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

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In the Matter of)
Annual Assessment of the Status of) CS Docket No. 95-61
Competition in the Market for the)
Delivery of Video Programming)

NOTICE OF INQUIRY

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I. INTRODUCTION

1. On October 5, 1992, Congress enacted the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act").¹ Section 19(g) of the 1992 Cable Act directs the Commission to report annually to Congress on the status of competition in the market for the delivery of video programming.² The Commission issued its first report in compliance with this statutory requirement on September 28, 1994.³ This *Notice of Inquiry* ("NOI") is designed to assist the Commission in gathering the information necessary to prepare the second of these annual reports on competition in the market for the delivery of video programming.

¹ Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992), codified at 47 U.S.C. § 521, *et seq.*

² Communications Act of 1934, as amended ("Communications Act") § 628(g), 47 U.S.C. § 548(g).

³ *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, First Report*, CS Docket No. 94-48, 9 FCC Rcd 7442 (1994) ("1994 Competition Report" or "1994 Report").

2. The 1992 Cable Act clearly indicates Congress' preference for competition, rather than regulation.⁴ However, in 1992, Congress found that sufficient competition to cable television systems did not exist in most local markets, and as a result cable operators had "undue market power . . . as compared to that of consumers and video programmers."⁵ Accordingly, Congress established a regulatory scheme to promote competition and to ensure that consumer interests are protected in the absence of effective competition to cable.⁶ Thus, the 1992 Cable Act provides that where effective competition is present, cable television rates shall not be subject to regulation by government but shall be regulated by the market.⁷ Alternatively, where effective competition is absent, the Commission is to protect the interest of subscribers by ensuring that basic cable rates are reasonable and cable programming service rates are not unreasonable.⁸

3. Congress also sought to foster the development of competition to cable operators by requiring, in the "program access" provisions, that programming be made available to all multichannel video programming distributors on fair terms and conditions.⁹ In addition, the 1992 Cable Act provides that a cable operator shall have a uniform rate structure throughout the area served by its cable system,¹⁰ and that a franchise authority may not grant an exclusive franchise or unreasonably refuse to award an additional competitive

⁴ Communications Act § 623(a)(2), 47 U.S.C. § 543(a)(2).

⁵ 1992 Cable Act, sec. 2, 106 Stat. at 1460.

⁶ *Id.*

⁷ Communications Act § 623(a), 47 U.S.C. § 543(a).

⁸ Communications Act §§ 623 (b)-(c), 47 U.S.C. §§ 543 (b)-(c).

⁹ 1992 Cable Act, § 19, Communications Act § 628, 47 U.S.C. § 548. Congress also passed the "program carriage" provision, 1992 Cable Act, §12, Communications Act § 616, 47 U.S.C. § 536, and the "channel occupancy" provision, 1992 Cable Act, § 11, Communications Act § 613(f)(1)(B), 47 U.S.C. § 533(f)(1)(B). The latter two provisions help ensure that vertically integrated cable operators do not, through anticompetitive means, limit the ability of unaffiliated video programming vendors to secure carriage on multichannel distribution systems. In addition, we have held that under the program carriage provision, injured multichannel video program distributors have standing to complain of exclusive programming arrangements that are the result of cable operator coercion. *See Implementation of the 1992 Cable Act -- Development of Competition and Diversity in Video Programming Distribution and Carriage, Memorandum Opinion and Order*, MM Docket No. 92-265, 9 FCC Rcd 4415 (1994).

¹⁰ Communications Act § 623(d), 47 U.S.C. § 543(d).

franchise.¹¹ A critical element of the regulatory framework mandated by Congress is to promote the emergence of competition over time by fostering the entry of alternative multichannel video programming distributors.

4. The Commission has also sought in a variety of proceedings to promote the growth of competition in the marketplace for the delivery of video programming. This *NOI* presents an opportunity to assess whether progress is being made in developing competition and to determine whether further actions are necessary.

II. SUMMARY OF THIS NOTICE OF INQUIRY

5. This *NOI* is intended to solicit information, data and public comment that will be used to prepare the Commission's second annual report, the 1995 Competition Report. The purpose of this report is to monitor and summarize the status of competition in the marketplace for video programming. We intend to gather sufficient information to prepare an analysis of the current status of competition for the delivery of video programming and to evaluate changes in the competitive environment since the *1994 Competition Report* was submitted to Congress last September.

6. Accordingly, commenters are invited to submit data, information and analysis regarding the cable industry, existing and potential competitors to cable systems, and the prospects for increased competition in the market for the distribution of video programming. We ask specific questions to solicit current information and data regarding changes since the *1994 Competition Report* and fact-based projections for the future development of competition in this market. Parties also are asked to provide any other information or analysis deemed relevant for this report.

7. The Commission recognizes that much of the information that we will need for the 1995 Competition Report can be obtained from publicly available sources. In addition, a considerable amount of relevant, and even necessary information, has been provided in filings with the Commission in connection with a variety of ongoing proceedings. The Commission also recognizes that parties that choose to file comments in response to this *NOI* have limited resources. Accordingly, we are not asking parties to provide the Commission with information that is otherwise publicly available. Nor are we asking parties to repeat here the substance of comments that have been filed in other proceedings. Nonetheless, while the Commission intends to look to publicly available sources and filings in other proceedings as sources of information, commenters should feel free to comment or provide information on any matter that they believe is relevant to the issues on which the Commission will report.

¹¹ Communications Act § 621(a)(1), 47 U.S.C. § 541(a)(1).

8. As stated in the *1994 Competition Report*, we view this annual statutory requirement as a "work in progress in which certain parts are continually updated and revised" because the market for the delivery of video programming is "dynamic and evolving."¹² We begin, in Section III of this *NOI*, with an overview of the *1994 Competition Report*, including its findings regarding the status of competition as of September 1994 and a summary of the framework for analyzing competition in the market for delivered video programming.¹³ Section IV seeks information and comment regarding the relevant product and geographic markets for delivered video programming. We wish to examine distributors already in the market, entities that are potential entrants in this market and other technologies that might impact the nature of competition. The *1994 Competition Report* analyzed the cable television industry and compiled statistics regarding the development of existing and potential competition for the provision of video programming by alternative delivery technologies. In this *NOI*, we seek data to update this information to assess the current state of such competition and to analyze evolving trends. In Section V, we ask for comment on the structure of the market for the delivery of video programming and the effect of market structure on competition. In Section VI, we seek recommendations, as appropriate, for promoting further competition in the market for delivered video programming.

