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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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FEDERAL COMMUNICATIONS COMMISSION
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In the Matter of	)	
	)	
Annual Assessment of the Status of	)	CS Docket No. 00-132
Competition in Markets for the	)	
Delivery of Video Programming	)	

COMMENTS OF
THE NATIONAL CABLE TELEVISION ASSOCIATION

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COMMENTS OF THE NATIONAL CABLE TELEVISION ASSOCIATION

The National Cable Television Association ("NCTA") hereby submits its comments in response to the Notice of Inquiry in the above-captioned proceeding.

NCTA is the principal trade association representing the cable television industry in the United States. Its members include cable operators serving more than 90% of the nation's cable television subscribers, as well as more than 200 cable programming networks and services. NCTA's members also include suppliers of equipment and services to the cable industry.

INTRODUCTION AND SUMMARY

Six years ago, when the Commission conducted its first annual inquiry on the status of competition in the delivery of video programming, the comments and the Commission's report consisted of more predictions than conclusions. DBS had just been launched, so there was not yet any way of knowing the extent to which DBS would be viewed by consumers as a competitive alternative to cable. There was no talk about competitive bundled offerings of voice, video and Internet offerings. Cable systems had scarcely begun offering telephone service over upgraded hybrid fiber-coaxial facilities. And, a mere six years ago, hardly anyone even knew about the World Wide Web, much less that cable systems, telephone companies and others might compete to provide their customers with high speed access to such a thing. Moreover, the range of existing wireline and wireless providers of competitive telecommunications and Internet companies that might foreseeably have offered full-service packages was, in 1994, still quite small.

This did not, of course, mean that cable operators were unconstrained by competition. To the contrary, even at the time of the Commission's first annual report, consumers across the nation faced a wide range of competitive alternatives to cable's video programming services. One of the most significant, of course, was broadcast television. Broadcast programming captured the lion's share of television viewership – and it was available over the air at no charge to consumers. The Commission had, as recently as 1991, recognized that broadcast stations were themselves a source of effective competition to cable systems.

In addition, cable systems faced competition from a broad array of terrestrial competitors, including multichannel multipoint distribution systems ("MMDS"), satellite master antenna television systems ("SMATVs"), and private and municipally-owned cable system "overbuilders." Moreover, the availability of video rentals was an alternative source of video programming. Also, in seeking to sell packages of news, sports, movies and other entertainment programming to consumers, cable operators faced competition from a wide array of other *non*-video providers of news, sports, movies and entertainment available in most communities.

Nevertheless, the prospect of a new competitive technology – DBS – attracted much attention. Once launched, DBS services would instantly be available to most communities nationwide with digital audio and video and more channels than were then provided by most cable systems. If successful, these new nationwide multichannel substitutes for cable could ensure that competition in the provision of video programming would be permanent and irreversible. But in 1994, the successful launch of DBS was still an "if."

In the intervening years, all that has changed. It wasn't long before the data collected by the Commission in its annual inquiries began to show a remarkably rapid growth of DBS, with steady increases year after year. Some thought this growth might ultimately be limited to rural areas where cable was unavailable and to wealthy consumers who were willing to pay the initially high up-front cost of purchasing and installing satellite receiving equipment in order to *supplement* their cable service with the premium digital sports and movie programming available from DBS.

But the evidence convincingly showed that this was not the case. Newspaper advertisements showed that the marketing campaigns of the DBS companies were directly targeted at cable subscribers in urban and suburban communities, and surveys showed that a majority of new DBS subscribers were, in fact, former cable subscribers. Meanwhile, the up-front costs disappeared as the DBS companies offered free equipment and installation.

Last year, Congress removed what DBS operators identified as their last remaining regulatory obstacle – their inability to retransmit their subscribers' local broadcast stations. And this year's statistics show another growth spurt. Between July 1999 and July 2000, DBS added almost 3 million new subscribers – more than in any previous year, and three times as many as cable added during the same time period. DBS now has 15.25% of all subscribers to multichannel video program distributors ("MVPDs"), and cable's share has dropped to 79.62%. DirecTV now has more subscribers nationwide than all but the top two cable multiple system owners ("MSOs"). Only five MSOs rank ahead of EchoStar.

Can there be any doubt that these two DBS providers have established themselves nationwide as competitive alternatives to cable in every market?

Moreover, for more and more households, DBS companies are not the only competitive alternatives to cable. In its annual reports, the Commission has often speculated whether the availability of a second wireline cable provider in a community might have a greater competitive impact than DBS. There is overwhelming evidence that, in fact, the nationwide competitive threat from the two major DBS providers has caused cable operators to compete vigorously to ensure that they offer the best value to consumers. Nevertheless, the other headline of the past year is that new cable "overbuilders" are obtaining franchises and deploying competitive cable systems in communities across the country at the fastest rate ever.

If a facilities-based provider of cable service can also provide voice and high-speed data services over the same facilities, there are additional incentives to overbuild existing cable systems. That is what these new overbuilders are doing, with the strong financial backing of investors who believe in this new economic model. According to a recent report, the new overbuild competitors have raised "billions of dollars of equity, and in some cases debt behind that."[1] And, as a result, overbuilds by companies such as RCN, Digital Access, Knology, WideOpenWest and many others are proliferating all over the United States. <u>In fact, cable companies are now or will soon be competing against alternative broadband providers in the top nine – and 21 of the top 25 – Nielsen television markets</u>.

It is more obvious than ever that most consumers now have a choice of providers of multichannel video service and that their options will continue to expand for the foreseeable future.

This competition has made the cable industry compete harder and in new ways. This development, too, benefits consumers. Cable operators have been racing to upgrade their

[1] Donaldson, Lufkin & Jenrette, "Cable Overbuilders: Who Wants To Borrow a Billion?" *Media and Entertainment*, April 18, 2000, p. 7.

facilities to ensure that they can offer subscribers more programming options and higher quality service in order to retain existing subscribers and compete effectively for new ones. Cable operators have invested approximately $36 billion in such upgrades since enactment of the Telecommunications Act of 1996. And they, like their competitors, are offering or preparing to offer high-speed Internet and telephony services in addition to their video programming services. Moreover, they are adding digital tiers that enable them to provide their cable subscribers with a multitude of additional channels of digital-quality video and audio programming. Thus, while cable has been giving ground to video competitors, it has also grown stronger by diversifying its product mix and utilizing its broadband platform more efficiently.

Who are going to be the ultimate winners in this irreversibly competitive environment? As a recent headline in the Detroit News proclaimed, the "winner is the consumer."[2]

In each year's inquiry, the trend towards this outcome has become more and more evident. But this year, one hardly needs another inquiry to know that competition is flourishing and is here to stay, since consumer behavior is providing evidence practically every day. In any event, the evidence in this year's inquiry, as we now show, *does* confirm the proliferation of choice and competition among providers of video programming, and the Commission should report straightforwardly that this is the case.

