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# Regulatory/ Legislative Issues

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# curbing anticompetitive practices by cable incumbents:

## If Not Now, When?

**O**ver the last two decades, Congress has enacted increasingly forceful federal legislation intended to foster and protect competition in the cable industry. The evidence bears out the wisdom of this policy – year in and year out, the Federal Communications Commission (FCC) has found that incumbents charge lower prices, offer more channels, provide better customer service and introduce more new products and services in markets in which they face meaningful competition from terrestrial competitors than in markets in which they do not.<sup>1</sup> As cable operators have continued to grow in size and market power, however, several



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multiple system operators (MSOs) have employed a variety of anticompetitive practices that undermine competition and harm the public.

In 2003, at the suggestion of Rick Maultra, former member of NATOA's Board of Directors, and at request of the Board, the authors studied the nature, extent, contributing factors and possible solutions to this problem. We focused on predatory pricing, rate discrimination, denial of access to critical content and various other unfair business practices. Our research confirmed that anticompetitive behavior by major MSOs is a significant and growing threat to competition in the cable industry; one that is likely to continue into 2004 and beyond. This article summarizes our findings.

## Predatory Pricing

Predatory pricing involves “deliberately pricing below cost to drive out rivals and raising the price to the monopoly level after their exit.” *Panamsat v. Comcast*, 12 FCC Rcd 6952, FCC 97-172 (rel. May 20, 1997, quoting *Price Cap Performance Review for Local Exchange Carriers*, 11 FCC Rcd 858, 870-71 (1995)). Not only did we find numerous examples of predatory pricing, but the FCC itself has expressed increasing alarm about this practice. For example, in its order approving the AT&T-Comcast merger, the FCC found that AT&T and Comcast had not successfully rebutted the evidence of record that they had routinely engaged in “targeted discount pricing,” which enables “an established incumbent with dominant market power ... to eliminate nascent competitors and stifle competitive entry.”<sup>2</sup> The FCC found that the merger proceeding did not present an appropriate vehicle to address this problem, but it took note of “mounting consumer frustration” and “the threat such practices pose to competition,” and it suggested that “regulatory intervention may be required either at the local, state or federal level.”<sup>3</sup>

Elsewhere, however, the FCC has observed it is not clear whether the Commission has authority under the Communications Act to remedy predatory pricing.<sup>4</sup> Furthermore, even if the FCC had such authority, the complexity, slow pace and expense involved in prosecuting predatory pricing claims under the standards applicable to antitrust cases would make this an impractical remedy.<sup>5</sup>

## Rate Discrimination and “Effective Competition”

Rate discrimination can be anticompetitive and contrary to the public interest even if the perpetrator does not charge below-cost rates or have a probability of recouping losses after driving its competitor out of the market. In the cable industry today, several major MSOs are practicing targeted rate discrimination through what they euphemistically call “win-back” programs. These programs have a common and critical feature — the MSOs offer special deep discounts only to their competitors’ subscribers or to their own subscribers who threaten to leave the MSOs. If the MSOs had to offer the same deals to all of their own subscribers, they might well abandon this form of anticompetitive behavior.

It was precisely for this reason that Congress, in 1992, enacted a uniform rate requirement in Section 623(d) of the Communications Act, 47 U.S.C. § 521(d). According to the Commission, the purpose of Section 623(d) was “to prevent cable operators from having different rate structures in different parts of one cable franchise ... [and] to prevent cable operators from dropping the rates in one portion of a franchise area to undercut a competitor temporarily.”<sup>6</sup>

In the Telecommunications Act of 1996, acting on the assumption that the Act’s pro-competitive measures would rapidly bring meaningful competition to the cable industry, Congress exempted from the uniform rate requirement in Section 623(d) areas that were subject to “effective competition.” While such an exemption may sound reasonable in theory, the FCC has interpreted “effective competition” in ways that render that term all but useless in identifying markets where true competition can fairly be said to exist. To the contrary, the FCC’s interpretations have opened the door to precisely the kinds of anticompetitive behavior that Congress sought to prevent by enacting the uniform rate provision.<sup>7</sup>

## Denial of Access to Critical Content

In Section 628 of the Cable Act of 1992, Congress banned unfair and anticompetitive restrictions on access to cable programming, including most exclusive contracts, and required satellite programming distributors in which MSOs had attributable interests to make cable programming available to competitors of the

<sup>1</sup> See e.g., *In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Ninth Annual Report, FCC 02-338 (released December 31, 2002) (hereafter “Ninth Annual Video Competition Report”) at ¶18.

<sup>2</sup> *Applications for Consent to the Transfer of Control of Licenses from Comcast Corporation and AT&T Corp., to AT&T Comcast Corporation*, MB Docket No. 02-70, Memorandum Opinion and Order at ¶ 33-34 (released November 14, 2002) (“AT&T/Comcast Merger Approval Order”).

