Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)
	)
Nondiscrimination in the Distribution)	CS Dkt. 01-7
Of Interactive Television Services	)
Over Cable	)

REPLY COMMENTS

of

CONSUMERS UNION,

CONSUMER FEDERATION OF AMERICA

and

THE CENTER FOR MEDIA EDUCATION

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TABLE OF CONTENTS

SUMMARY **1**

ARGUMENT **2**

1. A NON-DISCRIMINATION REQUIREMENT WOULD SERVE THE FIRST AMENDMENT. 2

    1. Strict Scrutiny Does Not Apply. 3

    2. Even If Non-Discrimination Triggers Intermediate Scrutiny, A Non-Discrimination Requirement Passes Intermediate Scrutiny. 4

    1. The Potential Harm Is Non-Conjectural and Supported by the Record 5

2. CABLE COMPANIES DO NOT REQUIRE AN ABILITY TO DISCRIMINATE TO ENSURE THE DEPLOYMENT OF ITV. 8

3. INTELLECTUAL PROPERTY CONCERNS HAVE NO PLACE IN THIS PROCEEDING. 10

CONCLUSION 11

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To: The Commission

REPLY COMMENTS OF CONSUMERS UNION, CONSUMER FEDERATION OF AMERICA, AND THE CENTER FOR MEDIA EDUCATION

Consumers Union, Consumer Federation of America, and the Center for Media Education (collectively "CU, *et al.*") submit the following replies in the above captioned proceeding.

SUMMARY

The NCTA and the cable operators[1] (collectively "Cable Commentors) raise a host of arguments against the imposition of a non-discrimination requirement. While many of these were addressed by CU, *et al.* or others in the initial comments stage, two deserve special consideration. First, the cable operators argue that the First Amendment militates against imposing any regulations on ITV at this time. Second, that vertical integration will confer positive benefits on the industry at this early stage.

A non-discrimination requirement will serve, rather than frustrate the First Amendment. Even under intermediate scrutiny, a simple non-discrimination requirement is clearly the least restrictive means of achieving the twin compelling interests of promoting competition and diversity. Enough evidence exists to make the problem "non-conjectural," even at this early stage of ITV development.

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[1] AT&T Corp., AOL Time Warner, Charter Communications, Comcast Corp., Cablevision systems Corp.

As to the vertical integration issue, CU, *et al.* do not deny that cable operators will make significant contributions to and investment in ITV services. Commentors do dispute the proposition that cable operators must have the right to exclude rivals, distort the market, and exact monopoly rents to have sufficient incentive to make the investment.

The history of the 1992 Cable Act[2] demonstrates the folly of this reasoning. The ability of cable system operator to discriminate against rival programers, and to withhold essential programming from potential multichannel video programming distributors (MVPDs) such as direct broadcast satellite (DBS), is well documented. Congress created the 1992 Cable Act in large part to correct such abuses with structural safeguards. These non-discrimination requirements have not deterred cable deployment or investment, and have allowed at least some modest competition from DBS to begin to emerge.

Finally, the FCC should not allow concerns over intellectual property rights to influence the outcome of this proceeding. The courts, rather than the FCC, should judge what intellectual property rights vest with programmers rather than with system operators. Instead, the FCC should focus upon the purpose of the Communications Act, to ensure that the people of the United States enjoy the benefits of communication by wire and radio that promotes competition and diversity.

ARGUMENT

4. A NON-DISCRIMINATION REQUIREMENT WOULD SERVE THE FIRST AMENDMENT.

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[2] Cable Television Consumer Protection and Competition Act of 1992, Pub. L. 102-385, 106 Stat 1460.

Cable Commentors argue that the First Amendment prohibits imposing a non-discrimination requirement on ITV. *See, e.g., NCTA Comments* at 49-53; *Charter Communications Comments* at 9-13; *AT&T Corp. Comments* at 38. Leaving aside the argument raised that existing laws held constitutional already mandate non-discrimination,[3] nothing could be further from the truth. To the contrary, the First Amendment ***compels*** the adoption of a non-discrimination requirement, rather than mandating against it.

