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November 11, 2009

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: National Broadband Plan (GN Docket 09-51)

Dear Ms. Dortch:

Yesterday Eric Einhorn and I, both with Windstream, spoke with FCC staff members Elise Kohn, Elizabeth McCarthy, and Jennifer Flynn about initiatives to increase broadband adoption. We described Windstream's broadband offerings and how we promote broadband subscribership. As part of efforts to bring more consumers online, we recommended that federal policymakers consider developing new government funding mechanisms, and prohibit cable television operators from banning competing broadband providers' advertisements at the local level. A description of Windstream's proposed funding mechanisms, along with other documents provided in the meeting, are attached.

Please feel free to contact me if you require additional information.

Sincerely,

/s/

Jennie Chandra

Attachments

cc: Elise Kohn
Elizabeth McCarthy
Jennifer Flynn

GOVERNMENT MECHANISMS FOR INCREASING BROADBAND ADOPTION

	Non-Users Who Are Lifeline/Link Up Eligible	All Other Non-Users with HHI ≤ 300% of the Federal Poverty Line
Award Broadband Service Discount	• Award $20/month discount. • Supported service should offer advertised downstream speeds of at least 3 Mbps.	• Award $20/month discount for the first 3 months online. • Supported service should offer advertised downstream speeds of at least 3 Mbps.
Offer Broadband Initiation Discount	• Offer $100 to defray costs of installation, broadband equipment (other Internet access devices like computers), and/or tech support for setting up a new PC.	• Offer $100 to defray costs of installation, broadband equipment (other than Internet access devices like computers), and/or tech support for setting up a new PC.
Initiate Computer Ownership Program	• Serve as guarantor for lower credit class members who want to buy a computer using an installment plan. • Subsidize $200 of computer cost.	• Serve as guarantor for lower credit class members who want to buy a computer using an installment plan.

Note: Supply-side initiatives are excluded here, although efforts to increase broadband availability undoubtedly will lead to greater broadband adoption.

WINDSTREAM BROADBAND OFFERINGS*

(2003-Current)

	Service Offerings	Maximum Speeds**	Price***	Notes
2003	Broadband Lite	256Kbps/64Kbps	$ 35.00	
	Broadband - 1.5M	1.5 Mbps/128Kbps	$ 49.95	
2004	Broadband Lite	256Kbps/128Kbps	$ 35.00	
	Broadband - 1.5M	1.5 Mbps/384Kbps	$ 49.95	
2005	Broadband Lite	256Kbps/128Kbps	$ 35.00	Improved Upstream Speed
	Broadband - 1.5M	1.5 Mbps/384Kbps	$ 49.95	Improved Upstream Speed
	Broadband - 3.0M	3 Mbps/384Kbps	$ 54.95	Introduced New Speed Tier
2006	Broadband Lite	256Kbps/128Kbps	$ 29.95	$5 Price Decrease
	Broadband - 1.5M	1.5 Mbps/384Kbps	$ 39.95	$10 Price Decrease
	Broadband - 3.0M	3 Mbps/384Kbps	$ 44.95	$10 Price Decrease
	Broadband - 6.0M	6 Mbps/ 384Kbps	$ 54.95	Introduced New Speed Tier
2007	Broadband Lite	512Kbps/256Kbps	$ 29.99	Improved Speed Tier
	Broadband - 1.5M	1.5 Mbps/384Kbps	$ 39.99	
	Broadband - 3.0M	3 Mbps/384Kbps	$ 44.99	
	Broadband - 6.0M	6 Mbps/ 384Kbps	$ 54.99	
2008	Broadband Lite	512Kbps/256Kbps	$ 19.99	$10 Price Decrease
	Broadband - 1.5M	1.5 Mbps/384Kbps	$ 24.99	$15 Price Decrease
	Broadband - 3.0M	3 Mbps/384Kbps	$ 29.99	$15 Price Decrease
	Broadband - 6.0M	6 Mbps/ 384Kbps	$ 34.99	$20 Price Decrease
	Broadband - 12.0M	12 Mbps/ 768 Kbps	$ 39.99	Introduced New Speed Tier
2009	Broadband Lite	512Kbps/256Kbps	$ 19.99	
	Broadband - 1.5M	1.5 Mbps/384Kbps	$ 24.99	
	Broadband - 3.0M	3 Mbps/ 768Kbps	$ 29.99	Improved Upstream Speed
	Broadband - 6.0M	6 Mbps/ 768Kbps	$ 34.99	Improved Upstream Speed
	Broadband - 12.0M	12 Mbps/ 768 Kbps	$ 39.99	

* Broadband offerings prior to Windstream's creation in 2006 represent former Alltel wireline offerings.

** Maximum speeds available vary by region.

*** Prices available to customers subscribing to Windstream local phone service.
Prices do not reflect promotions or regional differences.

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THE COMPETITIVE EFFECTS OF A CABLE TELEVISION OPERATOR'S REFUSAL TO CARRY DSL ADVERTISING

*Hal J. Singer**

ABSTRACT

Many cable television operators routinely refuse to run local DSL advertising on their cable systems. Given that such conduct reduces the advertising profits of cable companies, a plausible purpose for such discriminatory refusals to deal is to limit their cable customers' information about competitive alternatives to their cable modem services. By banning local DSL advertisements placed on cable television, a cable television operator forecloses equally efficient rivals (DSL providers) in the broadband Internet access market from the most efficient form of advertising a broadband product (television advertising), as I prove here, and thereby impairs rivals' efficiency. To the extent that DSL providers cannot compete as effectively as they would in the absence of the ban, the ban allows cable television operators to raise the price of cable modem service and thereby reduce consumer welfare. Using a traditional antitrust analysis, I present evidence that local television advertising can be a separate product market (when it comes to marketing DSL), and that cable television providers have market power in that advertising market. I also present evidence that local television advertising on cable networks is the most efficient form of advertising for DSL providers. The potential anticompetitive effect of cable's ban on DSL advertising is to relegate DSL advertising to less efficient marketing channels, thereby allowing cable operators to charge higher prices for cable modem service. Such conduct thus raises obvious antitrust issues.

I. INTRODUCTION

Several major cable television operators, including Charter, Comcast, Cox, and Time Warner, have refused local DSL advertisements over cable networks since 2001, arguing that the First Amendment protects their right to do so,[1]

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[1] Although compelling a cable company to carry DSL advertising content implicates questions of free speech under the First Amendment, such questions lie beyond the scope of this article. It is worth noting, however, that the Supreme Court previously addressed an analogous compelled speech argument when cable operators filed suit to challenge a federal "must-carry" statute.

and that telephone companies can still reach cable customers via alternative media such as local broadcast television advertisements, national cable advertisements, radio, and billboards. In June 2001, the *New York Times* reported that Verizon's DSL advertisements were refused by Time Warner in New York City, and were turned down by Comcast in Philadelphia, New Jersey, and the Washington area.[2] SBC's DSL advertisements were refused by Charter in Newtown, Connecticut, and by Cox in Los Angeles and San Diego, were rejected by Time Warner in Austin, Houston, and San Antonio, and were turned down by Comcast in Danbury, Connecticut.[3]

In a letter from Comcast's CEO Brian Roberts to another cable company, Comcast stated that it refused DSL advertisements because such advertisements promoted services that competed directly with Comcast's cable modem service.[4] Although a cable television operator cannot dictate the advertising that appears on (1) national networks, (2) local affiliate stations of the national networks, or (3) national advertisements for cable stations, it can restrict the sale of local advertisements on cable systems. By restricting access in this way, cable operators prevent DSL providers from targeting their advertisements to a particular demographic group (for example, males between the age of 18 and 26 years) in a particular geographic location, and thereby prevent DSL providers from advertising their services in potentially the most efficient manner.

Comcast, the largest U.S. cable operator with 30.3 percent of all U.S. cable households, has taken a very aggressive stance toward DSL advertisements.[5] On January 28, 2003, Comcast's Corporate Ad Sales division issued an internal memorandum stating that it would not accept "DSL only"

The statute compelled cable operators to fill up to one-third of their cable channels with local broadcast television signals, thereby displacing the cable operator's own content selections for those particular channels. *See* Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102–385, §§ 4–5, 106 Stat. 1460, 1471–83 (1992). The Court ultimately upheld the statute under an intermediate scrutiny review. *See* Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 662 (1994) (holding that federal must-carry statute is subject to intermediate scrutiny as content-neutral regulation of speech); Turner Broad. Sys., Inc. v. FCC, 520 U.S. 180, 212, 215–16 (1997) (upholding constitutionality of federal must-carry statute because statute served important governmental interests unrelated to the suppression of free speech and did not substantially burden more speech than necessary).

[2] Seth Schiesel, *Cable Giants Block Rival Ads In Battle for Internet Customers*, N.Y. TIMES, June 8, 2001, at C1.

[3] *Id.*

[4] Mark P. Couch, *Qwest, Comcast clash on DSL ads: Phone firm alleges cable spots refused*, DENVER POST, Apr. 30, 2003, at C1.

[5] Comcast offers cable television and cable modem service in 12 of the 14 Western and Midwestern states where Denver-based Qwest is the main local telephone provider. According to Credit Suisse First Boston, roughly 67 percent of Qwest's telephone customers reside in areas Comcast serves. *See Qwest, Comcast Clash Over DSL Advertisements, USA Today Says*, BLOOMBERG NEWS, Apr. 19, 2004.

advertisements.[6] Comcast would only accept advertisements for bundles of telecommunications services, and only if those advertisements limited references to DSL service to 20 percent of the advertisement—that is, no more than six seconds for a 30-second spot.[7] Comcast also stated that it would ban any advertisements that demeaned cable services or mentioned prices.[8]

The DSL advertising ban was quickly enforced. On April 15, 2003, Comcast notified Qwest that Comcast would not accept a DSL advertisement in Albuquerque, New Mexico.[9] Qwest submitted DSL advertisements in four local markets during the week of May 12, 2003. These advertisements were rejected by Comcast in Seattle because they did not comply with Comcast's DSL advertising policy. The advertisements were initially approved by Comcast and ran in Denver, Salt Lake City, and Spokane. On May 20, 2003, Comcast pulled the advertisements in the three markets and sent Qwest an e-mail restating its policy.[10] In April 2004, Qwest sent Comcast a DSL advertisement that was to run in Seattle in May and June. Comcast rejected the advertisement on May 19, 2004, saying that "This spot – XQWS4033 is a DSL spot that we cannot air."[11]

This report seeks to evaluate these restrictions on DSL advertisements from a consumer welfare perspective. In Section II, I demonstrate the existence of a separate product market for local television advertising. This market is distinct from other local media channels, including radio, newspapers, and the Internet. Moreover, two independent analyses show that television advertising is the most efficient form of advertising for DSL providers:

- According to a Qwest marketing study, removing television advertising from a local media campaign reduces the frequency of exposure to the advertising campaign from 34 to 23 exposures per four-week interval. A hypothetical $862,000 DSL advertising campaign in the Denver area that includes television advertisements as part of the mix costs $15.15 per thousand impressions over the four-week period, whereas a campaign without television costs $22.63 per thousand impressions, which implies a savings of roughly 33 percent.
- An econometric analysis of Qwest's advertising expenditure and DSL subscriptions by week by market reveals that television advertising for

[6] Memorandum from Comcast, Acceptance Guidelines for Data Products ("DSL") (Jan. 28, 2003) (on file with author).

