BEFORE THE

Federal Communications Commission

WASHINGTON, D.C.

In the Matter of	)	
	)	
The Commission's Cable Horizontal and Vertical Ownership Limits	)	MM Docket No. 92-264
	)	

COMMENTS OF COMCAST CORPORATION

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August 8, 2005

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Channel Line-up for Comcast's Cable System in Arlington, Virginia

BEFORE THE

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In the Matter of	)	
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COMMENTS OF COMCAST CORPORATION

Comcast Corporation ("Comcast") hereby responds to the Commission's request for comment in the above-captioned proceeding (the "*Second Further Notice*").[1]

I. INTRODUCTION AND SUMMARY

In view of the legal history of cable ownership proceedings, the Commission's task in the *Second Further Notice* is a difficult one. When Congress adopted the cable ownership statute, it established a specific goal -- to ensure that no single cable operator can impede the flow of video programming to consumers. In the 13 years since passage of the statute, the Commission has never been able to adopt a sustainable rule. And, of course, the task is much harder now in light of the D.C. Circuit's opinion in *Time Warner II*. In that opinion, the court made clear that the Commission may only adopt a cable ownership limit if it can show substantial evidence in the marketplace that a cable operator could impede the flow of programming to consumers. But the marketplace contains no such evidence. To the contrary, the video programming marketplace today is extraordinarily vibrant and competitive and there are no signs that program producers

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[1] *In re The Commission's Cable Horizontal and Vertical Ownership Limits,* Second Further Notice of Proposed Rulemaking, 20 FCC Rcd. 9374 (2005) ("*Second Further Notice*").

are having difficulty delivering, or that consumers are having difficulty receiving, video programming. Given these dynamics, it will be exceedingly difficult for the Commission to justify a limit on cable ownership that can pass judicial muster.

Video programming is delivered to consumers in a vast number of ways. For example, programming can be included in traditional packages, such as broadcast and non-broadcast networks, or in new forms, such as video-on-demand ("VOD") or downloadable media to a variety of devices. Video programming can be delivered by local broadcast stations, MVPDs, such as cable, DBS, and telcos, or even through other innovative, new technologies like the Internet and mobile phones. Consumers are increasingly indifferent to the means by which video programming is delivered, and the Commission should be as well.

The fundamental point is that options abound for producers of video programming to deliver, and consumers to receive, video programming, and those options are growing. In determining whether a single cable company of a particular size could unfairly impede the flow of programming, the Commission must consider *all* of these options and not focus narrowly, as the *Second Further Notice* does, on the economics of a cable program network. The statute is not intended to guarantee the economic success of *every* video programming network or any particular network. Nor is it designed to ensure the economic success of *every* program producer or of any particular producer. Rather, the statute is designed to ensure that a single cable operator may not unfairly impede the flow of video programming to consumers. Moreover, even if the Commission could properly focus only on the economics of cable program networks, it is difficult to understand how it could justify an ownership limit on a single cable operator, given that the number of national networks has risen 266 percent in the last decade.

The Commission's ability to adopt cable horizontal ownership rules is further limited by the constraints imposed by the court in *Time Warner II*. Most importantly, the court said that any ownership limit must be based on *real* evidence of marketplace harm. Purely conjectural theories of potentially anti-competitive behavior are insufficient to justify restrictions on cable operators' First Amendment rights. Any cable ownership limit must also be based on a dynamic assessment of real world marketplace conditions, not static market shares. In other words, at a minimum, because DBS is available to virtually all cable subscribers, and because those cable subscribers can and do switch distributors, the Commission must give far greater emphasis than it has in the past to the competitive impact of DIRECTV and EchoStar -- now the second and third largest MVPDs, serving over 27% of MVPD subscribers nationwide. Moreover, as these comments demonstrate, when analyzing the true purpose of the statute, one must consider *all* competitive or potentially competitive distribution platforms in undertaking the analysis Congress and the *Time Warner II* court required.

The *Time Warner II* court also made clear that the Commission must give significant weight to the pro-consumer benefits of increased horizontal ownership. For the past decade, the Commission has consistently recognized that significant efficiencies and other benefits arise from increased horizontal ownership, including economies of scale that allow cable companies to invest in more and better programming for consumers and to facilitate the deployment of advanced broadband services. In these comments, Comcast provides concrete evidence of these consumer benefits. For example, when Comcast acquired the Jacksonville, Florida system from AT&T Broadband in 2002, it promptly upgraded the system from 550 MHz to 750-860 MHz, introduced new products and services (including HDTV, VOD, digital cable, home-networking, and high-speed Internet), and expanded the offering of minority and foreign language

programming. Customer complaints dropped dramatically -- from a high of 1,100 per month under AT&T Broadband, to only a handful in recent months. In contrast to the conjectural harms posited by advocates of cable ownership limits, these facts show that Comcast's acquisition of AT&T Broadband resulted in an across-the-board increase in the amount and quality of services available to consumers in Jacksonville.

Finally, the competitive state of the video programming marketplace today makes it virtually impossible for the Commission to adopt limits that are consistent with the statute and the requirements of *Time Warner II*. Consider, for example, the myriad traditional and emerging ways in which program producers can deliver and consumers can receive programming:

- *Eight national broadcast networks*, including ABC, CBS, NBC, Fox, WB, UPN, PAX, and PBS.
- *Several large broadcast station groups*, including Cox, Tribune, Gannett, and Univision.
- *Over 1,700 local television stations* through syndication and other means.
- *Over 380 national "cable program networks,"* including channels specializing in news, religion, children, science, food, history, minority interests, comedy, music, sports, and almost every other conceivable topic.
- *Over 90 regional "cable program networks"* devoted to local news and sports, foreign languages, local government, and a variety of other topics.
- *Thousands of local cable television systems*, which, in addition to carrying traditional program networks, pay-per-view, and video-on-demand, also offer local origination, PEG, and leased access channels.
- *Two ubiquitous, national DBS operators*, with hundreds of channels of capacity.
- *Overbuilders*, such as Knology, RCN, and Everest Connections.
- *Video-on-demand* with thousands (and potentially tens of thousands) of hours of capacity to deliver innovative types of programming as well as repurposed existing programming.

- *The Internet*, with virtually unlimited opportunity for delivery of content, and a growing number of important program aggregators (including Yahoo!, AOL, and others).
- *Mobile telephone* "third screen" services that are rapidly gaining consumer acceptance and legitimacy among programmers, as evidenced by MobiTV's recent distribution deal with Major League Baseball.
- *Downloadable video services*, like TiVO, CinemaNow, and Greencine.
- *Through-the-mail services*, like Netflix.
- *Telephone companies*, including Verizon, SBC, and BellSouth, all of whom are now building or currently operate multichannel programming networks.

In light of this list, and thinking about what a similar list might have looked like only five or ten years ago, one can ask the following questions: Is the flow of programming increasing or decreasing? Do program producers have more options to distribute programming or fewer? Are consumers better off in terms of diversity or worse? Is this a dysfunctional marketplace that needs government regulation, or is it a dynamic, expanding video programming marketplace that is increasing opportunities for all participants?

In effect, the Commission already answered these questions when it recently stated that "the vast majority of Americans enjoy more choice, more programming and more services than any time in history." Given this statement, it is difficult to see how the Commission could, consistent with the requirements of *Time Warner II*, find a real and non-conjectural situation where a single cable operator can unfairly impede the flow of video programming sufficient to justify a cable ownership limit.

II. THE STATUTE, THE RESTRICTIONS IMPOSED BY *TIME WARNER II*, AND THE CURRENT COMPETITIVE STATE OF THE VIDEO PROGRAMMING MARKETPLACE MAKE IT DIFFICULT FOR THE COMMISSION TO ADOPT A SUSTAINABLE A CABLE OWNERSHIP LIMIT.

