

**BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554**

In the matter of )  
 )  
Annual Assessment of the Status of ) MB Docket No. 03-172  
Competition in the Market for the )  
Delivery of Video Programming )

To: The Commission

**REPLY COMMENTS OF  
CONSUMER FEDERATION OF AMERICA  
CONSUMERS UNION, CENTER FOR DIGITAL DEMOCRACY  
COMMON CAUSE, CENTER FOR THE CREATIVE COMMUNITY,  
UNITED CHURCH OF CHRIST, OFFICE OF COMMUNICATION, INC.,  
U.S. PIRG, THE ASSOCIATION OF INDEPENDENT VIDEO AND FILMMAKERS,  
THE NATIONAL ALLIANCE FOR MEDIA ARTS AND CULTURE, AND  
THE MEDIA ACCESS PROJECT**

Commentors represent both subscribers to multichannel video programming distributors (MVPDs) and providers of independent content. As organizations with members who subscribe to a variety of MVPDs – or who rely on a robust, free, over the air television system for their news and entertainment – Consumer Federation of America (CFA), Consumers Union (CU), the Center for Digital Democracy (CDD), Common Cause (CC), the United Church of Christ (UCC), and U.S. PIRG (USP) have a critical interest in promoting a diverse and competitive video marketplace. As trade organizations representing independent program producers – many of whom use cable access channels to distribute their work and who sell their products to MVPD programmers – The Center for the Creative Community (CCC), the Association of Independent Video and Filmmakers (AIVF), and the National Alliance of Media Arts and Culture (NAMAC) have a financial interest in promoting a competitive market where their wares can find access to the public based on the quality of their work rather than on the whims of a few, powerful media gatekeepers.

Sadly, as a direct result of the Commission's failure to act, market concentration has continued to increase. *Despite* finding credible evidence that AT&T Broadband and Comcast, the largest and third largest cable MSOs respectively, may have engaged in anticompetitive conduct the Commission permitted them to merge. *Despite* a finding that the broadband market remains "highly concentrated," the Commission has refused to impose necessary safeguards on cable broadband to promote competition and diversity – and has even proposed eliminating such safeguards in DSL. *Despite* a Congressional mandate to impose limits on cable horizontal ownership, the Commission has failed to act on its pending horizontal ownership proceeding.

Predictably, the MVPD "haves" – the largest incumbent cable companies and the largest programming networks – assert that all is well and there is no need for Commission action.

The filings of the genuine market competitors, however, tell a very different tale. Small cable systems and rural providers have described how vertically integrated programmers and cable MSOs have blocked access to programming through exclusive marketing agreements. *See, e.g., Comments of the Rural Independent Competitive Alliance, Comments of the American Cable Association.* Most importantly, the Broadband Service Providers Association, one of the best hopes for genuine facilities-based competition to cable, have submitted detailed comments describing the anticompetitive practices of existing cable incumbents. *See Comments of Broadband Service Providers Association.*

The Commission's own findings consistently support the comments of the would-be competitors rather than the rosy pictures painted by the incumbents. In 2002, the Commission found that the program access rules remained necessary for competition. In the AT&T/Comcast merger, the Commission found that evidence presented that AT&T and Comcast already commanded sufficient strength to engage in anticompetitive practices warranted further investigation. Two

Commission working papers demonstrated, respectively, that cable MSOs could extract excess value from programmers than would otherwise be possible in a competitive market. *See OPP #35, Horizontal Concentration in the Cable Television Industry: An Experimental Analysis; Media Research Bureau Paper #14: Most Favored Customers in the Cable Industry.* Another working paper examined the Raskovich “pivotal buyer” hypothesis used by the cable MSOs to deflect concerns about market power, and found that it bore no relation to reality. *Media Research Bureau Paper #13: Asymmetric Bargaining Power and Pivotal Buyers.*

Perhaps more telling was the Commission’s failed attempt to gather evidence on conditions in the programming market. Despite twice soliciting comment from programmers in the cable ownership docket by directly mailing voluntary survey forms, the Commission has not received a *single response*. Rather than risk the retribution of the cable MSOs on whom their livelihoods depend, these programmers uniformly remain mute. This silence speaks considerably louder than the chorus of cable incumbents assuring the Commission that competition is healthy and cable MSOs remain at the mercy of programmers.

AIVF and NAMAC members have also suffered discrimination at the hands of the largest vertically integrated programming networks. Increasingly, independent video programmers and film makers who sell their works to the largest, vertically integrated cable networks must sign away the right to have their names included in the credits. This deprives independent programmers of their ability to gain fame for their work – an absolutely necessity for independent artists hoping to survive. But because these vertically integrated companies control access to needed channels of distribution, many independent programmers do indeed sign these contracts.

As to the Commission’s previous Competition Reports finding competition ever increasing,

the General Accounting Office has thoroughly discredited these. In a report released in April, the GAO found the FCC's data collection methodology unreliable and its results highly questionable. *Data Gathering Weaknesses in Survey of Information on Factors Underlying Cable Rate Changes*, GAO-03-742T.

With regard to broadband, the Commission's explicit findings that residential and small business access to broadband remains a highly concentrated market deserve full quotation here:

If we assume that a typical market consists of the incumbent service provider, one cable provider, and one other non-ILEC, and assume that the above numbers can be used to represent a typical market, the Herfindahl-Hirschman Index (HHI) is approximately 4500.<sup>1</sup> If we don't allow for an additional non-ILEC and again assuming that the national numbers of ILEC/RBOC and cable non-ILEC can be used to calculate market shares representative of a typical local broadband market, the HHI ranges between approximately 5000 and 5400. The above figures indicate that the typical broadband internet market is very highly concentrated....

