Testimony of

Dr Mark Cooper

Director of Research
Consumer Federation of America
December 7, 2006

Testimony of
Mark Cooper
Director of Research
Consumer Federation of America

On Behalf of

Consumer Federation of America
Free Press
Consumers Union

before the

United States Senate
Committee on the Judiciary
December 7, 2006

The Consumer Federation of America,* Free Press**, and Consumers Union*** appreciate the opportunity to testify on the issue of competition and convergence in the telecommunications market. My name is Dr, Mark Cooper. I am Director of Research at the Consumer Federation of America.

Overview

The continuing market failure and imperfections in the Multi-channel Video Distribution Programming (MVPD) market is evident in rising prices for monthly service, anti-consumer and anticompetitive bundling, discrimination in the carriage of programming by cable operators and refusal to offer critical marquee programming to competing delivery platforms.

Entry into the industry remains extremely difficult from both the content and the distribution sides. Satellite has been unable to discipline cable market power and it appears that the entry of telephone companies is equally ineffective. Monthly prices for basic and expanded service have just about doubled since the passage of the Telecommunications Act of 1 996.1 Just last week the two largest theoretical competitors in the Northeast each upped their rates dramatically, by four to five times the rate of inflation. 2

This market power stems primarily from a lack of competition at the point of sale. The MVPD market exhibits not only the classic barriers to entry such as high capital costs, specialized inputs and economies of scale, but cable operators have also built barriers to entry with their regional concentration, vertical integration and bundling strategies, The topic of this hearing, the withholding of vital, geographically specific marquee programming from alternative distribution platforms is one of the elements in a tightly woven web of business practices that have dampened competition in the sector.

*The Consumer Federation of American is the nation's largest consumer advocacy group, composed of ever 280 state and Local affiliates representing consumer, senior, citizen, low-income, labor, farm, public power and cooperative organizations, with more than 50 million individual members.
**Free Press is a national, nonpartisan organization with over 225,000 members working to increase informed public participation in crucial media and communications policy debates.
***Consumers Union is a nonprofit membership organization chartered in 1936 under the laws of the state of New York to provide consumers with information, education and counsel about good, services, health and personal finance, and to initiate and cooperate with individual and group efforts to maintain and enhance the quality of life for consumers. Consumers Union's income is solely derived from the sale of Consumer Reports, its other publications and From noncommercial contributions, grants and fees. In addition to reports on Consumers Union's own product testing, Consumer Reports with more than 5 million paid circulation, regularly, carries articles on health, product safety, marketplace economics and legislative, judicial and regulatory actions which affect consumer welfare. Consumers Union's publications carry no advertising and receive no commercial support.

Market power at the point of sale to the public and monopsony power at the point of purchase from programmed combine to undermine competition. Large MSOs have come to dominate specific regions of the country. They move into regionally specific programming, that is itself a monopoly. They embed this programming in huge bundles, forcing all consumers to pay for programming, They then deny access to this programming to competing distributors.

Their monopsony power, grounded in their market power at the point of sale and the huge regional clusters and concentrated national market created over the past decade, gives them the ability to secure control over the regionally specific marquee programming, like sports channels. Since this programming is regional, it is readily distributed through terrestrial means. Subject to the so-called "terrestrial loophole," the programming can be withheld from competing distribution platforms under the Cable Consumer Protection Act of 1992. The net effect is to add another tool to the cable operators' kit of anticompetitive and anti-consumer practices.

The incessant reduction in the number of cable operators and their increasing size has led to the aggregation of cable systems into large, regional clusters of systems. As cable operators gain control of large, contiguous geographic areas, their ability to withhold programming they own from other operators increases. They are also more able to obtain exclusive rights to programming they do not own. Restricting the flow of programming to alternative distribution platforms blunts competition at the point-of-sale increasing the cable operator's market power over consumers and programmers. The result is that consumers have few or no alternatives for obtaining television service, while programmer's alternatives for distributing programming to the public are significantly limited.

Another development that has further restricted consumer choice and programmer access is the cable industry practice of bundling. Cable operators force consumers to buy large bundles of programs in order to obtain the small number of networks that they actually watch. And for independent programmers, carriage in the bundles that will be widely distributed nationally or regionally is a make-or-break threshold. Access to these bundles is under the control of the cable operator. This practice, which has been prevalent for basic and expanded basic tiers in the past, has recently been extended to digital tiers. In addition, anecdotal evidence suggests that cable distributors are beginning to eliminate availability of some channels on analog systems, requiring consumers to pay a hefty monthly rental fee for the digital box, just to get the channel they had previously been receiving in the analog bundle.3 With rental prices exceeding $5/month in many cases, "migration" of analog channels to digital, represents a hidden rate hike on consumers.

By creating the huge bundles, then controlling which programs are placed in the bundles, cable operators perpetuate their control over consumer pocketbooks and the success or failure of programming. The refusal of cable operators to allow consumers to choose which programs they want to pay for on a program-by-program basis makes it impossible for programmers to market directly to the public. They must sell themselves, literally and figuratively, to the handful of gatekeepers that control access to the big bundles. Advertisers, looking for national and regional audiences are unable to target their messages because every subscriber is forced to pay for all the channels, whether they watch them or not, as a result of cable's bundling strategy. Forced bundling places a premium on carriage on cable systems, in the eyes of the advertisers, rather than actual viewing by the public.

