Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of Section 11 of the Cable Television Consumer Protection and Competition Act of 1992	)	CS Docket No. 98-82
	)	
Implementation of Cable Act Reform Provisions of the Telecommunications Act of 1996	)	CS Docket No. 96-85
	)	
The Commission's Cable Horizontal and Vertical Ownership Limits and Attribution Rules	)	MM Docket No. 92-264
	)	
Review of the Commission's Regulations Governing Attribution Of Broadcast and Cable/MDS Interests	)	MM Docket No. 94-150
	)	
Review of the Commission's Regulations and Policies Affecting Investment In the Broadcast Industry	)	MM Docket No. 92-51
	)	
Reexamination of the Commission's Cross-Interest Policy	)	MM Docket No. 87-154

REPLY COMMENTS OF THE
CONSUMER FEDERATION OF AMERICA,
CONSUMERS UNION,
CENTER FOR DIGITAL DEMOCRACY,
MEDIA ACCESS PROJECT

February 19, 2002

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I. EXECUTIVE SUMMARY

In these Reply Comments, the Consumer Federation (CFA), *et al.* build on our extensive analysis of the structure, conduct and performance of the cable industry that provided a clear basis for the reimposition of a 30 percent limit on how much of the cable market a particular company may control. CFA *et al.* demonstrate here that the comments of cable industry do not withstand close, empirical scrutiny. Industry comments present incorrect legal analysis and conclusions, unsubstantiated economic theory that is directly at odds with market reality, and characterizations of economic data that are blatantly inaccurate in several instances.

CFA *et al.* show in these comments that:

- Cable/satellite competition is far weaker than the cable industry claims, which results in the exercise of market power by the dominant cable operators.
- Multi-system Operators (MSOs) who are vertically integrated into programming have clear incentives to discriminate against unaffiliated programming.
- The programming market is dominated by a small (and ever decreasing) number of large entities who erect significant barriers to entry.
- Independent programmers must achieve a substantial scale, 20 to 30 million subscribers, to survive in the programming market.

Contrary to industry claims, there is nothing in either law or economics that prevents the Commission from re-instituting the 30 percent limit. Indeed, both the law and economic facts should compel it to impose a 30 percent limit.

The cable company commenters and their experts argue that there has been an immense increase in the amount of competition in the multichannel video market, so that they no longer have an incentive to foreclose the programming market, if they ever did. They rely on competition from Direct Broadcast Satellite (DBS) to make this claim, but in their construction of the case for DBS competition, they misconstrue the Commission's findings about DBS competition, they repeat each other's economic hypotheticals – as if this makes the hypotheticals facts – and they totally mischaracterize the findings of key academic studies.

Industry commenters offer two primary lines of theory. First, they present economic theory which purports to demonstrate that large vertically integrated firms have no incentive to behave in anticompetitive or anti-consumer ways. Disregarding countless examples of programming unaffiliated with cable networks getting shut out from distribution, the cable industry claims that it has no incentive to discriminate. Second, the industry points to the various broadcast-owned networks in the programming marketplace to demonstrate that independent programming can easily enter the market and succeed.

These two lines of analysis attempt to theorize away a remarkable reality – a handful of companies dominate the programming side of the multichannel video market. Moreover, each of the dominant programmers has guaranteed access to carriage on cable systems – either by ownership of the wires (cable operators) or by carriage rights conferred by Congress (broadcasters).

- **AOL Time Warner** (has ownership in cable systems reaching over 12 million subscribers and cable networks with over 550 million subscribers),
- **Liberty Media** (owns some cable systems and has long term contractual rights on AT&T's broadband systems and owns cable networks with approximately 880 million subscribers),
- **Disney/ABC** (has must carry-retransmission rights and ownership in cable networks reaching almost 700 million subscribers),
- **Viacom/CBS** (has must carry-retransmission rights and ownership in cable networks reaching approximately 625 million subscribers).

These four entities have ownership rights in 20 of the top 25 programming networks based on subscribers and prime time ratings. They account for over 60 percent of subscribers to cable networks, rendering this market a tight oligopoly.

Other entities with ownership or carriage rights account for four of the five remaining most popular networks. The only network in the top 25 without such a connection is the Weather Channel. Entities with guaranteed access to distribution over cable account for 80 percent of the top networks and about 80 percent of all subscribers' viewing choices on cable systems.

Not only do industry commenters ignore market reality, but they misrepresent the Commission's findings and academic studies. Cable experts claim that the FCC found DBS to be a "close substitute" for cable. To the contrary, the Commission found that the elasticities of demand for cable and DBS show that DBS is barely a substitute for cable at all. The substitution effect of DBS on cable is actually quite weak.

Ordover, the expert for AT&T, cites a study which he says stands for the proposition that DBS is a good substitute for cable. In actuality, this study says precisely the opposite. This is no mere omission of some minor point in an academic study, but is rather an overt misrepresentation. In the end, industry commenters' house of cards—arguments that rely on mischaracterization of Commission data, reified economic assumptions, and studies that support exactly the opposite conclusion industry commenters claim—topple with the slightest wind of truth and marketplace reality.

Without point of sale competition, cable operators do not face market discipline in their programming choices. They can scrimp on quality to enrich themselves, degrade the programming bundle by discriminating against non-affiliated programs, or use monopoly rents to further the political agenda of the system owners, without suffering significant economic loss.

Cable industry commenters characterize the horizontal ownership limit merely as a mechanism to preserve the rights of broadcasters on cable systems. However, it is evident from both the actual text of the 1992 Cable Act and the legislative history that Congress had a more far-reaching purpose than this; Congress intended to limit the bargaining power of cable systems *vis a vis* ***independent*** programmers as well as broadcasters.

Not only does the statute explicitly state that Congress was interested in the development of ***new programming*** (that is, other than broadcast), but the fact that it contained provisions beyond Must Carry and Retransmission Consent shows that Congress had more in mind than just channeling all new programming through broadcasters. The existence of structural and behavioral requirements in the 1992 Act, Section 6—Nondiscrimination with Respect to Video Programming, Section 7—Leased Commercial Access, Section 8—Limitations on (Vertical) Control and Utilization, and Section 12—Horizontal Ownership Limits, all provide an **additional** framework designed to foster the development of independent, non-broadcast programming.

Thus, it is clear that by establishing separate rules and conditions of access to the public through multichannel video transmission for broadcasters and independent programmers, Congress established the fundamental conditions of success and failure in video programming. That was true in 1992 when the Cable Consumer Protection and Competition Act was passed, and it is equally true today. In fact, the cable horizontal ownership limit is more important today than it was a decade ago.

The industry has grown even more concentrated than when Congress directed the Commission to impose this rule, and there is abundant evidence that large MSOs have acted anti-competitively to foreclose the cable programming market—precisely what Congress feared. Just as Congress created the conditions for success of programming by setting the rules of access, its decision to mandate an ownership limit is a reasonable step to promote an environment in which independent programmers have a chance of substantial success. It is therefore imperative that the Commission reimpose the 30 percent horizontal ownership limit as a necessary tool to promote competition and diversity in the video programming market.

II. INTRODUCTION

The initial comments of the Consumer Federation, *et al.* presented an extensive analysis of the structure, conduct and performance of the cable industry that provided a clear basis for the implementation of the horizontal limit on cable ownership of 30 percent of the national market. The limit was justified both on economic structural grounds and on the basis of a foreclosure analysis, as originally proffered by the Federal Communications Commission (FCC). If anything, under current conditions the foreclosure analysis suggests the limit should be lowered.

These reply comments confirm the central conclusions of our initial comments by demonstrating that the cable industry arguments do not withstand close, empirical scrutiny.

- Cable/satellite competition is far weaker than the cable industry claims, which results in the exercise of market power by the dominant cable operators.

- Multi-system Operators (MSOs) who are vertically integrated into programming have clear incentives to discriminate against unaffiliated programming.

- The programming market is dominated by a small number of large entities with significant barriers to entry.

- Independent programmers must achieve a substantial scale, 20 to 30 million subscribers, to survive in the programming market.

In these reply comments we demonstrate that the arguments of the cable industry commenters simply fail to portray a realistic picture of economic reality in the industry. We demonstrate that the cable companies have overstated the extent of competition between satellite and cable. Large, vertically integrated cable companies have clear incentives to discriminate. We challenge the cable commenters' hypothetical economic arguments first, and then turn to the industry's ill-conceived analysis of program development.

A separate filing by the Media Access Project demonstrates that the legal issues raised by the cable industry commenters are without merit.[1] There is nothing in either law or economics that prevents the Commission from re-instituting the 30 percent limit. Indeed, both the law and economic facts compel it to impose the 30 percent limit.

A. INDUSTRY COMMENTS REFLECT A FUNDAMENTAL MISREADING OF THE ACT: CONGRESS INTENDED TO PREVENT A HANDFUL OF PROGRAMMERS DOMINATING THE TUNER

The cable company commenters[2] and their experts argue that there has been an immense increase in the amount of competition in the multichannel video market, so that they no longer have an incentive to foreclose the programming market, if they ever did. Their argument relies on the construction of broad economic hypotheticals that run against the grain of reality.

Theory can always make sense in the abstract; the question the Federal Communications Commission (FCC) must address in this proceeding is whether this theory applies to the reality of the multichannel video (MVPD) market. Do the assumptions underlying the theory properly reflect economic reality? In the case of the cable commenters, the answer is no.

The cable industry commenters offer two primary lines of theory. First, they give us economic theory that purports to demonstrate that large vertically integrated firms have no

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[1] Reply Comments of Media Access Project*, et al.*

[2] There is little difference between the commenters. For purposes these replies we focus on the expert statements and attachments, since the commenters rely on those statement – Januz Ordover, Attached to ATT, Stanley Besen, Attached to ATT, Paul Joskow and Linda McLaughlin, Attached to AOL Time Warner, and Howard Schelansky, Attached to NCTA.

incentive to behave in anticompetitive or anti-consumer ways. Second, they recount the various networks in the programming marketplace to demonstrate that independents can easily enter and succeed.

These two lines of analysis attempt to theorize away a remarkable reality – a handful of companies dominate the programming side of the multichannel video market. Moreover, each of the dominant programmers has guaranteed access to carriage on cable systems – either by ownership of the wires (cable operators) or by carriage rights conferred by Congress (broadcasters).

- AOL Time Warner (has ownership in cable systems reaching over 12 million subscribers and cable networks with over 550 million subscribers),
- Liberty Media (owns some cable systems and has rights on ATT systems and owns cable networks with approximately 880 million subscribers),[3]
- Disney/ABC (has must carry-retransmission rights and ownership in cable networks reaching almost 700 million subscribers),
- Viacom/CBS (has must carry-retransmission rights and ownership in cable networks reaching approximately 625 million subscribers).

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[3] Cable magnate John Malone controls Liberty Media Corp., owns a substantial stake (currently passive) in News Corp., which owns the Fox broadcast network, local broadcast stations serving about 40% of the public, and dozens of cable regional sports channels. In addition, Malone has gone public with the fact that he intends to ask the Federal Trade Commission for full voting rights on Liberty Media Corp.'s 4% stake in AOL Time Warner, Inc. (Peers, Martin. *"Liberty Media Jockeys at Home,"* The Wall Street Journal, Feb. 14, 2002.) The voting rights of this stake were limited as a result of the 1996 Federal Trade Commission consent decree, approving the merger of Time Warner and Turner. The FTC imposed this condition due to concerns about the potential anti-competitive effects of aligning the interests of two of the largest cable companies at the time, Malone's TCI and Time Warner. Liberty, as the programming arm of TCI, was subject to these restrictions when it acquired the Time Warner stake.

There has been speculation in the media that Mr. Malone would use this interest, as well as the interest of Ted Turner—an additional 3.8%, giving them a combined 8%—to achieve anti-competitive goals. This is significant because not only would Mr. Malone be able to manipulate a large share of AOL Time Warner, but he is also expected to become Comcast's largest shareholder after he converts his QVC stock to Comcast stock. The merger of Comcast and AT&T, the nation's largest cable company, is currently pending. The active interests in AOL Time Warner and the combined AT&T/Comcast would give Mr. Malone a significant amount of influence over cable systems in the U.S. Although Liberty may not appear to be a dominant, vertically integrated MSO at this point in time, in reality it is positioned, through John Malone's broad ownership interests, to ensure distribution of Liberty and News Corp. programming over anywhere from one-third to all cable systems in the U.S.

These four entities have ownership rights in 20 of the top 25 programming networks based on subscribers and prime time ratings. They account for over 60 percent of subscribers to cable networks, rendering this market a tight oligopoly.

Other entities with ownership or carriage rights account for four of the five remaining most popular networks. The only network in the top 25 without such a connection is the Weather Channel. It certainly provides a great public service, but is hardly a hotbed for development of original programming or civic discourse. Entities with guaranteed access to distribution over cable account for 80 percent of the top networks and about 80 percent of all subscribers' viewing choices on cable systems.

Cable industry commenters characterize the horizontal ownership limit merely as a mechanism to preserve the rights of broadcasters on cable systems. However, it is evident from both the actual text of the statute and the legislative history that Congress had a more far-reaching purpose than this; Congress intended to limit the bargaining power of cable systems *vis a vis* independent programmers as well as broadcasters.

The 1992 Cable Act provided two mechanisms to ensure the carriage of local broadcast signals by cable systems. Broadcasters can elect either 1) Retransmission Consent, where they can negotiate with cable systems for compensation for their carriage, but carriage by the cable system is optional; or 2) Must Carry, where a cable system is required to carry a local broadcast signal, but no compensation is granted to the broadcaster. Public Law 102-385, §§ 15-16.

In essence, with Retransmission/Must Carry, broadcast has bargaining power equal to or greater than that of the cable system operator. Whereas cable owns the wire, broadcast networks have been given a right of transmission over cable systems. If the broadcaster has market power, i.e. if it has programming that it knows the cable system must obtain to maintain its subscriber base, the Retransmission provisions allow the broadcaster to obtain additional value—money or additional channel capacity—in return for the value to the cable company of having this particular channel on its cable system. If they do not have such confidence, the Must Carry provisions grant them certain carriage of their programming.

Although Congress did not grant a specific result to broadcasters, e.g. a certain dollar figure for broadcast programming, they provided broadcasters with a set of procedures and a bargaining structure to ensure carriage, plus additional value to the broadcaster. Because Congress felt that the service provided to communities by broadcasters was extremely valuable—such as their requirements to carry educational programming and meet the needs of the community through localized content—they enacted these mechanisms to protect broadcasters' programming.

The 1992 Cable Act had some unusually detailed legislative findings (§2(a)(4)): Congress found that the cable industry has become highly concentrated, that the potential effects of such concentration are barriers to entry for ***new programmers*** and a reduction in the number of media voices available to consumers. Note the statute's invocation of "new programmers," which clearly intends beyond the scope of current broadcast networks and any additional channels these broadcasters might offer.

Because of MSOs clear incentives[4] to deny carriage of broadcast channels, and the public's interest in ensuring the future of broadcast programming, Congress found that it

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[4] In Turner Broadcasting System, Inc., *et al.* v. Federal Communications Commission, *et al.* 512 U.S. 622, 114 S.Ct. 2445 (1994) (upholding the must carry provisions of the 1992 Cable Act), the Supreme Court found immense incentives on behalf of MSOs to deny carriage of broadcasters. That is, despite the MSOs' protestations that they were and are nondiscriminatory in choosing programming for their systems, the Court noted even when broadcast channels had ratings higher than all cable channels, those broadcast channels were

was necessary to guarantee carriage of those channels through the Must Carry rules; the Supreme Court upheld this reasoning in response to the cable industry's First Amendment challenge to Must Carry.[5] If Congress thought it were sufficient for independent programmers to get carriage through broadcast, as cable commenters contend in this proceeding, Congress would have had no reason to do anything more than impose the Must Carry/Retransmission requirement on cable companies, since these provisions guarantee that anything coming through a broadcast signal can reach the public in the appropriate local community. However, what cable commenters have failed to take note of is the numerous other provisions in the 1992 Cable Act that would be unnecessary to protect broadcasters who elect Must Carry/Retransmission, but are essential to any independent programmer who seeks carriage on cable through other means. Clearly, Congress intended to do much more than guarantee independent programmers an avenue to sell their programming to broadcast licensees and obtain carriage on cable systems as part of the broadcast-owned programming.

Instead, Congress crafted separate structural and behavioral requirements for cable companies to ensure that independent programmers had a reasonable opportunity to obtain carriage rights on cable systems on their own.

These structural and behavioral requirements, Section 6—Nondiscrimination with Respect to Video Programming, Section 7—Leased Commercial Access, and Section 8—Limitations on (Vertical) Control and Utilization, all provide an **additional** framework designed to foster the development of independent, non-broadcast programming.

