Testimony of

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CONSUMER FEDERATION OF AMERICA

on behalf of

THE CONSUMER FEDERATION OF AMERICA, CONSUMERS UNION AND FREE PRESS

on

COMPETITION IN THE SPORTS PROGRAMMING MARKETPLACE

Before the

SUBCOMMITTEE ON TELECOMMUNICATIONS AND THE INTERNET
COMMITTEE ON ENERGY AND COMMERCE
U.S. HOUSE OF REPRESENTATIVES

March 5, 2008

Mr. Chairman and Member of the Committee,

My name is Dr. Mark Cooper. I am Director of Research for the Consumer Federation of America (CFA).[1] I appear today on behalf of Consumers Union[2] and Free Press,[3] as well as CFA. I greatly appreciate the opportunity to appear before you today to express, yet again, the consumers' frustration with the cable industry.

Over the past quarter century, since the deregulation of cable in 1984, consumer advocates have complained loudly about the abuse of market power in the multi-channel video programming distribution industry (MVPD) and the Congress has repeatedly become involved in attempting to address this nagging problem. The causes of the problem are clear, as are the solutions, but neither Congress nor the FCC has been willing to act to break the stranglehold that the cable industry has on the consumer's video pocketbook. It is time to act.

The focal point of today's hearing is a good example of the broader problem in the industry. The cost of the monthly cable bill for the most popular basic cable bundle has more than doubled since the passage of the Telecommunications Act of 1996 (see Appendix A). Embedded in those monthly bills are the costs of sports programming, which consumers are forced to pay for in the bundle. The incredible escalation of sports salaries is funded by the viewing public, the vast majority of whom, if given the opportunity, would not choose to purchase those channels.

[1] The Consumer Federation of America is an advocacy, research, education and service organization established in 1968. CFA has as its members some 300 nonprofit organizations from throughout the nation with a combined membership exceeding 50 million people. As an advocacy group, CFA works to advance pro-consumer policy on a variety of issues before Congress, the White House, federal and state regulatory agencies, state legislatures, and the courts.

[2] Consumers Union, the publisher of Consumer Reports®, is an independent, nonprofit testing and information organization serving only consumers. CU does advocacy work from four offices in New York, Washington, San Francisco, and Austin. CU's public policy staff addresses a broad range of telecommunications, media and other policy issues affecting consumers at the regional, national and international level.

[3] Free Press is a national, nonpartisan organization working to increase informed public participation in media and communications policy debates.

Competition is the consumers' best friend, but, unfortunately, the sports video programming market is a rats' nest of anti-competitive, anti-consumer structures and practices. On one side we find dominant programmers like network broadcasters with carriage rights or sports entertainment companies who hold exclusive rights to home team broadcasts, which are must have, marquee programming for local cable operators. On the other side we have gatekeeper cable companies with market power over access to local video customers. Increasingly, cable operators are also becoming regional sports network providers. The programmers and the cable operators combine to restrict consumer choice and raise consumer prices. The programmers ask for more and the cable operators give more because the cable operator force the consumer pay more for sports programming by increasing the cost of the bundle. They maintain their ability to push prices up by controlling and restricting access to the bundle in two ways, denying consumers choice and forcing consumers to buy the whole bundle and the keep independent programmers out of the bundle. We have described this anti-competitive, anti-consumer structure in detail in our comments to the FCC in the horizontal limits proceeding, an excerpt of which is attached as Appendix B. We have also submitted a complete copy for the record.

Occasionally, the excess profits created by the abuse of market power attract the attention of entrepreneurs, as it should in our capitalist economy. Sometimes the incumbent programmers and the cable operators will get into a squabble – as in the dispute between Yankee Entertainment Sports and Time Warner. Unfortunately, they find it attractive and have the market power to resolve their differences by simply putting their hands deeper into the consumers' pockets. Appendix C presents our analysis of the cost to consumers in the case of the highest cost sports network.

Occasionally, the sports leagues and teams, with their own market power created by antitrust immunity (blessed either by explicit, congressional grants of monopoly or lax court oversight over restraints on trade) try to pull their programming out into separate network offerings. They seek to monetize their monopolies in a new way, as in the dispute between the NFL and cable over placement of exclusive NFL programming. They want a larger share of the excess profits, but the cable operators defend their own profits by raising consumer prices and they get away with it because there is insufficient competition to restrain the price increases.

The problem starts at the point of sale, where consumers have, at best, a very small number of choices for multi-channel video programming. The market power of cable built up over the years through a shifting set of anti-competitive practices including franchises and refusal to sell marquee programming – first general entertainment, then home team sports – has allowed it to create huge bundles of programming that have grown far beyond anything the typical consumer wants or watches. Weak competition between cable and satellite does not restrain price increases because satellite operators have little interest in ability to drive down monthly bills.

While consumers suffer pain in the pocketbook, independent programmers also suffer at the hands of the cable gatekeepers. Getting into the bundle and onto the systems owned by the two dominant cable operators is a necessary condition for programming success. Not one national network has achieved an audience reach of sufficient size to sustain quality programming without being carried on both Comcast and Time Warner systems. In short, cable operators can make or break programmers by deciding whether programming is carried and where it is placed. The big Bundle of basic cable is dominated by fewer than half a dozen major broadcaster/movie programmers, who account for three quarters of the video market place, a situation that began to develop in the mid 1990s and has been firmly in place for half a decade (see Appendix D).

Cable operators do not have the interest of the consumer at heart when they resist the efforts of independent programmers, like the America Channel, from getting carriage in the big bundle. The America Channel is the quintessential example of the gatekeeping power of the cable operator. Denied access to cable systems for years as an entertainment channel, it was reborn as a sports programming channel that threatens the cable operators regional sports networks. Even though the dominant cable operators had agreed to conditions in recent merger proceedings that would have opened up the regional sports market to entry, the cable operators have reneged on their promise. While the plight of America's Channel epitomizes the dire circumstances in which independent programmers find themselves, the problem is pervasive. Our recent study of minority-targeted programming found that independent minority-owned, minority-targeted programming simply does not get carriage in the big basic bundle (see Appendix E). Relegated to digital and high priced tiers, we find that this programming accounts for only 3.7 percent of carriage, when the targeted groups represent over 30 percent of the national population and the members of these groups are required to pay an average of $43 to get minority-owned, minority-targeted programming.

The easiest way for cable operators to preserve their share of the excess profits and avoid dissipating the profits squeezed from consumers due to lack of competition – i.e. lower the cost to consumers – is to prevent new entry or relegate it to the back of the bus. By restricting the quantity and type of sports programming in the bundle they maintain the squeeze on consumers and preserve the excess profits available. By excluding independent programming from the bundle, cable operators protect their own sports offerings. The league-based programmers are not looking out for the consumers either, since their fundamental goal is to capture a larger share of the excess profits.