I. IT'S NOT JUST TWO NATIONAL DBS COMPETITORS – CONSUMERS CAN CHOOSE FROM A SUPERMARKET OF COMPETITIVE ALTERNATIVES TO CABLE.

In each of the six preceding annual inquiries on the status of competition in the delivery of video programming, the Commission's Report has detailed the emergence of the national DBS companies as vigorous nationwide competitors of cable television operators in the provision of

2 "Cable vs. Satellite? Winner is the Consumer," *Detroit News*, Aug. 7, 2000, p. 1B.

video programming. The Commission's numbers and graphs each year portrayed a rapid, steady and irreversible growth in subscribership.

The evidence showed that this growth was by no means limited to rural areas unserved by cable, nor to high-end subscribers seeking to supplement their cable service with additional services provided by DBS. To the contrary, DBS companies were aiming their marketing efforts at areas served by cable systems and a large portion of their growth was attributable to households that switched from cable to DBS. And as a result, even though both cable and DBS added new subscribers every year, cable's share of multichannel video subscribers steadily declined while DBS's share grew by leaps and bounds.

This year's evidence confirms all these trends. But it also confirms that, in addition to the established presence of DBS, new terrestrial competitors are also emerging to join the already vigorous and permanent state of competition among video providers. This year, the opportunity to provide "full-service" packages of voice, video and data services has made it economical for a proliferation of new multi-service providers to enter the marketplace with competitive wireline "overbuilds." This year, as in previous years, more and more consumers are choosing competitive alternatives to cable. But now it is more apparent than ever that consumers will face a larger and larger *supermarket* of competitive alternatives in their communities.

A. DBS Companies Are Competing Vigorously with Cable Operators Throughout the Nation.

The numbers this year show that DBS continues to grow by leaps and bounds, in direct competition with cable systems. The only difference this year is that, to anyone reading the daily newspapers, the numbers only confirm what is already common knowledge. The fierce competition that has been going on between DBS and cable has now become headline news:

Cable's Satellite Wars: Communications Giants Are Waging a Multibillion-Dollar House-to-House Battle for Subscribers
— *Washington Post*, Aug. 13, 2000, p. H1.

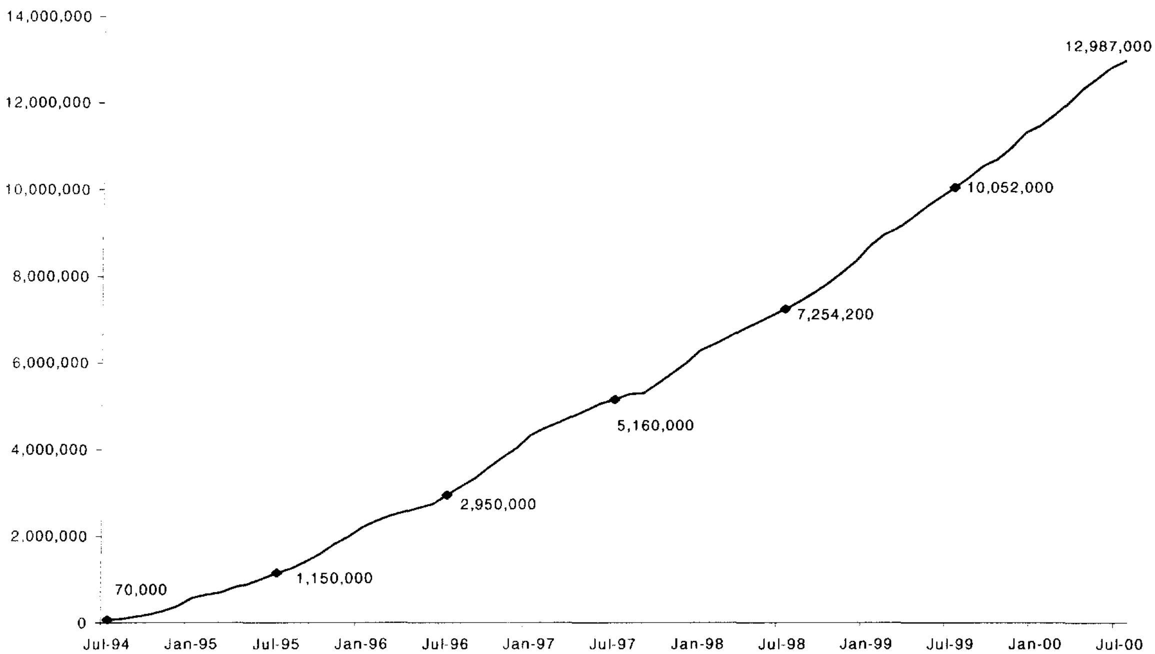
Cable vs. Satellite? Winner is the Consumer
— *Detroit News*, Aug. 7, 2000, p. 1B.

Cable, Satellite Firms Just Trying To Survive: Providers Battle To Win Viewers
— *San Antonio Express-News*, Aug. 18, 2000, p. 1E

Pay-TV War Between DBS and Cable Heats Up
— *Communications Daily*, Aug. 23, 2000

In the past year alone, DBS subscribership climbed from just over 10 million to just under 13 million – an increase of almost 30 percent. This is the largest increase in subscribership in any year since DBS launched in 1994:

Growth in DBS
July 1994-July 2000



Source: Media Business Corporation SkyTrends

A year ago, DBS companies served 12.8% of all multichannel subscribers in the United States. By July 2000, that number had climbed to 15.25%. Meanwhile, cable's share of multichannel subscribers decreased to from 82.19% to 79.62%.

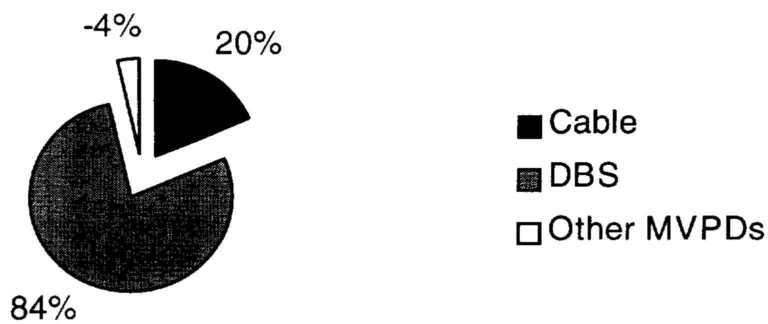
Multichannel Video Program Distributors (MVPDs)
July 2000

MVPD	SUBSCRIBERS (IN MILLIONS)	PERCENT OF MVPD SUBSCRIBERS
DBS	12.99	15.25%
C-Band	1.48	1.74%
MMDS	0.7	0.82%
SMATV	1.5	1.76%
Local Telephone Companies	0.3	0.35%
Broadband Competitors	0.39	0.46%
Total Non-Cable	17.36	20.38%
Cable	67.84	79.62%
Total Multichannel Subscribers	85.20	100.00%

Source: National Cable Television Association, based on SkyTrends, Paul Kagan Associates data.

