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

In the Matter of	)	
	)	
Annual Assessment of the Status of	)	MB Docket No. 02-145
Competition in the Market for the	)	
Delivery of Video Programming	)	

REPLY COMMENTS OF CABLEVISION SYSTEMS CORPORATION

Cablevision Systems Corporation ("Cablevision"), by its attorneys, hereby submits these reply comments in the above-referenced proceeding. In the initial comment round, cable competitors predictably argued that cable companies were "monopolies" that "maintain and create new barriers to competitive entry," and that cable operators must therefore be required to share their programming and facilities with billion dollar enterprises such as Disney and General Motors. These arguments -- repeated and basically unchanged over the last eight years notwithstanding tectonic shifts in the cable and MVPD marketplace -- can no longer withstand scrutiny.

The fact is -- as the Commission's video competition reports confirm -- that cable operators have lost substantial market share to DBS operators over the last few years and face vigorous broadband competition from telephone companies and wireless technologies. As the Commission knows, the cable industry faces one of the greatest financial challenges in its history. Cablevision and other cable operators have raised and spent billions of dollars to upgrade their networks and expand the range of services they offer to customers, helping to achieve the goals of accelerated broadband deployment. The industry is now working to realize financial returns on this hefty investment and to educate consumers about the opportunities these new technologies present.

Particularly in the current environment, the Commission should reject calls for increased regulation as nothing more than self-serving efforts to enlist the government to hobble one competitor for the benefit of another. As Chairman Powell has recognized, "the government has a duty and obligation to be very cognizant of the reality of the economic situation and try to understand that its expectations and its policies have to, in part, take into account in a serious and humble way what is achievable in the context of the realistic economic situation."[1/]

DISCUSSION

Cablevision and other cable operators face an array of regulations, including must-carry, program access, and rate regulation, that were predicated on the market conditions of 1992. Ten years ago, cable operators served more than 95 percent of all MVPD subscribers.[2/] DBS, still a new concept, had not yet secured a single subscriber.[3/] The extensive regulatory scheme devised in that environment was designed to give new competitors a chance to succeed, and some of the new rules -- such as program access -- required direct subsidies by cable operators to their new rivals, such as DBS. In imposing these extraordinary limits on the free market, Congress nevertheless expressed its preference to "rely on the marketplace, to the maximum extent feasible,"[4/] and as such, provided for these rules to give way when the market topography had shifted.

1/ Remarks of Michael K. Powell, Chairman, Federal Communications Commission, Northern Virginia Technology Council Policymakers Series Breakfast, Tysons Corner, Virginia (Feb. 27, 2002).

2/ *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, First Report, 9 FCC Rcd 7442 (1994), Appendix G, Table 1.

3/ *See id.*

4/ *See, e.g.*, Cable Television Consumer Protection and Competition Act of 1992, § 2(b)(1), (2), codified at 47 U.S.C. § 521 nt.

That shift has happened to a degree unimaginable in 1992. Now Cablevision is dwarfed by its DBS rivals. DirecTV and EchoStar are the 3rd and 7th largest MVPDs in the nation,[5/] while Cablevision is 9th, and their market capitalization is more than ten times that of Cablevision. Despite these changes, the rules continue to constrain Cablevision's competitive opportunities and to enhance those of EchoStar and DirecTV, even as they call for more government aid to expand their share. In this market, maintenance or expansion of rules that tilt the table against cable and for its rivals cannot be justified. Reliance on the marketplace is the appropriate course, not more regulation.