A. Any Cable Ownership Rule The Commission Adopts Must Be Limited To The Congressional Objective Of Ensuring The Flow Of Programming To Consumers.

The horizontal cable ownership rules were authorized for a discrete and specific purpose. That goal was to ensure that the "flow of video programming from the video programmer to the consumer" would not be "unfairly impede[d]."[2] A statutory interpretation that centers on the interests of consumers is essential.

The Commission has underscored in its video competition reports that video programming is delivered to consumers through a vast number of independent distribution channels.[3] In addition to all of the traditional distribution channels, such as cable and DBS, the Commission has highlighted other distribution paths: "Over the past year, video provided over the Internet has grown and promises to become an increasingly strong product in the market for the delivery of video programming."[4] The Commission also noted that it considers "the sale and rental of home video, including videocassettes, DVDs, and laser discs, part of the video

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[2] 47 U.S.C. § 533(f)(2)(A); *see also* Cable Act of 1992, § 2(a)(4) (focusing on "the number of media voices available to consumers"). It is clear that Congress' main goal in the 1992 Act was to serve the public interest. The aim of benefiting consumers is pervasively reflected in the text of the 1992 Act and its legislative history. *See e.g.*, 138 Cong. Rec. S759 (daily ed. Jan. 31, 1992) (statement of Sen. Kerry) ("[We] must keep our eye on the ball. And the ball, in this case, is the well-being of American video consumers, the viewers all across the nation."); 138 Cong. Rec. S562 (daily ed. Jan. 29, 1992) (statement of Sen. Inouye) ("This is a consumer bill."); 138 Cong. Rec. H8657 (daily ed. Sept. 17, 1992) (statement of Rep. Harris) ("This cable bill is exactly as it is named. It protects consumers and it encourages competition.").

[3] *In re Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming,* 20 FCC Rcd. 2755 ¶ 3 (2004) ("*11th Annual Report*").

[4] *See id.* ¶ 14.

marketplace because they provide services similar to the premium and pay-per-view offerings of MVPDs."[5]

Moreover, in setting horizontal ownership limits, there is no basis for the Commission to distinguish between the ability of a producer of video programming to sell that programming to a program distributor and its ability to sell video programming to a program packager, such as a broadcast or cable network. Both outlets are potential purchasers of programming. Both can convey that programming to consumers. When seen in this light, the distribution outlets for program producers and the viewing options for consumers are plentiful.

While acknowledging that the "primary purpose of the cable horizontal ownership rules is to ensure that the flow of video programming to consumers not be unfairly impeded by cable operators," the *Second Further Notice* seems to define the entire issue in terms of the economic success of individual cable program networks.[6] But a producer's ability to deliver its programming and a consumer's ability to receive programming are not dependent on the success or failure of any individual cable program network.

The Commission has noted in the past that the "the flow of video programming" involves three distinct markets: (1) the *creation* of programming (*e.g.*, by producers of individual programs or series), (2) the *aggregation* (or packaging) of programming (*e.g.*, by networks), and

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[5] *See id. See also In re Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 19 FCC Rcd. 1606 ¶ 16 (2003) ("*10th Annual Report*") ("Nevertheless, real-time and downloadable video accessible over the Internet continues to become more widely available and the amount of content is increasing…. We consider the sale and rental of home video, including videocassettes, DVDs, and laser discs, part of the video marketplace because they provide services similar to the premium and pay-per-view offerings of MVPDs.").

[6] *Second Further Notice* ¶ 82.

(3) the *distribution* (or delivery) of programming to viewers (*e.g.*, by MVPDs).[7] Where the analysis in the *Second Further Notice* falls down, however, is in its exclusive focus on the flow of video programming between Market 2 and Market 3, completely ignoring other distribution paths linking program creators in Market 1 and consumers. In fact, as described in extensive detail in these comments, there are many options today for producers to get their programming to consumers.

The horizontal ownership statute does not aim to guarantee the economic success of every video programming network or the success of every producer of video programming. In this sense, the Commission's analysis should be "technology neutral," *i.e.*, indifferent to the manner in which consumers get video programming, so long as they do get it.[8] So understood, the directive that the Commission consider horizontal ownership rules to ensure that the flow of video programming not be "unfairly impeded" means that the Commission must determine how to ensure that *no cable operator should have the unilateral power*, by making a decision not to carry certain video programming, to prevent that programming from reaching the critical mass of viewers necessary to support programming of that type or genre. *No cable operator does* -- and given the proliferation of independent outlets for video programming, no cable operator will. So long as a creator of video programming can potentially access a wide range of outlets with its message, the statutory objective is satisfied.

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[7] *See In re Implementation of Section 11 of the Cable Television Consumer Protection and Competition Act of 1992*, Further Notice of Proposed Rulemaking, 16 FCC Rcd. 17312 ¶ 8 (2001) ("*2001 Further Notice*").

[8] The Commission has adopted a "technology neutral" approach in other contexts. *See In re Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992; Development of Competition and Diversity in Video Programming Distribution and Carriage*, First Report & Order, 8 FCC Rcd. 3359 ¶¶ 109, 111, nn.161, 165 (1993); 47 C.F.R. 76.1002(b)(Note 2).

B. *Time Warner II* Sharply Constrains The Commission's Ability To Impose A Cable Ownership Limit.

The *Second Further Notice* recognizes that *Time Warner II* has important implications for its horizontal and vertical analyses, but does not fully reflect the extent to which the decision limits the Commission's discretion in implementing of the statute. Comcast summarizes in the remainder of this section the requirements established by the court in *Time Warner II* and how those requirements restrict the Commission's ability to adopt a cable ownership limit in this proceeding.

1. A Horizontal Limit Must Be Reasonably Tailored To A Legitimate Government Objective.

The first and most critical point is the D.C. Circuit's observation that any ownership restriction implicates the First Amendment speech rights of cable operators: "The horizontal limit interferes with [cable operators'] speech rights by restricting the number of viewers to whom they can speak."[9] A limit on the number of viewers that can receive a cable operator's speech is subject to intermediate scrutiny and will only "be upheld if it 'advances important governmental interests unrelated to the suppression of free speech and does not burden substantially more speech than necessary to further those interests.'"[10] And, the Commission "must show a record that validates the *regulations*, not just the abstract statutory authority."[11]

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[9] *Time Warner Entm't Co. v. FCC*, 240 F.3d 1126, 1129 (D.C. Cir. 2001) ("*Time Warner II*"); *see also Turner Broad. Sys. Inc. v. FCC*, 512 U.S. 622, 626 (1994) ("*Turner I*") (finding that cable operators are "entitled to the protection of the speech and press provisions of the First Amendment"); *Turner Broad. Sys. Inc. v. FCC*, 520 U.S. 180 (1997) ("*Turner II*") (same); *Leathers v. Medlock*, 499 U.S. 439, 444 (1991) (same).

[10] *Time Warner II*, 240 F.3d at 1130 (quoting *United States v. O'Brien*, 391 U.S. 367, 377 (1968)); *see Time Warner Entm't Co. v. United States*, 211 F.3d 1313, 1316-22 (D.C. Cir. 2000) ("*Time Warner I*") (holding that the relevant statutory provisions are subject to intermediate scrutiny).

[11] *Time Warner II*, 240 F.3d at 1130.

For all these reasons, the Commission must be especially cautious in adopting any ownership limit that constrains the free speech rights of cable operators.