9. In addition, throughout this *NOI* we ask that commenters consider the economic framework for analyzing competition in the market for the provision of video programming. Parties are invited to comment on the findings of the *1994 Competition Report* regarding the relevant product and geographic markets, our evaluation of the market structure and our conclusions concerning the cable industry's market power. We also invite comment on the relevant economic methodologies for assessing the extent of competition and market performance in the market for the delivery of video programming. Finally, in addition to comments on specific issues raised in this *NOI*, we seek any information that commenters believe will assist the Commission in the preparation of this report.

III. OVERVIEW OF THE *1994 COMPETITION REPORT*

10. The *1994 Competition Report's* analytical framework can be summarized as follows: (a) definition of the market; (b) analysis of the status of current and potential future participants in the market; (c) examination of the conduct of the firms in the market; (d) analysis of market structure conditions that may affect competition, with particular emphasis on impediments to competition and regulatory efforts to promote competition; and (e) evaluation of the overall economic performance of the market.

¹² *1994 Competition Report*, 9 FCC Rcd at 7558, ¶ 253.

¹³ In the market for "delivered video programming," cable operators or alternative distributors supply programming to viewers. By contrast, in the "programming market," producers supply their programming to cable operators or to alternative distributors.

11. Specifically, the Commission wrote that the relevant market consists of a relevant product and a relevant geographic area. In the *1994 Competition Report*, the Commission used the 1992 Cable Act's definition of "multichannel video programming service"¹⁴ as a starting point for the definition of the relevant product.¹⁵ The Commission also analyzed the status of other multichannel video programming distributors ("MVPDs") that were not included in the statutory definition,¹⁶ and "discuss[ed] other video programming distribution media as potential substitutes for cable services."¹⁷ The Commission defined the relevant geographic market as the "area to which buyers will reasonably turn and from which competing suppliers sell their products," and wrote that "[g]iven the current state of competitive entry, it would seem reasonable to define, at least tentatively, the local franchise area as the geographic market relevant to an analysis of the cable industry."¹⁸

12. The Commission observed that cable television was the only provider of multichannel video programming for most households.¹⁹ The Commission found that cable television was available to over 96% of all homes and almost 60% of all households subscribed to basic cable service in 1993.²⁰ We observed that since 1990, when the Commission last provided Congress with an analysis of the cable industry and the state of competition,²¹ the cable industry had grown with respect to subscriber penetration, average system channel capacity, the number of programming services available, revenues, expenditures on programming, and capital investment.²²

¹⁴ See Communications Act § 602(12), 47 U.S.C. § 522(12).

¹⁵ *1994 Competition Report*, 9 FCC Rcd at 7467, ¶ 49.

¹⁶ See Communications Act § 602(12), 47 U.S.C. § 522(12).

¹⁷ *1994 Competition Report*, 9 FCC Rcd at 7467, ¶ 50.

¹⁸ *Id.* at 7468, ¶ 51.

¹⁹ Broadcast television is not an MVPD under the definition in the 1992 Cable Act. See Communications Act § 602(12), 47 U.S.C. § 522(12).

²⁰ *1994 Competition Report*, 9 FCC Rcd at 7451, ¶¶ 18-19.

²¹ *Competition, Rate Deregulation and the Commission's Policies Relating to the Provision of Cable Television Service, Report*, MM Docket No. 89-600, 5 FCC Rcd 4962 (1990) ("1990 Report" or "1990 Cable Report").

²² *1994 Competition Report*, 9 FCC Rcd at 7451-61, ¶¶ 17-36.

13. In addition, the *1994 Competition Report* analyzed the status of existing and potential competitors to local cable systems.²³ The Commission stated that while competitors were emerging, alternative video programming distributors were not available to a sufficient number of subscribers to create a competitive environment in most video programming delivery markets. We reported the existence of approximately fifty "overbuilds" scattered across the country where more than one cable system has cable lines passing the same homes in direct competition for subscribers.²⁴

14. With respect to alternative distribution technologies, the Commission observed that some inroads had been made since the *1990 Cable Report* on the status of competition in the cable industry. Direct broadcast satellite ("DBS") service, which the Commission first authorized in 1982, became available to consumers in 1994.²⁵ Another four million households received multichannel video programming using home satellite dishes ("HSDs").²⁶ The Commission found that multipoint multichannel distribution service ("MMDS"), or "wireless" cable systems, were increasing in number and obtaining the financial resources necessary for growth and expansion. The Commission indicated that, in June 1994, there were 143 systems serving 550,000 subscribers.²⁷ Satellite master antenna television ("SMATV") systems, also known as "private cable systems," showed growth in terms of numbers of systems and subscribers. Industry sources indicated that there were between 3,000 and 4,000 such systems serving about one million subscribers in August 1994.²⁸ In addition, at the time the *1994 Competition Report* was issued, the Commission had begun to authorize local telephone companies to provide video dialtone ("VDT") service within their local telephone service areas. Five technical or market trials and one permanent VDT service were authorized and another twenty-three applications were pending which, if granted, would allow service to 8.5 million homes.²⁹ The *1994 Competition Report* also considered electric utilities as potential distributors of video programming.³⁰

²³ We describe each of these competitors more fully below.

²⁴ *1994 Competition Report*, 9 FCC Rcd at 7468-72, ¶¶ 55-60.

²⁵ *Id.* at 7473-78, ¶¶ 62-70.

²⁶ *Id.* at 7478-82, ¶¶ 171-177.

²⁷ *Id.* at 7482-88, ¶¶ 78-90.

²⁸ *Id.* at 7488-92, ¶¶ 91-96.

²⁹ *Id.* at 7495-505, ¶¶ 103-20.

³⁰ *Id.* at 7508-09, ¶¶ 131-33.

15. The *1994 Competition Report* also evaluated broadcast television and other technologies as competitors to multichannel video program distributors.³¹ We observed that, for the more than one-third of all households that do not subscribe to cable, broadcast television satisfies the demand for video programming. We also noted that even in the households that subscribe to cable, two-thirds of prime time viewing was of retransmitted broadcast stations. Despite the size of its audience, the Commission found that broadcast television does not constrain cable rates to reasonable levels. However, the Commission identified possible technological and regulatory advances that might allow broadcast television, low-power television and local multipoint distribution service ("LMDS") to become distributors of multichannel video programming.³²

16. Turning to market structure conditions, the Commission analyzed multiple system operator ("MSO") ownership of cable systems and programming services, including changes since the *1990 Report*. We concluded that there had been a moderate increase in the horizontal concentration of cable MSOs nationwide and, if consummated, several proposed mergers would result in a further increase in concentration and increased "clustering," or regional concentration, of cable system ownership.³³ Vertical integration in the industry (i.e., the ownership of programming services by MSOs) was approximately the same in 1994 as in 1990, with cable MSOs continuing to invest in video programming vendors. Since 1990, there had been growth in diversity and quality of programming services that were offered or whose launch was announced.³⁴ The Commission stated that it appeared the program access rules adopted as a result of the 1992 Cable Act had been successful in ensuring the availability of programming to competing multichannel video program distributors.

