

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the matter of)
)
Annual Assessment of the Status of) **CS Docket No. 01-129**
Competition in the Market for the Delivery)
of Video Programming)

COMMENTS OF SHERJAN BROADCASTING CO., INC. (WJAN-CA)

1. Sherjan Broadcasting Co., Inc. ("Sherjan"), licensee of Class A television station WJAN-CA, Miami, Florida ("WJAN") hereby submits these comments in response to the *Notice of Inquiry* in this proceeding, wherein the Commission seeks information the state of competition in the market for delivery of video programming. These comments are focused on the monopoly power held by, and the exercise of that power, by the cable television industry.

2. Sherjan urges the Commission to look at competition and monopoly on a micro-basis as well as a macro-basis. Thus even if the cable television industry as a whole faces competition from over-the-air broadcasting, direct broadcast satellite systems, and other multichannel video service providers, it has an absolute monopoly on each individual television receiver to which its wires are attached. It absolutely controls access to each and every one of those receivers, and it exercises that monopoly power fully. Thus the only real competition in the marketplace is to wean the subscriber away from the cable company altogether; there is no possibility of competition by those who seek to provide programming to cable television viewers unless they can persuade a reluctant cable gatekeeper to open the gate. The Commission has recognized the bottleneck problem in the areas of local exchange telephone service and pole attachments. It is unrealistic to ignore the same strangulation that exists with cable television.

3. WJAN was the first station in the nation to receive a Class A television license. For almost four years, the station has provided increasing amounts of local programming to the Miami Hispanic community. Its schedule currently includes four hours of local live programming in prime time every weekday evening, 240 minutes a week of live local news, and four hours of live public affairs and entertainment programming on weekends, which far exceeds the local programming service offered in prime time by any other Miami full power television station and exceeds total local programming for most full power stations in the market. WJAN has enjoyed audience shares, measured by Nielsen, of up to a 7 share, even though its interference-free signal falls far short of covering the full DMA.

4. Because Miami is within the Top 160 Metropolitan Statistical Areas, WJAN does not have cable must-carry rights, even though it competes head-on with full power Spanish language stations that do have must-carry rights. *See* Section 614(h)(2)(E) of the Communications Act. WJAN does lease cable channels, but the competitive situation is extremely unbalanced, because WJAN, which provides more local programming than any of its full power competitors, suffers enormous cable-related economic and marketing burdens that its competitors do not face. The sum and substance of it is that Sherjan has very direct experience with the impact of the cable monopoly on a receiver-by-receiver basis.

5. Sherjan pays dearly for cable carriage, while its competitors are carried for free. And for all that Sherjan pays, WJAN is carried on only the expanded tier in Miami proper, is carried only part-time on that tier, and reaches only about half of the subscribers of the largest cable operator in the DMA. It reaches only those cable subscribers who pay an extra fee for the expanded tier, and it does even reach those subscribers during home hours. The cost of even this limited carriage is strangling Sherjan and taking up funds that would, in substantial part, otherwise be invested in improving WJAN's service.

6. When Sherjan first sought cable carriage, there were a half dozen cable operators scattered throughout the Miami market. Sherjan negotiated with each of them, one-by-one, and eventually reached agreements to lease channels on most of the systems, albeit it at a cost of almost \$1 million a year for all the systems taken together. During the past few years, AT&T Broadband has purchased most of the systems in the market. AT&T Broadband has raised Sherjan's rate from just over \$62,000 per month to \$85,000 per month, or \$1,020,000 per year, for AT&T Broadband's systems alone, which do not cover the entire market, not all of which carry WJAN, and which carry WJAN only part-time and not on the basic tier in Miami proper. Adding payments to other cable operators brings Sherjan's cable carriage bill to \$1.4 million a year. Those payments make WJAN unprofitable notwithstanding the station's significant success in achieving audience shares of as much as a 7 share measured by Nielsen.