I. THE MULTICHANNEL VIDEO PROGRAMMING DISTRIBUTION MARKET HAS BECOME SIGNIFICANTLY MORE COMPETITIVE IN THE LAST TEN YEARS

In the ten years since the enactment of the 1992 Cable Act, the share of the marketplace held by non-cable MVPDs has more than tripled. Cable's market share "continues to decline" on an annual basis[6/] -- not by the fifteen percent Congress determined would represent "effective competition" to cable -- but by nearly 25 percent, to 76 percent of MVPD subscribers at last count.[7/] New marketing and equipment designs have made changing from cable to satellite service virtually costless to customers, as evidenced by the growing number of customers who switch their service as readily as they switch telephony providers. For the last five consecutive years, DBS providers have outpaced cable operators with respect to signing up new customers,

5/ *In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Eighth Annual Report, 17 FCC Rcd 5600, Table C-3 (2002).

6/ *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Seventh Annual Report, 16 FCC Rcd 6005, ¶ 5 (2001) ("*2001 Video Competition Report*").

7/ *See In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, MB Docket No. 02-145, Comments of National Cable & Telecommunications Association at 3 (filed on July 29, 2002).

and their growth appears to be accelerating.[8/] If merged, DirecTV and EchoStar would be the largest MVPD in the country. They are, separately or combined, many times the size of Cablevision in terms of financial resources, access to capital, and subscriber base.

Cable operators have responded to these market developments by competing fiercely for subscribers, investing over $60 billion to rebuild the infrastructure that allows them to offer a robust array of innovative broadband and video services.[9/] Cablevision itself -- with only 3 million subscribers compared to DirecTV's 10.7 million and EchoStar's 7.46 million[10/] -- has invested more than 3 billion dollars rebuilding its service infrastructure to enable the company to provide its subscribers with a full slate of next-generation broadband services. It is imperative that cable operators begin to recover the significant investments they have made to bring advanced services to their subscribers. Cable stocks have plummeted "more than 40% on average since the beginning of the year,"[11/] and investors are demanding to see returns from their investments.[12/]

8/ *2001 Video Competition Report*, Table C-1; *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Fifth Annual Report, 13 FCC Rcd 24284, 24418, Table C-1 (1998).

9/ *See CableFax Daily*, "Industry Perspective" (May 6, 2002).

10/ *See Communications Daily*, "Mass Media," June 12, 2002 ("Cablevision . . . has 3 million subscribers in Greater N.Y. area."); "The Charlie Ergen Show; EchoStar's Founder is One Tough Operator Who will Soon Take Control of the Satellite TV Industry--if Washington Lets Him," *Fortune*, September 2, 2002 at 142; "The Week that Was," *Broadcasting and Cable*, Aug. 19, 2002 at 14 ("EchoStar also added 295,000 new subscribers, bringing its total to 7.46 million subscribers, a 23% increase year to year.").

11/ *See* "Cablers Decry Battered Shares," *The Hollywood Reporter* (June 5, 2002); *see also* "Cable's Rise Fails to Help Elevate its Stock Values," *USA Today* (Feb. 11, 2002) at B6.

12/ *See* "'Interactive' Isn't a Word Cable Customers are Interested In," *New York Times*, May 13, 2002 at C4 ("The cable television industry has invested about $50 billion of investors' money over the last five years to upgrade cable networks to deliver digital services. Those investors now want to see serious returns"); "Adelphia Asset Sales Could Lift Cable Stocks," *The Street.com* (May 27, 2002) ("Cable operators haven't been shy about borrowing to plow money into infrastructure upgrades and the like, but investors are now tapping their feet waiting for returns").

Despite this dramatic shift in the market, cable's competitors -- who have grown in size and strength -- continue to seek government protections and subsidies to compete with cable operators. DirecTV -- which has nearly 8 million *more* subscribers than Cablevision -- argues that cable operators' "market power" merits an expansion of the program access requirements to include terrestrially-delivered programming -- the same argument it has made for the past five years.[13/] EchoStar, which has nearly 2 1/2 times the subscribers of Cablevision, similarly maintains -- as it has since 1997 -- that it needs expanded program access rights in order to compete with "the dominant MVPD provider" and asserts that if "recent trends continue, DBS will be less able to offer a competitive alternative to cable, resulting in even higher cable rates and anticompetitive behavior."[14/]

