

RECEIVED

MAR 19 2001

DOCKET FILE COPY ORIGINAL

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Federal Communications Commission
WASHINGTON, D.C. 20554

In the Matter of

)

)

Nondiscrimination in the Distribution of
Interactive Television Services Over Cable

)

)

CS Docket No. 01-7/



COMMENTS OF
THE ASSOCIATION OF LOCAL TELEVISION STATIONS, INC.

ASSOCIATION OF LOCAL
TELEVISION STATIONS, INC.

David L. Donovan, Esq.
V.P. Legal & Legislative Affairs
1320 19th Street, N.W.
Suite 300
Washington, D.C. 20036
(202) 887-1970

March 19, 2001

01/11

TABLE OF CONTENTS

	<u>PAGE</u>
SUMMARY	ii
I. THE FCC SHOULD ENCOURAGE THE DEVELOPMENT OF INTERACTIVE SERVICES THROUGH REGULATION THAT PROHIBITS DISCRIMINATORY BEHAVIOR.	2
II. VERTICALLY INTEGRATED MVPDS HAVE THE INCENTIVE AND THE ABILITY TO FAVOR THEIR OWN INTERACTIVE SERVICES.	6
A. Cable’s Market Power Continues To Grow And To Result In Abuses.	7
B. ITV Provides Additional Incentive And Ability For MVPDs To Discriminate. . .	9
III. THE COMMISSION SHOULD PROHIBIT DISCRIMINATORY TREATMENT OF ITV CONTENT BY VERTICALLY INTEGRATED MVPDS.	11
A. Nondiscrimination Rules Should Apply To All Vertically Integrated MVPDs. .	12
B. A Finding That An MVPD Is Subject To Effective Competition Should Not Exempt It From ITV Nondiscrimination Rules.	12
C. The Case For Nondiscrimination Requirements Is Particularly Strong With Respect To “Program-Related” ITV Services, But The Commission Should Not Limit ITV Nondiscrimination Obligations to “Program-Related” ITV.	13
D. The Commission Should Adopt Requirements that Prevent Discriminatory ITV Practices, Including Alteration of Unaffiliated ITV Content.	15
E. Alternatively, The Commission Should Modify Its Existing Rules To Bar Anti-Competitive Conduct.	16
IV. THE FCC HAS AUTHORITY TO IMPLEMENT THE LIMITED REQUESTED RELIEF, AND SHOULD PROVIDE FOR EXPEDITED ENFORCEMENT PROCEDURES.	17
A. Section 616 Of The Act Authorizes The Commission To Adopt Rules Protecting The Development Of ITV Services.	17
B. The FCC Should Strengthen Its Existing Enforcement Procedures For Discrimination Proceedings, And Make Them Applicable To ITV.	18
CONCLUSION	20

SUMMARY

In considering any rule to bar discrimination in connection with the provision of ITV, the Association of Local Television Stations urges the FCC not to overlook the interests of broadcasters, and to protect them (and other parties interested in the rapid rollout of ITV) from the anti-competitive conduct of vertically integrated MVPDs. Without FCC protection, even the potential for discriminatory behavior will have a chilling effect on investment in ITV – which would unnecessarily delay the delivery of highly desired interactive services to millions of consumers.

Vertically integrated MVPDs have the incentive to favor their own programming where market power provides them with the ability to do so. Similarly, dominant ITV service providers, have shown a willingness to act in a discriminatory manner, even independent of their relations with MVPDs. Not surprisingly, when a powerful MVPD becomes affiliated with a dominant ITV service provider, the likelihood of discriminatory behavior in the provision of interactive services is heightened. Potential anti-competitive behaviors made possible through such vertical integration include denying carriage of non-affiliated “triggers” or interactive enhancements; placing unaffiliated programming in a less prominent position on the screen on an operator’s homepage, electronic programming guide or “walled garden”; failing to provide comparable upstream and downstream bandwidth; and requiring the purchase or lease of multiple devices in order for a consumer to receive unaffiliated ITV services.

Given the very real risk of discrimination, the FCC should adopt a broad nondiscrimination rule that applies to *all* vertically integrated MVPDs – not just cable operators, because communications technology is evolving too rapidly to exclude such other delivery

platforms as DBS. Moreover, from the consumers perspective, once you subscribe to either cable or a DBS service, that service effectively becomes the “gatekeeper” platform into the home. This gives either service the ability to prevent information from being transmitted to its own subscribers. Accordingly, the FCC should also not exclude from regulation those MVPDs subject to effective competition for purposes of rate regulation. Such MVPDs will be readily able to discriminate in their provision of ITV services, since they do not compete with each other on the basis of their respective ITV offerings, but rather on fundamental aspects of service such as pricing and program packaging. In addition, while ITV nondiscrimination rules should not be limited to “program-related” ITV services, they should at a minimum encompass material that is related in any way to a primary video program.

