

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

In the Matter of)	
)	
Annual Assessment of the Status of)	MB Docket No. 03-172
Competition in the Market for the)	
Delivery of Video Programming)	

**REPLY COMMENTS OF THE NATIONAL CABLE &
TELECOMMUNICATIONS ASSOCIATION**

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<u>INTRODUCTION AND SUMMARY</u>	1
<u>I. THE RECORD CONFIRMS THE INEXORABLE COMPETITION IN THE MARKET FOR THE DELIVERY OF VIDEO PROGRAMMING</u>	3
<u>II. EXPANSION OF THE SCOPE OF THE PROGRAM ACCESS RULES TO INCLUDE TERRESTRIALLY-DELIVERED CABLE PROGRAM NETWORKS OR PROGRAM NETWORKS THAT ARE NOT VERTICALLY INTEGRATED CANNOT BE JUSTIFIED ON EITHER LEGAL OR POLICY GROUNDS</u>	8
<u>III. CERC’S ARGUMENTS ARE EITHER BEING ADDRESSED ELSEWHERE OR ARE WITHOUT MERIT OR BOTH</u>	12
<u>CONCLUSION</u>	19

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The National Cable & Telecommunications Association (“NCTA”), by its attorneys, hereby submits its reply comments in the Commission’s annual Notice of Inquiry on the status of competition in the market for the delivery of video programming.

INTRODUCTION AND SUMMARY

The record in the Commission’s tenth annual inquiry into the status of video competition decisively confirms what NCTA showed in its initial comments: that competition has fully arrived in the video marketplace. Both the cable and direct broadcast satellite (“DBS”) industries provide persuasive evidence of a highly competitive marketplace, where alternatives to cable television are virtually universally available to consumers, multiple providers aggressively vie with each other for customers, and product differentiation – in both video and non-video services – abounds among an array of delivery media. These comments reflect the enormous changes of the past decade – from the dramatic growth of DBS, to the explosion in new services and consumer choice, to the investment in facilities and programming, to the bundling and discounting of services. The dizzying one-upmanship and strategic maneuvering among competitors over the past year alone provides stark evidence of robust competition.

But the Commission need not solely take our word for it. The record is replete with evidence from financial analysts, economists, media journalists, and communications experts on the highly competitive state of the video marketplace. From virtually every corner, there is recognition that the video marketplace is changed forever and that competitive forces are driving it. Nothing in the record contradicts this essential point.

With inescapable proof of intense competition in the record, we are left with marginal allegations from some of cable's competitors on issues that have already been decided or are the subject of other ongoing Commission proceedings.¹ DBS providers and broadband overbuilders, for example, attempt to advance a wish list of policy objectives and regulatory changes to artificially grow their businesses. Apart from addressing the program access issues raised, which are part of the video competition provisions of the Communications Act, and responding to recycled arguments from the Consumer Electronics Retailers Coalition on the "plug and play" agreement, we refer the Commission to the exhaustive records in those dockets.

In sum, NCTA urges the Commission to hew to Congress' central purpose in mandating the annual inquiry: to ascertain the status of competition in the market for the delivery of video programming. As the Commission recognized almost ten years ago in the First Annual Report, "the 1992 Cable Act's regulatory scheme serves as a transitional mechanism until competition

¹ Comments of RCN Corporation at 16-17; Comments of Broadband Service Providers Association at 39-41. With respect to RCN and BSPA's call for additional regulation of MDU arrangements, the Commission, less than a year ago, completed a comprehensive proceeding on this matter. See Telecommunications Services Inside Wiring, First Report and Order on Reconsideration and Second Report and Order, FCC 03-9, rel. Jan. 29, 2003. Paxson Communications Corporation's call for mandatory carriage of all broadcast digital multicast signals is being addressed in the digital must carry and digital transition proceedings. See Carriage of Digital Television Broadcast Signals, CS Docket No. 98-120, 00-96; Second Periodic Review of the Commission's Rules and Policies Affecting the Conversion to Digital Television, MB Docket No. 03-15, NCTA Reply Comments at 6-8, May 21, 2003.

develops and consumers have adequate multichannel video programming alternatives.”² The record shows that this time has arrived and the Commission should declare it so.