17. Finally, the Commission evaluated overall economic performance in local markets for the distribution of multichannel video programming services. We found that competitive rivalry in most such markets "is largely, often totally, insufficient to constrain the market power of incumbent cable systems."³⁵ However, we also wrote that "entry of competitors to local cable systems over the coming months and years should exert a significant, favorable effect on market conduct and performance"³⁶

³¹ *Id.* at 7492-95, ¶¶ 97-102.

³² *Id.* at 7505-08, ¶¶ 121-130.

³³ *Id.* at 7511-20, ¶¶ 137-56.

³⁴ *Id.* at 7520-36, ¶¶ 157-93.

³⁵ *Id.* at 7556, ¶ 246.

³⁶ *Id.*

IV. DEFINING THE MARKET FOR DELIVERED VIDEO PROGRAMMING

A. The Market for Delivered Video Programming

18. The Commission intends to draw upon the relevant market concept to define the market for analysis in the 1995 Competition Report. As in the *1994 Competition Report*, the Commission intends to define the relevant product market by analyzing the degree to which products or services are "reasonably interchangeable by consumers for the same purposes."³⁷ The relevant geographic market is defined in a similar manner. The relevant geographic market is the area in which products compete with substantial parity. As with the definition of the relevant product market, its scope is defined by the geographic area to which buyers can reasonably turn or from which competing suppliers are likely to sell.³⁸

19. In the *1994 Competition Report*, the Commission used the 1992 Cable Act's definition of "multichannel video programming service" as a starting point for the definition of the relevant product.³⁹ The Commission also analyzed the status of other MVPDs that were not included in the statutory definition, and "discuss[ed] other video programming distribution media as potential substitutes for cable services."⁴⁰ We invite comments about that definition of the relevant product market, and in particular, responses to the following questions:

- (a) What changes (if any) have occurred, since the *1994 Competition Report*, in the relevant product market relative to the delivery of video programming?
- (b) Was the Commission's analysis of the relevant product market in the *1994 Competition Report* correct? Or, was it too broad? Or, was it too narrow?
- (c) In the *1990 Cable Report*, the Commission noted that cable provided four services: (1) an "antenna service" delivering high quality retransmitted broadcast signals; (2) a "premium" service offering uninterrupted recent movies; (3) a "general interest basic" service consisting of imported distant broadcast channels; and (4) a "specialized basic" service with channels that

³⁷ *1994 Competition Report*, 9 FCC Rcd at 7463, ¶ 40 (quoting *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 394 (1956)).

³⁸ *Id.* (citing *Tampa Elec. Co. v. Nashville Coal Co.* ("*Tampa Electric*"), 365 U.S. 320, 330-33 (1961)).

³⁹ *1994 Competition Report*, 9 FCC Rcd at 7468, ¶ 49.

⁴⁰ *Id.* at 7468, ¶ 50.

offer either news, sports or entertainment.⁴¹ Should the Commission's analysis treat cable service as a single product or as a combination of these or other services comprising separate relevant products?

- (d) What technologies are being used to provide services that should be included in the definition of the relevant product market? What technologies might be added to that list within the next two years?
- (e) Can subscribers create their own service comparable to cable by combining over-the-air broadcast service with service from a non-cable MVPD and "premium" programming obtained from a non-cable MVPD or personal VCR?
- (f) What approach should the Commission use to identify alternative video services that compete with cable services? Should the Commission attempt to assess how many cable subscribers would switch to alternative video service providers in response to a "small but significant non-transitory price increase"⁴² for a particular cable service? If the effect of such a price increase were to be assessed, should the current regulated cable rate be used as the base price for computing the price increase?

20. With regard to the relevant geographic market, the Commission wrote that "[g]iven the current state of competitive entry, it would seem reasonable to define, at least tentatively, the local franchise area as the geographic market relevant to an analysis of the cable industry, but that over time this definition may be broadened."⁴³ We invite comments about that analysis and definition of the relevant geographic market and, in particular, responses to the following questions:

- (a) What is the relevant geographic area within which customers can turn for alternative sources of delivered multichannel video programming? Are franchise areas relevant geographic areas? Or are they too broad? Or too narrow?
- (b) As cable operators increasingly cluster their operations, are the relevant geographic areas going to become increasingly regional? On the other hand, will relevant areas remain local, and perhaps smaller than franchise areas, if it is likely that substantial numbers of potential subscribers in any given area will not be able to choose from the same range of service providers as other

⁴¹ *1990 Cable Report*, 5 FCC Rcd at 4995-6, ¶¶ 50-52.

⁴² See Department of Justice and Federal Trade Commission, *1992 Horizontal Merger Guidelines* ¶ 1.51, 4 Trade Reg. Rep. (CCH) ¶ 13,104, at 20,573-5 to 20,573-6.

⁴³ *1994 Competition Report*, 9 FCC Rcd at 7468, ¶ 51.

potential subscribers in the same area (e.g., because they do not live in multiple dwelling units ("MDUs") or do not have line-of-sight access to satellites)?

- (c) How should the relevant geographic areas be defined in light of entry by firms that operate regionally (VDT) and nationally (DBS)?

B. Status of the Cable Industry and Its Competitors

1. Cable Industry

21. In order to evaluate fully the effect of existing and potential competitors in markets for multichannel video programming, we first seek information concerning cable industry performance. We intend to update and expand on the information that was provided in the *1994 Competition Report*, including that presented in Appendix C.⁴⁴ Among the issues that we intend to explore are the following: (a) the numbers of homes passed, including the numbers of subscribers, and penetration rates; (b) channel capacities, including the numbers and types of channels offered; (c) industry revenues, including the sources of those revenues; (d) cable industry expenditures and cash flows; (e) the industry's capital investments; and (f) cable system mergers and acquisitions, including the prices paid for systems. We note that the *1994 Competition Report's* analysis of these issues was based largely on public information, and we intend to use such information to the extent possible in the 1995 Competition Report. Commenters should nevertheless feel free to comment or provide any information on the foregoing that they wish to bring to our attention. In addition, we invite comments on any problems with the information presented last year, the method used to develop the information, or any additional information that the Commission should consider. In addition to the foregoing, we seek comment on the following.