The current system where the cable operators and dominant sport programmers force consumers to pay ever increasing prices for a restricted set of choices is the worst possible for the consumers.

The best solution to the problem is simple, give consumers real choices -- unleash consumer sovereignty in a big way by requiring the cable operators to allow consumers to buy on a stand alone basis any program that the cable operators have chosen to bundle. This is called mixed bundling and we have explained its consumer and competitive benefits in detail in the cable *a la carte* proceeding at the FCC. Appendix F provides a brief explanation of how mixed bundling will affect consumers and the industry. Let consumers choose the programming they want to pay for and it will become immediately clear that the vast majority of subscribers would not pay the current price of the most popular sports programming that they are forced to buy for in the big bundle. This will break the upward spiral of prices. Leagues demand more and more for sports programming and cable operators pay more and more because they know that they can just pass it through to the consumer who is a captive of the big bundle. If consumers had real choices, that pass through would meet real resistance.

If sports programmers faced the true elasticity of consumer demand for their products, prices would decline and choices would expand. As video revenues declined, so too would the grossly inflated packages that the leagues and the players get, especially the highest paid players. Shaquille O'Neal and Alex Rodriguez would play just as hard for $1 million as they do for $20 plus million. Actually, there is a solid theory in labor economics that suggests they might play even harder. The same set of teams and players take the field today would take the field if consumer choice cut the TV packages in half because the current packages include a substantial amount of excess profits extracted from consumers through restricted choice at the point of sale.

The claim that cable has to aggregate audiences with big bundles to recover its fixed cost and create audiences for new networks might have made sense in a linear world of few choices where cable sold a single product composed of a small number of channels. Whatever the validity of the argument back, then, the world has changed. Cable can recover its fixed costs from three completely different services – video, high speed Internet, and telephony. It offers hundreds of channels, an increasing number of which are not linear, but on demand. Technology has crated a niche market world where the transaction costs of choice have decline sharply and each network can contribute to joint and common costs. The old explanation has become a convenient excuse for preserving a marketing scheme that costs consumers dearly.

If Congress and the FCC are unwilling to free the consumer from the broad tyranny of the cable bundle, they could more narrowly require sports programming be pulled out into a separate tier. This would at least allow those who have no interest in sports programming to avoid paying for it, thereby giving the leagues and the programmers a smaller pie to fight over. In the case of the professional leagues, Congress could certainly argue that since it has granted them immunity from the antitrust laws, it needs to do something to protect the public from their market power.

If Congress and the FCC are unwilling to empower the consumer to choose, thereby unleashing the power of the demand-side, the least they can do is ensure that there is more supply-side competition. Broadcasters and cable operators should not be allowed to restrict supply-side competition by putting their programming in the big bundle and forcing competing programming into more expensive tiers.

Demand-side approaches are preferable because they force the programmers and the leagues to take a hard look in the mirror. Who do they think their audience really is and what is the audience willing to play?   The supply-side approach could be beneficial in the long term by allowing new programming to reduce the market power of programmers with preferred access to carriage. Spreading the sports viewing audience across programming that is targeted by geography and sport may erode the viewership of the handful of programs that have benefited from the restriction of consumer choice.

Appendix A:
EXCERPT FROM
TIME TO GIVE CONSUMERS REAL CHOICE

(Analyzing and Updating Cable Price Increases)

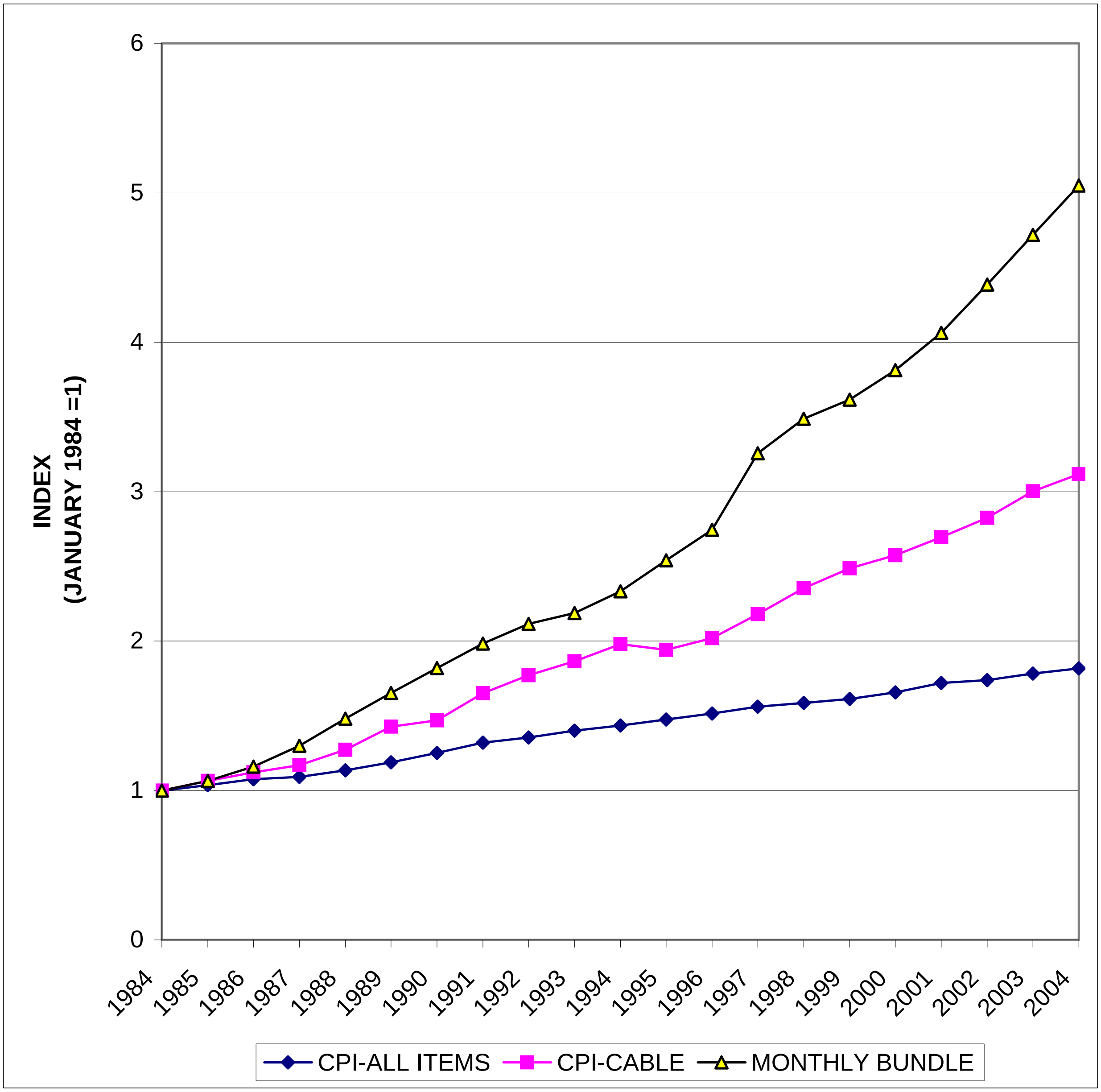
A. THE LONG-TERM PROBLEM OF CABLE BUNDLING