I. THE RECORD CONFIRMS THE INEXORABLE COMPETITION IN THE MARKET FOR THE DELIVERY OF VIDEO PROGRAMMING

In its comments, the Satellite Broadcasting and Communications Association (“SBCA”) makes clear that over the past ten years “the multichannel video market has seen the growth of satellite-delivered television as a viable competitor” to cable and that “competition in the multichannel video market has intensified significantly.”³ SBCA points out that “this is largely due to the launch of DBS, and its boom as a competitor in the multichannel video programming distribution (“MVPD”) market. As of June 30, 2003, there were nearly 21 million households in the U.S. that receive multichannel video via satellite.”⁴

SBCA highlights the many factors that have led to DBS’ remarkable growth as a strong competitor to cable, including programming selection, the expansion of local-into-local service by DBS providers, and the “fast-paced rollout of advanced services” such as HDTV, interactive and personal video recording services.⁵ Indeed, as SBCA acknowledges, “the roll-out of satellite-delivered local-into-local service, authorized by SHVIA in 1999, evens the competitive landscape by allowing DBS providers to offer highly-desirable local programming, as cable operators have done for years.”⁶ By the end of 2003, according to SBCA, the largest DBS

² Implementation of Section 19 of the Cable Television Consumer Protection & Competition Act of 1992, Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, First Report, 9 FCC Rcd. 7442, 7447.

³ Comments of the Satellite Broadcasting and Communications Association at 1 and 15.

⁴ Id. at 2 (emphasis added).

⁵ Id. at 2, 7-10.

⁶ Id. at 8 (emphasis added).

providers, DIRECTV and EchoStar's DISH Network – which already reach 79% of U.S. households with local-into-local service – plan to expand their reach to 125 markets, covering 90% of U.S. television households.

In discussing the DBS industry's gains over the past year, SBCA reports that DBS subscribership rose from 18.2 million customers in July, 2002 to 20.36 million households on June 30, 2003, a 12% increase.⁷ Today, SBCA acknowledged, "20% of television households depend on satellite-delivered technology for their multichannel television service" and "DBS subscribership continues to escalate."⁸

The subscriber trends identified in a study submitted with SBCA's comments solidify that cable and DBS compete head-to-head in most markets and that DBS is a service that appeals to urban, suburban and rural subscribers alike.⁹ For example, the study by Taylor Research and Consulting Group, Inc. found that:

Of DBS subscribers who have subscribed to DBS for less than one year, 41 percent live in an urban setting, 32 percent in a suburban area, and 23 percent in a rural location. Seventy-six percent of "new" DBS subscribers (those who have subscribed to DBS for less than three months) have cable available to them, compared to 60 percent of new DBS subscribers in 1999.¹⁰

DIRECTV provides compelling proof of its competitive status vis-a-vis cable, starting with its "more than 225 national channels of digitally-delivered entertainment, educational, and informational programming" delivered directly to homes and businesses.¹¹ It goes on to point out

⁷ Id. at 4.

⁸ Id. at 4 and 15.

⁹ Id. at 6; see SBCA Press Release: Satellite Television Viewer Satisfaction Continues to Rise, May 20, 2003, Attachment A to SBCA Comments.

¹⁰ Id. at 6.

¹¹ Comments of DIRECTV, Inc. at 1.

that it has devoted an “enormous amount of resources to state-of-the-art technologies” and utilized additional DBS frequencies and orbital locations “to improve and increase the variety of its services and offer consumers more attractive program packages, including the offering of local broadcast channels via satellite in 64 local television markets (with plans to expand that service to approximately 100 DMAs).”¹²

The factual information and statistical data submitted by DIRECTV further confirm DBS as a full-fledged competitor to cable. DIRECTV subscribership grew from 10.7 million customers in June 2002 to 11.56 million customers in June 2003, an 8 percent increase. It notes that “direct-to-home satellite services have attained greater than 15% household penetration in 35 states in the U.S.”¹³ DIRECTV reports that its “prices and program packages are comparable to those offered by cable operators.”¹⁴ Among the new services that DIRECTV has launched are a new high definition programming package that includes ESPN HD, Discovery HD Theater, HDNet, HDNet Movies and the broadcast of special events in high definition. In addition to HDTV, DIRECTV offers interactive television, providing up-to-the-minute information including news, sports and weather, and e-commerce, digital video recording capability, subscription video-on-demand service, Starz on Demand, and an Impulse Pay-Per-View service.