Persistent Market Power in the Multichannel Video Program Distribution Market

Not only 3s the industry becoming more concentrated (as measured by the HHJ index) but it is also overcharging consumers (as measured by the Lerner index), and capturing massive monopoly profits (as measured by Tobin's q ratios). Each of these measures indicates that the overall competitive situation has become worse since 1992. Unfortunately, when Congress decided to move media and communications policy toward greater reliance on competition in the Telecommunications Act of 1996, the cable operators headed in the opposite direction. Rather than use their expertise, existing plant and ownership of programming to enter neighboring service territories and compete with monopoly incumbents, the dominant cable companies chose to buy each other instead. Not one major incumbent has ever sought to overbuild a neighbor to compete against mother incumbent. The monopolies they had gained through franchise awards in the 1970s and defended through anticompetitive behavior in the 1980s were merged into ever-larger MSOs and clusters in the 1990s. The result has been a dramatic increase in concentration and clustering of systems. Thus, we should not be surprised to find that in the late 1990s, the Assistant U.S. Attorney General for Antitrust called the cable industry "the most persistent monopoly in the American economy."4

Since that statement was made, mergers have been executed between the first, second, third, fourth and sixth largest companies, creating two giants that tower over the industry. Regional markets have been drawn into huge clusters of systems. Cable dominance as the multichannel medium is overwhelming, with a subscribership of approximately two-thirds of all TV households. Its penetration is about three times as high as the next multichannel technology-satellite. Because a large number of satellite subscribers live in areas that are not served by cable, competition in geographic markets is less vigorous than the national totals suggest. Cable has about four times the market share of satellite in markets where both are available.

This suggests that cable retains a market share at the point of sale of above 80 percent. The HHI index at the local level is above 6400, at best a duopoly. These market shares and levels of concentration make cable operators virtual monopolies.

Clustering

This market power at the point of sale is reinforced by a strong trend toward regionalization in which one company gains ownership of many firms in a region. Clustering has increased sharply since 1994, when less than one-third of cable subscribers were in clusters.5 Just over one-half of all cable subscribers were clustered in 1997, but by 2000, three-quarters were. Today, the figure is over 80 percent.6 The Adelphia-Comcast-Time Warner transaction will push it into the 65-90 percent range.7

Econometric analysis by several agencies shows that bigger monopolies are worse when it comes to consumer prices. In the GAO analysis, if a cable system is part of a large national operator, its prices are 5.4 percent higher than if it is not. The GAO called this horizontal concentration. Federal Communications Commission (FCC) econometric models have been finding this to be the case for several years, with even larger effects of being part of a multiple system operator (MSO).9 When the FCC models add in a specific variable for regional clustering, they find that clustering has an added effect of further raising price.10 Consumers serviced by one of the mega-MSOs, which have been expanding their grip on the industry through mergers and clustering, suffer higher prices by more than 5 percent and perhaps as much as 8 percent. Thus, there could be as much as an additional $1.5 billion in consumer savings that could be wrung out of the cable market if it were de-concentrated.

The important implication is that the theory used to allow large cable operators to become larger is not supported by the empirical evidence. That theory claimed that the combination of larger, clustered systems would create efficiency-based cost savings that would be passed on to the public because one big monopolist is no worse than two, contiguous smaller ones. Since large incumbents never overbuild one-another and compete, the claim is that there was little to be lost. The econometric evidence suggests that there is, in fact, considerable harm. It turns out that large operators and clustered systems have more muscle to thwart competition and impose price increases. They can distribute programming terrestrially and extract exclusivity deals from independent programmers, thereby denying programming to competing distribution media (overbuilders and satellite). They have more leverage over local governments to obstruct the entry of overbuilders. But if they knew they could not grow through mergers, they might compete by overbuilding one anothers' networks.11

The importance of regional programming is highlighted in FCC's Eleventh Annual Report on the cable industry. Regional sports networks represent about 40% of total regional networks, while regional news networks represent another 40%.12

A recent FCC staff white paper on DBS-cable substitution found, "firm-specific attributes and demographic variables that influence consumer choice and switching costs that appear to affect consumers' desire to switch from one service to another." Notably, the control of regional programming decreased consumers' desire to switch from cable to DBS:

We also find that DRS penetration is lower where cable operators carry regional sports channels,

This is likely due to a combination of Factors discussed above. Two of the factors may involve cable operators limiting DBS operator access to regional sports networks, If this is true, cable operators may be able to offset competitive pressures from DBS, and thus may be able to impose larger price increases without losing subscribers to DBS where they are able to transmit vertically-integrated regional sports networks terrestrially, or are able to reach exclusive carriage agreements with non-vertically-integrated regional sports networks. l3

As shown in the Eleventh Annual Report, cable operators continue to concentrate their systems regionally in "clusters" through the purchase and sales of MSOs or through "swapping." The Report found that clustering subscribers has increased in recent years.l4

The Eleventh Annual Report also shows that distributors serving small communities and rural areas represent distinct markets that are at it competitive disadvantage in acquiring programming. Operators of small systems report that they have difficulty obtaining programming due to higher costs (programming is not available on tems similar to those received by large MSOs) and because of contractual tying requirements imposed by dominant media programmers. 15 Tying Involves programmer requirements that distributors buy all or most of the programmer's channels and offer them all in the expanded basic tier, just to get the channels the distributor's customers want. The practice prevents distributors from meeting customer demands and imposes additional costs on customers.