1. Strict Scrutiny Does Not Apply.

Relying heavily on *Comcast Cablevision of Broward County, Inc. v. Broward County*, 124 F. Supp.2d 685 (S.D. Fla 2000)("*Broward*"), Cable Commentors argue that any regulation of ITV would be subject to strict scrutiny by a reviewing court. This analysis is flawed.

The *Broward County* decision is an outlier. No other court has ever adopted its reasoning. By contrast, the Court of Appeals for the District of Columbia Circuit has routinely rejected the proposition that neutral rules designed to foster competition and diversity that address the cable industry's market power are subject to strict scrutiny. *See, e.g., Time Warner Entertainment Co. v. FCC*, 97 F.3d 957 (D.C. Cir. 1996); *Time Warner Entertainment Co. v. FCC*, 211 F.3d 1313 (D.C. Cir. 2000) ("*TWE I*"). Furthermore, *Broward County* contradicts the only other district court to consider the First Amendment issue of cable open access. *See AT&T Corp. v. City of Portland*, 43 F. Supp.3d 1146, 1154 (D. Ore 1999), *r'vsd on other grounds*, 216 F.3d 871 (9th Cir. 2000) (holding

[3] *See, e.g., Comments of PBS & APTS* at 7 (non-discrimination part of must-carry); *Comments of SBC* at 4-9 (ITV information or telecommunication service subject to common carriage requirements).

that open access provision did not raise First Amendment concerns and, if it did, proper level of scrutiny was intermediate scrutiny).

Excluding *Broward County*, Cable Commentors arguments for strict scrutiny have been routinely rejected by the Supreme Court, *see Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 645-66 (1994) ("*Turner I*"), and the circuit courts. *See, e.g., TWE I*, 211 F.3d at 1316-18. Furthermore, CU, *et al.* do not propose that the non-discrimination provision "single out" cable. To the contrary, CU, *et al.* urge the Commission to adopt a uniform non-discrimination rule regardless of platform. Nevertheless, even if the Commission were to apply a non-discrimination requirement solely to cable, this would not trigger strict scrutiny. *See Turner I*, 512 U.S. at 665-66; *TWE I*, 211 F.3d at 1317-18.

2. Even If Non-Discrimination Triggers Intermediate Scrutiny, A Non-Discrimination Requirement Passes Intermediate Scrutiny.

Even if a non-discrimination requirement triggers intermediate scrutiny – a by no means certain conclusion, *see, e.g., Warner Cable Communications, Inc. v. City of Niceville*, 911 F.2d 634 (11th Cir. 1990) (First Amendment right of cable operator does not include right to suppress speech of others) – a non-discrimination requirement satisfies intermediate scrutiny.

Under intermediate scrutiny, the rule must further "an important or substantial government interest..unrelated to the suppression of free expression" and must restrict speech no more than necessary. *Turner I*, 512 U.S. at 662. As the Supreme Court has recognized, both ensuring competition within the MVPD industry and guarantying to citizens a diversity of information from antagonistic sources are "compelling interests of the highest order." *Turner Broadcasting Systems, Inc. v. FCC*, 520 U.S. 180, 190 (1997) ("*Turner II*"). A simple non-discrimination requirement is easily the

least intrusive and least repressive means to achieve the goal of ensuring that the ITV market can develop freely. It is certainly less intrusive than other measures employed to curtail the market power of the cable industry and upheld by the courts. *See Turner* II, 520 U.S. at 190-96 (must carry requirements); *TWE I*, 211 F.3d at 1319-23 (horizontal ownership limits, channel occupancy rules); *Time Warner Entertainment v. FCC*, 93 F.3d 957 (D.C. Cir. 1996) (rate caps, PEG channels, leased access). Nor does the existence of anti-trust remedies undermine the validity of a prophylactic behavioral restraint such as a non-discrimination requirement. *TWE v. FCC*, 211 F.3d at 1322.