<sup>3</sup> *AT&T/Comcast Merger Approval Order* at ¶ 34.

<sup>4</sup> *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Eighth Annual Report, FCC 01-389 (released January 14, 2002) ¶ 209 (“Eighth Annual Video Competition Report”).

<sup>5</sup> *Id.* at ¶ 208.

<sup>6</sup> S. Rep. No. 92, 102d Cong, 1st Sess. 76 (1991).

<sup>7</sup> Their problems are discussed at length in *Implementation of Sections of The Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, MB Docket No. 02-144, Comments of The National Association of Telecommunications Officers and Advisors, the National League of Cities and the Miami Valley Cable Council, pp. 26-36 (submitted November 4, 2002).

# Curbing Anticompetitive Practices

MSOs on a non-discriminatory basis. “Congress believed it unlikely that new market entrants could compete effectively unless they could gain access to vertically integrated, satellite delivered programming” and that “incumbent providers had both the incentive and the ability to deny [access] to new competitors.”<sup>8</sup>

Section 628 has done much to spur competition over the last decade, as applied to vertically integrated cable operators and satellite-delivered programming vendors. The FCC has repeatedly held, however, that Section 628 does not apply to *terrestrially*-delivered programming.<sup>9</sup> Interpreted this way, Section 628 leaves an increasingly significant loophole.

As the FCC has recognized, “the terrestrial distribution of programming, including in particular regional sports programming, could have an impact on the ability of alternative [providers] to compete in the video marketplace.”<sup>10</sup> The FCC has also noted that incumbents have “an incentive to shift regional sports networks from satellite to terrestrial distribution and thereby avoid the ambit of program access rules.”<sup>11</sup> Doing so will become all the more tempting as MSOs. As we saw in 2003 and will undoubtedly see increasingly in 2004, acquisitions and system swaps continue to create ever-larger clusters of contiguous systems that facilitate delivery of programming terrestrially over fiber.

Furthermore, the more market power MSOs accumulate, the more likely they will be to use that power to bend content providers to their will.<sup>12</sup> As video-on-demand and other time-shifting technologies mature, and as the lines between traditional cable television programming and other forms of content blur, MSOs will undoubtedly seek to obtain exclusive rights to content of all kind. Unless Section 628 is clarified and expanded to impose non-discrimination requirements on content generally, regardless of how it is delivered, MSOs will increasingly be able to use access to content to thwart competition.

## Other Anticompetitive Practices

Our research also uncovered anticompetitive MSO conduct of various other kinds. These practices included, but were by no means limited to, the following activities:

- Refusing to deal with suppliers and contractors that provide services to competitors<sup>13</sup>
- Hiring away key employees of competitors<sup>14</sup>
- Using litigation to prevent or delay competition<sup>15</sup>
- Refusing to carry advertising of overbuilders<sup>16</sup>
- Interfering with local franchise processes<sup>17</sup>
- Flooding local media with misinformation about public communications initiatives<sup>18</sup>
- Lobbying for anticompetitive state laws<sup>19</sup>

<sup>8</sup> *In The Matter of Implementation Of The Cable Television Consumer Protection and Competition Act of 1992, Development of Competition and Diversity in Video Programming Distribution, Section 628(c)(5) of the Communications Act Sunset of Exclusive Contract Prohibition, Report and Order*, at ¶ 7, 17 FCC Rcd. 12,124, 2002 WL 1396090 (rel. June 28, 2002) (“Exclusive Contracts Report”).

<sup>9</sup> See, e.g., *DirectTV, Inc. v. Comcast Corp.*, et al., 15 FCC Rcd. 22,802 (2002).

<sup>10</sup> *Eighth Annual Video Competition Report* at ¶ 14.

<sup>11</sup> *Eighth Annual Video Competition Report* at ¶ 173.

<sup>12</sup> See, e.g., J. Flint and P. Grant, “Comcast: Newfoundland Clout And Bare-Knuckle Tactics,” *Wall Street Journal Online*, June 27, 2003, [http://online.wsj.com/article\\_print/0,,SB105666423651582800,00.html](http://online.wsj.com/article_print/0,,SB105666423651582800,00.html).

<sup>13</sup> For example, in its *AT&T/Comcast Approval Order*, the FCC noted that RCN had reported that “Comcast . . . [has] attempted to prevent contractors from doing business with RCN in Philadelphia by requiring them to sign non-compete clauses in their contracts and by threatening any contractors found working for RCN with reprisals.” *Id.* at ¶ 36. Everest Connections reported that it could not purchase set top converters from Scientific-Atlanta or Pioneer because of restrictions demanded by incumbents. Comments of Everest Connections in CS Dkt. 00-129 at 8. AT&T allegedly fired a local installations vendor in Provo, UT, for performing services for the City’s cable system. *Multichannel News*, “Overbuild Deal Costs an AT&T Vendor,” (February 5, 2001) at 20.