DIRECTV barely mentions, however, its major new initiatives with telephone companies, BellSouth and Qwest Communications. As NCTA noted in our Comments, starting next year, BellSouth will make DIRECTV television services available to its customers as part of BellSouth’s AnswersSM bundle of communications services. The companies also have begun exploring the integration of digital satellite and DSL technology. DIRECTV also recently

¹² Id. at 1-2.

¹³ Id. at 11.

entered into a strategic marketing alliance with Qwest Communications that will enable one-stop shopping for Qwest's customers ordering local, long distance, wireless, DSL and TV services.

The comments of NCTA and major cable companies comprehensively demonstrate that competition is now firmly rooted in the video marketplace.¹⁵ They show that cable operators have undertaken massive infrastructure upgrades to keep pace with their various video rivals and now provide hundreds of new channels of programming and new ways of watching those services. Digital tiers, HDTV, video-on-demand, personal video recorders, electronic programming guides are now well-entrenched in the video landscape.

Cable companies not only compete vigorously for every customer with DBS and broadband service providers, but they face ever-aggressive, well-financed competition from DBS-telco combinations, the videocassette and DVD retail industry, and burgeoning Internet video content options.¹⁶

As Comcast stated in its comments:

Everything that we do at Comcast – every investment we make, every new technology we test, every new initiative we launch to improve customer service and satisfaction – is driven by the inescapable competitive realities of the multichannel video marketplace. . . . It also gives Comcast every impetus to control costs, improve service, stay ahead of the innovation curve, and offer consumers quality products and good value.¹⁷

In describing its response to the emergence of DBS as a “powerful competitor to cable”, Time Warner Cable pointed out that “largely in response to vigorous competition, cable operators have invested unprecedented amounts in system upgrades, allowing them to provide

¹⁴ Id. at 12.

¹⁵ See Comments of NCTA, Comcast Corporation, Time Warner Cable, Cox Communications.

¹⁶ See e.g., Comments of NCTA at 17-22; 27-32; Comments of Comcast at 2, 29-37.

¹⁷ Comments of Comcast at 1-2.

better packages of video programming at a competitive price. In addition, system upgrades have enabled innovative non-video services, including high speed Internet and residential telephone service.”¹⁸ As Cox Communications illuminates in its comments, “the evolution of just one cable operator – Cox – reveals that the market not only for video programming services but also voice and data have changed irrevocably” over the past decade.¹⁹

It’s still the case that substantially more MVPD customers are served by cable than by other competitive services nationwide. But, as NCTA has shown in previous years, it’s also the case that consumers nationwide have a choice among several fully competitive facilities-based alternatives. DIRECTV and EchoStar can and do add customers anywhere with virtually no extra costs. In these circumstances, cable’s relatively high share of MVPD subscribers does not at all indicate a lack of full and vibrant marketplace competition.²⁰

Nor is the fact that cable prices have risen faster than inflation indicative of an underperforming or non-competitive video marketplace. As the study by economist Steven S. Wildman, submitted with NCTA’s initial comments, shows, there is a valid way of measuring cable prices over time, beyond a knee-jerk resort to comparisons with general inflation: take into account changes in the quality or value of the service. The Wildman study shows that there is compelling evidence that the value proposition offered cable television customers has been steadily improving over time, which is precisely what is expected in a vibrantly competitive marketplace.

¹⁸ Comments of Time Warner Cable at 2.

¹⁹ Comments of Cox Communications at 1.

²⁰ See Annual Assessment of the Status of Competition in the Market for Delivery of Video Programming, MB Docket No. 02-145, Comments of NCTA at 6-10, Appendix A, Statement of Dr. Debra J. Aron, July 29, 2002; Annual Assessment of the Status of Competition in the Market for Delivery of Video Programming, CS Docket No. 97-141, Comments of NCTA, Appendix B, Report of Economists, Inc., July 23, 1997.

The record confirms the reality of today's video marketplace: competition has fully taken hold and is here to stay.

