Arkansas; Grant County and Tacoma, Washington; Cedar Falls, Iowa; Newnan, Georgia; and Kutztown, Pennsylvania, all provide voice, video, and Internet access services for their residents.[614] The American Public Power Association (APPA), an association of municipalities, surveyed its members at the end of 2003, finding that 570 public power entities offer some kind of broadband services. Of those, 109 offered video service, 76 offered high-speed Internet access, and 43 offered local telephone service.[615]

133. ***Broadband Over Powerline.***[616] Several utility companies have been experimenting with a technology called "broadband-over-power-line (BPL)" service, which uses power lines to carry high-speed data signals the "last mile" to the home.[617] BPL uses fiber optic lines or another traditional medium to deliver data to the power line. While the primary objective of this technology is to provide high-speed Internet access services, some companies have expressed plans to offer video streaming services, but not traditional video services.[618] Four utilities, the City of Manassas, Virginia; Cinergy in Cincinnati, Ohio; Pennsylvania Power & Light; and Central Virginia Cooperative, have implemented commercial BPL this year.[619] The Comcast Corporation and the National Cable and Telecommunications Association have filed comments citing examples of growing sources of video competition through BPL.[620] NATOA has cited Cedar Falls, Iowa, as an example where an advanced municipal communications system has stimulated economic development.[621]

134. On October 14, 2004, the Commission adopted a *Report and Order* to encourage the development of BPL.[622] The Commission stated that this new medium offers the potential for the establishment of a significant new medium for extending broadband access given that power lines reach virtually every home and business.

III. MARKET STRUCTURE AND CONDITIONS AFFECTING COMPETITION

A. Horizontal Issues

135. The video programming market is comprised of a downstream market for the distribution of multichannel video programming to households, and an upstream market for the purchase of video programming by MVPDs.[623] In this section we review changes in the market for the distribution of video programming, including changes in the level of competition in that market between June 2003 and June 2004. We then review the market for the purchase of video programming by MVPDs, and examine the

[614] *Officials: Broadband Investments Pay Off For Localities*, TR DAILY, Sept. 26, 2003.

[615] APPA, *Public Power: Powering the 21st Century with Community Broadband Services* (fact sheet), May 2004, at http://www.appanet.org/files/PDFs/TelecomFlyer1204.pdf?sn.ItemNumber=9965&tn.ItemNumber=10000 (visited Jan. 14, 2005). *See also* NATOA Comments at 3.

[616] *See Fourth 706 Report*, 19 FCC Rcd at 20561-62.

[617] Ken Brown, *The Web's New Outlet*, WALL STREET JOURNAL, Mar. 2, 2004.

[618] For example, Cinergy Broadband and Current Communications Group have formed a joint venture that aims to bring broadband over power lines to 20 million customers. This BPL initiative would include voice, data, and eventually video. *See* BROADBAND DAILY, Aug. 16, 2004. *See also* paras. 113-117 *supra.*

[619] *In Broadband Over Power Lines Gains Steam*, PCWORLD, Aug. 23, 2004.

[620] *See* Comcast Comments at 18; NCTA Comments at 43.

[621] NATOA Comments at 3.

[622] *Amendment of Part 15 Regarding New Requirements and Measurement Guidelines for Access Broadband Over Power Line Systems, Carrier Current Systems, Including Broadband Over Power Line Systems*, ET Docket Nos. 04-37, 03-104, FCC 04-245 (rel. Oct. 28, 2004).

[623] *See, e.g., 2003 Report*, 19 FCC Rcd at 1681 ¶ 123.

effects that changes in concentration among MVPDs at the regional and national levels have had on this market in the last year.

1. Competitive Issues in the Market for the Distribution of Video Programming

136. DBS, the major wireless MVPD technology that is available to subscribers nationwide, saw its share of MVPD subscribers increase between June 2003 and June 2004, from 22.7 percent of the market to 25.1 percent.[624] Relatively few consumers, however, have a second wireline alternative, such as an overbuild cable system.[625] Of the 33,760 cable community units nationwide, 1,241, or approximately 3.7 percent, have been certified by the Commission as having effective competition[626] as a result of consumers having a choice of more than one wireline MVPD, or because DBS penetration was above 15 percent.[627] In cases where incumbent cable operators face competition from a new wireline entrant, BSPs report benefits to consumers, such as restraint in cable price increases and increased access to advanced services, citing several studies.[628] A 2003 GAO study found that where wire-based competition is available, cable rates are lower by about 15 percent. GAO further found that in markets where DBS companies provide local broadcast stations, cable rates are only slightly lower, but cable operators are more likely to improve the quality of their service in response to DBS competition.[629] NCTA, on the other hand, submitted a white paper concluding that the price drops resulting from overbuilding are not sustainable.[630] Several other MVPD technologies, such as private cable systems and wireless cable systems, offer consumers alternatives to incumbent cable services, but only in limited areas.

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[624] *See* Appendix B, Table B-1. *See also* NCTA Comments at 8. Previous year numbers in Table B-1 have been revised due to improved data sources.

[625] *See* New Jersey Comments at 8.

[626] Under Section 76.907, a cable operator (or other interested party) may petition the Commission for a determination of effective competition pursuant to Commission's procedural rules in Section 76.7. *See* 47 C.F.R. §§ 76.7, 76.907. In its petition, a cable operator must provide evidence that it meets one of the statutory tests for the existence of effective competition. *See* 47 U.S.C. § 543 (l)(1)(A)-(D). *See also* 47 C.F.R. § 76.905(b). Based on the evidence provided in the petition and any opposition received, the Commission determines whether to grant effective competition status within a franchise area. Where effective competition exists, a local franchising authority (LFA) may not regulate basic service rates. *See* 47 C.F.R. § 76.905 (a). If an LFA believes that a Commission finding of effective competition is no longer valid, it may file a petition for recertification pursuant to Section 76.916 of the Commission's rules. 47 C.F.R. § 76.916. If the Commission grants the petition, the LFA's certification to regulate basic service tier rates will be reinstated.

[627] Of the 1,241 communities where effective competition status was granted, 936 were based on DBS competition. We note that there may be more communities that meet this test of effective competition; grants of effective competition are made at the request of the provider to a community, so the Commission does not have information about communities in which the provider has not sought designation that effective competition exists. We note further that, according to NCTA, in 41 states, DBS penetration exceeds the 15 percent threshold that is the first part of one of four statutory tests for the existence of effective competition in a local market. The entire test is that at least two MVPDs serve 50 percent or more of households and at least 15 percent of those households take service other than from the largest MVPD. *See* 47 U.S.C. § 543(l)(1)(B). In most, if not all areas, at least 50 percent of households can receive DBS service.

[628] *See* para. 74 *supra.*

[629] *See 2003 GAO Report,* at 3-4. *See also* U.S. General Accounting Office, *Telecommunications: The Effect of Competition From Satellite Providers on Cable Rates*, GAO/RCED-00-164 (July 2000).

[630] NCTA Reply Comments at Attachment A.

137. The percentage of MVPD subscribers served by cable operators has dropped steadily, both in national percentages, as well as in most local markets.[631] Most consumers may choose between over-the-air broadcast, one cable provider, at least two DBS providers, and, in limited cases, an overbuilder or other delivery technology.[632] Nonetheless, according to some commenters, certain barriers to full competition exist, including: (a) cable operator exclusive access to programming, especially sports programming; (b) anti-competitive "predatory pricing"; (c) limited access to MDUs; (d) limited access to utility poles; and (e) consumer electronics standards that create a disparity among delivery technologies.[633] NCTA and Comcast dispute these allegations.[634] Comcast responds that competition from DBS and other sources constitutes effective competition and thus all regulations established pursuant to the 1992 Cable Act should be reviewed and removed as appropriate.[635]

138. ***Competitive Developments in the MDU Market.*** Multiple dwelling units (MDUs) comprise a separate segment of the MVPD market because alternative video providers may have difficulty offering service in MDUs in competition with an incumbent provider.[636] Non-incumbent MVPD commenters raise a number of issues that they contend adversely affect their ability to serve the MDU market.[637]

139. Exclusive contracts are those that specify that video service in an MDU will be provided only by a particular MVPD. Perpetual contracts are those which grant an MVPD the right to provide service for an indefinite or very long period of time, or which have automatic renewal provisions (sometimes referred to as "evergreen" clauses). Competitive entrants into the MVPD market have raised concerns with these kinds of contracts for the past several years. As it did last year, BSPA states that these kinds of contracts block potential entry into MDUs, and lock tenants and building owners into outdated networks and services.[638] BSPA alleges that incumbent cable operators use long-term contracts as "an anticompetitive weapon," by responding to impending competitive entry through negotiating exclusive contracts with MDU owners.[639] DIRECTV reiterates its comment from last year that the over-the-air-reception devices (OTARD) rules should be extended to renters and owners who do not have exclusive use of areas suitable for satellite reception.[640]

[631] *See* Appendix B, Table B-1. As of June 2004, approximately 72 percent of MVPD subscribers were served by cable operators. In June 2003, approximately 74 percent of MVPD subscribers were served by cable operators.

[632] Some sources indicate, however, that some percentage of households cannot receive one or both DBS providers due to line of sight issues. *See 2002 Report,* 17 FCC Rcd at 26952 ¶ 113 n.385.

[633] BSPA Comments at 12-22 and Reply Comments at 7-12; RCN Comments at 9-10; SBCA Comments at 16-19; DIRECTV Comments at 9-11 and Reply Comments at 4-5; ACA Comments at 3-6; EchoStar Comments at 10-13; Verizon Comments at 16-20 and Reply Comments at 5-6; NTCA Comments at 3-4.

[634] Comcast Reply Comments at 12-29; NCTA Reply Comments at 10-15.

[635] Comcast Comments *generally*. NCTA Comments at 6-28.

[636] The incumbent provider is not necessarily the incumbent cable operators. Often private cable operators are incumbents for many MDUs.

[637] Inside wiring is an important issue for MVPDs serving the MDU market. For a discussion of inside wiring, *see* paras. 111-112 *supra.*

[638] BSPA Comments at 19. *See also* Weston Comments at 2, 4, 5-7; Advocate Reply Comments at 1-3.

[639] *Id.*

[640] DIRECTV Comments at 10. *See also* SBCA Comments at 19 (adding that DBS MDU penetration is much lower than DBS penetration to single-family homes. The OTARD rules prohibit restrictions that impair the installation, maintenance or use of antennas used to receive video programming. The rule applies to video antennas including direct-to- home satellite dishes that are less than one meter (39.37") in diameter (or of any size in Alaska), TV antennas, and wireless cable antennas. The rule prohibits most restrictions that: (1) unreasonably delay or prevent

(continued....)

