiscrimination requirement now to level the ITV services playing field, it will be required to step in later when, because vertically integrated ITV providers will already have established their dominant market

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<sup>14</sup> See *AOL Time Warner Merger Approval Order* ¶ 188 (“The risk of our not intervening now, however, is to risk the emergence of a significant new business needing regulation, a result we and Congress wish to avoid *especially on the Internet and interactive services.*”) (emphasis added).

shares, any efforts to regulate will be met with challenges and claims that existing arrangements should be grandfathered.<sup>15</sup>

In order to avoid this undesirable result, MSTV urges the Commission to adopt principles of nondiscrimination by immediately: (1) issuing a Notice of Proposed Rulemaking setting forth the nondiscrimination requirements advanced in MSTV's comments in the open access docket; and (2) ruling in the pending navigation devices proceeding. Specifically, the Commission should prohibit cable operators or other MVPDs with gatekeeper power from discriminating against unaffiliated content and service providers by:

- Discriminating in prices, terms, and conditions in affording independent entities – including providers of interactive television services (including EPGs) and other analog and digital television services – access to subscribers or the MVPD platform;<sup>16</sup>
- Discriminating on the basis of affiliation or non-affiliation (i) in affording access to subscribers and the MVPD platform; and (ii) in establishing the prices, terms, and conditions of such access;
- Interfering with a broadcaster's or other non-affiliated video service provider's ability to use part of its analog or digital channel capacity to provide interactive services, including EPGs, or other content or services to subscribers;
- Conditioning access to subscribers or the MVPD platform on the relinquishing of legal rights, such as the right to have all free digital content in a broadcaster's digital signal carried on the cable system or the right to have EPG information carried in the analog VBI;

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<sup>15</sup> See, e.g., *Time Warner Entertainment Co. v. FCC*, No. 94-1035, 2001 U.S. App. LEXIS 3102 (D.C. Cir. Mar. 2, 2001) (upholding a challenge by Time Warner to the FCC's 30% cable ownership cap).

<sup>16</sup> This principle might be subject to exceptions similar to certain of the exceptions established in the context of the program access rules. Thus, while the proposed nondiscrimination requirements would prohibit MVPDs from discriminating against unaffiliated content and service providers to advance the competitive position of the MVPD or its affiliates or to advance the competitive position of one preferred entity over its competitors, it would not prohibit MVPDs from imposing reasonable requirements for creditworthiness and financial stability or from establishing different prices, terms, and conditions to take into account actual and reasonable differences in the cost of delivering the content or service to its subscribers.

- Conditioning access to subscribers or the MVPD platform on the removal of competing content or services from the broadcast analog or digital signal;
- Unreasonably refusing to grant access to subscribers or the MVPD platform to a class of content or service providers (*e.g.*, broadcasters) or refusing to negotiate in good faith with a particular content or service provider when the MVPD has granted access to that provider's competitor;
- Entering into exclusive arrangements with either affiliated or unaffiliated content and service providers that prevent competing providers from obtaining access to subscribers or the MVPD platform; and
- Engaging in any other conduct that unreasonably restrains the ability of an unaffiliated content or service provider to compete fairly with respect to (i) other services delivered to a subscriber's home by the MVPD; or (ii) the market for such content and services generally.<sup>17</sup>

Because set-top boxes are an essential component of ITV services,<sup>18</sup> the

Commission should also promptly issue a decision in its pending proceeding to ensure the commercial availability of independent navigation devices by adopting open standards and ensuring an open platform so that consumers may obtain workable customer premises equipment from commercial sources other than cable providers by the Commission's January 1, 2005, deadline.<sup>19</sup> As MSTV explained in reply comments submitted in that proceeding, so "long as MSOs are allowed to flood the market with proprietary set-top boxes, they will maintain a stranglehold on their subscribers' access to DTV signals."<sup>20</sup> This is why the Commission adopted section 76.1204 of its rules: so that consumers may patronize their choice of set-top box provider and so that an open marketplace has a chance to develop. As MSTV urged in its

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<sup>17</sup> See *MSTV Open Access Comments* at 9.

<sup>18</sup> See *NOI* ¶ 13 (identifying the ITV set-top box as one of the three building blocks of an ITV system).

<sup>19</sup> See *Navigation Devices FNPRM*.

<sup>20</sup> Reply Comments of the Association for Maximum Service Television, Inc. in CS Docket No. 97-80, at 3 (filed Dec. 18, 2000) ("*MSTV Navigation Device Reply Comments*").

*Navigation Device Reply Comments*, in order to ensure that this goal becomes a reality, the Commission must act expeditiously to: (1) set January 1, 2002, as the date by which cable operators may no longer deploy integrated devices, so that the cable industry will have incentive to shift its focus from proprietary to open technology; (2) set clear benchmarks for the development of standards that enable the independent manufacture of host set-top boxes comparable to MSO-provided set-top boxes; (3) require substitute alternative standards if these benchmarks are not met; and (4) sanction members of the cable industry that attempt to derail the development of a competitive navigation devices market by deploying proprietary devices when comparable devices are not available at retail.<sup>21</sup> In addition, the Commission should apply these rules to all MVPDs with bottleneck control, not just cable operators.

These basic tenets of nondiscrimination are grounded in existing doctrines of openness and nondiscrimination established by Congress and the Commission in the program access rules,<sup>22</sup> the nondiscrimination rules for open video systems,<sup>23</sup> and the good faith negotiation requirements established by the Commission pursuant to the Satellite Home Viewer Improvement Act of 1999.<sup>24</sup> By issuing a NPRM that proposes a nondiscrimination requirement incorporating the principles proposed above and moving forward in the navigation devices docket, the Commission will remain true to its well-established commitment to openness, competition, and consumer choice and will take an essential step towards assuring that

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<sup>21</sup> See *MSTV Navigation Device Reply Comments* at 7.