[7] *Id.*

[8] *Id.*

[9] Email from Comcast's Donna Ferguson to Initiative Media's Lorie Furay (Apr. 15, 2003) (on file with author).

[10] Email from Comcast's John J. Tierney Jr. to Initiative Media's Jim Pallini (May 20, 2003) (on file with author).

[11] Email from Comcast's Marita Jackson to Initiative Media's Yasemin Tedeschi (May 19, 2004) (on file with author).

> DSL generates the greatest return on advertising expenditure. I find that the first dollar spent on a DSL television advertisement generates more DSL subscriptions (0.00382) by the second week of the campaign than print (0.00118) but slightly less than other media (0.00408). More importantly, DSL television advertising yields the greatest returns over a five-week period. By summing the coefficients over the five-week period, I find that a DSL television advertisement generates 11.75 new subscriptions *for the first* $1,000 spent, DSL print advertising generates 1.8 new subscriptions *for every* $1,000 spent (but 7.7 new subscribers over the subsequent three-week period), and all other media advertising generates 0.18 new subscriptions *for every* $1,000 spent (but 4.1 new subscribers over the subsequent week). This analysis clearly shows that television is the most efficient way to advertise DSL.

In Section III, I show that cable operators possess significant market power in the market for local television advertising. DSL advertising must be local to be cost-effective because DSL operators only offer their service in local areas rather than nationwide. Given cable's large share of television viewers, the viewers' growing tendency to choose basic cable channels over broadcast channels, and the inability of national cable networks to sell advertising on a local basis, a cable operator can offer far more cost-effective advertising to a DSL provider. I show how the inclusion of cable as part of a television campaign decreases advertising costs. By allocating 25 percent of the television advertising budget to local cable channels rather than local broadcast stations, Qwest's audience reach increases by 4 percent (from 79 percent to 83 percent). This added reach combined with a smaller budget to reach the same total gross rating points over a four-week period translates into a cost per impression (CPM) of $16.44 versus a CPM without cable of $17.82, which represents an 8 percent cost saving.

In Section IV, I outline the relevant anticompetitive theory—namely, cable's refusal to sell television advertising to DSL operators impairs the efficiency of those DSL operators, and thereby weakens their ability to compete with the cable operators in the market for broadband Internet access. Such a discriminatory refusal to deal cannot be justified by any plausible efficiency gain because carrying DSL advertisements is no more costly or difficult than carrying any of the other advertisements that cable operators actively solicit. This evidence also reinforces the conclusions above on market definition. For if the market were broader than local television advertising, then DSL operators would have equally effective means of advertising that they could substitute for local cable television, and the only effect of refusing to carry DSL advertisements would be to decrease the profits of cable operators on television advertising. I can thus infer, from the fact that cable operators are willing to deny themselves these advertising profits, that denying cable advertising to DSL operators must harm their ability to compete in the market for broadband

Internet access in a way that increases the cable operators' profits in that market enough to offset the lost profits in the television advertising market. And this could be true only if the substitutes for cable advertising were not in fact fungible for DSL operators.

Using the estimates from my cross-sectional time-series feasible generalized least squares (FGLS) regression, in Section V, I calculate the intersection of the (decreasing) marginal returns to television advertising with the (assumed constant) marginal returns to print advertising:

- In the first scenario, where I allow television advertising expenditures to increase until the marginal return equals the marginal return to print over a five-week period, I find that Qwest would invest $91,124 per week in local television advertising (including cable television) in Denver—compared with the actual average television spending per week in Denver of $30,692—which would generate an additional 511 DSL subscribers per week, and therefore 26,592 additional subscribers per year.
- In the second scenario, where I allow television advertising expenditures to increase until the marginal return equals the marginal return to print over a more generous three-week period, I find that Qwest would invest $37,088 per week in local television advertising (including cable television) in Denver, which would generate an additional 73 DSL subscribers per week, and therefore 3793 additional subscribers per year. The average of the two scenarios suggests that, but for the cable advertising ban, Qwest would invest $64,106 per week in local television advertising (including cable television) in Denver, which would generate an additional 332 DSL subscribers per week, and therefore 17,260 additional subscribers per year. Similar models could be performed for other geographic markets.

The increase in consumer welfare that would result from an end to the cable ban on DSL advertising depends on the source of the new DSL subscribers. I provide two models for estimating this increase in consumer welfare:

- In the first model, I assume that new DSL subscribers come from dialup households or non-Internet households. If broadband providers could charge new subscribers a lower price (through rebates, for example) than the price charged to existing customers, the annual gain in consumer welfare would range from $1.7 to $86.3 million. Alternatively, if broadband providers would be constrained to charge existing subscribers the same price as the price charged to new subscribers, the annual gain in consumer welfare would range from $205.8 to $1.514 billion.
- In the second model, I assume that the additional subscribers come from existing cable modem subscribers and that cable systems and

DSL providers compete for subscribers by assuming that the other's subscriber levels are fixed (the "Cournot" assumption). Under the first scenario, where DSL subscribers increase by 4.7 percent, the price for broadband would decline by $0.50 per month and the associated increase in annual consumer welfare would be $176.1 million. Under the second scenario, where DSL subscribers increase by 32.9 percent, the price for broadband would decline $1.96 per month and the associated increase in annual consumer welfare would be $707.2 million.

Section VI provides policy implications that emerge from my findings. I conclude that the advertising ban is anticompetitive and that it raises obvious antitrust issues.

II. LOCAL TELEVISION AND OTHER MEDIA FOR DSL ADVERTISEMENTS

I use traditional economic analysis to demonstrate the existence of a separate local television advertising market. Even if one rejects my market definition, local television is the most efficient medium for DSL advertisements in particular.

A. Is There a Separate Market for Local Television Advertising?

Antitrust economists employ a "critical elasticity of demand" analysis to demonstrate the existence of a separate product market.[12] The critical elasticity of demand is the highest market elasticity that would make it profitable for a hypothetical monopolist of a given service to raise prices by the five percent threshold set forth as the presumptive test in the U.S. *Merger Guideline* sections on market definition.[13] If the actual elasticity is lower than the critical elasticity, then the market is confined to this service. If the actual elasticity is higher than the critical elasticity, then substitution possibilities exist outside this service and therefore the market is presumptively wider absent evidence that current prices are already above the competitive level. **Q1**

Applied here, the relevant inquiry is whether the propensity with which television advertisers in a given locality would switch to alternative media in response to an increase in local television advertisement rates suffices to make that price increase unprofitable. If so, then the sale of local television advertising does not represent a discrete product market unless television advertising rates are already above the competitive level. If not, then the sale of local television advertising represents a discrete product market.

[12] *See* Gregory J. Werden & Luke M. Froeb, *Calibrated Economic Models Add Focus, Accuracy, and Persuasiveness to Merger Analysis* 3-6 (Vanderbilt University Law School, Working Paper No. 02-22, 2002), *available at* http://papers.ssrn.com/sol3/ papers.cfm?abstract_id=354121.

[13] *See* Dep't of Justice & Fed. Trade Comm'n, Horizontal Merger Guidelines § 1.1, 57 Fed. Reg. 41 (Apr. 2, 1992).

The answer involves the calculation of the critical demand elasticity for local television advertisement.

When testing for the existence of separate product market, only two variables—the own-price elasticity of demand and the gross margin—are needed.[14] Data on cross-price elasticities between two potential substitutes are irrelevant. There is a large literature that seeks to estimate the own-price elasticity of demand for *national* television advertising.[15] There is a smaller literature that seeks to estimate the own-price elasticity of demand for *local* television advertising.[16] Table 1 summarizes both strands of this literature in chronological order of publication.

As Table 1 shows, with one exception, the literature shows that the own-price elasticity of aggregate demand for television advertising is inelastic, which suggests that price increases above competitive rates are likely to be profitable. Ekelund, Ford, and Jackson's estimated elasticity of demand for a mix of national and local television advertising suggests the opposite—namely, that demand is highly elastic. Bush explains that Ekelund's result "is limited in its generality for several reasons. Due to data limitations Ekelund could not differentiate between national radio (television) buys and local radio (television) buys within an Arbitron (DMA) market ... [which] may hide different patterns and levels of inter-media substitutability/complementarity among more finely disaggregated components."[17] When Bush replicates Ekelund's result with this criticism in mind, he concludes that the demand "for both local radio advertising and local television advertising are price inelastic."[18] Given that the operating income (before interest and taxes) margin for television broadcasters was 26.8 percent in 1997 and that operating cash flow margin was 35.0 percent for

[14] To be more precise, one would want data on marginal profit margins that a hypothetical monopolist would lose with a 5 percent price increase, but that is normally unavailable. If, as typical, marginal costs increase with increasing output, then marginal costs will likely be higher than average variable costs, meaning that the marginal profit margin will be lower than the average profit margin. Using the average profit margin thus likely inflates the profits that a hypothetical monopolist would lose by imposing a 5 percent price increase, lowering the calculated critical demand elasticity and narrowing market definitions. Thus, using average profit margins is a conservative assumption.

[15] *See* Gary Bowman, *Demand and Supply of Network Television Advertising*, 7 BELL J. ECON. 258 (1976); Barry J. Seldon & Chulho Jung, *Derived Demand for Advertising Messages and Substitutability Among the Media*, 33 Q. REV. ECON. & FIN. 71 (1993); B.D. McCullough & Tracy Waldon, *The Substitutability of Network and National Spot Television*, 37 Q. J. BUS. & ECON. 3 (1998); Alvin J. Silk, Lisa R. Klein, & Ernst R. Berndt, *Intermedia Substitutability and Market Demand by National Advertisers*, (NBER, Working Paper No. 8624, 2003), *available at* http://www.nber.org/papers/w8624.

[16] *See* Robert B. Ekelund, George S. Ford, & John D. Jackson, *Are Local TV Markets Separate Markets*, 7 INT. J. ECON. BUS. 79 (2000); C. Anthony Bush, *On the Substitutability of Local Newspaper, Radio, and Television Advertising in Local Business Sales* (FCC Media Bureau Staff, Research Paper No. 2002-10, 2002), *available at* http://www.fcc.gov/mb/mbpapers.html.