The total number of multichannel subscribers continued to grow – from 81.83 million in July 1999 to 85.20 million a year later. More than 80% of this growth in subscribership – four out of every five – went to DBS.

Distribution of New Multichannel Households in 2000



Source: Paul Kagan Associate Cable Program Investor, June 16, 2000 at 7.

Satellite penetration of television households (including C-Band satellite service, which reaches an additional 1.48 million subscribers nationwide) now exceeds 10 percent in 45 of the 50 states. It exceeds 15 percent in 35 states, 20 percent in 24 states, 25 percent in nine states, and 30 percent in three states.

States with DTH Penetration in Excess of 10 Percent July 2000

STATE	% OF TV HH w/DTH
Vermont	39.30%
Montana	39.27%
Wyoming	32.06%
North Dakota	28.24%
Mississippi	28.22%
Idaho	27.30%
Arkansas	26.88%
Kentucky	25.50%
North Carolina	25.25%
West Virginia	24.30%

STATE	% OF TV HH w/DTH
South Dakota	23.66%
Missouri	23.64%
South Carolina	23.14%
Maine	22.91%
New Mexico	22.60%
Indiana	22.03%
Alabama	21.95%
Utah	21.90%
Tennessee	21.61%
Texas	21.35%
Oklahoma	21.20%
Iowa	20.88%
Virginia	20.11%
Georgia	20.07%
Wisconsin	19.89%
Nebraska	19.67%
Colorado	19.31%
Kansas	19.25%
Oregon	19.11%
Arizona	18.23%
Minnesota	17.44%
Michigan	16.99%
Louisiana	15.89%
Florida	15.35%
Washington	15.35%
Nevada	14.78%
New Hampshire	14.52%
Delaware	13.89%
Ohio	13.87%
Illinois	13.04%
California	12.20%
Maryland	11.91%
Alaska	11.66%
New York	10.80%
Pennsylvania	10.34%

Source: Media Business Corporation, SkyTrends

During the first few years of DBS' steadily accelerating growth spurt, some observers were unpersuaded that DBS and cable should be viewed as head-to-head competitors, and the Commission's annual reports reflected some of that skepticism. Some suspected that DBS and cable might be targeting different audiences, with DBS appealing to residents of rural areas unserved by cable. Others thought that because DBS subscribers were required to purchase and install expensive receiving equipment, it would inherently appeal only to "high-end" consumers who were willing to pay these high up-front costs in order to enjoy DBS's digital picture and sound or to receive the additional premium movie channels and sports programming that DBS offered. And because DBS had been legally precluded from providing local broadcast stations, it seemed to be less than a good substitute for cable service.

But none of those concerns retains any plausibility today. For the last few years, as we have shown in past years' comments,[3] it has been clear that DBS is aiming its marketing efforts squarely at existing cable subscribers in urban and suburban communities. And it has been clear that the large gains in subscribership that DBS has enjoyed have been attributable, in large part, to former cable subscribers and other residents of areas served by cable systems.

Moreover, the high up-front costs that used to accompany DBS service virtually disappeared a couple of years ago. Now, EchoStar and DirecTV entice subscribers with offers of free equipment and free installation – even for second set connections – with monthly subscription fees that are generally competitive with the rates charged by competing cable systems for comparable packages of programming.

Finally, last year, Congress removed the last remaining legal obstacle identified by the DBS industry when it enacted the Satellite Home Viewing Improvements Act ("SHVIA"), which authorizes DBS companies to retransmit local broadcast stations, subject to must carry rules and other requirements comparable to those imposed on cable operators. This year, the Commission has implemented the key elements of the Act.

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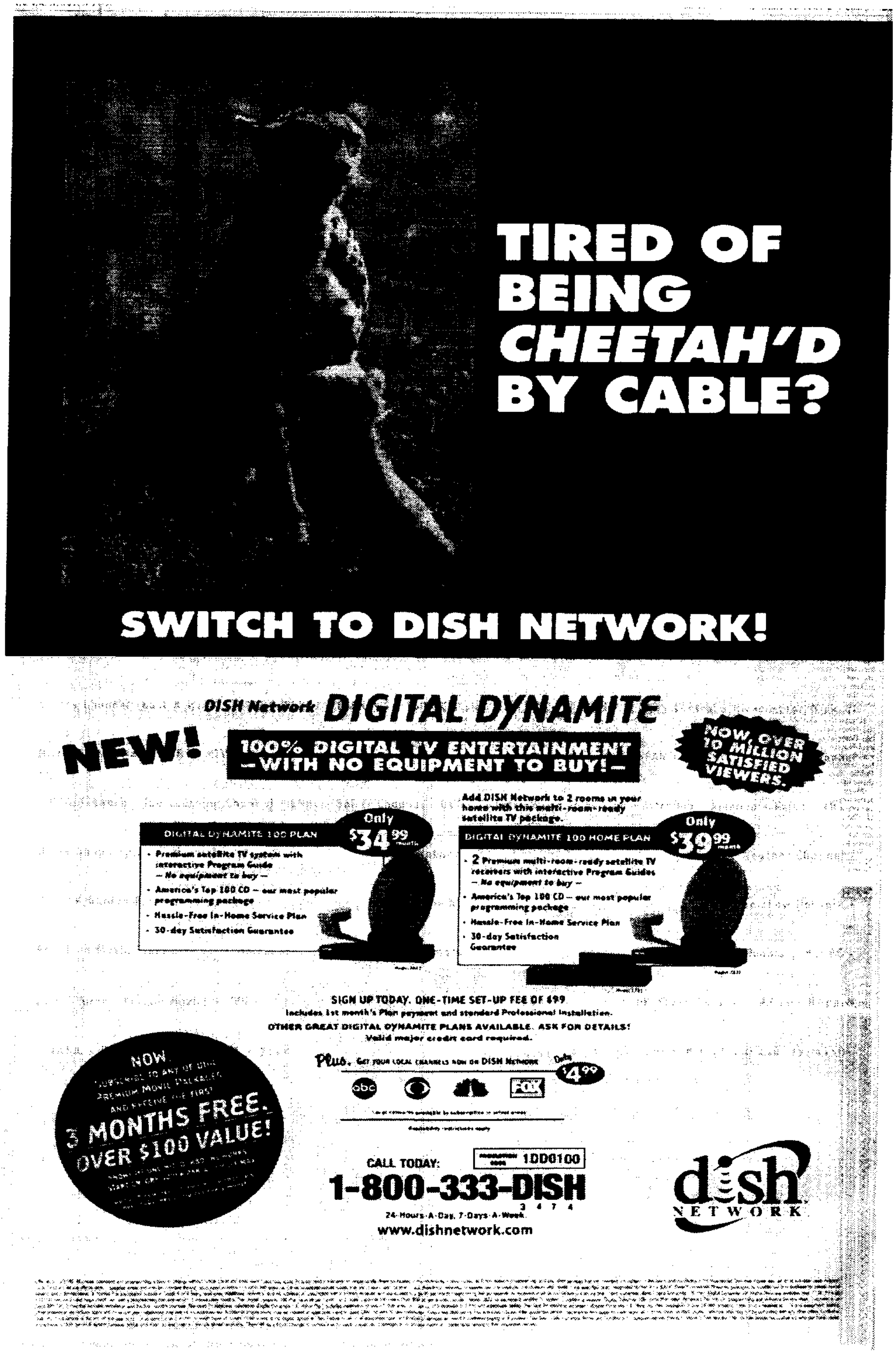
[3] *See, e.g.*, NCTA Comments, CS Docket No. 99-230 at 2, 4, 7; NCTA Comments, CS Docket No. 98-102 at 13-15.