7. Sherjan has been negotiating with AT&T Broadband for approximately four months to try to reach a more reasonable carriage arrangement. However, AT&T Broadband is firm on its increased price and has refused to yield on two critical points: (a) It will not guarantee WJAN's channel placement, reserving the right to change the channel for any number of reasons outside of Sherjan's control; and (b) it will not list WJAN on its channel line-up. Thus while WJAN broadcast competitors are listed by their call letters, WJAN's channel is marked as simply "leased access" or "unavailable." In other words, WJAN cannot buy cable parity with its competitors at any price and must pay an economically strangling price for a channel that is not on the basic tier, is not full-time, and is not identified as WJAN in channel listings.

8. There can be no doubt that AT&T's market power is overwhelming as far as Sherjan is concerned. It is no different from the fact that a competitor for local telephone service must have access to the incumbent local telephone company's "local loop" wiring to the home in order to provide competitive service,^{1/} or that a utility's poles are "bottleneck facilities" for any

^{1/} See *In the Matter of Reform of Access Charges Imposed by Competitive Local Exchange*

telecommunications carrier or cable company seeking to run wires along the streets.^{2/} Any television receiver to which cable is connected cannot receive WJAN at all unless it is on that cable. The monopoly over that particular television set is thus absolute.

9. In other words, while cable companies must compete against other multichannel video service providers to win subscribers in the first instance, they control an absolute monopoly gateway into each and every television receiver to which their wires are connected, and they are not required to offer access to that gateway except to the limited extent that the Communications Act forces a wedge for must-carry stations, public/educational/channels, and leased access.^{3/} 10. The only way that a viewer can escape the gatekeeper's control is to take three steps: (a) disconnect the cable from the receiver, (b) attach an antenna to the receiver, and (c) reprogram the receiver's tuner to tune to broadcast rather than cable channels. The technical sophistication to do all that, and then to undo all three steps to resume cable viewing, is well beyond all but a very few diehard viewers. Thus, there can be virtually no competition among those who offer programming unless the cable operator opens the gate to the arena. As the keeper of the arena gate, the cable company enjoys significant monopoly power that the market place has not eroded, and essentially cannot erode.

11. As the largest cable provider in the Miami market, AT&T Broadband's monopoly power to control which broadcast stations viewers may watch is very substantial. The consolidation process that is sweeping through all media today, including AT&T Broadband's acquisition of most

Carriers, Seventh Report and Order and Further Notice of Proposed Rulemaking in CC Docket No. 96-262 (released April 27, 2001).

^{2/} See *Alabama Cable Telecommunications Assoc. v. Alabama Power Company*, FCC 01-181, released May 25, 2001, at par. 54.

^{3/} While Sherjan does lease cable channels, there is very little leased access going on in the this country today because of the price barrier that the Commission's Rules permit cable operators to erect. Sherjan plans to petition the Commission to re-examine its leased access rate regulations.

of the cable systems in the Miami DMA, is accelerating the problem. As discussed above, the burden on WJAN is direct and severe.

12. Sherjan urges the Commission to recognize the cable television receiver gateway monopoly in its Report and Order and in reports to Congress resulting from this proceeding. The Commission has recognized the bottleneck access problem in other contexts. Ignoring it in the cable context is both unrealistic and unjustified.

13. The Commission must take a closer look at the different facets of cable company power than it has in the past. Looking at multichannel video provider competition is only half the picture. The impact on program providers of the cable monopoly over end user terminations is the other half. In Miami, AT&T Broadband's exercise of receiver monopoly power has impaired WJAN's ability to help achieve the goal of Congress to encourage increased local programming services embodied in the Community Broadcasters Protection Act of 1999.^{4/}

14. The first step is to recognize and discuss the problem. This proceeding is the place for that, and now is the time. Once there is recognition, the opportunity will arise to address the problem of remedies.

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^{4/} Codified at Section 336(f) of the Communications Act.