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denied carriage. In other words, even where subscribers valued channels very highly as evidenced by ratings, the MSOs denied them carriage because they competed against the MSO for advertising dollars.

[5] Id.

In the Conference Report on the Cable Act[6] Congress specifically noted that certain broadcast affiliated networks, such as ESPN, had substantial market power against MSOs. "In addition, there are certain major programmers that are more able to fend for themselves. It is difficult to believe a cable system would not carry the sports channel, ESPN. . . However, the Committee continues to believe that the operator in certain instances can abuse its locally-derived market power to the detriment of programmers and competitors. The provisions in the legislation reflect those concerns."

In other words, throughout the entire section of the law that pertains to discrimination in programming and cable's market power, Congress established unique mechanisms to enable independent programmers who have no relationship with broadcast networks to have an opportunity to disseminate their programming under fair terms and conditions. Independent programming—unaffiliated with cable, not directly or indirectly owned by broadcasters and not packaged through broadcast-supported channels—was the basis for the entire portion of the 1992 Act requiring the Commission to establish on horizontal and vertical limits on cable ownership.

Thus, it is clear that by establishing the rules and conditions of access to the public through multichannel video transmission, Congress established the fundamental conditions of success and failure in video programming. That was true in 1992 when the Cable Consumer and Competition Act was passed, and it is equally true today. The cable horizontal ownership limit is even more important today than it was a decade ago. The industry has grown even more concentrated and there is abundant evidence that large MSOs

[6] Cable Television Consumer Protection and Competition Act of 1992, Senate Report (Commerce, Science, and Transportation Committee) No. 102-92, House Report (Energy and Commerce Committee) No. 102-628, House Conference Report No. 102-862. Cong. Record Vol. 138 (1992).

have acted anti-competitively to foreclose the cable programming market. Just as Congress created the conditions for success of programming by setting the rules of access, its decision to mandate an ownership limit is a reasonable step to promote an environment in which independent programmers have a chance of substantial success.

III. THE INDUSTRY RELIES ON INCORRECT EMPIRICAL ANALYSES AND IRRELEVANT HYPOTHETICALS

A. COMPETITION BETWEEN CABLE AND SATELLITE IS FAR WEAKER THAN THE CABLE INDUSTRY CLAIMS

Economic reality stands in the way of the cable companies and their experts. Many of the hypothetical and theoretical discussions assume the absence of market power when we have shown through every measure proposed by the Commission that there is clear evidence of market power. Many of the hypothetical and theoretical discussions assume the presence and strength of market forces – elasticities of supply and demand – far in excess of those that exist in reality.

Elasticities of demand for cable services show that it is not very responsive to price increases. Contrary to claims by the cable companies, cable and satellite are not close substitutes. As a result, cable companies have a great deal of market power. Not once in the cable commenters' august economists' analysis do they mention elasticity of demand or the elasticity of substitution between cable and satellite as calculated by the Federal Communications Commission. The Commission's analysis of these elasticities shows that satellite does not qualify as a close economic substitute for cable. Nevertheless, the cable industry commenters all insist that the Commission ignore the traditional measures of market power and base its policy on assumptions about the nature of the multichannel video market that are simply not supported by empirical evidence.

Competition and substitutability are the "central thesis" [7] of industry claims that cable cannot exercise market power in the programming market.[8] Yet to sell this claim, cable industry experts mischaracterize the Commisison's data, reify each other's findings, and in some cases even dishonestly represent the conclusions of certain economic studies. For example, Ordover misinterprets the FCC's conclusions. He claims satellite is a close substitute that provides "stiff competition,"[9] going well beyond what the FCC concluded.

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[7] Ordover, p. 4.

> My central thesis – that an economically sound limit must rely on *dynamic* considerations and reflect the demonstrated ability and willingness of consumers to switch between cable-based and direct broadcast satellite ("DBS")-based multi-video programming distribution ("MVPD").

[8] Ordover, p. 10.

> First, exercise of buyer market power requires a *credible* threat to withhold carriage if the supplier refuses to accede to the buyer's anticompetitive demands. Here, however, programming suppliers know that in the presence of DBS (and other cable competitors such as overbuilders and MMDS providers), inefficient purchasing decisions by a cable operator – *i.e.*, refusals to carry competitively priced programming that subscribers demand – would impose substantial costs on the cable operator in the form of (existing and future) subscribers lost to rivals… the willingness of customers to choose DBS over cable is highly relevant to the programming supplier's own assessment of its available alternatives. (p. 10)
>
> Here, it is important to recognize the impact that the nationwide *availability* of DBS – especially given the close substitutability between DBS and cable, *see infra* – has in discouraging any cable strategy that would squeeze/foreclose video programming that consumers desire (p. 20).
>
> First, because of the growing competitive threat from DBS and other alternative MVPDs, franchised cable systems have private incentives to provide good customer service and signal quality independent of the franchise renewal process. (p. 46)
>
> The demonstrated ability of customers to switch from cable to DBS and alternative providers is very important here. If these other MVPD distributors can garner share from the foreclosing firm be virtue of offering superior programming (and attractive rates), then even being foreclosed from a large MSO does *not* mean that a foreclosed programmer will lose a significant share of the distribution needed to maintain competitive viability. (p.53)
>
> Any attempt by a cable MSO to degrade the quality of its programming in order to foreclose a rival would cause it to lose significant customers to DBS and other alternatives thereby undermining the effectiveness of its strategy. (p. 59)
>
> In this section I consider some of the evidence regarding the competitive constraint imposed on the MSOs by DBS and show that this constraint is very powerful. Because of the strength of this constraint, the incentives to degrade cable programming are significantly muted. (p. 60)

[9] Ordover, p. 23.

> Cable faces stiff competition, particularly from DBS.

> **Recent empirical work confirms that consumers view DBS and cable as close substitutes** and that any attempt at foreclosure would therefore be extremely costly to a cable MSO in terms of lost subscribers. For example, in the Commission's recent *Report on Cable Industry Prices*, 16 FCC Rcd. 4346 (2001), the Commission undertook a regression analysis of the effects of DBS on the demand for cable services and concluded that "DBS is a substitute for cable service." *Id.* ¶ 53.

If satellite were a close substitute, one would expect that it would have a large effect on cable. In fact, the Commission's own findings and data contradict the claim repeated by the cable companies that vigorous competition between satellite and cable precludes the cable industry from exercising market power over the programming market. The Commission never stated that cable and satellite are <u>close</u> substitutes. It found that satellite only **exerts a small (shown by the small magnitude of DBS coefficient) but statistically significant influence on the demand for cable service."**[10] In the same econometric estimation, the Commission concluded that the **"the demand for cable service is somewhat price elastic (i.e. has a price elasticity of minus 1.45) and suggests that there are substitutes for cable."**[11] This elasticity is not very large and the Commission recognizes that.

Even more damning is the fact that Ordover completely misrepresents his second empirical source on DBS/cable competition. He claims that the Goolsbee and Petrin analyses indicate cable and satellite are close substitutes.

> Likewise, in a recent paper, Professors Goolsbee and Petrin collected data on the purchase decision of 15,000 households in 60 urban markets to estimate a system of demand curves for over-the-air TV, DBS, expanded basic cable services and expanded basic and premium cable services. Austan Goolsbee & Amil Petrin, *The Consumer Gains from Direct Broadcast Satellites and the Competition with Cable TV*, University of Chicago Graduate School of Business Working Paper (October 2001). From their estimated elasticities

[10] Report on Cable Industry Prices, February 14, 2002, p. 36.
[11] Report on Cable Industry Prices, February 14, 2001, p. 36.

> and shares, one can compute diversion ratios, which is a measure of substitutability between goods. Using the Goolsbee-Petrin data, the diversion ratio from even *basic* cable to DBS is between 0.26 and 0.4, which means that 26-40 percent of basic cable customers who leave cable in response to an increase in cable prices would choose DBS instead. These diversion ratios are significant and imply that **DBS and basic cable are close substitutes.**[12]
>
> Goolsbee's and Petrin's conclusion is quite the opposite.
>
> The modest estimated welfare gains are, in some sense, a different ways of saying that the demand for DBS is highly own-price sensitive. We also find that it is quite sensitive to the price of cable as well. These statements are much less true in reverse, however. The demand for cable is rather insensitive to its own price and to the DBS price. Premium cable is more price responsive than basic is, though neither is particularly elastic… In other words, the demand estimates indicate that **DBS is not a particularly good substitute for cable in the minds of consumers.**[13]

B. THE REALITY OF MARKET POWER

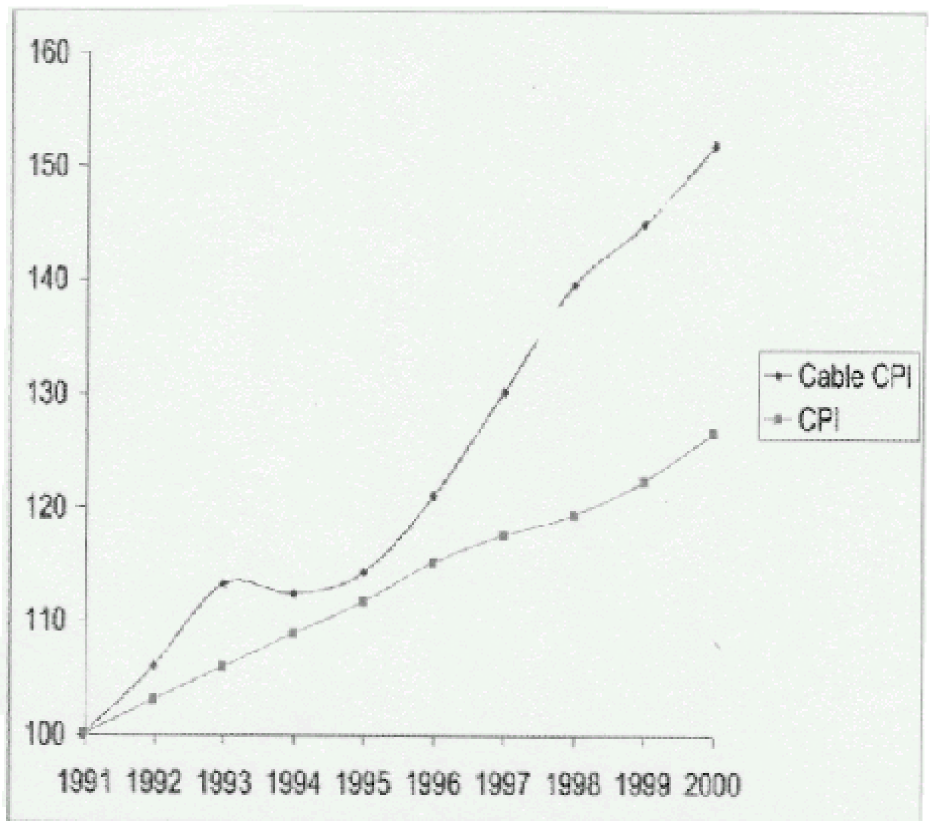
This is no simple oversight on Ordover's part. This study he is citing starts by referring to the complaints of consumer groups that prices were being deregulated without adequate market forces to discipline them. It set out to study DBS and found it wanting as a competitor (see Exhibit III-1).

> The Telecommunications Act of 1996, however, phased out most price regulation and instead tried to promote competition as a check on price. The explicit goal of the Act was to stimulate local phone companies or new cable start-ups to enter the market.

[12] Ordover, p. 62, footnotes omitted.
[13] Austan Goolsbee & Amil Petrin, *The Consumer Gains from Direct Broadcast Satellites and the Competition with Cable TV*, University of Chicago Graduate School of Business Working Paper (October 2001), p.

EXHIBIT III-1:

Figure 1: Cable Prices and the CPI, 1991-2000



Source: Austan Goolsbee and Amil Petrin, *The Consumer Gains from Direct Broadcast Competitoin with Cable TV* (May 29, 2001).

> As a general matter, this effort to encourage entry failed. Phone company and new cable entrants have been rare. Consumer advocates say that unfettered monopolies can now raise prices with impunity (Consumer Federation of America, (2001)). As the CPI and the Cable Television CPI data presented in figure 1 indicate, since the phase out of price regulation began in 1996, the prices of cable have grown about 2.5 times faster than overall prices in the economy. This has led to increasing public calls for congress and the FCC to re-regulate cable, at least until there is "viable competition" (Kimmelman (1998)).[14]

The study found a lower elasticity of demand than the Commission and noted that the cable operators moved aggressively to increase prices, upon deregulation. Their behavior was consistent with the exercise of market power.

> Using the baseline specification, the results indicate that to get to the point where the elasticity of demand reached –1 (the minimum price increase compatible with static profit maximizing), the firms would need to raise prices by 17%. To give some perspective, in the period immediately following our sample. Prices actually rose by about 11%. [15]

The study pointed out that cable operators had moved aggressively to capture a large part of the available monopoly rents. It produced a graph showing the dramatic increase in prices with deregulation.

Leaving aside the shocking nature of this sloppy scholarship on the part of the cable experts, this misstatement of facts has a devastating impact on the cable industry arguments. Without point of sale competition, cable operators do not face market discipline in their programming choices. They can scrimp on quality to enrich themselves, degrade the programming bundle by discriminating against non-affiliated programs, or use monopoly rents to further the political agenda of the system owners, without suffering significant economic loss.

[14] Goolsbee and Petrin, p. 4.
[15] Goolsbee and Petrin, p. 27.

C. Subscriber Patterns Support the View of Limited Competition Between Satellite and Cable

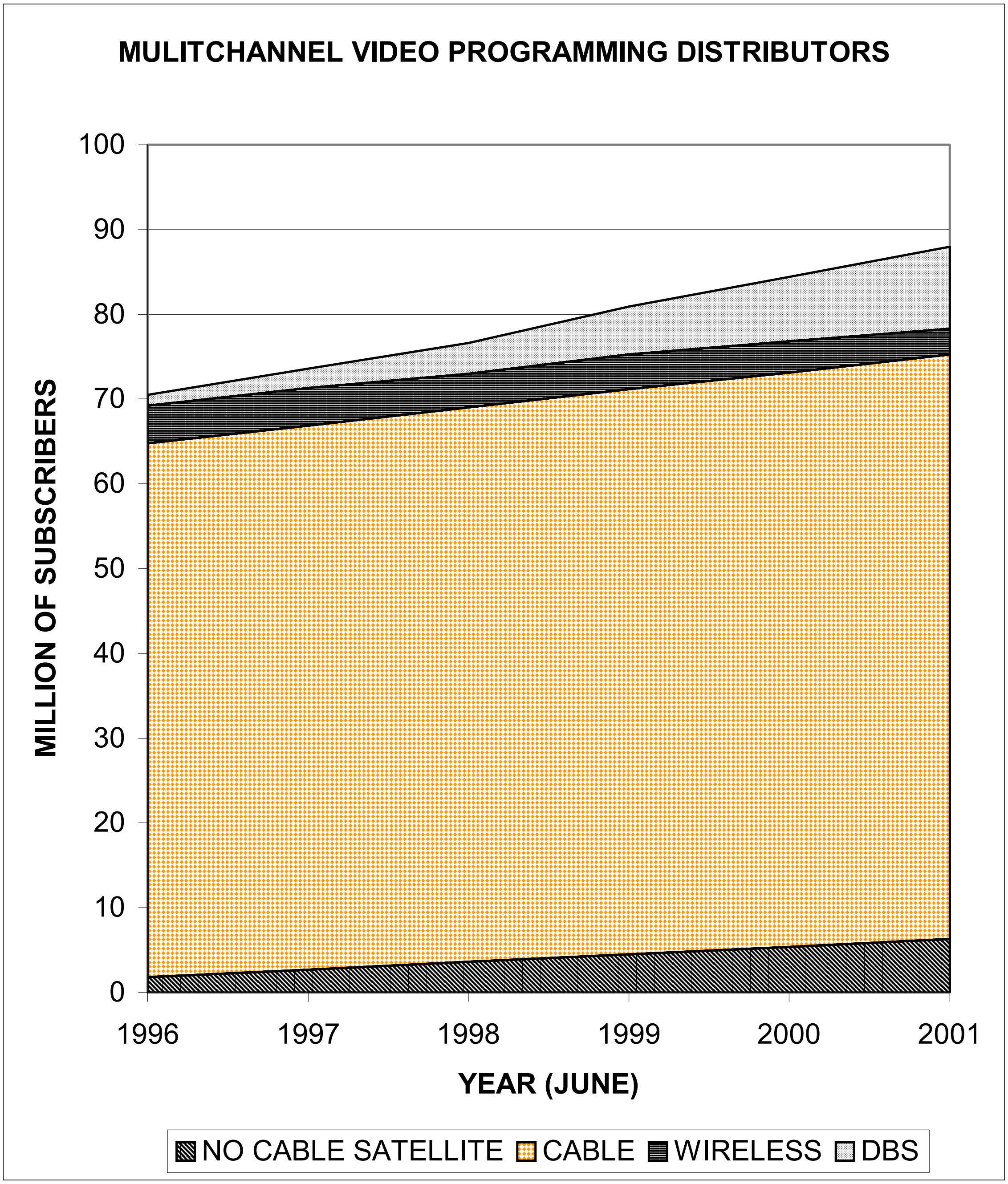
In addition to misrepresenting the fundamental implications of the research results, Ordover misinterprets the simple patterns of change in the industry. Ordover states that "the non-cable share of the MVPD business continues to experience an annual growth rate of nearly 20%. Most of this growth has come from luring away existing cable subscribers."