II. EXPANSION OF THE SCOPE OF THE PROGRAM ACCESS RULES TO INCLUDE TERRESTRIALLY-DELIVERED CABLE PROGRAM NETWORKS OR PROGRAM NETWORKS THAT ARE NOT VERTICALLY INTEGRATED CANNOT BE JUSTIFIED ON EITHER LEGAL OR POLICY GROUNDS

The Broadband Service Providers Association (“BSPA”), RCN and DIRECTV call upon the Commission to expand the already elaborate mandatory program access requirements.²¹ Not satisfied with the enormous benefit they already derive from guaranteed access to satellite-delivered programming of vertically-integrated cable networks, they seek additional regulation. BSPA and RCN call for legislation to guarantee their access to terrestrially-delivered cable networks. The inescapable conclusion is that BSPA, RCN and DIRECTV want the government to mandate their ability to carry any and all programming carried on cable systems. Congress has rejected this policy judgment, and, given current marketplace circumstances, the Commission ought to reject it out of hand.

It was only last year, in the proceeding extending the ban on exclusive programming contracts for satellite-delivered programming, that the Commission rejected proposals to extend the program access rules to terrestrially-delivered programming.²² The Commission found:

The language of Section 628(c) expressly applies to “satellite cable programming and satellite broadcast programming,” and that terrestrially delivered programming is “outside of the direct coverage of Section 628(c).” We have been presented with no basis to alter that conclusion in this proceeding. To the contrary, the legislative history to Section 628 reinforces our conclusion.²³

²¹ See Comments of Broadband Service Providers Association, September 11, 2003 (“BSPA Comments”); Comments of RCN Corporation, September 11, 2003 (“RCN Comments”); Comments of DIRECTV, Inc., September 11, 2003, at 9-11.

²² Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Development of Competition and Diversity in Video Programming Distribution: § 628(c)(5) of the Communications Act, Sunset of the Exclusive Contract Prohibition, FCC 02-176, CS Docket No. 01-290 (rel. June 28, 2002).

²³ *Id.* at ¶ 73.

The Commission explained, by reference to the legislative history of the 1992 Act, that Congress considered, in the course of adopting the program access provision, whether the program access rules should apply to satellite-delivered and terrestrially-delivered programming (the Senate version), or to just satellite-delivered programming (the House version). As explained in the Conference Report, by adopting the House version Congress decisively rejected the application of the program access rules to terrestrially-delivered programming, and limited their application to “satellite cable programming vendor[s] affiliated with a cable operator.”²⁴ Based upon its evaluation of the statutory language and congressional intent, the Commission found:

given this express decision by Congress to limit the scope of the program access provisions to satellite delivered programming, we continue to believe that the statute is specific in that it applies only to satellite delivered cable and broadcast programming.

Nothing has occurred since the Commission’s 2002 decision that provides any basis for altering this conclusion.

The statute makes clear that terrestrially-delivered programming is, generally, not subject to the program access rules. The Commission has found that terrestrially-delivered programming may be subject to such a requirement, but only if the particular programming was moved by the cable company from satellite to terrestrial delivery for the express purpose of evading the program access requirement. Several cable competitors have contended that selected cable operators have engaged in such practices, but the Commission has repeatedly and consistently rejected such claims.

²⁴ See H.R. Conf. Rep. No. 102-862, 102nd Cong., 2nd Sess. at 91-3 (1992).

For example, RCN adverts to a 2001 decision in which the Commission rejected a program access complaint which the company brought against Cablevision. RCN contends: “Cablevision deprived RCN of access to key overflow sports programming by revising its distribution system from satellite to terrestrial so as to preclude RCN’s carriage of this important tier of programming.”²⁵ But as RCN acknowledges in the next sentence, the Commission majority “dismissed the complaint on the grounds that RCN had failed to show that Cablevision had moved the programming from satellite to terrestrial distribution for the purpose of evading the program access rules.”²⁶ And, despite the best efforts of cable’s competitors to argue the point, the Commission has never found that vertically-integrated cable companies have transferred programming from satellite to terrestrial for the purpose of evading the program access rules. The D.C. Circuit has affirmed the rejection of such claims.²⁷

The Commission has previously found that a cable company may choose terrestrial over satellite distribution as the “legitimate business means” of distribution.²⁸ Terrestrial distribution may be, for example, “dramatically less expensive” than satellite distribution.²⁹ RCN identifies local sports and news programming as the main examples of cable programming that may not be distributed by satellite. But since this programming is designed to serve primarily limited

²⁵ RCN Comments at 9.

²⁶ Id.