A second aspect of clustering that plays an important role is the special role of large urban markets in the industry. The reasons offered for the importance of the large designated market areas (DMAs) include the attractiveness to advertisers of n high-income, trend-setting population, as wd1 as the presence of the major media.

In addition to the number of viewers, advertisers consider the markets to be important (indeed even disproportionately to their subscriber numbers) for a number of reasons including product trend-setting, higher per capita disposable income, and the presence of major press. Networks that do net substantially penetrate the top markets me at a severe disadvantage in the competition for advertising dollars relative to similar networks which do.16

While there are many intangible elements to this characteristic of the industry, there is one area in which it should be visible. Advertising revenue should be higher in the more highly valued markets. To assess the importance of this phenomenon, we have calculated the ratio of revenue to population - essentially the market-wide power ratio. The top eleven markers all have a substantial premium of ad revenues above TV households. These markets account for 3 1 percent of the 'FV households, but 41 percent 'FV ad revenue, a premium of over 33 percent. Six of the next 14 markets have a premium, but the overall premium is about the same. That is, the top 25 markets have 49 percent of TV households and 59 percent of the ad revenue.

The dominance of the MSOs in large, urban markets exacerbates their market power over consumers and independent programmers, for example, the importance of large urban markets and the weakness of satellite as a competitor, both at the point of sale and as a means of distribution for independent programming, converge in the case of Comcast. These two factors are extremely important in evaluating the market power of Comcast.

Comcast, the largest cable operator, has clustered its systems in the dominant urban designated market areas. About (10 percent of its subscribers reside in the top 11 DMAs. Eighty percent of its subscribers reside in the top 25 DMAs. Thus, it has a heavy premium in terms of advertising clout. This gives it greater leverage over programmers than its subscriber count would indicate.

Moreover, approximately 85% of the major league franchises for baseball, football and basketball are located in the top 25 DMAs and approximately 90% of those franchises are monopolies - that is, the franchise is the only team in the sport in the DMA. MSO's that dominate large urban DMA's have greater ability to own and control must-have sports programming.

Vertical Integration and Must Carry Rights

Vertical issues must also be a factor in this hearing. In economics, vertical integration is a potential concern, especially when dominant firms become integrated across markets for critical inputs. The anticompetitive conduct and negative market performance result from weakened markets due to vertical concentration.

Vertical integration can create barriers to entry. By integrating across stages of production, incumbents may force potential competitors to enter at both stages, making competition much less likely.17 Vertical mergers can also foreclose input or output markets to competilom.18 Exclusive and preferential deals for the use of facilities and products compound the problem.19 Cross-subsidization is more readily accomplished.20 Vertical integration facilitates price squeezes and enhances price discrimination.21

Concerns arise that not only will the dominant firm in the industry gain leverage across input and output markets to profitably engage in anti-competitive conduct,22 but also the dynamic processes in the industry will clearly shift toward cooperation and coordination rather than competition. Mutual forbearance and reciprocity can occur as spheres of influence are recognized and honored between and among the small number of interrelated entities in the industry.23 The final behavioral effect is to trigger a rush to integrate and concentrate. Being a small independent firm at any stage renders a company extremely vulnerable to a variety of attacks.24

The vertical problem is readily identifiable in the market for video programming. A small number of firms that control distribution arc integrated into the production of programming. As a smaller number of owners control a larger share of the distribution market, they gain greater bargaining leverage over independent producers. Indeed, a decision by a large MSO to carry or deny carriage to an independent programmer can determine the economic viability of an independent network, thus, MSOs have the ability to squelch competition in programming simply by denying carriage.

It is also important to recognize that complete foreclosure is not the only concern. The terms and conditions of carriage are at least as important. Vertically integrated firms defend the marquee programming in which they have a direct interest by frustrating entry and extracting rents from others.

The power to foreclose also implies the ability to force down the license fees that an MSO pays to networks. Some anecdotal evidence suggests the possibility that larger MSOs hold significant monopsony power in the programming market.25

Carriage data provide an incomplete picture of vertical integration's effects on premium networks. In particular, even if both affiliated and unaffiliated networks are carried, an integrated system might price them differently to subscribers. Personal selling and other marketing tactics offer other opportunities for system operators to favor one available network over another...For the most part, those subscribership results suggest that integrated systems also tend to favor their affiliated premium networks in pricing and promotion behavior.26

By forcing consumers to take large bundles and controlling the content of the bundles, cable operators control the flow of content and the access of programmers to the public. By leveraging their control of distribution, they ensure favorable treatment for their own shows.