3. The Potential Harm Is Non-Conjectural and Supported by the Record

The Cable Commentors, relying on *Time Warner Entertainment Co., v. FCC*, 240 F.3d 1126 (D.C. Cir 2001) ("*TWE II*") argue that, at this stage, any harm remains conjectural and that the FCC therefore cannot apply a prophylactic rule. This misconstrues the holding of *TWE II*.

TWE II did not , as the Cable Commentors appear to suggest, prohibit the FCC from enacting prophylactic rules. Congress intended the FCC to use its expertise to ensure that the benefits of communications "by wire or radio" inured to the benefit of all Americans, not merely the privileged few. *See, e.g.,* Communications Act of 1934 §214(a) (commission must ensure that new communications services should serve the public interest); §257(b) (policy to encourage innovation, competition, diversity of media voices); §303(g) (encourage "larger and more effective use of radio in the public interest"); §309(a) (requiring broadcast licenses serve the public interest); §601(4) ("assure that cable communications provide and are encouraged to provide the widest possible diversity of information sources and services to the public"); Telecommunications Act of 1996, Pub. L. No. 104-104, §706 (deployment of advanced telecommunications services "to all Americans"). The courts have consistently upheld the FCC's use of its predictive powers and expertise in setting ground rules for

the development of new services. *See United States v. Southwestern Cable Co.*, 392 U.S. 157, 168-69 (1968)(cable); *NBC v. FCC*, 319 U.S. 190, 212, 216-17 (1943)(broadcasting); *Computer and Communications Industry Association v. FCC*, 693 F.2d 198, 213 (D.C. Cir. 1982)("electronic publishing"); *United States v. FCC*, 652 F.2d 81, 93, 100 (D.C. Cir. 11980 (en banc) (satellite services). As the Court of Appeals for the District of Columbia Circuit has explained:

> the Commission is empowered by the Communications Act to foster innovative methods of exploiting the radio spectrum . . . when piloting such a course, the Commission functions as a policy maker and, inevitably, a seer – roles in which it will be accorded the greatest deference by a reviewing court.

Telocator Network of America v. FCC, 691 F.2d 525, 538 (D.C. Cir 1982).

To suggest, as Cable Commentors appear to suggest, that the FCC must wait for the harm to occur to demonstrate that it is "non-conjectural" violates these statutory provisions and the consistent interpretations of the courts regarding the FCC's predictive judgments.

TWE II is not to the contrary. *TWE II* dealt with a very specific statutory construction. As an initial matter, the court affirmed the authority of Congress and the FCC set prophylactic rules. *TWE I*, 211 F.3d at 1318-1320. The *TWE II* Court concluded, however, that the statute in question required the FCC to use a strictly competitive analysis, rather than one which relied upon diversity. *Id.* at 1135-36.

Here, no such restriction applies. The FCC can (indeed, must) use its predictive powers to determine whether a non-discriminatory provision will best encourage deployment and serve "the public interest, convenience and necessity."

CU, *et al.* And others have submitted sufficient evidence in this proceeding to warrant a non-discrimination provision. The Federal Trade Commission explicitly found that AOL Time Warner

would have both the incentive and the ability to discriminate against rivals and manipulate its ITV offerings for competitive advantage. *See In re America Online, Inc. and Time Warner*, FTC Docket No. C-3989, ¶¶ 19, 32-37 (2000); *In re Merger of America Online and Time Warner*, Docket No. CS 00-30, ¶¶ 215-39 (released January 22, 2001). This reasoning applies with equal validity to AT&T, which is also a vertically integrated cable MSO providing broadband access and content.[4]