This statement is irrelevant, if not wrong (see Exhibit III-2). Cable's subscriber base is growing and has continued to grow at a steady pace throughout the recent period of rapid satellite growth. It may well be that cable is losing "mega-service" subscribers to satellite, but if that is the case, it is adding lunch bucket subscribers at a much faster pace because the overall subscriber count of cable continues to grow. In fact, it continued to grow even before the rollout of digital cable, which is targeted at the mega-service segment. Viewers with less expensive tiers of cable programming are insensitive to rate increases because DBS only competes with cable for multiple pay-service tier subscribers (those who buy expensive sports and movie packages). Furthermore, cable MSOs are able to extract monopoly rents from the lower tier subscribers to cross-subsidize their competition with DBS for mega-service subscribers.

Moreover, there is evidence that satellite's expansion is slowing. Starting from a small base, non-cable MVPD had a very high rate of growth immediately after the launch of DBS fostered by the 1992 Cable Act, but as it fills its niche, the growth rate has slowed.

The cable strategy for responding to satellite is to exploit market power in the lunch

EXHIBITIII-2:



Source: Federal Communications Commission, *Eight Annual Report*, In the Matter of Annual Assessment of the Status of the Market for Delivery of Video Programming, January 14, 2002.

bucket segment by driving up prices much faster than inflation (as described in Exhibit III-1, above). Given the weak elasticities, it makes better economic sense for cable operators to increase prices than to hold them down. We have shown that cable operators have a secure base of monopolized customers (i.e. a market share far in excess of the traditional standard for monopoly). With this secure base of customers to exploit, cable now has developed a strategy to attack the mega-service niche of satellite – its digital tier and bundled video high speed Internet package. The weak market forces observed in the recent past are likely to get weaker.

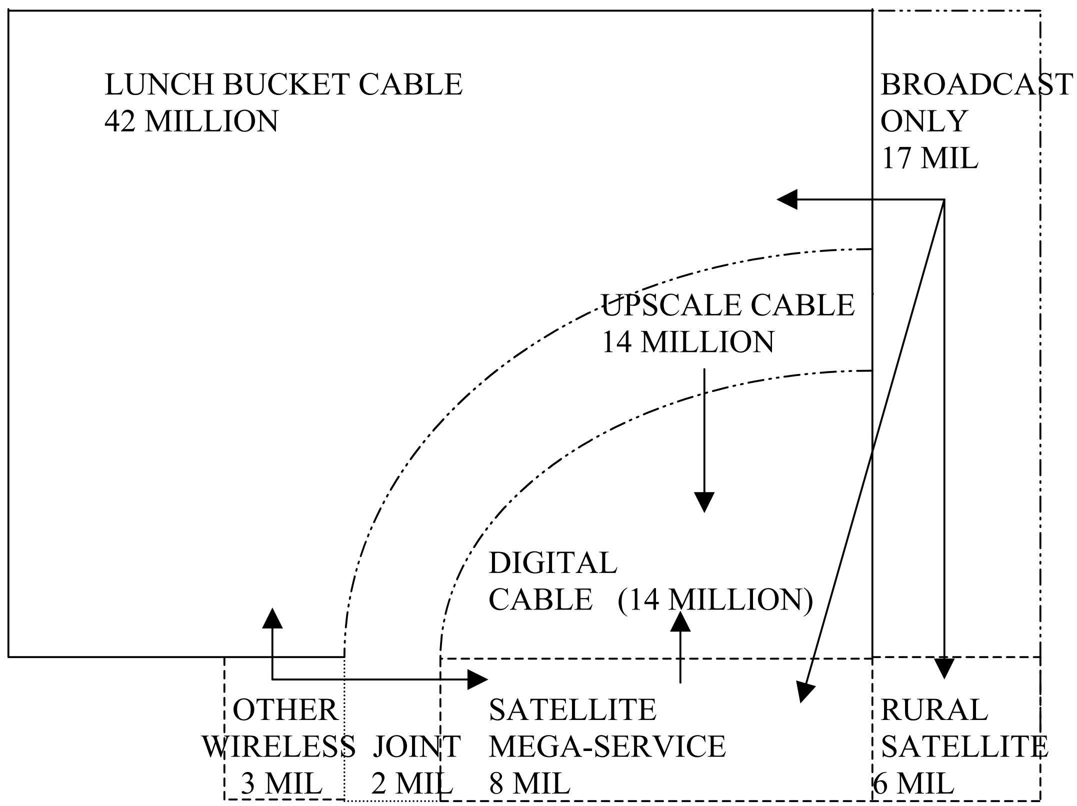
The pattern of elasticities in both the FCC analysis and the Goolsbee and Petrin study supports our view of the multichannel video program distribution market. As the price of satellite comes down, it attracts the mega-service customer, but that is a relatively small segment of the market. Exhibit III-3 presents the picture of product space we presented in the initial comments. We have added the arrows indicating the movement from over-the-air to through-the-wire. The numbers of consumers in each segment of the market are consistent with the most recent Commission report.[16]

Lacking real economic evidence of competition, in spite of recent growth of satellite subscribers, Ordover and other cable commenters project large continuing gains for satellite.[17] The analysis is based on faulty assumptions. It fails to note that cable has been

[16] Table C-1, shows 69 million cable subscribers and 16 million satellite subscribers. We have added in the other wireless subscribers to complete the picture. They are the only category of multichannel service that is declining.
[17] Ordover, pp. 23-27.

EXHIBIT III-3

THE MULTICHANNEL VIDEO DISTRIBUTION PRODUCT SPACE



adding digital subscribers at a much faster rate than satellite over the past three years and the multichannel market is becoming saturated. As a result, cable is in a much stronger position than satellite. As a recent JP Morgan analysis concluded,[18]

> With the multi-channel video market approaching saturation and cable now capturing more than 70% of digital net adds against DBS, the satellite threat is significantly diminished.

The J.P. Morgan analysis shows that satellite digital additions peaked in late 1999 and early 2000. Morgan Stanley Dean Witter had earlier predicted this pattern.

> We also believe that DBS additions will peak in 2000 as the cable television industry complete the majority of its system upgrades and deploys digital cable service throughout the U.S.[19]

The fact that cable now has an offering to compete in the satellite niche will slow satellite penetration and cable has other advantages.

> The outlook for DBS is all the more ominous when we look at total digital net adds across both cable and DBS. Since cable began offering a digital video service, it has increasingly shown its ability to capture a larger portion of net adds in each successive quarter. In large part, we think this reflects the simple reality that cable must merely convert existing customers from analog while DBS must acquire a new customer, a far costlier and perhaps untenable proposition in the long run. Cable's simple structural advantage will likely be difficult for DBS to overcome.[20]

The implications of this analysis for public policy are important and straightforward. Satelllite has always been a digital niche player, as we have argued. It never did compete for the bulk of the lunch bucket cable crowd.

> We believe that more than 95% of all cable churn is caused by factors other than DBS competition. Competition generated churn rates of just 1.3% per year during the past five years, suggesting that former cable customers make up less than one-third of DBS's current customer base. The implication of this finding is significant because it suggests that the vast preponderance of

[18] Jason B. Bazinet, *The Cable Industry* (J.P. Morgan Securities, Inc., November 2, 2001), p. 1.
[19] Richard Bilotti, *The Digital Decade* (Morgan Stanley Dean Witter, April 6, 1999), p. 9.
[20] Bazinet, p. 9.

> DBS's growth depended on first-time multi-channel video (MVC) subscribers. We believe that growth in the MVC market will drop off in the next several years as the potential population of first-time MCV subscribers dwindles.[21]

Our initial comments support this perspective. We have found that 40 percent of satellite subscribers could not get cable. Another 10 to 15 percent continue to take cable. Thus, over half of all satellite subscribers did not represent churn from cable. Another 15 to twenty percent of households move each year, which accounts for cable churn. In other words, competition was never strong and it is getting weaker with the roll-out of digital cable.

> Although we think the competitive overlap between DBS and cable is low, a historical analysis of DBS net adds relative to digital cable net adds suggests cable is rapidly closing in on DBS. In 1999, both digital cable and DBS were adding subscribers at roughly the same rate, but now digital cable is rapidly closing the gap. Presumably it is less expensive to upgrade an existing cable customer than it is for a DBS player to sign up a brand new customer.[22]

The cable industry argument against a horizontal limit relies on the much touted competition between cable and satellite to an extreme degree. That competition is feeble at best. The need for a horizontal limit remains as salient today as it was a decade ago when Congress required it.

D. STANDARD MEASURES OF MARKET POWER CONTRADICT THE CABLE INDUSTRY DESCRIPTION OF THE MULTICHANNEL VIDEO MARKET

Our calculations of traditional measures of economic power refute the hypothetical economic constructions the cable commenters ask the Commission to embrace in eliminating or altering the horizontal ownership cap. The Lerner Index, Tobin's Q, and the HHI—not once calculated by cable industry commenters—all demonstrate to us substantial

[21] Baxinet, p. 4.
[22] Baxinet, p. 24.

market power. It seems to us that they have ignored this analysis because they cannot bear refutation.

Exhibit III-4 updates the estimates of cable industry rents as represented by Tobin's q, or the ratio of the system sale prices to reproduction costs, with the recently published data from the *Eight Annual Report* on multichannel video competition. It is certainly true that the industry over exuberance for purchasing cable properties abated somewhat in 2001. Even with the decline of price to the range of $3700 per subscriber, there are still very large monopoly rents being collected by cable owners. This price is still twice what the proposed Echostar/DirecTV transaction of satellite subscribers would yield.

IV. CABLE COMPANIES ARE NOT BENIGN MONOPSONISTS

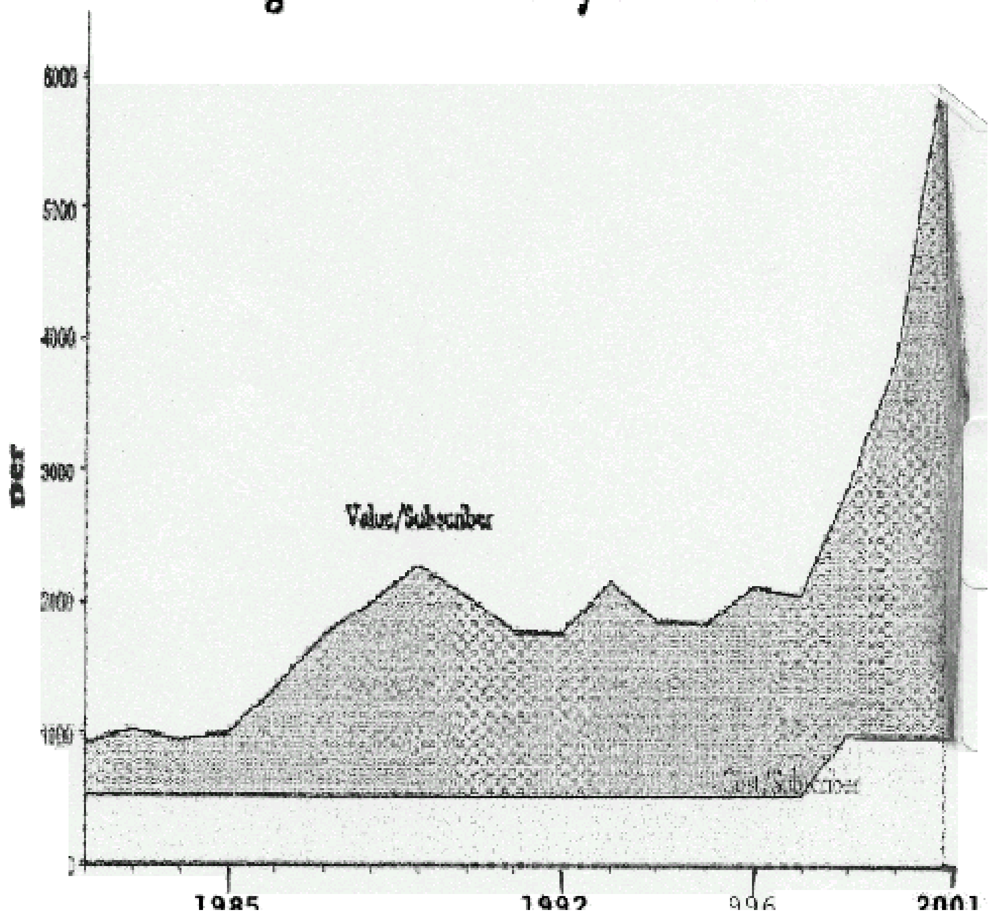
Several of the cable experts argue that monopsony power does not matter in the cable TV industry because of the nature of the product—i.e. cable is a highly differentiated product with high first copy costs. If products are very different from each other, they possess attributes that distinguish them in the mind of the consumer, which enables the producer to set prices above costs because of consumers' attachment to the product. However, the cable theorists present hypotheticals that do not comport with the nature of the product, the market, or the public policy concerns expressed by Congress.

A. ASSUMING AWAY THE PROBLEM

Ordover and Joskow simply assume away the key issues in their hypotheticals.

EXHIBIT III-4: CABLE OWNER RENTS

Figure 1. Cable TV System Rents



Source: Federal Communications Commission, *Eight Annual Report*, In the Matter of Annual Assessment of the Status of the Market for Delivery of Video Programming, January 14, 2002.

Ordover, who presents the lengthiest discussion, assumes no ability to price discriminate,[23] no market power for the buyers,[24] a lack of specialized inputs,[25] fair competition for the sellers[26] and highly differentiated products.[27] With the most challenging problems assumed away,[28] the cable companies have reduced the entire analysis to a battle over rents, which they assume can have no basis in public policy.[29]

> The survival of programmers and the prices offered for programs are, therefore, determined by the marginal values of programming on each cable

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[23] Ordover, p. 34.

> In this example, I assume away price discrimination by the hospital. If the hospital could price discriminate, it would hire both nurses at the nurses' reservation prices. In that case there would be no social welfare loss but the merger would enable the hospital to capture the cheaper nurse's "surplus" (or quasi-rent).

[24] Ordover, p. 37.

> If each MSO is a "price taker," then both will purchase the cheaper program at a price (p. 35), The only exception to this would be if the putative monopsonist also gains incremental monopoly power which, however, is not related to monopsony power.

[25] Joskow and McLaughlin, p. 9.

> The primary input used to produce these services, unlike coal miners in a company town, can easily be shifted to alternative uses.

[26] Ordover, p. 35.

> This assumes that the two suppliers compete on price against each other in offering their programs to the MSOs and that the supplier with the lower "reservation" price offers its service slightly below the higher reservation price of the other supplier.

[27] Ordover,

> Fifth, video programming is not a commodity, but a differentiated product, generally characterized by unique content protected by copyright. Economics teaches that such products can command prices that exceed the costs of production and provide economic rents to the owners of the products (and to the talent they hire as inputs to produce the content).
>
> Joskow and McLaughlin, p. 10.
>
> Program services are differentiated products, each with its own unique characteristics.

[29] Ordover, p. 17, p. 36

> In general, existence of such rents raises no public policy concerns. However, bargaining over the distributions of such rents between video programmers and distributors (MSOs, DBS providers, etc.) is inevitable. In the same vein, as there is no concern about the rents, there is no social welfare interest in ensuring that video programmers (or talent) retain all (or, indeed, any) such rents. To the contrary, in some cases, reducing such rents may reduce prices to consumers without any sacrifice in output or quality.
>
> The only possible effect is redistribution of any "rents" obtained by programmers to the combined MSO – *i.e.*, pushing prices paid for programming closer to the programmer's reservation price. *See also infra* note 46. Such redistribution, by definition, is socially neutral.
>
> Joskow, p. ?.

> system, the costs of the programming, as well as the details of negotiations between the willing buyer and a willing seller. (p. 36).