The cause of the twenty year long struggle over deregulated cable prices, and the intense scrutiny that is now being applied to bundling, can be readily appreciated by examining the long-term trend of cable prices (see Exhibit V-3). The sharp difference between the BLS-quantity adjusted price and the total bundle price underscores the problem consumers confront as a result of the bundling. The price of the bundle has increased more than 60 percent faster than the BLS cable index. Over a twenty year period, when the CPI for all items was increasing by a compounded annual rate of 3.1 percent, the BLS cable price index increased by 5.9 percent, and the bundled price increased by 8.4 percent.

If we make a quality adjustment to the bundle price based on total TV viewing, we still find a major problem (see Exhibit V-4). The average annual price increase for the viewing adjusted bundle is 7.7 percent. In other words, it is about 2.5 times the rate of inflation, sustained over twenty years.

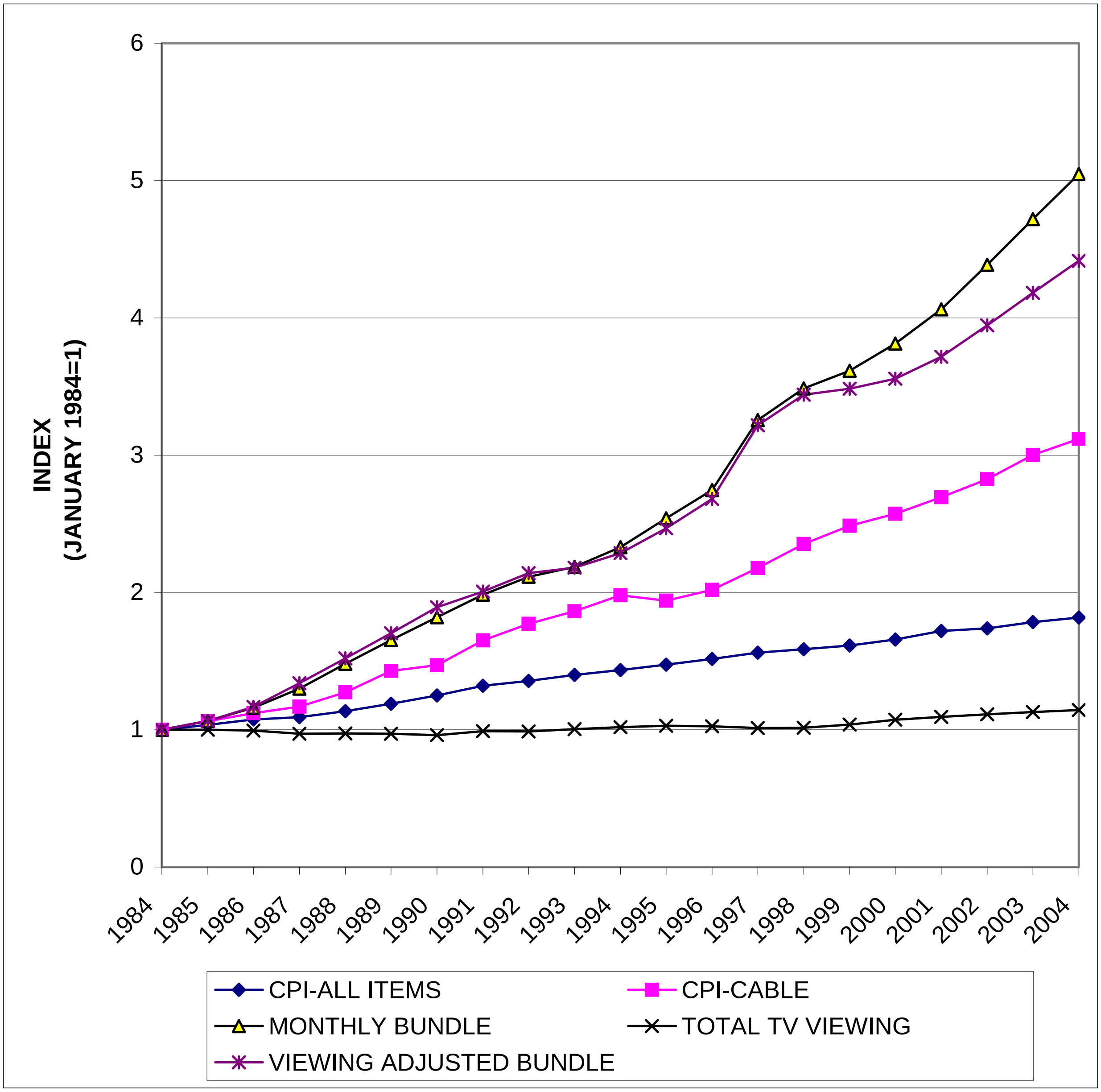
The data suggests that cable operators have pushed prices into the range where there is price resistance (i.e., the more elastic portion of the demand curve). That does not mean the abuse has stopped, it simply means it may not grow as quickly as in the past, but cable operators are aggressively finding ways to keep their producer surplus growing, like rebundling (retiering) programming to drive penetration of digital tiers. Bundling is one of the strategies that monopolists use to extract consumer surplus and the evidence is consistent with such an interpretation in this case. Of course, real competition would be better still, but after two decades of failure of competition to develop and with the cable operators extending the anticompetitive, anti-consumer business model to the Internet, the need for action is critical.

Exhibit V-3: Cable TV Prices



Sources: Bureau of Labor Statistics, Data base, Kagan Associates, *History of Cable TV Subscribers and Revenues;* Federal Communications Commission, *Report on Cable Prices*, various issues.