Discrimination in Carriage is More Widespread and Pernicious than Previously Believed

Vertical integration leads to discrimination in access to carriage. In a rigorous econometric analysis, the GAO found that cable operators were 64 percent more likely to carry their own programming. 27 They were 46 percent more likely to carry cable channels developed or owned by broadcast networks. These are, of course, the two entities that have carriage rights on cable systems. Given how severely tilted access is against independent programmers, it is hard to imagine how they can possible succeed.

The GAO findings are consistent with the published econometric analysis that was provided in comments filed in FCC's horizontal and vertical ownership cap proceeding. The findings are quite strong on discrimination, providing a detailed understanding of foreclosure motivations and behaviors. Integrated owners of basic programming exclude competitors for their basic package but offer more of their own basic packages and more premium packages.28 Owners of premium services foreclose competitors and sell more of their own programming, but offer fewer services at higher prices.29

The discrimination at the top of the industry, in terms of the most frequently carried networks, starts at the bottom, in terms of carriage for newly launched networks. Not only are affiliated channels nine times as likely to receive carriage as independent programming, they are also more likely to get better carriage on systems owned by the dominant cable operators - Comcast and Time Warner.

Beyond collusion,30 mutual forbearance and reciprocity can occur, as spheres of influence are recognized and honored between and among the small number of interrelated entities in the industry.31 The ability of large, dominant firms to look and learn about how others behave adjust their behavior has been documented across a variety of industries. Even introductory economics texts now contain long discussions of strategic behavior and game theory, and it has become a routine part of applied policy analysis.32

This bears directly on the cable industry, since a small number of firms controls access to a large number of TV sets. Indeed, in the cable a la Carte proceeding, the fact that programmers only had to market to handful of cable executives was touted as a huge transaction cost savings. This small number of executives has make or break power over programming, and they have used that power to favor their own programming at the expense of independent production, exactly the situation Congress intended to prevent.

Occasionally, practices within the industry become so bad that collegiality breaks down and even major players became involved in formal protests, Viacom and its affiliates, a group not affiliated significantly with the top two cable operators in the industry, filed an antitrust lawsuit against the largest chain of affiliated competitors in its New York territory.33 Ultimately, it sold its distribution business to its competitors.

The dispute between Yankee Entertainment Sports (YES) and Cablevision is another example.34 YES alleges and provides facts to support its claim that Cablevision's refusal to provide nondiscriminatory carriage is part of a scheme to prevent competition in sports and preserve Cablevision's local monopoly in distribution.36 It documents a long history of threats to foreclose markets as a lever against programmers back to the 1980s.37 The demands of the operator include demands for an equity stake in YES-38 and exclusivity in carriage.39 Programmers' "bargaining" with a dominant distribution incumbent frequently involves these types of take-it-or-leave-it-threats-40 that offer inferior placement,-41 discriminatory prices,-42 or exclusion from carriage. Programmers have little bargaining power,-43 particularly since denial of access to 40 percent of the market renders new programming unviable.44

The market structure that gives distributors leverage is precisely described by the dispute between Cablevision and YES. There is little direct competition in distribution, with Cablevision having a 90 percent market share,-45 which remains insulated behind barriers to entry.46 Market power has been built and reinforced by acquisition of distribution and programming.47 Regional market power through clustering plays a critical role-48 particularly for advertising markets.49 Dominating specific programming categories generates both high profits and provides leverage to undermine competitors. Cable operators have recently added bundling of high speed Internet to their arsenal of anticompetitive practices-51 and reinforced it with anticompetitive cantacts.52 The pattern is being repeated by Cablevision in withholding sports programming in New York-23 and Comcast is battling with an independent sports programmer in the Baltimore-Washington area.54

Other examples of resistance to entry of programming that might compete with the marquee offerings of the vertically integrated incumbent programming abound, including national-55 and local-56 news programming, home shopping networks,57 as well as niche programming including educational,58 arts,59 and minority-61 programming.

Overbuilders have faced vigorous efforts to prevent competition through exclusion from access to programming and regulatory tactics of incumbent cable operators.61 Comcast has shifted some sports programming to terrestrial delivery, thereby avoiding the open access requirement of the 1992 statute. As cable operators become larger and more clustered, this strategy will become increasingly attractive to them. Specific areas where such programming has been denied wire Phoenix, Kansas, Philadelphia and New York. The denial of access to marquee sports programming can have a devastating effect, with satellite providers in markets where foreclosure has occurred achieving a market penetration only one-quarter of the national average. 62

Integrated MSOs wield immense power against smaller cable companies, exploiting loopholes in the program access rules.63 For the smaller entities, the current refusals to deal are not limited to sports programming. Other services have been denied, such as video-on-demand.64

Second, where the large MSOs do not have direct ownership of video services, they have obtained exclusive arrangements, thereby denying competitors and potential competitors access to progamming.65 The exclusionary tactics apply not only to head-to-head cable operators and satellite providers, but also to DSL-based providers seeking to put together a package of voice, video, and data products. Bundling is critica1 to controlling entry into the emerging digital multimedia market.66