[17] Bush, *supra* note 16, at 7.

[18] *Id.* at 12.

Table 1. Econometric literature on demand elasticity for television advertising

Study	Methodology	Market Demand	Elasticity
Bowman (1976)	Simultaneous equations model using monthly data for the period 1964–69	National TV advertisement on all three broadcast networks	−0.73
Seldon and Jung (1993)	Translog model using annual expenditure data from 1950–87	National plus local TV advertisement on broadcast networks	−0.4
McCullough and Waldon (1998)	Translog model using annual expenditure data from 1960–94	National TV advertisement on broadcast networks	−0.776
Ekelund, Ford, and Jackson (2000)	Log–log model using cross-sectional data in 1995	Mix of national and local TV advertisement for "spot" TV	−4.3
Silk, Klein, and Berndt (2002)	Translog model using three-stage least squares, based on 1960–94 annual U.S. data	National TV advertisement on broadcast networks	−0.69
Bush (2002)	Linear system of equations, using cross-sectional data in 2001	Local TV advertisements on broadcast networks	−0.7960

1996,[19] the associated critical elasticity (in absolute terms) assuming constant elasticity of demand is between 2.73 (margin of 35.0 percent) and 3.51 (margin of 26.8 percent). Because Bush's estimate of the elasticity of demand for local television advertising is less than the range of critical elasticities (in absolute terms), I conclude that there exists a local television advertising market.

Indeed, the Federal Communications Commission (FCC) has embraced the existence of a separate local television advertising market. For example, in its decision to approve the Bell Atlantic–Nynex merger in 1997, the FCC noted that "the New York television advertising market, as well as most of the New York radio advertising market, encompasses all of LATA 132."[20] In its decision to approve the Citicasters–Jacor merger, the FCC stated that "WKRC-TV garners a 21.5% share of the television advertising market" in Cincinnati.[21] In its decision to approve the Pegasus–Chancellor merger, the

[19] Veronis, Suhler & Associates, Communications Industry Report (Nov. 1997).

[20] In re Applications of NYNEX Corporation, Transferor, and Bell Atlantic Corporation, Transferee, for Consent to Transfer Control of NYNEX Corporation and Its Subsidiaries, 12 F.C.C.R. 19,985, 20,017 (1997).

[21] In re Applications of Shareholders of Citicasters, Inc., Transferor, and Jacor Communications, Inc., Transferee, 11 F.C.C.R. 19,135, 19,141 (1996).

FCC stated that "WAPA-TV controls 23% of the television advertising revenue in the San Juan market and the radio stations control, at most, 22% of the radio advertising revenue in the market."[22]

Finally, the Department of Justice (DOJ) has also accepted the existence of a separate local television advertising market. For example, in its announcement that Abry Broadcast Partners abandoned its efforts to purchase Bastet Broadcasting Group, the DOJ noted that "if the deal had not been abandoned, the company selling advertising time on both stations would have controlled a substantial amount of the Wilkes–Barre/Scranton television advertising market."[23] In its decision not to oppose Meredith Corporation's acquisition of First Media Television, the DOJ explained that the "transaction, as originally structured, would have resulted in anticompetitive effects in the television advertising market in Orlando, Florida, by combining the parties' competing television stations."[24]

B. Is Television the Most Efficient Advertising Medium for DSL Providers?

In general, television, unlike any other media, creates brand awareness and provides broad market coverage. It is widely believed that television advertising serves as an anchor to Qwest's DSL media plan. By "softening the beachheads," television advertising makes subsequent print and direct marketing efforts more productive. For example, relative to the Internet, television is still the preferred medium among advertisers. Indeed, many advertisers and ad-space buyers remain skeptical about the Internet.[25] A recent survey by the research firm Gartner Inc. found that 60 percent of media buyers believe that online ads are not as effective as traditional media, such as television, newspapers, and magazines.[26] In what follows, I review three independent pieces of evidence, all confirming that television is the most efficient means of advertising DSL.

1. Marketing studies

Although the Gartner survey was not specifically addressed to the effectiveness of advertising broadband, internal marketing data from Qwest reveal that

[22] In re Applications of Pegasus Broadcasting, LLC, Transferor, and Chancellor Media Corporation of Los Angeles, Transferee, 14 F.C.C.R. 13,767, 13,779 (1999).

[23] Press Release, U.S. Dep't of Justice, Abry Broadcast Partners Abandons Deal with Bastet Broadcasting (July 16, 1999), *available at* http://www.usdoj.gov/opa/pr/1999/July/309at.htm.

[24] U.S. Dep't of Justice, Antitrust Division Merger Challenges, Meredith Corp./First Media Television, L.P., (Sept. 16, 1998), *available at* http://www.usdoj.gov/atr/public/4523h.htm.

[25] Mylene Mangalindan, *Web Ads on the Rebound—After a Multiyear Slump, Online Marketing Gets a Lift By Broadband, New Formats*, WALL ST. J., Aug. 25, 2003, at B1.

[26] *Id.*

television advertising is the most effective means to target potential (for example, dial-up or households without Internet access) and existing (for example, cable modem) broadband users in a given geographic market. According to an internal Qwest marketing analysis, television advertising for DSL increases market impressions by over 30 percent relative to a DSL advertising campaign that reallocates the television spending entirely to print. Television advertising for DSL is effective because it increases the "reach" of an advertisement—the share of the targeted audience that views the advertisement at least once—and the "frequency" of the advertisement—the number of occasions in which the audience is exposed to the advertisement over the relevant time horizon (in this case, a four-week period).

To estimate the impact of a change in a marketing campaign, Qwest uses software that estimates the reach and frequency of alternative television advertising plans based on viewing patterns. Analyses can be undertaken for virtually any combination of network, cable, and syndication program types. Viewing patterns are based on Nielsen viewing data that are limited to groups of programs, not individual shows. The viewing data cover a four-week time period beginning in November that excludes Thanksgiving week. The model estimates are typically accurate to within four rating points of Nielsen's tabulated "actual" reach.

I illustrate the Qwest methodology by analyzing two hypothetical DSL advertising campaigns in the Denver area with equal budgets of $862,000. In Campaign A, 62 percent of the advertising dollars are directed toward local television advertisements, with radio and print receiving 15 percent and 23 percent, respectively. In Campaign B, none of the advertising dollars is directed toward local television advertisements—the former 62 percent is redirected to print entirely, raising print's share of the budget to 85 percent. Table 2 shows the estimated results of each campaign in terms of reach, frequency, and cost per impression.

As Table 2 shows, the reach of a local media campaign decreases by 1 percentage point (from 97 percent to 96 percent of the targeted audience)

Table 2. The effect of television advertising on market exposure in the Denver market

	Campaign A (with TV)	Campaign B (without TV[a])
Reach (1)	97%	96%
Frequency (2)	34	23
Denver adult households 18–49 years (3)	1,725,000	1,725,000
Impressions (4) = (1) × (2) × (3)	56,890,500	38,088,000
CPM (5) = [$862,000/(4)] × 1000	$15.15	$22.63

Source: Internal Qwest marketing analysis.

[a] The funds dedicated to television from Campaign A are reallocated entirely to print in Campaign B.

when television is removed from the mix, while the frequency of exposure to the advertising campaign decreases from 34 to 23 exposures per four-week interval. Given Denver's number of adult households as 1.725 million as of 2000, the removal of television from an advertising campaign reduces the number of impressions (equal to the product of the number of households, the reach, and the frequency) over a four-week period from 56.9 million to 38.1 million. Hence, a $862,000 DSL advertising campaign in the Denver area that *includes* television advertisements as part of the mix costs $15.15 per thousand impressions over the four-week period, whereas a campaign without television has a CPM of $22.63 per impression, which implies that including television yields a savings of roughly 33 percent.

In short, local television is 33 percent more cost-effective than other forms of advertising. A hypothetical monopolist in local television advertising could thus likely raise prices by five percent without losing a significant number of customers since it would take a 33 percent price increase to make the other forms of advertising equally cost effective, given the absence of local television advertising.

2. Poll of broadband users

From January 25 through January 29, 2005, Professor Daron Shaw of the University of Texas,[27] working in association with Murphy, Turner and Associates,[28] conducted a national survey of broadband users. Four hundred respondents who used broadband Internet access were asked questions concerning their broadband history, the relative importance of different media in learning about and selecting broadband providers, and their television viewing habits. Approximately 1200 adults had to be contacted to obtain 400 broadband users. Given the 30.1 million current broadband users in the United States,[29] the margin of error for the poll is plus or minus 5.5 percentage points and the confidence level is 95 percent. The complete poll results are presented in the Appendix.

When rating the importance of different media for their awareness of broadband access, almost half (49 percent) of the respondents said television had the greatest impact. Figure 1 summarizes the results.

As Figure 1 shows, the percentage of respondents who assert that television advertising had the greatest effect on their broadband awareness is greater than the *combined* percentages for newsprint, radio, the Internet, and direct mail. Only 16.0 percent of respondents credited the Internet for

[27] The personal biography of Professor Shaw is available at http://www.utexas.edu/cola/depts/government/faculty/pages/shaw.

[28] Company information available at http://www.murphyturner.com.

[29] FCC, High-Speed Services for Internet Access: Status as of June 30, 2004, at tbl.3 (2004), *available at* http://www.fcc.gov/Bureaus/Common_Carrier/Reports/FCCState_Link/IAD/hspd1204.pdf.

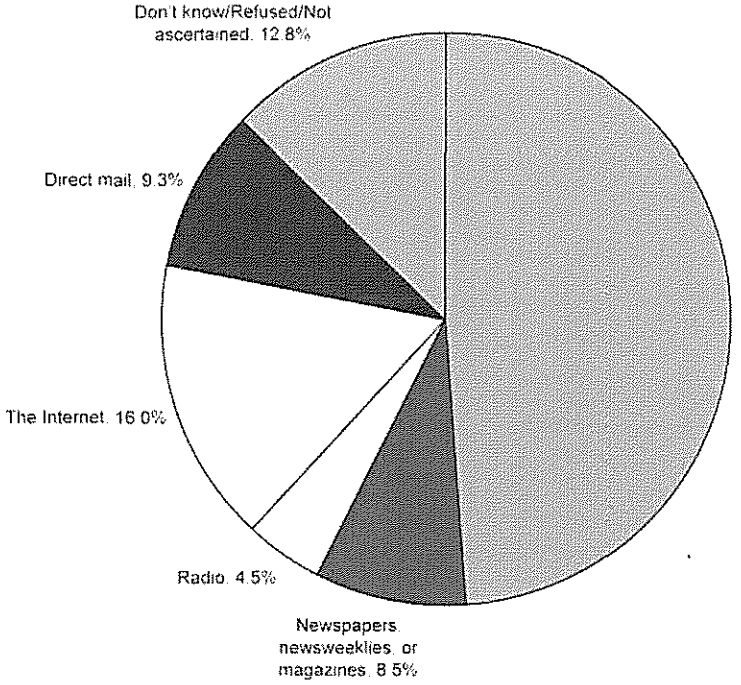

Figure 1. Advertising medium that had the greatest effect on survey respondents' general awareness of broadband (*Source*: poll conducted by Professor Daron Shaw in conjunction with Murphy Turner Associates).

having the greatest impact on generating awareness of broadband alternatives in their area.