As to specific nondiscrimination requirements, the FCC should bar anti-competitive conduct at all three “building blocks” of the ITV delivery system, including prohibiting the exclusion, modification or degradation of competing content; barring all technical disparities between the treatment of affiliated and unaffiliated ITV; and restricting all discriminatory remote control and navigational interfaces available through customer premises equipment. Alternatively, and in the interest of administrative ease, the FCC could simply modify its existing rule barring discriminatory treatment of unaffiliated video programming to preclude anti-competitive treatment of all ITV services.

The Commission has the statutory authority to impose ITV nondiscrimination regulations pursuant to Section 616 of the Communications Act, which requires the FCC to adopt rules to prevent MVPDs from discriminating against “video programming” vendors – a term broad enough to include ITV services. Section 616 also provides for expedited review of any video programming complaint. In this regard, the Commission should tailor its existing anti-

discrimination enforcement procedures to require completion of ITV complaint proceedings within 120 days of their initiation.

BEFORE THE
Federal Communications Commission
WASHINGTON, D.C. 20554

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

COMMENTS OF
THE ASSOCIATION OF LOCAL TELEVISION STATIONS, INC.

The Association of Local Television Stations, Inc. ("ALTV") hereby submits its comments in the above-captioned proceeding concerning interactive television ("ITV") service.¹ ALTV is a non-profit, incorporated association of local television stations that are primarily affiliated with the newer, emerging broadcast networks, such as Fox, UPN, WB, PAX, as well as traditional independent stations. As the representative of numerous broadcasters nationwide, ALTV has a clear interest in ITV, a rapidly growing service that permits viewers to interact in a variety of ways with the video signal provided by broadcasters, among other program providers.

As an initial matter, ALTV takes exception to the overly narrow scope of the instant inquiry, which focuses its review on non-broadcast program providers and distributors.

¹ Nondiscrimination in the Distribution of Interactive Television Services Over Cable, Notice of Inquiry, CS Docket No. 01-7 (rel. Jan. 18, 2001) ("NOI").

Broadcast delivery of ITV-enhanced programming can be subject to the anti-competitive behavior of multichannel video programming distributors (“MVPDs”), because MVPDs can act as gatekeepers to viewers’ homes. When a broadcaster’s signal is delivered to viewers via cable and other multichannel distributors (as such signals are to nearly 84 percent of U.S. homes), the potential for that broadcaster’s programming to be treated in a discriminatory manner is the same as that of any other provider of programming to multichannel video program distributors (“MVPDs”). Moreover, the advent of digital television has provided broadcasters with greatly enhanced opportunities to provide ITV services. Thus, the interests of broadcasters with respect to ITV are inextricably linked with those of non-broadcast program providers.

I. THE FCC SHOULD ENCOURAGE THE DEVELOPMENT OF INTERACTIVE SERVICES THROUGH REGULATION THAT PROHIBITS DISCRIMINATORY BEHAVIOR.

ITV is best characterized as a video enhancement capability whereby television viewers initiate on-screen choices or take other actions, usually – but not necessarily – related to a particular video programming signal. Examples of ITV services include the display of supplementary program-related information, “t-commerce” (e.g., the purchase of merchandise tied in with a video display), electronic programming guides (“EPGs”), “customized” transmission of programming, and e-mail or chat room features used in conjunction with programming. ALTV concurs with the Commission’s division of the ITV distribution system into three major “building blocks” – the video stream, two-way connection (e.g., via the Internet), and specialized customer premises equipment (e.g., the set-top box).²

² See *id.* at 4-5.

The ITV market today stands at a critical juncture of its development. Although sufficiently established to ensure that it will play a significant role in expanding the viewing experience of millions of Americans, ITV is still a new and evolving technology and as such requires major capital investments, and entails substantial financial risks. ITV's progress should not have to be additionally burdened by concerns that existing distribution platforms vertically integrated with providers of interactive content are likely to engage in anti-competitive conduct with respect to unaffiliated ITV.

Thus, ALTV believes that it is vital for the Commission, at this stage of ITV's development, to send a signal to the broadcast community and to all other parties interested in the equitable, rapid development of ITV, that the future of interactive services will not be permitted to be inhibited by discriminatory conduct. If a level playing field for all competitors cannot be guaranteed, even the potential for discriminatory behavior in the provision of ITV services will have a chilling effect on investment in ITV. On the other hand, regulatory protections established by the Commission that bar anti-competitive behavior will undoubtedly boost ITV investment and hasten its development – consistent with the FCC's mandate to promote new technologies and services to the public.³

Put another way, regulation barring anti-competitive behavior with respect to agreements governing the distribution or control of ITV is necessary where one party has an economic incentive and sufficient bargaining power to discriminate against the other party. As the U.S. Court of Appeals for the D.C. Circuit observed last year in upholding the constitutionality of certain provisions of the Cable Television Consumer Protection and

³ See U.S.C. § 157(a).