Here is a recent advertisement for EchoStar's "Dish Network," which illustrates every one of the foregoing points – the targeting of cable subscribers, the elimination of up-front equipment costs for first and second-set reception, the offering of packages and prices comparable to cable's, and the availability of local broadcast stations:



Source: Full page advertisement, The Washington Post, August 28, 2000, p. B5.

In sum, two DBS choices are available to consumers nationwide, with products that are comparable to cable's. All the perceived barriers that might have made it difficult for DBS to compete for the same customers as cable operators have disappeared, and DBS and cable companies *are* competing for the same customers. And in this competitive environment, cable's share of MVPD customers has dropped below 80%. It is time, in the face of these facts, for the Commission to acknowledge squarely that *today*, consumers *across the nation* enjoy the full benefits of competition among DBS and cable companies in the delivery of video programming.

B. New Local Broadband Overbuilders Are Establishing Themselves as Competitive Providers of Video Programming.

While the two major DBS companies are ubiquitously available to consumers nationwide, they are not the only alternatives to incumbent cable operators. In the past year, there has an explosion of activity in terrestrial wireline overbuilds. Almost every day the newspapers report that another provider of broadband voice and/or data services also plans to – or has received a franchise to – offer video programming to subscribers in competition with a local cable system.

The convergence of broadband voice, video and data services and the proliferation of new competitive telecommunications companies made possible by the Telecommunications Act of 1996 appears to be changing the economics of overbuilds. The ability to offer – and receive revenues from – telephone, high-speed Internet *and* an expanded number of video programming channels over a single broadband facility (or in conjunction with wireless or satellite providers) appears to be providing new incentives for local facilities-based competition from a new breed of overbuilders. Thus, as the CEO of Digital Access, Inc., a company that has received a franchise to compete against the incumbent cable operator in Indianapolis and other locations, recently stated, "What makes this work, and what didn't make it work five years ago, is that instead of competing for a market share of a $35 average cable bill, you are competing for the opportunity to take $100 to $150 out of the home for voice, video and data."[4]

RCN Corporation was the first broadband telecommunications company to begin, a few years ago, to target residential households for an integrated offering of telephone, Internet and cable television services. "At the time," as one reporter has noted, "most telecommunications companies shunned the residential market after [the Telecommunications Act of 1996] opened the cable and local-phone markets to competition. Instead they went straight for higher-profit business customers. But RCN went after those residential markets, first in Boston and then New York."[5]

In its comments in the last two video competition inquiries, NCTA cited RCN's efforts, and the similar fledgling broadband overbuilds by Knology, as a sign that the broadband convergence would soon lead to new sources of competition in the provision of video programming. That prediction has come true. This year, "[a] Donaldson, Lufkin & Jenrette analyst's report outlined about 15 other companies of [RCN's] kind – called *overbuilders* – around the country."[6] And, unlike the overbuilders of the past, these companies are not small operators trying to compete with a single cable system in a small community. To the contrary, these new competitors have raised "billions of dollars of equity,"[7] and are deploying broadband facilities on a large-scale basis.

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4 "Comcast Has a Battle on its Hands," *Philadelphia Inquirer*, June 11, 2000. The executive corps of Digital Access consists primarily of experienced veterans of the cable industry.

5 *Id.*

6 *Id.* (emphasis in original).

7 Donaldson, Lufkin & Jenrette, "Cable Operators: Who Wants To Borrow a Billion?," *Media and Entertainment*, April 18, 2000, p. 7.

As detailed in the attached White Paper,[8] here are some examples of the proliferation of broadband overbuilders now competing or planning to compete head-to-head with incumbent cable operators:

RCN Corporation. RCN is the largest of the broadband overbuilders. Already offering service in the Boston, MA,[9] New York, NY, Philadelphia, PA, San Mateo, CA, Chicago, IL, San Francisco, CA, and Washington, DC areas, RCN plans to offer service in Seattle, WA, Portland, OR, and Los Angeles, CA. In fact, RCN has recently applied for cable franchises in 12 communities southwest of Portland.[10] RCN was also just granted a cable franchise in Arlington County, VA (Washington DC area) which brings RCN's potential reach in the Washington area to over 600,000 homes.[11]

In total, RCN plans to target 7.6 million homes and already has over 335,000 subscribers. RCN Corporation has raised $6.56 billion in capital to support their overbuilds. Its investors include Paul Allen (Vulcan Ventures), and Hicks Muse, Tate & Furst, and public equity.

In many communities, RCN is offering ResiLink, which is bundled voice, video and Internet services. RCN customers can purchase a bundle of two telephone lines, 150 channels of video service plus high-speed cable Internet service for $149 per month. For as little as $69 per month, ResiLink customers can purchase 150 channels of video service and either one telephone line or cable Internet service. Based on first quarter data, consumers appear to be responding

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8 "Development of Broadband Overbuild Competition: An Analysis of New Entrants in the Video/Voice/High-Speed Data Marketplace," September 2000, attached as Appendix A.

9 Dedham and Arlington, MA are the latest communities in the Boston area to receive RCN's ResiLink service. *Communications Daily*, August 7, 2000, p. 7.

10 "RCN Seeks Dozen Franchises in Oregon", *Multichannel News*, July 10, 2000, p. 32.

11 *Communications Daily*, August 9, 2000, p. 5.

favorably to the ResiLink package as RCN has acquired more than 90,000 customers for this service.[12]

Digital Access. Digital Access, with $1.3 billion in financing, plans to overbuild existing cable systems in Indianapolis, IN (along with eight area suburbs), Kansas City, MO, Milwaukee, WI (and 29 surrounding communities) and Nashville, TN. In total, Digital Access plans to target 1.2 million homes in these communities. Investors in Digital Access include CALPERS, Bachow & Associates, Cornerstone Equity, First Union Capital, Fleet Equity, Goldman Sachs, M/C Venture Partners, Norwest Equity, Providence Equity and Spectrum Equity.