Similar results are found with respect to the actual purchase decision. In particular, 33 percent of respondents rated television advertising as the greatest influence on their decision to purchase broadband access from a particular vendor in their area. Figure 2 summarizes the results.

As Figure 2 shows, direct mail and the Internet, the next most powerful influences, were cited by only 15.8 percent and 15.0 percent of respondents, respectively. Print media, including newspapers, newsweeklies, and magazines, were credited by only 7.3 percent for having the greatest influence of their broadband purchase decision.

The general tendency for television to be the dominant source of information and persuasion is especially pronounced among many of the groups that have decided to subscribe to broadband in recent months. Most notably, blacks, Latinos, those under 30 years of age, those with a high school education, those making less than $40,000 per year, and those residing in the country's East North Central region relied most heavily on television for broadband access information.

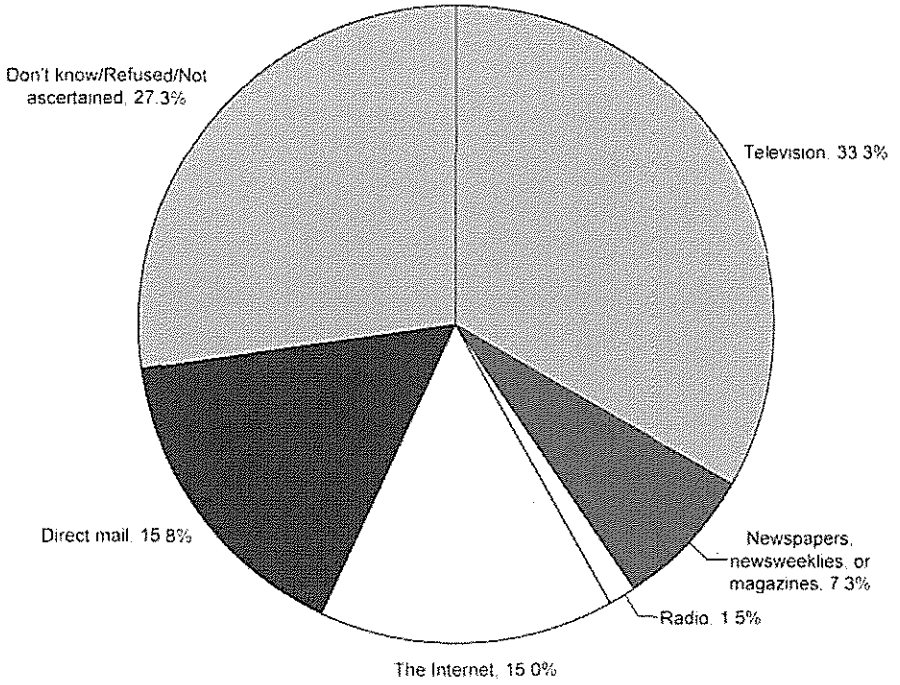

Figure 2. Advertising medium that had the greatest effect on respondents' broadband purchase decisions (*Source*: poll conducted by Professor Daron Shaw in conjunction with Murphy Turner Associates).

And although television was the dominant medium in influencing broadband purchases for about one-third of all broadband users (see Figure 2), over 40 percent of African-Americans identified television as the most important factor in their decision to select a particular broadband vendor in their area. The demographics thus tell an intriguing story. Television advertising is the main source of information about broadband, and it is especially important for many of those groups that are only now beginning to subscribe to this new service.

3. Econometric analysis of return to DSL advertising by medium

Qwest provided me with a database of its DSL additions by market by week for a 65-week period beginning in September 2003. I merged this database with a separate database that contained Qwest advertising expenditures by medium by market by week over the same period. The categories of advertising expenditures were print (including magazine, free standing insert, and run of press), radio, door-to-door, and television. To focus on the marginal effect of DSL advertising, I eliminated from the database all advertising expenditures that were not DSL-only advertisements—that is, I eliminated all campaigns that marketed a bundle of telecommunications services.

Given the nature (time-series–cross-sectional) of the database, I estimated an econometric model of DSL subscriber additions by market using a technique known as "feasible generalized least squares" (FGLS), which controls for correlation among the error terms across time periods.[30] Because the error term for one observation is generally correlated with the error term for the next observation in time, ordinary least squares (OLS) regression is not the most efficient estimation technique.[31] For this reason, I regressed DSL subscriber additions in a given market in a given week on total DSL-only television advertisements in the prior week (variable name "Dsl_tv_ad_lag1"), total DSL-only print advertisements in the prior week (variable name "Dsl_print_ad_lag1"), total DSL-only advertisements in all other media in the prior week (variable name "Dsl_other_ad_lag1"), and lagged expenditure for each of those three categories for up to five weeks (for example, "Dsl_tv_ad_lag2" is DSL-only television advertisements in that market two weeks prior). To allow for declining marginal returns to television advertising, which is a key component of my advertising simulation model in Section V, I included squared terms for the television advertising only. I also attempted to use squared terms for DSL print advertising, but rejected these terms due to the low individual z statistics (on three of the five terms) and the fact that the cumulative effect of the squared print terms was positive, which contradicts the notion of decreasing marginal returns. Table 3 reports the results of my final estimated equation.

As Table 3 shows, the first dollar spent on a DSL television advertisement generates more DSL subscriptions (0.00382) by the second week of the campaign than print (0.00118) but slightly less than other media (0.00408). More importantly, DSL television advertising yields the greatest returns over a five-week period. By summing the coefficients over the five-week period, I find that a DSL television advertisement generates 11.75 new subscriptions for the first $1000 spent, DSL print advertising generates 1.8 new subscriptions for every $1000 spent (but 7.7 new subscribers over the initial three-week period), and all other media advertising generates 0.18 new subscriptions for every $1000 spent (but 4.1 new subscribers over the initial one-week period). Each additional dollar spent on television generates slightly fewer new DSL subscribers, but the marginal effect over the relevant range of weekly expenditure generally exceeds the marginal effect of print and other media. For example, for $30,000 per week in DSL television expenditure, the marginal effect of the last $1000 spent is 10.1 new DSL customers over a five-week period. This analysis clearly shows that television is the most efficient way to advertise DSL.

[30] A common auto-regression of one lag (AR1) among the error terms was employed in the regressions.

[31] *See, e.g.*, PETER KENNEDY, A GUIDE TO ECONOMETRICS 94 (MIT Press 2d ed. 1989).

Table 3. Cross-sectional time-series FGLS regression (dependent variable: weekly DSL additions in a local market)

Independent variables	Estimated coefficient	Estimated standard error	z statistic	Level of significance
Dsl_tv_ad_lag1	0.00382	0.00061	6.26	0.00
Dsl_tv_ad_lag2	0.00378	0.00061	6.17	0.00
Dsl_tv_ad_lag3	0.00001	0.00058	0.02	0.98
Dsl_tv_ad_lag4	0.00193	0.00056	3.44	0.00
Dsl_tv_ad_lag5	0.00222	0.00056	3.94	0.00
Cumulative TV effect (for 1st $ spent)	0.01175			
Dsl_print_ad_lag1	0.00118	0.00086	1.37	0.17
Dsl_print_ad_lag2	0.00234	0.00090	2.60	0.01
Dsl_print_ad_lag3	0.00419	0.00092	4.54	0.00
Dsl_print_ad_lag4	−0.00041	0.00088	−0.47	0.64
Dsl_print_ad_lag5	−0.00547	0.00085	−6.47	0.00
Cumulative Print effect	0.00183			
Dsl_other_ad_lag1	0.00408	0.00209	1.95	0.05
Dsl_other_ad_lag2	−0.00092	0.00191	−0.48	0.63
Dsl_other_ad_lag3	0.00454	0.00189	2.40	0.02
Dsl_other_ad_lag4	−0.00650	0.00190	−3.41	0.00
Dsl_other_ad_lag5	−0.00103	0.00179	−0.57	0.57
Cumulative Other effect	0.00018			
Dsl_tv_ad_lag1_sq	-2.11×10^{-8}	4.70×10^{-9}	−4.48	0.00
Dsl_tv_ad_lag2_sq	-1.37×10^{-8}	4.86×10^{-9}	−2.82	0.01
Dsl_tv_ad_lag3_sq	-5.39×10^{-9}	4.63×10^{-9}	−1.17	0.24
Dsl_tv_ad_lag4_sq	-6.78×10^{-9}	4.40×10^{-9}	−1.54	0.12
Dsl_tv_ad_lag5_sq	-7.5×10^{-9}	4.17×10^{-9}	−1.80	0.07
Cumulative TV effect	-5.447×10^{-8}			
Constant	423.44750	33.0889	12.80	0.00

III. DO CABLE TELEVISION PROVIDERS HAVE MARKET POWER IN THE MARKET FOR LOCAL TELEVISION ADVERTISING?

Although some magazines and newspapers might decline to sell advertising space to competitors, these media do not generally possess the same level of market power as cable operators in their respective product markets. Local cable advertising, from the standpoint of price and the audience reached, is one of the most effective ways to promote DSL to the relatively young, technically adept, and affluent consumers most likely to sign up for high-speed Internet access. Further, local cable advertising is more effective at targeting the local markets being wired for DSL service than national cable advertising, which requires paying for advertising in many areas where a regional DSL operator is not offering DSL service.

A. Television Viewership Trends

Television viewers have been moving away from the major broadcast networks and toward basic cable stations for some time. In the last decade, the broadcast

networks have lost nearly one-quarter of their viewing audience to advertiser-supported basic cable networks—from 65 million viewers in 1993 to 50 million viewers in 2003 (equal to roughly 45 percent market share).[32] In the 2001–2002 season, basic cable's share of viewing surpassed that of the seven broadcast networks (ABC, CBS, NBC, FOX, WB, UPN, and Pax) for the first time according to Nielsen Media Research.[33] Figure 3 shows the AC Nielsen television viewership trends from 1998 through 2003.

