Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming	MB Docket No. 04-227

COMMENTS OF SBC COMMUNICATIONS INC.

In these comments, SBC Communications Inc. ("SBC") addresses a number of questions posed by the Commission in its June 17, 2004 Notice of Inquiry ("*NOI*"),[1] principally, the need for, but almost universal absence of, the wireline competition to incumbent cable operators that Congress authorized in the 1996 Act.

1. ***The State of Competition***. Since the Commission's last notice of inquiry on cable competition in 2003, little has changed. There have been few new inroads into the video market. DBS providers have captured some market share,[2] but DBS appears to apply far less downward

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1 *See* Notice of Inquiry, Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, MB Docket No. 04-227, FCC 04-136 (June 17, 2004) ("*2004 Video NOI*").

2 According to the Commission, as of June 2003, DBS represented 21.6 percent of the MVPD market, up from 20.29 percent the year before. Tenth Annual Report, *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 19 FCC Rcd 1606, App. B, Table B-1 (2004) ("*Tenth Video Competition Report*"). *But see* Katy Bachman, *Direct Broadcast Satellite Gains Users; Cable Wanes*, Mediaweek.com (Apr. 7, 2004) (reporting Television Bureau of Advertising's figure that 17.8 percent of MVPD customers subscribe to DBS as of February 2004).

pressure on cable rates than does the presence of a wire-based video competitor.[3] In contrast, a study by the General Accounting Office ("GAO") has found that where a wireline competitor is present, "cable rates are significantly lower — by about 15 percent — than cable rates in similar markets without wire-based competition."[4] A number of other observers, including Senator McCain, have agreed.[5]

But facilities-based wireline competition has not taken hold.[6] Not surprisingly then, consumers generally have enjoyed very little price pressure in the cable market. To the contrary: the GAO report found that cable rates *increased* approximately 40 percent over the past five years — compared to the approximately 12 percent increase in the Consumer Price Index over that same time period.[7] These steadily increasing cable rates stand in sharp contrast to prices for

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3 *See 2004 Video NOI* 4 ¶ 9.

4 U.S. General Accounting Office, *Report to the Chairman, Comm. on Commerce, Science, and Technology, U.S. Senate: Telecommunications, Issues Related to Competition and Subscriber Rates in the Cable Television Industry* 9 (Oct. 2003), *available at* http://www.gao.gov/new.items/d048.pdf ("2003 GAO Report").

5 *See* Testimony of the Honorable John McCain, U.S. Senate Committee on Commerce, Science & Transportation, at 1 (March 25, 2004) ("McCain Testimony") ("GAO concluded that satellite service has a minimal effect on lowering incumbent cable prices."); *The Continuing Abuse of Market Power by the Cable Industry: Rising Prices, Denial of Customer Choice, and Discrimination in Access*, Consumers Union Federation of America at 5-7 (Feb. 2004) ("Head-to-head, wireline competition is the only market structure feature that significantly disciplines monopolistic pricing. . . . satellite appears as a niche product that cannot discipline cable pricing abuse for the vast majority of cable subscribers[.]"), *attached to* Testimony of Gene Kimmelman on behalf of Consumers Union and Consumer Federation of America Before the Senate Committee on Commerce, Science and Transportation, at 2 (March 25, 2004) ("Kimmelman Testimony").

6 The Commission's most recent data showed that cable subscribers in only about two percent of all markets have "the opportunity to choose between two or more wire-based video operators." 2003 GAO Report at 9 (citing Ninth Annual Report, *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 17 FCC Rcd 26901 (2002)); *see also* McCain Testimony at 1 (citing GAO findings on level of wire-based competition). In the *Tenth Annual Report*, the Commission reported that only 2.6 percent of the nation's cable community units had been certified as having effective competition, but that includes community units with DBS penetration above 15 percent. *Tenth Video Competition Report* at 1683 ¶ 126.

7 2003 GAO Report at 20; *see also* Statement of Senator Patrick Leahy, *Hearing on: Cable Competition — Increasing Value?, Before the U.S. Senate Judiciary Antitrust Subcommittee*, at 1 (Feb. 11, 2004) (citing GAO data on cable price increases); Kimmelman Testimony at 2 (noting that cable prices rose "2.7 times faster than inflation" from 1996 until March 2004).

nearly all other communications services, which have dropped precipitously in recent years in the face of steadily increasing competition.[8] Nor, as many in Congress have also recognized,[9] do cable incumbents have any significant incentive to respond to customers' desire for diverse service offerings in the absence of true facilities-based competition. Opening additional transmission paths to the home will stimulate competition not only in price, but in service packages.