2. Competitive Issues in the Market for the Purchase of Video Programming

140. Buyers in the market for the purchase of video programming are MVPDs, including cable operators and other video programming providers. The sellers are primarily nonbroadcast programming networks.[641] This market tends to be regional or national since programmers seek to reach a much broader audience than could be provided by a local franchise area. For example, some programming services are intended for nationwide audiences (e.g., CNN, USA) while others seek a regional audience (*e.g.*, New England Sports Channel).

a. The Regional Programming Market

141. Cable operators continue to pursue a regional strategy of "clustering" their systems. Many of the largest MSOs have concentrated their operations by acquiring cable systems in regions where the MSO already has a significant presence, while giving up other holdings scattered across the country.[642] This strategy is accomplished through purchases and sales of cable systems, or by system "swapping" among MSOs.

142. ***System Mergers and Acquisitions, and Clusters***. Between July 2003 and June 2004, a total of 22 transactions were announced. Together these transactions were valued at approximately $1.4 billion and affected 616,402 subscribers.[643] At the end of 2003, there were 108 clusters with approximately 53.6 million subscribers compared to 109 clusters and approximately 51 million subscribers at the end of 2002.[644] In the largest cluster size category (over 500,000 subscribers), the number of clusters remained constant at 29 between 2002 and 2003.[645]

b. The National Programming Market

143. ***Buyers of National Video Programming***. Cable and DBS operators are the primary purchasers of multichannel video programming targeted to a national audience.[646] As of June 2004, cable

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installation, maintenance or use; (2) unreasonably increase the cost of installation, maintenance or use; or (3) preclude reception of an acceptable quality signal. Effective January 22, 1999, the Commission amended the rule so that it also applies to rental property where the renter has an exclusive use area, such as a balcony or patio. *See* 47 C.F.R. § 1.400.

[641] In this section, we refer to programming that is packaged as one or more 24-hour video programming network(s), rather than the individual shows and series that nonbroadcast networks and broadcast networks purchase and package into 24-hour networks. Purchasing content and packaging it into networks represent two steps in the process of delivering programming to consumers which, when combined with a means of distribution, results in the programming choices consumers have. Video programming also is purchased from program producers and suppliers by nonbroadcast networks as well as broadcast stations and networks, but we do not address that market here because this report is focused on the MVPD market.

[642] *See* New Jersey Comments at 8.

[643] Kagan World Media, *Cable System Sales Summary*, CABLE TV INVESTOR, Aug. 18, 2004, at 13; Jan. 31, 2004, at 11; and Aug. 28, 2003, at 13.

[644] *See* Appendix B, Table B-2. We note that merging clusters can cause the total number of clusters to drop.

[645] *See id.*

[646] In this context that Congress adopted Section 613(f) of the Communications Act as part of the 1992 Cable Act to address the consequences of horizontal concentration and vertical integration in the cable television industry. Section 613(f) was adopted as Section 11(c) of the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460, codified at 47 U.S.C. § 533(f). In *Time Warner Entertainment Co. v. FCC* (240 F.3d 1126 (D.C. Cir. 2001)), the United States Court of Appeals for the D.C. Circuit reversed and remanded the Commissions rules implementing Section 613(f). The Commission has an ongoing proceeding to

(continued....)

operators served approximately 71.6 percent of MVPD subscribers.[647] Other MVPDs, however, have continued to increase their share of the MVPD market. For example, the two largest DBS providers now serve 25 percent of the total market. While inter-modal competition has been growing, the market share of the largest MVPDs has decreased slightly since our last report.[648] In 2004, the four MVPDs with the largest subscribership served 58 percent of all MVPD subscribers,[649] while in 2003, the top four served 59 percent of all subscribers.[650] The share of subscribers served by the top ten MVPDs also decreased from approximately 86 percent in 2003 to 84 percent in 2004.

144. To compare market concentration for the purchase of programming over a period of time, we have traditionally used the Herfindahl-Hirschman Index (HHI).[651] We recognize that the HHI is not an indicator of "competition" in the market for purchase of video programming, and that it is not being used in the same way that it would be for purposes of antitrust analysis. For purposes of this report, however, the HHI is a useful tool to follow trends in the dispersion of MVPD size from year to year. We use the reported MVPD subscriber shares to calculate HHI figures. In March 2004, the HHI for the national market for the purchase of programming was 1097. This represents a marginal decline from the revised June 2003 MVPD HHI of 1134.[652] This declining HHI reflects the fact that the DBS providers grew more quickly than the largest cable providers, thereby decreasing the difference in the market shares of the largest providers.

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respond to the ruling of the court. *See Implementation of Section 11 of the Cable Television Consumer Protection and Competition Act of 1992,* 16 FCC Rcd 17312 (2001).

[647] *See* Appendix B, Table B-1.

[648] *See id.* at, Tables B-3, B-4. The percentages reported in these tables are derived from publicly available data and are not the result of application of the Commission's attribution rules. There is no double counting of subscribers. If a cable operator is partially owned by more than one MSO, its subscribers are assigned to the largest MSO in terms of subscribership and may not include subscribers that are affiliated with the entity either through equity, debt, or other such investments or management duties. For example, Comcast holds investments in Time Warner Cable, Bresnan Broadband Holdings LLC, Insight Midwest LP, Texas Cable Partnerships, Kansas City Cable Partners, Parnassos Communications LP, Midcontinent Communications, US Cable of Costal Texas LP, and Century-TCI Communications LP, all of which were acquired in its purchase of AT&T, which had previously obtained these assets when it purchased TCI Communications. Cox Communications holds an investment in TCA Cable TV. Charter Communications holds investments in Renaissance Media, Avalon Cable, Falcon Cable Communications, and Fanch. In addition, Cablevision has investments in various cable television subsidiaries in New York, Connecticut, and New Jersey.

[649] *See* Appendix B, Table B-4. In this section, reported statistics for 2004 are based on March data since June data comparable to that used in previous years were unavailable.

[650] *Id.*

[651] *1998 Report*, 13 FCC Rcd at 24363 n.562. The HHI is a measure of concentration that is calculated by summing the squared market shares of the participants in the market. It is a measure of concentration that takes account of the distribution of the size of firms in the market. The HHI varies with the number of firms in the market and degree of inequality among firm size. Generally, the HHI increases when there are fewer and unequal sized firms in the market. HHI is usually employed to examine concentration in markets in which products are sold directly to consumers, not intermediate markets like the market for cable programming networks, but a comparison of HHIs from previous years shows a general trend in ownership concentration. The HHI calculation is based on the MVPD shares of cable companies serving over 91 percent of all subscribers and the two largest DBS operators. The addition of the shares of other cable operators and smaller MVPDs would change the HHI only a small fraction.

[652] In the *2003 Report*, we reported a 2003 HHI of 1031. *See* 19 FCC Rcd at 1689-90, 1721 ¶ 140, Appendix B, Table B-3. We have revised the 2003 HHI for this *Report* due to a revision of previous years' cable industry and MVPD subscribers to allow for use of a consistent data source in the tables in Appendix B.

B. Vertical Integration and Other Programming Issues

1. Status of Vertical Integration

145. Our examination of vertical integration in the MVPD industry focuses on ownership affiliations between video programming distributors and video programming suppliers. These vertical relationships may have beneficial effects,[653] or they may deter competitive entry in the video marketplace and/or limit the diversity of programming.[654] Since our last *Report*, the total number of national networks has increased. In 2004, we identified 388 satellite-delivered national programming networks, an increase of 49 networks over the 2003 total of 339 networks. Of the 388, 89 networks (23 percent) were vertically-integrated with at least one cable operator in 2004.[655] Last year, 110 networks were vertically-integrated (33 percent) of the 339 total.[656]

146. Four of the top six cable operators (*i.e.*, Comcast, Time Warner, Cox, and Cablevision) hold ownership interests in satellite-delivered national programming networks. If we count iN Demand as one network, one or more of these companies has an interest in the 54 vertically-integrated satellite-delivered national programming networks.[657] Comcast has an ownership interest in ten national programming networks; Time Warner has an ownership interest in 29 national programming networks; Cox has an ownership interest in 16 national programming networks; and Cablevision, through its programming affiliate Rainbow Media, has an ownership interest in five national programming networks.[658]

147. In the *Notice*, we sought information regarding the ownership of national satellite-delivered programming networks by media entities other than cable operators.[659] We specifically requested information to identify programming networks owned by DBS or other MVPD operators, broadcast networks, broadcast stations, and newspapers.[660] We have identified 103 programming

[653] Beneficial effects can include efficiencies in the production, distribution, and marketing of video programming, and providing incentives to expand channel capacity and create new programming by lowering the risks associated with program production ventures. *See, e.g.*, H.R. Rep. No. 862, 102nd Cong., 2d Sess. 56 at 41-43 (1992).

[654] Possible detrimental effects can include unfair methods of competition, discriminatory conduct, and exclusive contracts that are the result of coercive activity. *See 1995 Report*, 11 FCC Rcd at 2135 ¶ 157; *Implementation of Section 11(c) of the Cable Television Consumer Protection and Competition Act of 1992 Vertical Ownership Limits*, 10 FCC Rcd 7364, 7365 ¶ 4 (1995). *See also* Consumers Union Reply Comments at 1.

[655] We count each unique programming service of a multiplexed package separately. We do not, however, count services that are not unique, as in a multiplexed programming service that is merely time shifted. *See 1998 Report*, 13 FCC Rcd at 24376, n.661. *See also 2000 Report*, 16 FCC Rcd at 6079, n.579. *See also* Appendix C, Table C-1.

[656] *2003 Report*, 19 FCC Rcd at 1690 ¶ 141. The drop in the percent of vertically integrated networks is explained, in part, by Liberty Media spinning off its ownership interest in Liberty Media International, Inc. (LMI) and no longer holding an interest in Cablevision of Puerto Rico. Liberty Media Corporation, *Liberty Media Corporation Completes Spin Off of Liberty Media International, Inc.* (press release), June 7, 2004.

[657] Traditionally, the Commission has counted each channel of several multiplexed networks separately (*e.g.*,35 channels for iN Demand and 33 channels for TVN Entertainment Corporation) for the total number of networks and for these calculations. *See* Appendix C, Table C-1.

[658] In addition, Advance Newhouse, owner of the Bright House Networks cable systems, has ownership interests in 13 national nonbroadcast networks and Insight Communications owns one programming network, Source Suite. *See* Appendix C, Table C-1.

[659] *Notice*, 19 FCC Rcd at 10914 ¶ 15.