As Figure 3 shows, by the 2002–2003 season, advertiser-supported cable commanded nearly half of total television viewing, and broadcast television accounted for only one-third of viewing.

The likely explanation for the change in viewing patterns is the steady improvement in content on advertisement-supported basic cable networks. Indeed, basic cable networks made significant inroads at the 2003 Emmy Awards.[34] Although the major broadcast networks supply reality shows, basic cable channels are carving a niche in "edgier scripted dramas," including highly successful shows like Bravo's *Queer Eye for the Straight Guy*, FX's *Nip/Tuck* and *Rescue Me*, USA's *The 4400* and *Monk*, Comedy Central's *The Daily Show with Jon Stewart* and *Chappelle's Show*, the Cartoon Network's *Adult Swim*, Sci-Fi's *Steven Spielberg Presents Taken*, and MTV's *Punk'd* and *The Newlyweds*.[35] Because basic cable networks are not subject to the same content—that is, indecency—regulation by the FCC as the broadcast networks, these program series are able to entice writers who feel constrained by the traditional standards applied to broadcast television.[36] Moreover, live sports programming on ESPN, TNT, and USA draw large television audiences to the basic cable networks.

Given the trend in viewership away from the major broadcast networks, advertisers are diverting their spending to cable networks. Based on upfront payments and other commitments, media analysts expect cable advertising to increase by 10.9 to 14.5 percent in the 2004–2005 season, from an estimated $5.5 billion in 2003–2004 to between $6.1 billion to $6.3 billion.[37] In contrast, sales growth in advertising by the broadcast networks was flat in 2004–2005, holding steady at $9.3 billion.[38] If this trend continues, cable advertising expenditures will surpass broadcast television advertising in a few years.

[32] Bill Carter, *As Season Begins, Networks Struggle In Cable's Shadow*, N.Y. TIMES, Sept. 19, 2004, at 1.

[33] Elizabeth Jensen, *From reruns to respect; Original programs on ad-supported basic cable are gaining Emmys and esteem*, L.A. TIMES, Sept. 23, 2003, at E1.

[34] *Id.*

[35] Gary Levin, *Cable series thrive in less restrictive climate; Ability to show 'unvarnished truth' attracting more talent*, USA TODAY, Aug. 4, 2004, at 4D.

[36] *Id.*

[37] Stuart Elliott, *Maybe not the magic $1 billion, but big gains are still expected for cable TV's advance sales*, N.Y. TIMES, June 22, 2004, at C4.

[38] *Id.*

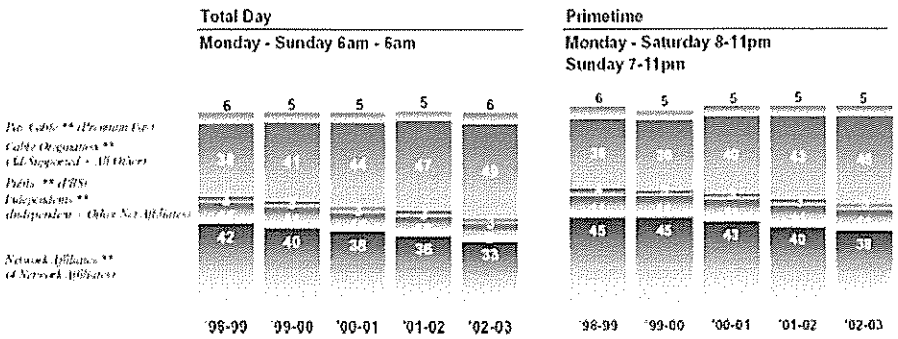

Figure 3. AC Nielsen television viewership trends.

B. Calculating the "Foreclosure Share"

According to the most recent FCC statistics, cable television providers serve 66.1 percent of all U.S. television households and 75.0 percent of all multi-video programming distribution (MVPD) households, which include cable and satellite television households.[39] Assuming hypothetically that a local cable operator had the ability to completely deny DSL advertisements on its platform (via basic cable and broadcast channels, via local and national advertisements), a DSL provider in the same local service area would be foreclosed on average from reaching roughly 66.1 percent of television households via a television advertisement and 75.0 percent of the MVPD households via a television advertisement. Because cable operators cannot restrict access to cable television customers via advertisements purchased from national broadcast networks or their local affiliates, however, the actual "foreclosure share" is smaller.

As explained above, viewers have been moving away from the television networks and toward cable stations. For example, in the 2001–2002 television season, cable's primetime share of viewing surpassed that of the seven broadcast networks (ABC, CBS, NBC, FOX, WB, UPN, and Pax) for the first time, according to Nielsen Media Research data.[40] Since then, basic cable has continued to gain, reaching 49.6 percent of the audience to the broadcasters' 44.9 percent in 2003.[41] These results are confirmed by the Murphy–Turner survey of broadband users. When it comes to television viewing patterns, those with broadband access tend to spend as much time on cable stations as they do on traditional network channels (each category accounted for 37 percent of total television viewing time).[42] The intergroup differences here are not large, but

[39] FCC, Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, MB Dkt. No. 03-172, at 114 tbl.B-1 (2004), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-04-5A1.doc.

[40] Jensen, *supra* note 33.

[41] *Id.*

[42] *See* Appendix, Questions 6, 8.

do merit some attention. In particular, cable television stations are disproportionately viewed by Latinos, those with a high school education, those in urban residences, and those in New England and the West North Central region.

Assuming that 49.6 percent of cable television viewers watch a basic cable station, and assuming that these viewers are equally likely to purchase DSL as broadcast viewers, the share of total U.S. television households that are foreclosed from DSL television advertisements at any point in time is equal to 32.8 percent (equal to 49.6 percent of cable television viewers watching basic cable times 66.1 percent of all television households). Stated differently, at any point in time, a DSL provider is foreclosed from reaching nearly one-third of all television households through the placement of a local advertisement appearing on a cable network. Although a DSL provider can reach that foreclosed segment of the MVPD market by placing an advertisement on a local broadcast station or national network, such a strategy could be cost-prohibitive for reasons explained in the next two sections.

C. The Relative Efficiency of Purchasing Local Advertisements from a Local Broadcast Station Compared to Purchasing Local Advertisements from a Cable Network

Local television broadcast stations provide a possible alternative for advertising DSL services, especially as broadcast stations have no competitive reasons to refuse the DSL advertisements. However, an advertisement purchased from a local broadcast station is not a substitute for a local advertisement purchased from a cable network for potential DSL customers who are generally not watching the local broadcast affiliate. For example, a Latino family living in Miami is more likely to watch Univision over the local NBC affiliate. Moreover, broadcast advertisements tend to reach a more diffuse mass audience with potentially less appeal to the DSL marketers. For example, many young adults do not spend much time watching the major broadcast networks because of the availability of programming targeted to their tastes (such as music videos or extreme sports) on cable television.

With the same software and Nielsen data that was used in Table 2, it is possible to measure the marginal effect of adding local advertisements purchased from cable operators to the television advertising mix. Two local television-advertising campaigns in the Denver area with approximately equal budgets are compared. In Campaign A (budget of $221,274), 25 percent of the advertising budget is allocated to local advertisements purchased from cable operators. In Campaign B (budget of $245,300), none of the advertising budget is allocated to local advertisements purchased from cable operators. Table 4 summarizes the effect of this change on frequency, reach, and CPM.

As Table 4 shows, by allocating 25 percent of the television advertising budget to local cable channels, Qwest's audience reach increases by 4 percent (from 79 percent to 83 percent). This added reach combined with a

Table 4. The effect of adding local cable to the advertising mix at 25 percent in the Denver area

Sample Tier 1 market schedule	Campaign A (25% cable)	Campaign B (no cable)[a]
Reach (1)	83%	79%
Frequency (2)	9.4	10.1
Denver Adult Households 18–49 years (3)	1,725,000	1,725,000
Impressions (4) = (1) × (2) × (3)	13,458,450	13,763,775
CPM (5) = [(4)/Budget] × 1000	$16.44	$17.82

Source: Internal Qwest marketing analysis.

[a] Funds dedicated to local advertisements purchased from cable operators from Campaign A reallocated entirely to local advertisements purchased from broadcast affiliates. Total gross rating points of 200 in each campaign.

smaller budget to reach the same total gross rating points over a four-week period translates into a CPM of $16.44 versus a CPM without cable of $17.82, which represents an 8 percent cost savings. This suggests a hypothetical monopolist in local cable advertising could raise prices by 8 percent without losing customers, thus exceeding the 5 percent threshold for market definition used in antitrust analysis. This suggests that cable advertising could represent its own product market, or at least that a cable operator has monopoly power in any broader market for local television advertising.

D. The Relative Efficiency of Purchasing National Advertisements from a Cable Network Compared to Purchasing Local Advertisements from a Cable Network

National cable networks sell national advertising only so that their shows have the same advertisements everywhere. For example, a national cable network like Comedy Central sells national advertising, without any involvement by the cable operator. The cable operator sells advertising for local spots only and generates most of its revenues from monthly subscription fees. Some cable companies have argued that DSL providers can simply purchase advertisements on national networks that are carried on cable. However, such a strategy is not cost-effective for a regional telephone company attempting to promote DSL in its bundle of telecommunications services.

The inefficiency of national television advertising is especially severe for DSL, which can be sold only within the footprint of the regional telephone company and, unlike a mobile telephone service, which is advertised nationally, cannot be taken outside of one's residence. For example, Qwest serves only 13 percent of the nation's population. Hence, if Qwest were to pursue national cable advertisements to get around the local cable restrictions, 87 percent of the audience targeted by a national Qwest advertisement could not be sold DSL by Qwest. Regional telephone companies rely on local

advertising feeds of broadcast and cable entities to reach customers who live in their service territories.

A simple example illustrates this point. The average CPM on a national cable network for a product that can be purchased anywhere in United States is roughly $9. Hence, if Qwest were to use a national television advertisement for DSL to target its 13 percent share of all U.S. households, the CPM would increase from $9 to roughly $69 (equal to $9 divided by Qwest's 13 percent share of households). By comparison, the CPM for a local cable television advertisement averages roughly $38. Hence, a local cable advertisement is 45 percent less costly than a national advertisement. In sum, a national cable advertisement is a very inefficient option for regional telephone companies to advertise DSL.

The relevant inefficiency of national network advertising for a DSL operator is even greater if one also takes into account the fact that local advertising can target areas (1) where the residents are particularly likely to adopt DSL or (2) where DSL service or various enhanced versions of it are being rolled out for the first time.