In August 2000, Digital Access received cable franchises from the Village of Hales Corner and from the Village of Butler in Wisconsin.[13] Digital Access also received cable franchises in Brentwood, Franklin and Williamson County, TN (Nashville suburbs) in July.[14] Moreover, Digital Access has been granted a telecommunications franchise to compete for local phone service with SBC in Lenexa, KS and is expected to be granted a cable franchise in that community within a month.[15] In April, Digital Access also announced an interest in providing broadband service in the Indianapolis area.[16] In late August, Digital Access was granted franchises in Brookfield and Hales Corner, WI and Mission, KS.[17]

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[12] "RCN adds S.F. Suburbs," *Kagan Broadband*, May 19, 2000, p. 2.

[13] *Communications Daily*, August 10, 2000, p. 7.

[14] "Rivals are Up to Date in Lenexa, Kansas, " *Multichannel News*, July 31, 2000, p. 14.

[15] *Id.*

[16] "Comcast Gains Hoosier Rivals," *Multichannel News*, April 26, 2000, http://www.multichannel.com/daily/2000/apr24/042600/Indy18d_042600.htm

[17] "As Rivals Gain, AT&T Grows in Texas," *Multichannel News*, August 28, 2000, p 3.

Knology. Knology, which already offers service in Columbus, GA, Augusta, GA, Huntsville, AL, Montgomery, AL, Charleston, SC and Panama City, FL, is targeting smaller and midsize communities. It has recently acquired a franchise in Knoxville, TN and has applied for a franchise in Nashville.[18] Knology currently serves over 130,000 subscribers but already has the financial backing to buildout in franchise areas to one million homes.[19] Its long-term target is to pass 1.5 million homes.[20]

WideOpenWest. WideOpenWest, LLC, has raised $50 million (and is seeking to raise an additional $400 million) to offer service in the Greater Denver area, Aurora, CO, Portland, OR, Dallas-Fort Worth, TX and Houston, TX.[21] WideOpenWest's investors include Abry Partners and Oak Hill Capital Partners. WideOpenWest recently won three key cable franchises: Denver and Boulder in Colorado and Tucson, AZ.[22] These franchises are in addition to franchises already secured in the Colorado communities of Greenwood Village, Commerce City, Aurora Loveland and the southern portion of Jefferson County. Moreover, WideOpenWest is making serious inroads into the Dallas Metroplex area by acquiring a cable franchise to serve 41,000 plus households in Grand Prairie (in April) and Irving, TX (in May).[23]

WideOpenWest's request for a cable franchise in Colorado Springs was placed on the November ballot by a City Council vote in July. According to press reports, WideOpenWest

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18 "Knology Applies for Cable TV Franchise in Nashville," *Knology Press Release*, March 31, 2000.

19 Donaldson, Lufkin & Jenrette, "Cable Operators: Who Wants To Borrow a Billion?," *Media and Entertainment*, April 18, 2000, p. 7.

20 *Id.*

21 WideOpenWest's original plans to target San Antonio and Austin were recently scrapped as numerous other overbuilders have entered those markets. (*Multichannel News*, May 15, 2000, p. 12).

22 "WideOpenWest to Challenge AT&T and Cox," *Kagan Broadband*, August 9, 2000, p. 1.

23 "WideOpenWest Gains Steam," *Multichannel News*, April 6, 2000 and "WOW gets Second Texas Franchise," *Multichannel News*, May 26, 2000.

plans to begin service in Portland, OR and in several communities in Texas later this year.[24] WideOpenWest has also recently announced plans to offer service in Minnesota and Missouri and has applied for cable franchises in 120 communities in these two states, including St. Louis and Minneapolis-St. Paul.[25] WOW has already gained a foothold into the St. Louis area by obtaining a 15-year franchise to offer service in nearby St. Peters, MO.[26]

Carolina Broadband. Carolina Broadband has decided to target the major cities in North Carolina and South Carolina. Having raised $450 million, Carolina Broadband is building out plant in Charlotte, NC, Raleigh/Durham, NC, Winston/Salem, NC, Greenville/Spartanburg, SC and Columbia, SC. Carolina Broadband's investors include M/C Ventures, Spectrum, Chase, JH Whitney, First Union, Haborvest and Providence.

Western Integrated Networks. Western Integrated Networks (WIN) has targeted nearly 500,000 homes in Dallas, Houston, Austin, and San Antonio, TX, as well as Sacramento and San Diego, CA. WIN's application for a cable franchise in Houston recently was granted approval.[27] Likewise, WIN has received the go-ahead to build competitive systems in Austin, San Antonio, San Diego and Sacramento.[28] Moreover, WIN's cable franchise request in Dallas was approved last month.[29]

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24 "WOW gets Texas-Wide Thumbs Up," *Multichannel News*, May 8, 2000, p. 34.

25 "WideOpenWest Aims at AT&T Bastions," *Multichannel News*, July 10, 2000, p. 20.

26 "WideOpenWest Secures Franchise Agreement in St. Peters, Missouri," *WideOpenWest Press Release*, August 10, 2000. (*See* www.wideopenwest.com)

27 "Portland, Houston Gear Up for WIN, Grande," *Multichannel News*, August 7, 2000, p. 8.

28 "WIN Get San Diego Franchise," *Multichannel News*, June 6, 2000; "WIN Get San Antonio Franchise," *Multichannel News*, May 8, 2000.

29 "As Rivals Gain, AT&T Grows in Texas," *Multichannel News*, August 28, 2000, p. 3.

Clear Source. ClearSource plans to overbuild in Waco, Corpus Christi, Midland/Odessa, and Amarillo, TX as well as other smaller southwestern communities.[30]

Everest Connection Corp. Everest Connection Corp has targeted Amarillo and Lubbock, TX (in addition to smaller Texas communities) for overbuilds. Recently, Everest was granted a telecommunications franchise to compete for local phone service with Southwestern Bell (and overbuilder Digital Access [see above]) in Lenexa, KS and is expected to have its cable franchise request approved within a month. In addition, Everest has received a cable franchise in Kansas City, MO and is reportedly "very close to an agreement to serve numerous communities in the Minneapolis-St. Paul region.[31] Moreover, Everest recently sent a proposal to the city of Grand Rapids, MI for a franchise in 14 communities in the area. The city council is expected to vote on the proposal by mid-September.[32]

Grande Communications. Grande Communications has raised $225 million to build systems in San Antonio, Austin, San Marcos, Dallas and Houston. In Houston, the City Council is positioned to grant final approval for Grande to compete (along with WIN {see above}) later this month.

American Broadband. American Broadband has raised $170 million to overbuild existing cable systems in Rhode Island and several "medium sized" East Coast cities. Already this month, American Broadband received cable franchises from the Rhode Island Division of

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30 Donaldson, Lufkin & Jenrette, "Cable Overbuilders: Who Wants To Borrow a Billion?" *Media and Entertainment,* April 18, 2000, p. 9.

31 "Nashville Loses Potential Overbuilder," *Multichannel News*, June 26, 2000, p. 8.

32 *CableFax Daily*, August 28, 2000.