²⁷ See DIRECTV, Inc. v. Comcast Corporation, 15 FCC Rcd 22802, 22807 (2000), aff’g. EchoStar Communications Corporation v. Comcast Corporation, 14 FCC Rcd 2089 (1999), DIRECTV, Inc. v. Comcast Corporation, 13 FCC Rcd 21822 (1998), aff’d sub nom. EchoStar Communications Corporation v. FCC, 292 F.3d 749 (D.C. Cir. 2002); RCN Telecom Services of New York, Inc. v. Cablevision Systems Corp., 16 FCC Rcd 12048 (2001).

²⁸ DIRECTV, Inc. v. Comcast Corporation, Memorandum Opinion and Order, 13 FCC Rcd 21822, 21837 (1998). See also EchoStar Communications Corp. v. Comcast Corporation, 14 FCC Rcd 2089 (1999).

²⁹ DIRECTV, Inc. v. Comcast Corporation and EchoStar v. Comcast Corporation, Application for Review of Orders of the Cable Services Bureau Denying Program Access Complaints, Memorandum Opinion and Order, 15 FCC Rcd 22802 (2002).

geographic areas, it would be unsurprising if providers of this programming choose terrestrial distribution designed to serve a restricted geographic area instead of the entire continental United States.

Despite its insistence that access regulation of terrestrially distributed cable programming is necessary, RCN nevertheless acknowledges marketplace solutions are feasible. In the midst of its veritable tornado of complaint against cable programmers and calls for regulation and even congressional action, RCN concedes that private negotiation has resulted in “some progress” and that the company “... is hopeful that it will be able to finalize a long-term agreement with Comcast for the SportsNet programming in the near future.”³⁰

While RCN is “hopeful” that a negotiated marketplace solution between the parties with respect to the particular case of SportsNet programming will result in a long-term agreement, it fails to explain why marketplace solutions are inappropriate in the general case. Given the judgment of Congress that the program access rules should be limited to satellite-delivered programming (and even then that these rules should be applied for a limited period, and may be extended by the Commission only upon a specific finding that they are necessary to preserve competition and diversity), the burden of expanding the statutory and regulatory scope of the program access rules should fall squarely upon those who seek their expansion. Since RCN is “hopeful” that marketplace negotiation will succeed, there appears to be no basis for the Commission to recommend a legislative solution.

³⁰ RCN Comments at 8.

Legislation to mandate access to terrestrially-delivered programming and non-vertically integrated satellite programming would be a step in the wrong direction. The balance struck by Congress in 1992, at a time when cable was significantly more vertically integrated and DBS did not exist, has been followed by significantly greater facilities-based competition. By leaving terrestrially-delivered programming options to the marketplace, Congress has given programmers the choice of striking carriage arrangements with distributors of terrestrially-delivered programming on an exclusive or multi-provider basis.

III. CERC’S ARGUMENTS ARE EITHER BEING ADDRESSED ELSEWHERE OR ARE WITHOUT MERIT OR BOTH

As is the case with a number of other commenters, the Consumer Electronics Retailers Coalition (“CERC”) has used the occasion of this Inquiry to re-argue a number of issues that either are already the subject of pending proceedings or, if not, are plainly not appropriate subjects for this proceeding. We will address briefly the CERC claims.

First, CERC alleges that the new FCC “plug and play” regulations – supported by both the cable and CE industries – “present[] the last, best hope for competition, and that there appears to be no feasible alternative.”³¹ We agree with CERC that the “plug and play” agreement reached by the cable and consumer electronics (“CE”) industries in December, 2002 and the FCC’s recent action implementing critical provisions in that agreement were landmark moments in the development of a competitive navigation devices marketplace. However, CERC is plainly wrong in asserting that there is no alternative to the “plug and play” agreement. In fact, there *is* a feasible alternative to the agreement – the CableLabs POD-Host Interface License Agreement (“PHILA”) – although for years CE companies, supported by CERC, refused to follow that path.

While most companies in the CE industry had previously refused to sign PHILA, in part as a result of the trust built during the “plug and play” negotiations, over 14 consumer electronics companies (including set-top box and DTV set manufacturers) have now signed PHILA.³² Indeed, Panasonic recently announced that it would have four models of DTV sets available to market this fall which will be built under PHILA and not require the need for a cable set-top box.³³ Surely, without diminishing the importance of the “plug and play” agreement, those developments demonstrate that there is a “feasible alternative” to the “plug and play” rules for building competitive navigation devices.