In order to put a reasonable face on the "bargaining" that results, the cable experts must assume what is essentially a marketplace fight of elephants in which the grass gets trampled. Huge and powerful programmers, some of whom are vertically integrated face off against huge and powerful MSOs, some of whom are integrated, but independent producers and the consumer get trampled in the process.

> In fact, it is quite common for programmers to use this type of "bundling" to gain "bargaining power" as well as to lessen the competitive pressures on "weaker" offerings that face more ready substitutes. Of course, like foreclosure, such a countervailing strategy may be costly to the programmer (especially if it is forced to carry out its threat). Nevertheless, the higher the potential harms from being foreclosed by an MSO the stronger is the countervailing incentive to impose costs on the MSO with the goal of reaching a mutually agreeable *modus vivendi.*
>
> Relatedly, many of the programmers that could be targets of an exclusionary foreclosure, are themselves affiliated with other MSOs. *See 2000 Video Competition Report*, App. D. If an MSO tried to foreclose a programmer affiliated with another MSO in order to gain market power in the programming "market", the second MSO, who could end up paying elevated prices for programming, could in turn retaliate and refuse to carry the affiliated programming of the foreclosing MSO. The effect of the counterstrategy would be that the MSO implementing foreclosure could find its affiliated programming subject to an equal or greater amount of foreclosure.

In addition to being vertically integrated, the other strategies necessary to *vive* in Ordover's *modus vivendi* are to have large portfolios of programs[30] or sell in foreign

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[30] Ordover, p. 16, 21,

> I understand that in today's marketplace, there are as many as several dozen programming networks (from HBO to ESPN to the Food Network and the Golf Channel) that are *de facto* "must carry" networks (given, among other things, the fierce competition among DBS and cable operators to attract viewers). Any program producer that sells content to one of these programming networks is therefore, for all practical purposes, guaranteed widespread cable distribution of that content.
>
> Because program packagers often own more than one programming network, they can (and, I understand, often do) strengthen their bargaining position and reduce the risk of foreclosure by, for example,

markets.[31] There is little room for the mice (independent, modestly sized, domestic producers of programming) in this dance of the elephants. Unfortunately for Ordover, his cable clients failed to inform him that two huge vertically integrated MSO and a couple of broadcasters battling each other to a duopolistic stasis and squeezing independent programmers was not what Congress had in mind in the 1992 Act.

In the Ordover/Joskow hypothetical world, small independent entities depend on the enlightened self-interest of the cable operators to protect them. They need not fear in this fantasy world, cable operators behave well. Indeed, the bigger they are the better they treat the small independent producers because they have too much to lose.[32]

> As an MSO's share of subscribers increases, it is more likely to recognize that its program purchasing decisions can affect the ability of a new program service to be successful. It recognizes both that it has something to gain by carrying the service and something to lose if the program service cannot gain enough subscribers overall in the market to generate an adequate subscription and advertising revenue to be financially viable… [33]

B. THE MARKET BEARS LITTLE RESEMBLANCE TO CABLE INDUSTRY THEORY

Examining some of Ordover's assumptions demonstrates how his analysis cannot withstand the touchstone of reality. For example, he claims that cable MSOs lower

---

> presenting the cable operator with a "take-it-or-leave-it" programming bundle that includes both one or more programming networks that customers view as "must see TV" and less popular program offerings (or by stimulating demand for a less established network by cross-promoting it on a more established network).

[31] Foreign markets for Viacom, Disney, AOL, Liberty, Fox, p. 29-30.

[32] Ordover, p. 40.

> Because of the public good nature of programming, a larger MSO can less credibly threaten to hold-out and refuse to pay its "fair share" of programming costs than a smaller MSO. This is so because a large cable MSO may have more to lose than small MSOs from non-carriage (or lower program quality). In other words, the more subscribers that a MSO serves, the more it stands to lose from refusing to carry programming that those subscribers value. Therefore increases in size *reduce* the credibility of the MSO's threat to hold-out until the free-riding problem is solved. (p. 40)

[33] Joskow and McLaughlin, p. 15.

consumers rates because of the economies they achieve through concentration.[34] He claims that MSOs do not seek to impede the access of overbuilders to programming[35] and claims that the synergies/efficiencies from large horizontal consolidation are passed through to smaller cable operators.[36]

However, the empirical evidence contradicts these observations. The Commission's pricing analysis shows that larger, more integrated operators charge more.

- Affiliated MSOs charge higher prices,[37]
- Larger MSOs charge higher prices, [38]
- Clustered MSOs charge higher prices.[39]
- In the discussion of vertical integration below, we find that integrated firms charge higher prices.

In addition to this quantitative evidence, our initial comments presented numerous examples of large vertically integrated MSOs seeking to impede the access of overbuilders

[34] Ordover, p. 69.

> First, economies of scale exist in administration and planning for new technologies and services. Larger MSOs are therefore likely to have lower per unit costs. Further, to the extent that cable ownership concentration could lead to lower costs of programming, consumers likely would benefit over the long haul through lower subscription fees. Such lower subscription fees could come about because competition among MVPDs creates incentives for passing to consumers a share of these lower programming costs.

[35] Ordover, p. 43.

> Rather, faced with the scenario described in Paragraph 30 of the *Notice*, the programmer would never develop the programming in question because it knows that if incumbents that serve the vast majority of subscribers refuse to pay the fair share of the costs, the programmer may not be able to recover its remaining costs. Clearly, if the overbulider is forced to exit and the incumbents do not contribute enough, then the programmer will not recover its costs and will refuse to invest on a forward-looking basis. Indeed, with respect to the pre-existing programming, the overbuilder actually benefits from the willingness of the incumbents to contribute sufficient amounts to bring forth the desirable programming.

[36] Joskow and McLauhglin, p. 16.

> By helping to ensure that an attractive program service is financially viable, a large MSO creates additional surplus for its own subscribers by increasing the likelihood that an attractive service will be available to them. It also increases surplus for program suppliers and for subscribers of other smaller MVPDs who will now have greater assurance that the program will be available to them in the market.

[37] Report on Cable Industry Prices, February 14, 2002, p. 10.

[38] Id. at 25.

[39] Id. at 16.

and others to programming, and to impede the access of programmers to consumers. It is precisely the entities that Ordover/Joskow claim that the large integrated MSOs are helping in Fantasyland, who complain the loudest in the real world.

- Programmers still find the dominant firms demand equity or other onerous conditions of carriage,[40]
- Overbuilders cannot get programming,[41] and
- Small cable companies are cut off from programming and forced to sell out to large MSOs at depressed prices.[42]

The failure of the cable company experts to comprehend the real world behavior of the cable companies is well demonstrated in their complaints against the horizontal limit. Ordover misrepresents the horizontal limit by saying that an ownership limit provides a perverse incentive; "an MSO that is "too" successful at increasing its subscribership through superior marketing, customer service and provisioning of desired video programming may have to *divest* systems in order to remain under the subscriber ownership cap."[43] Besen made a similar claim at the Commission's Roundtable on ownership.[44] As we described in our comments, cable operators are not prevented from winning new customers by the rule. Subscribers that they gain by building new competitive systems do not count against the limit. The Commission has not suggested that a company which grew its business by increasing its penetration within its service territory would be forced to divest. Challenges under the rule have only come in reaction to mergers, which involve buying, not winning new customers.

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[40] See below, pp.
[41] CFA, et al., pp. 127 - 132.
[42] CFA, et al., pp. 132 -133.
[43] Ordover, p. 21.
[44] Roundtable On FCC Ownership Policies, October 29, 2001.

The rule was written to encourage competition through overbuilding by exempting this type of expansion. Ordover fails to recognize that the dominant, integrated cable companies never compete with one another head-to-head for subscribers.

C. MONOPSONY HYPOTHETICALS

The cable commenters do not present direct evidence on monopsony power. The prior research that they cite on bargaining is either purely theoretical or relies on assumptions or situations that are directly contradictory to conditions in the cable TV industry.[45] For example, recent research and theoretical analysis which purports to show that large size does not confer market power in bargaining with input suppliers rests on the fundamental assumption that there is no vertical integration[46] or that programmers and cable operators have equal bargaining power.[47] Ironically, three quarters of the networks studied were, in fact, vertically integrated. We have shown that there is substantial vertical integration in the industry—with one third of all program networks and one half of the top networks being vertically integrated—and that a few large firms dominate the landscape, using their bargaining power to extract concession from programmers or prevent them from getting on the cable system altogether.

The study that empirically addresses bargaining in the cable industry does so by estimating the shape of the revenue curve. It estimates the point at which becoming larger by merger leads to an increase in revenue for the cable operators at the expense of programmers. The study did not find that merger to achieve leverage was not possible. It

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[45] Tanseen Chipty and Christopher M. Snyder, "The Role of Firm Size in Bilateral Bargaining: A Study of the Cable Television Industry," *Review of Economics and Statistics*, May 1999, 81 (2); Alex Raskovich, "Pivotal Buyers and Bargaining Power," Economic Analysis Group Discussion Paper EAG 00-9, December 2000.

found that leverage occurred at a large size (36+ million subscribers). The inflection point on the revenue curve occurs at a large number.

Unfortunately, it looks at the wrong issue in bargaining, or at best, looks at only part of the issue. It focuses on the advertising revenues earned by programmers, and explicitly excludes an assessment of programming license fees. In the real world, the largest disputes about discrimination pertain to license fees. In fact, the two very large, pending mergers have been justified on the grounds that cable operators will gain leverage to lower programming costs. EchoStar/Direct TV believes it can achieve leverage in bargaining with programmers at 17 million subscribers. ATT/Comcast claim the same objective at 22 million (or 30 if attributable subscribers are included).

Dertouzos and Wildman show that license fees account for a much larger part of the economic benefits that larger MSOs obtain in bargaining with programmers.[48] They see license fee discounts are three times as large as advertising revenue gains. Indeed, they argue that splits of revenues from advertising (which would appear to favor programmers) are offset by higher license fees, which would favor MSOs.[49]

Inclusion of program licensing fees in the bargaining process could significantly shift the inflection point to lower levels of ownership. In today's market of 88 million subscribers, a 30 percent limit would be just over 26 million subscribers. Exhibit IV-1 depicts this argument.

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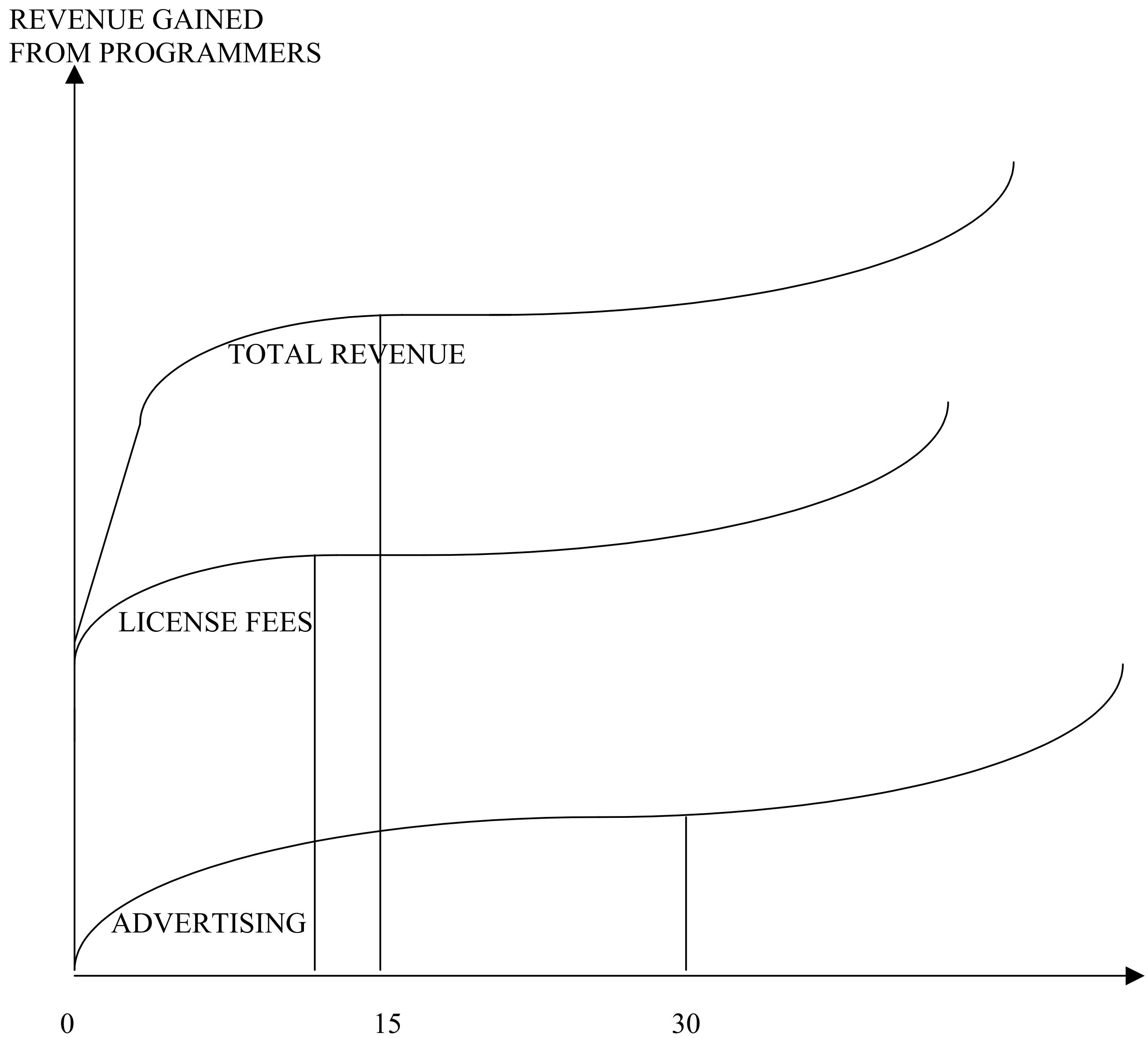
[46] This is only one of many critical factors that reduces or eliminates the relevance of these discussions to the current proceeding. For example, in their theoretical discussion, Waterman and Weiss, *Vertical Integration in Cable Television* (Cambridge, MIT press, 1997), p. 79,assume *a la carte* pricing.

[47] Joskow/McLaughlin, p. 15.

[48] *The Economics of License Fee Discounts*,

[49] Drtouzos and Wildman, p. 25, showing that half of the higher ad revenues for ESPN and CNN, which would indicate lack of bargaining power by MSO *vis-à-vis* programmers in an analysis of advertising only, is returned to MSOs in the form of higher license fees.

EXHIBIT IV-1: GAINING LEVERAGE IN BARGAINING OVER REVENUE AS AS SYSTEMS INCREASE IN SIZE



V. VERTICALLY INTEGRATED CABLE COMPANIES HAVE A CLEAR INCENTIVE TO DISCRIMINATE IN THE FACE OF WEAK MARKET FORCES

In order to blunt the contradiction between the theory of good behavior and the reality of cable industry practices, the cable experts offer the argument that what appears like anticompetitive discrimination or rent seeking is actually procompetitive efficiency seeking behavior. The key is to show that misbehaving is not in the economic interests of the vertically integrated MSOs. As Ordover puts it

> Any attempt by a cable MSO to degrade the quality of its programming in order to foreclose a rival would cause it to lose significant customers to DBS and other alternatives thereby undermining the effectiveness of its strategy.[50]

Cable industry commenters have built an economic house of cards by reifying each others' assumptions and standing on unsubstantiated hypotheses. Ordover cites Besen several times. Besen presents a hypothetical analysis that attempts to demonstrate that it is not in the interest of the cable operators to discriminate. Ordover cites this analysis as proof that his hypothetical/theoretical arguments apply, but he provides no independent empirical analysis. Neither Shelansky, nor Joskow/McLaughlin offer direct evidence on the incentive to discriminate, although they assert much the same conclusion as Bessen.

A. Market Forces are Too Weak to Prevent Discrimination

Besen's argument is also a hypothetical since it never examines the real world behavior of either cable operators or cable consumers. It takes average industry economics, makes assumptions about the costs and benefits of excluding networks and then asks the

[50] Ordover, p. 59.

question “how many subscribers would the cable company have to lose to make the foreclosure strategy unprofitable?”

He builds an unrealistic hypothetical and concludes that

> <u>With these assumptions a very modest reduction in the number of subscribers served by a large vertically integrated cable operator would more than offset the operator’s share of any increase in profits that an affiliated program service would obtain from the foreclosure of a rival service.</u>

He assumes that the reader will be convinced that the number is so small; it is obvious that discrimination is not in the interest of the cable operator. He is wrong because he ignores the essence of the business model used by cable operators.