Public Utilities (covering 650,000 homes) and from the Baltimore County (MD) Council to provide competitive service.[33]

<u>Gemini.</u> Gemini is planning to deploy overbuild systems in Connecticut.[34]

<u>Millennium Digital Media.</u> In July 2000, the City Council in Issaquah, WA approved the franchise request of Millennium Digital Media, which has also acquired cable franchises to provide broadband services in Seattle and Bellevue, WA, and in Snohomish and King Counties (WA).[35]

<u>Other Overbuilders.</u> In addition to those described above, other broadband overbuilds are planned by **Open Access Broadband** (in Tier 1 Cities), **DeCom** (Charlotte, NC) and **Altrio Communications** (in Los Angeles, CA).[36]

C. Utility Companies Are Again Deploying Broadband Wireline Overbuilds.

As utilities face a newly deregulated and competitive marketplace, they – like telecommunications companies – have advanced incentives to offer and package additional services over their facilities. As a result, utilities are joining the new array of broadband overbuilders to offer multichannel video programming services to subscribers:

<u>Sigecom.</u> In Evansville, IN and Newburg, IN, Sigecom has raised $100 million to target 120,000 homes and already has 14,000 customers. Sigecom is funded by a joint venture of Sigecorp (Southern Indiana Gas and Electric) & Utilicomm, and Blackstone Capital and offers

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33 *Communications Daily*, August 10, 2000, p. 6.

34 Donaldson, Lufkin & Jenrette, "Cable Overbuilders: Who Wants To Borrow a Billion?" *Media and Entertainment,* April 18, 2000, p. 9.

35 "Comcast Takes Over in D.C. Suburb," *Multichannel News*, July 24, 2000.

36 Donaldson, Lufkin & Jenrette, "Cable Overbuilders: Who Wants To Borrow a Billion?" *Media and Entertainment,* April 18, 2000, p. 9.

bundled voice, video and data services under the brand "TOTALink."[37] The company has already approached 22 other (smaller) cities in Indiana with hopes to expand its TOTALink service area.[38]

Seren Innovations Inc. Seren Innovations Inc., a subsidiary of Northern States Power Company, has begun to offer service in the San Francisco Bay Area. Seren recently applied for cable franchises in Martinez and Pittsburg, CA and already has been award cable franchises in Concord and Walnut Creek, CA. Seren also has cable franchises pending in Danville, Pleasant Hill, Clayton and the unincorporated areas of Contra Costa County, CA.[39] Seren is also offering service, under the brand name "Astound," in the St. Cloud, MN area, where it has cable franchises in St. Cloud, Sartell, Waite Park and Sauk Rapids. Moreover, in July, Seren applied for cable franchises in 13 additional suburban St. Cloud communities. Seren has also expressed an interest in deploying cable service in the Charlotte, NC area.

Digital Union. In Austin, TX, Digital Union, a subsidiary of a local utility, has plans to overbuild the incumbent cable operator.

D. Telephone Companies Are Adding a Video Programming Component to their Full-Service Packages.

As voice, video and data services are increasingly bundled together into full-service packages, incumbent local exchange carriers – which still serve 96% of the nation's residential households and business customers[40] – are adding video programming (and high-speed Internet) components to their offerings. With narrowband facilities in place throughout the nation for the

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[37] www.sigecom.net

[38] "Comcast may have New Rivals," *Multichannel News*, May 8, 2000, p. 34.

[39] "Seren, WideOpenWest Add Franchises," *Multichannel News*, July 24, 2000, p. 30.

[40] "FCC Releases Local Telephone Competition Report," *FCC Press Release*, August 31, 2000.

provision of telephone service, the ILECs, unlike the new broadband telecommunications companies, cannot easily use the same facilities for the provision of voice and video services. But they have powerful incentives to find alternative means of providing video services. And their dominance in the provision of local telephone service gives them strong marketing advantages in offering bundled services.

One approach, which has already been adopted by Verizon and SBC, is to use one of the existing DBS services as the video component of a full-service communications package. Verizon offers DirecTV to subscribers in the Boston, New York, Pittsburgh, Philadelphia, Baltimore, and Washington, D.C. metropolitan areas, and in Delaware and New Jersey.[41] SBC entered into a similar arrangement last year to "market and sell DirecTV services to its 18 million customers in seven states and provide customers *with a single bill for phone, satellite-television and high-speed Internet access*."[42]

BellSouth is pursuing a different satellite-based approach. On May 9, 2000, it "move[d] one step closer to its goal of becoming a single source provider of high-quality telecommunications and entertainment services by signing a long-term satellite service agreement with GE Americom, a GE Capital company."[43] BellSouth has for two years been providing video programming via multichannel multipoint distribution systems ("MMDS") and cable systems in a limited number of communities in the Southeast and serves more than 120,000 customers through those systems. But it expects its new digital satellite service to give it "the

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41 *See* "Bell Atlantic Video Offers DIRECTV Programming in the New York Area, Giving Consumers an Alternative Television Provider," *Bell Atlantic Press Release*, May 1, 2000 (http://newscenter.verizon.com/proactive/newsroom/release.vtml?id=38390).

42 "SBC, DirecTV Seal Marketing Deal," *Bloomberg News*, July 16, 1999 (http://aolcom.cnet.com/news/0-1004-200-344927.html).

43 "BellSouth Announces Major Home Entertainment Initiative, Building an Even Bigger Bundle of Services," *BellSouth News Release*, May 9, 2000 (http://www.bellsouthcorp.com/proactive/documents/render/32702.vtml).

capability to deliver digital TV entertainment and interactive information to over 14 million households in its current telecommunications markets and potentially 50 million households in neighboring states outside the southeastern United States."[44] BellSouth intends to start rolling out this service "to its top markets in less than a year, expanding throughout the Southeast by the first half of 2002."[45]

Qwest, meanwhile, has introduced a new and different means of delivering video programming to telephone subscribers in the metropolitan Phoenix area, using its existing fiber-optic and residential copper-wire telephone facilities. The new technology – VDSL (very-high-speed digital subscriber line) – is similar to the DSL service that the telephone companies use to provide high-speed Internet service. U S West's "Choice TV & On-Line" service, which already serves more than 54,000 subscribers, "delivers more than 181 channels of 100 percent digital video and audio programming, 'always-on' Internet connections from nine to 35 times faster than a standard modem, and integrated telephony features such as on-screen U S West Caller ID and Voice Messaging, over existing telephone lines."[46]

A recent analysis by Cahners In-Stat Group predicts that VDSL will ultimately become a prominent video programming alternative for millions of households. According to a Cahners analyst, "[m]ultiple approaches and a lack of standards are currently holding Video over DSL deployment to a trickle, but the dam will burst . . . . Telecom deregulation will compel nearly all telcos to look at video over DSL."[47] The In-Stat Group "cites the advantages of bundled service

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[44] *Id.*

[45] *Id.*

[46] "Choice TV & Online Service Fact Sheet," *US West Press Release*, http://www.uswest.com/products/video-internet/choice/media.html.