Second, CERC re-argues an issue that it has raised in numerous filings in the Commission’s Navigation Devices docket: that devices leased to customers by cable operators must have “full and exclusive reliance” on the same specifications made available to competitive manufacturers. In the more than five years since the FCC issued its first Notice of Proposed Rulemaking in the Navigation Devices docket, CERC has raised this issue countless times in that and related (and sometime unrelated) proceedings, and NCTA and others have previously explained why CERC’s argument is without merit.³⁴

To date, the Commission has not seen fit to adopt CERC’s suggestions. And for good reason. The Navigation Devices statute and the Commission’s rules implementing it are

³¹ CERC Comments at 3.

³² See “Broadcom Corporation Signs CableLabs® PHILA, 14 Signatories to Date,” March 31, 2003 (available at http://www.cablelabs.com/news/pr/2003/03_pr_PHILA_033103.html).

³³ See “Panasonic Notches Digital Milestone: Four Models Of Integrated Digital Television Sets Achieve CableLabs® OpenCable™ Certified Status,” August 14, 2003 (available at http://www.cablelabs.com/news/pr/2003/03_pr_oc_certified_081403.html); “Panasonic Introduces First Cable-Ready HDTV at CEDIA,” September 4, 2003 (available at http://www.panasonic.com/consumer_electronics/perssroom/index.asp).

³⁴ See, e.g., NCTA Comments, filed in CS Docket No. 97-80 (November 15, 2000), at 30-35 (“NCTA Comments”); NCTA Reply Comments, filed in CS Docket No. 97-80 (December 18, 2000), at 25-30 and n. 119 (“NCTA Reply Comments”).

intended to assure that commercially available devices work on cable systems. When those devices have separate security modules and are otherwise built to specifications that cable operators support, a market for those devices will develop. By imposing extraneous requirements on cable operator-provided equipment – and potential costs accompanying those requirements – the consumer will bear the ultimate burden of such requirements.³⁵ Beyond imposing additional costs on consumers, adoption of CERC’s proposal would impose significant constraints on cable operators’ ability to introduce new or more efficient technologies and services and to compete with DBS and other alternative service providers who are not subject to such restrictions. Such constraints would conflict directly with Congress’ directive to avoid stifling innovation³⁶ and would deprive consumers of potentially significant benefits.³⁷ In any event, the Navigation Devices docket is still open as is the docket examining cable compatibility issues,³⁸ demonstrating that there is no need – and no reason – to address this issue in this proceeding.

³⁵ See, e.g., Report of the National Cable & Telecommunications Association Regarding the Significant Costs to Consumers Arising from the 2005 Ban on Integrated Set-Top Boxes, filed in CS Docket No. 97-80, August 2, 2002 (demonstrating significant additional costs imposed on consumers by the imposition of a ban on integrated set-top boxes); Ex Parte Letter of NCTA, filed in CS Docket No. 97-80, January 7, 2003 (attaching affidavits by industry experts further demonstrating the cost burden on consumers associated with the ban on integrated devices).

³⁶ In enacting the 1996 Act, Congress made clear that in implementing the navigation device provisions, the Commission must “avoid actions which could have the effect of freezing or chilling the development of new technologies and services.” See S. Conf. Rpt. No. 230, 104th Cong., 2nd Sess. 181 (1996).

³⁷ By contrast, under the “plug and play” agreement, retailers may sell “digital cable ready” devices which include other features or native applications in the host device such as a PVR or game console. They may even add their own proprietary middleware, IPPV technology, or other features.

³⁸ See Implementation of Section 304 of the Telecommunications Act of 1996, Commercial Availability of Navigation Devices, FCC 03-89 (rel. April 25, 2003), at ¶ 3 (“Other issues raised in the Further Notice and Declaratory Ruling will be addressed separately at a later time.”); Compatibility Between Cable Systems and Consumer Electronics Equipment, PP Docket No. 00-67.

Third, in a similar vein, CERC raises its time-worn argument that the digital set-top boxes provided by cable operators are “subsidized” to the detriment of providers of competitive devices. But, as NCTA and others have observed on numerous occasions, the so-called “subsidy” that CERC protests is, in fact, the Congressionally-authorized and FCC-implemented equipment averaging methodology. The arguments buttressing equipment averaging have been set forth in numerous NCTA filings³⁹ and need not be repeated here in any detail. Suffice it to say that Congress enacted the equipment averaging provision to encourage the spread of digital devices and services – and the provision has done exactly that to the benefit of consumers. By contrast, CERC’s proposal that cable operators be forced to subsidize the retailers’ provision of navigation devices to consumers – which, as NCTA has shown, is both inconsistent with the 1992 Cable Act⁴⁰ and also unworkable as a practical matter⁴¹ – would place an obstacle in the path of the digital transition.⁴² In any event, as with the argument above, this issue has been raised repeatedly by CERC and has found no traction at the Commission. And, once again, the Navigation Devices docket in which it has been raised the most by CERC remains open.