<sup>14</sup> On October 9, 2001, at a conference in Seattle, WA, sponsored by the American Public Power Association, a representative of Click! Network of Tacoma, WA, reported that AT&T Broadband had repeatedly engaged in this and various other “dirty tricks.”

<sup>15</sup> In enacting the Cable Act of 1992, Congress observed that “incumbent cable systems often wage legal battles to prevent cities from awarding second franchises.” S. Rep. No. 10292, 102nd Cong., 1st Sess. 1991, 1991 WL 125145 at \*13 (Leg. Hist.). In 2000, Knology, Inc. asserted anti-trust claims against the incumbent cable operator in Louisville, KY, Insight Communications, for allegedly filing a “sham” level-playing-field lawsuit against the City to thwart or significantly delay Knology’s entry into the market. The City subsequently won summary judgment dismissing all claims asserted by Insight. *Insight Communications Co. LP, et al. v. City of Louisville, KY*, (petition for Kentucky Supreme Court review pending), <http://www.baller.com/pdfs/ky-ct-app-louisville-opin6-25-03.pdf>.

<sup>16</sup> In Gainesville, FL, Cox Cable refused to carry advertising of its competitor, Gainesville Regional Utilities.

<sup>17</sup> Section 621(a)(1) of the Communications Act, § 541(a)(1), expressly prohibits exclusive cable franchises, and the courts have frequently held that incumbent cable operators have no standing to interfere with a local government’s consideration of a competitive franchise. See, e.g., *United Cable Television Services Corp. v. Dep’t of Public Utility Control*, 235 Conn. 334, 663 A.2d 1011, 1019 (1995); *New England Cable Television Ass’n, Inc. v. Department of Public Utility Control*, 27 Conn. 95, 717 A.2d 1276, 1283 (1998); *In re Dakota Telecommunications Group*, 590 N.W.2d 644, 648 (Minn. App. 1999). In its *AT&T/Comcast Approval Order* ¶ 35, the FCC noted that RCN had complained that “Comcast’s interference with its local franchise negotiations in Prince George’s County, Maryland, and in Philadelphia, Pennsylvania, kept RCN from securing a cable franchise.”

<sup>18</sup> For example, in the Tri-Cities of St. Charles, Batavia and Geneva, Illinois, Comcast and Southwestern Bell conducted result-oriented “surveys” and bombarded the area with inaccurate information to persuade voters to reject a public fiber network. The history of the Tri-Cities fiber project is documented at <http://www.tricitybroadband.com>; <http://www.surfcity.net/cabletv/kramerfirm/joe/Page28.htm>.

# Curbing **Anticompetitive Practices**

As video-on-demand and other time-shifting technologies mature, and as the lines between traditional cable television programming and other forms of content blur, MSOs will undoubtedly seek to obtain exclusive rights to content of all kind.

Some of this conduct is arguably lawful, but only up to a point. For example, the First Amendment protects the right of incumbents to seek anticompetitive federal and state laws, to petition agencies and courts for anticompetitive rulings, and to persuade local decision-making bodies to restrain entry by public or private competitors.<sup>20</sup> Other forms of anticompetitive behavior that are not protected by the First Amendment or any other legal doctrine, including refusing to deal with suppliers and contractors that provide services to competitors, hiring away key employees of competitors, refusing to carry competitors' advertising, and destruction of competitors' property.

## **Conclusion**

NATOA is still gathering information about anticompetitive actions by MSOs, and it is continuing to evaluate options for addressing them. One thing is already clear, however, this is a major problem that is growing progressively worse. If our Nation is serious about encouraging and protecting meaningful competition in the cable industry, we will have to solve this problem quickly, in a focused and energetic way. As the FCC has suggested, this may take concerted action at the federal, state and local levels. The time to begin is long overdue. ■

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<sup>19</sup> Cable companies and their national and state trade associations have been at the forefront of efforts to persuade state legislatures to ban or significantly impair the ability of public entities to provide or facilitate the provision of competitive services in their communities. For example, after obtaining restrictive legislation in Virginia, the Virginia Cable Telecommunications Association crowed: "Another competitive threat was muted this session when the legislature included cable-backed 'level playing field' language into a bill that allowed municipal utility companies to enter the telecom business." [http://www.vcta.com/industry/reg\\_reports/march2002.doc](http://www.vcta.com/industry/reg_reports/march2002.doc).

<sup>20</sup> The scope of such First Amendment protections are currently being litigated in *Knology, Inc. v. Insight Communications Co.*, No. 3:00 CV-723-R (W.D. Ky.), in which Knology alleges that the incumbent, Insight, crossed over the line in seeking to block Knology's entry into the City of Louisville, KY.