Third, because the dominant MSOs are so large, they can influence important programmers not to sell to competitors or potential competitors. Commentors in the horizontal limits proceeding have noted that they are cut off from programming.67 The list could go on and on.68

The problem is not simply one of complete exclusion. Dominant, vertically-integrated MSOs can inflict "discriminatory or excessively burdensome terms and conditions of programming distribution."69 Recent comments in the program access proceeding point to an even more stark demonstration of the power of cable to engage in content discrimination.70

The Anti-Consumer, Anti-Competitive Potential in Cable Bundling

The Committee must also not overlook the important role that bundling plays in the well of anticompetitive practices. Over the past two decades, the anticompetitive potential of bundling has been explored and documented in detail. Indeed, almost immediately after the Chicago school of economic analysis tried to conclude that all bundling be deemed, per se, benign,71 potentially anticompetitive effects of bundling reemerged in the literature. This literature concluded that bundling engenders market efficiency only when the market is characterized by extreme conditions (i.e., permanent monopoly in one product, perfect competition in the other), in the more common situations, farms whose market power is neither total, nor permanent, can use bundling to defend or extend their market power, leading to further inefficiencies in the market. Under a wide range of assumptions, the dynamic-72 ability of bundling to undermine competition has been demonstrated through a number of mechanisms including inducing exit,73 creating barriers to entry,74 relaxing price competition, 75 distorting investment,76 retarding innovation,77 and extending market power into new markets.78

The best that can be said of the current no-alternative bundles imposed on consumers is that, in a static analysis, they may expand total social surplus while reducing consumer surplus.79 In other words, producer surplus may increase more than consumer surplus declines, increasing total surplus. Even the conclusion to this static analysis is dubious, as it is unclear whether producer surplus has increased more than consumer surplus has fallen.

Under a dynamic analysis, the enrichment of producers is not random. The current system favors a small number of dominant producers and creates barriers to entry for small, independent outlets, resulting in little diversity in ownership, leveraging their market power through forced bundling, the large operators and dominant programmers not only reduce diversity, but also diminish competition, leading to inefficiencies in the market. Because bundling reduces competitive pressures, the total surplus is limited. When reality is injected into the theory, the cable industry argument falls apart even faster. There is no reason to believe that prices will skyrocket in an environment where consumers are allowed to choose between bundles and individual programs. In a more competitive, consumer-friendly environment, total surplus might well be higher.

The record is rife with solid evidence from smaller and independent MVPD operators, independent content producers, local cable commissions and independent programmers that discrimination takes place with the largest programmers bundling to force cable operators and consumers to take networks that would not be taken in the absence of leverage.80

Recommendations

If the Congress intends to rely on market forces to discipline the market power of cable operators, it will have to break the stranglehold that the handful of vertically integrated, horizontally concentrated firms use to dominate the sector.

Congress should require cable operators to make available to consumers on an unbundled basis all programming that they choose to bundle. This form of "mixed bundling" - where the bundle remains available, but consumers can also pick and choose the channels they want - will allow consumer demand to begin to exercise it influence on programming choices and control skyrocketing prices.

Congress should impose a strict horizontal limit on cable ownership, to diminish cable's monopsony power in the programming market.

Congress should ban the abuse of vertical leverage, both by closing the terrestrial loophole and adopting an effective policy prevent discrimination in carriage.

Congress should prohibit contractual anti-competitive tying arrangements by dominant media programmers that force distributors to carry all of a network's cable channels just to receive the channels their customers want.

Endnotes:

1 "Remarks of FCC Chairman Kevin J. Martin,"' Georgetown University McDonough School of Business and Public Policy, November 30,2006, p. 6.
2 Craig Moffet and Judah Rifkin, "Comcast: 2007 Expanded Rnsic Video Price Increases