[660] *Id.* With respect to newspaper ownership of programming networks, we find that the newspaper owners we have identified also are broadcast television station licensees.

networks that do not have cable ownership interests, but that are owned by one or more of these media entities.[661] These networks represent 27 percent of the 388 total networks identified, and 34 percent of the 299 networks that are not affiliated with a cable operator. Thus, we have identified 196 national nonbroadcast networks, representing 51 percent of the total of 388 networks, which are not affiliated with any cable operators, or other media entities identified above.[662]

148. There are 89 national satellite-delivered nonbroadcast networks, not also owned by a cable operator, that are owned by one or more national broadcast networks (*i.e.*, Fox, ABC, CBS, NBC-Universal, Univision).[663] These networks represent 23 percent of the 388 total networks identified, and 30 percent of the 299 networks that are unaffiliated with a cable operator. With respect to national broadcast network ownership of nonbroadcast networks, News Corporation, which holds a 34 percent interest in DIRECTV, has ownership interests in 12 national nonbroadcast networks, or three percent, through its Fox subsidiary, which also operates the Fox television network.[664] ABC, through its parent company Disney, has ownership interests in 20 national networks, or five percent of all national programming networks, including 16 in partnerships with other media entities.[665] Viacom, the parent company of the CBS and UPN broadcast networks, has ownership interests in 39 national nonbroadcast networks, or ten percent of all national programming networks.[666] NBC-Universal, through its parent company, General Electric, has ownership interests in 17 nonbroadcast networks, or four percent of all national programming networks, including five networks owned jointly with Disney and Hearst and one with Paxson Communications.[667] Univision, a Spanish language network and station licensee, has ownership interests in eight networks, representing two percent of the 388 total networks.[668] We also have identified programming networks affiliated with broadcast television station licensees. Hearst, in joint ventures with Disney and NBC-Universal, has ownership interests in 14 programming networks.[669] E.W. Scripps holds ownership interests in six national programming networks. The Trinity Broadcasting Network owns four programming networks. Landmark Communications owns The Weather Channel and Weatherscan. The New York Times has a 50 percent interest in Discovery Times and an interest in

[661] *See* Appendix C, Table C-3.

[662] There are 192 networks affiliated with either a cable operator or other media entity (89+103=192). Thus, there are 196 networks that are unaffiliated (388-192=196). *See* Appendix C, Tables C-1, C-3.

[663] The WB network, through its parent company Time Warner, has ownership interests in 63 national nonbroadcast networks, or 16.5 percent of the 388 total networks. *See* Appendix C, Table C-1. UPN (United Paramount Network) is owned by Viacom, also the parent of CBS. *See* Viacom, http://www.viacom.com/business.tin (visited Dec. 16, 2004).

[664] Fox Comments at Attachment A; DIRECTV Comments at Exhibit E.

[665] Disney Reply Comments at 1-3. Disney's has ownership interests in two networks with Comcast (E! Entertainment and Style), five networks with NBC-Universal and Hearst (A&E, Biography, History, History Channel in Español, and History International) and nine with Hearst (six ESPN-branded networks and three Lifetime-branded networks).

[666] Viacom Comments at 4-5.

[667] NBC-Universal, http://www.nbcuni.com/AboutNBC_Universal/Company_Overview/overview02.shtml (visited Dec. 16, 2004). The networks jointly owned with Disney and Hearst are A&E, Biography, History Channel, History Channel in Español, and History International.

[668] Univision Communications Inc., http://www.univision.net/corp/en/mp/jsp (visited Dec. 16, 2004); TuTv, http://tutv.tv/tutv/en/our_company.jsp (visited Dec. 16, 2004).

[669] *See* fn. 665 *supra.*

Ovation.[670] The Tribune Company, Paxson Communications, and Daystar Television Network each have ownership interests in one programming network.[671] DBS operator EchoStar holds an interest in G4techTV, along with Comcast. In addition, Liberty Media, which has an ownership interest in News Corp., is affiliated with 34 national programming networks (counting Starz! Superpack as one network), including 12 networks it owns jointly with one or more cable operators (*i.e.*, the Discovery-branded networks with Cox and Advance Newhouse and Court TV with Time Warner).[672]

149. In 2004, we found 96 regional networks, an increase of 12 networks over the 84 regional programming networks in 2003.[673] Many, but not all, are satellite delivered. These networks provide programming of local or regional interest and are distributed to subscribers of one or more MVPDs in an area. A significant number of regional networks offer local news or sports programming, but some provide more general programming, such as religious or ethnic programming. Of the 96 regional networks, 46 networks, or 48 percent, were vertically-integrated with at least one MSO. Cablevision has ownership interests in 16, or 17 percent, of the regional networks. Time Warner has ownership interests in 12, or 12.5 percent, of the regional networks. Comcast also has ownership interests in 12, or 12.5 percent, of the regional networks. Cox also has ownership interests in five, or five percent, of the regional networks. In addition, Charter and Adelphia each have ownership interest in one, or one percent, of the regional networks. Fox, an affiliate of News Corporation, has ownership interests in 22, or 23 percent of the regional networks.[674]

150. Vertically-integrated programming networks tend to attract the largest number of subscribers. Currently, seven of the top 20 nonbroadcast video programming networks (ranked by subscribership) are vertically-integrated with a cable operator.[675] Of the remaining 13 networks, one is C-SPAN, which is funded but not directly owned or controlled by MVPDs, and the other 12 are affiliated with non-cable media entities. This figure represents a slight decrease from 2003 when nine of the top 20 networks were vertically-integrated.[676] Additionally, it appears that there is diverse ownership of the most popular networks: 10 different entities own all or part of the top 20 programming networks in terms of subscribership.[677]

151. Vertically-integrate networks also tend to be the most highly rated.[678] Three of the top 15 prime time non-broadcast video networks are vertically-integrated with a cable operator (Time Warner owns 100 percent of TNT and TBS while Cox and Advance Newhouse each owns 25 percent of The

[670] Discovery Times is a joint venture of the New York Times and Discovery Communications (owned by Cox, Advance Newhouse, and Liberty Media). *See* New York Times Company, http://www.nytco.com/subsites/nyttv/about-dtc.html (visited Jan. 14, 2005); Ovation, http://www.ovationtv.com (visited Jan. 14, 2005).

[671] *See* Appendix C, Table C-3. *See also* FCC, Broadcast Radio and Television Electronic Filing System, http://www.fcc.gov/e-file/support_table.html (visited Jan. 14, 2005); Daystar Television Network, http://daystar.com/about.htm (visited Jan. 14, 2005).

[672] *See* Appendix C, Table C-3.

[673] *2003 Report,* 19 FCC Rcd at 1732-1734, Appendix C, Table C-4.

[674] Fox Comments at Appendix A.

[675] *See* Appendix C, Table C-6.

[676] *See 2003 Report,* 19 FCC Rcd at 1741, Appendix C, Table C-6.

[677] They include: Time Warner, Cox, Disney, General Electric (NBC-Universal), Hearst, Liberty Media, Advance Newhouse, Viacom Landmark Communications, and C-SPAN (National Cable Satellite Corporation). *See* http://www.cjr.org/tools/owners (visited July 20, 2004).

[678] *See* Consumers Union Reply Comment at 2 (stating that of the 90 most popular networks, broadcasters have majority ownership of 40 percent and cable operators have interests in an additional 20 percent).

Discovery Channel).[679] The remaining 12 networks are owned by other media entities. Disney has ownership interests in The Disney Channel, ESPN, Toon Disney, Lifetime, The History Channel, and A&E. Hearst has ownership interests in ESPN, Lifetime, The History Channel, and A&E. NBC has ownership interests in The History Channel, A&E, and USA Network. Viacom has ownership interests in Nickelodeon, Nick At Nite, and MTV. Fox has ownership interests in Fox News Channel and FX.

152. This year, we found 78 programming services that have been planned but are not yet operational, an increase of 17 over last year.[680] The planned-services count includes some overlap from previous years because it can often take several years from the announcement of a new programming network to its initiation of service. Moreover, we include in this list programming networks that have been announced, but which are in various stages of development.[681]

2. Other Programming Issues

153. In this section, we discuss a number of programming issues apart from vertical integration and the status of existing and planned programming services. These issues include comments we received about the effectiveness of our program access, program carriage, and channel occupancy rules that govern the relationships between cable operators and programming providers, and issues relating to the carriage of local broadcast stations pursuant to must carry and retransmission consent. We also address other matters related to programming, including local and regional channels, public education and governmental ("PEG") channels; compliance with the DBS public interest programming obligations; locally-originated programming, children's, news and community affairs programming; programming in languages other than English; packaging of programming; and access to video programming by persons with disabilities.

a. Regulatory Issues

154. ***Program Access and Carriage Rules***. The Commission's rules concerning competitive access to cable programming seek to promote competition and diversity in the multichannel video programming market by preventing vertically-integrated programming suppliers from favoring affiliated video distributors over unaffiliated MVPDs in the sale of satellite-delivered programming.[682] The program access rules apply to cable operators and to programming vendors that are affiliated with cable operators and deliver video programming via satellite to an MVPD. The rules prohibit any cable operator that has an attributable interest in a satellite cable programming vendor from improperly influencing the decisions of the vendor with respect to the sale or delivery, including prices, terms, and conditions of sale or delivery, of satellite-delivered programming to any competing MVPD. The rules also prohibit vertically-integrated satellite programming distributors from discriminating in the prices or terms and conditions of sale of satellite-delivered programming to cable operators and competing MVPDs.[683] In

[679] *See* Appendix C, Table C-7.

[680] *See* Appendix C, Table C-5. *See also 2003 Report,* 19 FCC Rcd at 1735, Appendix C, Table C-4.

[681] *See 1995 Report,* 11 FCC Rcd at Appendix H, Tables 3 and 4; *1996 Report,* 12 FCC Rcd at Appendix G, Tables 3 and 4; *2003 Report* 19 FCC Rcd at 1693 ¶ 146.

[682] 47 U.S.C. § 548.