Promoting wireline competition will also ensure competition in those markets where the cable incumbents have leveraged their stronghold in the video programming distribution market to stake out powerful positions, such as broadband Internet access and the market for bundled broadband, video, and voice. For example, in the twelve markets where Cox Communications is offering phone services, seventeen percent of its customers subscribe to the triple play offering of high-speed Internet, video, and local telephone service, up fifteen percent from the end of 2003.[10] All three of the leading cable providers (Comcast, Time Warner, and Cox) have begun

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8 According to figures from the U.S. Department of Labor's Bureau of Labor Statistics, in 2003, the consumer price index ("CPI") for interstate toll service fell 10.8 percent; the intrastate toll CPI dropped 9.3 percent; and the cellular CPI declined 1.3 percent. In contrast, the CPI for all goods and services *rose* 1.8 percent in 2003. Paul R. Zimmerman, Industry Analysis & Technology Division, Wireline Competition Bureau, *Reference Book of Rates, Price Indices, and Household Expenditures for Telephone Service* Table 3.1 (rel. July 1, 2004). The average revenue per minute for interstate toll service calls has fallen 53 percent since discount long distance plans were introduced in 1992. *Id.* 1-5, Table 1.15. *See also* "Federal Communications Commission Authorizes Qwest to Provide Long Distance Service in Arizona," News Release (rel. Dec. 3, 2003) (reporting 26 percent fall in residential long distance rates from December 1997 and October 2003); Eighth Report, *Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services*, 18 FCC Rcd 14783, 14793-14794 ¶ 17 (2003) (reporting continuation of trend of lower prices for consumers for CMRS services); Government Promotion of Broadband, Statement of Reed E. Hundt, Former FCC Chairman before the Committee on Senate Commerce, Science, and Transportation, Oct. 1, 2002 (As a result of "Congress' national competition policy, . . . [l]ong distance prices dropped an average of 6 percent per year from 1995 to 2000; wireless prices dropped 19 percent annually.").

9 In hearings before the Senate Committee on Commerce, Science & Transportation, Senator McCain has noted that, "[w]hen it comes to purchasing cable channels beyond the basic tier today, consumers have all the 'choice' of a Soviet election ballot. One option — take it or leave it." McCain Testimony at 1.

10 National Cable and Telecommunications Ass'n, *2004 Mid-Year Industry Overview* 6, *available at* http://www.ncta.com/pdf_files/Overview.pdf.

testing Voice over Internet Protocol ("VoIP") technologies to facilitate these combined offerings,[11] strengthening their ability to offer a robust, full service package.

2. ***The Obstacles to LEC Entry into the Video Market***. A natural source of competition in these areas should be incumbent LECs such as SBC. Congress itself recognized the need for competition from the LECs in the 1996 Act, in which it eliminated the prior ban on telephone competition against cable operators.[12] The Commission similarly has suggested that LECs, with their existing infrastructure and market presence, would logically be the primary alternative to cable.[13] As a practical matter, however, LECs have made only limited progress in their efforts to enter the video market to date, and largely have done so, where they have, by partnering with DBS providers — not as independent, facilities-based competitors.

More recently, both SBC and Verizon have announced plans to roll out fiber-based network deployments that should make possible the provision of advanced and robust wire-based video services. As the *NOI* appears to recognize,[14] fiber-based deployment could be the way to break the cable competition logjam, given the bandwidth and speed that fiber offers. SBC's planned fiber deployment should power a network that can "deliver[] a new generation of integrated digital TV, super-high-speed broadband and voice over IP (Internet Protocol) services

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11 *See Cable Industry Suggests Regulatory Framework for VoIP*, Communications Daily, 2004 WL 60704968 (Feb. 3, 2004).

12 H.R. Rep. No. 104-458 at 172-73. As Representative Dingell recently remarked, real video competition depends on telcos "compet[ing] head-on in this marketplace" with cable. *Telecommunications Reports Daily* at 7 (July 14, 2004).

13 *See, e.g.*, *2004 Video NOI* 2 ¶ 2 ("Congress and the Commission expected local exchange carrier . . . video systems to become the primary competitors to cable systems[.]").

14 *Id.* at 23 ¶ 72.

to residential and small business customers."[15] SBC plans to provide FTTP in new, or "greenfield," housing developments and FTTN in existing neighborhoods.[16] It is rolling out trials of its IP-based service in selected neighborhoods this summer, and plans to make the service available to millions of customers throughout its region over the next five years.[17] But SBC and Verizon, which recently announced its own plans to roll out a fiber-based service,[18] are at the early stages of that effort. Whether the regulatory and investment climate will favor a robust and successful video play remains to be seen.