IV. ECONOMIC THEORY OF ANTICOMPETITIVE HARM ARISING FROM CABLE'S BAN ON DSL ADVERTISING

A cable television firm that bans DSL advertising acts anticompetitively to the extent that such activity leads to a reduction in consumer welfare. The relevant caselaw can best be explained as embracing a test that bans a monopolist from engaging in discriminatory refusals to deal with rivals where no inefficiency would result from sharing and where denying access to rivals enhances monopoly power.[43] Discriminatory refusals to deal with rivals are much more anticompetitive because they cannot be justified by any effect on incentives to invest and are less likely to be justifiable in terms of production efficiencies. Moreover, discriminatory refusals to deal with rivals are easier to remedy because the remedy does not require courts to set prices but only to require the defendant to charge rivals the same rates as it voluntarily charges others, which also does not discourage rival efforts to duplicate the facility if the monopolist is charging monopoly prices.[44]

Given the facts described here, it is reasonable to conclude that a cable firm that bans DSL advertising has exposed itself to an attempted monopolization suit under Section 2 of the Sherman Act.[45] To demonstrate attempted monopolization, a plaintiff must prove (1) that the defendant engaged in predatory or anticompetitive conduct, (2) that the defendant had a specific intent to monopolize, (3) that there is a dangerous probability of achieving

[43] *See* Einer R. Elhauge, *Defining Better Monopolization Standards*, 56 STAN. L. REV. 253, 295–98, 305–14 (2003).

[44] *Id.*

[45] *See* 15 U.S.C. § 2 (2000).

monopoly power,[46] and (4) antitrust injury. All four elements appear to be satisfied here.

First, cable firms behave anticompetitively by refusing to sell advertising to DSL providers at the same price that identical advertising is sold to other retailers and service providers where no inefficiency would result from such access.[47] By banning DSL advertisements, a cable television firm forecloses equally efficient rivals (DSL providers) in the broadband Internet access market from the most efficient form of advertising a broadband product (television advertising), as I have demonstrated above, and thereby impairs rival efficiency. To the extent that DSL providers cannot impose the same degree of price-disciplining behavior on cable modem prices as they would in the absence of the ban, the ban allows cable television operators to raise the price of cable modem service. The Supreme Court has held that an efficiency justification (or valid business reason) is necessary to justify such a refusal to deal.[48] Therefore, a cable television firm cannot ban DSL advertising without an efficiency justification, especially if such a refusal to deal enhances the cable television firm's market power.

The remaining three elements of an attempted monopolization claim may also be shown. The specific intent element is reflected in the cable television companies' admissions of their desire to limit competition to their cable modem service from DSL providers.[49] In any event, such intent may also be inferred from evidence that the defendant engaged in unfair or predatory tactics.[50]

With respect to the third element, there is also a dangerous probability of achieving monopoly power, which requires both a relevant market (in this case, broadband Internet access) and some demonstration of market power in that market. Given that cable firms can raise their prices for high-speed Internet access because DSL firms are unable to compete through effective advertising, and that cable firms control about 60 percent of the high-speed Internet access market, these requirements appear to be satisfied.[51] Finally,

[46] Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 456 (1993).

[47] *See* M&M Med. Supplies & Serv., Inc. v. Pleasant Valley Hosp., Inc., 981 F.2d 160, 166–68 (4th Cir. 1993) (hospital's pressuring of staff to refer patients to hospital's medical equipment company instead of to outside dealer and its practice of failing to inform patients that they had a choice of medical equipment suppliers), *cert. denied*, 508 U.S. 972 (1993).

[48] *See* Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 602 (1985).

[49] Mark P. Couch, *Qwest, Comcast clash on DSL ads: Phone firm alleges cable spots refused*, DENVER POST, Apr. 30, 2003, at C1 (quoting Comcast CEO Brian Roberts).

[50] *See Spectrum Sports*, 506 U.S. at 459.

[51] *See M&M*, 981 F.2d at 168 (finding that claims involving more than 50 percent market share should be treated as attempts to monopolize when other elements of claim are satisfied); Rebel Oil Co., Inc. v. Atlantic Richfield Co., 51 F.3d 1421, 1438 & n.10 (9th Cir. 1995) (holding that "market share of 44 percent is sufficient as a matter of law to support a finding of market power, if entry barriers are high and competitors are unable to expand their output in response to supracompetitive pricing"; rejecting bright-line rules for determining whether a defendant has market power based on market share), *cert. denied*, 516 U.S. 987 (1995).

with respect to the fourth element, my empirical evidence that DSL providers suffer reduced market penetration as a result of advertising exclusions and that consumers have been injured by these practices demonstrates the requisite antitrust injury.[52]

By banning DSL advertisements, a cable television firm forecloses equally efficient rivals (DSL providers) in the broadband Internet access market from the most efficient form of advertising a broadband product (television advertising), as proven by my analysis in Section II. B., and thereby impairs rival efficiency. To the extent that DSL providers cannot impose the same degree of price-disciplining behavior on cable modem prices as they would in the absence of the ban, the ban allows cable television operators to raise the price of cable modem service. The antitrust injury for consumers is measured in terms of the overpayment on cable modem service plus the deadweight loss associated with marginal broadband customers who no longer choose cable modem service at the higher price.

If a cable operator has the ability to make advertisements more expensive for its rivals, then it potentially may be able to make advertising so expensive that its rivals cannot compete at all (complete foreclosure), or cannot compete as effectively (partial foreclosure). In general, foreclosure strategies can create anticompetitive effects by depriving rivals of economies of scale, scope, distribution, supply, research, learning, and/or network effects.[53] Such an impairment of rival efficiency can eliminate existing rivals or deter entrants, but it also may have anticompetitive effects by reducing the efficiency of their rivals, thereby limiting the market options available to buyers and lessening the constraints on market power.

The only plausible motivation for refusing to accept DSL advertisements (which pays the same rate and costs the same to run as other advertising that cable companies actively solicit) is that a cable operator seeks to limit its customers' information about competitive alternatives to cable modem service. A cable operator would only refuse DSL advertisements if the loss

[52] The antitrust injury for consumers is measured in terms of the overpayment on cable modem service plus the deadweight loss associated with marginal broadband customers who do not choose to purchase cable modem service at the elevated price.

[53] *See* 11 HERBERT HOVENKAMP, ANTITRUST LAW 94–95 (1998); HERBERT HOVENKAMP, FEDERAL ANTITRUST POLICY 421 (2d ed. 1999) (explaining how a firm can relegate a rival to "inferior distribution channels"); Thomas G. Krattenmaker & Stephen C. Salop, *Anticompetitive Exclusion: Raising Rivals' Costs to Achieve Power Over Price*, 96 YALE L.J. 209, 234–45 (1986); Stephen C. Salop & David T. Scheffman, *Raising Rivals' Costs*, 73 AM. ECON. REV. 267 (1983) (Special Issue); James E. Hodder & Yael A. Ilan, *Declining Prices and Optimality When Costs Follow an Experience Curve*, 7 MANAGERIAL & DECISION ECON. 229 (1986); A. Michael Spence, *The Learning Curve and Competition*, 12 BELL J. ECON. 49 (1981); David S. Evans & Richard Schmalensee, *A Guide to the Antitrust Economics of Networks*, ANTITRUST, Spring 1996, at 36; Michael L. Katz & Carl Shapiro, *Systems Competition and Network Effects*, 8 J. ECON. PERSP. 93 (1994); S.J. Liebowitz & Steve Margolis, *Network Effects and Externalities*, in THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW 671 (1998).

of profits caused by lower television advertising revenues (via the decrease in DSL advertisements) were offset by the profits from greater sales of cable modem service. The implications of this anticompetitive theory are higher cable modem prices and lower DSL penetration rates in geographic areas where the DSL advertising ban is in force. With the advertising ban in place, a DSL operator is not able to fully discipline the price of cable modem service because it is forced to advertise DSL service through less efficient channels.

V. EVIDENCE OF HARM ARISING FROM CABLE'S BAN ON DSL ADVERTISING

In this section, I create a simulation model that estimates the effect of the cable advertising ban on DSL subscribers, and then apply that model to the Denver market. By constraining the DSL provider's ability to purchase local—that is, cable—television advertisements, the cable advertising ban prevents a DSL provider from allocating its advertising budget optimally across various advertising media. I solve for the optimal allocation of an advertising budget in Denver in the absence of such a cable ban—that is, I compute the amount of additional television advertising dollars that are needed to equate the marginal return from investing in television advertising to the marginal return from investing in print advertising. I also present a methodology for converting those forgone DSL subscribers into lost consumer welfare attributable to the cable advertising ban.

A. Are DSL Penetration Rates Lower in Geographic Markets Where DSL Advertising on Cable Is Restricted?

A well-known equilibrium condition in microeconomic theory requires that a firm invest in a resource up to the point where the marginal returns from investing in that resource equal the marginal returns from investing in an alternative resource. Applied here, free of any constraint, a DSL provider will purchase local television advertisements in a given market up to the point at which the marginal return from television advertising equals the marginal return from some alternative advertising media. I assume conservatively that the marginal return to local cable advertising is the *same* as the marginal return to all other forms of local television advertising. To the extent that the marginal returns to local cable advertising *exceed* the marginal return to all other forms of local television advertising, my predicted increase in television advertising in a but-for world in which there is no cable advertising ban would be even greater. Figure 4 shows this result in graphical form.

As Figure 4 shows, the first $1000 spent on television advertising generates 11.8 new DSL subscribers over the first five weeks (see Table 3). By contrast, each additional $1000 spent on print advertising generates 7.7 new DSL

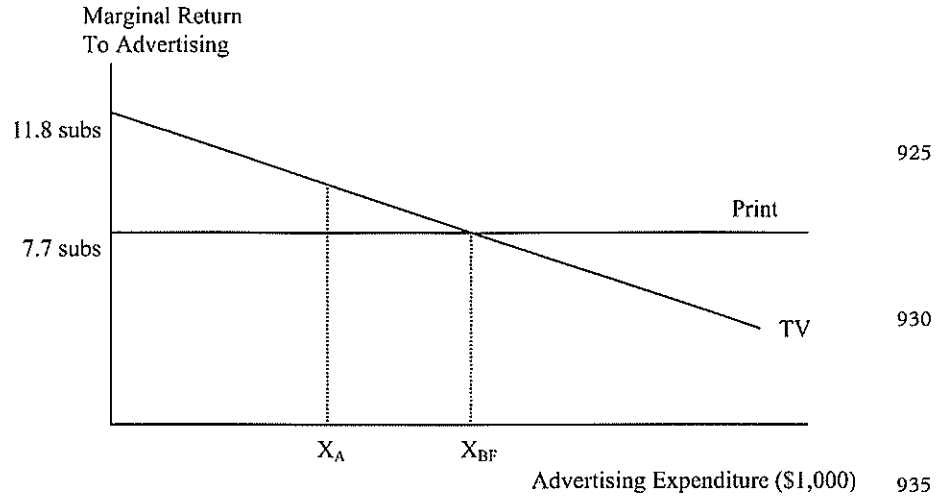

Figure 4. Optimal amount of television advertising.

subscribers over the first three weeks (see Table 3, summing over the first three print lagged coefficients). If the DSL provider were free to spend optimally on television advertising, then it would choose to purchase X_{BF}. If the DSL provider is constrained to spend only X_A, then the marginal returns to purchasing television advertisements exceed the marginal returns to purchasing print advertising, which violates the optimality condition. With the estimates from my cross-sectional time-series FGLS regression (Table 3), I can measure the slope of the TV line and thereby calculate the intersection of the (decreasing) marginal returns to television advertising with the (assumed constant due to the regression results) marginal returns to print advertising. Table 5 presents the calculations under two scenarios.