[683] As a condition of the News Corp.-Hughes transaction, News Corp. is required to offer its existing and future cable programming services on a non-exclusive basis and on non-discriminatory terms and conditions, for as long as the Commission's program access rules are in effect. *See News Corp Order*, 19 FCC Rcd at 523-4, 525-6, 531-2 ¶¶ 107-108, 113-115, 127. These conditions also extend to any broadcast station that News Corp. owns or operates, or on whose behalf it negotiates retransmission consent. *See News Corp Order*, 19 FCC Rcd at 572-575 ¶¶ 218-222. For MVPDs with fewer than 5000 subscribers, News Corp. is required to either elect "must-carry" status or negotiate retransmission consent for its owned and operated stations without any requirements for cash

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addition, cable operators generally are prohibited from entering into exclusive distribution arrangements with vertically-integrated programming vendors. The Commission has concluded that the statutory access requirements apply only to satellite-delivered programming and not to terrestrially-delivered programming.[684]

155. As in previous years, a number of commenters address the statutory exemption for terrestrially-delivered programming in the existing program access rules.[685] Several commenters again express concerns over incumbent cable operators' ability to restrict competing MVPDs' access to programming due to the terrestrially-delivered exemption in the existing program access rules, which puts competing MVPDs at a competitive disadvantage.[686] DIRECTV and EchoStar argue that the terrestrial exemption continues to be used by cable-affiliated programmers to foreclose noncable MVPDs' access to popular programming, such as regional sports networks.[687] Verizon also states that the terrestrial exemption in the program access rules hampers effective competition in video services because, without access to "must have" networks that are terrestrially delivered, new entrants are at a serious disadvantage when competing against incumbent cable companies.[688] Comcast states that neither DIRECTV nor EchoStar have provided any evidence that the terrestrially-delivered exemption has prevented them from competing successfully.[689] We are not aware of any comprehensive source for determining the delivery mode for each of the national and regional networks. In light of the entry of providers using fiber, this is an issue of interest, and we believe such information is necessary to monitor the use of terrestrial delivery.[690]

156. A number of commenters, including ACA, Verizon, RCN, and NATOA recommend changes to the program access requirements.[691] RCN and Verizon ask the Commission to inform

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compensation or carriage of programming other than the broadcast signal. *See News Corp. Order*, 19 FCC Rcd at 575 ¶ 224.

[684] *See Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Petition for Rulemaking of Ameritech New Media, Inc. Regarding Development of Competition and Diversity in Video Programming Distribution and Carriage,* 13 FCC Rcd 15822, 15856-7 ¶¶ 70-71 (1998).

[685] We did not receive comments on the program carriage and channel occupancy rules.

[686] *See e.g.*, SBCA Comments at 18; Verizon Comments at 16-17; DIRECTV Comments at 18-19; EchoStar Comments at 11-12.

[687] EchoStar Comments at 11; DIRECTV Reply Comments at 4-5. EchoStar cites the refusal of Comcast to make the Philadelphia sports programming it controls available to DBS operators. It also states that the detrimental effect of this conduct on MVPD competition is well documented as evidenced by the below national average market penetration of DBS providers in areas where such programming is withheld. *Id.* DIRECTV states that C-SET, a sports network serving North and South Carolina, will be carried exclusively on Time Warner cable systems and will not be made available via satellite services. DIRECTV argues that Time Warner has offered C-SET a "premium" to grant it exclusive rights to C-SET programming, otherwise C-SET would not forgo satellite affiliate fees and additional advertising revenue. DIRECTV believes the arrangement with C-SET is indicative of Time Warner's market power in the North and South Carolina MVPD market. *See* DIRECTV Reply Comments at 5. We note that C-SET's corporate website indicates that C-SET will only be available on Time Warner cable systems in North and South Carolina, that the company is in negotiations with other cable operators for carriage, and that C-SET will not be available on satellite systems. *See* C-SET, at http://www.c-set.tv/faqs.asp (visited Jan. 14, 2005).

[688] Verizon Comments at 16-17.

[689] Comcast Reply Comments at 19-20.

[690] *See* paras. 125, 127-128 *supra.*

[691] *See, e.g.,* ACA Comments at 18-19; Verizon Comments at 16-17; RCN Comments at 10; NATOA Comments at 23.

Congress of the need to expand the program access rules to include terrestrially-delivered programming.[692] SBCA also advocates expansion of the rules to include such programming.[693] In addition, DIRECTV requests that the Commission closely monitor cable operators' use of the terrestrial-delivery exemption and be prepared to redress any competitive distortion in the marketplace.[694] RCN states that the Commission should strictly enforce its program access rules and, where necessary, make changes that will ensure competitors nondiscriminatory access to critical programming under reasonable rates, terms, and conditions.[695] Comcast states that only one program access complaint has been filed in the last four years, with the Commission finding that complaint to be without merit, thus suggesting that few parties believe they have meritorious complaints about program access violations.[696]

157. Commenters also address other matters related to access to programming. For example, NATOA states that competitive operators face the danger of being unable to access essential programming due to clustering of cable systems, which increases an incumbent cable operator's ability to secure exclusive distribution of programming.[697] DIRECTV also contends that clustering has enabled MSOs to concentrate their subscribers and achieve market share levels throughout many of the largest DMAs that they previously enjoyed only in their individual franchise areas, thus becoming virtually indispensable to local and regional programmers seeking distribution.[698] BSPA states that fair access to content means that all competing distributors should have the same access to content as cable incumbents at the same prices.[699] BSPA states that BSPs are dependent on program suppliers that are either partially or fully owned by the incumbent cable operators with which BSPs compete for customers, thus giving these suppliers the incentive to discriminate against BSPs and other non-cable operators with respect to providing fair and equal access to programming and content.[700] BSPA and RCN argue that the ability to compete effectively is not limited to access to video programming but should extend to all forms of content, in particular digital content.[701]

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[692] RCN Comments at 9-10; Verizon Comments at 16-17.

[693] SBCA Comments at 4.

[694] DIRECTV Comments at 23.

[695] RCN Comments at 9.

[696] Comcast Reply Comments at 19, citing *Complaint by Everest Midwest Licensee, L.L.C. v. Kansas City Cable Partners*, DA 03-4077 (Dec. 24, 2003). On October 8, 2004, Rainbow DBS Company LLC, operating as VOOM, filed a program access complaint against iN DEMAND, LLC. In its complaint, VOOM accuses iN DEMAND of unfair competitive practices by a satellite cable programming vendor in which cable operators have an attributable ownership interest, the result of which prevents VOOM from providing HDTV programming to its satellite customers on commercially reasonable terms. The complaint is under review. *See* Program Access Complaint, Rainbow DBS Company LLC, filed Oct. 8, 2004.

[697] NATOA Comments at 19-21.

[698] DIRECTV Reply Comments at 3. DIRECTV provides approximate market shares for the dominant cable operator in nine DMAs: Philadelphia (Comcast) – 79 percent; San Francisco/Oakland (Comcast) – 78 percent; Seattle/Tacoma (Comcast) – 80 percent; St. Louis (Charter) – 87 percent; Raleigh/Durham (Time Warner) – 71 percent; Milwaukee (Time Warner) – 74 percent; West Palm Beach (Adelphia) – 77 percent; Norfolk/Portsmouth (Cox) – 80 percent; and Las Vegas (Cox) – 90 percent. *Id.*

[699] BSPA Comments at 13.

[700] *Id.*

[701] *Id.* at 12-14. BSPA cites as an example of "digital content" a movie that can be delivered as part of a broadcast schedule, as a pay-per-view option, as part of a cable operator's video-on-demand offering, as streaming video on the Internet, or as a downloadable file for later viewing on a computer. *See also* BSPA Reply Comments at 9-11; RCN Comments at 10.

158. Comcast states that differentiating program offerings is a legitimate competitive response and enhances competition among producers and distributors, and it urges the Commission to acknowledge that competition in the MVPD marketplace would be enhanced by allowing the marketplace to operate freely without the constraints of rules prohibiting exclusivity.[702] Indeed, DIRECTV notes that it uses its agreement for the *NFL Sunday Ticket* programming to differentiate its service from incumbent cable operators.[703] Comcast argues that the Commission should consider eliminating the prohibition on exclusive contracts for satellite cable or broadcast programming between vertically integrated programming vendors and cable operators because of the significant and accelerated growth of DBS and its use of exclusive programming to attract subscribers.[704]

159. Commenters also suggest several regulatory changes they contend would ensure fair access to programming. ACA recommends that the Commission undertake regulation of programmers' distribution agreements with MVPDs and prohibit non-cost-based pricing. ACA also proposes that the Commission require programmers to report on prices, terms, and conditions of wholesale pricing agreements regularly. In turn, it states that the Commission should report to Congress on prices, competition, and diversity in the provision of wholesale programming.[705] According to EchoStar, despite the significant growth in its subscriber base, there are still discrepancies in the terms and conditions under which vertically-integrated programmers make programming available to EchoStar and to cable operators, but the discrepancies are not founded upon legitimate competitive factors.[706] Explaining its concerns, EchoStar states that the Commission should penalize discriminatory tying of programming services and the imposition of penetration requirements by vertically-integrated programmers.[707]

160. In the *Notice*, we asked for comment on the experiences of new networks and their ability to successfully launch.[708] The America Channel, an independent programming network that is currently trying to obtain carriage on MVPDs, describes reasons it believes account for its inability to secure carriage. It states that these reasons include the practice of tying carriage of one network to carriage of several other networks; the market power of large cable operators, which lessens the incentive for these carriers to strive to find new and diverse content; the penetration requirements, preferential dispensations from so-called "delete rights" provisions,[709] and unfavorable contractual terms imposed by large programmers.[710] The America Channel suggests that the Commission request periodic reports from cable operators on the criteria used to determine whether to provide carriage to an independent programmer, an MSO-owned network, and a conglomerate-owned network, and to submit semi-annual reports describing

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[702] Comcast Reply Comments at 17-18.

[703] DIRECTV Comments at 20-21. DIRECTV notes that exclusive programming arrangements are not *per se* disfavored. In the case of the *NFL Sunday Ticket*, an unaffiliated programmer sells its programming on an arms' length basis, and the MVPD in turn uses exclusivity to differentiate itself from entrenched competitors.

[704] Comcast Comments at 42 (referring to the Commission's extension of this prohibition until Oct. 5, 2007, in *Sunset of Exclusive Contracts*, 17 FCC Rcd 12124 (2002)).

[705] ACA Comments at 18.

[706] EchoStar Comments at 13.

[707] *Id.* at 8-9.

[708] *Notice*, 19 FCC Rcd at 108914-15 ¶ 17.

[709] "Delete rights" refers to contractual rights maintained by an MSO to terminate all distribution of an independent network at any time for any reason. The America Channel argues that all networks should be subject to delete rights and not just independent networks. The America Channel Comments at 7.

[710] *Id.* at 6-7. The America Channel does not describe how penetration requirements hurt its ability to obtain carriage, nor does it detail what contractual terms cause it to be disadvantaged vis-à-vis other nonbroadcast networks.

new distribution inquiries cable operators receive from independent networks and the status of such inquiries.[711] It believes these reports will allow the Commission to determine how many independent networks have received carriage and to develop a "scoreboard" measuring the ease or difficulty with which independent programmers gain access to MSO platforms.[712] Comcast disagrees, stating that there is no statutory basis for these proposed reporting requirements, and notes that cable operators do not routinely discriminate in favor of affiliated networks and against independent networks.[713]

161. ***Must Carry and Retransmission Consent.*** Under Sections 614 and 615 of the Communications Act, cable operators must set aside up to one third of their channel capacity for the carriage of commercial television stations and additional channels for noncommercial stations depending on the system's channel capacity.[714] Pursuant to the SHVIA, DBS operators may provide local-into-local broadcast television service.[715] Unlike cable operators, which are required to carry local television stations in every market they serve, a DBS operator must carry all stations in any market where it chooses to carry any local television station ("carry-one, carry-all").[716] In both the cable and DBS contexts, commercial broadcasters may elect to be carried pursuant to must-carry status or retransmission consent.[717] Where a station elects must-carry it is generally guaranteed carriage, but it is prohibited from receiving compensation for this carriage.[718] Under retransmission consent, the broadcaster and cable or DBS operator negotiate an agreement that may involve compensation in return for permission to retransmit the broadcast signal. The current rules apply to the carriage of analog television stations only.