Competition Act of 1992⁴: “[A] cable operator has an incentive to offer an attractive package of programs to consumers, but . . . also has an incentive to favor its affiliated programmers; where the two forces are in conflict, the operator may, as a rational profit-maximizer, compromise the consumers’ interests.”⁵ This unassailable economic logic applies with equal force to ITV services. Indeed, the new president of interactive television provider AOL TV reputedly is “expected to be at the forefront of . . . sorting through tricky issues like how much of an advantage to give AOL Time Warner cable networks over those of competitors on AOL TV’s on-screen television guides.”⁶ Similarly, the Commission itself has acknowledged that America Online, Inc. (“AOL”), the Internet service provider arm of the newly vertically integrated AOL Time Warner Inc. (“AOL Time Warner”), “has a history of negotiating exclusionary deals once it is in its economic interest to do so.”⁷ ALTV submits that the threat to competition and diversity posed by vertically integrated media companies that led Congress to enact the 1992 Cable Act is equally applicable today to the market for ITV services, and therefore regulations to address this threat are fully warranted.⁸

⁴ Pub. L. No. 102-385, 106 Stat. 1460 (“1992 Cable Act”).

⁵ Time Warner Entertainment Co., L.P. v. FCC, 211 F.3d 1313, 1322 (D.C. Cir. 2000) (“Time Warner I”).

⁶ Jim Rutenberg, AOL to Name Executive of Cinema Division to Run Its TV Unit, N.Y. Times, March 8, 2001, at C-4.

⁷ 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, slip. op. at 99 (rel. Jan. 22, 2001) (“AOL/Time Warner Transfer”).

⁸ ALTV stresses that the recent decision by the U.S. Court of Appeals for the D.C. Circuit that struck down the Commission’s horizontal and vertical cable ownership regulations as unconstitutional did not disturb that court’s earlier finding in Time Warner I that the statutory basis for the voided regulations was, itself, facially constitutional. See Time Warner Entertainment v. FCC, No. 94-1035, slip op. at 6 (D.C. Cir. March 2, 2001) (“Time Warner II”). Thus, a similar basis for Commission regulation of ITV based upon the market power and anticompetitive nature of cable systems should not be questioned; indeed, arguably there is a greater need for the “behavioral norms” required by the 1992 Cable Act’s anti-discrimination provisions, see Time Warner I, 211 F.3d at 1322-23, now that the Act’s structural limits, as implemented by the FCC in the form of quantitative subscriber limits and channel occupancy

(continued...)

Beyond ensuring a level playing field, Commission regulations prohibiting anti-discriminatory behavior will expand consumers' content choices. Vertically integrated distributors possess the ability to favor their affiliated content over that of non-affiliates (or, in a worst case scenario, possess the ability to refuse to carry non-affiliated content), thereby potentially denying the viewing public from benefiting from the multiplicity of available interactive enhancements.

Regulation to achieve these goals is not premature. While the business models and various applications of ITV are still in a nascent stage, interactive services, already viewed by consumers as highly attractive, are on the verge of rapid growth. ITV revenues for 1999 totaled \$665 million,⁹ but by 2001, these revenues are predicted to more than double to \$1.68 billion, and to increase more than ten-fold to \$7.3 billion by 2003.¹⁰ By 2006, experts predict that ITV revenues will reach \$32.1 billion.¹¹

Driving the growth in ITV revenues is the wide range of existing and proposed services that ITV alone can offer. Today, interactive services available through the set-top boxes of AOL TV and WebTV include EPGs, web browsing, e-mail, instant messaging and chat rooms. These offerings, however, barely scratch the surface of what is possible with ITV. With imminent upgrades in place that will permit high-speed Internet connections and broadband

(...continued)

provisions, have been struck down as unsupported by the record. Time Warner II, slip op. at 3. Significantly, the Time Warner I court also rejected Time Warner's argument that the harms envisioned by Congress as requiring redress were merely "speculative." Instead, the court concluded that Congress's concerns regarding discriminatory intent and ability were both reasonable and supported by substantial evidence. See Time Warner I, 211 F.3d at 1322.

⁹ See Interactive Television Outlook 2000, The Myers Group (June 2000) at 13, noted at NOI n.13 (citing to the report as part of the AOL/Time Warner Transfer record).

¹⁰ Id.