running at 5.4%,"
RernsteinResearch, Novcrnbcr 29,2006, intstprets the price increases fbr Comcast and Verizon Fios ;is "a signal that
competitive intensity in the pay TV market remains restrained."
7 See, e.g., Joseph Berges, Fuming Over ~ J Z EC OS~ofS C Ias~ic movie,^, New York Times, November 5, 2006.
'u.s. Department of Justicc, 1998. The Department of Justice prea release refers to the "cable rnonopaIy."
Zn remarks made at the press conference, Assistant Attorney General Joel Klein added the adjective persistent.
5 Federal Communications Commission, In the Matter of Implentenration of,T'uction / 9 ofthe Cnhle
Televirion Conslimer Prnrecfion and Competition Acd, 2002, Table C-1.
(I Kagan, Paw1 Associates. Major Cable TY Sysrem Clusters. Camel, CsIifomia: Paul Kagan Associates
1998; Federal Comrnunication~C ommission, Tenth Annttai Report.
3 If Adelphia is assumed not be clustered, the increase would be aver 8 percent. If we caIculate only the net
increa..e in large clusters it would be 4 percent, ' U.S. Genmal Accounting Office (US. GAO), Ismm Related to Comp~tiriona nd Srrbscrihrr Rates in the
Cable Television Indrtsiry, October 2003; Teiecommrtnicnliom: Issues in Providing Cable ~ nSdat ellite Television
Service, October 15,2003, Appendix IV.
FCC, Rrport un ClihIc I1ricc.s, April 4,2002, Attachment D- 1 ; February 14,200 1, Attachment D- 1 ; Sme
2000, Attachment D-1; May 7, 1999, C-l.
111 FCC, Report on Cuhle Prices, Fcbnlary 14,2001, Attachment D-l ; June 2000, Attachment D-I.
'?oopcr, Mark, Cniile Mergers ued Monopolies (Economic Policy Institute, 2002), ChapteT 7.
'"ederal Communications Commission, In the Matter of Implemenlation qfSection J 9 qf fhr CaAIp
Tt>lnli.sinnC ons~mrPr rotection rrnd Comperirion Ad, 2005. Eleventh Annual Report, fl166-169.
" P. 21
I 4 Eleventh Annual Report, 71 4 1 - 142
15 Elcventh Amunl Report, f l Xh
Id "'l'he America Cllannel LLC's Petition to deny?'"^ the Matter of Application of tlte Consent to the
Assignmen f andor Trnn.$er q/Cunrrnl ofUcemres Adelphia Cnmrnunicalions Corporation (and Suhsidiarim,
drhtors-in-pn.~.se.~.~iAosns)i,g ners to Tirnr IVarner Cahlc lno. (~ub.ridiar;e,rA),s signees; Aciebhin Comrnirrt ications
Corpurcrr iott (und Sttbsiriicmri~sd, ebtars-in-possession).A ssigne~to~ C o~ncnsfC orpornti on (s~thsidiari~Ass)s ign~es
nnd Transferees; Comccrst Cuvporrtfion, Tmnsferor to 'rime Warner, Inc., 7).anLfiee; fime Warner, Inc.,

Tmnsf~rorrso Comcosr Curporutiun, 7'ransfcree, ME Docket No. 05- 192, July 2 1,2005 (hereafter TAC Petition),
Exhibit 2.
17 Perry, Martin. K., '"Vertical fntegration: Determinants and Effects." In Ricl~ard Scltmalensee and Robert
D.W illig, eds., Handbook qfl8rdtrsvini Or~anizntion(New York: North-Holland., 19891, p. 247. "[VJerticaI
mergers may enhance barriers to entry into the primary industry if entrants must operate at both stages in order to he
competitive with existing firms and if cntry nt both stages is substantially morc difticult than entry at one stage."
Scherer ~ n Rdo ss, F. M., and David Ross, f~~clustriMala rkel Stmcrure and Economic Performance (Houghton
Mifflia Company: Boston, 1990), pp, 526-527. " ; Sltepherd. William G.,T ltc F~conomicosf lndr~~srriOalr ~flnkarion(P rentice Hall, Englewotrd Cliffs,
N.J., 19XS), pp. 289-290.
1') Perry. 1989. p. 247; Shepherd, 1985, p. 294.
2n Asck, Pcter, and Iiosalinrl Senoca. Governnzcnt ant/ the Marketplace (Chicago: Dryden Press. 18951, p.
248; Sl~efhesd, 1985, p. 302. -' Scherer, F. M.. and David Ross, I,rrlustriul Mnrket S~~-rtc! unrned Econnm ic P~firtnanc(H~o ughton
MiMin Company: noston, 1990}, p. 524,
l2 There is a growing body of theoreticaI md empirical analysis that has reinvigorated concerns about the
anti-competitive impacts of vertical integration, particularly in the cabIe industry, see Kmtrcnmaker. T.G.,a nd S. C.
Salop, 1 VXh "Anti-competitive Exclusisn: Raising Rivals' Costs to Achieve Power Over Prices," The Yale Law
Ju~oiirnalV, oE. 92; Chdover, Janusz, A. Olivar Sykes, and Robert D. WiIlig, "Non-price Anti-Competitive Behavior
hy Dominant Finns Toward tllc Procll~ccrso f Complementary Products," Fn F. M. Fisltcr, ed, Anailn~sra nd
Rcguluf~on(C nmbridge: MIT Press: 19851.
21 Asch and Senaca, 1985, p. 248.
24 Scherer and Ross, 1940, pp. 526-527; Shepherd, 1985, p. 290.
Waterman, DnvEd, and Andrew A, Weiss, VerticflS Integralion in Cable Tc/evision. Washington, D.C.:
MI Press. 1997, p. 66.
26 Waterman and Weiss, 1997, pp. 93.. -94. " 7 . S . GAO, 2003, p. 30.
28 Chipty, Tween, "Vertical Integration, Market ForecIosure, and Consumer Welfare in the Cable Television hdustry." American Economic Rwim. Val. 9 1,2002, p, 429. " Chipty, 2000, p. 429.
3a Perry, 1989, p. 247.
31 Asch, Peter and Rosalincl Scnaca, Government and the Marketplace (Dryden Press, Chicngo: 1985$, p.
248.
32 See, for example, Taylor, John B, Economics (Boston, Houghton Miflin, 2001) Chapter 11;