2. A Horizontal Limit Must Be Based On Real Evidence Of Marketplace Harm.

Furthermore, the court in *Time Warner II* made abundantly clear that the Commission cannot adopt an ownership limit unless it can demonstrate that there is a "real" and "non-conjectural" risk that cable operators can and will engage in harmful anti-competitive behavior by abusing market power over programmers -- and thereby impede the flow of programming to consumers.[12] Significantly, the Commission must support such a limit with "substantial evidence" demonstrating the prospects for collusion or other forms of anti-competitive behavior.[13] Purely conjectural theories of potentially anti-competitive behavior cannot satisfy the Commission's steep burden of proof under *Time Warner II*. It is *evidence* that is required -- not theory, not conjecture, not allegations -- but *proof* of harm in the marketplace.[14]

3. A Horizontal Limit Must Be Based On A Dynamic Assessment Of Real World Marketplace Conditions.

Time Warner II also directed the Commission to base its market power analysis on a *dynamic* assessment of the video programming marketplace. Contrary to the suggestion in the

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[12] *Time Warner II* at 1130; *see also Second Further Notice* ¶ 39 (underscoring that the Commission "must base [its] limits on 'non-conjectural risk' of economic harm").

[13] *Time Warner II*, 240 F.3d at 1129; *see also Second Further Notice* ¶ 39.

[14] The Commission has made clear that allegations of harm do not constitute evidence of harm. *See, e.g.*, *In re Application of Puerto Rico Communications Authority*, Order on Reconsideration, 2 FCC Rcd. 1108 ¶ 4 (1987) (asserting that "allegations contained in the complaints cannot be said to be true merely because such complaints have been filed").

Second Further Notice,[15] the analysis *cannot* be based on static market shares. The court stated in the strongest terms that reliance on current market shares fails to take full account of the constantly changing nature of the marketplace, and especially the indisputable fact that "customers with access to an alternative MVPD may switch" providers to reflect programming preferences.[16] As noted by the court, the Commission itself reached the same conclusion in another context when it explained that "very small and rural cable systems have used a variety of schemes to add digital channels, expand their program offerings, and take *preemptive* action against aggressive DBS marketing."[17]

In short, *Time Warner II* and the Commission's own statements require that the Commission give far greater emphasis than it has in the past to the competitive impact of DBS and other outlets, including the emerging telco video platforms.[18] When the Commission does so, it will be virtually impossible for it to justify an ownership limitation on cable operators.[19]

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[15] *See Second Further Notice* ¶ 111 ("We seek comment on whether a dynamic analysis of the type envisioned by cable commenters is necessary, and comment on how we could perform such an analysis. A number of factors suggest that a dynamic analysis is not necessary.").

[16] *See Time Warner II*, 240 F.3d at 1134. As indicated above, even an analysis that is limited to the role of MVPDs is overly narrow and fails to account in full for a dynamically competitive video programming marketplace.

[17] *Id.* at 1134 (emphasis added) (quoting *In re Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Seventh Annual Report, 16 FCC Rcd. 6005 ¶ 67 (2001) ("*7th Annual Report*")).

[18] *See Time Warner II*, 240 F.3d at 1134; *see also Second Further Notice* ¶ 73 ("The court stated that on remand the Commission should take into account relevant measures of market power, and elasticities of supply and demand vis-à-vis other MVPD offerings, mainly DBS.").

[19] On June 3, 2002, the Media Bureau sought comment on OPP Working Paper No. 35, "Horizontal Concentration in the Cable Television Industry: An Experimental Analysis" by Mark Bykowsky, Anthony M. Kwasnica, and William Sharkey. *See Media Bureau Seeks Comment on Experimental Economics Study Examining Horizontal Concentration in the Cable Industry*, Public Notice, 17 FCC Rcd. 10544 (2002). The Working Paper recounted the results of a game based on a hypothetical market model that was intended to "illuminate the distribution of profits from cable programming between cable networks and cable operators… and the frequency with which those networks and operators are able to conclude contracts where it is in their economic interests to do so." Comments of Comcast Corporation on OPP Working Paper No. 35, filed in CS Dkt No. 98-82, at 5 (July 18,

(footnote continued…)

The Commission rightly views both DBS providers as strong competitors to the cable industry, stating in its order approving the News Corp/DIRECTV merger that "the MVPD market has been and will remain fiercely competitive between cable operators and DBS providers."[20] Marketplace facts clearly support this conclusion. DIRECTV and EchoStar are respectively the second and third largest MVPDs. Together they have nearly 26 million subscribers,[21] or approximately 27% of the total MVPD subscribers nationwide.[22] During 2004, DIRECTV added more new U.S. customers "than any other pay television service in the country,"[23] and in the first quarter of 2005, it added 505,000 new subscribers, a 21% increase

(…footnote continued)

2002). In the study, college students were expected to conduct a full round of bargaining within a six minute interval. Among the numerous problems with the experimental design, the students had no prior course of dealing, no cumulative expertise, and were permitted no face-to-face communications. In several filings before the Commission, Comcast critiqued the study, asserting that it "assume[d] a hypothetical environment that [bore] no resemblance to the real-world environment" in which programming networks negotiate with cable operators for program distribution and then "studie[d] that hypothetical environment in a way… itself further removed from reality." *Id*. at 4. For instance, the small and unrepresentative sample of theoretical networks used in the study apparently did not compete with one another for viewers or channel positioning -- in the experiment, a buyer's decision to carry one competitor's programming network did not affect the carriage of any other. *Id.* at 9. This is obviously contrary to real world marketplace conditions. In addition, the experimental conditions did not produce results demonstrating the effect of cable ownership limits on "the flow of programming from *program producers* to *consumers." Id*. at 5 (emphasis in original). As such, the study failed to yield insights relevant to describing or predicting actual bargaining power between programming networks and cable operators.

[20] *See In re General Motors Corp. and Hughes Elec. Corp., Transferors, and The News Corp. Ltd., Transferee, for Authority to Transfer Control*, Memorandum Opinion & Order, 19 FCC Rcd. 473 ¶ 282 (2004).

[21] Based on the latest available numbers, DIRECTV and EchoStar collectively serve 25.9 million subscribers. *See* Press Release, The DIRECTV Group, Inc., *The DIRECTV Group Announces Second Quarter 2005 Results* (Aug. 4, 2005) ("*DIRECTV 2Q05 Earnings Release*") (reporting 14.67 million subscribers as of June 30, 2005), *available at* http://phx.corporate-ir.net/phoenix.zhtml?c=127160&p=irol-newsArticle&ID=739619&highlight=; Press Release, EchoStar Communications Corp., *EchoStar Reports First Quarter 2005 Financial Results* (May 5, 2005) ("*EchoStar 1Q05 Earnings Release*") (reporting 11.23 million subscribers as of March 31, 2005), *available at* http://www.corporate-ir.net/ireye/ir_site.zhtml?ticker=dish&script=410&layout=-6&item_id=705808.

[22] 25,900,000 DIRECTV and EchoStar subscribers ÷ 93,300,000 total MVPD subscribers equals 27.8%. *See* Kagan Research LLC, *Kagan Media Index,* Kagan Media Money, July 26, 2005, at 6 (showing that there are 93.3 million MVPD subscribers nationwide).

[23] DIRECTV's new customer additions in the fourth quarter of 2004 totaled more than 1.1 million -- marking "the second consecutive quarter in which [DIRECTV] added more than 1 million gross new subscribers." Press

(footnote continued…)

over the same period last year.[24] EchoStar added 325,000 new subscribers during the first quarter of 2005[25] and more than 7.6 million customers over the last five years.[26] And the two DBS companies have attracted eight out of every ten new multichannel television subscribers.[27] This impressive growth comes at a time when the cable industry's growth has been essentially flat.[28]

Moreover, as indicated above, a dynamic assessment of the video programming marketplace cannot be limited just to DBS competition. Cable operators face vigorous competition in many markets from overbuilders, such as RCN and Knology. Likewise, Verizon, SBC, and BellSouth are rapidly expanding their fiber-optic networks in an effort "aimed squarely at cable companies and predicated on the success of an advanced digital video programming

(…footnote continued)

Release, DIRECTV, Inc., *The DIRECTV Group Announces Full Year and Fourth Quarter 2004 Results* at 1 (Aug. 4, 2005) (quoting Chase Carey, president and CEO of The DIRECTV Group), *available at* http://media.corporate-ir.net/media_files/irol/12/127160/pdf/Q404EarningsRelease.pdf.