162. Several commenters address the issue of retransmission consent agreements that require MVPDs to carry certain nonbroadcast networks in return for the right to carry local broadcast signals (*i.e.*, tying). EchoStar states that its ability to negotiate for retransmission consent of local broadcast network affiliates is often hampered by tying requirements imposed by entities that control these stations as well as nonbroadcast programming.[719] EchoStar urges the Commission to strictly enforce the retransmission consent rules and to closely examine disputes involving MVPDs that lack market power.[720]

163. Fox disagrees with MVPDs that complain about retransmission consent agreements that require carriage of nonbroadcast programming. Fox states that, in the initial retransmission consent negotiations, the cable industry made clear that it would not pay cash for the carriage of broadcast signals. Therefore, many broadcasters negotiated instead for cable systems to carry the broadcasters' affiliated nonbroadcast programming.[721] Similarly, NAB states that cable systems and satellite carriers often choose the tying option because such agreements provide substantial benefits to local stations at relatively modest out-of-pocket costs to MVPDs.[722] In particular, Fox asserts, tying arrangements maximize

[711] *Id.* at 1.

[712] *Id.*

[713] Comcast Reply Comments at 27.

[714] 47 U.S.C. §§ 534(b), 535(b). *See also* 47 C.F.R. § 76.56.

[715] Pub.L. No. 106-113, 113 Stat. 1501, 1501A-526 to 1501A-545 (Nov. 29, 1999).

[716] 47 C.F.R. § 76.66.

[717] 47 C.F.R. § 76.64.

[718] 47 C.F.R. § 76.60.

[719] EchoStar Comments at 10.

[720] *Id.* at 10-11. EchoStar does not provide specific examples where the Commission has failed to enforce the retransmission consent rules.

[721] Fox Comments in MB Docket No. 04-207 at 21-22 (Fox A La Carte Comments).

[722] NAB Reply Comments at 12.

consumer, programmer and cable system welfare, and demonstrate that benefits accrue when government permits the marketplace to determine the most efficient and cost-effective way to distribute video programming.[723] Fox also contends that MVPDs' carriage of broadcasters' affiliated programming networks have led to tangible public interest benefits by contributing additional content to the marketplace and fostering an environment in which new content can emerge and thrive. Fox indicates that broadcasters continue to offer cable systems multiple options in exchange for retransmission consent, maintaining that marketplace negotiations have led to the creation of a number of vibrant, diverse, and new nonbroadcast programming networks.[724]

164. On December 8, 2004, the Satellite Home Viewer Extension and Reauthorization Act of 2004 (SHVERA) was enacted.[725] SHVERA extended certain provisions of the SHVIA, primarily pertaining to the distant signal copyright license and retransmission consent negotiations for five years and added some new provisions to the law pertaining to the retransmission by DBS of distant broadcast signals.[726] In particular, SHVERA: (1) extends and revises the rules governing DBS retransmission of distant analog broadcast stations; (2) establishes terms and conditions under which DBS operators can retransmit distant digital broadcast signals; (3) imposes on DBS and cable a good faith retransmission consent negotiation obligation comparable to the existing obligation imposed on broadcasters and extends until 2010 the sunset of these reciprocal good faith negotiations provisions and the ban on exclusive retransmission consent agreements; (4) gives satellite carriers 18 months to phase out its practice of requiring two dishes to receive a full complement of local broadcast stations; and (5) allows satellite carriers to offer "significantly viewed" stations out of market. SHVERA also subjects DBS to the same subscriber privacy rules that currently apply to cable and adds several new notice provisions.

165. In the pending *DTV Must-Carry Proceeding,* the Commission is considering issues relating to the carriage of digital television signals.[727] Reiterating previously filed comments, Paxson argues that the Commission should adopt multicast must-carry rules that would require cable operators to carry multiple streams of programming offered over a single digital channel.[728] Cable and satellite providers oppose mandatory carriage of broadcasters' digital multicast streams of programming. Comcast states that channel capacity remains constrained, and decisions regarding the carriage of multicast programming should be left to the cable operator, who is capable of deciding which programming will best serve its customers' needs.[729] SBCA argues that multicast must-carry should never be forced upon DBS due to its limited spectrum resources, which could require DBS to cease transmission of large amounts of local-into-local programming.[730] NAB disputes the DBS commenters'

[723] Fox A La Carte Comments at 22. We note that as a condition of its acquisition of DIRECTV, for MVPDs with fewer than 5000 subscribers, News Corp. is required to either elect "must-carry" status or negotiate retransmission consent for its owned and operated stations "without any requirements for cash compensation or carriage of programming other than the broadcast signal." *See News Corp. Order*, 19 FCC Rcd at 575 ¶ 224. *See also* fn. 683 *supra*.

[724] *Id.* at 21-24.

[725] Pub. L. No. 108-447, 118 Stat. 2809 (2004). SHVERA was enacted as Title IX of the Consolidated Appropriations Act, 2005.

[726] Local-into-local service is affected only in that the two-dish carriage approach used by EchoStar in some markets must be discontinued within 18 months, and local-into-local service in Alaska and Hawaii is revised to phase in dual must carry over 30 months. Several commenters addressed issues relating to the pending re-authorization of SHVIA in this proceeding. *See, e.g.,* SCBA Comments at 14; NAB Reply Comments at 1.

[727] *Carriage of Digital Broadcast Signals*, 16 FCC Rcd 2598 (2001).

[728] Paxson Comments at 5. *See also 2003 Report*, 19 FCC Rcd at 1699 ¶ 157.

[729] Comcast Comments at 28.

[730] SBCA Comments at 3.

claims of capacity constraints, stating that many options exist for DBS operators to expand their capacity to deliver local signals, including local digital and HD signals.[731]

b. Sports Programming

166. We continue to monitor the availability of sports programming, which is an important segment of programming for all MVPDs.[732] There are 38 regional networks devoted to sports programming, an increase from the 27 we identified last year.[733] Regional sports networks now represent approximately 40 percent of the 96 regional networks.[734] Fox continues to be the leader in the distribution of regional sports networks, owning or holding an ownership interest in 19, or 50 percent, of all regional sports networks.[735] This year several professional sports franchises and organizations created regional sports and entertainment networks. In March 2004, the parent company of the NBA Denver Nuggets, NHL Colorado Avalanche, and other Denver-area professional and amateur sports teams created a regional television network called Altitude, which will provide exclusive sports coverage of those teams throughout the Rocky Mountain States.[736] Prior to the debut of this network, those teams' games were telecast on News Corp.'s Fox Sports Net Rocky Mountain, which is available on cable and DBS systems. In October 2004, The New York Mets, Time Warner Cable and Comcast announced the creation of a new regional sports network providing coverage of Mets' regular-season games throughout the New York metropolitan area beginning in 2006.[737] On October 1, 2004, Comcast launched a new sports network featuring the games of local Chicago teams The Cubs, The White Sox, The Blackhawks and The Bulls.[738]

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[731] NAB Reply Comments at 9.

[732] *See General Motors Corporation and Hughes Electronics Corporation, Transferors, and The News Corporation Limited, Transferee, For Authority to Transfer Control*, 19 FCC Rcd 473 (2004).

[733] *2003 Report*, 19 FCC Rcd at 1700 ¶ 158.

[734] *See* Appendix C, Table C-3.

[735] The Commission remains cognizant that Fox's ownership of numerous regional sports programming networks may pose a public harm when combined with DIRECTV's nationwide distribution platform. The Commission imposed conditions on News Corp. requiring it to enter into arbitration where negotiations fail to produce a mutually acceptable set of prices, terms and conditions. In addition, News Corp. cannot offer any existing or future regional programming services on an exclusive basis to any MVPD and shall make such services available to all MVPDs on a non-exclusive basis. *See News Corp Order*, 19 FCC Rcd at 531-2, 543, 552-555, 626, ¶¶ 127, 147-48,172-79, 366.

[736] NHL.com Network, *KSE Regional Sports Network Named Altitude Sports & Entertainment*, Mar. 11, 2004; Chris Walsh, *Kroenke Sports Network Signs First Deal*, ROCKY MOUNTAIN NEWS, May 13, 2004. As of November 7, 2004, Altitude had carriage agreements with Comcast, DIRECTV, EchoStar, Adelphia Communications in Colorado Springs and several smaller cable operators, for a total of 250,000 subscribers. *See* Jason Blevins, *Altitude Takes Shot at Comcast Talks*, DENVER POST, Oct. 4, 2004; DIRECTV Group, Inc., *DIRECTV and Altitude Sports & Entertainment Reach Multi-Year Carriage Agreement* (press release), Oct. 29, 2004; Comcast Corp., *Comcast Adds Altitude Sport & Entertainment to Lineup* (press release), Nov. 7, 2004.

[737] Richard Sandomir, *Mets Decide the Time is Right for a Cable Network of Their Own*, NEW YORK TIMES, Oct. 13, 2004. Carriage on Time Warner Cable and Comcast provides the network with distribution to approximately 3.1 million cable households. The Mets had a television broadcast rights agreement with Cablevision's MSG Network and Fox Sports New York, but paid a termination fee of $54 million to be released from that agreement. The Mets are reported to own 60 percent of the network, Time Warner 40 percent, and Comcast will operate the network. Peter Grant, *New York Mets, Cable Operators Launch Network*, WALL STREET JOURNAL, Oct. 13, 2004.