¹¹ Id.

delivery of content, ITV will truly become interactive – fully incorporating video-on-demand, the “customized” transmission of a video stream, and “t-commerce.” These and other services portend the explosive growth of ITV, which should compel the Commission to act now because emerging ITV companies, including most significantly AOL Time Warner, AT&T, and Cablevision, have vertically integrated corporate structures already in place that provide the incentive and ability to act in an anti-competitive manner. These corporate structures, and the potentially anti-competitive power that they wield, are examined in the next section.

II. VERTICALLY INTEGRATED MVPDS HAVE THE INCENTIVE AND THE ABILITY TO FAVOR THEIR OWN INTERACTIVE SERVICES.

Congress and the Commission have long recognized the potential for anti-competitive behavior that derives from the vertical integration of program delivery platforms with providers of content, and have acted to attempt to prevent such behavior. Significantly, however, the market power Congress sought to curb in the 1992 Cable Act has, if anything, increased due to the significant consolidation in the cable and satellite industries (and may continue to increase following the Time Warner II decision striking down the FCC’s cable ownership restrictions).¹² The potential for anti-competitive effects is further enhanced by the

¹² Cable operators have experienced recent and continued growth in homes passed, basic cable subscribership, premium service subscriptions, basic cable viewership, basic cable penetration and channel capacity. For example, the number of homes passed by cable was approximately 95.6 million at the end of 1998 and 96.6 million at the end of 1999, with the figure expected to have risen to an estimated 97.1 million by the end of June 2000. Basic cable television subscribership grew from 66.1 million subscribers at the end of 1998 to 67.3 million subscribers at the end of 1999, with an estimated 67.7 million subscribers predicted by June 30, 2000. In October 1999, cable systems with a capacity of 30 or more channels accounted for 85.4 percent of cable systems, a figure that increased to 86.6 percent in October 2000. See Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, Seventh Annual Report, CS Docket No. 00-132, slip. op. at 11-12 (rel. Jan. 8, 2001) (“Cable Annual Report”).

integration of program provider-distributors with powerful interactive service providers – as exemplified by the recent merger of AOL with Time Warner.¹³

A. Cable’s Market Power Continues To Grow And To Result In Abuses.

An examination of the extent to which content distributors and content providers have become affiliated shows just how pervasive a threat vertical integration can be. In 2000, five of the top seven national program services by subscribership and four of the top five services by prime time ratings were affiliated with at least one cable multiple system operator (“MSO”).¹⁴ AT&T, the largest MSO, has an ownership interest through Liberty Media in 64 (or 23 percent of all) program services, including both basic and premium services such as the Discovery Channel, Encore and Starz, which directly compete with parallel basic and premium program services offered by program providers that are not vertically integrated.¹⁵ AOL Time Warner, the second largest MSO, has an ownership interest in 34 (or 12 percent of all) national programming networks, including basic and premium services such as CNN, TBS, TNT, the Cartoon Network, HBO and Cinemax, which also compete directly with basic and premium program services offered by non-vertically integrated program providers.¹⁶ Where a content distributor has an ownership interest in the content itself, there exists both the natural incentive to favor affiliated content, and the ability to do so, at the expense of non-affiliated content.

¹³ Although the focus of the NOI is on vertical integration involving cable operators, ALTV believes that it would be shortsighted of the Commission to ignore the potential vertical integration of *all* MVPDs, including most prominently direct broadcast satellites (“DBS”).

¹⁴ Cable Annual Report at 134-35.

¹⁵ See id. at 75, 130-32.

¹⁶ See id.

Vertically integrated MVPDs derive increased market power from their roles as gatekeepers at the point of program distribution – at both the local and national level. In their local markets, cable MSOs are particularly potent gatekeepers to U.S. television viewers because of their role as the predominant source of multichannel video programming in the majority of viewing markets. On the national level, vertically integrated MVPDs have gained market power in large part due to increased consolidation, as reflected by the fact that, in 1999, nearly 84 percent of all U.S. MVPD subscribers were served by the ten largest cable and DBS operators.¹⁷

In addition, vertically integrated MVPDs are able to collude with one another to secure distribution of affiliated programming on each other’s platforms, and to exclude or discriminate against independent programming. The fact that minimum levels of national distribution are required for a program service to be viable exacerbates vertically integrated MVPDs’ market power over unaffiliated program services.¹⁸

That such MVPDs will act anti-competitively is not mere speculation. For example, Time Warner has gone as far as to delete the owned and operated broadcast stations of ABC, Inc. (“ABC”) from certain of its cable systems in apparent retaliation against the campaign of The Walt Disney Co. (ABC’s parent company) to promote the satellite services of DirecTV – a brazen act on the part of Time Warner ultimately found by the FCC to have violated Section

¹⁷ See *id.* at 109.