[24] Press Release, The DIRECTV Group, Inc., *The DIRECTV Group Announces First Quarter 2005 Results*, at 3 (May 2, 2005) ("*DIRECTV 1Q05 Earnings Release*") (reporting 14.45 million subscribers as of March 31, 2005), *available at* http://media.corporate-ir.net/media_files/irol/12/127160/pdf/Q105EarningsRelease.pdf.

[25] *EchoStar 1Q05 Earnings Release*.

[26] Press Release, EchoStar Communications Corp., *DISH Network Passes 11 Million Customer Milestone; Company Now Third Largest Pay-TV Provider* (Jan. 31, 2005), *available at* http://www.corporate-ir.net/ireye/ir_site.zhtml?ticker=dish&script=410&layout=-6&item_id=668247.

[27] Eleanor Laise & William Mauldin, *Cutting the Cord*, Smart Money, July 1, 2004, at 68 (reporting that EchoStar and DIRECTV attracted more than 80% of all new MVPD subscribers in 2003).

[28] *See 11th Annual Report* ¶ 5 (finding that "cable subscribership is remaining relatively stable as the MVPD market grows; thus, cable's share of the MVPD market is declining. In contrast, DBS subscribership continues to increase at nearly double-digit rates of growth, and its share of the marketplace is increasing.") In addition, DIRECTV's relationship with Verizon enables it to combine its multichannel video services with broadband and telephone services, and gives it the ability to exploit Verizon's customer relationships and brand name within Verizon's huge service area. *See DIRECTV 1Q05 Earnings Release* at 3 (attributing record growth to, among other things, "improved distribution mostly through the telephone company partnerships and in the former NRTC territories").

offer."[29] Verizon, for example, plans on offering "about 300 video and audio channels, along with about 2,000 video-on-demand titles, by the time it launches [its FiOS video] service broadly next year."[30] In addition, new distribution platforms are providing yet more competition.

4. The Commission May Not Rely Exclusively On A Diversity Rationale To Impose Ownership Limits.

A dynamic assessment of the video marketplace, as required by *Time Warner II*, makes plain that the Commission cannot base a horizontal ownership limit on the basis of anti-competitive harm. *Time Warner II* also precludes the Commission from relying exclusively on a diversity rationale to impose ownership limits.[31]

As the *Time Warner II* court explained, diversity alone cannot justify a limit that "does more than guarantee a programmer two possible outlets."[32] Of course, the vast majority of consumers in America today *already* have access to three MVPDs (a cable operator and two DBS operators), and in many cases more than three.[33] The government's interest in maintaining

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[29] Scott Moritz, *Bells Will Get Their Fiber*, TheStreet.com (July 7, 2005), *available at* http://www.thestreet.com/pf/tech/scottmoritz/10231093.html.

[30] Reuters, *Verizon Signs First Video Deal With Time Warner*, MSN Money, July 6, 2005, *available at* http://news.moneycentral.msn.com/printarticle.asp?Feed=OBR&Date=20050706&ID=4944942.

[31] Unlike the diversity considerations at the core of the Commission's rulemaking on broadcast ownership, diversity is not a central concern here because cable operators, by their very nature, significantly expand the number and diversity of voices available to consumers, bringing hundreds of non-affiliated program services into consumers' homes.. *See generally In re 2002 Biennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, Report & Order and Notice of Proposed Rulemaking, 18 FCC Rcd. 13620 (2003).

[32] *Time Warner II*, 240 F.3d at 1135.

[33] The Commission has recognized that "[t]oday, almost all consumers have the choice between over-the-air broadcast television, a cable service, and at least two DBS providers. In some areas, consumers may also choose between other traditional (*e.g.*, broadcasting, cable, DBS) and emerging (*e.g.,* use of digital broadcast spectrum, fiber to the home, video over the Internet) delivery technologies as well." *11th Annual Report* ¶ 4. The Commission has long presumed that the DBS services of DIRECTV and EchoStar are "technically available due to [their] nationwide satellite footprint, and . . . actually available if households in the franchise area are made reasonably aware that the service is available." *In re Charter Communications*, Memorandum Opinion & Order,

(footnote continued…)

diversity, the court concluded, does not "give the FCC carte blanche to [h]obble cable operators" in the name of diversity alone.[34] Moreover, even if it were legally permissible for the Commission to rely exclusively on diversity, it is hard to see how it could do so without violating the "arbitrary and capricious" standard of the Administrative Procedure Act[35] in light of its recent statement that "the vast majority of Americans enjoy more choice, more programming and more services than any time in history."[36]

5. The Commission Must Consider Pro-Consumer Benefits of Horizontal Ownership.

Time Warner II requires the Commission to give significant weight to the pro-consumer benefits of increased cable operator size.[37] This requirement is consistent with the directive in the ownership statute that the Commission account for the "efficiencies and other benefits" that may arise from increased horizontal ownership.[38] In other contexts, the Commission has long recognized that "consolidation in the cable industry [has] produced significant benefits and

(…footnote continued)

DA 05-1649 ¶ 3 & n.6 (Media Bureau June 13, 2005) (citing *In re MediaOne of Georgia*, Memorandum Opinion & Order, 12 FCC Rcd. 19406 (1997)); *see also In re Time Warner Entm't-Advanced/Newhouse P'ship*, Memorandum Opinion & Order, 12 FCC Rcd. 13801 ¶ 10 (Cable Servs. Bureau 1997).

[34] *Time Warner II*, 240 F.3d at 1136.

[35] As the D.C. Circuit has explained, "to pass even the arbitrary and capricious standard, the agency must at least reveal a rational connection between the facts found and the choice made." *See Time Warner II,* 240 F.3d at 1137 (internal quotations omitted) (quoting *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co*., 463 U.S. 29, 43 (1983)).

[36] *10th Annual Report* ¶ 4.

[37] *See Time Warner II*, 240 F.3d at 1136.

[38] 47 U.S.C. § 533(f)(2)(D); *Time Warner II*, 240 F.3d at 1136; *Second Further Notice* ¶ 1 ("At the same time, Congress recognized that multiple system ownership could provide benefits to consumers by allowing efficiencies in the administration, distribution and procurement of programming, and by providing capital and a ready subscriber base to promote the introduction of new programming services.").

efficiencies to consumers,"[39] including economies of scale which allow cable companies both to invest in "more and better" programming for consumers and to "promote the introduction of new programming services."[40] More recently, for example, the Commission found that the merger of AT&T Broadband and Comcast was likely to produce public interest benefits, including the accelerated deployment of broadband services.[41] As the discussion in Section II.D below depicts, the Commission was right.

C. In Today's Marketplace, Consumers Have Access To Vast Amounts Of Programming From A Variety Of Independent Sources, And Producers And Aggregators Of Programming Have Numerous Options For Delivering Programming To Consumers.

The Commission cannot justify a limit on cable ownership unless it can show credible, compelling evidence that a cable operator of a certain size may "unfairly impede" the flow of video programming to consumers. There is not only no evidence that any cable operator could cause such harm (or would have an incentive to do so), but the evidence irrefutably demonstrates that the flow of programming to consumers is vibrant and expanding, whether looked at from the standpoint of the extensive outlets available to consumers for obtaining video programming, or from the standpoint of the producers, aggregators, or distributors who are all part of the chain that ultimately delivers video programming to consumers.

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[39] *In re Implementation of Sections 11 and 13 of the Cable Television Consumer Protection and Competition Act of 1992; Horizontal and Vertical Ownership Limits, Cross-Ownership Limitations and Anti-trafficking Provisions*, Notice of Proposed Rulemaking, 8 FCC Rcd. 210 ¶ 34 (1992).

[40] *Id.* ¶ 34.