<sup>22</sup> See 47 U.S.C. § 548; 47 C.F.R. §§ 76.1000-76.1003.

<sup>23</sup> See 47 U.S.C. § 573; 47 C.F.R. §§ 76.1503(a), 76.1504, 76.1507 and 76.1512.

<sup>24</sup> See 47 U.S.C. § 325(b)(3)(C); 47 C.F.R. § 76.65.

subscribers are afforded nondiscriminatory access to new, competitive content and services, regardless of whether those services are delivered by an affiliated or unaffiliated entity.

In the *NOI*, the Commission also inquires about two options for enforcing the nondiscrimination rules it adopts: (1) for ITV providers and cable operators to make private enforcement arrangements subject to judicial review; and (2) for aggrieved parties to rely on the Commission's normal complaint procedures.<sup>25</sup> MSTV endorses the latter option because it brings the FCC's expertise to bear on the issues and promotes consistency and reliability in the application of the nondiscrimination principle. However, it is unnecessary to finalize specific enforcement mechanisms at this time, before the Commission has placed concrete rule proposals on the table so that they may be considered in context.

## **II. THE COMMISSION CLEARLY HAS JURISDICTION TO REGULATE ITV SERVICES.**

In the *NOI*, the Commission asks whether it should regulate ITV services as cable, telecommunications, advanced, information, or other services.<sup>26</sup> MSTV believes it is not necessary for the FCC to resolve this matter at present because the Commission has ample authority to regulate ITV pursuant to its authority in Sections 1 and 2 of the Communications Act, both of which grant it broad discretion to address new technologies as they evolve.

Section 1 of the Communications Act requires the Commission "to make available, so far as possible, to all the people of the United States, ... a rapid, efficient, Nation-wide and world-wide wire and radio communication service with adequate facilities at

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<sup>25</sup> See *NOI* ¶ 39.

<sup>26</sup> See *NOI* ¶ 44. In its order approving the merger of AOL and Time Warner, the FCC determined that it has authority to regulate ITV services pursuant to Sections 521(4) and 157 nt of the Communications Act. See *AOL Time Warner Merger Approval Order* ¶ 216.

reasonable charges.”<sup>27</sup> The courts and the Commission have interpreted this section flexibly to allow the FCC to address new technologies that do not fit squarely within a particular regulatory framework but are critical to making available a wire and radio communication service.<sup>28</sup>

Section 2 of the Act also gives the Commission authority to address emerging technologies because it explains that the Act “appl[ies] to all interstate and foreign communication by wire or radio . . . which originates and/or is received within the United States, and to all persons engaged within the United States in such communication.”<sup>29</sup> Section 2 has similarly been read expansively to permit, for example, regulation of reciprocal compensation for a LEC delivering traffic to an ISP,<sup>30</sup> a LEC’s DSL offering,<sup>31</sup> and the administration of telephone numbers.<sup>32</sup>

ITV is without doubt a wire or radio communication service. The Act defines a “wire communication” as “the transmission of writing, signs, signals, pictures, and sounds of all kinds by aid of wire, cable, or other like connection between the points of origin and reception of such transmission, including all instrumentalities, facilities, apparatus, and services (among other

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<sup>27</sup> 47 U.S.C. § 151.

<sup>28</sup> See, e.g., *United States v. Southwestern Cable Co.*, 392 U.S. 157, 178 (1968) (holding that Section 1 gives the Commission authority to regulate cable television systems); *In re Implementation of Video Description of Video Programming, Report and Order*, MM Docket No. 99-339, ¶ 55 (2000) (noting that “[t]he courts have consistently held that the Commission has broad discretion so long as its actions further the legislative purposes for which the Commission was created and are not contrary to the basic statutory scheme”) (quoting *In re Amendment of Part 67 of the Commission’s Rules and Establishment of a Joint Board, Decision and Order*, 96 FCC 2d 781, 787 n.15 (1984)).

<sup>29</sup> 47 U.S.C. § 152.

<sup>30</sup> See *In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Declaratory Ruling in CC Docket No. 96-98 and Notice of Proposed Rulemaking in CC Docket No. 99-68*, 14 FCC Rcd 3689, 3701-02 (1999).

<sup>31</sup> See *In re GTE Telephone Operating Cos., Memorandum Opinion and Order*, 13 FCC Rcd 22466, 22474-75 (1998).

<sup>32</sup> See *In re Administration of the North American Numbering Plan, Notice of Proposed Rulemaking*, 9 FCC Rcd 2068, 2069 (1995).

things, the receipt, forwarding, and delivery of communications) incidental to such transmission.”<sup>33</sup> Similarly, a “radio communication” is “the transmission by radio of writing, signs, signals, pictures, and sounds of all kinds, including all instrumentalities, facilities, apparatus, and services (among other things, the receipt, forwarding, and delivery of communications) incidental to such transmission.”<sup>34</sup> These definitions encompass each of the three components of ITV services – the video or other stream that transmits information; the two-way connection, which joins the points of origin and receipt of the information; and the set-top box, which is the apparatus that conveys the information to the consumer. Therefore, the Commission has jurisdiction pursuant to Sections 1 and 2 of the Act to regulate ITV services.

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For these reasons, MSTV urges the Commission promptly to adopt a nondiscrimination requirement with respect to the provision of ITV services by vertically integrated MVPD/ITV service providers. If the Commission does not proceed expeditiously to a rulemaking, this *NOI* will have only interposed a wasteful and unnecessary delay, one with the potential permanently and adversely to affect the development of ITV services.

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<sup>33</sup> 47 U.S.C. § 153(52).

<sup>34</sup> 47 U.S.C. § 153(33).

Respectfully submitted,

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