¹⁸ Notwithstanding the Court’s decision in Time Warner II striking down the Commission’s horizontal and vertical cable ownership and channel occupancy restrictions, the Court did confirm the important governmental interests of promoting public access to a variety of information sources, and of preserving competition. See Time Warner II, slip op. at 6-7.

614(b)(9) of the Communications Act.¹⁹ Other examples of anti-competitive behavior exhibited by Time Warner include:

- The refusal to carry the local news channels in markets (e.g., Columbus, Ohio) where Time Warner has established its own local news channels; and
- Favoritism toward its own programming by assigning it to lower-numbered (and more desirable) cable channels than those assigned to competitors' programming.

Thus, as the Time Warner example makes plain, MVPDs with market power have shown a propensity, even outside the context of ITV, to discriminate against competitors when the opportunity presents itself.

B. ITV Provides Additional Incentive And Ability For MVPDs To Discriminate.

The likelihood that Time Warner or any other vertically integrated MVPD will act in an anti-competitive manner is heightened when ITV is added to its mix of services. Indeed, Time Warner has already shown that it will not hesitate to discriminate against non-affiliated ITV service providers, as in the case of its removal of the EPG signal of Gemstar, a free service carried over a television signal's vertical blanking interval, in order to promote the fee-based EPG services of Time Warner's cable subsidiaries. Although cable operators remain the pre-eminent source for multichannel program delivery – and thus, the most likely perpetrators of anti-competitive conduct – DBS providers, too, have the ability to favor affiliated ITV services.

Significantly, ITV service providers, independent of their relations with MVPDs, have also shown a willingness to act in an anti-competitive manner, as the most dominant

¹⁹ See Time Warner Cable, Emergency Petition of ABC, Inc. for Declaratory Ruling and Enforcement Order for Violation of Section 76.58 of the Commission's Rules, Or In the Alternative For Immediate Injunctive Relief, Memorandum Opinion and Order, 15 FCC Rcd 7882 (CSB, May 3, 2000). Pursuant to a Consent Decree adopted March 8, 2001 and subject to FCC approval, Time Warner will contribute \$72,000 to the U.S. Treasury to settle this matter. Order in CSR 5543-C (DA 01-636 rel. Mar. 9, 2001).

Internet service provider in the U.S., AOL, amply demonstrates.²⁰ AOL has successfully excluded competitors from the popular instant messaging (“IM”) service, a market in which AOL currently has a 90 percent share, by thwarting the ability of rivals to interconnect with its IM service. AOL also practices exclusionary tactics by, for example, requiring that companies purchasing space on the AOL website refrain from including links to web addresses outside of AOL’s carefully maintained “walled garden” of content, or, as the FCC has found, by requiring exclusive contracts when doing so is in its economic interest.²¹ Given their independent willingness to discriminate, when MVPDs and ITV service providers join forces – as in the case of AOL Time Warner – the result is an interactive service distribution model ripe for abuse.

In light of the economic and technological resources that make up the ITV delivery system, vertically integrated MVPDs have a variety of ways to discriminate in connection with the provision of interactive services. A partial list of these discriminatory techniques includes denying carriage of interactive enhancements or of “triggers” designed to alert viewers to the availability of interactive content – or allowing both to be passed through, but denying or diminishing users’ ability to utilize ITV enhancements or to retrieve the information called for by ITV triggers. MVPDs may also discriminate by providing affiliated programmers with the best and most prominent screen placement on an operator’s homepage, EPG and/or “walled garden” homepage, by defaulting to affiliated programmers’ promotional pages when viewers turn on the TV or access the EPG, or by making it more difficult for users to find unaffiliated content.

²⁰ AOL describes itself as “the world’s leader in interactive services, Web brands, Internet technologies, and e-commerce services.” America Online, Inc., Who We Are, at <http://www.corp.aol.com/whoweare.html> (visited Mar. 15, 2001).

²¹ See *supra* at 4.

Discrimination can also occur through technical means. For example, an MVPD could fail to provide comparable upstream and downstream bandwidth for unaffiliated content, lessen the quality of a primary video signal in order to provide the capacity necessary to pass through the ITV material, or deny access to unaffiliated web sites. MVPDs may discriminate on economic grounds as well, by requiring multiple set-top boxes for unaffiliated ITV services, or offering a more attractive price for affiliated ITV services through bundling opportunities and economies of scale.

These and other performance-related anti-competitive methods will, if not properly regulated, undoubtedly discourage the development of interactive content by companies unaffiliated with MVPDs, and adversely impact the delivery of diverse ITV content to consumers.