In the first scenario, I require the marginal return to television advertising to decline all the way to the marginal return to print advertising over a five-week lag period (equal to 1.8 new DSL subscribers per $1000 spent on print advertising). In the second scenario, I require the marginal return to television advertising to decline to the marginal return to print advertising over a more generous three-week lag period (equal to 7.7 new DSL subscribers per $1000 spent on print advertising). Note that the coefficients on the fourth and fifth lag for print are negative, which reduce the cumulative effect of print advertising over a longer time period. In the first scenario, Qwest would invest $91,124 per week in local television advertising (including cable television) in Denver—compared to the actual level of weekly television advertising expenditure of $30,692—which would generate an additional 511 DSL subscribers per week and, therefore, 26,592 additional subscribers per year. In the second scenario, Qwest would invest $37,088 per week in local television advertising (including cable television) in Denver, which would

Table 5. But-for weekly sales and TV advertising expenditure in Denver

	Scenario 1	Scenario 2	Average
Average DSL sales per week	2,627	2,627	
Average TV ad expenditures per week [A]	$30,692	$30,692	
Average Print ad expenditures per week	$11,400	$11,400	
Average Other ad expenditures per week	$7,301	$7,301	
Predicted total TV ad expenditures such that the marginal effect of TV ad expenditures equals the marginal effect of print ad expenditures [B]	$91,124	$37,088	$64,106
Predicted *increase* in TV ad expenditures [A]−[B]	$60,432	$6,396	$33,414
Predicted *increase* in DSL sales [C]	511	73	332[a]
Predicted *increase* in annual DSL sales [C] × 52	26,592	3,793	17,260

[a] Evaluated at an increase of $33,414 in TV ad expenditures.

generate an additional 73 DSL subscribers per week and, therefore, 3793 additional subscribers per year. The average of the two scenarios suggests that, but for the cable advertising ban, Qwest would invest $64,106 per week in local television advertising (including cable television) in Denver, which would generate an additional 332 DSL subscribers per week and 17,260 additional subscribers per year.

B. Do Broadband Customers Pay Higher Prices as a Result of the Cable Advertising Ban?

I have shown that cable operators' refusal to accept DSL advertising forces DSL providers to pursue less efficient advertising strategies, thereby reducing the number of DSL subscribers. To estimate the competitive effect of reduced DSL subscriber levels, I now consider two separate models that attempt to quantify the forgone consumer benefits that are attributable to the cable advertising ban. The increase in DSL subscribers that would materialize as a result of lifting the cable advertising ban would come from one or both of two sources. The first source would be existing cable modem subscribers. The second source of new DSL subscribers would be dial-up households or households without Internet access.

A comparison of March 2005 prices of cable modem service (when purchased as a bundle with cable television) and DSL service (at 1.5 Mb per second download speeds, the highest speed offered by DSL) in Qwest territories reveals that cable modem service costs an additional $3.22 per month (equal to $43.21 for cable modem service less $39.99 for DSL). Given cable's nationwide residential broadband market share of 63.3 percent,[54] the weighted average price for broadband service in Qwest's territories is approximately $42.03 per month.

[54] FCC, *supra* note 39, at tbl.3.

In the first model, I assume that the additional DSL subscribers generated by cable advertising come from dial-up households or households without access to the Internet. I solve for the market clearing price that would be consistent with the new (higher) level of broadband subscribership. Figure 5 shows this calculation in graphical form.

To solve for the percentage decrease in price necessary to support the new equilibrium number of broadband customers, I use an estimate of the own-price elasticity of demand for broadband service (−1.25) based on previous estimates in the literature.[55] In the Denver market, I estimate that Qwest would have obtained an additional 3793 (equal to a 4.7 percent increase over year-end subscribers) to 26,592 (equal to a 32.9 percent increase over year-end 2004 subscribers) new DSL subscribers in 2004 by shifting additional resources to local (cable) television advertising but for the cable advertising ban (see Table 5). To the extent this effect would have been replicated across the United States—that is, to the extent that the ban is equally pervasive inside and outside Qwest's territory—there would have been between 0.5 and 3.5 million additional broadband customers in 2004 but for the cable advertising ban. As a percentage of total broadband subscribers, the change represents between a 1.7 and 12.1 percent increase in 2004. Using my estimate of the elasticity of demand, I estimate that the price for broadband service would have declined by $0.58 to $4.06 per month per subscriber to support the higher broadband subscribers.

If broadband providers could charge new subscribers a lower price (through rebates, for example) than the price charged to existing customers, the gain in consumer welfare would be captured by the area B in Figure 5. Under this scenario, the annual increase in consumer welfare would range from $1.7 to $86.3 million (equal to 0.5 multiplied by forgone DSL subscribers multiplied by the monthly reduction in weighted average price multiplied by 12 months). Alternatively, if broadband providers would be constrained to charge existing subscribers the same price as the price charged to new subscribers, the gain in consumer welfare would be captured by the areas A and B in Figure 5. Under this more likely assumption, the annual increase in consumer welfare would range from $205.8 to $1.514 billion (equal to the existing number of broadband subscribers multiplied by the monthly reduction in weighted average price multiplied by 12 months plus 0.5 multiplied by forgone DSL subscribers multiplied by monthly reduction in weighted average price multiplied by 12 months).

In the second model, I assume that the additional subscribers come from existing cable modem subscribers and that cable systems and DSL providers compete for subscribers by assuming that the other's subscriber levels are fixed (the "Cournot" assumption). Under this assumption, the following

[55] *See* Robert W. Crandall, J. Gregory Sidak, & Hal Singer, *The Empirical Case Against Asymmetric Regulation of Broadband Internet Access*, 17 BERKELEY TECH. L.J. 953, 954 (2002).

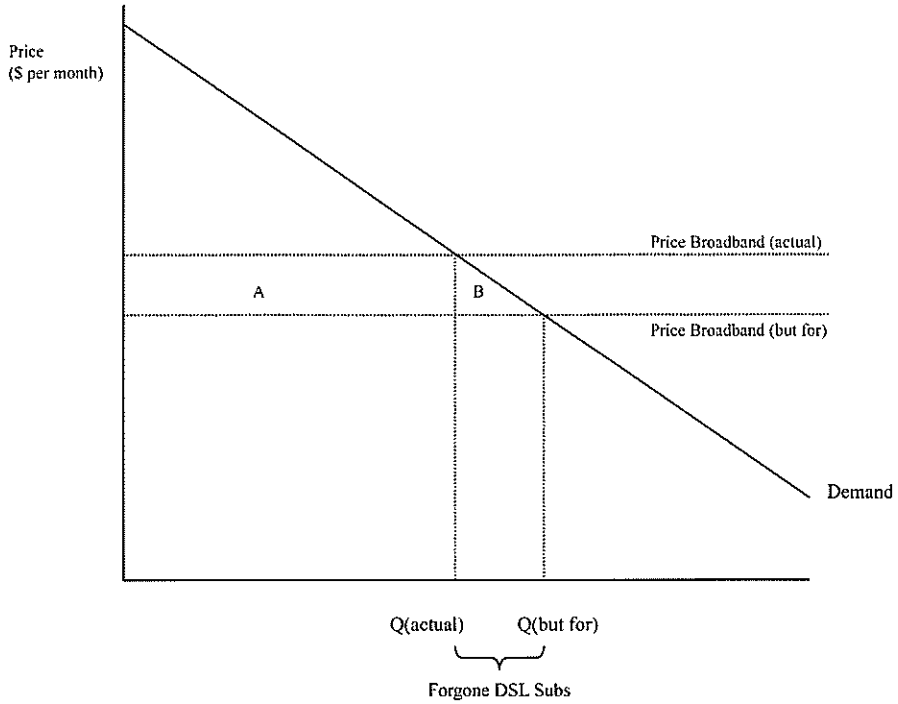

Figure 5. New market clearing price for broadband Internet services.

equilibrium condition obtains: $(p - c)/p = -HHI/e$, where p is the price, c is the marginal cost, *HHI* is the Herfindahl–Hirschman Index of concentration, and e is the elasticity of demand for broadband service. Given the current market shares, the actual *HHI* is 0.535. Under the first scenario, where total DSL subscribers increase by 4.7 percent, the but-for *HHI* is 0.527. Under the second scenario, where total DSL subscribers increase by 32.9 percent, the but-for *HHI* is 0.500. Given the above estimates for the elasticity of demand and the weighted average price for broadband access, one can solve for the implied marginal cost, and then solve for the but-for prices. Under the first scenario, where DSL subscribers increase by 4.7 percent, the price for broadband would decline by $0.50 per month and the associated increase in annual consumer welfare would be $176.1 million (equal to reduction in monthly price multiplied by the existing number of broadband subscribers multiplied by 12 months plus the deadweight welfare triangle associated with the gains by new subscribers). Under the second scenario, where DSL subscribers increase by 32.9 percent, the price for broadband would decline $1.96 per month and the associated increase in annual consumer welfare would be $707.2 million. Table 6 summarizes these results.

Table 6. Estimated reduction in annual consumer welfare due to the cable advertising ban

	Scenario 1	Scenario 2
Assumption: New DSL subs from dial-up/other		
Change in price per month	$0.58	$4.06
Change in welfare (lower price for new subs)	$1,761,598	$86,318,310
Change in welfare (same price for all subs)	$205,789,126	$1,514,511,008
Assumption: New DSL subs from cable modem		
Change in price per month	$0.50	$1.96
Change in welfare	$176,096,027	$707,215,531

Under any reasonable assumption, the effect on consumer welfare of cable television's refusal to carry DSL advertisements is very large.

VI. POLICY IMPLICATIONS

I have shown that the cable television ban on DSL advertising constrains DSL service providers to less efficient advertising channels in promoting their services. This inefficiency, in turn, reduces the ability of DSL providers to constrain the pricing of cable modem service. The result is a reduction in competition in the delivery of broadband services and, therefore, a reduction in consumer welfare. Given the absence of any other plausible explanation for cable operators' refusal to carry DSL advertising, this practice raises obvious antitrust concerns. As long as cable operators have market power in local advertising markets, they should provide advertising to their broadband rivals on the same terms that they offer to non-rival advertisers.