These fiber-based telco video services will require enormous investments. SBC estimates that rolling out FTTN will cost between *$4 billion and $6 billion* during a five-year period.[19] The Commission itself has acknowledged that "the costs of FTTH loops are both fixed and sunk, and deployment is expensive."[20] Industry analysts, too, have uniformly concluded that "costs remain relatively high to deploy FTTH,"[21] that fiber deployment is "close to being cost-

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15 Press Release, "SBC Communications Announces Advances In Initiative To Develop IP-Based Residential Network For Integrated Video, Internet, VoIP Services" (June 22, 2004), *available at* http://www.sbc.com/gen/press-room?pid=4800&cdvn=news&newsarticleid=21207 ("SBC FTTN Press Release").

16 *Id.*

17 *Id.*

18 *See* Petition of Verizon for Declaratory Ruling or, Alternatively, For Interim Waiver with Regard To Broadband Services Provided via Fiber to the Premises, WC Docket No. 04-242 (June 28, 2004).

19 *See* SBC FTTN Press Release at 1.

20 *See* Report and Order on Remand and Further Notice of Proposed Rulemaking, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 18 FCC Rcd 16978, 17142 ¶ 274 (2003) ("*Triennial Review Order*"); *see also* Third Report and Order, *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 14 FCC Rcd 20912, 21034 App. B ¶ 30 (1999).

21 Craig Kuhl, *Fiber-to-the-where? FTTP compelling for overbuilders, but not for incumbents*, COMMUNICATIONS ENGINEERING & DESIGN (March 2002) at *1, *available at* http://cedmagazine.com/ced/2002/0302/03d.htm.

prohibitive,"[22] that "deployment of the technology is too expensive to ensure a realistic return on investment,"[23] and that "current business cases for FTTP . . . are questionable."[24] According to Scott Cleland, CEO of the Precusor Group, FTTP "is currently too risky and expensive" for the Baby Bells to deploy.[25]

While the Commission recently recognized that the unbundling requirements of section 251 of the Act were inappropriate in the context of broadband networks and would deter investment in these critical new technologies,[26] as an economic matter, LECs cannot contemplate the required investment unless they have an effective ability to compete for the *full* revenue stream that a fiber-based network offers. As several investment analysts have recognized, an economic video offering is a necessary element of the equation.[27] Given the LECs' position as new entrants in the video services market along with the substantial risk they must undertake in investing in networks capable of offering such services, requiring compliance with the full panoply of federal and local requirements designed for incumbent cable providers could turn an already risky economic proposition into an untenable one.

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22 *Id.* (quoting Geoff Wilbur, analyst for KMI Research).

23 Matthew Davis, *Verizon Leads the Fiber-to-the Premises Initiative*, Yankee Group, Jan. 2004, at 2; *see also The Residential Battle Needs New 'Sweet Spot,'* FIBER OPTIC NEWS, Sept. 30, 2002 (quoting Karl Rookstool, vice president/business development for ADC Telecommunications Inc: "the anticipated revenues from FTTH video-voice/data services do not justify the construction costs").

24 Kuhl, *supra* note 21.

25 Testimony of Scott Cleland, CEO Precursor, *Hearing on: Cable Competition — Increasing Value?, Before the U.S. Senate Judiciary Antitrust Subcommittee*, at 3 (Feb. 11, 2004).

26 *See Triennial Review Order* ¶ 272.

27 *See, e.g.*, Davis at 3 ("[T]elcos must generate revenue from video services to effectively compete in the approaching broadband-centric communications landscape.")

In short, SBC and other LECs cannot justify an investment in next-generation technologies *without* offering video over those technologies. But offering video could expose LECs to open-ended regulation with respect to those new facilities, which in turn could make the deployment financially infeasible. Thus, in answer to one of the questions posed by the Commission in the *NOI*, regulatory threats, standing alone, constitute "barriers to entry into the market for the delivery of video programming[.]"[28] The Commission should take whatever action is necessary to foster a regulatory climate that will promote, rather than hinder, the kind of LEC entry into the video market that Congress contemplated.

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28 *2004 Video NOI* 5 ¶ 13.

Conclusion

Ensuring meaningful competition not only in the video market but also in the broadband and advanced services markets requires a new approach and a readiness to depart from legacy rules and statutory provisions that were designed to regulate the cable incumbents, not to facilitate new entry. Fiber-based networks may finally position LECs such as SBC to be a real alternative to the cable incumbents, but this will happen, and happen quickly, only to the extent the Commission uses all the regulatory tools at its disposal to foster a regulatory climate that supports rather than deters the required investment.

Respectfully submitted,

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