Like all of the cable industry commenters, Besen ignores the leverage provided by bundling—the most powerful arrow in the cable industry’s anticompetitive quiver. Because cable operators have immense market power, they can force consumers to buy bigger and bigger bundles of services. They force take-it-or-leave-it decisions on the consumer. Besen assumes that, if a cable operator drops one channel, consumers who watch that channel will drop cable. Because cable operators offer only bundles, the consumer must give up all of the channels in a tier of service. We have already shown that for price and other reasons, core cable subscribers—the lunch bucket crowd—are not likely to switch to satellite.

First, for the purpose of argument, at this stage, we will accept all of Besen’s economic assumptions and assertions, but expose them to a reality check. Later we will criticize his assumptions. We focus on his 10 percent increase in price of programming case, since most public policy analyses have moved away from a 5 percent increase in price as a reason to take action. Besen calculates that if the cable operator lost about 1 percent of its subscribers as a result of the foreclosure strategy, it would not be profitable (see Exhibit V-1).

Besen did not notice that while this may be a modest percentage of the total number of subscribers of the large MSO, it is actually a very large part of the audience of the programming that is being foreclosed. In fact, only the most popular five program networks have audiences larger than that the threshold figure that Besen calculates. In other words, vertically integrated programmers would have to lose more subscribers than most networks have viewers to make discrimination unprofitable.

Even for the most popular network, if the cable company forced it off the system, more than half of its audience would have to give up cable service to make it unprofitable for the cable company to discriminate (see Exhibit V-2). In other words, more than half the people who really wanted channel X – one of 30+ channels in a cable package –

would have to decide to give up the entire package of cable service for Besen's theory to be accurate. It is highly unlikely that such a large number of subscribers will be lost.

The Commission's econometric analysis provides a direct contradiction to Besen's contention. Assume that the average subscriber has 33 expanded basic cable networks, since there are about 35 networks with more than 70 million viewers. The elimination of one network constitutes about a 3 percent reduction in quality (1/33 =.03). Under Besen's approach, subscribers lose 3 percent of their networks as a result of the foreclosure.

If we apply the elasticity of substitution to a 3 percent reduction in quality – i.e. a removal of 3 percent of the programming, which is what Besen assumes happens, we find

EXHIBIT V-1: BESEN THRESHOLDS FOR BREAK-EVEN

5 PERCENT PRICE INCREASE

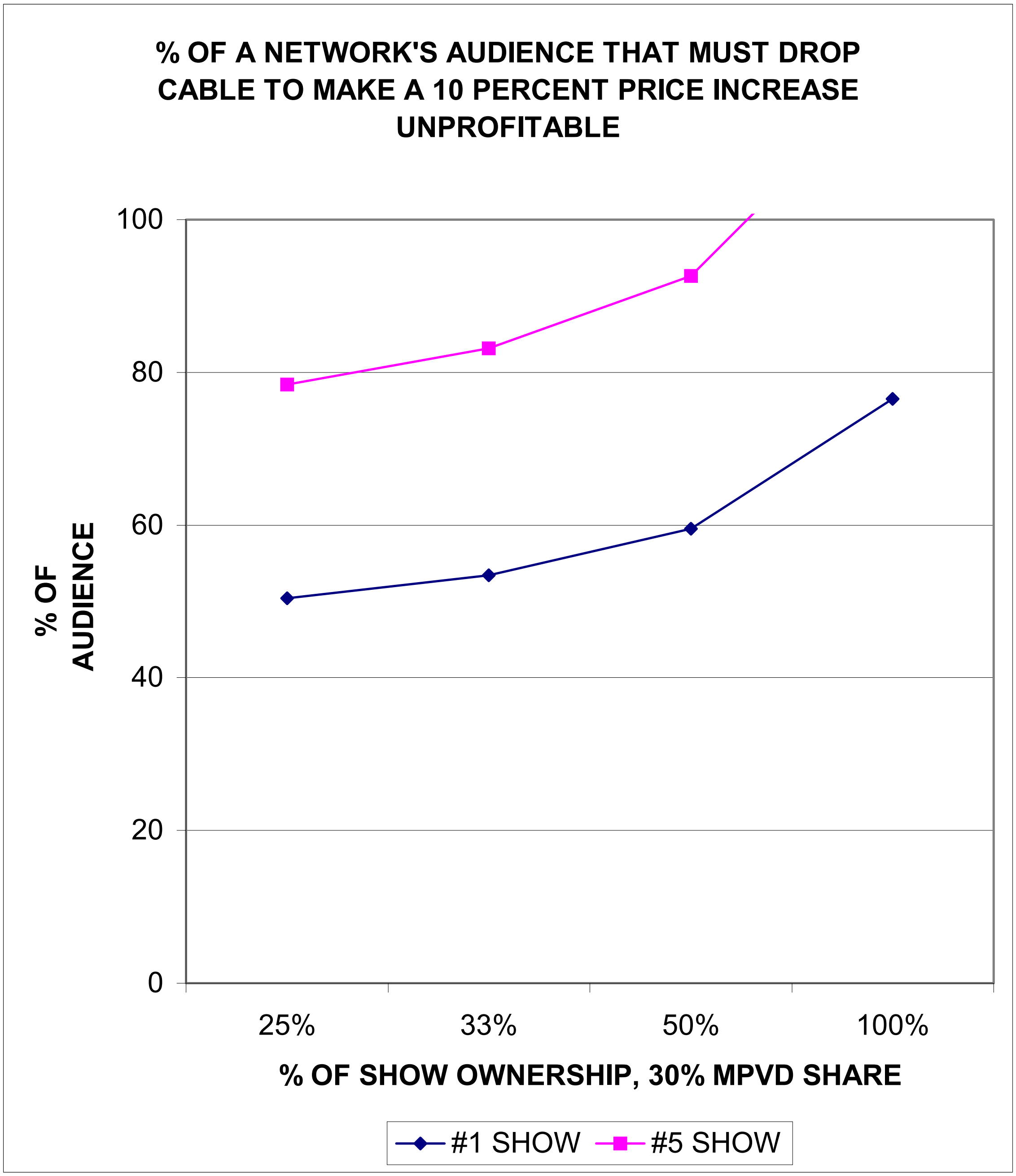
MSO PROGRAM SERVICE OWNERSHIP PERCENTAGE	CABLE OWNERSHIP OF MVPD SUBSCRIBERS				
	30%	35%	40%	50%	60%
25%	.79%	.78%	.77%	.76%	.76%
33%	.81	.80	.79	.78	.77
50%	.86	.84	.83	.81	.79
100%	.99	.95	.93	.89	.88

10 PERCENT PRICE INCREASE

MSO PROGRAM SERVICE OWNERSHIP PERCENTAGE	CABLE OWNERSHIP OF MVPD SUBSCRIBERS				
	30%	35%	40%	50%	60%
25%	.83%	.81%	.80%	.77%	.76%
33%	.88	.85	.83	.80	.78
50%	.98	.94	.91	.86	.83
100%	1.26	1.18	1.12	1.04	.98

“Declaration of Stanley Bessen,” p. 19.

EXHIBIT V-2:



Cahiers/ TVInsite, Basic Cable Primetim Ratings Average, 2001, January 10, 2002 for subscribers, “Declaration of Stanley Bessen,” p. 19., for loss of subscribers.

that only .41 percent of the cable subscribers would switch. This is between one-third and one-half the number that Besen calculated would be necessary to make discrimination unprofitable. In every case, it would be profitable for the vertically integrated cable company to discriminate.

Besen assumes that there is no price increase passed through to the public as a result of the increase in costs effected by the vertically integrated cable operator. This is completely at odds with the statements of cable operators who insist that they are just passing programming cost through to the public every year, when they raise cable rates for their customers. The price increase would be small (.3 percent) and it would have a small effect on subscribership for non-integrated companies (we can assume that the integrated entity does not have to increase its prices since this is partly an internal transfer).[51] One could argue that the integrated company would only pass through the percentage of the cost increase it had to pay to its partners in the program, in which case the loss of subscribers would increase slightly as the percentage ownership declined (see Exhibit V-3). As the ownership interest declines the profitability narrows, but discrimination remains profitable.

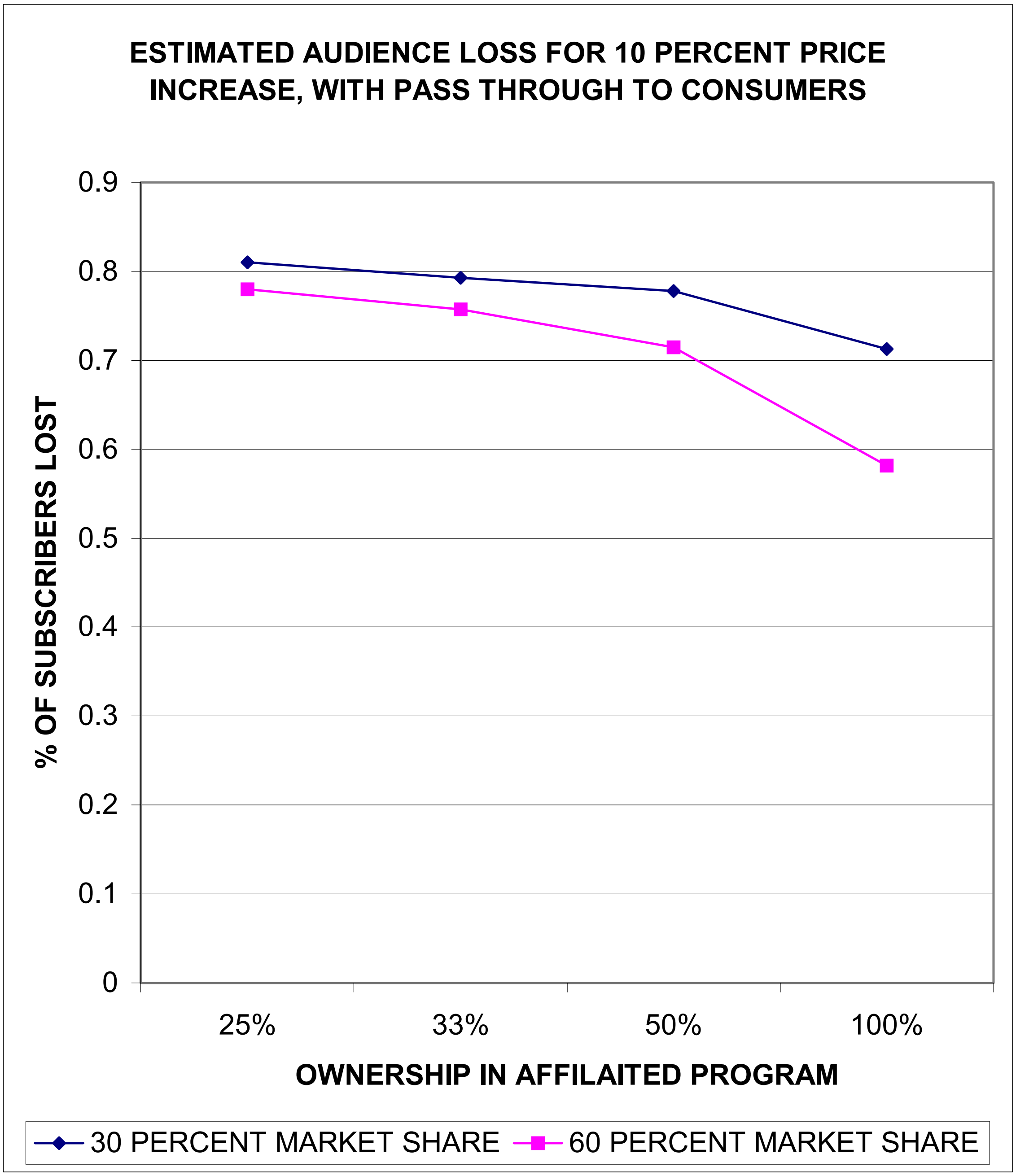
Besen's analysis flunks the reality test.

B. REALISTIC ASSUMPTIONS REINFORCE THE CONCLUSION THAT DISCRIMINATION IS PROFITABLE

An empirically grounded view of cable industry and consumer behavior contradicts Besen's theory. Several of Besen's assumptions are not consistent with economic reality.

[51] The 70 percent of the market that is not integrated but increased prices would suffer slight reduction of subscribers -- .3 percent). The combined effect (.71 percent) would still be less than the threshold values Bessen calculated.

EXHIBIT V-3:



Cahiers/ TVInsite, Basic Cable Primetim Ratings Average, 2001, January 10, 2002 for subscribers, “Declaration of Stanley Bessen,” p. 19., for loss of subscribers.

Within a foreclosure framework, Besen appears to have ignored several benefits because he assumes that when a program network is eliminated from a cable system, the channel goes blank. He does not estimate how much the integrated programmer gains by adding more subscribers on non-affiliated systems. Integrated MSOs do not discriminate at random, they are more likely to discriminate against programs that compete with their owned offering. If the competitor exits the market, other cable operators would want to add a substitute program, perhaps that of the integrated MSO who triggered the exit.

Similarly, Besen does not identify any gains to the integrated MSO by adding one of its own offerings in the slot vacated by the foreclosed network. In work conducted by independent researchers, this appears to be exactly the pattern of cable behavior. As discussed below, vertically integrated companies foreclose in order to add more of their own shows and charge higher prices to consumers.

The benefits that Besen has overlooked flow from his incorrect methodological and analytic approach which relies on the argument that foreclosure should be looked at for the aggregate of all networks carried and not carried, rather than for discrimination against specific program networks. In Besen's approach, the discrimination by an integrated operator against a high value premium or basic channel that competes with one of its marquee offerings is offset by it lack of discrimination against an unaffiliated basic educational network or a religious network programming, where the vertically integrated company has no offering.

Besen's conclusion that there is no foreclosure is in contrast to published studies that found foreclosure, particularly when one considers directly competing types of program networks. Indeed, the strongest conclusion in studies cited by the Commission finds foreclosure.[52] Contrary to Besen, these other analysts paid careful attention to the actual reason for discrimination – i.e. it looked at programs within specific categories.

> Operators who own premium cable services offer, on average, one fewer premium services than do other operators. In particular, operators who own premium movie services are less likely to carry the rival basic movie service, American Movie Classics (AMC). In addition, TCI and Comcast, two operators who own the basic shopping service, QVC, are less likely to carry both QVC and HSN. These results are statistically significant and establish that premium operators and certain basic operators are less likely to carry rival services.[53]

> While differences are often insignificant or minor, a consistent general pattern emerges: Integrated cable systems tend to "favor" the programming with which they have ownership ties, either by carrying those networks more frequently than would otherwise be expected or by pricing them lower or marketing them more vigorously. Our analysis also shows that integrated systems tend to disadvantage unaffiliated networks in those same respects, at least if the latter are good substitutes for affiliated programming. Integrated systems also tend to offer fewer cable networks in total, although the differences are very small. The dominant effect appears to be that integrated cable systems replace unaffiliated networks with similar, affiliated networks. A separate analysis of the effects of vertical integration on larger channel capacity systems suggests that those effects of integration will persist, though they will diminish, as channel capacities expand or VOD systems are developed.[54]

This published analysis is quite strong on the foreclosure finding. It provides a detailed understanding of foreclosure motivations and behaviors. Integrated owners of basic programming, whose profits rise by increasing basic subscribers, exclude competitors for their basic package but offer more of their own basic packages and more premium packages.[55]

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[52] Chipty and Waterman and Weiss are cited at p.

[53] Tanseen Chipty, "Vertical Integration, Market Foreclosure, and Consumer Welfare in the Cable Television Industry," *American Economic Review,* 91 (June 2000), p. 429.

[54] Waterman and Weiss, p. 7.

[55] Chipty, p. 429.

> [O]perators integrated with basic programming successfully sell more basic cable subscriptions, despite their tendency to exclude certain program services from their distribution networks. These operators

Owners of premium services foreclose competitors and sell more of their own, but offer fewer services at higher prices.[56] While the published research on foreclosure to which the Commission points is strong on finding foreclosure, it is weak on the consumer welfare impact of vertical foreclosure.[57] At best, the result for basic services is more variety, but less diversity of ownership.[58] The change in welfare is positive (because of more subscribers) but not statistically significant. Measured purely in economic terms the conclusion is "that consumers in unintegrated markets are certainly no better off than consumers in integrated markets, despite the tendency of integrated operators to exclude certain program services."[59]

Exhibit V-4 applies the lessons of the published studies of discrimination to the Besen data. That is, it breaks out the premium movie channels (per Waterman and Weiss)

> stimulate demand by offering somewhat larger basic cable packages with less programming duplication and more premium packages.

[56] Chipty, p. 429,

> Similarly, operators integrated with premium programming successfully sell more premium subscriptions. While these operators offer fewer premium choices at higher prices, they manage to stimulate demand for premiums services by offering smaller, cheaper basic cable packages.