22. *Cable Industry Output.* (a) The percentage of cable households that subscribe to satellite programming services and the changes in such percentage since last year; (b) the percentage of total subscribers that receive cable service from cable systems that offer "lifeline basic service," defined as a limited, low price package that includes only broadcast stations and public, educational and governmental ("PEG") channels and the changes in this percentage since last year; and (c) the percentage of subscribers receiving satellite programming on the basic tier and the number of such channels.

23. *Attributes of Cable Services.* The extent of customer satisfaction with cable services, including quantity and quality of programming, and other quality attributes of cable services such as service response times.

⁴⁴ *1994 Competition Report*, 9 FCC Rcd at 7451-61, ¶¶ 17-36; 9 FCC Rcd at 7566-74, App. C.

24. *Cable Industry Advertising and Nonsubscription Revenue.* The amount of industry revenue obtained from local advertising spots made available to cable operators by programming networks; the amount of national and regional advertising sold by programming networks; recent developments and trends concerning cable industry participation in advertising markets; and other potential sources of revenue.

25. *Cable Industry Capital Investment.* (a) Cable operators' access to loans from banks and other lenders, to equity capital from investors and recent developments in those markets; (b) the extent to which cable systems are upgrading their facilities by deploying conventional cable technology (e.g., bigger headends) versus advanced technologies such as fiber optics and signal compression; (c) the extent to which cable systems have deployed fiber optic plant, the combinations of fiber and coaxial cable that are proving to be the most efficient, the amount of fiber that was deployed over the past year and the percentage of that deployment that was replacement of existing coaxial wiring; (d) the extent to which cable systems and programmers have begun to deploy the facilities needed to take advantage of enhanced services that can be provided using digital compression, the current status of the manufacture and deployment of digital converters and the current status of, and activities associated with, the National Digital Television Center launched by Tele-Communications Inc. ("TCI").⁴⁵

26. *Cable Industry Responses to Competition.* The steps cable operators are taking to build subscribership in anticipation of the entry of competitive alternatives. In particular, cable industry responses to actual or potential competition in local markets, including, in particular, any pricing responses, changes in advertising and service quality, and changes in tiering or packaging of services.

2. *Cable Overbuilds*

27. The term "overbuild" describes the situation in which a second cable operator enters a local market in direct competition with an incumbent cable operator. In these markets, the second operator, or "overbuilder" lays wires in the same area as the incumbent, "overbuilding" the incumbent's plant.⁴⁶ The *1994 Competition Report* cited studies suggesting that overbuilding to date has been relatively limited.⁴⁷ The Commission noted that "[f]actors such as local franchising requirements, entry-deterring strategic behavior by the incumbent operator, and the prospective effects of possible direct competition by local telephone companies, appear to be some of the considerations that currently limit the extent

⁴⁵ *Id.* at 7555-56, ¶ 244.

⁴⁶ *Id.* at 7468, ¶ 54.

⁴⁷ *Id.* at 7468-72, ¶¶ 55-60.

of overbuilding."⁴⁸

28. The Commission intends to analyze in the 1995 Competition Report the status of competition from cable overbuilds and the reasons for that level of competition. Among other things, we will be looking at the following issues: (a) the number of cable operators facing competition from cable overbuilds, the locations of those overbuilds, and changes in those figures over the past year; (b) the manner in which those overbuilders market their services to subscribers, and the numbers of subscribers choosing to subscribe to the services of the incumbent and the overbuilder, respectively; (c) the percentage of the franchise area served by the overbuilder and the percentage of the area served by the incumbent cable system that is also served by the overbuilder; (d) the effects of overbuild competition on cable rates, services and service quality; and (e) the nature and extent of current barriers to overbuild competition, such as the overbuilder's need to incur substantial sunk costs combined with the incumbent cable operator's ability to prevent recovery of those costs by lowering price, instituting litigation and bringing regulatory challenges. We invite any party with specific information on overbuild competition to comment on these issues and any other matters that they feel are relevant to the issue of overbuild competition.

29. We also note that Section 621(a) of the Communications Act prohibits the unreasonable denial of a competitive franchise.⁴⁹ However, a split has developed in the federal circuit courts of appeal over the interpretation of the 1992 Cable Act's prohibition on exclusive franchises.⁵⁰ The Commission stated in the *1994 Competition Report* that it would recommend the revision of that section to clarify that it applies prospectively to all denials of franchises including those that would compete with existing franchises.⁵¹ In connection with these developments, we invite comments concerning the following questions:

- (a) To what extent do cable systems have exclusive franchises?
- (b) How many, if any, applications for competitive franchises have been filed since the enactment of the 1992 Cable Act? How many competitive franchises have been awarded? How many have been denied? Has Section 621(a) promoted the award of competitive franchises?

⁴⁸ *Id.* at 7472, ¶ 60 n.136.

⁴⁹ Communications Act § 621(a), 47 U.S.C. § 541(a).

⁵⁰ Compare *Cox Cable Communications, Inc. v. United States*, 992 F.2d 1178 (11th Cir. 1993) (applies prospectively to all denials of franchises including those that would compete with existing franchises) with *James Cable Partners v. City of Jamestown*, 43 F.3d 277 (6th Cir. 1995) (all existing exclusive franchises shall remain in force, and only new grants of exclusives are prohibited).

⁵¹ *1994 Competition Report*, 9 FCC Rcd at 7558, ¶ 251.

- (c) To what extent have the activities of local franchising authorities been an impediment to overbuilding by additional cable systems? Have incumbent cable operators used local franchising processes to delay or prevent overbuilding?

3. *Wireless Cable Systems*

a. *Multichannel Multipoint Distribution Service*

30. The term "wireless cable" is often used to refer to multichannel multipoint distribution service ("MMDS") and multipoint distribution service ("MDS"), both of which use over-the-air microwave facilities to transmit video programming. The programming is transmitted from wireless cable towers to subscribers using rooftop antennas.⁵² There are eleven MMDS channels available to wireless cable system operators for full-time use, and either one or two single-channel MDS channels depending on the particular city. In addition, wireless cable system operators have access to the twenty channels allocated to instructional television fixed service ("ITFS")⁵³ on a leased, part-time basis. Thus, wireless cable operators have access to a maximum of thirty-two or thirty-three channels, using traditional analog transmission technologies. Since release of the *1994 Competition Report*, the Commission has taken actions designed to eliminate the backlog of MMDS license applications and to streamline the licensing process. On November 10, 1994, the Commission denied petitions for reconsideration of the return of over 4,000 applications to construct and operate MDS transmitter sites.⁵⁴ On that date, the Commission also initiated a rulemaking proceeding looking towards streamlining the processing of MMDS applications, including electronic filing and the use of competitive bidding procedures.⁵⁵ On February 7, 1995, the Commission adopted changes in the application process for ITFS licenses designed

⁵² *Id.* at 7482, ¶ 78.