These claims echo those made by cable competitors in other ongoing proceedings, each seeking to convert cable's risky and substantial investments for their own use. Broadcasters demand free, wholesale access to cable's physical plant in the form of expanded must-carry rights for each of their digital signals.[15/] DBS operators and others eschew any interest in investing in or creating original programming, and demand that program access rights be

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13/ *Compare In the Matter of Annual Assessment of the Status of Competition in the Markets for the Delivery of Video Programming*, MB Docket No. 02-145, Comments of DirecTV, Inc. at 9-11 (filed July 29, 2002) *with* Annual Assessment of the Status of Competition in the Markets for the Delivery of Video Programming, CS Docket 97-141, Comments of DirecTV, Inc. at 4-6 (filed July 23, 1997). *See also* SBCA at 17-18 (program access rules should be extended to terrestrially-delivered programming).

14/ *Compare In the Matter of Annual Assessment of the Status of Competition in the Markets for the Delivery of Video Programming*, MB Docket No. 02-145, Comments of EchoStar Satellite Corporation at 1-2 (filed July 29, 2002) *with In the Matter of Annual Assessment of the Status of Competition in the Markets for the Delivery of Video Programming*, CS Docket 97-141, Comments of EchoStar Satellite Corporation at 11 (filed July 23, 1997).

15/ *See, e.g., In the Matter of Carriage of the Transmissions of Digital Television Broadcast Stations; Amendments to Part 76 of the Commission's Rules*, CS Docket 98-120, Comments of National Association of Broadcasters at 2-6 (filed October 13, 1998); *see also Ex Parte Communication* from Henry L. Baumann, Executive Vice President, National Association of Broadcasters to Chairman Michael Powell, Federal Communications Commission, CS Docket No. 98-120, March 27, 2002.

extended to ensure that cable operators are forbidden the ability to differentiate their services in the marketplace.[16/] And just as cable is beginning to be freed of local rate regulation in many areas -- in recognition of the intense competition cable faces from DBS and other competitors -- local governments have intensified their assertions that they have power to regulate cable's business practices and to obtain expanding "rent" for use of the rights-of-way, even though cable competitors are not subject to any such local scrutiny or fees.[17/]

II. THE COMMISSION SHOULD CONFORM REGULATION TO MARKETPLACE REALITIES

The Commission must resist calls to increase regulatory burdens on cable and subsidies for its competitors. While the Commission adopted an extension of the exclusivity ban in the program access rules for five years, the dynamism and shifts in the competitive MVPD market suggest that this rule -- which the Commission and Congress both note saps investment in creative, original content and new programming -- should be reevaluated continually to ensure that it remains "necessary" and to eliminate the high cost of this ban as soon as practicable.[18/] Insofar as Congressional policy behind the program access rule is to favor competition, preventing cable operators from using common marketplace tools, including exclusivity, to compete with DBS and other MVPD rivals is at odds with that policy, especially considering the

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16/ *See, e.g., Development of Competition and Diversity in Video Programming Distribution: Section 628(c)(5) of the Communications Act; Sunset of Exclusive Contract Prohibition*, CS Docket No. 01-290, Comments of EchoStar Satellite Corporation at 8-10 (filed December 31, 2001); Comments of Everest Midwest Licensee, LLC at 5 (filed December 31, 2001).

17/ *See, e.g., Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities, Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities*, CS Docket No. 02-52, Comments of Alliance of Local Organizations Against Preemption at 26-27; Comments of the City of New York at 19 n.41.