[57] Chipty, p. 430.

> Estimates suggest that consumers are better off in integrated markets than in unintegrated markets, although the differences are not statistically significant.

[58] Waterman and Weiss, p. 109, argue that economic efficiency results in roughly the same menu of programs being offered by integrated and non-integrated programmers, they are just owned by the integrated MSO. Implicit in the process, variety is served at the expense of diversity of ownership and antagonism between owners. They do not show hard evidence of efficiency gains, however.

> Although we cannot be sure of the reasons for the observed outcomes of vertical integration, and evidence of the benefits of integration to consumers remains ambiguous, an overall empirical pattern emerges: The relatively minor effects on the total amount of programming made available suggest that the main result of vertical integration is the substitution of one similar network for another or, perhaps, more advantageous market of one rather than another.

[59] Chipty, p. 430.

EXHIBIT V-4: PROGRAM CATEGORY SPECIFIC DISCRIMINATION

NETWORK	SUBSCRIBERS ADVANTAGED/DISADVANTAGED SIMPLE	PROBIT
PAY MOVIES NETWORKS		
TCI		
ENCORE	8471	5812
NON-TCI		
CINEMAX	309	
SHOWTIME	282	196
HBO	13	5
TMC	-1237	-836
NET	9104	6447
BASIC MOVIE NETWORKS		
TCI		
FAMILY	265	177
TNT	766	530
TBS	202	142
AMC	2971	2034
NON-TCI		
USA	147	105
DISNEY	13	12
BRAVO	-403	-280
WWOR	-995	-681
WPIX	-713	-490
WGN	-1479	-1019
NET BASIC MOVIE	7634	5236
SHOPPING		
TCI		
HSN	-2286	-1563
QVC-FASH	-760	-463
HSN-2	-363	-248
QVC	1681	1151
NET	-1728	-1123

"Declaration of Stanley Bessen," pp. 27-30.

and the basic movie channels[60] and home shopping (per Chipty).

We find that there is strong favoring for affiliated movie programming *vis a vis* directly competing programming in Besen's the simple and probit analyses. Since TCI had between 9 and 10 million subscribers in this data set, it was using a substantial degree of its resources to favor its programming. All of the shopping networks considered in Besen's analysis were affiliated. The fact that TCI appears to "disfavor" this programming is more of a function of the effort to avoid redundancy in a category in which it faced no competition (at least in this data set). In fact, TCI displayed these networks to more subscribers in total than did non-TCI affiliated MSOs, even though three of the four individual networks that were "disfavored." These three networks account for half of the affiliated networks Besen found TCI "disfavored."

This critique of Besen/Ordover can be stated in another way that makes it even more relevant to this proceeding. It is easy to discriminate against smaller programmers,[61] especially if they are new entrants, and particularly if they are contemplating developing programs that compete with the dominant integrated offerings.

The Waterman and Weiss study supports a similar conclusion. The study finds that horizontal market power is the central concern. Indeed, it advocates lowering the cap to 20 percent on very similar grounds as we identified in our initial comments.

> [I]f the FCC's right to impose a limit on the proportion of homes that any single MSO can reach is upheld by the courts, then the FCC should reduce its limit from 30 percent to no more than 20 percent. While systematic evidence

[60] We have included all basic channels that Waterman and Weiss (see Table 3-1)identified as showing movies.
[61] Waterman and Weiss, p. 98,

> Although the data are less complete than for premium networks, the weight of the evidence is that MSOs integrated with basic and hybrid networks also tend to favor those networks by carrying them more frequently than the average nonintegrated system. The differences appear to be very minor, however, for more widely distributed basic networks.

> to document the extent to which individual MSOs might now exert monopsony power were not available, it is reasonable that an MSO with substantially less than 30 percent of the national market could anticompetitively affect competition in cable-programming supply because of economies of scale in cable network distribution. Conversely, it appears unlikely that a 20 percent or even lower limit would result in major sacrifices to economies of scale in cable system operations or to the creative and financial resources necessary to develop new programming and new technology.

It finds vertical integration is clearly associated with discriminatory carriage rates. As with the Chipty analysis, it finds that there are both strategic (anticompetitive) and efficiency justifications that are consistent with the findings of vertical foreclosure. Therefore, they hesitate to condemn vertical integration. Nevertheless, they conclude that economies of scale are not strong enough on the MSO side to justify a cap above 20 percent. In other words, horizontal concerns are an independent reason that the cap should be imposed and concerns about vertical efficiencies should not dissuade the Commission from imposing a cap.

The efficiency arguments that cause analysts who find discrimination to hesitate in concluding that it is strategically motivated have been criticized by Dertouzos and Wildman, in the context of bilateral bargaining between MSOs and programmers.[62] They argue that the transaction costs that large MSOs point to in order to justify their large discounts on programming are too small to be justified on efficiency grounds. They conclude that it embodies significant strategic discrimination against smaller MSOs. The same logic applies to efficiency gains from vertical integration. If transaction cost savings are small, then the efficiency gains of vertical integration are small as well.

[62] Dertouzos and Wildman, pp. 14-25.

C. Other Problems in the Foreclosure Analysis

There are a number of additional reasons that Besen's foreclosure analysis should not be relied upon by the Commission to relax the horizontal limit in the mistaken belief that integrated MSOs have not discriminated against unintegrated programmers.

First, his data pertain to a period in which rates were regulated. Rate regulation changes the incentives for large, vertically integrated firms.[63]

Second, Besen's analysis shows that there is a positive, but not statistically significant relationship between ownership and carriage rates. This first calculation is a simple correlation coefficient that does not control for any other characteristics of networks or cable operations.

Third, in the analysis that includes statistical controls for system characteristics, the statistics for the full model are not presented, so there is no opportunity to evaluate its validity or representativeness. Arbitrary decision about which programs were included were made (e.g. why were 12 states chosen?). The statistical validity of several important assertions is not reported.

Fourth, Besen's assumption is that the objective of discrimination is to force programming to exit and that foreclosure is the only means of discrimination. However, we show that there are other types of discrimination that are important. We have argued and demonstrated that foreclosure is only one form of discrimination. The terms and conditions of carriage are at least as important. The vertically integrated firms defend the marquis programming in which they have a direct interest by frustrating entry and extract rents from others.

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[63] Chipty, p 430, notes that price regulation may be a confounding factor in previous foreclosure analysis.

> The power to foreclose also implies the ability to force down the license fees that an MSO pays to networks. Some anecdotal evidence suggests the possibility that larger MSOs hold significant monopsony power in the programming market.[64]
>
> Carriage data provide an incomplete picture of vertical integration's effects on premium networks. In particular, even if both affiliated and unaffiliated networks are carried, an integrated system might price them differently to subscribers. Personal selling and other marketing tactics offer other opportunities for system operators to favor one available network over another… For the most part, those subscribership results suggest that integrated systems also tend to favor their affiliated premium networks in pricing and promotion behavior.[65]

Discrimination may also take place for non-economic reasons. Given the massive monopoly rents being earned by cable operators, as demonstrated in our initial comments and confirmed above, owners have the flexibility to pursue their political agendas. Since discrimination is likely to impose little, if any cost, this becomes a large concern.[66]

The empirical evidence and this critique of the industry comments lead to a simple and clear conclusion in terms of the statute. Imposing a limit on horizontal ownership and thereby checking both the horizontal monopsony power and the vertical market power of the large MSOs promotes diversity without detracting from consumer welfare. Citizens gain and consumers do not lose.

D. Real World Behaviors Demonstrate the Abuse of Market Power

As we have pointed out in our initial comments, integrated MSOs have a long history of granting preferential access to subscribers for affiliated programmers and denying access to those who are not affiliated. Evidence of these problems is both qualitative and

[64] Waterman and Weiss, p. 66.
[65] Waterman and Weiss, pp. 93…94.
[66] Waterman and Weiss, pp. 155-156, make this point in arguing that vertical integration is a smaller problem than horizontal concentration..

quantitative.[67] Contrary to the claims of the current owners of the TCI systems, if anti-competitive moves are made by a cable operator in the decades since the deregulation of cable, it is likely that that operator is TCI. Most anti-competitive mergers or maneuvers involves TCI in some respect, as has been the case for decades.

In the late 1980s, TCI and Time Warner maintained the trend they began to establish in the late 1970s of making their programming choices based on selfish motives. Both part owners of CNN, TCI and Time Warner refused to carry a new NBC Cable News channel when it was proposed to them[68]. Clearly, a new cable news channel could have had a competitive (what they view as negative) effect on CNN. Instead of considering the benefits for their viewers (an added news voice that creates new stories and perspectives, etc.) TCI and Time Warner worked to keep CNN free of competition.

A similar situation arose in the early 1990s and persisted throughout the decade. Rupert Murdoch, head of News Corp., tried for years to get TCI and Time Warner to carry his conservative-slanted Fox News channel in order to reach their tens of millions of viewers. The operator goliaths already carried other News Corp. programming but refused to carry Fox News[69] because of the competitive effect it would have had on their news channel and the opposing political stance the station would have taken. Without the countless eyeballs that TCI and Time Warner controlled made available, launching Fox News was not a worthwhile venture and Murdoch was prohibited from delivering his content.

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[67] Ahn, Hoekyun and Barry R. Litman, "Vertical Integration and Consumer Welfare in the Cable Industry," *Journal of Broadcasting and Electronic Media,* 41.
[68] Keating, Stephen. Cutthroat, p.19 & Waterman/Weiss. Vertical Integration in Cable Television, p. 56
[69] Keating, Stephen. Cutthroat, p. 17

Rupert Murdock's plans to create the Fox News Channel in 1994, for example, were thwarted by both Time Warner and TCI.[70] In order to eventually receive carriage for Fox News, Murdoch had to loan then TCI "$200 million…and an option to buy 20 percent of the network." Other programmers who did not have an investment in the country's then largest MSO suffered. "To make room (for Fox News), Malone cleared out existing networks like a bowling ball cracking into the tenpin. The arrival of Fox News in Denver pushed Court TV to split the programming day with Spice, a pay-per-view sex network."

Recent comments in the program access proceeding summarize these events aptly:

> It is also well known that Fox News Channel ("FNC") owes its very existence to Telecommunications, Inc. ("TCI," since acquired by AT&T), whose agreement to carry FNC on systems serving 90% of TCI's subscrigbers was critical to the successful launch of the network. Not coincidentally, Fox made FNC available to incumbent cable operators on an exclusive basis. Like the saga of News Corp./EchoStar, FNC's launch and subsequent exclusivity to the cable MSOs is a case study of how the largest incumbent cable operators control the destiny of new programming services, and why programmers sell to cable's competitors at their own risk.[71]

Fox fought a similar battle with Time Warner. In 1996, Time Warner (who owned a 20% stake in CNN's parent company, Turner broadcasting) refused to allow any other cable network to compete with CNN on its cable systems.[72] The nation's largest cable operator at the time, TCI, also owned a stake in CNN, and as a result would also not allow any competitive news services on its systems. Consequently, the U.S. public was denied an alternative news service—despite several attempts at entry from major programmers, e.g.

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[70] Stephen Keating, Cut Throat: High Stakes and Killer Moves on the Electronic Frontier Johnson Books, Boulder, CO., (1999), pp. 17-18, characterizes the incident as described in this paragraph.
[71] Joint Commenters. p. 8.
[72] Grossman, Lawrence. *"Bullies on the Block: Cable Television in New York City,"* Columbia Journalism Review, Jan. 11 1997.

NBC, into the 24 hour news channel business—until the consent decree in the merger of Time Warner and Turner forced the cable operators' hands.

The Federal Trade Commission's (FTC) consent decree[73] required the merged company to make available to at least 50 percent of its cable subscribers a second twenty-four hour news channel in which it held no financial interest. It seems odd that the FTC would have to force a cable system to put a second news channel on their system if the MSO had no incentives to the contrary.

In fact, the backroom strong-arming that Rupert Murdoch attempted to employ in getting carriage of his Fox News Channel (FNC) on Time Warner systems demonstrates just how powerfully vested these incentives are. Mr. Murdoch convinced New York City Mayor Rudy Giuliani to coerce Time Warner into carrying FNC, and the city threatened to revoke Time Warner's Manhattan cable franchise, refusing to approve the newly merged Time Warner/Turner franchise transfer until Time Warner agreed to carry FNC. Deputy Mayor Fran Reiter even proposed that Time Warner could simply bounce the History channel or the Discovery channel, and transfer them to one of its public/educational/governmental (PEG) channels to make room for FNC. Time Warner refused, and was asked by the city to grant a waiver to allow the city to put FNC on the PEG channel, since news, as Deputy Mayor Reiter claimed, was educational by nature.[74]

While Fox was battling to get on to TCI systems, John Malone and TCI had no problem launching a libertarian-slanted public affairs show in 1996 on all TCI systems called *Damn Right*. The show, which discussed subjects such as ending income taxation,

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[73] Federal Trade Commission, In the Matter of Time Warner Inc., *et al.*; *Proposed Consent Agreement with Analysis to Aid Public Comment.* Sep. 25, 1996.
[74] Grossman at 20.

arose mysteriously at the same time as TCI was booting The 90s Channel, a leftist news program, off of seven TCI systems by imposing a massive rate hike, one which The 90s Channel could not afford.[75] While the controversy surrounding this 'coincidence,' coupled with *Damn Right's* lack of success did lead to the removal of the show, what TCI's decisions indicate about their motivations is clear – serve yourself and your company above all.

Another example of discriminatory carriage decisions by TCI took place in 1997 when VH1, one of Viacom's top music video channels, was removed from 2 million TCI homes and its big sister channel, MTV, was removed from another 700,000 homes, all without prompting from the viewership.[76] So outraged were these viewers, most of whom lived in areas where there was no other cable operator choice, that letters began to pour in and musician celebrities, like John Mellencamp, organized summit-style protests. TCI was struggling economically and decided that these channels did not make them enough money, though they were two of the more popular channels on the dial. In the end, TCI was forced to reinstate the two music video channels, but not without exposing their treacherous tendencies.

The purpose and impact of the exercise of market power goes beyond favoring affiliated programming. It also has the effect of undermining competing distribution. Large MSOs gain a competitive advantage by paying much lower prices for programming or preventing unaffiliated programmers from making their programming available to alternative delivery systems.

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[75] Keating, Stephen. Cutthroat, p. 72 & Waterman/Weiss. Vertical Integration in Cable Television, p. 156
[76] Keating, Stephen. Cutthroat, p. 188

As Dertouzos and Wildman demonstrate, the dominant, integrated firms get programming deals that are far more favorable than costs savings would justify. Other analyses demonstrate additional favorable aspects of such deals including "most favored nation" clauses from programmers an MSO as good a price as any other operator pays for programming, although the dominant MSOs, Time Warner and TCI are frequently excluded since the biggest get the best deals.[77] Other examples of anticompetitive conduct include efforts to impose or obtain exclusive arrangements, price discrimination, and "dial disadvantage."[78]

Exclusive arrangements, refusals to deal for programming due to loopholes in the law requiring non-discriminatory access to programming,[79] tying arrangements,[80] and denial of access to facilities[81] prevent competing technologies from obtaining programming, [82] as well as preventing competition from developing within the cable industry.[83] Even where the

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[77] McAdams, John M. Higgins, "Hangover from Takeovers," *Broadcasting & Cable,* April 19, 1999.

[78] Competitive Issues in the Cable Television Industry, Subcommittee on Antitrust, Monopolies and Business Rights, Committee on the Judiciary, United States Congress, March 17, 1988. More recently, for example, The Time Warner-Turner merger as originally proposed included preferential treatment for TCI (see "Separate Statement of Chairman Pitofsky and Commissioners Steiger and Varney," In the Matter of Time Warner, File No. 961-0004. Efforts to exclude non-affiliated programs have also been in evidence, as Viacom's most popular programming (MTV) has been bumped.

[79] The loophole will be terrestrial transmission to regional clusters, thereby avoiding the requirement to provide non-discriminatory access to satellite delivered programming. Bell South gives examples of Comcast in Philadelphia and Time Warner in Orlando (p. 5). Ameritech cites Cablevision in New York (p. 8). A similar process seems to be developing in Detroit (see).

[80] Bell South gives examples including NBC/CNBC, Scripps Howard/Home and Garden (p. 5).

[81]Testimony of Michael J. Mahoney on Behalf of C-TEC Corporation Subcommittee on Telecommunications, Trade and Consumer Protection, Committee on Commerce, U.S. House of Representatives, July 29, 1997.