Exhibit V-4: Cable TV Prices and TV Viewing



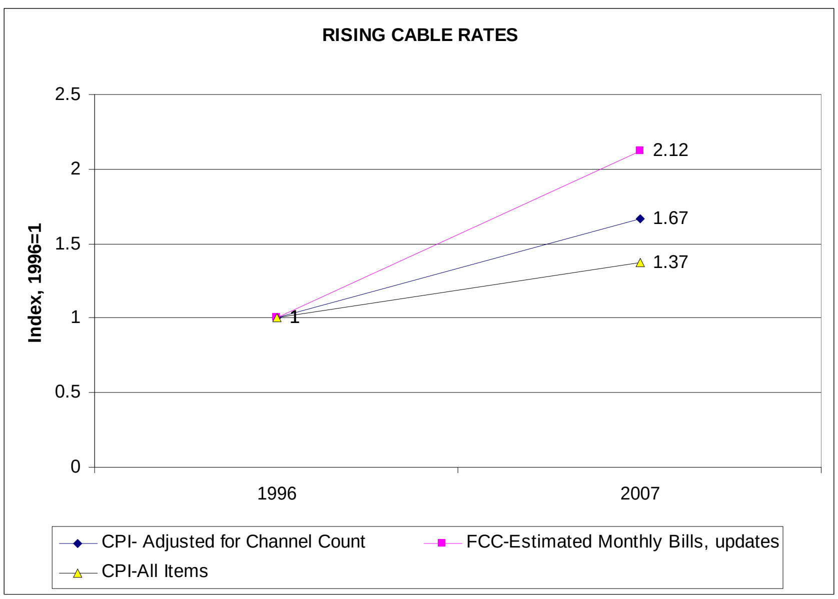
Sources: Bureau of Labor Statistics, Data base, Kagan Associates, *History of Cable TV Subscribers and Revenues;* Federal Communications Commission, *Report on Cable Prices*, various issues; U.S. Census Bureau, *Statistical Abstract of the United States*, "Media Usage and Consumer Spending," various issues; Veronis Schuler Stevenson, *Communications Industry Report*: *Forecast Summary, 2003*.

Update of pricing patterns from Chris Murray to Chairman Markey, February 21, 2008

On an inflation-adjusted basis, according to the Bureau of Labor Statistics (BLS), cable rates have increased more than 72% since Congress called for cable industry deregulation in 1996. Inflation was 35% during that same period. In other words, cable rates have increased at more than double the rate of inflation since 1996.

Furthermore, our research shows that actual rate increases in nominal terms are significantly more than the BLS numbers, because BLS adjusts the rate increases, factoring in a discount for additional channel offerings. BLS computes a "quality-adjusted price," dividing the number of channels by the price consumers pay. This assumes there is full value for every channel added. In other words, BLS assumes that WE, TruTV and TV Land are equal to ESPN, CNN and Discovery in value. If we drop BLS's "quality adjustment" on cable prices, cable rate increases go from double the rate of inflation to triple the rate of inflation since 1996.

More to the point, as long as the cable operators force people to buy channels they don't watch, it's the full price of the monthly bill that hits consumers in the pocketbook, not some theoretical per-channel price. Most consumers watch the same 17 channels[4], yet they are forced to pay for all of them. If consumers can't buy cable television on a per-channel basis, what does some theoretical per-channel price really mean?



Sources: Bureau of Labor Statistics, Consumer Price Index; FCC, Report on Cable Industry Prices, various issues; Monthly bill increases 2005-2007 are projected at the same rate as CPI cable.

[4] http://www.gao.gov/new.items/d048.pdf

APPENDIX B:

EXCERPT FROM
COMMENTS OF CONSUMER FEDERATION OF AMERICA,
CONSUMERS UNION AND FREE PRESS
IN THE MATTER OF THE COMMISSION'S CABLE HORIZONTAL AND VERTICAL OWNERSHIP LIMITS AND ATTRIBUTION RULES
MM DOCKET NO. 92-264

(Describing the Major Anti-consumer, Anti-competitive Structures and Practices in the Multi-channel Video Programming Distribution industry)

Consumers have seen their monthly bills for basic and expanded basic cable skyrocket, doubling in the past decade. They are forced to buy larger and larger bundles of programs to keep receiving the small number they actually choose to view. Year-after-year, the increase in basic monthly bills fuels increased cash flow in the industry, contradicting claims that programming expenses are driving up price increases. Over this period, cash flow per subscriber per year has increased by 90 percent.

Independent programmers continue to find it difficult if not impossible to gain carriage on cable systems. Year-after-year, independent programmers watch cable operators favor the programs they own by giving them carriage in the basic and expanded basic tiers. Broadcasters, who have been given must-carry and retransmission rights also are far more likely to succeed in gaining carriage on cable systems than an independent programmer. Affiliated programming is nine times as likely to be carried as independent programming in national markets. As a result the same half dozen programmers affiliated with cable operators or broadcasters completely dominate the TV dial, accounting for eighty percent of prime time viewing, programming budgets and cable subscribership. Not one national network has achieved an audience reach of sufficient size to sustain quality programming without being carried on both Comcast and Time Warner systems.

OVERVIEW OF THE MVPD MARKET

In this proceeding, following the intent of Congress, the Commission must focus its attention on whether excessive concentration of cable ownership unfairly impedes the flow of independent programming to the public. However, in its Notice, the Commission recognizes that it must examine the patterns of fundamentally anticompetitive conduct throughout the industry to assess whether limits on the reach of a single cable operator (called horizontal limits) will help to prevent such behavior. Therefore, the Commission has asked a wide-ranging set of questions about the basic structure, conduct and performance of the industry.

1. Lack of Competition at the Point-of-Sale

In these comments we show that excessive concentration of ownership is harming consumers and independent programmers. Local market concentration in the industry – the lack of competition at the point of sale – is the key source of market power over both consumer prices and the terms and conditions imposed on programmers for carriage on cable networks.

2. Concentration in the National Video Market

The ability to control programmer access to the consumer by deciding which programs to carry occurs on a market-by-market basis, but as the number and size of the markets controlled increases, the market power over access to consumers translates into market power over programmers as well. Once cable operators become large enough, the refusal to carry programming, or the imposition of onerous conditions of carriage, undermine the ability of the programmer to succeed. Thus the fate of the consumer and the programmer are linked.

3. Clustering of Systems in Regional Markets

Recent developments in the industry have tied the fate of the consumer and the programmer more closely together in another way. The incessant reduction in the number of cable operators and their increasing size has led to the aggregation of cable systems into 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. Consumers find that their alternatives for obtaining television service are restricted, while programmers find that their alternatives for distributing programming to the public are restricted.

Concentration in the national market can harm programmers because of inadequate competition at the point-of-sale. Without a well-reasoned rule in place, in the dozen years since Congress acted, the top four firms in the industry have increased their market share from less than half to about two-thirds. The growth of clustered systems has been even more dramatic, from less than one third of all cable subscribers to over four-fifths.