III. THE COMMISSION SHOULD PROHIBIT DISCRIMINATORY TREATMENT OF ITV CONTENT BY VERTICALLY INTEGRATED MVPDS.

As these comments have shown, there is ample justification for the Commission to regulate the ITV-related actions of vertically integrated MVPDs, since vertical integration provides the incentive and the ability to discriminate against unaffiliated programmers and ITV service providers. As itemized above, where an MVPD is affiliated with an ITV service provider, the combined entity has the opportunity to discriminate against unaffiliated ITV service providers and unaffiliated program providers in numerous ways, including with respect to carriage, positioning, pricing, and technical treatment of ITV content, with the result being a natural foreclosure of innovation and competition. Similarly, where an MVPD owns a cable programming service, the MVPD may share in the monopoly rents of its ITV provider, or the affiliated cable programmer may receive preferential ITV access – conduct that also inhibits

competition in the interactive marketplace. Given the very real threat of discriminatory behavior, ALTV now turns to the issue of *how* a nondiscrimination rule should be implemented.

A. Nondiscrimination Rules Should Apply To All Vertically Integrated MVPDs.

At the outset, ALTV believes that the Commission should ensure that any nondiscrimination rule it may adopt will apply to *all* vertically integrated MVPDs that are affiliated with either video programmers or ITV service providers – not just cable operators. Notwithstanding the current advantage of the cable platform for the delivery of ITV services, communications technology is evolving too rapidly to justify the exclusion of other delivery platforms. DBS providers, for example, may have significant market power with respect to ITV within their own customer base, and are expected to invest heavily in ITV should they become vertically integrated. In short, they can act as effective information “gatekeepers” to those who subscribe to its multichannel service. In enacting the Satellite Home Viewer Improvement Act of 1999, Congress recognized the shrinking differences between cable and DBS and therefore manifested an intention to subject DBS providers to regulatory treatment analogous to that applicable to cable.²² Congress saw little difference between the discriminatory incentives that exist for cable or satellite operators. In short, there is no policy or economic justification to treat cable and DBS disparately.

B. A Finding That An MVPD Is Subject To Effective Competition Should Not Exempt It From ITV Nondiscrimination Rules.

The Commission should not allow an MVPD’s status as subject to effective competition for purposes of rate regulation to result in an exception to the application of ITV

²² See Pub.L. No. 106-113, 113 Stat. 1501, 1501A-526 to 1501A-545 (Nov. 29, 1999).

nondiscrimination rules to that MVPD. Multiple system operators such as Time Warner frequently obtain judgments of effective competition for various individual systems. Such findings, however, would not minimize the risk of their applying exclusionary or discriminatory tactics to the retransmission of unaffiliated ITV services, on a system-by-system or MSO-wide basis. This is because MVPDs do not compete with each other for subscribers on the basis of their respective ITV offerings, but rather on more fundamental aspects of their overall service, such as pricing and program packaging. Thus, MVPDs that are subject to effective competition, such as MSOs in markets where DBS carriers have made substantial subscriber inroads, are not incentivized to avoid discriminatory behavior with respect to interactive television enhancements, and such status should not immunize them from ITV anti-discrimination requirements.

C. The Case For Nondiscrimination Requirements Is Particularly Strong With Respect To “Program-Related” ITV Services, But The Commission Should Not Limit ITV Nondiscrimination Obligations to “Program-Related” ITV.

An MVPD that offers ITV services, is vertically integrated with respect to either programming or ITV services, and carries an unaffiliated video programming service should be required to provide nondiscriminatory treatment of any ITV content that is associated with the unaffiliated program service.²³ Interactive enhancements often derive their value, as perceived by consumers, from the fact that they are add-ons to program services. If MVPDs treat interactive services that are associated with unaffiliated content in a discriminatory manner, competition will be damaged in the large, established *non-interactive* programming arena,

²³ ALTV agrees with the Commission’s position that ITV service providers should not have mandatory access to MVPD capacity (i.e., that there should not be the ITV equivalent of a must-carry rule). See NOI at 8. Instead, any nondiscrimination rule adopted should not be triggered unless an MVPD offers ITV services itself or through an affiliate.

because the unaffiliated content (offered by broadcasters and other programmers) will be deemed less valuable by viewers – arguably in violation of the anti-discrimination provisions of the 1992 Cable Act.²⁴

Particular attention should also be accorded to such “program-related” ITV content because of the need in many cases for precise synchronization of that content. Many types of program-related ITV require a seamless blend of interactive content and television programming as interactive enhancements are sent together with the video signal or delivered over the Internet, and then synchronized for the viewer through the set-top box. This exacting timing requirement demonstrates the greater need for nondiscriminatory treatment of ITV-enhanced programming than with respect to non-program-related ITV.

In other proceedings, the Commission is currently exploring the scope of just what constitutes “program-related” material.²⁵ ALTV proposes that notwithstanding the Commission’s future resolution of this question in those proceedings, “program-related” content should be broadly defined for ITV purposes as material that is related in any way to the primary program. This standard modifies the WGN v. United Video²⁶ test to conform to the way ITV actually functions. While ALTV urges the Commission to require nondiscriminatory treatment of *all* unaffiliated ITV services, at a minimum, the Commission should bar discrimination against unaffiliated ITV that is “program-related” in this broad sense.