³⁹ See, e.g., NCTA Comments at 21-26; NCTA Reply Comments at 32-36; Ex Parte Letter from Neal M. Goldberg, Esq., General Counsel, NCTA, to Commissioner Susan Ness, filed in CS Docket No. 97-80 (May 16, 2001) (“Goldberg Letter”); Response of NCTA to CERC’s Ex Parte Submission, filed in CS Docket No. 97-80 (September 21, 2001), at 26-32 (“NCTA Response”).

⁴⁰ See, e.g., NCTA Response at 28-29 (equipment averaging statute directs the Commission to allow cable operators to aggregate “their equipment costs” for purposes of setting rates for the equipment “they” provide to subscribers) (emphasis added).

⁴¹ See id. at 30-32 (explaining significant practical problems and administrative burdens with extending the equipment averaging process to retail customers); Goldberg Letter at 5 (same).

⁴² For example, as NCTA has pointed out, if CERC’s subsidy proposal were adopted, nothing would prevent retailers from establishing prices that effectively allow the retailer, rather than the consumer, to reap the benefit of the subsidy. Retailers could do this simply by raising the price of the product (or package of products) they sell by the amount of any “retail subsidy” payment received by the consumer, while advising consumers that they can receive a “rebate” for the same amount from their local cable operator. Because retailers are not subject to rate regulation, there would be no way to detect, let alone prevent, such behavior. The ability of unregulated retailers to appropriate CERC’s proposed subsidy for their own economic benefit undercuts CERC’s claim that its proposal is pro-consumer and would advance the purposes of the equipment averaging provision.

Fourth, CERC would have the Commission intervene in any future cable operator efforts to convert analog systems to all-digital systems. Despite grudgingly recognizing that “such conversion would offer bandwidth efficiencies and potential cost savings,”⁴³ CERC suggests that Commission oversight would be required to administer certain deployments of low-cost digital-to-analog converters to customers with analog TV sets. Contrary to CERC’s claim, a conversion to an all-digital network accompanied by the provision of low-cost digital-to-analog converters would *accelerate* the digital transition, hastening the day when broadcasters’ analog spectrum can be returned to the government. Granted, if cable operators or others develop low-cost analog-to-digital converters and make them generally available to consumers, that might deprive retailers of the high margins they are accustomed to attaining from the sale of consumer electronics equipment. However, it is difficult to see how the FCC adopting policies designed to maintain high retailer margins could be characterized as a public interest benefit. By contrast, the benefit to the consumer and the digital transition of a low-cost digital-to-analog converter would be undeniable. This is not to say that such a scenario is imminent or inevitable – only that it hardly should be the province of FCC “oversight” as suggested by CERC.

Finally, in a leap of law and logic, the retailers contend that the separate security module – now called a CableCARD and formerly called a Point of Deployment (“POD”) module – should be provided free to consumers. CERC claims it “functions as part of the network, just as buried ‘tier’ filters long have done in analog cable networks,” and should essentially be free to the consumer.⁴⁴ However, the separate security module is more appropriately categorized as customer equipment than part of the cable network.

⁴³ CERC Comments at 5.

⁴⁴ Id.

Under current Commission rules, cable equipment generally has been treated as customer equipment if it is located on the customer's side of the demarcation point, which has been defined for a single family home at or about 12 inches *outside* of where the cable wire enters the home.⁴⁵ The Commission has stated that cable-related customer equipment includes, among other things, television sets, VCRs, remote control units, and set-top boxes.⁴⁶ Cable network equipment, in contrast, generally encompasses any equipment located beyond the demarcation point, including, for example, equipment located on the pole or pedestal or in the cable headend.⁴⁷ Thus, under current Commission rules, the POD should be treated as customer equipment, not network equipment.