[738] The network will be available initially on Comcast's Chicago system, which covers approximately 1.5 million homes. Comcast stated its intention to negotiate carriage agreements with other cable and satellite providers. *See* Comcast Corp., *Comcast SportsNet Chicago to Launch October 1, 2004* (press release), Dec. 2, 2003. Comcast shares ownership of the network with the teams' owners. Jeremy Mullman, *Comcast SportsNet Expands Reach*, CHICAGO BUSINESS, Oct. 1, 2004. In addition to SportsNet Chicago, Comcast serves customers in the Philadelphia

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It also announced plans to launch similar networks in Detroit and in California. On October 16, 2004, Carolina Sports Entertainment Television Network (C-SET) launched on Time Warner cable systems serving North and South Carolina.[739] Time Warner will offer C-SET as a digital basic channel.[740] A notable exception to the growth of new regional networks is the short life of Victory Sports One. In October 2003, the owners of the Minnesota Twins Major League Baseball team launched Victory Sports One, which would provide exclusive distribution of Minnesota Twins baseball games as well as other local sports franchises. Victory Sports One, which was unaffiliated with any distribution company, signed carriage agreements with 30 small cable operators serving Minnesota, but it could not reach agreement with EchoStar, DIRECTV, Charter, Comcast and Time Warner, the largest MVPDs operating in Minnesota, and it ceased operations in May 2004.[741]

167. In February 2004, Time Warner Cable of Kansas City and Kansas City broadcaster KCTV initiated an agreement whereby Time Warner would replace KCTV's sports department with programming from its own Metro Sports Channel.[742] Under this arrangement, Metro Sports functions as a separate cable channel on Time Warner's systems, with a full range of programming, and during KCTV's regular evening newscasts, Metro Sports delivers a sports newscast originating from Metro Sports studios. Time Warner has an agreement with Comcast to distribute Metro Sports to areas not served by Time Warner Cable, but Time Warner has not made the channel available to DBS operators.[743]

168. This year, cable operators continue to package sports networks into sports tiers or packages.[744] Comcast states that it offers several optional sports packages to its digital cable subscribers, including NASCAR IN CAR, MLB Extra Innings, Major League Soccer Direct Kick, ESPN GamePlan, NHL Center Ice, and NBA League Pass.[745] Small cable operators state that sports channels are the most costly services they distribute, with annual wholesale rate increases in excess of inflation. According to ACA, contractual distribution restrictions and tie-ins with what it terms "weaker channels" increase the

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region with Comcast SportsNet, which reaches 2.9 million subscribers, and in the Baltimore/Washington, D.C. region with Comcast SportsNet Mid-Atlantic, which serves 4.5 million customers. In addition, Comcast has partnered with Charter Communications to offer regional sports programming to 11 million subscribers in southeastern states on Comcast/Charter Sports Southeast. *See* Comcast Comments at 27.

[739] Tim Whitmire, *Bobcats Launch New TV Network; C-SET Offers More Than NBA to Fans in the Carolinas*, SUN-NEWS (Myrtle Beach, South Carolina), Oct. 16, 2004. C-SET is owned by Robert Johnson, who owns the professional men's basketball team The Charlotte Bobcats and professional women's basketball team the Charlotte Stings. The network will operate 24-hours-a-day, seven days a week and feature these teams' games as well as regional college football games and will develop original programming *See also*, R. Thomas Umstead, *Carolinas on Their Minds*, MULTICHANNEL NEWS, Aug. 9, 2004.

[740] C-SET, at http://www.c-set.tv/faqs.asp, and at http://www.c-set.com/about.htm (visited Jan. 14, 2005). According to C-SET, Time Warner has approximately 600,000 digital basic subscribers in North and South Carolina.

[741] *Cold Minnesota Shoulder for Twins Baseball*, SKYREPORT, Apr. 26, 2004; Mike Reynolds and R. Thomas Umstead, *Twins Rights Victory for Fox*, MULTICHANNEL NEWS, May 17, 2004. The team's owners signed a multi-year carriage agreement with Fox Sports Network. *Id.*

[742] Aaron Barnhart, *KCTV5 to Outsource Its Sports; Metro Sports Will Handle Coverage on Telecasts*, KANSAS CITY STAR, Nov. 7, 2003. The programming is delivered via a fiber optic line from Metro Sports' studios to KCTV's broadcasting facility.

[743] Time Warner Cable, at http://www.kcmetrosports.com/info/faq.asp (visited Jan. 14, 2005).

[744] *See 2003 Report*, 19 FCC Rcd 1706-7 ¶¶ 175-76.

[745] Comcast Comments at 27.

aggregate cost of sports channels.[746] DIRECTV maintains that clustering is the reason that obtaining exclusive arrangements for valuable regional sports networks has become an increasingly viable and attractive proposition for cable operators.[747]

c. News Programming

169. We requested comment on the extent to which MVPDs provide local news and community affairs programming.[748] This year, of the 96 regional programming networks identified, 40, or 42 percent, are regional news networks.[749] In July 2004, Time Warner Cable and Belo Corp., a broadcast station owner, dissolved their joint venture that operated 24-hour cable news channels in Houston and San Antonio, Texas, and Charlotte, North Carolina.[750] In September, Belo announced that it was assessing whether to discontinue its Texas Cable News channel, citing an inability to obtain analog carriage on Time Warner's cable systems in Houston, San Antonio and Austin, Texas, or any carriage at all from other cable systems operating in Texas, in particular those owned by Cox Communications.[751]

d. Other Programming

170. ***PEG Programming***: Local franchising authorities may request, as part of the franchising process, that operators devote a certain amount of channel capacity and equipment to PEG programming.[752] PEG channels are intended to provide community-specific information, such as bulletin boards for local activities, local civic meetings, and local governmental activities. There are approximately 5,000 public, educational and government access channels in the United States, which are divided among 1,500 access operations with some cable systems providing as many as twelve channels for PEG programming and others providing one channel for all three purposes.[753] Approximately 85 percent of all PEG channels are not operated by cable companies, but instead are operated by non-profit entities, government agencies and educational institutions.[754] Comcast reports that it carries more than 2,400 PEG channels across the country and spends $100 million in direct support for PEG channels.[755]

171. ***DBS Public Interest Programming***: DBS operators are required to reserve four percent of their channel capacity for "noncommercial programming of an educational or informational nature."[756] To qualify as a public interest channel on a DBS system, programmers must be organized for a non-commercial, non-profit purpose, be a national educational programming supplier, and be responsible for 50 percent of the direct costs incurred by the DBS operator in making the channel available.

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[746] ACA Comments at 23.

[747] DIRECTV Reply Comments at 4.

[748] *See Notice*, 19 FCC Rcd 10916 ¶ 21.

[749] *See* Appendix C, Table C-3.

[750] *Time Warner Cable, Belo Dissolve Venture*, ASSOCIATED PRESS, July 23, 2004. The joint venture had been formed in September 2000.

[751] Belo Corp., *Belo Updates Investment Community on Operating Strategy* (press release), Sept. 29, 2004.

[752] 47 U.S.C. § 531. Local franchise authorities are allowed to establish procedures under which the cable operator may utilize unused PEG channel capacity for other services. 47 U.S.C. § 531(d)(1).

[753] NATOA Comments at 30.

[754] *Id.*

[755] Comcast Comments at 24.

[756] *See Implementation of Section 25 of the Cable Television Consumer Protection and Competition Act of 1992, Direct Broadcast Satellite Public Interest Obligation*, 19 FCC Rcd 5647 (2004).

Furthermore, the programming offered by such programmers must contain no advertisements, be of an educational or informative nature, and be available on a regular schedule.[757] DIRECTV provides 12 public interest channels.[758] EchoStar provides 21 channels of public interest programming.[759] To ensure that the programming is commercial-free and educational or informational in content, EchoStar claims that it conducts a limited review of the content, but given the constraints of reviewing hundreds of programs and the desire to avoid interfering with programmers' rights to editorial control, EchoStar does not undertake an in-depth review.[760]

172. Although DBS providers are subject to the public interest channel reservation requirements discussed above, NATOA asserts that they should have additional access requirements. NATOA argues that even though DBS can deliver local-into-local signals, in order for public interest programmers to gain access to DBS, they are required to pay to be carried. NATOA argues that DBS providers should be held to the same standards as cable operators and provide public interest programming to the local community.[761]

173. ***Non-English Programming***: SBCA states that the DBS industry provides international and non-English speaking households with programming offerings in other languages including Spanish, Chinese, Korean, Urdu, Arabic, and Polish.[762] DBS operators have long focused on international programming. EchoStar added an additional 14 Chinese channels to its Chinese programming lineup to create the Great Wall TV Package featuring 17 total channels.[763] EchoStar also introduced a new Arabic programming package called Arabic Elite Super Pack, which is offered on a mini-tier basis for $39.99 per month.[764] This year, DIRECTV introduced Vietnamese language programming to its lineup.[765] Comcast reports that it reorganized its digital cable package targeting Hispanic viewers in the United States, offering ten digital networks and eight audio channels that are targeted to Hispanic audiences. Comcast

[757] *See* 47 U.S.C. § 25.701.

[758] DIRECTV Comments at Exhibit H. DIRECTV states that when faced with a capacity constraint, it must choose the most qualified programming, which will make its overall service offering as attractive and compelling for viewers as possible. DIRECTV attaches a copy of its instructions to programmers applying for access to its channel capacity. *See* DIRECTV Comments at Exhibit I.

[759] EchoStar Comments at 14. EchoStar segments its programming into the following categories: seven educational, one arts, one multicultural, two news, three religious, one family, two social/political/cultural, one workplace learning, one Spanish educational, one NASA channel, and one health. In terms of how it selects its public interest programming, EchoStar states that a committee comprised of five or six EchoStar employees reviews all applications and make recommendations, which result in final selections by senior management. *Id.*

[760] *Id.* at 14-15.

[761] NATOA Comments at 31-32. According to NATOA, the most cost effective solution to accomplish funding of public interest programming by DBS operators is to subject them to the same regime cable operators are subject, by which local cable franchise authorities collect five percent of gross revenue receipts which are then directed to funding public interest programming facilities. *Id.* at 32.

[762] SBCA Comments at 12.

[763] *Programming: DISH Grows Chinese Programming*, SKY REPORT, Oct. 4, 2004. The service costs $29.99 per month and is available as an a la carte offering. The package requires customers to use EchoStar's SuperDISH system, which is capable of processing medium-power Ku-band and high-power DBS signals.

[764] *EchoStar Adds International Channels*, SATELLITE BUSINESS NEWS, Oct. 1, 2004. The package includes Al Arabiya, NBN, New TV, Noursat, Iqraa, Al Jazeera, ART America and MBC.