⁵³ ITFS channels are used by educational institutions to interconnect scattered campus locations.

⁵⁴ *In the Matter of 101 Applications for Authority to Construct and Operate Multipoint Distribution Stations, Memorandum Opinion and Order on Reconsideration*, 9 FCC Rcd 7886 (1994); *In the Matter of 4,330 Applications for Authority to Construct and Operate Multipoint Distribution Service Stations at 62 Transmitter Sites, Memorandum Opinion and Order on Reconsideration*, 10 FCC Rcd 1335 (1994), *joint notice of appeal filed, A/B Financial, Inc., et al. v FCC*, Docket No. 95-1027 (D.C. Cir. Jan. 9, 1995).

⁵⁵ *Amendment of Parts 21 and 74 of the Commission's Rules With Regard to Filing Procedures in the Multipoint Distribution Service and in the Instructional Television Fixed Service and Implementation of Section 309(g) of the Communications Act (Competitive Bidding)*, *Notice of Proposed Rulemaking*, MM Docket No. 94-131, 9 FCC Rcd 7665 (1994).

to make it more efficient and flow more smoothly.⁵⁶

31. We intend to update the information concerning the current status of competition from MMDS system operators that was presented in the *1994 Competition Report*.⁵⁷ Among the issues that we intend to explore are: (a) the number of wireless cable systems and subscribers, including the number of new systems that have begun operations and the number of systems that have ceased operations; (b) the average number of subscribers served by established systems, the penetration as a percentage of the number of homes seen, and the penetration as a percentage of homes passed by cable; (c) the marketing strategies and methods of competition employed by wireless cable operators (in terms of both price and product differentiation); (d) plans for development of new wireless cable systems; (e) the projected growth of the industry in terms of subscribers and revenue; and (f) the current status of consolidation in the wireless cable industry, including numbers of systems changing hands, the sales prices for those systems, and the relative share of MMDS subscribers served by the largest wireless MSOs. We note that the *1994 Competition Report*'s analysis of these issues was based largely on public information, and we intend to use such information to the extent possible in the 1995 Competition Report. Commenters should nevertheless feel free to comment or provide any information on the foregoing that they wish to bring to our attention. In addition, we invite comments on any problems with the information presented last year, the method used to develop the information, or any additional information that the Commission should consider.

32. We also request information on the following questions:

- (a) Have MMDS systems achieved success by emphasizing price competition (offering comparable services, or the most desired services, at substantially lower rates), or has it proven to be a more successful strategy to emphasize product differentiation (offering services that are not available from principal competitors, or offering higher quality services)?
- (b) How are MMDS system operators planning to deploy digital compression technology?⁵⁸ To what extent will the use of digital compression technology

⁵⁶ *Amendment of Part 74 of the Commission's Rules with Regard to the Instructional Television Fixed Service, Memorandum Opinion and Order*, MM Docket No. 93-24 (FCC 95-51 Feb. 7, 1995).

⁵⁷ *1994 Competition Report*, 9 FCC Rcd at 7482-88, ¶¶ 78-90.

⁵⁸ The Wireless Cable Digital Alliance has commenced the testing of digital technology to be used in wireless systems. The Alliance has shown that the use of a digital signal combined with compression algorithms has the potential to increase the channel capacity of wireless systems from the current maximum of 33 channels to at least 200 and perhaps even

enable them to offer a range and quality of programming options that is comparable to, or better than, the range of services offered by competing cable system operators?

- (c) What are the costs associated with the deployment of digital compression technology? Will MMDS system operators be able to employ digital compression technology at low enough costs to remain competitive with incumbent cable operators?
- (d) Is there a trend towards increasing concentration of MMDS system ownership?⁵⁹ If so, what are the competitive implications of this trend? Is it likely to lead to increased competition with cable systems?
- (e) We note that Bell Atlantic, NYNEX and Pacific Telesis have recently announced plans to invest in wireless cable systems.⁶⁰ We seek comment on the strategic issues underlying these investments, and whether commenters view these investments as part of a trend towards increased local telephone company ("LEC") investment in wireless cable facilities. Are such interests likely to lead to increased competition with cable systems? Are there competitive questions raised by these investments?
- (f) What impediments are there to the development of wireless cable, and how have they changed since the *1994 Competition Report*?
- (g) Have MMDS operators been the targets of significant instances of alleged anticompetitive conduct since the issuance of the *1994 Competition Report*?⁶¹

as many as 300. See Comm. Daily, Mar. 7, 1995, at 2. At least one MMDS operator, Cross-Country Wireless, which has indicated that it would be purchased by Pacific Telesis, announced its intention to use digital compression to offer more than 100 channels by the end of 1996. See Comm. Daily, Apr. 18, 1995, at 8. See also Rich Brown, *MMDS (Wireless Cable): A Capital Idea*, Broadcasting & Cable, May 1, 1995, at 16.

⁵⁹ For example, we note that it has been reported that during 1994 and early 1995, American Telecommunications Inc. became the first wireless company to have over 100,000 subscribers by purchasing over 40,000 subscribers from existing systems. Paul Kagan Associates, Inc., *Wireless Cable Investor News Analysis*, Dec. 9, 1994, at 1.

⁶⁰ See Kent Gibbons, *Wireless Op Receives \$100M from Baby Bells*, Multichannel News, Apr. 3, 1995, at 58; Gautam Naik, *PacTel to Buy Tiny Wireless Cable Firm for \$120 Million to Speed Video Project*, The Wall St. J., Apr. 18, 1995, at A4.

⁶¹ *1994 Competition Report*, 9 FCC Rcd at 7487, ¶ 89.

b. Local Multipoint Distribution Service

33. Local multipoint distribution service ("LMDS") is a technology, similar to MMDS, in which multiple channels of video programming are transmitted using high-frequency microwave channels in the 28 GHz band. LMDS subscribers must have an antenna that is located with a line of sight to the transmitter. LMDS requires multiple transmitters in "cells" with radii of three to six miles in order to cover the same area that could be covered by a single MMDS transmitter.⁶²

34. In the *1994 Competition Report*, the Commission identified one LMDS system authorized by the Commission and in commercial operation.⁶³ As was the case then, we cannot now reach any conclusions on the feasibility of LMDS as a technology that could be used to offer competitive service in the video marketplace because the Commission has before it an open proceeding concerning the authorization of services for use of the 28 GHz band.⁶⁴ We also recognize that considerable information concerning the competitive potential of this technology has been provided to the Commission in comments filed in that proceeding. We do not ask parties to repeat here the substance of comments that have been filed in other proceedings, except to the extent they wish to bring particular matters to our attention.