4. Bundling

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. Getting into the bundles that will be widely distributed is a make-or-break threshold for programmers. 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.

The hope that the expansion of capacity with digital technology would weaken the hold of cable operators has been dashed by the creation of bundles of digital programming. Consumers are forced to buy these bundles if they want the benefits of digital technology. The consumer must now spend about $60 per month and buy about 100 channels in tiers to get digital service. But the typical household watches fewer than twenty channels.

Offering independent programmers the opportunity to sell in the video on demand (VOD) space provides little genuine relief from the stranglehold of the programming cartel. VOD programmers are told to compete for consumer dollars and attention after the cable operators have picked the consumer's pockets and crammed about 100 channels onto the consumer's TV tuner. This is hardly the fair competition for consumer attention that the Congress demanded when it established the objective of this proceeding.

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 sell 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 audiences, are unable to refine their message because everybody is forced to pay for everything 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.

APPENDIX C:

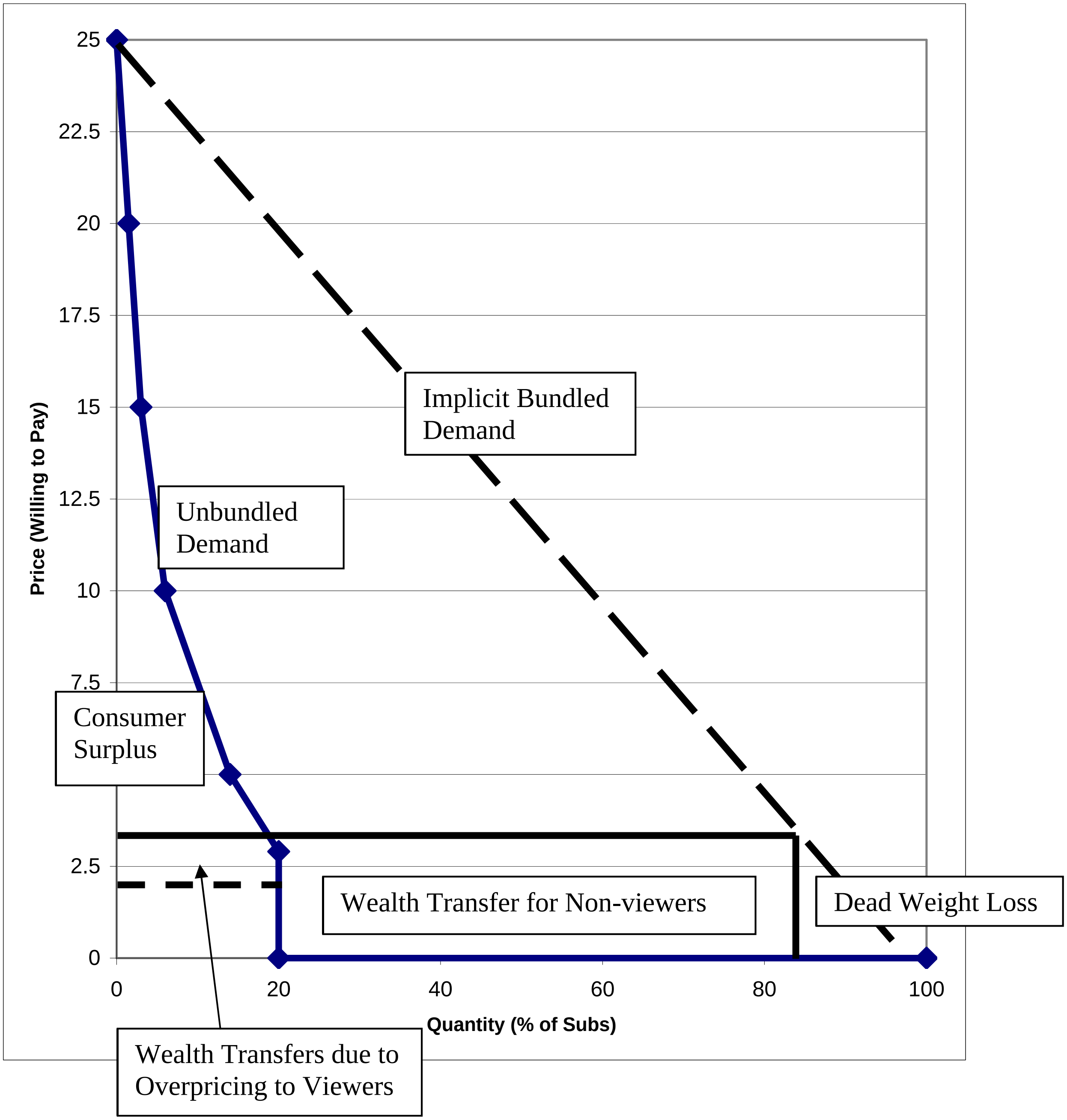
EXCERPT FROM
TIME TO GIVE CONSUMERS REAL CHOICE

(Explaining the Extraction of Consumer Surplus through Bundling)

A recent study by Deutsche Bank of the Cox – ESPN controversy reinforces the conclusion that bundling leads NCTA to overestimate the welfare gains (see Exhibit V-2). ESPN is one of the most popular and the most expensive cable network, yet seventy-eight percent of respondents said that they would not pay $2 per month for it if they were given the choice. Cox confirms this estimate, noting that less than a quarter of its subscribers are "avid sports fans."

There is good reason to believe that the elasticity of demand for ESPN alone is a lot higher than for the bundle and that the bundling of sports programming into the most popular package is harming consumers. The three-quarters of cable viewers who say they would not pay $2 dollars for ESPN, likely the three-quarters who are less than avid sports fans, are paying over $1.5 billion for it in the bundle (at Cox's cost). Exhibit V-2 shows the wealth transfers and efficiency losses associated with ESPN. For every one dollar of consumer surplus, there is at least one dollar of wealth transfer. This does not include the wealth transfers associated with the overpricing of ESPN to those who would take it, which may equal another quarter of the consumer surplus. The deadweight efficiency losses are an additional cost associated with this anti-consumer bundling.

Exhibit V-2: Wealth Transfer and Consumer Surplus For ESPN



Source: Deutsche Bank, *Walt Disney Company*, October 27, 2003, p. 16.