Furthermore, Cable companies have already demonstrated a willingness to strip out information and ITV triggers provided by rival services to gain a competitive advantage. *AOL Time Warner Merger Order* at ¶¶204-06, 239 n.597; *In re Petition for Special Relief of Gemstar*, CSR-5528-Z (filed Mar. 16, 2000). Indeed, the entire history of the cable industry has been one of exploiting local monopolies to the detriment of rivals and subscribers denied the benefits of competition. 1992 Cable Act, §2(a)(4)-(5), S. Rep. 102-92 at 24-29, 32-34(1991) ("1992 Act Senate Report"); H..R. Rep. 102-628 at 28-29 ("1992 Act House Report") It is hardly "conjectural" for the Commission to determine that the cable industry will continue to act in its historically anti-competitive fashion, and create prophylactic rules to protect the emerging ITV market.

Nor need the FCC rely merely on these established facts. CU, *et al.* and others have

[4]In addition, in the wake of the Commission's order suspending the AT&T/MediaOne divestiture conditions, AOL Time Warner and AT&T/MediaOne remain joined through their mutual interest in TWE. The Commission explicitly found that this link creates a danger that AOL Time Warner and AT&T will coordinate to the detriment of competition. *AOL Time Warner Merger Order* at ¶¶258, 265-76. Given that these two companies control nearly 50% of the market, this situation makes industry-wide non-discrimination rules more urgent than ever.

submitted into the record evidence that cable providers have both the capacity and the incentive to discriminate against rival content, to erect "walled gardens" – carefully managed areas designed to prevent users from finding rival content while creating the illusion of openness. *See Comments of CU, et al.* at 5-8. Furthermore, as noted above, the FTC and the Commission have already made findings regarding the ability and incentive of one large cable provider, AOL Time Warner, to discriminate. The Commission may consider these findings in this docket as well.

The FCC need not wait for cable providers, or others, to permanently distort the market before it can apply its authority. As the courts have explained, where an entity controls both content and conduit, it is reasonable for the Commission to assume an ability and incentive to discriminate, and to impose safeguards against this danger. *See United States v. Western Electric Co., Inc.,* 673 F. Supp. 525, 586 (D.D.C. 1987) On the contrary, to fail to act would be to abandon the responsibility Congress entrusted to the agency.

As CU, *et al*. explained in their initial comments, ITV has the potential to enhance the ability of Americans to "to receive suitable access to social, political, esthetic, moral, and other ideas and experiences." *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390 (1969). A non-discrimination requirement thus enhances, rather than violates the First Amendment, and is a proper exercise of the FCC's statutory mission.

5. CABLE COMPANIES DO NOT REQUIRE AN ABILITY TO DISCRIMINATE TO ENSURE THE DEPLOYMENT OF ITV.

In a variety of guises, the Cable Commentors argue that, although they do not intend to ever discriminate, a regulation actually ***prohibiting*** discrimination would discourage investment, inhibit cable MSOs from developing services and content, and either delay or prevent the deployment of

ITV.

On its face, this argument is absurd. If discrimination does not constitute a part of Cable Commentors' business plans, it is difficult to see how a simple regulation enshrining this principle can have the detrimental effects the Cable Commentors predict. Rather, it is clear that the Cable Commentors' merely seek to muddy the waters and preserve their ability to leverage their control of the delivery system with impunity.

No one has suggested that cable operators be prohibited from deploying new services, working with affiliates, or even taking equity stakes in new ventures. All that has been suggested is that cable operators (and others) not be allowed to leverage their control of the ITV platform in an anti-competitive fashion.

This argument exactly parallels the history of cable development. To encourage deployment, cable operators were permitted to engage discriminatory behavior. This gave cable an iron lock on the MVPD market and inhibited the development of new technologies and new programming options. 1992 Cable Act §2(a)(5).