It is reasonable to conclude that a cable firm that bans DSL advertising has exposed itself to an attempted monopolization suit under Section 2 of the Sherman Act. Cable firms behave anticompetitively by refusing to sell advertising to DSL providers at the same price that identical advertising is sold to other retailers and service providers where no inefficiency would result from such access. The specific intent element of an attempted monopolization claim is reflected in the cable television companies' admissions of their desire to limit competition to their cable modem service from DSL providers. With respect to the third element, there is also a dangerous probability of achieving monopoly power, which requires both a relevant market (in this case, broadband Internet access) and some demonstration of market power in that market. With respect to the fourth element, my empirical evidence that DSL providers suffer reduced market penetration as a result of advertising exclusions and that consumers have been injured by these practices demonstrates the requisite antitrust injury.

APPENDIX: RESULTS OF U.S. NATIONAL SURVEY, JANUARY 25–29, 2005

Q3. For approximately how many months have you subscribed to broadband?

25.8% Less than 6 months
17.0% 6–12 months
23.0% 1–2 years
10.0% 2–3 years
6.8% 3–4 years
7.3% More than 4 years
10.3% Don't know/Refused/Not ascertained
MEAN = 21.9 months

Q4. Thinking about the many different sources of advertising information, which one had the greatest impact on your awareness of broadband availability in your area?

49.0% Television
8.5% Newspapers, newsweeklies, or magazines.
4.5% Radio
16.0% The Internet
9.3% Direct mail
12.8% Don't know/Refused/Not ascertained

Q5. What about your actual decision to purchase broadband from a particular vendor in your area? Which type of advertising was most important to your decision?

33.3% Television
7.3% Newspapers, newsweeklies, or magazines
1.5% Radio
15.0% The Internet
15.8% Direct mail
27.3% Don't know/Refused/Not ascertained

Q6. Of course, people have many television viewing options these days, including standard cable, premium or pay-per-view cable, and regular local broadcast channels. When you watch television, approximately what percent of the time do you spend viewing basic cable channels such as CNN, ESPN, MTV, TBS, and FX?

41.5% 0–20 percent
15.0% 20–40 percent
16.3% 40–60 percent
14.0% 60–80 percent
10.3% 80–100 percent
3.0% Don't know/Refused/Not ascertained
MEAN = 37.3 percent.

Q7. Now, approximately what percent of the time do you spend viewing local broadcast channels such as ABC, NBC, CBS, Fox, and WB?

39.5% 0–20 percent
20.8% 20–40 percent
19.0% 40–60 percent
9.3% 60–80 percent
9.8% 80–100 percent
1.8% Don't know/Refused/Not ascertained
MEAN = 36.5 percent

Q8. Finally, what percent of the time do you spend viewing premium or pay-per-view cable channels such as HBO and Showtime?

84.0% 0–20 percent
7.5% 20–40 percent
4.3% 40–60 percent
1.3% 60–80 percent
1.5% 80–100 percent
1.5% Don't know/Refused/Not ascertained
MEAN = 9.1 percent

AGE.

8.3% 18–24 years
5.8% 25–29 years
33.5% 30–44 years
20.8% 45–54 years
15.0% 55–64 years
14.0% 65+ years
2.8% Refused/Not ascertained

MARRIED. *How would you characterize your current marital status?*

19.0% Never married
63.0% Married
3.0% Separated
9.8% Divorced
4.0% Widowed
1.3% Refused/Not ascertained

EDOFR. *What is your highest level of formal education?*

1.0% Less than high school
18.0% High school
29.5% Some college
31.5% College graduate

18.5% Post-graduate degree
1.5% Refused/Not ascertained

RESIDE. *Would you say that you live in an urban, suburban, or rural community?*

22.8% Urban
47.0% Suburban
28.3% Rural
2.0% Refused/Not ascertained

HISP. *Do you consider yourself to be of Hispanic origin?*

6.3% Yes
92.8% No
1.0% Refused/Not ascertained

RACE. *What is your racial background?*

75.5% White
7.8% African-American
14.8% Other
2.0% Refused/Not ascertained

INCOME. *What was your combined household income last year?*

6.5% Less than $20K
16.8% $20–$40K
24.5% $40K–$75K
14.0% $75K–$100K
17.8% $100K–$200K
20.5% Refused/Not ascertained

GENDER.

48.8% Male
51.3% Female

REGION.

6.5% New England
13.3% Mid-Atlantic
17.3% East North Central
7.5% West North Central
15.8% South Atlantic
6.5% East South Central
8.5% West South Central
6.8% Mountain
16.8% Pacific
1.3% Refused/Not ascertained

FOCUS - 1 of 1 DOCUMENT

USA TODAY

April 29, 2003, Tuesday, FINAL EDITION

SECTION: MONEY; Pg. 1B

LENGTH: 395 words

HEADLINE: Qwest, Comcast duel over DSL ads

BYLINE: David Lieberman and Andrew Backover

BODY:
Qwest Communications fired the first shot Monday in a potentially important fight over Comcast's refusal to air its DSL ads. DSL is the top rival to cable's lucrative high-speed Internet offering.

"By denying us access, you are blocking a customer's ability to learn about all the choices in the marketplace and to make an informed decision," Qwest CEO Dick Notebaert wrote to Comcast CEO Brian Roberts in a letter obtained by USA TODAY. "It smacks of censorship."

Notebaert didn't specify DSL; he mentions only "services." But he cites what Qwest says is a Jan. 28 memo from Comcast stating it will not accept "DSL only" ads. Ads for service bundles, the memo says, must limit references to DSL to 20% of the ad. Also, ads can't demean cable services or mention price.

Seizing on Notebaert's vague wording, Comcast says it "currently accepts advertising for Qwest services including products that are competitive with Comcast."

But that could mean local phone service, which Comcast offers in some markets.

As for the memo Notebaert cites, Comcast said, "It would be irresponsible to react to (it) when we don't know to whom it was sent or when it was sent."

Cable operators have long refused to air DSL ads, arguing that the First Amendment protects that right -- and that phone companies can still reach potential customers via local TV, radio and billboards.

But critics say that antitrust considerations may now come into play as cable operators consolidate. Comcast became No. 1 last year when it acquired AT&T's cable operation, giving it more than 21 million subscribers.

"There's no First Amendment protection to use a monopoly to violate the antitrust laws," says Media Access Project CEO Andrew Jay Schwartzman.

About 67% of Qwest's customers live in areas served by Comcast, according to Credit Suisse First Boston. Qwest is the dominant local phone company in 14 Western and Midwestern states.

Qwest is counting on DSL growth to counter a decline in local phone lines because of competition.

While Qwest was considered a DSL pioneer in the late 1990s, it had just 535,000 DSL customers at year's end -- far fewer than its peers.

"Qwest is really playing catch-up to cable," says Mark Kersey, a broadband analyst for Current Analysis. "They need every outlet and vehicle for advertising."

GRAPHIC: GRAPHIC, Color, Julie Snider, USA TODAY, Source: Current Analysis (BAR GRAPH)

LOAD-DATE: April 29, 2003

Knight Ridder/Tribune News Service
Philadelphia Inquirer

May 1, 2003, Thursday

SECTION: BUSINESS AND FINANCIAL NEWS

KR-ACC-NO: K2473

LENGTH: 622 words

HEADLINE: Qwest accuses Comcast of censorship for banning its DSL ads

BYLINE: By Akweli Parker

BODY:

PHILADELPHIA _ For Comcast Corp., becoming the nation's biggest cable company has also meant becoming a bigger target.

The Philadelphia company has come under fire this week from Richard C. Notebaert, chief executive officer of Denver-based Qwest Communications International Inc., for prohibiting advertisements for digital subscriber lines from running on its cable systems.

The issue is not new. There has long been debate about cable companies' admitted practice of sometimes refusing to run the ads of their competitors.

But with Comcast now in 17 of the nation's 20 largest cities and serving more than 21 million customers, it is raising new fears of its power.

"By denying us access, you are blocking a customer's ability to learn about all the choices in the marketplace and to make an informed decision," Notebaert said to Comcast Chief Executive Officer Brian L. Roberts in a letter dated Monday. "It smacks of censorship, and it's unfair to the millions of people you serve who don't have any other real choice for cable services."

Comcast defended its right to block ads for DSL service _ the type of fast Internet service offered by Qwest and other telephone companies _ but said it often did run competitors' commercials. DSL service is the main competition to the cable-modem service offered by Comcast and other cable firms.

"Limitations on competitive advertising are standard in the marketplace," Comcast spokesman Tim Fitzpatrick said.

He said, however, that "Comcast currently accepts advertising for Qwest's services, including products that are competitive with Comcast. ... Comcast does run DSL ads." He could not specify when or where those ads have run.

Comcast also competes on a limited basis with Qwest to provide local telephone service in a few markets. Qwest provides local-phone service, its primary business, in 14 Western and Midwestern states.

Fitzpatrick pointed out that Qwest had other advertising options, including print media, radio and TV network affiliates.

"We can and do advertise on the NBC affiliate in Denver, let's say, and they can't prevent that," Qwest spokesman Bill Myers said.

But targeting specific groups without cable is tough, Myers said.

"Let's say we want to reach 18- to 25-year-old people. We can't advertise on MTV, VH1, Black Entertainment Television, Comedy Central," he said.

Qwest accuses Comcast of censorship for banning its DSL ads Philadelphia Inquirer May 1, 2003, Thursday

Ever since Comcast announced plans to acquire then-No. 1 cable provider AT&T Broadband in 2001, consumer groups have voiced concerns that the combined company could freeze out any advertising, programming and Internet content that it objected to, and that it would be able to do so on an unprecedented scale.

"Comcast is doing what any smart monopolist would do, as far as not letting competitors use their platform," said Chris Murray, legislative counsel for Consumers Union, Wednesday.

"The underlying structural problem is bundling content and conduit _ when the monopoly network provider ... can dictate who can say what over the network. Extend this to politics," he said, and such censorship could stifle democratic discourse.

The row between Qwest and Comcast raises antitrust issues, said June Casalmir, a lawyer with Powell, Goldstein, Frazer & Murphy in Washington who once worked for the Federal Trade Commission.

"If you have the ability to make things more expensive for your competitors, you could make things so expensive that they can't compete at all," Casalmir said.

Myers said that although Qwest had not heard from Comcast as of Wednesday, Qwest was "hopeful" the companies could work out the disagreement.

JOURNAL-CODE: PH

LOAD-DATE: May 1, 2003