Hasting,
Justine, 'Tactors that Affect Prices of Refined PetmIeum Products" (Washington, D.C. Fedeta! 'Trnde Commission
Public Conference, August 2,200 1); Cooper, Mark, "Recognizing Limits of Markets, Rediscovering Public Interest
In Utilities,'Waiural Gas And Electric Powcr 1nri11sttyA nalysis. Robert E. Willett, Ed. Financia1 ComrnunicatEom
Company, Houston 2003).
33 Viacorn International V. Telecommunication Inc., et. nl. United States District Court of Southern New
York, S' km ber 23, 1993. Yankee Pntert~inmenSt ports, Complaint, May 5,2002. " Yankee Entertainment Sports, 2002, para. 1, 12.
j6 Yankee Entertainment Sports, 2002, para., 2, 13.
17 Yankee Entertainment Sports, 2002, psm. 16,29.
3R Yankee Entertainment Sports, 2002, para. 16, 114. " Yilnkee Entertainment Sports, 2002, para. 66.
Yankee Ihtcrtainrnent Sports, 2002, para. 70.
41 Yankee Entertainment Sports, 2002, paras, S3,67.
Yankee Entertainment Sports, 2002, para. 69.
It Yankee Entertainment Sports, 2002, para. 89.
M"Yankec Entertainment Sports, 2002, para. 107.
4s Yenkcc Entertainment Sports, 2002, pan. 64.
46 Yankee Entertainment Sports, 2002, para. 36-40.
47 Yankee Entertainment Sports, 2002, para. 39.
411 Yankee Cntcrtafnment Sports, 2002, para. 17, 28-29.
49 Yankee Entertainment Sports, 2002, para. 34-35,54.
50 Yankee Entertainment Sports, 2002, para, 30-3 1. " Y~nkeeE ntertainment Sports, 2002, paras. 14,41.
52 Yankct Entertainment Sports, 2002, pm. 41.
53 '"Petition of TCR Sports Broadcasting Iloldings, LLP, to Impose Condition!: or, it he Alternative to Deny
Parts of the Proposed Transact~on,"I n the Mutie-r of Applicdiion ofthe Consmt tu tl~Ac ssignment nn&r Transfer uf
ConrraI of Licenses Adelphia Comm~rnicationsC orporuiion (and S ~ b s i d i ~daeb~t0,r .r-in-posse.~sinnA), ssign~rsto
Time Warner Ct~hleIn c. (srrh+~idit~r'ieA.s~sJi,g nec.~;A delphin Cnmrnrrnicntions Corporation (and S1tha~iriiaries,
d~btor~~-in-posse.~A.~.risoignn~er,s to Comcnsl Co~poraiion(~ rtlrsidinriesA), ~signeesa nd Tmn$erees; Corncast
Carporration, Tranrferor to Erne Warner,i nc.. Tmnsferee; Time Warner, Jnc., Trans J~rnr.7to Comcnst Corporation,
Pansf~reeM, R Dockct No. 05-1 92, July 2 1,2005, p. 1h " Declaration of J. Gregory Sidak and Hal 5. Singer, in suppart of "Petition of TCR Sports Broadcasting
Holdings, LLP, to Impose Conditions or, it he Alternative to Deny Parts of the Proposed Transaction," In tile Mntier
o/'Applicalion of the Con.wn&to thr' As.ri~nnctn l anrl/or Tran.$;fiqrf Control of Licc nsrs

Adclpliia Cornmunic(alions
Corpomtion (and Subsidiaries. debtors-in-possc?ssion}A, .ssiigners lo Time Warner Cahle Inc. (srrbsidiaries),
Assignees: Adelph~nC omm rmicatio~tsC orporntion (and Srrkidiarics, debtors-in-posses.rion)A, .r,rimer,r lo Corncast
Corpom!ion (subsidiaries) Assifn~rsa nd Transfcrce,~;C on!c ast Corporation, Transferor to Time Warner. Inc.,
Transferee; Time M'arner. Inc., Tran.rferors to Comcas! Corporntion, Transferee, ME Docket No. 05- 192, July 2 I,
2005
Watermnn and Weiss, 1997, p. 56. Keating, Stephen, Cut Throat: High stake,^ and Killer Moves on Be
Electronic Frontier (Boulder: Johnson Books, 29991, pg. 17-18, characterizes the incident as describecl in this
paragnph. Recent comments in tlle program acccss proceeding summarkc these events aptly: '3iq also well
known that Fox New Channel (YTK") owes ib very existence to TeIecommunications, Inc. ("TCI," since acquired
by hT&T), whose agreement to caw FNC on systems serving 90% of TCI's subscribers was critical to the
successftl launch of the nctwork. Not coincidentally, Fox made FNC available to incumbent cable operators an an
exclusive basis. Like the saga of News Corp.RchoStar, FNC's launch and subsequent exclusivity to the cahlc
MSOs is a case study of how the largest incumbent cable operators control the destiny of new progmmming
scrviccs, and why programmers sell to cable" competitors at their own risk.'"
Joint Comments, In ?he Matler qf Jmplementation qf he Cab Ie T~levi~~Cioonns rtmer Protcction and
Competition Act of 1992, Devr~loprnenql f Conrpdition and Div~r&~ini tyY irleo Pmgromwing Disfrihution: Section
ri2R (c) (5) Df the Comm tcniccrrions Act: Si{nsel of Excltrsir~eC ontract Prohihition, Fedaal Communications
Commission, CS Dkt. No. 01-290. December 3, 2001, p. 8. 'To make room (for Fox Ncws), Malone cleared out
existing networks like a bowling ball cracking into the headpin, The arrival ofFox News in Renvcr puslled Court
'W to split the ptagamming day with Spice, a pay-per-view sex network"
According to Grossman, Lawrence. 1997. "Bullies on the Rlock: Cable Television in New York City."
Co/iimbia J~tmrntlI~R~nciv i~wJ.a n. 11 1997, Fox fought a similar battle with Time Warner. In 1996, Time Warner
(who owned a TO?& stake in CNN's parent company, Tumer Broadcasting) refused to aIIow any other cable network
to compete with CNN on its cable systems. Thc nation's largest cable operator at the time, TCI, also owned a stake