4. *Satellite Master Antenna Systems*

35. SMATV systems (also known as "private cable systems") are MVPDs that serve residential, multiple dwelling units, and various other buildings and complexes.⁶⁵ A SMATV system offers generally the same type of programming as a cable system, and the operation of a SMATV system largely resembles that of a cable system -- a satellite dish receives the programming signals, equipment processes the signals, and wires distribute the programming to individual dwelling units. The primary difference between the two is that a SMATV system typically is an unfranchised, stand-alone system that serves a single building or complex, or a small number of buildings or complexes in relatively close proximity to

⁶² *Id.* at 7505, ¶ 121.

⁶³ The LMDS system identified in the *1994 Competition Report* is CellularVision of New York, operating in Brooklyn, New York. *Id.* at 7505-6, ¶ 122.

⁶⁴ *Rulemaking to Amend Parts 2 and 21 of the Rules to Redesignate the 27.5-29.5 GHz Frequency Band and to Establish Rules and Policies for Local Multipoint Distribution Services*, MM Docket No. 92-297, 8 FCC Rcd 557 (1993).

⁶⁵ In the *1994 Competition Report*, the Commission wrote that there appeared to be approximately 3000 to 4000 SMATV systems operating nationwide (9 FCC Rcd at 7488-89, ¶ 92). As of August 15, 1994, approximately one million subscribers were served by SMATV systems.

each other. This is because a SMATV system is different from a cable system only in that it does not use "closed transmission paths" to: (1) serve buildings that are not commonly owned, controlled, or managed; or (2) cross a public right-of-way.⁶⁶

36. We intend to update the information concerning the current status of competition between cable and SMATV system operators that was presented in the *1994 Competition Report*.⁶⁷ The issues that we expect to explore include: (a) the current and projected future numbers of SMATV systems and subscribers, and their locations; and (b) the channel capacities of SMATV systems, and the existing and projected future developments in channel capacities. We note that the *1994 Competition Report's* analysis of these issues was based largely on public information, and we intend to use such information to the extent possible in the 1995 Competition Report. Commenters should nevertheless feel free to comment or provide any information on the foregoing that they wish to bring to our attention. In addition, we invite comments on any problems with the information presented last year, the method used to develop the information, or any additional information that the Commission should consider.

37. We also request comments concerning the following questions:

- (a) To what extent is competition from SMATV systems characterized by competition for the exclusive right to serve all subscribers in an individual multiple dwelling unit, and to what extent by competition for individual subscribers within a multiple dwelling unit (where each subscriber may choose between two (or more) service providers)? What are the relative shares of multiple dwelling units served by the cable and SMATV industries?
- (b) What effects, if any, have state mandatory access laws had on the economic viability of SMATV systems?
- (c) To what extent is the SMATV industry becoming more concentrated? To what extent is the industry changing from one of small proprietor owned or developer owned systems, to one characterized by multiple system operators that serve entire metropolitan areas or regions? What are the sources of new investment in the industry? Are wireless cable system operators purchasing SMATV systems, and vice versa? Are any other MVPDs purchasing SMATV

⁶⁶ *Implementation of Sections 11 and 13 of the 1992 Cable Act (Horizontal and Vertical Ownership Limits, Cross-Ownership Limitations and Anti-Trafficking Provisions), Memorandum Opinion and Order on Reconsideration of the First Report and Order, MM Docket No. 92-264 (FCC 95-21 Jan. 12, 1995) ("SMATV-Cable Cross-Ownership Recon.")*.

⁶⁷ *1994 Competition Report*, 9 FCC Rcd at 7488-92, ¶¶ 91-96.

systems in significant numbers?

- (d) Are SMATV system operators engaging in marketing strategies designed to differentiate their services from cable services (particularly bundling with home security and intercom systems), and to what extent has price competition been a successful growth strategy for SMATV operators?
- (e) Are there SMATV and other non-cable operators that specialize in serving hotels and motels? How does their share of this business compare to the cable industry's share? What are the types of services that are offered by these operators to hotels and motels?
- (f) To what extent are SMATV operators using 18 GHz technology to interconnect SMATV systems?⁶⁸ Have such developments facilitated increased competition from SMATV operators? Is the use of 18 GHz links leading to the creation of systems that serve wider geographic areas?
- (g) Has the loosening of the SMATV-cable cross-ownership restriction had any effect on SMATV operators?⁶⁹ In particular, is there likely to be a significant exodus of SMATV operators from the market or acquisition of SMATV operators by incumbent cable operators? Or will the eased exit policy induce the increased entry of SMATV systems?
- (h) What is the competitive effect of the Communications Act definition of a cable system, which includes any system that interconnects separately owned buildings even where there is no use of public rights-of-way?⁷⁰ Should that definition be modified, as recommended by the Commission in the *1994 Competition Report*?
- (i) Are there other barriers to increased competition by SMATV systems? In particular, what effect do perpetual exclusive contracts (or ones of greater than

⁶⁸ See *Amendment of Part 94 of the Commission's Rules to Permit Private Video Entertainment Distribution Systems Access to the 18 GHz Band, Report and Order*, PR Docket No. 90-5, 6 FCC Rcd 1270 (1991).

⁶⁹ The Commission recently released an order on reconsideration concerning, among other things, cable operators' acquisition of SMATV systems. In that decision, we eliminated the prior prohibition on such purchases. The Commission noted that one benefit of the decision was to provide an exit strategy for SMATV operators. The absence of this exit strategy caused by the prior prohibition was claimed to have been a barrier to entry. *SMATV-Cable Cross-Ownership Recon.*

⁷⁰ Communications Act § 602(7), 47 U.S.C. § 522(7).

15 to 20 years in duration) between building owners and cable system operators have on competition by SMATV system operators? To what extent do SMATV systems typically enter into exclusive contracts? What is the typical duration of these contracts? What should public policy be regarding these contracts?

38. Finally, the Commission also has before it a proceeding concerning home wiring issues in which SMATV operators have extensively participated.⁷¹ We recognize that considerable information has been provided to the Commission in comments filed in that proceeding concerning the potential competitive effect of various potential outcomes. We do not ask parties to repeat the substance of comments that have been filed in that proceeding, except to the extent that they wish to bring to our attention particular matters that are relevant to the 1995 Competition Report.