[765] *International: DIRECTV Adds Vietnamese Content*, SKYREPORT, Oct. 7, 2004. The channel is called VietnameseDirect and is the result of a joint venture involving International Channel Networks and Saigon Broadcasting Network. Most content is produced in the United States and consists of news, talk shows, sports, children's programs, cultural, history, and general entertainment programs.

adds that it plans to introduce Hispanic VOD content.[766] In addition, Comcast offers five international specialty channels.[767] In July 2004, in a move designed to counter DBS operators' strong international programming fare, Comcast assumed ownership of The International Channel.[768] Other cable operators offering non-English language programming include Time Warner, which offers programming in Spanish, Chinese, Hindi and several other South Asian languages.[769] Cox offers programming in Spanish, Arabic, Korean, Vietnamese, Filipino, and other South Asian languages.[770] Cablevision offers programming in Russian, Chinese, Korean, German, Portuguese, Indian/Southeast Asian, Japanese, Italian, and Polish on certain systems in New York City.[771] Additionally, in May 2004, the History Channel launched a U.S. Spanish-language version of the History Channel.[772]

174. ***Locally-Originated and Community-Oriented Programming:*** We requested information on the extent to which locally-originated programming is delivered to consumers by broadcasters and MVPDs, and the factors affecting production of and availability of locally-originated programming.[773] NCTA states that cable operators are active in promoting local and regional programming ventures that provide coverage of state and local events.[774] Distribution includes dedicated cable television channels, shared cable television channels, over-the-air broadcasting, and Internet streaming and archived media, but public affairs and government networks rely principally on cable distribution.[775] Approximately 20

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[766] Comcast Comments at 26. The ten networks include Discovery en Espanol, CNN en Espanol, Fox Sports Espanol, Toon Disney Espanol, MTV Espanol, VH Uno, TVE Internacional, Cinelatino, Utilisima, and HTV Musica.

[767] Comcast Comments at 27. The channels include TV5, an international French language channel; RAI, an Italian network; CTI Zhong Tian, a 24-hour Mandarin-Chinese channel; Zee TV, an Indian satellite channel; and RTN, a 24-hour Russian language network. Comcast also reports that it now provides WKTV-Korean American Television to subscribers served by the MSO's Maryland systems. *Id.* at 28.

[768] Seth Arenstein, *Q&A With International Channel Networks' Steve Smith; Comcast Battles Satellite With Ethnic Programming*, CABLEWORLD, Oct. 7, 2004. Comcast stated that it would direct The International Channel's programming at Asian demographic groups. In June 2004, The International Channel also made an investment in Television Korea 24, which planned to launch in Los Angeles in the fourth quarter of 2004. The channel is a Korean-language digital basic cable or satellite network featuring news, dramas, movies, sports, business, health, music, children's programming, and game shows, with selected shows subtitled in English. *Korean Channel to Launch in L.A.*, BROADCASTING AND CABLE TV FAX, June 2, 2004.

[769] *See* Time Warner Cable, at http://www2.twcnyc.com/index2.cfm?c=dtv/channel (visited Jan. 7, 2005).

[770] *See* Cox Communications, at http://www.cox.com/fairfax/digitalcable/digitalchannellineup.asp (visited Jan. 7, 2005).

[771] *See* Cablevision Systems Corp., at http://www.io.tv/index.jhtml?pageType=international (visited Jan. 7, 2005).

[772] *History Readies Spanish-Language Version*, BROADCASTING & CABLE TV FAX, Feb. 24, 2004.

[773] *See Notice,* 19 FCC Rcd at 10916 ¶ 21.

[774] NCTA Comments at 46. State public affairs networks in California, Michigan, and Pennsylvania are funded almost entirely by the cable television industry and receive wide scale distribution within those states. The California Channel is available in 5.6 million households, or 89 percent of all California cable households; Pennsylvania Cable Network is available in 3 million homes, or 85 percent of cable television households; and Michigan's MGTV reaches 1.6 million households, or about 75 percent of Michigan's cable television households. Radio and Television News Directors Foundation, *A Look at Regional News Channels and State Public Affairs Networks* (*RTNDF Study*), Feb. 2004, at 23.

[775] *RTNDF Study* at 22. Some statewide networks share time with local government access cable channels that typically feature programming produced by city or county government agencies. For example, in Detroit, the Detroit Cable Commission, a city-controlled agency, shares time on its dedicated cable channel with Michigan Government Television. Some state networks, such as Florida Channel, are distributed by public broadcast networks and through access-channel arrangements with cable operators. Washington State's TVW uses the

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million homes have access to state public affairs television coverage.[776] Twenty-five states feature televised coverage of government activities and events, and another ten or more state channels are in development.[777] The coverage varies from a few hours of daily state House and Senate coverage during legislative sessions to professionally staffed networks providing 24-hour daily coverage of executive, legislative and judicial activities.[778] Some state networks have begun to broaden their programming beyond retransmission of government meetings; for example, in addition to state public affairs coverage, the Pennsylvania Cable Network offers original documentary programming, book review discussions and high school sports coverage.[779] In addition, Comcast reports that it distributes a regional news, sports and entertainment channel - CN8 - to households in Delaware, Maryland, New Jersey, New England and Pennsylvania.[780]

175. ***Children's Programming:*** Nonbroadcast networks are attracting a growing audience share for their children's programming. Total day viewing by children aged 2-11 of advertising-supported nonbroadcast networks increased from a 28.3 share in 1993/1994 to a 53.6 share during the 2003/2004 television season.[781] In June 2004, Comcast, the Public Broadcasting System, and programmers Sesame Street Workshop and HIT Entertainment were reported to be in discussion to develop a 24-hour, commercial-free nonbroadcast network dedicated to preschool aged children.[782]

176. ***Access to Programming by Persons with Disabilities***: Under the Commission's rules, video programming distributors are currently required to provide at least 1,350 hours of captioned "new" nonexempt programming on each channel during each calendar quarter.[783] In addition, a video

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Internet to distribute content, by placing digital recordings of hearings on its website. Some statewide networks distribute programming via Internet archiving, sometimes in conjunction with state universities. For example, Michigan State University stores unedited footage of state legislative debates and proceedings to be used by researchers and historians. *Id.* at 24-25.

[776] *RTNDF Study* at 17. According to the report, in February 2004, several state public affairs networks incorporated a not-for-profit trade association, the National Association of Public Affairs Networks, to foster the advancement of public affairs channels. For purposes of the report, a state public affairs television network is defined as an organization that produces and makes available to citizens ongoing televised coverage of activities, events and proceedings of the state government, including coverage of the legislative, executive and/or judicial branches. *Id.* at 18.

[777] *Id.*

[778] For example, according to the report, in Washington State, cameras are allowed within the state Supreme Court chambers, and about five percent of the 2,200 hours of television produced annually by TVW, the state's public affairs network, consists of oral arguments before the court. That is contrasted with the California Channel, which has no access to the state's Supreme Court, and concentrates mainly on legislative and regulatory agency hearings and activities in the state capital to make up its six-and-a-half hours of daily programming. *Id.* at 20-21.

[779] *Id.* at 21.

[780] Comcast Comments at 48.

[781] NCTA Comments at 46.

[782] Dennis K. Berman, *Comcast Plans to Create 24-Hour Network – For Toddlers*, WALL STREET JOURNAL, June 9, 2004.

[783] 47 C.F.R. § 79.1(b)(1) (phase-in schedule for programming "new" programming which is defined as programming first published or exhibited on or after January 1, 1998). Video programming first published or exhibited for display on television receivers equipped for display of digital transmissions or formatted for such transmission is defined as "new" as of July 1, 2002. 47 C.F.R. § 79.1(a)(6)(ii). *See Closed Captioning Requirements for Digital Television Receivers,* 15 FCC Rcd 16788, 16808-09 ¶ 60 (2000) (*Digital Captioning Order*). As of January 1, 2006, 100 percent of all new, nonexempt video programming must be provided with

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programming distributor must include captioning in 30 percent of its "pre-rule" nonexempt programming on each channel during each calendar quarter.[784] The rules exempt several specific classes of programming from the closed captioning requirements.[785] Video programming providers may also petition the Commission for an exemption from the closed captioning rules if the requirements would impose an undue burden.[786] The closed captioning rules specified in Section 79.1 are enforced through a complaint process, with the complaint initially directed to the video programming distributor responsible for compliance with the rules.[787]

177. We sought comment on many issues relating to programming providers' and consumers' experiences with closed captioning, including whether programming providers are complying with the existing requirements and updated information on the cost of captioning.[788] In response, we received approximately 220 informal comments from consumers regarding the amount and quality of captioning. The vast majority of commenters express their appreciation for the existing captioning and their desire to have all television programming captioned, including commercials.[789] Many commenters described how important captioning is for their enjoyment of television, for news and other information, or for learning for children who are deaf.[790] While numerous commenters note that closed captioning has improved recently, many mention, and often complain about, the continuing problems with quality, accuracy, placement, and missing or delayed captions. The accuracy of captions ranges from excellent to undecipherable, with many spelling errors.[791] Commenters express frustration with captions that fall behind the spoken words, or are cut off when scenes switch, there are commercial breaks, or before the end of a show.[792] Another concern is captions that block a speaker's face or name, textual material or the action in a sporting event.[793] There is also incomplete or inaccurate captioning information in television program guides and listings.[794] Some commenters point out that programs may be captioned on the first showing, although not when the program is repeated and sometimes episodes of a usually captioned series do not appear with captions.[795] Commenters are especially concerned that all or part of their local

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captions. 47 C.F.R. § 79.1(b)(iv). A separate phase-in schedule applies for Spanish programming. 47 C.F.R. § 79.1(b)(3)-(4).

[784] 47 C.F.R. § 79.1(b)(2) (phase-in schedule for "pre-rule" programming). *See also* 47 C.F.R. § 79.1(a)(6) (definition of pre-rule programming).

[785] 47 C.F.R § 79.1(d).

[786] 47 C.F.R § 79.1(f).

[787] 47 C.F.R § 79.1(g).

[788] *Notice*, 19 FCC Rcd at 10917 ¶ 23.

[789] *See, e.g.*, Letters from Richard S. Nealy (Aug. 23, 2004); Barbara and Bob Rummel (June 25, 2004); Steve Barber (July 12, 2004).

[790] *See, e.g.*, Letters from Christopher Parkes (July 12, 2004); Marcia Breese (June 25, 2004); Deborah Culp Hook (July 12, 2004).

[791] *See, e.g.*, Letters from Barbara Curtis (June 23, 2004); Paul Hammerschlag (July 9, 2004); Carolyn Wilson (July 15, 2004).

[792] *See, e.g.*, Letters from Barbara Curtis (July 23, 2004); Clifford Cleary (July 12, 2004); Patricia Raswant (July 14, 2004).

[793] *See, e.g.*, Letters from Liz Peterson (July 9, 2004); Don Senger (June 25, 2004); Jenni Tiziani (July 13, 2004).

[794] *See, e.g.*, Letters from William D. Sager (July 14, 2004); Karen Hearn (July 19, 2004); Liz Peterson (July 9, 2004).