in CNN, and as n result would also not allow any competitive news services on its systems. Consequently, the U.S.
public was denied an afternative news service-despib several attempts at entry from major programmers, e.g.
NBC, into the 24-hour news ch~nnebl usiness-until the consent dccree in the merger of Time Warner and Turner
Forced thc cable operators~anr~s.
Heidi Ptzyb yl a, "BRC uses D .C. as Beachhead for American imnvasion," Washington Brlritr~.J~o.u~m nl,
suggests that even thc RRC was stymied by MSOs who Imd other cable news programming intercsk. The BRC was
prevented by cable MSOs from establishing a cable news channel ax far back as 199 1. In 1998, the BRC announced
it hoped to form agreements with cable operators to carry BRC World, its international news service, within the next
two or threc years. A CNN spokesman, Stcve I-laworth, is quoted as saying, "Competition is always good for
journalism, but I think that tlae LlBC xiill find this to be a very tough marketplace for them. Remember, this is a
second attempt for them," referring to BBC World's unsuccessful first attempt ?a gain US cable distribution. RBC
World was launcl~ed in 1991 but only made its firat appearance in the United States in 1997 afier ~t made: a deal with
25 public television stations for them to carry daily news bulletins. DRC, as the Comrnissioa know, was only able
to secure some digital distribution after it parhered with MSO-linked Discovery Cbanncl, mating the RBC
America channel.
56 Dreyer, R. Micllelle, "CNN-Style charnel planned for Austin," Austin American Statesman, August 22,
1998. p. Dl ; Tgon, Kim, "Rclo adds KVUE to Texas TV Holdings," A~isfinA merican-Stut~s-man.F ebruary 26.
19'39. P. A 1. In August of 1998, Time Warner Cablc announced that it watrId launch an a1I-news. 24-hour TV
channel in Austin, Texas to be available to 220,000 area subscribers, with the specific intent of Focusing an central-
Texas news. The A.13, Belo Corporation, a media company hat currently owns 1 R broadcast television stiltions and
four daily newspapers nationwide (including 4 stations and the Dallas Morning Nws in Texas), had also planned to
start a cable news channel during the following ycar, "AT&T Pulls PIug on BayTV News Network," MultichanneI
Ncws, Jul 9,200 1.
"Waterman and Weiss. 1997, p. 73; Davis. 1991, p. 143.
58 Wateman and Weiss, 1997, p, 65; Davis, 1998, p. 97
5""13nrry's New Haby," Cahlc~ni.~ioJnu,n c 1 1,200 1.

"Minority Nets Continue Distribution Push," Mtrliichnnnel new.^^ December 3,2001, %BET'S Lee
Searches for Viacam Synergies," Mtdticllannrl New*, December 3,2001.
61 RCN T~iecorn ,Y~rvicc qf Nmv Yurk, Im, v. Cablevision Corp., DPMCW v. Corncaxt: EchoStar 11.
Corncast. Problems C ~ I aI lsa occur on an event-by-event basis (see Evemst, 2001, p. 4; Gemini Networks, 2001, p. 3, " Joint Comments, p. 14.
63 American Cablc Association, *'Comments of the American Cable Association.'"n The Matter of
lmplem~ntoiiono fthe Ct~bleT elevi.~foCno nncmer Pmtection and Competition A d ~$1992,D ewlaprn~nto f
Cornperition onrl Diuer:vit.v in: ITirfmP rogrumrnin~D istrihuliort: Sectilsr? (528 (CJ (S) qJ Be Communicnti om Acr:

customers must pay for programming that they would not otherwise choose, solely to receive a he, over-the-air
local broadcast stntion." Echostar's comment! (page I) states ' W M s flexibility tn offer a la carte and ticrcd
services is inlribitcd today by many factors. First and foremost among them is the practice of Large media
conglomerates of bundling their must-have programming, including in particular the lacal network broadcast
stations and the most popular cable networks, with programming that consumers do not want. Faced with
widcspreatl bundling, MVPDs currently have little choice but to offer bmad packages [to consumen]." l h s is just
a small sample of the myriad examples in the initial comments filed: this is not a competitive market.