[41] *See In re Applications for Consent to the Transfer of Control of Licenses from Comcast Corporation and AT&T Corp., Transferors, to AT&T Comcast Corporation, Transferee*, Memorandum Opinion & Order, 17 FCC Rcd. 23246 ¶ 9 (2002) ("*Comcast/AT&T Order*").

1. There Are Numerous Ways In Which Producers Can Deliver, and Consumers Can Receive, Video Programming.

Video programming flows to consumers through a variety of different paths. There is an enormous, and growing, number of potential buyers of video programming, including, for example, traditional program aggregators, such as broadcast or non-broadcast networks, program distributors, such as cable and DBS operators, and, increasingly, consumers themselves, who buy programming directly from producers, through the myriad Internet-based streaming and download services. Likewise, video programming reaches consumers over a large, and growing, number of distribution platforms.

The discussion that follows details a number of these distribution services and platforms. As these examples demonstrate, there is simply no credible basis for arguing that the flow of video programming from producer to consumer is in any way being impaired -- or can be impaired -- by any cable operator. Rather, the paths for distribution of video programming are multiplying, and this trend can be expected to continue given the rapid pace of technological innovation in the video programming marketplace.

a. Broadcast Stations and Networks

A producer of video programming can ensure that its programming reaches consumers merely by selling its programming to any one of eight national broadcast networks (ABC, CBS,

NBC, FOX, WB, UPN, PAX, and PBS).[42] These broadcast networks buy substantial amounts of video programming and reach a huge number of consumers.[43]

Large broadcast ownership groups, such as Viacom, Tribune, Cox, Univision, and Gannett, offer another opportunity for producers to sell their programming and consumers to view it. Sale of programming to one of the major station groups (through direct sale or syndication) has the potential to reach a large audience. For example, Viacom covers nearly 39% of U.S. television households.[44] Tribune Broadcasting Company's 26 broadcast television stations cover over 30% of U.S. television households, including all of the top five television markets.[45] Univision's 37 stations reach nearly 23% of U.S. television households.[46]

And, there are 1,747 commercial and noncommercial broadcast television stations nationwide.[47] All of these are buyers of video programming.[48] While many of these broadcast

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[42] *See* George Winslow, *How They Rank and Why*, Broadcasting & Cable, Apr. 18, 2005 (cataloguing broadcast ownership interests of networks and broadcast groups), *available at* http://www.broadcastingcable.com/article/CA525332.html?display=Search+Results&text=station+groups.

[43] Even though nonbroadcast networks, in the aggregate, have recently attracted a higher audience rating than broadcast networks, "individual broadcast networks generally attract higher audience shares than individual nonbroadcast networks." *11th Annual Report* n.392 (citing Nielsen Media Research). In fact, "six of the seven broadcast networks attained average prime time audience shares greater than the average prime time audience share of the highest rated nonbroadcast networks." *Id*.

[44] *See* George Winslow, *supra* note 42.

[45] *Id*.

[46] *See* George Winslow, *Kicking The Upfront Higher; Latino Networks Have Reason for Optimism as They Battle Some Advertising Challenges*, Multichannel News, June 13, 2005, at 24 (noting that during the last season, Univision was the fifth largest network in adults 18 to 49 and that on 21 nights during the last season, Univision managed to be the highest ranked network in the U.S. among 18 to 34 year olds).

[47] *See 11th Annual Report* ¶ 78.

[48] As the Commission noted in its most recent video competition report, "Broadcast stations and networks, and nonbroadcast networks alike must either produce programming or purchase programming from third-party producers." *Id.* ¶ 14; *see also 10th Annual Report* ¶ 16 (same).

television stations are affiliated with one of the major broadcast networks -- and get much of their prime time programming from the networks -- broadcast station owners still ultimately decide what programming is carried on their stations. Consequently, broadcast station groups or individual stations will typically buy non-network programming in the syndication marketplace to fill out their channel lineups, including, but not limited to, sports and other local interest programming.[49]

It is important to note that program producers can deliver their programming over these broadcast networks and broadcast stations, and consumers, including consumers in cable homes, can receive that programming, in part because all of the networks and virtually all of the broadcast stations are carried in cable homes pursuant to the retransmission consent or must carry rules.

b. Non-broadcast Programming Networks

Similarly, a program producer can sell its programming to scores of non-broadcast networks that are carried by virtually all cable systems and, in this way, ensure their ability to reach the vast majority of consumers nationwide. According to the Commission, the Discovery Channel, ESPN, CNN, TNT, TBS, USA Network, Nickelodeon, C-SPAN, A&E, Lifetime Television, The Weather Channel, Spike TV, TLC, ABC Family Channel, ESPN2, MTV, CNN Headline News, VH1, CNBC, and the History Channel all reach over 85 million subscribers and

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[49] *See, e.g.*, Ben Steverman, *West Metro Insider: Local TV Show is Quadrupling the Jokes*, Star Tribune (Minneapolis, MN), July 13, 2005, at 5W (announcing the move of a local comedy program from cable access to a weekly prime-time slot on local broadcast TV); Press Release, Minnesota Sports & Entertainment, *Wild Announce Partnership With KSTC.TV, Channel 45* (Dec. 23, 2004) (quoting Susan Anderson, station manager at KSTC-TV: "[p]roviding local programming is a priority to Channel 45 . . . . With the addition of the Minnesota Wild, Channel 45 continues its commitment to bringing quality sports programming to our viewers while showcasing one of Minnesota's greatest traditions"), *available at* http://www.wild.com/team/010/497/.

are carried by virtually all cable systems.[50] In addition, most cable systems carry numerous other programming networks, including, among others: QVC, HGTV, Cartoon Network, Fox News, AMC, Animal Planet, Comedy Central, Food, E!, HSN, Disney, FX, TV Land, Sci Fi, MSNBC, Court TV, BET, Bravo, Travel, TV Guide, CMT, Fox Sports, C-SPAN II, TCM, Hallmark, Golf, SPEED, Outdoor Life, Shop NBC, GSN, Discovery Health, ESPN Classic, WE, MTV2, Oxygen, EWTN, and National Geographic.[51] There are also dozens of premium channels to whom a program producer can license program content, including, among others, HBO, Cinemax, Showtime, The Movie Channel, and Starz! (as well as the many digital multiplex services associated with each of these services).

The number of non-broadcast program networks is enormous and continues to grow. According to the Commission, there are now almost 400 national non-broadcast networks and 90 non-broadcast regional networks.[52]

c. MVPDs

Distribution of non-broadcast networks (and redistribution of broadcast networks) is not limited to cable operators. These programming networks enjoy widespread distribution on other MVPD systems as well. For example, the non-broadcast networks referenced above are carried

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[50] *11th Annual Report* Table C-6 (noting that subscriber figures may include non-cable services, including DBS).

[51] *See* Nat'l Cable & Telecom. Ass'n, *Industry Overview, Cable Program Networks*, *at* http://www.ncta.com/industry_overview/programList.cfm?PageID=296 (last visited July 29, 2005).

[52] *See 11th Annual Report* ¶ 15.

by DIRECTV and EchoStar as well as cable overbuilders, including Knology, Everest Connections, Grande Communications, RCN, and others.[53]

In addition, new avenues of distribution are emerging. Several telephone companies are actively deploying fiber networks to millions of customers and plan to begin offering a wide array of programming options by the end of this year.[54] Verizon alone has deployed millions of miles of fiber in many communities where it offers its phone service, including communities in Massachusetts, New York, New Jersey, New Hampshire, Maryland, Pennsylvania, and Virginia.[55] In anticipation of the broad rollout of their video offerings, the telephone companies are currently signing carriage agreements with a variety of programmers.[56] For example, Verizon has already signed programming carriage agreements with NBC Universal Cable, STARZ! Entertainment, Showtime Networks, A&E Television Networks, Discovery Networks,

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[53] As noted, *supra* note 2222, DBS alone accounts for 27.8% of MVPD subscribers today. The Commission reports that overbuilders account for another 1.52% of MVPD subscribers nationwide. *See 11th Annual Report* Table B-1 (noting that broadband service providers have 1.4 million subscribers). Thus, combined, DBS and overbuilders account today for over 29% of MVPD subscribers nationwide.