[795] *See, e.g.*, Letters from Nancy Rosenberg (June 23, 2004); Carolyn Wilson (July 15, 2004); Jim Grennan (Aug. 23, 2004).

newscasts, especially the weather reports, remain uncaptioned, yet they are not sufficiently visual to provide necessary information, and commenters ask that real-time captioning be required for local news and emergency information.[796]

178. TDI submits a previously filed Petition for Rulemaking requesting that the Commission initiate a proceeding to establish additional enforcement mechanisms to better implement the closed captioning rules.[797] In its petition, TDI specifically requests that the Commission: (1) create a database with updated contact information for video programming providers and a captioning complaint form; (2) establish a compliance reporting requirement and undertake audits to ensure effective implementation of the captioning requirements and to improve accountability; (3) revise its complaint rules to require responses to consumer complaints regarding issues other than the captioning benchmarks (*e.g.*, captioning quality) within 30 days; (4) establish fines or penalties for noncompliance with the captioning rules; (5) require continuous monitoring of captioning by video programming providers to ensure that technical problems are remedied promptly; (6) require video programming providers to reformat edited or compressed captioning; (7) require that for a program to be captioned under the rules, it must meet minimum standards for completeness, accuracy, readability and synchronicity with the audio portion of the program; and (8) adopt nontechnical quality standards to ensure that video programming is fully accessible to persons with hearing disabilities.[798]

179. NAD supports TDI's petition and further addresses our request for comment on whether the procedures for applying for an exemption based on an undue burden are sufficient.[799] NAD argues that the procedures are not adequate because they do not provide for initial review of sufficiency of the petition for such an exemption before it is put out on public notice for comments and opposition.[800] NAD also claims that a program provider who files a petition for exemption, regardless of the merits, is effectively exempt from the captioning rules for at least two years while the petition remains pending before the Commission.[801] NAD recommends that the Commission adopt procedures to provide for preliminary review for sufficiency and that it reject those petitions that are insufficient, before posting a Public Notice. It further recommends that the Commission reduce the administrative delay in processing petitions for exemption.[802]

180. DIRECTV reports that it passes along all NTSC closed captioning.[803] With respect to advanced digital closed captioning, DIRECTV states that it is unaware of any HD programming currently being transmitted with native CEA-708B (*i.e.*, digital) closed captioning, but it has tested its receivers using in-house produced CEA-708B closed captioning, and they have all functioned properly.[804] Fox

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[796] *See, e.g.*, Letters from Lois Smith (July 19, 2004); Richard S. Nealy (Aug. 23, 2004); Julia Olson (July 12, 2004).

[797] *See Closed Captioning of Video Programming – Implementation of Section 305 of the Telecommunications Act of 1996 Video Programming Accessibility*, (filed July 23, 2004) (TDI Petition). The Media Bureau placed this Petition, RM No. 11065, on public notice on September 2, 2004, Report No. 2670, and is reviewing comments in anticipation of making recommendations to the Commission.

[798] TDI Reply Comments at 2-3. *See generally* TDI Petition.

[799] *Notice*, 19 FCC Rcd at 10917 ¶ 23.

[800] NAD Comments at 2. NAD states that a review of the petitions filed in 2004 indicate that many petitioners fail to provide information addressing the undue burden criteria in the rules. *Id.* at 45. *See also* 47 C.F.R. § 79.1(f)(2).

[801] NAD Comments at 2, 5-7. *See also* NAD Comments, Exhibits 1-3 (detailing the history of undue burden petitions).

[802] NAD Comments at 7.

[803] DIRECTV Comments at 17.

[804] *Id.* at 17-18.

provides information on the costs of captioning its originally-produced broadcast and nonbroadcast programming, noting that it uses several vendors and that costs vary widely depending on whether the programming is live or on tape.[805] For example, Fox's regional sports networks spend between $105 and $365 to caption a single hour of programming, with the higher fee associated with live sports events. For its National Geographic channel, Fox indicates that it typically costs $165 to caption an hour of original programming. Fox further states that, when it purchases programming from a third party, the cost of captioning is included in the overall cost of the programming.

181. With respect to video description, in August 2000, the Commission adopted rules requiring certain larger broadcasters and video programming distributors to include "video descriptions" with a small amount of their programming to increase their accessibility to persons with visual disabilities.[806] On November 8, 2002, the U.S. Court of Appeals for the D.C. Circuit vacated the Commission's video description rules, finding that they exceeded the Commission's authority.[807] In light of this decision, video description currently is provided by programmers on a voluntary basis.

182. In 1996, we reported that, with the exception of PBS, there were no video described programs distributed by broadcasters and TBS provided one movie a week with video description.[808] Today, we see some programming with video description on both broadcast and nonbroadcast networks.[809] Examples of prime time broadcast television programs that include video description are: PBS' *American Experience*, *Masterpiece Theatre*, *Mystery*, *Nature*, and *Nova; CSI: Crime Scene Investigation*, *JAG*, and some movies on CBS; NBC's *Law and Order* and some movies; *The Bernie Mac Show*, *That 70's Show*, and *The Simpsons* on Fox; and some movies on ABC. In addition, broadcasters distribute children's programming containing video description, such as: *Sesame Street*, *Barney and Friends*, and *Mr. Rogers' Neighborhood* on PBS: and *Reading Rainbow*, *Rugrats*, *Blue's Clues* and *Dora the Explorer* on CBS and also on co-owned Nickelodeon; *Scout Safari*, *Kenny the Shark*, and *Endurance* on NBC; and Fox's *Magic School Bus*. Nonbroadcast networks, TCM, TBS, TNT, Lifetime and USA offer movies with video description, with TCM showing at least one video described movie almost every day. In addition to movies, several nonbroadcast networks include video description when they rerun programs that were previously shown on broadcast networks. Examples of such programs are: *Law & Order* and *Homicide: Life on the Street* on TNT; *JAG* on USA; *CSI: Crime Scene Investigation* on Spike; and *Ripley's Believe it or Not* on TBS. Moreover, numerous websites provide consumers with daily listings of the availability of video described programming, some specific to particular local markets.[810]

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[805] Fox Comments at 4-5.

[806] Video descriptions are aural descriptions of key visual elements in a television program, inserted into the natural pauses in the program's audio and distributed in the program's second audio channel. *See Implementation of Video Description of Video Programming*, 15 FCC Rcd 15230 (2000), on recon., 16 FCC Rcd 1251 (2001).

[807] *Motion Picture Association of America v. FCC*, 309 F.3d 796 (D.C. Cir. 2002).

[808] *See Closed Captioning and Video Description of Video Programming, Implementation of Section 305 of the Telecommunications Act of 1996, Video Programming Accessibility*, 11 FCC Rcd 19214, 1926-61 ¶¶ 112-13, 116 (1996).

[809] *See, e.g.*, The Metropolitan Washington Ear, http://www.washear.org/dailylogs.htm (visited Jan. 14, 2005); WGBH – Media Access Group, http://main.wgbh.org/wgbh/pages/mag/services/description/ontv/ (visited Jan. 14, 2005); and Turner Broadcasting, http://www.tnt.tv/dvs?network=all (visited Oct. 28, 2004). *See also* Letter from Elizabeth Goodwin (July 12, 2004) (urging the widespread adoption of video description).

[810] *See, e.g.*, The Metropolitan Washington Ear, http://www.washear.org/dailylogs.htm (visited Jan. 14, 2005); WGBH, http://wgbh.org/schedules/daytv (visited Jan. 14, 2005); and Arts Access (Raleigh, North Carolina), http://www.artsaccessinc.org/AAvideodeodesc.html (visited Oct. 28, 2004).

183. In its comments, DIRECTV notes that programmers may use the Secondary Audio Programming (SAP) channel for video descriptions.[811] DIRECTV states that it carries a SAP channel on 39 nonbroadcast channels, and on over 200 broadcast channels, but it leaves the decision on how to employ the SAP channel to the programmers themselves, and it does not monitor the SAP channels systematically.[812]

e. Packaging of Programming Services

184. Generally, MVPDs continue to offer packages or tiers of service that include a large number of programming networks.[813] DIRECTV offers certain programming, such as pay per view events and international sports offerings, on an a la carte basis, and it offers five "mini-tiers."[814]

185. Cable and DBS operators complain of contractual restrictions requiring them to include programming in basic or expanded basic tiers.[815] With the proliferation of digital platforms, many cable operators are choosing to locate new digital cable channels on digital tiers, in many cases built around a theme, such as sports or family programming.[816] Small cable operators claim that large programmers are demanding that they distribute second tier channels to all digital subscribers, thereby undermining the ability to provide digital theme-tiers.[817] EchoStar describes as "pervasive" the practice of having to carry programming networks that it would not normally carry or carry programming on a tier it would not normally choose, if not for a tie-in requirement with an essential broadcast station or nonbroadcast network.[818] EchoStar states that this practice prevents it from offering programming on a la carte and tiered basis, requiring it to bundle must-have programming with programming its consumers do not want.[819] Large programmers argue that bundling of programming services is an economically efficient way to deliver video programming with maximum choice and minimum inconvenience to potential

[811] DIRECTV Comments at 18.

[812] *Id.*

[813] *See, e.g.*, Comcast Comments at Appendix A, listing 11 separate program packages and tiers on its Arlington, Virginia system. Comcast offers a "Limited Basic" package of 32 channels, an "Expanded Basic" package of 45 channels, five separate digital packages, Cable Latino, an Hispanic language tier, a Sports Tier, "HDTV Channels Package" of 14 HD channels, and premium channels offered on a stand alone basis, although some premium services, such as HBO, have multiple channels of programming.

[814] DIRECTV Comments at 13-14. The mini tiers consist of an HBO package, a Cinemax package, a Showtime package, a STARZ! package, and a sports package. DIRECTV subscribers can purchase their first such package for $12 per month, the second for $11 per month, the third for $10 month, the fourth for $8 per month and the fifth for $7 per month. DIRECTV states that it has no immediate plans to add further mini-tiers.

[815] *See, e.g.*, ACA Comments at 11; EchoStar Comments at 4-5; BSPA Comments at 23-24.

[816] *See, e.g.*, R. Thomas Umstead, *Diginets Hit the Screen*, MULTICHANNEL NEWS, Dec. 8, 2003; R. Thomas Umstead, *CSTV Continues Fight for Acceptance*, MULTICHANNEL NEWS, Apr. 12, 2004; Crown Media Holdings, Inc., *Crown Media Announces Hallmark Movie Channel* (press release), Nov. 11, 2003; For a description of Cable One's "Digital Value Pak" and "Digital Faith and Family Pak" *see* Cable One, Inc., at http://www.cableone.net/default.asp?logout=true (visited Jan. 14, 2005).

[817] *See, e.g.*, ACA Comments at 13. ACA states that some programmers are demanding migration of affiliated channels from digital tiers to analog expanded basic, using that as a lever to broaden distribution of their affiliated channels on the expanded basic tier.

[818] EchoStar Comments at 4-5.

[819] *Id.* at 5. According to EchoStar, it faces contractual provisions requiring bundling of local stations with nonbroadcast programming, bundling of nonbroadcast networks, and market penetration requirements that prevent it from placing programming on specialty tiers or offering it on an a la carte basis. *Id.* at 6.