²⁴ 47 U.S.C. §§ 536, 548.

²⁵ See Carriage of the Transmission of Digital Television Broadcast Stations, Notice of Proposed Rule Making, 13 FCC Rcd 15092, 15129 (1998); Petition for Special Relief of Gemstar, CSR-5528-Z (filed March 16, 2000).

²⁶ See WGN Continental Broad. Co. v. United Video, Inc., 693 F.2d 622 (7th Cir. 1982).

D. The Commission Should Adopt Requirements that Prevent Discriminatory ITV Practices, Including Alteration of Unaffiliated ITV Content.

The Commission should bar vertically integrated MVPDs from discriminating against unaffiliated ITV with respect to all three “building block” components of the delivery system for ITV services identified by the Commission (i.e., the video stream, the two-way connection, and the customer premises equipment components).²⁷ These requirements, at a minimum, should provide for the following:

- Video stream component: The FCC should bar the exclusion, modification or degradation of content from unaffiliated programmers or ITV providers, whether involving interactive content itself or triggers to activate it; the preferential treatment of affiliated content; the display of the host MVPD’s commercial or other content in conjunction with, around or on top of unaffiliated content; and the reduction of screen size, use of time compression, or other alteration of or interference with unaffiliated ITV content, unless agreed to by the program supplier.
- Two-way component: The FCC should bar all technical disparities between the treatment of affiliated and unaffiliated ITV, such as lesser upstream and downstream bandwidth; inferior connection specifications, data rates, or error correction capabilities; denial of local caching; or degraded Internet connections for unaffiliated ITV.
- Customer premises equipment component: The FCC should bar all discriminatory practices, including but not limited to in remote control/navigation interfaces;

²⁷ See NOI at 4-5.

interfering with the functionality of interactive content; forced tuning to the MVPD's "walled garden;" or requiring multiple set-top boxes due to differing technical standards.

E. Alternatively, The Commission Should Modify Its Existing Rules To Bar Anti-Competitive Conduct.

As an alternative to detailed anti-discrimination ITV rules, the FCC could simply adapt its existing rule barring discriminatory treatment of unaffiliated video programming vendors. Specifically, Section 76.1301(c) of the Commission's Rules²⁸ can be modified (i) to preclude anti-competitive treatment of all ITV services (or, at a minimum, *program-related* ITV services) by MVPDs that are unaffiliated with the programming vendors supplying such interactive content, including that of broadcasters, and (ii) to incorporate a rebuttable presumption that if a complaining ITV services provider can demonstrate that anti-competitive *effects* have occurred, the requisite discriminatory *intent* is present. If coupled with meaningful enforcement procedures, this approach, which has the advantage of administrative ease and is unquestionably within the Commission's authority (as shown below), should prevent discrimination in the placement, navigation, packaging, and technical treatment of unaffiliated interactive services at all points in the ITV distribution process.

²⁸ The rule currently states: "No multichannel video programming distributor shall engage in conduct the effect of which is to unreasonably restrain the ability of an unaffiliated video programming vendor to compete fairly by discriminating in video programming distribution on the basis of affiliation or non-affiliation of vendors in the selection, terms or conditions for carriage of video programming provided by such vendors." 47 C.F.R. § 76.1301(c).

IV. THE FCC HAS AUTHORITY TO IMPLEMENT THE LIMITED REQUESTED RELIEF, AND SHOULD PROVIDE FOR EXPEDITED ENFORCEMENT PROCEDURES.

A. Section 616 Of The Act Authorizes The Commission To Adopt Rules Protecting The Development Of ITV Services.

In the NOI, the Commission requested comment on whether FCC protection of ITV services would be within the agency's statutory authority and, if so, under which authority ITV services should be regulated.²⁹ Specifically, the Commission asks whether ITV services should be classified as Title VI cable services, Title II telecommunications services, Section 706 advanced services, information services, and/or hybrid services.³⁰ ALTV believes that, with the adoption of the limited regulations proposed herein, the FCC need not select one regulatory classification to the exclusion of others. Particularly if the Commission determines that anti-discrimination regulation should be limited to program-related ITV, it may rely on Section 616 of the Communications Act of 1934, as amended (the "Act"), as authority for the rules ALTV suggests.

First, at a minimum, the proposed regulations comport with the policy objective of the 1992 Cable Act — to ensure that a diverse flow of video programming to the consumer is not unfairly impeded — an objective recently affirmed as constituting a "governmental purpose of the highest order."³¹ Second, Section 616, enacted as part of the 1992 legislation, provides the Commission with statutory authority to protect the development of ITV services: that section

²⁹ See NOI at 14.