[54] *See* Press Release, Verizon Communications Inc., *Town of Herndon Awards Video Franchise to Verizon* (July 20, 2005) (reporting that Verizon will begin offering "hundreds of digital video and music channels, high-definition programming, video-on-demand content, a robust interactive programming guide and other customer-friendly features multichannel video services" in Texas later this year, and that additional communities will receive service after the initial rollout); Matt Stump, *SBC Reports DSL Gains*, Multichannel News, July 21, 2005 (noting that "IPTV soft-launches later this year"); *see also* Press Release, BellSouth Corp., *BellSouth Boosts Fiber Deployment Following FCC Order* (June 30, 2005) (reporting that BellSouth plans to increase its fiber-to-the-curb deployment).

[55] *See generally* Verizon Communications Inc., *Newscenter* (listing press releases announcing deployment of Verizon's FiOS network), *at* http://newscenter.verizon.com/ (last visited Aug. 8, 2005).

[56] *See, e.g.,* Linda Moss, *Latinos on Verizon's Horizon*, Multichannel News, Apr. 25, 2005 (describing Verizon's programming deal with NBC Universal, including both NBC Universal's existing cable networks and retransmission consent for 14 NBC owned-and-operated broadcast stations and 16 Telemundo TV stations), *available at* http://www.multichannel.com/article/CA527207.html?display=Search+Results&text=latinos; Reuters, *Verizon Signs First Video Deal With Time Warner*, *supra* note 30 (describing Verizon's programming deal with Time Warner, allowing it to carry several networks, including CNN, TNT, TBS, Cartoon Network and Turner Classic Movies).

NFL Network, and a host of other programmers.[57] Similarly, SBC has been actively negotiating with programmers for carriage, but has yet to announce specific deals.[58]

d. The Internet

As the Commission has noted, video provided over the Internet "promises to become an increasingly strong participant in the market for the delivery of video programming."[59] Recent marketplace developments confirm that view. A recent front page article in the *Philadelphia Inquirer* stated: "The rapid growth of high-speed Internet access is turning your computer into a TV alternative."[60] Program producers are now rushing to meet consumer demand for Internet video. According to one industry observer, "The attitude used to be that the Internet is the place

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[57] *See generally* Verizon Communications Inc., *News Center* (listing numerous press releases announcing carriage agreements), *at* http://newscenter.verizon.com/ (last visited June 24, 2005); Steve Donohue, *FiOS TV's $50 Factor*, Multichannel News, May 2, 2005, at 1 (reporting that Verizon is reported to have "reached distribution deals with programmers that would give the company more than 150 channels to market to subscribers"); *Verizon Lines Up Programmers*, Telco Media News, June 16, 2005 ("So far this quarter, [Verizon] has announced deals with NFL Network, SiTV, WealthTV, Varsity TV, Gospel Music Channel, Soundtrack Channel, MavTV and GoITV. Verizon also announced agreements with NBC Universal Cable, Starz Entertainment Group, Showtime Networks, A&E Television Networks and Discovery Networks, and said it's close to finalizing agreements with several other major content-partners.").

[58] *See* Matt Stump, *SBC Reports DSL Gains*, Multichannel News, July 21, 2005 ("SBC said talks with programmers continue, but no deals will be announced until IPTV soft-launches later this year.").

[59] *11th Annual Report* ¶ 113. The Commission provides several examples of video content already being streamed on the Web, including sports, news, and entertainment programming. *See id.* ¶ 116; *see also* Benjamin M. Compaine, *The Media Monopoly Myth: How New Competition Is Expanding Our Sources of Information and Entertainment* at 27 (2005) ("*Compaine Study*") ("Both the absolute numbers and the steep positive trends on adoption, penetration and broadband validates the use of the Internet as a serious avenue for distributing and accessing what have collectively been called the mass media: news, entertainment, information and commerce -- as text, audio and video -- bypassing many of the geographic, regulatory and capital barriers associated with older processes of distributing the same type of content."), *available at* http://www.thenmrc.org/archive/Final_Compaine_Paper_050205.pdf.

[60] *See* David Hiltbrand, *Log On, Tune In*, Philadelphia Inquirer, July 31, 2005 (noting that there are now 35 million broadband subscribers in the U.S. and 100 million worldwide), *available at* http://www.philly.com/mld/philly/entertainment/12264906.htm?template=contentModules/printstory.jsp.

to go for information. It's changing to the notion that the Internet is the place you go to watch things."[61]

Most established media players are launching programming services for the Web. Nickelodeon, for example, recently created TurboNick, a free Internet service that offers 24-hour access to popular programs like SpongeBob SquarePants and Jimmy Neutron as well as original programming.[62] Likewise, CNN is now offering an advertiser-supported video service.[63] According to Jim Walton, the president of CNN News Group, "There is critical mass with high-speed Internet connections, so video is a good user experience. And that means there can be critical mass for advertisers."[64] MTV has launched an advertiser-supported Web service, known as MTV Overdrive, that features music video collections, newscasts, artist interviews, and supplements to hit programs like "The Real World."[65]

Web portals are also providing a growing amount of video programming to Internet users. For example:

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[61] *See id.* (also quoting Pete Snyder, CEO of New Media Strategies, as saying: "All these different industries [e.g., sports, entertainment, news] are in a mad scramble to control Internet television. It's the biggest moneymaking portal of all.").

[62] *See* Viacom Int'l Inc., *TurboNick*, *at* http://www.nick.com/all_nick/turbonick/index.jhtml (last visited Aug. 1, 2005).

[63] *See* Cable News Network, *Video*, *at* http://www.cnn.com/video/player/player.html?url=/video/nitn/latest (last visited Aug. 1, 2005).

[64] *See* Saul Hansell, *More People Turn to the Web to Watch TV*, NY Times, Aug. 1, 2005 ("Internet commercials typically cost about $15 to $20 for each 1,000 viewers, nearly as much as broadcast networks charge. The price is high because there is more demand from advertisers than there is Internet video programming available."); *see also* David Hiltbrand, *supra* note 60 (noting that advertising revenue for Internet TV will reach $1.15 billion this year, and quoting Lee Westerfield, media analyst for investment bank Harris Nesbitt, as saying: "It's the fastest-growing major segment of Internet advertising. And all of that is money that would have been spent on traditional television.").

[65] *See* MTV Networks, *MTV Overdrive*, *at* http://www.mtv.com/overdrive/ (last visited Aug. 1, 2005).

- AOL's live webcasts of the Live 8 concert series in July 2005 drew five million viewers. Those viewers could instantly flip among the concerts in London, Paris, Philadelphia, Toronto, Rome, and Berlin.[66]

- Yahoo! recently announced agreements to use daily video clips from CNN.com and video-on-demand content from ABC News.[67] Yahoo! also carries Pepsi Smash, a TV music concert series carried on the WB Network for the past two summers.[68] Yahoo!'s director of programming development, Lloyd Braun, said he is "exploring dozens of video ideas, including original Internet programming in nearly every genre that has worked on television, including news, sports, game shows, dramas, sitcoms, and talk shows."[69]

- Google is actively recruiting networks and producers to participate in "Google Video,"[70] and ESPN.com is partnering with Major League Baseball ("MLB") to stream MLB games to fans.[71] Fans can access streams of the full baseball games, condensed versions, expanded highlights, and individual play highlights.[72] In addition, the games are archived so they may be accessed at any time.[73] MLB Advanced Media is also branching out into other sports programming, most recently, announcing that it will carry video of the World Track & Field Championships.[74]

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[66] *See* Saul Hansell, *supra* note 64 (also noting that consumers rated AOL's coverage of the Live 8 concerts more highly than MTV's competing coverage).