[82] "Statement of William Reddersen on Behalf of Bell South Enterprises (hereafter, Bell South), p. 4, cites examples of suspected exclusive arrangements involving Eye on People, MSNBC, Viacom, and Fox, as does "Testimony of Deborah L. Lenart on Behalf of Ameritech (hereafter, Ameritech), Subcommittee on Telecommunications, Trade and Consumer Protection, Committee on Commerce, U.S. House of Representatives, July 29, 1997, p. 7.

[83] HBO, a subsidiary of Time, played a key role in the effort to prevent TVRO operators from obtaining programming (see Chan-Olmsted, op. cit., at 11), and the effort to sell overbuild insurance (Competitive Issues in the Cable Television on Industry, Subcommittee on Antitrust, Monopolies and Business Rights, Committee on the Judiciary, United States Congress, March 17, 1988, at 127, 152-174. The current efforts to impose exclusive arrangements have raised numerous complaints from potential competitors (see for example

large MSOs do not have direct ownership of video services, they have obtained exclusive arrangements, thereby denying competitors and potential competitors access to programming.[84] The exclusionary tactics apply not only to head-to-head cable operators and satellite providers, but also to DSL-based providers seeking to put together a package of voice, video, and data products.[85]

Because the dominant MSOs are so large, they can influence important programmers not to sell to competitors and potential competitors. As the Commission noted, Ameritech and the WCA found that they were cut off from programming.[86] One of the more prominent examples was summarized in the recent program access proceeding extended to retransmission of broadcast.[87]

Ordover fails to recognize that a primary driving force behind clustering is the leverage it gives to incumbents to deny programming to overbuilders.[88] As noted in our initial comments, Comcast has shifted some sports programming to terrestrial delivery, thereby avoiding the open access requirement of the 1992 statute. As cable operators become larger and more clustered, this strategy will become increasingly attractive to them.

"Statement of William Reddersen on Behalf of Bell South Enterprises (hereafter, Bell South)," and "Testimony of Deborah L. Lenart on Behalf of Ameritech (hereafter, Ameritech)," Subcommittee on Telecommunications, Trade and Consumer Protection, Committee on Commerce, U.S. House of Representatives, July 29, 1997.

[84] Everest, p. 6, vies a different example.

[85] "Comments of the Competitive Broadband Coalition," *In the Matter of Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Development of Competition and Diversity in Video Programming Distribution: Section 628 (c)(5) of the Communications Act: Sunset of Exclusive Contract Prohibition*, Federal Communications Commission, CS Dkt. No. 01-290, December 3, 2001, p. 11.

[86] FNPRM, para. 28

[87] "Joint Comment," p. 8.

[88] *RCN Telecom Service of New York, Inc. v. Cablevision Corp., et. al,* Docket No. CS01-127; *DIRECTV v. Comcast; EchoStar v. Comcast.* Problems can also occur on an event-by-event basis (see "Comments of Everest Midwest Licensee LLC dba Everest Connections Corporation," *In the Matter of Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Development of Competition and Diversity in Video Programming Distribution: Section 628 (c)(5) of the Communications Act: Sunset of Exclusive Contract Prohibition*, Federal Communications Commission, CS Dkt. No. 01-290, December 3, 2001, p. 4; "comments of Gemini Networks, Inc.," p. 3.)

Specific areas where such programming has been denied are Phoenix, Kansas, Philadelphia and New York. The denial of access to marquee sport programming can have a devastating effect, with satellite providers in markets where foreclosure has occurred achieving a market penetration only one-quarter of the national average.[89] Small cable operators give examples of such discrimination that takes place in spite of the program access rules and make a strong case that larger entities have larger incentives to discriminate.[90]

Integrated MSOs wield immense power against smaller cable companies, exploiting loopholes in the program access rules.[91] For the smaller entities, the current refusals to deal are not limited to sports programming. Other services have been denied, such as video on demand.[92] This extends to leverage against retransmission rights.

Programmers face a parallel threat. Large MSOs can threaten to withhold access. The most outrageous offense may have come in 1990 when The Learning Channel (TLC)

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[89] Joint Comments, In the Matter of Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Development of Competition and Diversity in Video Programming Distribution: Section 628 (c)(5) of the Communications Act: Sunset of Exclusive Contract Prohibition, Federal Communications Commission, CS Dkt. No. 01-290, December 3, 2001 p. 14.

[90] "Comments of the American Cable Association, *In the Matter of Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Development of Competition and Diversity in Video Programming Distribution: Section 628 (c)(5) of the Communications Act: Sunset of Exclusive Contract Prohibition*, Federal Communications Commission, CS Dkt. No. 01-290, December 3, 2001.

> As discussed above, exclusive programming contracts will offer major MSOs opportunities to increase competitive advantage, maximize profits, and increase company value. Absent restraint, rational MSOs will respond to those economic incentives and enter into exclusive distribution arrangements. The Commission can safely assume that these consequences would follow a complete sunset of the prohibition on exclusive contracts. As discussed below, outside of Section 628(c)(2)(D), programming is already being withheld from small cable companies.

[91] ACA, p. 15. "Comments of Braintree Electric Light Department," In the Matter of Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Development of Competition and Diversity in Video Programming Distribution: Section 628 (c)(5) of the Communications Act: Sunset of Exclusive Contract Prohibition, Federal Communications Commission, CS Dkt. No. 01-290, December 3, 2001.

[92] Everest, p. 6.; "Comments of Qwest Broadband Services, Inc., *In the Matter of Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Development of Competition and Diversity in Video Programming Distribution: Section 628 (c)(5) of the Communications Act: Sunset of Exclusive Contract Prohibition*, Federal Communications Commission, CS Dkt. No. 01-290, December 3, 2001, p. 4.

was being sold. TLC is a popular channel that is very valuable to any cable dial in terms of the public service and information it provides. Lifetime appeared to be the highest bidder, offering $40 million, and thought for sure they would acquire the network. TCI, though, threatened to remove it entirely from their systems if the channel was not sold to them[93]. However, TCI offered substantially less money, and effectively lost the bidding war to Lifetime. Daunted by the prospect of having their network disappear, at least before the eyes of TCI's tens of millions of viewers, TLC was sold to TCI and Lifetime was left mistreated and TLC-less. This illustrates how the largest MSO can leverage the programming market, to maximize profits and control the flow of programming.

Another instance of the operators tampering with programming revolved around the home shopping network boom. The early 90s were spent consolidating this branch of cable TV after the initial channels exploded with profits. What started as 35 channels, owned and operated by various people, was transformed into 4 channels (Home Shopping Network, HSN II, QVC, and QVC Fashion) all run by cable operators, with TCI owning a major stake in all four.[94] When nearly three dozen home shopping channels existed, the home shopping industry resembled a mall, with choices galore and price differentiation. Unfortunately, such a consumer-friendly environment did not appeal to the cable operators who stood to profit far more from a viewer's inability to find a lower price. With TCI owning part of all four channels, it effectively was positioned to limit the competitiveness of these channels.

A final example of TCI's programming offenses can be found in the electronic programming guide sector. With News Corp. owning TV Guide, the largest publication of

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[93] Watermna/Weiss. Vertical Integration in Cable Television, p. 65 & Davis, L.J. The Billionaire Shell Game, p. 97

[94] Waterman/Weiss. Vertical Integration in Cable Television, p. 73 & Davis, L.J. The Billionaire

its kind by a mile, and Bill Gates working avidly to get his hands in the on-screen channel selection pie, TCI offered Rupert Murdoch 2 billion dollars to try to monopolize the programming guide sector. News Corp. agreed and TCI came away with 44 percent control of the sector, with News Corp.'s share at 40 percent. After News Corp. bought out TVSM, publisher of Total TV and the Cable Guide, there were no possible competitors left[95]. The merged companies threw the little assets TVSM accounted for into their anti-competitive cauldron and took, in practice, complete control of the on-screen TV Guide market. This fit nicely with the stranglehold TCI already had on the cable operator world.

VI. PROGRAMMING DEVELOPMENT

A. RIVALROUS IMITATION IS NOT PRODUCT DIFFERENTIATION

The issue of product differentiation discussed above is more complex than the cable theorists admit and it provide a good starting point for discussion of the cable commenters' programming analysis. Different categories of programming – such as news versus entertainment – are clearly differentiated. There is also an effort to create differentiation within program categories through branding. Hit comedies are distinct and the producers of such programs may have bargaining power. At the same time, there is a process of rivalrous imitation in the industry.

> [R]ivalry in the broadcast network television industry have been clearly mapped… patterns of imitation that might be described as rivalrous imitation among the television networks. Program types that were popular, as indexed by ratings, were more likely to be imitated, while less popular program types were not. Imitation takes the form or emulating programs with high ratings and also spin-offs of successful series. As evidenced by other studies, the

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Shell Game, p. 143

[95] Keating, Stephen. Cutthroat, p. 257

result of such rivalrous imitation among television networks was a decline in program diversity.[96]

In the previous section this process has been demonstrated by examining foreclosure and discrimination of substitute program networks. This section reinforces that conclusion, particularly in the context of creating programming through spin-offs and the use of content from the "cutting room floor" of existing program networks.

Programmers who have hit shows that are distinctive and well branded may have bargaining power, but how new entrants get into that position is unclear, especially when integrated entities can foreclose the market or discriminate against new entrants. There is very little entry by unaffiliated entities and very little churn in the ownership of programming in the industry. We start our analysis with the popular networks, and work down from there.

B. A SMALL NUMBER OF FIRMS DOMINATE THE MARQUEE

The Commission's annual reports provide a basis for assessing the movement in the most popular program networks (see Exhibit VI-1). To be consistent, we identified the top 20 networks by subscription and the top 15 by prime time ratings in the First and Eighth Annual Reports on Video Competition. These networks account for over one-half of cable's prime time viewers and about one-third of cable's all day viewers. There are 26 networks on the two lists. Of these, 23 are on both lists. All but one of them (the Weather Channel) has ownership interest of either a cable MSO or a broadcast network. In other words, it

[96] John Dimmick and Daniel G. McDonald, "Network Radio Oligopoly, 1926-1956: Rivalrous Imitation and Program Diversity," *Journal of Media Economics*, 14 (4), p. 201, citations omitted.

EXHIBIT VI-1: CONCENTRATION OF MARQUEE PROGRAMMING

NETWORK	1993 SUBS RANK	1993 PRIME TIME RANK	2000 SUBS	2000 PRIME TIME RANK	OWENRSHIP
ESPN	1	4	4	12	ABC/DISNEY
CNN	2	12	11		AOLTW
USA	3	1	5	2	LIBERTY
NICK	4	6	10	6	CBS/VIACOM
DISCOVERY	5	10	2	8	LIBERTY
TBS	6	2	1	5	AOLTW
TNT	7	3	3	3	AOLTW
CSPAN	8		12		CABLE CONSORTIUM
MTV	9	13	15	14	CBS/VIACOM
LIFETIME	10	7	9	1	ABC/DISNEY
TNN	11	11	13	10	CBS/VIACOM
FAMILY	12	8	6		FOX/ABC/DISNEY
A&E	13	9	7	7	ABC/DISNEY
WEATHER	14		13		
HEADLINE NEWS	15		17	17	AOLTW
CNBC	16		18		NBC
VH-1	17		20		CBS/VIACOM
QVC	18		16		COMCAST
AMC	19		19		CABLEVISION
BET	20	14		19	CBS/VIACOM
WGN	21			9	LOCAL BCAST
CARTOON		5		4	AOLTW
SCI-FI	1	5		16	LIBERTY
TLC			14	13	LIBERTY
HISTORY				11	ABC/DISNEY
FX				15	FOX

FCC, *In the Matter of the Status of Competition in the Market for the Delivery of Video Programming*, First and Eighth Reports.

appears that you must either own a wire or have transmission rights to be in the top tier of program networks. Four entities – AOL, Liberty, ABC/Disney and CBS/Viacom account for 20 of these networks.

C. FIRMS WITH DISTRIBUTION RIGHTS DOMINATE THE TUNER

The dominance of a few entities is not restricted to the most popular shows that were generally established prior to the passage of the 1992 Act. As Exhibit VI-2 shows, of the 39 new networks identified by the cable commenters that have been created since 1992, only 6 do not involve ownership by a cable operator or a national TV broadcaster. Sixteen of these network have ownership by the top four programmers. Eight involve other MSOs and 10 involve other TV broadcasters.

These numbers contradict the claim that there has been a dramatic change in the programming environment. As Exhibit VI-3 shows, the number of independent networks as a percentage of the total has remained about the same, as has the number of subscribers to independent networks. Things may not have become worse — during a time when no MSO was larger than the Commission's previous 30% ownership limit — but they certainly have not become much better. The claim that the situation would not become worse if the limit is breached is not supported by the discrimination analysis.

D. IDENTIFIED STRATEGIES FOR "SUCCESSFUL" ENTRY DO NOT UNDERMINE THE BASIS OF THE HORIZONTAL LIMIT

Cable commenters attempt to show that there are a variety of strategies available for entry into programming that make a horizontal limit unnecessary, either because costs of entry are small or success can be achieved with an extremely small number of subscribers.

EXHIBIT VI-2: THE LACK OF INDEPENDENT ENTRY

NETWORK	LAUNCH	OWNER
Cartoon Network	1992	MSO
Sci-Fi Network	1992	MSO
Turner Classic Movies	1994	MSO
Independent Film Channel	1994	MSO
WAM! Kidz Network	1994	MSO
Much Music USA	1994	MSO
Golf Channel	1995	MSO
Outdoor Life	1995	MSO
Great Amer.	1995	MSO
Animal Planet	1996	MSO
CNNFI	1996	MSO
CNNSI	1996	MSO
BET Jazz	1996	MSO
WE: Women's Entertainment	1997	MSO
Discovery Health Channel	1998	MSO
Tech TV	1998	MSO
Style	1999	MSO
Oxygen	2000	MSO
TV Land	1996	BCAST
Soapnet	2000	BCAST
Nat. Geog	2001	BCAST
ESPN 2	1993	BCAST
FX Network	1994	BCAST
History Channel	1995	BCAST
ESPN Classic	1995	BCAST
Fox News Channel	1996	BCAST
MSNBC	1996	BCAST
Speedvision	1996	BCAST
ESPNews	1996	BCAST
Fox Sports	1996	BCAST
LMN	1998	BCAST
Home & Garden	1994	BCAST
Food	1993	BCAST
Flix	1992	IND
Game Show Network	1994	IND
Bloomberg	1995	IND
Health	1998	IND
Goodlife	1998	IND
Ovation	1998	IND

Sources:

McLaughlin, *An Economic Analysis of Subscriber Limits*, Table 2, *Comments of the Writeres Guild of America Regarding Harmful Vertical and Horizontal Integration in the Television Industry,* Appendix A. FCC, *In the Matter of the Status of Competition in the Market for the Delivery of Video Programming*, Eighth Report, Tables D-1, D-2, D-3.

EXHIBIT VI-3:

NUMBER AND CURRENT SUBSCRIBERSHIP OF NETWORKS EXISTING BEFORE AND LAUNCHED SINCE THE 1992 ACT

	PRE-1992 NETWORKS		POST-1992 NETWORKS	
	#	SUBS	#	SUBS
INDEPENDENT	6	20	7	31
BROADCAST-AFFILIATES	14	55	13	72
MSO-AFFILIATED	19	36	18	70

See Exhibit VI-2.

Joskow and McLaughlin identify eleven networks that have achieved substantial success since the passage of the 1992 Act. Every one of these is affiliated with an entity that has guaranteed carriage (see Exhibit VI-4). Five of these are also associated with a strategy of launching with scraps from the cutting room floor/or as a spin off of a sister channel. In the case of the spin offs, they use the name of the successful show and focus on a subcategory of issues or ideas originally covered by the hit show (CNN begets CNN Headline News and CNNFI). In the case of cutting room floor shows (particularly news) they use content created but not used by the hit show, in addition to simply reusing content that was already used. Viewers receive a ten-second sound byte on they broadcast news and a three minute interview on the cable news.

Two of these program networks involve early buy-outs. An additional three networks that were also affiliated with MSO/Broadcasters also involved launch through the cutting room floor/sister channel strategy. There are three networks on this list with fewer than twenty million subscribers, two associated with broadcasters and one with an MSO. Three have disappeared. The average number of subscribers at the time of a sales transaction was 22 million. Although five of the networks sold out at less than 20 million, two of those resold. Of the three networks that were sold with fewer than 20 million subscribers, all are defunct. They have been acquired by dominant programmers in the same category and have ceased to exist.[97]

[97] Linda Moss, "DCI Buys Some Health," *Multichannel News*, September 3, 2001; David Zinkin, "America's Talking."