APPENDIX D:

Excerpt from
THE NEGATIVE EFFECT OF CONCENTRATION AND VERTICAL INTEGRATION ON DIVERSITY AND QUALITY IN VIDEO ENTERTAINMENT
Mark Cooper and Derek Turner

Telecommunications Policy Research Conference September 2007
Comments of Consumers Union, Consumer Federation of America and Free Press, In the Matter of Cross-Ownership of Broadcast Stations and Newspaper (etc.) MM Dockets No. 01-235, 01-317, 00-244. MB Docket Nos. 02-121, 02-277

(Describing the Origin and Extent of Domination of the Video Marketplace by a Small Number of Vertically Integrated Programmers)

Within less than a decade after repeal of Fin-Syn and the passage of the 1996 Telecommunications Act, the process of vertical integration and horizontal consolidation was complete (se Exhibit III-2).

Five firms have come to own major studios, broadcast networks and cable TV channels while holding television station licenses as well (see Exhibit III-3). The names are familiar to all in both the television and the theatrical movie space. All of the entities have a presence in each of the major video entertainment areas – network television, cable television and movie production. These firms account for five of the seven studios that produce motion pictures – known as the majors.

The 1990s policy changes triggered a series of acquisitions and product developments over the course of the decade that created a vertically integrated oligopoly in the television industry. Most directly, the networks could monopolize access to audiences in prime time broadcast television, foreclosing the streams of revenue that sustain production of all forms of content.

Each of the big three networks merged with a major studio and acquired cable programming over the course of the 1990s. Fox had taken a different path to vertical integration. After being rebuffed in an effort to acquire Warner studio, News Corp. acquired Twentieth Century Fox and a number of television stations in major markets, both in 1985. Since the late 1970s, Twentieth Century Fox had been one of the least active of the major studios in providing television programming. Fox's focus through the 1990s would not be on original programming as traditionally defined for prime time. It would focus on sports in programming and broadcast duopolies. Interestingly, Fox was vertically integrated but remained below the threshold for being subject to the Fin-Syn rules. For the big three networks who were subject to the rules, the repeal of Fin-Syn made mergers between networks and studies profitable, as self-supply was now allowed for both television and theatrical release. Each has a substantial ownership of television distribution. The four national broadcast networks are represented here. The broadcasters have substantial ownership of TV stations. The fifth entity, Time Warner, is a major cable operator.

As a result of the recent Adelphia acquisition and exchange of cable systems with Comcast, Time Warner dominates the two entertainment centers in the U.S., New York and Los Angeles. It also has a share in the new broadcast network, CW, to which its production operations are providing content. Each of the five also has substantial cable offerings. Indeed 24 of the top 25 cable channels, as measured by homes passed, are owned by these five entities. In terms of actual viewers, as opposed to homes where programming is available, these five entities account for the vast majority – as much as 85 percent of prime time viewing.

Note that each of the entities has a presence in all of the key areas of video product production and distribution (see Exhibit III-4). Each owns studios that produce video product

Exhibit III-2: Mergers, Acquisition and Product Launches in the Creation of the Vertically Integrated Video Oligopoly

	Disney/ABC	Time Warner	Viacom/CBS	G.E-NBC	News Corp	
1993	Disney acquires Miramax Films	Turner acquires Castle Rock & New Line			News Corp. reacquires New York Post	
1994		Time Warner acquires CPP/Belwin	Viacom acquires Paramount / acquires Blockbuster			
1995			CBS launches UPN			
1996	Disney acquires ABC	Time Warner acquires Turner	CBS acquires Infinity Broadcasting			
1997			CBS acquires American Radio Systems		News Corp. acquires New World Communications / acquires Burnham Broadcasting	
2000		Time Warner acquires Times Mirror magazines from Tribune Company	CBS acquires King World / CBS buys Outdoor Systems billboard group / Viacom			
1999				NBC acquires 30% of Paxon	News Corp. acquires Hearst Book Group	
2001	Disney acquires Fox Family from News Corp.	AOL acquires Time Warner	Viacom acquires BET			News Corp. acquires Chris-Craft-United Group / sells Fox Family to Disney
2002		AOL Time Warner buys out AT&T's stake in Time Warner Entertainment, creating TimeWarner Cable system		NBC acquires Telemundo / acquires Bravo (from Cablevision)		
2003				GE acquires Vivendi Universal Entertainment		News Corp. acquires stake in DirecTV
2005			Viacom acquires DreamWorks / CBS & Viacom Split (but Sumner Redstone still controlls majority votes in both			
2006	Disney acquires Citadel Broadcasting (Disney 52%) / Disney acquires Pixar	creation of CW Network with CBS (50%) / Time Warner acquires all of Adelphia's cable systems	creation of CW Network with Time Warner (50%)			

Exhibit III-3:
The Vertically Integrated, Video Entertainment Oligopoly

Parent	Television Property	Cable/Satellite	Film Production
News Corp.	35 TV Stations reach 39% of U.S. Households 9 duopolies – NY, LA, Chic. Minn. D.C. Dallas, Phoenix Orlando, Houston Fox Network	Fox News, Fox Movie FX, FUEL, Nat. Geog. Speed, Fox Sports, Regional Sports, College, Soccer DirecTV	20th Century Fox, Fox Searchlight, Fox Television S, Blue Sky Studios
General Electric	27 TV stations reaching ~30% of U.S. households 6 duopolies through Telemudo – NY, LA, Chic., SF, Dallas, Miami NBC Network 30% of Paxson	CNBC, MSNBC, Bravo, Sci-Fi, Trio, USA	Universal
Disney	10 TV stations reaching X% of U.S. households ABC Network	ESPN, ABC Family, Disney Channel, Toon Disney SAOPnet, Lifetime A&E	Walt Disney Touchstone Hollywood Buena vista Pixar Miramax
CBS/Viacom	17 TV stations reaching 39% of U.S. households CBS Network CW King World	Showtime MTV, Nickelodeon BET, Mick at Night TV land, Noggin Spike TV, CMT Comedy Central, Flix The Movie Channel Sundance	Paramount Paramount Home
Time Warner	CW Network	HBO, CNN, Court TV, Road Runner New York News 1 Time Warner Cable 14.5 million subscribers	Warner Bros. Studios, TV Home Video Domestic Pay-TV Telepictures, Hanna- Barbera Witt-Thomas,

Source: Columbia Journalism Review, *Who Owns What,* August 22, 2006.