This conclusion is supported by other factors and Commission precedent as well. For example, the POD is akin to other cable equipment used to descramble cable services that the Commission has classified as customer equipment, such as integrated set-top boxes – even those that are used by consumers *solely* to receive scrambled services like HBO. In addition, the POD is powered from the customer's home, and, like all other customer equipment, customers are aware that the POD is being used to receive services. The Commission has previously relied on such factors in classifying certain cable equipment as customer equipment.⁴⁸

⁴⁵ See Cable Home Wiring, 13 FCC Rcd. 3659 ¶ 12 (1997). Note that this demarcation point is different from the telephone demarcation point, which is defined as 12 inches *inside* the home.

⁴⁶ See Telecommunications Services: Inside Wiring; Customer Premises Equipment, NPRM, 11 FCC Rcd. 2747, at ¶ 67 (1996) ("CPE NPRM") (also noting that "future CPE used by cable and telephone subscribers may include computers, component decoders and tuning devices, and facilities used for interactive services"). Note that the POD is essentially a "component decoder."

⁴⁷ See, e.g., Motorola's HomeClear™ System, 12 FCC Rcd. 20505 ¶ 8 (1997) ("HomeClear") (distinguishing customer equipment from network equipment).

⁴⁸ See, e.g., HomeClear at ¶ 8 (highlighting the following facts in support of its decision to treat the HomeClear device as customer equipment: (1) the equipment was located at or near the demarcation point, as opposed to on a pole or pedestal (like a trap); (2) the device was to be powered from the subscriber's home; (3) the subscriber was not responsible for losses in cases of theft or tampering of the unit; and (4) customers were aware that the unit was attached to the home, unlike equipment on the pole or pedestal).

By contrast, CERC’s analogy to “buried ‘tier’ filters” is misplaced. Such filters, or “traps,” are treated as network equipment because, among other things, they are located *outside* the home on a pole or pedestal, are powered by the *network*, and are devices of which the customer is typically *unaware*.

CERC’s suggestion that charging consumers for PODs would be “comparable to charging telephone subscribers for using competitive rather than service provider-issued telephones”⁴⁹ is equally inapt. Congress and the FCC have established a different regulatory regime for cable-related customer equipment, and the Commission has repeatedly recognized the differences in the two regulatory regimes.⁵⁰ Charges for cable services and equipment are prescribed by a matrix of rules balancing cost recovery, surrogates for competitive market pricing, and market-based deregulation which has been carefully crafted for application to the cable industry. In short, CERC offers no apt precedent or other justification for treating PODs as network equipment, nor does it even attempt to distinguish the above Commission precedent.⁵¹

⁴⁹ CERC Comments at 5.

⁵⁰ See, e.g., Report and Order, In the Matter of Implementation of Section 304 of the Telecommunications Act of 1996, Commercial Availability of Navigation Devices, 13 FCC Rcd 14775, 14,789, ¶ 39 (1998) (“telephone networks do not provide a proper analogy to the issues in [the navigation device] proceeding due to the numerous differences in technology between Part 68 telephone networks and MVPD networks.”); Telecommunications Services: Inside Wiring; Customer Premises Equipment, NPRM, 11 FCC Rcd. 2747 (1996) (seeking comments on proposals to harmonize the treatment of telephone and cable customer equipment, but later declining to issue an order, and terminating proceeding).

⁵¹ We note that the Commission is currently analyzing whether to modify its rules on how to regulate or deregulate certain cable customer equipment. See Revisions to Cable Television Rate Regulations, Notice of Proposed Rulemaking and Order, MB Docket No. 02-144, MM Docket No. 92-266, MM Docket No. 93-215, CS Docket No. 94-28, CS Docket No. 96-157, 17 FCC Rcd. 11550, ¶¶ 44-49 (2002) (“*Rate Regulation Notice*”). NCTA has filed comments on the Rate Regulation Notice recommending various possible approaches to regulating or deregulating certain types of cable customer equipment. See NCTA Comments on Rate Regulation Notice, filed November 4, 2002, at 23-26.

CONCLUSION

In its Tenth Annual Report, the Commission should report to Congress the sweeping changes and remarkable developments in the video marketplace over the past decade. It should declare that the market for the delivery of video programming is fully competitive and that cable can not be considered “dominant” given the availability of fully substitutable alternative multichannel services and other video programming options. And it should celebrate the benefit to consumers from this marketplace competition.

Respectfully submitted,

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