18/ *See In the Matter of Amendment of Parts 73 and 76 of the Commission's Rules relating to Program Exclusivity in the Cable and Broadcast Industries*, *Report and Order,* 3 FCC Rcd 5299, ¶¶ 49-89 (1988) (subsequent history omitted); *Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992, Development of Competition and Diversity in Video Programming Distribution and Carriage,* First Report and Order, 8 FCC Rcd 3359, 3384 ¶ 63 (1993).

size and reach of the DBS competitors that are many times the size of Cablevision.[19/] And while cable operators enter the ring with DBS without the benefit of differentiating programming and exclusive content, DBS providers trumpet the advantages of their own "exclusive" sports programming in every media and predict to financial analysis that, in part because of this advantage, cable's market share in 2007 will have declined to 61 percent.[20/]

The Commission also faces importunities from the broadcast giants to impose upon Cablevision's ability to select the mix of services most responsive to subscriber demand -- and to infringe upon its constitutional rights -- by further expanding broadcasters' digital must-carry rights. Proposals for "dual" must-carry of analog and digital signals[21/] and mandatory carriage of all services provided by broadcasters in their digital spectrum[22/] would advance broadcasters' interests at the cost of cable's substantial new investment, even though broadcasters such as Capital Cities/ABC and CBS/Viacom have 34-60 times the market capitalization of Cablevision.[23/] Implementing these new takings would deprive cable operators of their free speech rights for the benefit of broadcasters already rich with taxpayer subsidies and government hand-outs.

19/ *Development of Competition and Diversity in Video Programming Distribution: Section 628(c)(5) of the Communications Act; Sunset of Exclusive Contract Prohibition*, Report and Order, 17 FCC Rcd 49247 (rel. June 28, 2002).

20/ *See* "Cable Industry: Less Than 60 Million Subs in Five Years," *Kagan on Demand* (Aug. 8, 2002) (noting DBS predictions that "the cable industry will lose 10 million subscribers from its base of 69 million subscribers within the next five years" or 14.5 percent of their subscribership).

21/ *See* n.15, *supra*.

22/ *See Carriage of Digital Broadcast Signals*, First Report and Order and Further Notice of Proposed Rulemaking, 16 FCC Rcd 2598, ¶¶ 15, 22 (2001).

23/ *See CBS Marketwatch*, "Viacom, Inc. Investor Profile" (reporting that Viacom's market capitalization is 66.94 billion), *available at* www2.marketwatch.com/tools/quotes (visited Aug. 26, 2002); *Yahoo Finance*, "Walt Disney Company Investor Profile" (reporting that Disney's market capitalization is 34.022 billion), *available at* http://finance.yahoo.com (visited Aug. 26, 2002); *Yahoo Finance*, "Cablevision System Corporation Investor Profile" (reporting that Cablevision's market capitalization is 1.648 billion), *available at* http://finance.yahoo.com (visited Aug. 26, 2002).

Rather than to respond to efforts to use government power to stunt cable growth and put cable assets at the disposal of its well-funded competitors, the Commission should conform regulation to marketplace realities. In today's video and broadband markets, cable is no longer dominant or even first among equals. It is one of several providers competing for market and mind share, warranting no special burdens. Arguments to the contrary ignore the Commission's own data and the financial climate that the entire telecommunications, cable, and high technology industry faces in seeking the funding it needs to continue to deploy the broadband and digital services that the Commission has consistently urged.

CONCLUSION

Notwithstanding the current market turmoil and continued heavy regulation, Cablevision has continued to invest significant capital to develop and deploy new technologies and services to create exciting new service offerings that will enable it to compete against the much larger and better financed DBS providers that capture more and more of cable operators' market share each year. The Commission should reward those efforts by allowing Cablevision to compete fairly in the market, and should reject requests to impose additional regulation designed to curb cable "market power." Cablevision cannot serve its subscribers to the best of its ability if it must continue to subsidize its competitors and face multiple levels of government scrutiny.

Respectfully submitted,

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August 30, 2002

CERTIFICATE OF SERVICE

I, Susan S. Ferrel, do hereby certify that on this 30th day of August, 2002, copies of the foregoing Reply Comments of Cablevision Systems Corporation were served on the following persons in the indicated manner:

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