Exhibit III-4: Vertically Integrated Video Oligopoly Domination of Television and Movie

Production and Distribution (Circa 2001-2003)

	TELEVISION							MOVIES/DVD (U.S. Revenue)	
	Subscribers*		Writing Budgets		Programming Expenditures		Share of Prime Time	Box Office	Video
	# Million	%	$ Million	%	$ Million	%	%	%	%
FOX/LIBERTY	1250	21	236	19	3803	9	3	11	10
TIME WARNER	925	15	206	17	7627	18	10	22	20
CBS/VIACOM	910	15	45	12	9555	22	28	8	7
ABC/DISNEY	705	12	132	11	6704	16	21	20	22
NBC/Universal**	720	12	159	13	3879	9	21	12	15
Subtotal	4315	75	772	72	31568	74	83	73	74
TOTAL	6000	100	1225	100	43212	100	100	100	100
HHI	**1179**		**1084**		**1226**		**1775**	**1213**	**1258**
FOUR FIRM CR	**63**		**61**		**65**		**70**	**65**	**67**

Notes: and sources: * Subscribers includes broadcast and cable homes passed. ** Universal added to NBC to project post-merger market. Federal Communications Commission, In the Matter of Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming, CC Docket No. 00-132, Seventh Report, Tables D-1, D-2, D-3, D-6, D-7; Television Market Report: 2001 (Washington, D.C.: BIA Financial Network, 2001); Comments In the Matter of 2002 Biennial Regulatory Review –MB Docket No. 02-277, MM Dockets 02-235, 01-317, 00-244, January 2, 2003, Bruce M. Owen and Michael G. Baumann, "Economic Study E; Concentration Among National Purchasers of Video Entertainment Programming," Comments of Fox Entertainment Group and Fox Television Stations, Inc., National Broadcasting Company, Inc. and Telemundo Group, Inc., and Viacom; Comments of the Writers Guild of America Regarding Harmful Vertical and Horizontal Integration in the Television Industry, Appendix A. Federal Communications Commission, In the Matter of Implementation of Section 11 of the Cable Television Consumer Protection and Competition Act of 1992 CS Docket No. 98-82, CS Docket No. 96-85, MM Docket No. 92-264, MM Docket No. 94-150, MM Docket No. 92-51, MM Docket No. 87-154, January 4, 2002; ; Federal Communications Commission, Program Diversity and the Program Selection Process on Broadcast Network Television, Mara Epstein, Media Ownership Working Group Study 5, September 2002, pp. 26. David Waterman, Hollywood's Road to Riches (Cambridge: Harvard University Press, 2005), pp. 21, 25.

APPENDIX E:

EXCERPT FROM
MINORITY PROGRAMMING:
STILL AT THE BACK OF THE BUS
MARK COOPER AND ADAM LYNN
INTERNATIONAL COMMUNICATIONS ASSOCIATION, FORTHCOMING, MAY 2008
FURTHER COMMENTS OF CONSUMERS UNION, CONSUMER FEDERATION OF AMERICA AND FREE PRESS, OCTOBER 22, 2007

(Examining the Carriage Status of Minority-Owned, Minority-Targeted Programming)

This paper examines the issue of minority-targeted programming on broadcast and cable television. It shows that minority owned programming is get little carriage and that minority-targeted programming is still at the back of the bus – severely underrepresented in carriage compared to the size of the minority population and relegated to expensive tiers on cable networks.

- The 192 networks that are deemed minority-targeted represent about 40 percent of the total number of network, but minority-owned, minority-targeted programming accounts for less than 4 percent of the total carriage.

- The more broadly available programming, which is carried on the expanded basic tier, is dominated by a handful of programmers. Four-fifths of the carriage on expanded basic tiers is accounted for by five networks – three owned by broadcasters (Univision and Telemundo (owned by NBC) and one owned by a cable programmer (Viacom).

- In order to gain access to the 98 percent of the minority-targeted programming, subscribers must pay for extra tiers – an average of almost $43 per month.

Results

Although the number of minority-targeted programs is large, they only get about 8.4 percent of the carriage on cable systems. Moreover, 44 networks that are owned in whole or in part by large broadcast and cable entities account for over two-thirds (69 percent) of that carriage.

Adding the minority-owned broadcasters (Univision, Television Azteca) and assuming that all the minority-targeted networks that are not owned by cable or broadcasters, we find that 3.7 percent of the programming carried on cable systems is minority-owned, minority targeted programming. These are low single digits that parallel the problem in the ownership of broadcast outlets. About one third of the minority-owned, minority-targeted programming is accounted for by a single broadcaster – Univision.

As troubling as these results based on carriage are for cable, the above availability analysis still leaves out the problem of placement (although the subscribership numbers include subscribers on all tiers).

Only one sixth of the carriage that minority programming receives is in the expanded basic tier, the tier in which all of the most popular non-minority programming is carried. With approximately 74 channels in the basic plus-expanded basic tier these minority-targeted networks account for about 5 percent of the availability. Moreover, five networks, three owned by broadcasters (Univision and Galavision owned by Univision and Telemundo owned by NBC) and one by a major cable programmer (BET owned by Viacom) account for 80 percent of the carriage in the basic tier.

In order to gain access to the vast majority of minority-targeted programming, the consumer must incur a substantial increase in cost – between $15 and $50 – to buy one of the larger bundles, where about half of the minority-targeted programming is found, or over $10 to purchase programs on an a premium basis.

The most prevalent offer is a separate Latino package, but these too come at a price. The consumer can purchase a Latino package at an added cost above the package price for on average $7.16. The only way to get a lower price for Latino-targeted programming is in combination with various elements. However, these alternatives are still expensive, costing an average of $42.75, as shown in Exhibit 8. Fifteen of the cable systems allow the consumer to purchase basic plus a digital box plus the Latino package for an average cost of $28.16. These "savings" come at the price of not having access to the most popular non-minority-targeted programming. Fifteen of the systems will allow you to include the Latino package in their digital basic package for an average price of $57.35. These packages are not available for the programming targeted at other minorities and many systems do not offer these alternative packages at all.

Every cable customer in America is forced to face the hard reality that they must pay for many channels that do not interest them in order to view the channels that do. This trend is exacerbated for those seeking to view diversity-oriented programming. We demonstrated earlier that few channels aimed at Latino, African American and Asian American audiences make it on to the basic tier of service and many of these channels require an additional per month fee, below we provide a few snapshots of what this looks like from a local cable customer's perspective.

According to the data we compiled, the average cable consumer looking for access to diversity oriented programming beyond what is already available over broadcast (and BET) must subscribe to a digital tier of service with their cable operator. Only Latinos have the "privilege" of tacking on another monthly fee to receive a package of Spanish language channels. This means to get the popular Spanish, African American or Asian channels a consumer will be paying substantially more than a consumer looking for the popular non diversity-oriented networks. Even with an increased monthly bill a consumer is still extremely limited in what they can receive.

APPENDIX F:

EXCERPT FROM
REPLY COMMENTS OF CONSUMERS UNION AND CONSUMER FEDERATION OF AMERICA
IN THE MATTER OF COMMENT REQUESTED ON A LA CARTE AND THEMED TIER PROGRAMMING AND PRICING OPTIONS FOR PROGRAMMING DISTRIBUTION ON CABLE TELEVISION AND DIRECT BROADCAST SATELLITE SYSTEMS,
MB DOCKET NO. 04-207

(Explaining the Impact of Mixed Bundling on Cable Market Power and Operations).