5. *Direct-to-Home ("DTH") Satellite Services*

a. *Direct Broadcast Satellite Services*

39. The 1994 *Competition Report* examined two types of direct-to-home ("DTH") satellite services that offer video programming for subscription that is comparable to that provided by cable. One is Direct Broadcast Satellite ("DBS") services which transmit signals in the K-band "intended for reception by the general public."⁷² Hughes Communications Galaxy, Inc./DirecTV ("DirecTV") and United States Satellite Broadcasting ("USSB") offer high powered DBS service. Primestar Partners, L.P. ("Primestar"), a medium power K-band service, is also analyzed as a DBS service, although it operates in the Fixed Satellite Service ("FSS").⁷³ Using a relatively small dish, DBS subscribers receive programming that is comparable to cable programming. There are now over one million subscribers for the three DBS services combined.⁷⁴ EchoStar Satellite Corporation and AlphaStar, a venture of Tee-Comm Electronics, Inc., expect to begin DBS service in 1995.⁷⁵

⁷¹ *Implementation of the 1992 Cable Act (Home Wiring), Report and Order*, MM Docket No. 92-260, 7 FCC Rcd 7349 (1993), *recon. pending*.

⁷² 47 C.F.R. § 100.3.

⁷³ *1994 Competition Report*, 9 FCC Rcd at 7473, ¶ 61.

⁷⁴ DBS Digest, Mar. 5, 1995, at 1.

⁷⁵ See Nikhil Hutheesing, *Kamikaze Satellites?* *Forbes*, Jul. 4, 1994, at 126. See also *AlphaStar Television Network, Tee-Comm Launches AlphaStar, America's New High-Powered Digital DTH Service*, Mar. 14, 1995 (News Release).

40. We intend to update the information concerning the current status of competition from DBS systems that was presented in the *1994 Competition Report*⁷⁶ and request comments concerning the following questions:

- (a) To what extent do the subscribership of these DBS services overlap? What is the total estimated subscriber base for each individual service provider and for the industry as a whole?
- (b) What is the projected subscribership of each DBS service and of the industry as a whole at the end of 1995? At the end of each subsequent year through the end of 1999? On what are these projections based?
- (c) Where are most DBS subscribers located (i.e., urban versus rural areas)? How many subscribers are located in areas served by cable operators? What factors account for cable subscribers' choice to receive DBS services? What percentage of DBS subscribers also subscribe to cable services, and what cable services do they receive?
- (d) What is the total estimated channel capacity of each operator? What are the plans of each operator to increase the digital compression ratio from the initial ratio used at the time of launch (so as to offer more channels at a later date)?
- (e) How does each operator market its services? Are current marketing efforts targeted equally to potential subscribers in areas served by cable systems and potential subscribers in areas unserved by cable systems?
- (f) Has the inability to offer local broadcast channels affected the competitive impact of DBS service? Have there been any developments that would permit DBS dish owners to use their systems to receive local broadcast channels?
- (g) Are the prices for DBS services nationally uniform, or do they vary depending on the location of the subscriber? If they vary, what are the reasons for the price differentials?
- (h) What is the availability of equipment for those who wish to subscribe to this service? If there is an equipment shortage, when is it projected to be eliminated? What is the basis for this projection?
- (i) How are equipment prices projected to change over one year? Over three years? What is the basis for this projection? Do installation and equipment

⁷⁶ *1994 Competition Report*, 9 FCC Rcd at 7474-79, ¶¶ 62-70.

charges limit the extent to which DBS services serve as reasonable substitutes for cable services?

- (j) What developments have there been concerning licensing and distribution arrangements for DBS equipment (such as plans for Sony to begin production and for other manufacturers to be licensed)?⁷⁷

41. We would like to update the information reported on existing permittees that were identified in the *1994 Competition Report*.⁷⁸ What are the projected launch dates for these systems and their anticipated service offerings? What type of arrangements have been made for licensing and distribution of the equipment and systems for services that are not yet launched? Is it anticipated that these services will use the same or different receiving equipment as DirecTV and USSB?

42. In addition to the issues addressed in the questions set forth above, the Commission observes that local zoning and other regulations may potentially serve as an impediment to the development and expansion of DBS service.⁷⁹ In that regard, we note that the Commission recently adopted a *Notice of Proposed Rulemaking* concerning the issue.⁸⁰ We seek comment on these issues.

b. Home Satellite Dishes

43. Home satellite dishes ("HSDs") are seven to ten feet in diameter and receive video programming transmitted in the C-band of frequencies. HSD owners can watch approximately 150 unscrambled signals without payment and over 100 scrambled channels purchased from program packagers. Comments cited in the *1994 Competition Report* indicated that there were approximately four million HSD users, roughly half of whom subscribe to one or more programming services.

44. We intend to update the information concerning the current status of competition from HSD systems that was presented in the *1994 Competition Report*.⁸¹ Among

⁷⁷ *Space Business Update*, Aerospace Daily, Mar. 22, 1995 (three additional suppliers of DBS equipment have been licensed -- Hughes Network Systems, Toshiba American Consumer Products and Uniden America Corp.).

⁷⁸ *1994 Competition Report*, 9 FCC Rcd at 7476, ¶67.

⁷⁹ See 47 C.F.R. § 25.104.

⁸⁰ *Preemption of Local Zoning Regulation of Satellite Earth Stations, Notice of Proposed Rulemaking*, IB Docket 95-59 (FCC 95-180, Apr. 27, 1995) ("Zoning Notice").

⁸¹ *1994 Competition Report*, 9 FCC Rcd at 7478-82, ¶¶ 71-77.

the issues that we intend to explore are: (a) the current and projected future numbers of HSD systems and subscribers, and their locations; (b) the channel capacities of HSD systems and the numbers of channels of programming offered in program packages; (c) prices for HSD systems and program packages; and (d) the extent to which HSD owners subscribe to cable services and the reasons given for such subscriptions. We note that the *1994 Competition Report's* analysis of these issues was based largely on public information, and we intend to use such information to the extent possible in the 1995 Competition Report. Commenters should nevertheless feel free to comment or provide any information on the foregoing that they wish to bring to our attention. In addition, we invite comments on any problems with the information presented last year, the method used to develop the information, or any additional information that the Commission should consider.