The imposition of the non-discrimination provision has not meant the death of cable. To the contrary, while it has allowed the development of competition, the number of cable customers and overall cable penetration has increased dramatically since the Act's passage.[5] Cable operators, under the threat of competition, have expanded their channel offerings, and the number of programmers has also grown. In short, contrary to the arguments of the Cable Commentors, non-discrimination

[5]At the time of the 1992 Cable Act, nearly 56,000,000 households subscribed to cable television, with negligible penetration by alternate MVPDs. 1992 Cable Act §2(a)(3). In 2000, there were 66.7 million cable subscribers, and an additional 17.7 million non-cable MVPD subscribers. *Seventh Annual Report on MVPD Marketplace*, Docket No. FCC 01-1 ¶¶5-6

requirements have encouraged expanded deployment of services to the public, increased innovation, and fostered competition; failure to impose non-discrimination requirements has, by contrast, stifled innovation and competition.

Furthermore, even absent outright discrimination, the ***potential*** for discrimination by a dominant player has the effect of distorting the market. Those seeking to offer services on the platform must, of necessity, take care not to offend the gatekeeper. As a result, the Commission has found that even a significant market share is sufficient to induce independent programers to act like affiliates. *See Cable Horizontal Ownership Limits*, Third Report and Order, 14 FCC Rcd 19098, 19122 & n.128 (1999) (evidence that "because of the MSOs' monopsony pressure, unaffiliated cable networks...act like vertically integrated programmers").

These examples have played out not merely in the cable industry, but elsewhere as well. For example, the non-discrimination requirements of the *Computer* proceedings allowed the Internet to develop and flourish. *See* OPP WORKING PAPER 31, THE FCC AND THE UNREGULATION OF THE INTERNET (authored by Jason Oxman) 3-17 (1999), Had the FCC failed to impose this non-discrimination regulation on the "nascent" industry of "electronic publishing," the modern revolution in telecommunications would not have occurred.

In short, for all the attempts to generate fear, uncertainty and doubt, the Cable Commentors have not shown how prohibiting them from doing something harmful they claim they will never do will discourage deployment of ITV. By contrast, history provides a very real warning for what will happen if the Commission fails to impose a non-discrimination requirement.

(released January 8, 2001).

6. INTELLECTUAL PROPERTY CONCERNS HAVE NO PLACE IN THIS PRO-CEEDING.

To allow intellectual property concerns to influence the deployment of ITV services, and in particular whether this should in any way prevent the Commission from creating a non-discrimination requirement, is to place the cart many miles before the horse. To the extent intellectual property holders have valid intellectual property claims, the courts remain available for recourse. *See In re Toll Free Services Access Codes*, 13 FCC Rcd 9058, 9068 (1998) (observing that trademark concerns should not delay roll out of new toll free service and that redress for intellectual property violations is available from the courts).

A content provider such as Major League Baseball should no more be able to dictate the development of ITV than a single website can dictate what browser the millions who surf the Internet use. To the extent Major League Baseball and the National Football League appear to suggest that they should have veto power over the ability of cable MSOs or others to provide generic enhancements on their systems, the Commission should reject this notion.

On the other hand, no one seriously suggests that ITV somehow deprives intellectual property holders of their rights under the law. If content providers wish to negotiate for endorsements or services, nothing in the proposed non-discrimination requirement interferes with this. To the contrary, the issue is whether the cable MSO can prevent the content provider or anyone else from offering services without tithing to the media gatekeeper that holds the keys to the ITV kingdom.

To the extent a content provider believes its rights have been infringed by a third party, the courts provide ample remedies. Indeed, the courts are far better suited to deal with such matters than the FCC.

CONCLUSION

The Cable Commentors have raised the traditional boogeymen to Commission action: that any action violates their First Amendment rights, that it will discourage innovation and deployment, and that everything will be much better if the Commission just trusts the "market" (*.i.e.*, the few remaining cable MSOs) and does nothing.

History has shown the fallacy of doing nothing. To the contrary, the evidence submitted in this proceeding, as well as all experience of the past, show that a simple non-discrimination provision will encourage rapid deployment, innovation, and new venues for citizens to receive information and express themselves. By contrast, a failure to act invites market concentration and a stifling of creativity and competition.

Respectfully submitted,

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