II. THE IMPACT OF MIXED BUNDLING

AUDIENCES

PENETRATION AND VIEWING UNDER BUNDLING WITH A LA CARTE CHOICE

The NCTA funded experts assume that 50 percent of TV viewers would take the bundle. They assume that an additional 10 to 30 percent of the subscribers choose networks *a la carte*. Thus, penetration is assumed to be between 60 and 80 percent of that found in the bundled environment (see Exhibit 14). The remaining 20 - 40 percent is captives who would escape, given *a la carte* choice.

Generally, the most popular networks are assumed to have higher *a la carte* take rates. This assumption is derived from an examination of the concentration of viewing and brand awareness. Interestingly, devotees are assumed to have a much higher concentration of viewing for the less popular shows. That is, a much smaller percentage of subscribers are assumed to account for half the total viewing. Therefore, even though they lose more subscribers, they should not be assumed to lose more viewers.

If advertisers are paying for eyeballs, not blank TV screens, there should be little change in the revenue flow. If advertisers were paying for blank TV screens, they would not be serving as the rational actors that economic models assume them to be. Paying to air commercials when nobody is watching makes no sense. In a mixed bundled world, what advertisers lose in reach, they make-up in effectiveness (the greater probability that someone is watching).

In fact, the evidence in this proceeding shows quite strongly that advertisers are really and primarily paying for viewers, which is, of course, a subset of the larger group of subscribers (Exhibit 15). Ratings points show a very strong linear relationship to advertising dollars -- much, much stronger than the relationship between subscribership and advertising revenues.

With such a high percentage of viewing carried into the *a la carte* environment, there is little reason to assume that advertising revenues would be lost. Interestingly, in the Bear Stearns analysis, the assumption was that networks would lose a smaller percentage of advertising revenue than subscriber. They assumed one-third of advertising revenues would be lost.

This analysis of audiences hardly seems to portend the disaster that the large cable operators and the dominant programmers predict. The reason is two fold. On the one hand, they assume that a loss of subscribers, without a substantial loss of viewers, undermines network economics. On the other hand, the cable industry has concocted a witch's brew of increasing transaction costs, which they claim will drive prices through the roof. Both of these are based on a series of assumptions that are dubious at best.

NETWORK SUCCESS

> The experts for the large cable operators predict that "widespread network failure and consolidation would likely occur" even under the mixed bundling scenario we have discussed. The critical assumption is that advertisers will not support networks that do not reach 50% to 70% of the nation's TV households. As a result, they are doomed to fail. That is an audience of 50 to 70 million subscribers.
>
> Historically, advertisers have been less willing to support networks with less than 50% to 70% coverage of TV households… Those advertisers that do support networks before they reach 50%-70% distribution do so because they want to "get in early" and develop relationships with networks they expect to grow significantly, and typically pay lower advertising rates than for established networks.

Two years ago, the largest cable operators told the Commission a very different story. One set of experts funded by the second largest cable operator objected to the fact that

> the Commission adopted the conclusion that a new programmer needs 15 million subscribers to insure viability. At that time, 15 million amounted to about 20 percent of MVPD subscribers. The total number of MVPD subscribers continues to increase. There is no indication that new cable services require an increasing number of subscribers, or a constant percent of the increasing total number of MVPD subscribers….
>
> Actual successful entrants follow varied and dynamic expenditure and carriage patterns….
>
> At least nine of the entrants did not reach 15 million subscribers in their first four years, but are still in existence.

Six of the nine that were identified are still in existence with an average of 24 million subscribers, far fewer than the 50 million the industry now claims. The other three have grown to close to 50 million. All are still in existence.

> The expert testifying on behalf of the largest cable operator at the time concluded that “program services can be, and are, viable even if they reach fewer that 15 million United States MVPD. Indeed, a number of services have been in existence for more than five years with fewer than 15 million subscribers.”

The 15 million subscriber figure, which the cable industry experts claimed was too high as a standard for ensuring the viability of networks two years ago, would be accomplished by the bundled subscribers alone, for every category identified by the cable industry experts in this proceeding. Regardless of where the number lies, the large cable operators and dominant national programmers ignore the fact that the *a la carte* environment will be much more friendly for programmers who are not part of the big five. The issue is not that networks have to grow – they certainly do – but that the bundled environment favors the dominant national programmers and forces entrants to sell ownership to cable operators to get carriage.

Cable operators favor programming in which they have an ownership interest. They are 64 percent more likely to carry it when this is the case, according to the GAO. Broadcasters have leveraged their rights of carriage to gain preferential rates of carriage (46% according to the GAO), and they own their own studios, so they buy little independent programming.

Because the current system is so discriminatory against independent programming, we believe that *a la carte* could expand the opportunity for independent programming. Programmers who achieved a significant *a la carte* following could gain considerable leverage with advertisers, since they were delivering a dedicated and perhaps distinctive audience with inelastic demand.

An *a la carte* system would temper the power of the big five, making independent programmers more competitive. A mixed tier system would have several specific advantages for independent programmers not tied to the big five:

First, it would expand the market, since some consumers who are priced out of the market by the massive bundle will be brought in. Independent and niche programmers therefore would have a higher probability of success, which would likely lead to increased diversity.

Second, increased access to consumers for independent programmers would also lead to greater diversity. Mixed bundling allows independent programmers to compete for consumer resources and consumer attention sooner. Under the current model, in which cable operators drive new entrants into the video on demand space, the consumer must pay about $65 for the basic, expanded basic and digital tiers, which have a combined 90 networks, before the VOD programmer gets to compete for subscribers. Under mixed bundling, they get to compete after a basic tier and a digital box have been purchased. They compete after a $20 price and 16 networks.

Cable operators could feel pressures to be more responsive to consumer needs in an *a la carte* environment. In all likelihood, cable operators would still want to sell bundles – and we would encourage them to do so – but they would have to guard against overpricing them and including networks that have no marginal benefit, since consumers could buy networks they did want *a la carte*. Cable operators would come under pressure to remove their own shows from bundles, if the number of consumers who selected *a la carte* for networks not owned by the cable operators was significant.

In short, the market would become more competitive. Large vertically integrated national programmers would be less likely to force large packages of channels into the expanded basic bundle when consumers could choose channels *a la carte*. Programmers would have incentives to create smaller themed tiers, with which consumers could enjoy the efficiencies of tiered packages without the burden of the current system, such as subscribing to many networks that remain unwatched.