45. We also request comments concerning the following questions:

- (a) How are HSD services marketed to subscribers? What is the projected growth of HSD use in the next year? Three years? What is the basis for this projection?
- (b) Has the inability to offer local broadcast channels affected the competitive impact of HSD services? Have there been any developments that would permit HSD owners to use their systems to receive local broadcast channels?
- (c) The HSD industry reportedly had a record year in 1994 in terms of systems sold and subscriptions to packaged programming services.⁸² To what can that success be attributed?
- (d) Sales of new HSD systems and new subscriptions to HSD package programming services grew at substantially slower rates in the last few months of 1994.⁸³ To what can that decline be attributed? Is that decline related to the rollout and marketing of DBS?

46. In addition to the issues addressed in the questions set forth above, the Commission recognizes that local zoning and other regulations may potentially serve as impediments to the development and expansion of HSD services.⁸⁴ We seek comment on these issues concerning zoning⁸⁵ and other local regulations that affect competition from HSD services.

⁸² Media Business Corp., *DTH Nears \$2.5 Billion Retail*, Sky Report, Feb. 1995, at 5-9.

⁸³ *Id.*

⁸⁴ See 47 C.F.R. § 25.104.

⁸⁵ See *Zoning Notice*. IB Docket 95-59.

6. *Local Exchange Carriers/Video Dialtone Services*

47. The Communications Act and Commission rules generally prohibit local telephone companies ("LECs") from providing video programming directly to subscribers within their service areas.⁸⁶ They are, however, permitted to provide video programming outside their service areas and in rural areas.⁸⁷ In addition, the court ordered agreement under which AT&T divested its local exchange telephone service (the "Modification of Final Judgment" or "MFJ") restricts the ability of the Bell Operating Companies ("BOCs") to transmit communications between or beyond the local calling areas of their regions.⁸⁸ Over the past few years, LECs have, however, been obtaining greater freedom to participate in the multichannel video marketplace.

48. In 1992, the Commission established a video dialtone ("VDT") framework which allows LECs, consistent with the Communications Act, to make available on a nondiscriminatory common carrier basis, a platform capable of transmitting video programming supplied by an unaffiliated entity.⁸⁹ Since that time, the Commission has authorized technical and market trials as well as permanent VDT service.⁹⁰ In addition, in 1993, the U.S. District Court for the Eastern District of Virginia held the cross-ownership prohibition unconstitutional as applied to Bell Atlantic in its service areas; in 1994 US West

⁸⁶ Communications Act § 613(b), 47 U.S.C. § 533(b). *See also* 47 C.F.R. §§ 63.54, 63.58. The cross-ownership restriction was instituted by the Commission in 1970, following a series of proceedings in which the Commission found that telephone companies denied access or provided discriminatory access to cable systems to utility poles necessary for cable distribution. Certain aspects of the regulatory restriction were codified by Congress in the 1984 Cable Act. Communications Act § 613(b), 47 U.S.C. § 533(b) (1984).

⁸⁷ 47 C.F.R. §§ 63.08, 63.09, 63.88.

⁸⁸ *United States v. AT&T*, 552 F. Supp. 131 (D.D.C. 1982), *aff'd sub nom. Maryland v. United States*, 460 U.S. 1001 (1983).

⁸⁹ *Telephone Co.-Cable Television Cross-Ownership Rules, Sections 63.54-63.58, Second Report and Order, Recommendation to Congress and Second Further Notice of Proposed Rulemaking*, CC Docket No. 87-266, 7 FCC Rcd 5781 (1992).

⁹⁰ *1994 Competition Report*, 9 FCC Rcd at 7499-500, ¶¶ 109-11. As of May 4, 1995, the Commission had granted twelve permanent and ten trial VDT authorizations and eleven applications were pending. In addition, two applications filed by Bell Atlantic were suspended at its request.

obtained a similar ruling in the U.S. District Court for the Western District of Washington.⁹¹ Since the Commission issued the *1994 Competition Report*, several other courts have struck down the cross-ownership prohibition.⁹²

49. In light of these decisions, the Cable Services Bureau, Common Carrier Bureau and the Office of the General Counsel announced that they will no longer enforce the cross-ownership restriction against: (1) any telephone companies that are parties to cases in which the Commission is enjoined from enforcing Section 613(b), including NYNEX, Ameritech, BellSouth, Bell Atlantic, US WEST, GTE, and most members of the United States Telephone Association, Organization for the Protection and Advancement of Small Telephone Companies and National Telephone Cooperative Association; and (2) any other telephone companies, to the extent they operate in the Fourth and Ninth Circuits, regardless of their status as parties to any suit.⁹³

50. The Commission has several ongoing proceedings regarding video dialtone services. The Commission issued a *Fourth Further Notice of Proposed Rulemaking* to consider changes in its video dialtone rules in light of court decisions such as those described above, and to consider the extent to which Title II and Title VI of the Communications Act apply to telephone companies providing video programming directly to subscribers in their telephone service areas over video dialtone facilities.⁹⁴ The Commission also issued a *Third Further Notice of Proposed Rulemaking* which sought information and comment on a number of issues including (1) channel capacity issues, (2) criteria for evaluating the viability of additional wire-based video competition in particular markets in the context of a proposal to use these criteria to modify the Commission's ban on the acquisition by telephone companies of cable facilities in their telephone service areas for use in the provision of video dialtone, (3) whether the Commission should require or permit LECs to provide preferential access or discounted rates to commercial broadcasters and/or certain types of not-for-profit programmers; and (4) whether we should adopt additional rules with respect to pole

⁹¹ *Chesapeake & Potomac Tel. Co. v. United States*, 830 F. Supp. 909 (E.D. Va. 1993), *aff'd*, 42 F.3d 181 (4th Cir. 1994) (Section 533(b) held unconstitutional as applied to Bell Atlantic within its service areas); *US West, Inc. v. United States*, 855 F. Supp. 1184 (W.D. Wa. June 15, 1994), *aff'd*, 48 F.3d 1092 (9th Cir. 1995) (Section 533(b) held unconstitutional as applied to US West within its service areas).

⁹² *See, e.g., Ameritech Corp. v. U.S.*, 867 F. Supp. 721 (N.D. Ill. Oct. 28, 1994); *NYNEX Corp. v. U.S.*, No. 93-323-P-C (D. Me. Dec. 8, 1994).

⁹³ *Public Notice*, DA 95-520, Mar. 17, 1995. *corrected*, DA 95-722, Apr. 3, 1995.

⁹⁴ *Telephone Co.-Cable Television Cross-Ownership Rules, Sections 63.54-63.58, Fourth Further Notice of Proposed Rulemaking*, CC Docket No. 87-266, (FCC 95-20 Jan. 20, 1995).