[47] "Video Over VDSL To Move Beyond Trials," *Cahners In-Stat Group Press Release*, March 1, 2000. (http://www.instat.com/pr/2000/mb0002vs_pr.htm).

discounts, the necessity of only one set top box [for multiple connections] and the robustness and security of high-speed DSL Internet access, as factors that will compel 23 million households worldwide to subscribe to Video over DSL by 2005."[48]

II. CABLE OPERATORS ARE UPGRADING THEIR SYSTEMS AND EXPANDING AND ENHANCING THEIR SERVICE OFFERINGS IN ORDER TO COMPETE VIGOROUSLY WITH ALTERNATIVE PROVIDERS OF VIDEO PROGRAMMING.

The emergence of competition in the provision of video programming can be seen not only in the presence and growth of DBS and a multitude of new competitors but also in the competitive response of cable operators. To meet the competition of DBS companies, which attract subscribers with a large number of channels and digital picture and sound and can market to 100% of the continental United States, cable operators are upgrading their systems to provide digital tiers. And to compete efficiently and effectively against the full-service offerings of telephone and telecommunications companies and other overbuilders, they are upgrading their systems to offer Internet and telephone service along with their video programming service.

The cable industry has spent more than 36 *billion* dollars on these upgrades since the enactment of the Telecommunications Act of 1996, which unleashed competition and eliminated much regulation. More than 7.1 million customers subscribed to cable's digital video programming services by the end of June 2000, and Paul Kagan Associates projects that by year-end, the number will exceed 10 million. These services offer subscribers both the high quality of digital transmissions and the multiplicity of programming options, including more numerous premium and pay-per-view options, that have been the hallmark of cable's DBS competitors.

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[48] *Id.*

At the same time, more and more systems are being upgraded to provide high-speed cable Internet service. Cable operators served more than 2.27 million cable Internet customers at the end of June, having added approximately 416,000 new high-speed cable Internet customers during just the second quarter of the year. Kagan projects that the number will reach 3.6 million cable Internet customers by year-end 2000.

Also, at the end of the second quarter of 2000, cable provided telephone service to almost 429,000 customers, more than half of which were added in the preceding six months. By year-end, the number of telephone customers is expected by Donaldson, Lufkin & Jenrette to double again.

As *Communications Daily* recently reported,

> While consumers still are deciding which service they like better, [the] battle for subscribers *between DBS and cable* clearly is heating up. Both DBS providers and cable operators are rolling out broadband services that include high-speed Internet access, video-on-demand, personal video recording (PVR), other interactive TV offerings, bundled bills. Companies in each industry have targeted customers of rivals in all-out marketing blitzes to gain [a] larger market share of [the] pay-TV pie. [The] DBS and cable industries are turning up pressure on each other to produce "better, more efficient service" to keep up in "maddening race" for rapidly growing revenue streams.... "There is a sense of urgency to compete and roll out new services in the marketplace that we haven't seen in a long time."[49]

Meanwhile, the battle *between cable and its new broadband competitors* is also heating up. So, for example, "Cox Communications has an arsenal of new products and services in the pipeline for its war with US West" in Phoenix, where the two companies are both seeking to

[49] "Pay-TV War Between DBS and Cable Heats Up," *Communications Daily*, Aug. 23, 2000, p. 1 (*quoting* industry analyst) (emphasis added).

provide bundled television, telephone and Internet services.[50] The new products include (1) a video-on-demand service that allows cable subscribers to rent movies, concert videos, sports programs and other content; (2) an interactive TV service that enables cable customers to access the Internet and send and receive e-mail and instant messages via their television sets; and (3) a TV-on-demand service that allows subscribers to "access pre-broadcast television programs as well as pause, fast-forward and rewind real-time television programming."[51]

All these enhancements and innovations are the mark of a fiercely competitive marketplace. The result is that, already, consumers face an array of choices that could not have been imagined only a few years ago – with more to come as newer entrants compete and develop a wider array of services to sell over their platforms, leading to competitive responses by established players.[52]

III. THE PROGRAM ACCESS RULES NEED NO FURTHER MODIFICATIONS BEFORE BEING ALLOWED TO SUNSET IN 2002.

In its Notice of Inquiry, the Commission has raised some questions regarding its "program access" rules. Those rules, which implement statutory provisions adopted in the Cable Television Consumer Protection and Competition Act of 1992, limit the extent to which satellite-delivered cable programmers that are owned, in whole or part, by a cable operator may enter into exclusive agreements with cable operators or may discriminate in the price, terms and conditions of the sale of its programming to competing MVPDs. The limitations on exclusivity will sunset on October 5, 2002 unless the Commission determines, in a proceeding to be conducted in the

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[50] "Cox Turns Up Heat on US West," *Arizona Republic*, June 12, 2000, p. D1.

[51] *Id.*

[52] *See, e.g.*, *Communications Daily*, Sept. 5, 2000, p.2: "ATT Broadband, SBC Communications and Verizon Communications are cutting monthly prices or planning to offer temporary discounts and free services to consumers and businesses this fall as part of increasingly fierce competition for high-speed data users."

year preceding, that they remain "necessary to preserve and protect competition and diversity in the distribution of video programming."[53]

The Commission asks whether the scope of the rules – specifically, the limitation to satellite-delivered services – is appropriate. And it seeks guidance and advice in anticipation of the proceeding that it must conduct during the year prior to October 5, 2002. In light of the chronicled success and continued growth of DBS and the rapid emergence of multiple new competitive choices for consumers among providers of video programming described in the foregoing sections, the Commission's questions answer themselves.

The purpose of the program access requirements is to ensure that consumers have a choice of providers of video programming and that cable operators not prevent competition from emerging by denying potential competitors access to core satellite-delivered programming that they own. In 1992, DBS had not been launched and offered still just a hope of competition. Telephone companies were still barred from providing video programming to subscribers in their telephone service areas. Nobody would have anticipated the plethora of competitive facilities-based providers that developed after the Telecommunications Act of 1996, or the digital convergence that would impel these companies, along with other facilities-based providers, to attempt to offer full-service packages of telephony, video and Internet services to consumers. Indeed, hardly anybody even knew what the Internet was, and there was no such thing as the World Wide Web.

Congress's concern was that, absent certain program access requirements, there could be *no* meaningful competition in the provision of video programming. As Congressman Tauzin, the sponsor of the program access amendment that was ultimately enacted, explained,

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[53] 47 U.S.C. § 548(c)(5).