³⁰ See id. at 15-17.

³¹ Time Warner II, slip op. at 9, quoting Turner Broad. System, Inc. v. FCC, 512 U.S. 622, 663 (1994).

requires the Commission to adopt rules containing “provisions designed to prevent a multichannel video programming distributor from engaging in conduct the effect of which is to unreasonably restrain the ability of an unaffiliated video programming vendor to compete fairly by discriminating in video programming distribution on the basis of affiliation or nonaffiliation of vendors in the selection, terms, or conditions for carriage of video programming provided by such vendors.”³² The Act defines “video programming” as programming “provided by, or generally considered comparable to programming provided by, a television broadcast station.”³³ That definition is clearly broad enough to include ITV services, particularly those provided by broadcasters such as ALTV’s members.

B. The FCC Should Strengthen Its Existing Enforcement Procedures For Discrimination Proceedings, And Make Them Applicable To ITV.

The Commission requests comment on methods for enforcement of any nondiscrimination rules that it may adopt.³⁴ ALTV believes that the first approach proffered by the Commission – private enforcement arrangements – will not, by itself, effectively deter anti-competitive behavior because, as the Commission has acknowledged, media companies with market power will act in a discriminatory manner when it is in their economic interest to do so.³⁵ ALTV believes that its independent broadcasters are especially vulnerable to this risk of discrimination, given the fact that even major content providers such as Disney have been

³² 47 U.S.C. § 536(a)(3).

³³ See 47 U.S.C. § 602(20).

³⁴ See NOI at 14.

³⁵ ALTV reminds the Commission of its earlier conclusion that AOL “has a history of negotiating exclusionary deals.” See supra at 4.

victims of anti-competitive behavior.³⁶ In addition, relying on contractual agreements without the prophylactic benefit of anti-discriminatory protections will inevitably invite costly and time-consuming litigation, which will have the certain effect of delaying the provision of ITV services to consumers.

In lieu of any exclusive reliance on private arrangements, ALTV believes that the Commission's existing anti-discrimination complaint procedures should be tailored to serve as a viable mechanism to enforce ITV nondiscrimination rules. ALTV specifically suggests that ITV discrimination complaints be made subject to the enforcement procedures of Section 76.1302 of the Commission's Rules.³⁷

Under these existing procedures, a party alleging discriminatory behavior must notify a potential defendant MVPD of its intent to file a complaint with the FCC, after which the MVPD has ten days to respond to the notice before the complaint may be filed. If the matter cannot be settled and a complaint is in fact filed, the MVPD has 30 days from the filing of the complaint to answer it, and the complainant then has 20 days to reply to the answer. The Commission may then order appropriate remedies, including the establishment of prices, terms and conditions for the carriage of the complainant's video programming.

The current procedures should be adopted for ITV, but should be strengthened to stipulate a deadline by which the FCC must act on ITV discrimination complaints, and to include the rebuttable presumption of discriminatory intent suggested above. ALTV believes that these procedures, as applied to ITV, should require completion of complaint proceedings within 120 days of their initiation. Adoption of this deadline would ensure expedited treatment of any ITV

³⁶ See *supra* n.19.

³⁷ 47 C.F.R. § 76.1302.

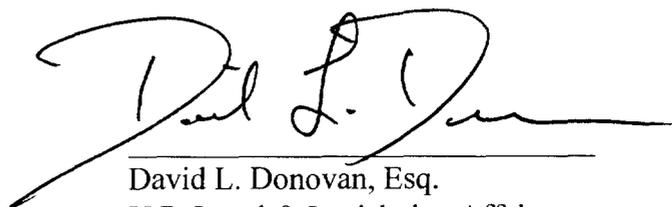
discrimination complaint, consistent with the requirement of Section 616 that FCC anti-discrimination rules “provide for expedited review of any complaints made by a video programming vendor pursuant to this section.”³⁸

CONCLUSION

For the foregoing reasons, ALTV urges the Commission to take affirmative steps to foster the continuing development of ITV by adopting the narrowly tailored requirements proposed herein. The adoption of these requirements, designed to protect broadcasters and other ITV providers from the discriminatory conduct of vertically integrated MVPDs, will foster the continuing development of ITV by making plain that the playing field upon which this exciting new service will be offered will be level for all comers.

Respectfully submitted,

ASSOCIATION OF LOCAL
TELEVISION STATIONS, INC.



David L. Donovan, Esq.
V.P. Legal & Legislative Affairs
1320 19th Street, N.W.
Suite 300
Washington, D.C. 20036
(202) 887-1970

March 19, 2001

³⁸ 47 U.S.C. § 536(a)(4).