[67] *See Yahoo to Partner With CNN, ABC for Video*, Associated Press, Aug. 1, 2005, *available at* http://abcnews.go.com/Technology/wireStory?id=996057.

[68] *See* Jefferson Graham, *Major Sites Hope to Keep Users 'Tuned in'*, USA TODAY, June 15, 2005, *available at* http://www.usatoday.com/money/industries/technology/2005-06-15-webnetworks_x.htm. (quoting Katie Lacey, a Pepsi marketing executive, as saying the fact that a TV show, even a low-rated one such as Pepsi Smash, could move from the television to the Internet "shows that the Internet has really transformed from an information exchange into an entertainment medium").

[69] *See* Saul Hansell, *supra* note 64.

[70] Jefferson Graham, *supra* note 68.

[71] *See* ESPN Internet Ventures, *MLB.TV, at* http://mlb.mlb.com/NASApp/mlb/mlb/subscriptions/espn_mlbtv.jsp?affiliateID=ESPN&partnerId=ESPN_MLBTV_homepageText (last visited Aug. 1, 2005).

[72] *See id.*

[73] *See id.*

[74] *See* Press Release, World Championships Sports Network LLC, *Groundbreaking Webcast of World Track & Field Championships To Be Available* (July 22, 2005) (announcing partnership between World Championships

(footnote continued…)

- Time Warner recently announced a joint venture with AOL, AEG (a "world-leading" sports and entertainment presenter), and XM Satellite Radio to create "Network Live," the first multi-platform digital entertainment company that will deliver live programming focusing on music and comedy performances through the Internet, satellite, and other third party global media platforms such as VOD, wireless and HDTV.[75]

There are also many new players in the Internet video space.[76] For example, Akimbo, a California-based company that provides video programming content over a broadband connection, offers over 75 channels, including many well-known networks, (*e.g.*, CNN, BBC, A&E, Cartoon Network), as well as lesser-known, niche programming (*e.g.,* Baby Channel, sail.tv, VegTV).[77] Likewise, DaveTV, an Atlanta-based media distributor, will soon begin offering over 100,000 hours of niche video programming over broadband Internet connections.[78] DaveTV's "narrowcasting" will provide consumers with pay-per-view niche video programming and will enable advertisers to tailor marketing efforts to these highly specific markets.[79]

(…footnote continued)

Sports Network and MLB Advanced Media to provide Webcast video of the event), *available at* http://www.wcsn.com/news/press_release.jsp?ymd=20050722&content_id=0001.

[75] *See* Press Release, Time Warner Inc., *AEG, America Online and XM Satellite Radio Join Forces with Executive Producer of Live 8, Kevin Wall, to Create 'Network Live,' the First Multi-Platform Digital Entertainment Company for Live Programming* (July 13, 2005), *available at* http://www.timewarner.com/corp/newsroom/pr/0,20812,1083088,00.html.

[76] *See Compaine Study* at 31 ("Even as the old television networks adjust to the impact of multichannel distribution alternatives such as cable and satellite, these new players are looking over their shoulder at the Internet and the telephone companies as potential competitors.").

[77] *See* Akimbo Systems, *What's On*, *at* http://www.akimbo.com/whatson.html (last visited July 29, 2005); *see also* Matt Stump, *Akimbo Makes Full Cable Pitch*, Multichannel News, Aug. 1, 2005 (noting that Akimbo has collected 3,500 programs from 140 producers, including a "bevy of independent video content."), *available at* http://www.multichannel.com/index.asp?layout=articlePrint&articleid=CA630915.

[78] *See* Mark Jewell, *Next on Internet: Niche TV; Several Small Firms Offer Programming To Fit Any Taste*, Columbian (Vancouver, WA), May 16, 2005, at E1.

[79] *See id.*

Moreover, AOL Video now offers a service enabling users to create and display their own video channels using a Webcam and easy-to-use software from WinAmp.[80] According to one industry provider, "With WinAmp, AOL has allowed users to create bootleg television stations. That's grown faster than anything I've seen in five years. A few months ago, it was a handful. Now there are hundreds."[81]

Downloadable video is another rapidly growing Web-based video delivery option.[82] CinemaNow offers feature films and other video on the Internet, available on a pay-per-view, download-to-own (also known as "digital sell-through"), or subscription basis;[83] Greencine, primarily a DVD rental business, also offers downloadable versions of alternative films;[84] and Netflix has recently announced that they plan to offer downloadable movies by the end of the year.[85] Starz! Ticket is another subscription-based Internet VOD service that provides

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[80] Jefferson Graham, *supra* note 68.

[81] *See* David Hiltbrand, *supra* note 60 (quoting Craig Stadler, CEO of East Bay Technology, which manufacturers a popular video-content finder).

[82] *See Compaine Study* at 45 ("Video and film via the Internet are on the verge of becoming more mainstream. As some of the local telephone carriers upgrade their systems with fiber optic cable to the curb or the home, the transmission speed of downloads will be competitive with cable and satellite services.").

[83] According to its website, CinemaNow's content library "contains approximately 7,500 feature-length films, shorts, music concerts and television programs from more than 250 content licensors, including 20th Century Fox, ABC News, Disney, Endemol, MGM, Miramax, NBC Universal, Sony, Sundance Channel, Warner Bros. and Lions Gate Entertainment." *See* CinemaNow, Inc., *About CinemaNow*, *at* http://www.cinemanow.com/AboutUs-Background.aspx.

[84] *See generally* GreenCine LLC, *at* http://www.greencine.com/main.

[85] *See* Claire Hoffman, *Netflix's Profit Surprises as Firm Gains Wider Audience*, L.A. Times, July 26, 2005, at C1.

consumers access to unlimited movie downloads in addition to a streaming version of the Starz! linear service.[86]

e. Mobile Telephones

In addition to televisions and computer screens, mobile telephones, although a recent entrant into the video programming business, are rapidly becoming a "third screen" for video programming.[87] In late 2003, Sprint launched MobiTV, the world's first live streaming television content service delivered to mobile phones, as part of PCS Vision services.[88] MobiTV provides popular cable channels, including the Discovery Channel, ESPN, the Weather Channel, and Fox News Channel.[89] MobiTV has also partnered with Major League Baseball ("MLB") to offer mobile phone customers the opportunity to watch MLB extended highlights and "top plays" on their handsets[90] and is working toward offering live video of baseball games.[91] Sprint

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[86] *See* Press Release, Starz Entertainment Group LLC, *Starz and RealNetworks Launch First Subscription Premium Movie Service for Broadband* (June 14, 2004), *available at* http://www.prnewswire.com/cgi-bin/micro_stories.pl?ACCT=238613&TICK=NCOR&STORY=/www/story/06-14-2004/0002192122&EDATE=Jun+14,+2004.

[87] Media analysts at Kagan Research predict that, from an operator perspective, wireless video represents an incremental revenues stream approaching $5 billion by 2014. *See* Kagan Research, LLC *Kagan Projects Growing Revenues From Wireless Video*, Kagan Media Money, June 14, 2005, at 3 ("The pieces of the jigsaw are still being assembled, but we think it's clear at this point that wireless video is on its way.").

[88] *See* Press Release, MobiTV, *Watch Live TV Content on Your Sprint Mobile Phone* (Nov. 13, 2003), *available at* http://www.mobitv.com/about/company/press/release_111303.html. ESPN is also planning to launch its own branded wireless phone service later this year that will include access to streaming video over Sprint's high-speed data network. *See ESPN Mobile Phone Service Rings In Soon*, AP, Dec. 1, 2004, *available at* http://sports.espn.go.com/espn/print?id=1935907&type=story.

