

## **Implementation of Section 302 of the Telecommunications Act of 1996**

### **CS Docket No. 96-46**

#### **Comments of the Staff of the Federal Trade Commission and the Antitrust Division of the Department of Justice In Opposition to Petition for Reconsideration**

The Staff of the Federal Trade Commission<sup>(1)</sup> and the Antitrust Division of the Department of Justice offer this joint comment in opposition to the Petition for Reconsideration of the National Cable Television Association, Inc., insofar as that petition asks the Federal Communications Commission to reconsider its decision to permit the operators of Open Video Systems ("OVS") to limit the ability of competing, in-region cable operators to demand carriage of their programming on the OVS.

The Federal Trade Commission and the Antitrust Division are responsible for maintaining competition and safeguarding the interests of consumers. Both the Antitrust Division<sup>(2)</sup> and the staff of the FTC<sup>(3)</sup> have wide experience in reviewing antitrust issues in the area of video programming distribution and other telecommunications issues.

This proceeding concerns the implementation of the portion of the Telecommunications Act of 1996<sup>(4)</sup> that relates to

OVSs will combine features of common carriers and cable systems.<sup>(9)</sup>

An OVS operator may act as a programming provider for at least one-third of the capacity of its own system.<sup>(10)</sup> An OVS operator is obligated to allocate the other two-thirds to unaffiliated video programming providers, but only to the extent that such program providers apply for channel capacity on the system.<sup>(11)</sup> The FCC is required to prescribe regulations that would prohibit an OVS operator from "unjustly or unreasonably" discriminating among these video program providers.<sup>(12)</sup> The Notice of Proposed Rulemaking raised the question of whether a decision by an OVS



Accordingly, we agree that the OVS regulations should be structured with a keen concern for the ability of an OVS operator to offer a service that is independent from that of a competing dominant cable operator. An OVS that is independent from competitors with market power will provide consumers with the benefits of competition.

We also believe that a bright-



(18) 1994 Cable Report at ¶ 131.

(19) *In re* Annual Assessment of the Status of Competition in Video Programming, 11 F.C.C. Rcd. 2060 at ¶¶ 9, 86-103 (December 1995) (Second Annual Report).

(20) Ted Hearn, "Scripps Howard, BellSouth Battle Heats Up," Multichannel News 150 (8 May 1996); Ted Hearn, "Bell South Fights to Keep Cable Off Georgia VDT Trial," Multichannel News 1 (May 1, 1995).

(21) Kent Gibbons, "SNET Says It Can't Fill Rainbow's VDT Channel Order," Multichannel News 14 (June 5, 1995).

(22) Ted Hearn, "BellSouth Nabs Franchise in Chamblee, GA," Multichannel News 20 (April 22, 1996); Kent Gibbons, "SNET Drops VDT Plan, Goes Cable across Connecticut," Multichannel News 1 (January 29, 1996).

(23) Ted Hearn, "For Now, It Looks Like SOS for OVS," Multichannel News 142 (April 29, 1996).

(24) *In re* Open Video Systems, \_\_\_ F.C.C. Rcd. at ¶¶ 66a, 1 TfH0D66an, Goes Cable acC TfHMf [(O)e4(c)-3