We note that broadband market shares for residential and small business markets are quite different from those of medium and large size business markets. As of June 30, 2002, national high-speed residential and small business lines consisted of 65% cable lines, 31% ADSL lines, and 3% other.<sup>2</sup> Business (medium and large size) lines consisted of 1% cable lines, 32% ADSL lines, 43% other wireline, 23% fiber, and 1% satellite or fixed wireless.<sup>3</sup> In addition, 31% of residential and small business high-speed lines are provided by a RBOC or other ILEC, 65% are provided by cable (non-ILEC), and 4% are provided by other non-ILEC on a national basis. Seventy-two percent of business (medium and large size) high-speed lines are provided by a RBOC or other ILEC, and 28% are provided by non-ILECs. We note that cable seems to play a very insignificant role in the business market. If we assume that a typical residential (and small business) market consists of the ILEC provider, one

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<sup>1</sup> Note that we do not have the data necessary to explicitly delineate the relevant product and geographic markets but believe that this analysis can give us a general idea of likely concentration levels.

<sup>2</sup> The market shares do not sum to one due to rounding. The data consists of information gathered from qualifying service providers who must submit FCC Form 477 on a biannual basis.

<sup>3</sup> The mutually exclusive types of technology are, respectively: Asymmetric digital subscriber line (ADSL) technologies, which provide speeds in one direction greater than speeds in the other direction; wireline technologies "other" than ADSL, including traditional telephone company high-speed services and symmetric DSL services that provide equivalent functionality; coaxial cable, including the typical hybrid fiber-coax (HFC) architecture of upgraded cable TV systems; optical fiber to the subscriber's premises (e.g., Fiber-to-the-Home, or FTTH); and satellite and (terrestrial) fixed wireless systems, which use radio spectrum to communicate with a radio transmitter at the subscriber's premises.

cable provider, and one other non-ILEC, and assume that the national figures can be used to represent a typical local market, the HHI is approximately 5200. If we don't allow for an additional non-ILEC and again assuming that the national numbers of ILEC/RBOC and cable non-ILEC can be used to calculate market shares representative of a typical local broadband market, the HHI ranges between approximately 5500 and 5800. We note that the residential numbers indicate that the markets are more concentrated than the total numbers indicate. If we assume that a typical business (medium and large size) market consists of the incumbent service provider and one other non-ILEC, the HHI is approximately 6000. Markets in which the non-ILEC plays a very insignificant role are essentially monopolies and the HHI can approach 10,000. As the national market share for the non-ILEC (excluding cable) for the business market is quite a bit higher than for the residential market, we request comment as to whether there is likely to be more than one non-cable, non-ILEC provider in a typical broadband business market.

*In re Amendment of Parts 1, 21, 73, 74 and 101 to Facilitate Provision of Fixed and Mobile Broadband Access*, ¶¶123-24.

Despite this, and despite evidence that vertically integrated cable broadband providers leverage their assets in anticompetitive fashion, the Commission continues to refuse to impose necessary safeguards in the broadband market. Until the Commission takes such action, broadband will not emerge as a serious competitor to cable for providing video programming.

Finally, commentors submit the report prepared by Jay Halfon on behalf of Commentor U.S. PIRG. As detailed in the report, the deregulation of cable in the hopes that a competitive market either had already emerged or would immanently emerge has failed. Instead, increased concentration and extension of oligopoly control has become the norm. When one factors in increased broadcast concentration, the state of video competition can only be described as feeble to non-existent. *See* "How Media Giants Are Reassembling the Old Oligopoly," *Wall St. J.*, September 15, 2003, A1.

The Commission can, and should, take immediate action to bring to viewers and independent programmers the robust, competitive market Congress intended. Three steps the Commission can

take are:

*First*, complete the pending cable horizontal ownership proceeding and reinstate the 30% ownership cap. The record compiled in both 98-92 and this docket more than support the 30% limit.

*Second*, reverse the Commission's disastrous "hands off" policy and impose necessary safeguards in the deployment of broadband services. These include both a prohibition on interfering with content and access to the cable plant by rival ISPs.

*Third*, the Commission should make the pre-requisite finding under Section 612(g) and take necessary steps to "provide diversity of information sources." In particular, the Commission can and should prohibit cable MSOs or cable network programmers from requiring independent programmers to agree to onerous contractual conditions relating to striping credits. Only by requiring cable programmers and cable MSOs to identify independent programmers can the Commission nurture a viable independent programming community.

In conclusion, the Commission finds itself again presented with a choice. It can continue to live in the fantasy world constructed by incumbent cable MSOs and vertically integrated programming behemoths, or it can take real steps to encourage facilities based competition and independent and diverse programming markets. If the Commission does finally recognize the dangers, however, it must act *now*, while independent programmers and independent overbuilders still remain potentially viable. If the Commission continues to irrationally hope that somehow competitive markets will emerge without regulatory action, these last possible competitors may finally wither away.

Respectfully submitted,

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September 26, 2003

# **The Failure of Cable Deregulation:**

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## **A Blueprint For Creating a Competitive, Pro-Consumer Cable Television Marketplace**

**U.S. PIRG**

**August 2003**

Written by Jay Halfon, Esq., President, New York Public Interest Research Group Fund, for the U.S. Public Interest Research Group, with Edmund Mierzwinski, U.S. PIRG Consumer Program Director.

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Photo descriptions: From top left: (1) Early coaxial cable for television (1938); (2) Comparing new wider angle picture tube, allowing television set to be less bulky, to older model (1957); (3) Demonstrating conversion of television signal for, (4) playback on tape (1960).

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