EXHIBIT VI-4: SELL-OUT/BUY OUT OF NEW ENTRANT NETWORKS

NETWORK	OWNER	SALE DATE	SUBS	EXISTS
FX	BCAST	10/95	25.0	Y
AMERICA'S TALKING	BCAST	12/95	20.0	N
FOOD		5/96	25.8	Y
GOLF	MSO	8/96	3.8	Y
		2/00	30.0	
		5/01	33.4	
TECH/TV	MSO	6/97	9.0	Y
		11/99	14.0	
CLASSIC SPORTS		9/97	10.4	N
EYE ON PEOPLE	MSO	12/98	11.0	N
SPEEDVISION	BCAST	05/01	42.0	Y
OUTDOOR LIFE	MSO	05/01	36.0	Y

McLaughlin, *An Economic Analysis of Subscriber Limits*, Table 4, Joskow/Mclaughlin argue that the ability of a programmer to sell out far short of 30 million subscribers improves the economics of entry because it lowers the risk. The argument is misleading at best, and contrary to the purpose of the ownership limit. First, if programmers encounter discrimination and have to sell out, at a much lower rate of profit than dominant firms, this hardly indicates a healthy industry.[98] If the entrant is forced to sell out to the dominant firm, there is no gain in diversity.

The analyses in Exhibits VI-5 and VI-6 clearly support our conclusion that independent programmers need to achieve 20 to 30 million subscribers if they are ultimately going to succeed. The existence of a potential buyout/sellout strategy does not change this observation. Exhibit VI-5 shows the pattern of subscribers and launch dates for affiliated entities for basic networks that are more than three years old. Exhibit VI-6 shows similar data for unaffiliated networks. These include all of the networks identified in the cable industry comments. Since the data set ends in 2000, we look at networks launched in 1997 or earlier. The message is clear: almost no networks survive past three years with fewer than 20 million subscribers, especially for the independents.

It is certainly true that a number of very small, predominantly regional networks exist. These are overwhelmingly cutting room floor or sister channel strategies. We have identified over 110 such entities (see Exhibit VI-7). They account for about 5 percent of all subscribers. Of these network, over half are affiliated with MSOs. Another 23 are regional sports and news channels, almost all affiliated with broadcasters. Six are foreign language networks. Four are devoted to reruns, which cannot be the source of original programming.

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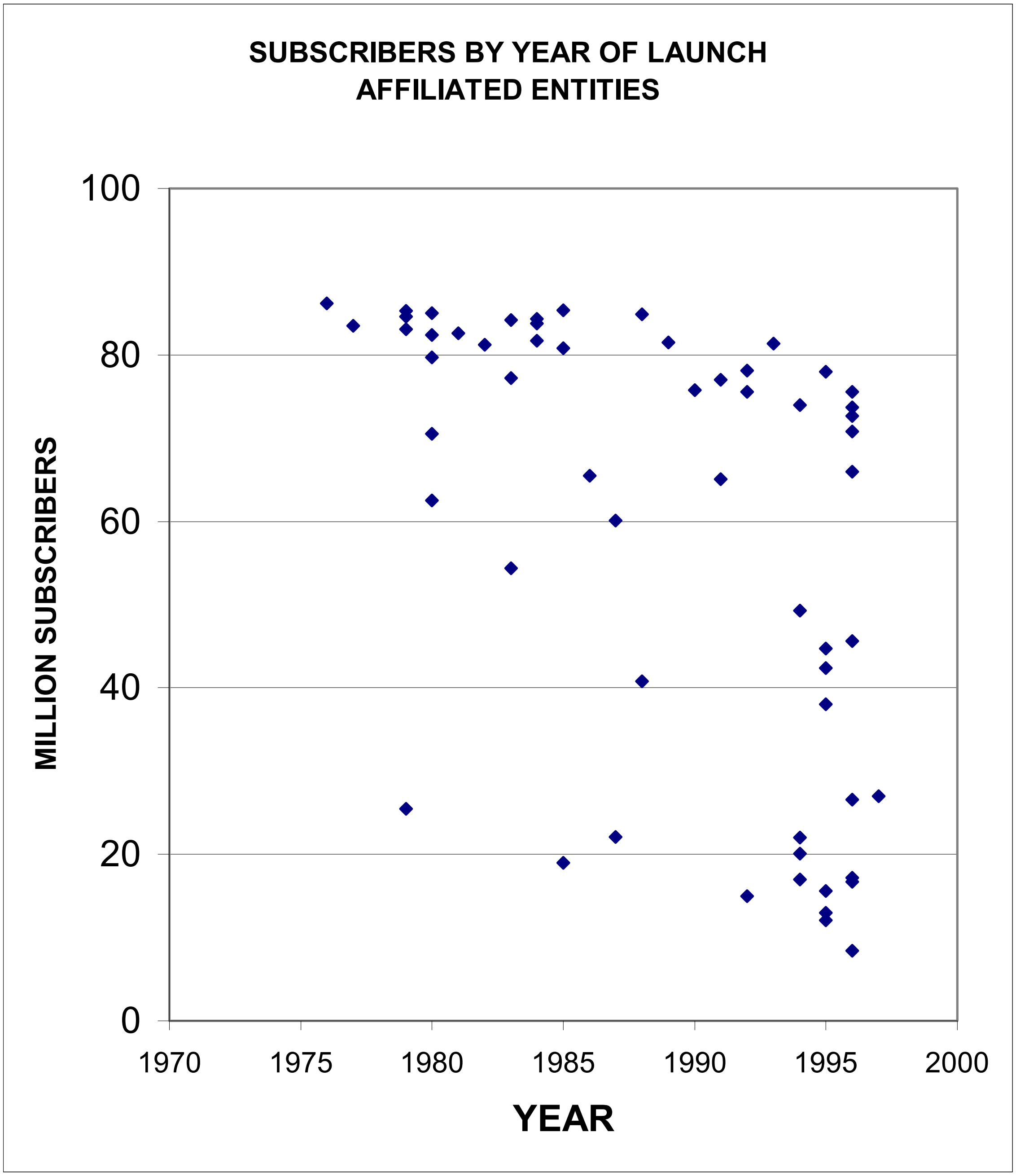
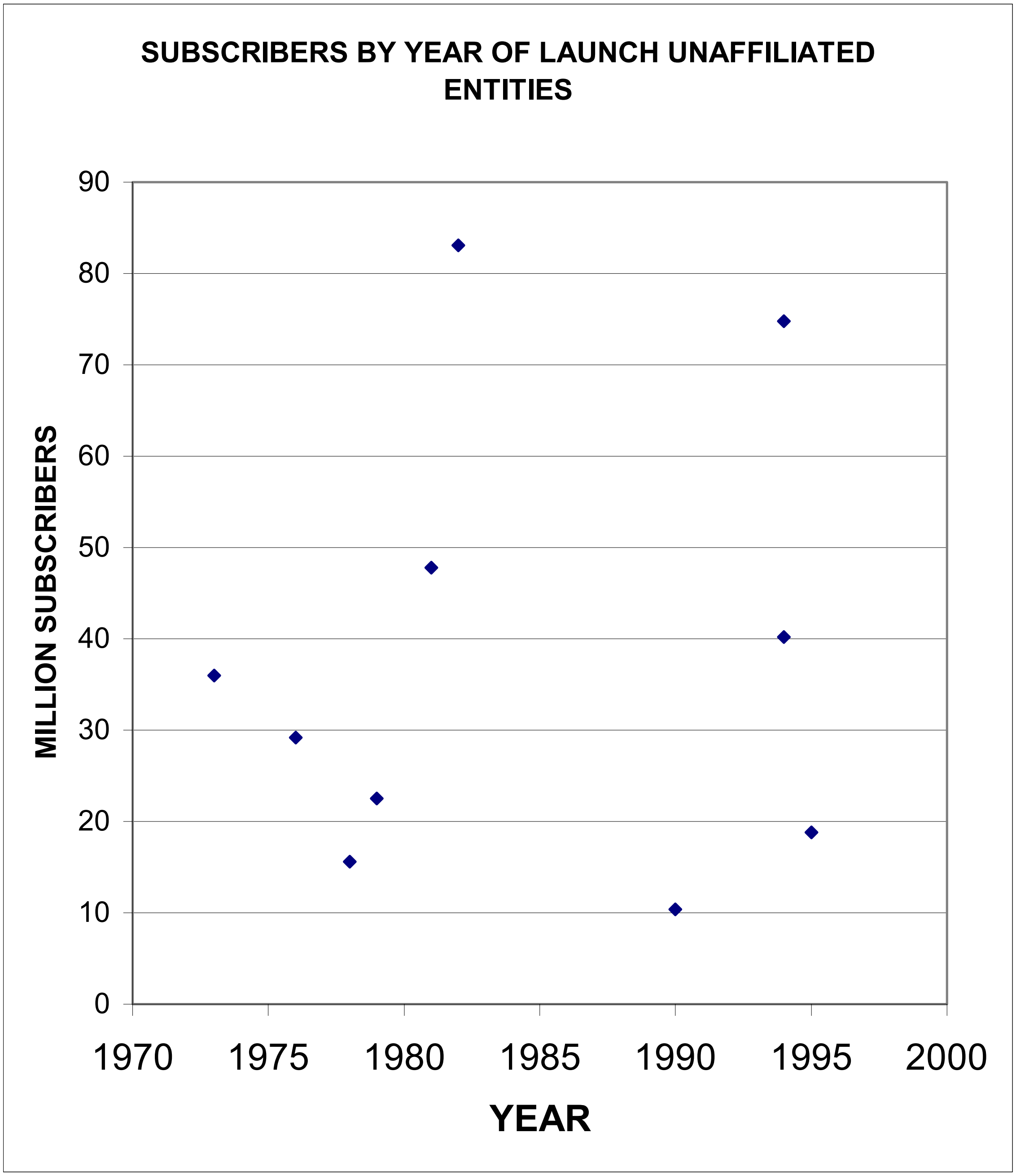
[98] Moss.

EXHIBIT VI-5:



Comments of the Writeres Guild of America Regarding Harmful Vertical and Horizontal Integration in the Television Industry, Appendix A. FCC, *In the Matter of the Status of Competition in the Market for the Delivery of Video Programming*, Eighth Report, Tables D-1, D-2, D-3, Cahiers, TVInsite, *Network Subscriber Counts*, September 17, 2001.

EXHIBIT VI-6:



Comments of the Writeres Guild of America Regarding Harmful Vertical and Horizontal Integration in the Television Industry, Appendix A. FCC, *In the Matter of the Status of Competition in the Market for the Delivery of Video Programming*, Eighth Report, Tables D-1, D-2, D-3, Cahiers, TVInsite, *Network Subscriber Counts*, September 17, 2001.

EXHIBIT VI-7: SMALLER NETWORKS

NETWORK	OWNER	SUBS
FMC	F	13
Goodlife		12.2
outdoor channel	L	12.1
CNNIFI	W	10.8
Pax TV		10.7
International		10.4
Recovery Network		10.2
BET Jazz	V	8.4
MSGN	C	7.6
America's Store		6.9
Fox Sports Net South	F	6.8
WB100+		6.5
Turner South	W	5.6
Ovation		5.5
Sunshine Network		5.5
Fox Sports Net Southwest	F	5.3
The California Channel		5.2
Fox Sports Net West	C,F	5
Comcast SportsNet/D.C. Area	CC	4.8
Shop At Home		4.2
CN8 – The Comcast Network	CC	4
V Games		4
Fox Sports Net New England	C,F	3.8
Fox Sports Net Chicago	C,F	3.4
Fox Sports Net New York	F	3.4
Fox Sports Net Florida	F	3.3
C-SPAN 3	CG	3.2
Fox Sports Net Bay Area	C,F	3.2
Fox Sports Midwest	C,F	3.1
KTVT		3
Research Channel (new)		3
Pennsylvania Cable Network		2.9
comcast SportsNet/Philadelphia	CC	2.8
Gems Television		2.6
New England Cable News		2.5
WPIX		2.5
Fox Sports Net Detroit	C,F	2.4

Fox Sports Net Northwest	C,F	2.4
ESPN Now		2.3
Fox Sports Net North	C,F	2.3
Fox Sports Net Ohio	C,F	2.2
Fox Sports World Espanol	F	2.2
Metro Channels		2.2
Fox Sports Net Pittsburgh	F	2.1
NorthWest Cable News		2.1
Boomerang		2
Fox Net	F	2
Inspirational Life		2
New York 1 News		2
Cable TV Network of NJ		1.8
ChicagoLand Television News		1.7
FamilyNet		1.7
Fox Sports Net Rocky Mountain	F	1.7
News 12 New Jersey		1.7
Fox Sports Net Cincinnati	F	1.6
Michigan Government Television		1.6
Comcast Sports Southeast	CC	1.5
NBA.com TV		1.5
Bay TV		1.4
HTV		1.4
Philly TV News		1.4
Empire Sports Network		1.3
Fox Sports Net Arizona	C,F	1.3
MediaOne 3		1.2
exas Cable News		1.2
WSBK		1.2
B-Movie		1.1
NewsChannel 8		1.1
Florida's News Channel		1
KTLA		1
Bay News 9		0.9
Chinese Communications		0.8
News 12 Long Island		0.8
Ohio News Network		0.8
Pittsburgh Cable News Channel		0.8
Arabic Channel		0.7
Central Florida News 13	W	0.6

Orange County NewsChannel		0.6
Nickelodeon Games & Sports	V	0.5
The Ecumenical Channel		0.5
The Word Network		0.5
Trio		0.5
World		0.5
CNN en Español	W	0.3
News 12 Connecticut		0.3
News 12 The Bronx		0.3
News 12 Westchester		0.3
News 8 Austin		0.3
Oasis TV		0.3
Celtic Vision		0.2
Mid-South News Network		0.2
MTV Latin America	V	0.2
Six News Now		0.2
Video Rola		0.2
Rarities Exchange		0.1
Arizona News Channel		0
Automotive Television Network A191		0
Bonjour USA		0
California Channel		0
Canal Sur		0
Casa Club TV		0
Cine Latino		0
Comcast SportsNet	CC	0
Comcast SportsNet Mid Atlantic	CC	0
County Television Network San Diego		0
Ecumenical Television Channel		0
Fox Sports Cincinnati	C,F	0
Fox Sports Intermountain West	C,F	0
Fox Sports Net 2	C,F	0
Latin TV		0
Mas Arizona		0
Puma TV		0
Television Games Network		0
V Chile		0

KEY FOR OWNERSHIP

D= DISNEY
C=CABLEVISION
CC=COMCAST
CG=CABLE GROUP
CX= COX
F=FOX
LAND=LANDMARK
L=LIBERTY
N=NBC
UV=UNIVISION
LAND=LANDMARK
V=VIACOM
VC=VULCAN
= UNAFFILIATED

Comments of the Writeres Guild of America Regarding Harmful Vertical and Horizontal Integration in the Television Industry, Appendix A. FCC, In the Matter of the Status of Competition in the Market for the Delivery of Video Programming, Eighth Report, Tables D-1, D-2, D-3, Cahiers, TVInsite, Network Subscriber Counts, September 17, 2001

In addition, the network has financial power to leverage sports rights, spreads coverage over the network and cable channel. Sports involves unique events—marquee programming—different from all other "original" programming (except in breaking news events). Obviously, some sporting events are of greater interest in a particular community (i.e. home teams) than on a nationwide basis, and therefore would not need more than 20 million subscribers to survive in a regional market—high local interest would provide enough demand to ensure local cable carriage.

E. CONCLUSION

Early and prominently in the cable industry comments, their experts make the argument that even if there is discrimination or the exercise of market power, the struggle is "only" about economic the division of quasi-rents between cable system owners and television programmers. Ordover and Joskow/McLaughlin argue that public policy has no business taking sides in such a dispute. This section shows that this claim is wrong for a simple reason; public policy should be concerned about these rents, even if they are purely economic, because Congress created these rents by establishing policies for access to cable distribution. Since Congress created the rents by establishing carriage rights, it can and should require the Commission to impose limits to create a modicum of "fairness" in the competition for those rents. That is what a limit on the market power of large MSOs accomplishes. Congress bestowed a special status on broadcast licensees, who have specific obligations to promote educational programming, serve community needs, and meet other public interest programming obligations.

Congress recognized that this policy was about more than just the division of economic rents. The division of quasi-rents between cable operators and program producers deeply affects media diversity and civic discourse. If cable operators can use their market power to diminish the quality of competing points of view and suffer little economic harms as a result, they reduce the quality of civic discourse. From the point of view of diversity in civic discourse, public policy is concerned about who has an opportunity to produce the shows, because independent owners are more likely to produce diverse and antagonistic content. Structural policies that seek to provide opportunities to produce programming accomplish the goal of promoting diverse and antagonistic sources of information without straying into the realm of dictating content.