> It will do us little good to struggle with the C-band dish industry. It will do us little good to hope in vain for the advent of a DBS, direct broadcast satellite, industry or for the expansion of wireless cable in America as competition to this monopoly if none of them can get programming.[54]

Congress understood that there were legitimate, pro-competitive reasons for programmers to enter into exclusive contracts with particular distributors or to negotiate different rates, terms and conditions with different distributors, And it recognized that in a competitive environment, the development or acquisition of exclusive programming by cable operators and other distributors could be a legitimate means of competition that would ultimately *increase* the programming options available to consumers. That's why it limited the program access restrictions to programming and practices that were deemed likely to prevent entirely the emergence of competitive providers:

> There is an argument against our amendment someone made. The argument is that we no longer allow for exclusive type programs that are important to people who develop a product. Not so. . . . [O]ur amendment says that exclusive programming that is not designed to *kill the competition* is still permitted. The FCC can grant exclusive programming rights under our amendment.[55]

Thus, Congress limited the restrictions to programming vertically owned by cable companies, and further limited them to vertically owned programming that is satellite-delivered – the core programming that, if denied to DBS and other new competitors, might have kept them from ever emerging. And Congress further limited the restrictions by authorizing the Commission to permit even vertically integrated, satellite-delivered program networks to enter into exclusive agreements or contracts with different prices, terms and conditions under certain

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[54] Remarks of Rep. Tauzin, Cong. Rec. H 6533 (daily ed., July 23, 1992).

[55] *Id.* at 6534 (emphasis added).

circumstances where such practices were more likely to be pro-competitive than to be aimed at preventing the emergence of competition.[56]

The competitive landscape described by the facts and figures set forth in the preceding sections of these comments surpasses anything that Congress or the Commission might have imagined in 1992. DBS is not only off the ground; it is currently offering most consumers across the nation *two* alternatives to the incumbent cable systems. One of those alternatives ranks ahead of all but the top two cable MSOs in subscribership; the other ranks ahead of all but the top five. And each of them has developed or acquired certain exclusive programming that permits them to differentiate themselves competitively to the benefit of consumers. Moreover, it is clear that a multitude of other new competitors are emerging to overbuild incumbent cable operators.

At the same time, competition among program networks has become even more intense than in 1992. Today, there are more than 200 networks, most of which are not vertically owned, competing to reach viewers. Some programming may be acquired on an exclusive basis – by cable operators *or* by alternative providers such as DBS – as a means of differentiating their product and attracting subscribers. For example, DBS has for several years had exclusive rights to some major league sports packages, as well as concerts, ethnic programming, and other programming. Similarly, some cable operators have developed or encouraged the development of cable-exclusive terrestrially-delivered local or regional programming as a means of differentiating themselves from their competitors. But there is more than enough programming competing for viewership to ensure that cable's competitors will not fail for lack of available programming. And the exclusive programming that has been developed for cable operators or for DBS or other competitors expands the range of programming options available to consumers.

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[56] *See* 47 U.S.C. § 548(c)(2)(B) and (c)(4).

In this environment, the notion that the scope of the program access rules might need to be *expanded* makes no sense. Indeed, if this environment does not justify the sunset of the exclusivity prohibition for which Congress provided in Section 628(c)(5), it is hard to imagine what circumstances Congress thought *would* justify a sunset of the rules.

IV. THE "70%-70%" THRESHOLD IN THE LEASED ACCESS PROVISIONS OF THE CABLE ACT HAS NOT BEEN MET.

The Commission has noted that "Section 612(g) of the Communications Act provides that at such time as cable systems with 36 or more activated channels are available to 70% of households within the United States and are subscribed to by 70% of those households, the Commission may promulgate any additional rules necessary to provide diversity of information sources."[57] It asks whether those benchmarks have been met and "how the requirements of this provision should be met."[58]

The short answer to the first question is that the benchmarks have not been met, and that, in light of the steady growth of new competitors in the marketplace, it seems unlikely that they will be met in the foreseeable future. While it is true that cable systems with 36 or more channels are available to far more than 70% of households within the United States, the penetration rate for those systems is only 65.5%.[59]

In any event, it is important to point out that the Commission's authority under Section 612(g) is narrowly circumscribed and applies solely to modifications of the leased access requirements set forth in Section 612 – in particular, the rates for leased access. When Section 612 was enacted in 1984, it contained a requirement that cable operators set aside up to 15

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[57] Notice, ¶ 3.

[58] *Id.*

[59] Based on analysis of A.C. Nielsen, *Cable On-line Data Exchange (CODE)* data as of August 19, 2000.

percent of their channels for leased access but set no specific limits on the rates that cable operators could charge for leased access. Operators were required only to impose rates, terms and conditions that were not unreasonable – and there was a statutory presumption that rates, terms and conditions set by the cable operator were reasonable, unless shown by clear and convincing evidence to be unreasonable.

As the legislative history makes clear, Section 612(g) was intended solely to authorize the Commission to regulate the rates, terms and condition of leased access more specifically and more stringently, and to impose additional procedures for resolving leased access disputes, if the 70% benchmarks were met and if such changes were necessary:

> At such time as cable systems with 36 or more activated channels are available (*i.e.*, households that are passed by cable) to 70 percent of households in the country, and as these cable systems are actually subscribed to by 70 percent of those households which have availability to them, the FCC is granted authority to promulgate any additional rules necessary to ensure that leased access channels provide as wide as possible a diversity of information sources to the public. Along these lines, the Commission may develop additional procedures for the resolution of disputes between cable operators and unaffiliated programmers, and may provide rules or new standards for the establishment of rates, terms and conditions of access for such programmers.
>
> In terms of developing any new regulations relating to the price charged programmers for the commercial use of channel capacity designated under this section, prohibitions contained in 621(c) and 623(a) relating to rate regulations and other regulatory authority do not operate as constraints on the possible options available to the Commission in adopting any new rules. However, the Commission should not see its role as that of a traditional common carrier regulator. In any case, the Commission may not increase the number of channels required to be set aside under this section or preempt any authority expressly granted to franchising authorities under the title.[60]

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[60] Report of the Committee on Energy and Commerce, H.R. Rep. 98-934, 98th Cong., 2d Sess. 54 (1984).

In the Cable Television Consumer Protection Act of 1992, Congress amended Section 612 to give the Commission immediate authority to impose maximum rates on leased access.[61] In other words, the Commission now already has most of the authority that Section 612 was initially intended to confer on it in the event that the 70-70 threshold was ever met. Nothing in the 1992 Act or in its legislative history purports to expand the limited scope of that prospective grant of authority.

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[61] *See* 47 U.S.C. §532(c)(4).

CONCLUSION

When Congress enacted the 1992 Cable Act and required the Commission to report annually on the state of competition in the delivery of video programming, it was cautiously optimistic that a yet-to-be-launched DBS service might add to the mix of video programming options available to consumers. Today, full-fledged and ubiquitous competition from two national DBS providers is an irreversible reality. But in terms of the broadband competition that is emerging, it is only the tip of the iceberg.

Consumers not only have a choice among providers of video programming; in many communities, they have four, five or more choices. And a substantial percentage are choosing a competitor of the incumbent cable operator. That competition is expanding the quantity, refining the quality, and enhancing the per-dollar value of the video programming services available from cable operators and their competitors. And it is also offering consumers competitive options for Internet and telephone service.

All the numbers, graphs and trends indicate that competition – and the array of competitive options – will only increase in the years ahead. But they also show that competition has already arrived and that consumers are the winners.

Respectfully submitted,

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