[89] *See* MobiTV, *Over 25 Channels*, *available at* http://www.mobitv.com/channels/sprint.html (listing programming networks carried by MobiTV).

[90] *See* MLB Advance Media L.P., MLB Mobile: Video, *at* http://mobile.mlb.com/web/smsVideoPrograms.aspx (last visited July 29, 2005).

[91] *See* Matt Hines, *Deals Bring Hardball to Handsets*, CNET News.com, March 14, 2005, *available at* http://news.zdnet.com/2100-1035_22-5615617.html.

also makes available to its customers original video content, including teen-oriented Varsity Mobile.[92] In addition, other wireless content distributors are now providing an increasing amount of content on the major wireless telephone networks. In contrast to MobiTV, which offers linear video programming channels, among other content, RealNetworks' rTV and Verizon's V-CAST provide pre-recorded video clips.[93]

f. VOD

VOD was virtually nonexistent when the cable ownership record was last open in early 2002. Now, VOD provides an enormous additional opportunity for program producers to get their programming to consumers. The VOD model can be particularly attractive for newer producers, but it is also being pursued by established networks.[94] Both VOD audience and usage numbers have grown exponentially since its inception.[95] Industry analysts estimate that, "by the

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[92] *See* Joel Meyer, *Teen-Targeted Mobile Media Net Launches*, Broad. & Cable, July 27, 2005 (explaining that "Varsity Mobile features user-submitted video clips of just about anything a teen might shoot with a camera: snowboarding, comedy skits, even garage bands"), *available at* http://www.broadcastingcable.com/index.asp?layout=articlePrint&articleID=CA629563.

[93] Verizon has reported strong uptake on its V-CAST wireless video program since its launch in early February. *See* Kagan Research LLC, *supra* note 87, at 3.

[94] For example, VOD services from traditional programming networks such as HBO On Demand provide consumers with more freedom and flexibility in their viewing schedules. *See generally* Home Box Office, Inc., *What is HBO On Demand?*, *at* http://www.hbo.com/hboondemand/faq.html (last visited July 29, 2005).

[95] Advertisers are scrutinizing VOD usage, increasing the likelihood that more incentives for VOD programming will develop. Rentrak, a research solutions firm, offers OnDemand Essentials, which provides cable operators, content providers, and advertisers with a real-time transactional tracking and reporting system to view and analyze on-demand content. Rentrak analyzes over 50% of VOD-enabled households using OnDemand Essentials, which has been adopted quickly by VOD providers. *See* Press Release, Rentrak Corp., *Rentrak and Charter Team to Track Video On Demand Content Usage and Ratings* (March 23, 2005); *see also* Press Release, Rentrak Corp., *Rentrak Adds Bresnan Communications Systems to OnDemand Essentials Trials* (July 20, 2005); Press Release, Rentrak Corp., *Comcast and Rentrak to Make Video on Demand Monthly Summary Reports Available to Participating Content Providers* (Mar. 3, 2005); Press Release, Rentrak Corp., *Cablevision and Rentrak Launch Groundbreaking On Demand Rating System* (Feb. 28, 2005); Press Release, Rentrak Corp., *Rentrak Welcomes Music Choice as First Network Customer of On Demand Essentials Measurement Service* (Aug. 11, 2004). All press releases are available at http://www.rentrak.com. The increased information on usage will increase understanding as to how VOD content is being viewed and, accordingly, enhance targeted programming. Nielsen,

(footnote continued…)

end of 2005, 23.9 million U.S. homes will have access to VOD from their local cable operator."[96]

Program producers can license their programming directly to MVPDs or via services that package VOD programming for MVPD distribution, such as TVN and iN DEMAND. For example, TVN, the largest distributor of on demand content, currently packages and distributes more than 2,000 hours of VOD programming every month, including movies, children's and Spanish language content, genre-themed on demand channels, subscription VOD, and major cable network programming.[97] Likewise, iN DEMAND offers VOD content, including television premieres of movies, major pay-per-view sport events, and a large library of other sport, movie, and entertainment titles.[98]

Comcast's own experience with VOD demonstrates that VOD is an increasingly important video distribution outlet for consumers and program producers. Launched in 2004, Comcast ON DEMAND is now available to 87% of Comcast subscribers.[99] It provides a wide variety of VOD content, including programming from popular linear networks such as HBO,

(…footnote continued)

in response to client demand, is developing a system for measuring VOD audiences and plans to offer three VOD reports in January 2006. *See* Ken Kerschbaumer, *Nielsen to Measure on Demand Audience*, Broad & Cable, May 30, 2005, *available at* http://www.broadcastingcable.com/article/CA604597.html?display=Technology.

[96] NCTA, *2005 Mid-Year Industry Overview* at 17 (citing Kagan Research LLC), *available at* http://www.ncta.com/industry_overview/CableMid-YearOverview05FINAL.pdf.

[97] *See* TVN Entertainment Corp., *Who We Are*, *at* http://www.tvn.com/highlight.asp?x=1&y=2&z=2 (last visited July 29, 2005).

[98] *See* iN DEMAND L.L.C., *iNside iN DEMAND*, *at* http://www.indemand.com/about/who.jsp (last visited July 29, 2005).

[99] *See* Ken Kerschbaumer, *ME TV: Cable Operators Fine-tune Economical Ways For Consumers To Customize Viewing Time*, Broad. & Cable, June 13, 2005, *available at* http://www.broadcastingcable.com/index.asp?layout=articlePrint&articleID=CA607716.

Nickelodeon, Discovery, MTV, and Comedy Central.[100] In addition, Comcast ON DEMAND offers newscasts from local broadcast stations and other local programming in several markets. In Boston, for example, local newscasts remain available to Comcast ON DEMAND viewers for 24 hours while longer programs, news magazine shows and certain sports events will remain on the service for up to a week.[101]

Comcast continues to expand its VOD offerings. For example, it recently signed a deal with Starz! that will allow Comcast to add more than 325 top movies a month to the 3,500 program choices -- more than 2,000 hours of programming, about 75% of which is free -- Comcast customers enjoy today on the Comcast ON DEMAND service.[102] Comcast's VOD customers have access to a wide range of programming from such industry leaders as Discovery Kids, Animal Planet, TLC, Nickelodeon, Boomerang, BBC America, CNN, A&E, Food Network, HGTV, ESPN, NFL Network, NBA On Demand, Comedy Central, The Travel Channel, and Gratis en Español.[103] Comcast also recently launched PBS Kids Sprout on Demand, a VOD service that features Sesame Street, Barney, and other well known children's

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[100] *See* Press Release, Comcast Corp., *Comcast Announces Additional Content Partners For Video On Demand Service In Philadelphia* (Jan. 17, 2003), *available at* http://www.cmcsa.com/phoenix.zhtml?c=147565&p=irol-newsArticle&ID=451265. Comcast's Philadelphia system offers 5,500 free VOD programs. *See* Ken Kerschbaumer, *supra* note 99 (reporting that more than 90% of the free VOD programs were watched at least once during March 2005).

[101] *See* Peter J. Howe, *Comcast Launches Video-On-Demand Package with Local Programming*, Boston Globe, Apr. 16, 2004, at D1 (describing on-demand offerings in Boston market); *see also id.* (quoting Jon Abbott, general manager of public TV station WGBH, as saying that VOD "can extend the reach and impact of some of our award-winning programs. Viewers live busy lives, and now they can watch our programs at a time that works for them.").

[102] *See* Press Release, Comcast Corp., *Comcast Reports Second Quarter 2005 Results*, at 1 (Aug. 2, 2005) ("*Comcast 2Q05 Earnings Release*"), *available at* http://www.cmcsk.com/phoenix.zhtml?c=118591&p=irol-newsArticle&ID=738204&highlight=.

[103] *See* Comcast Corp., *On Demand* (listing Comcast's VOD offerings), *at* http://comcast.m0.net/m/p/com/mic/Index.asp?email=&cmp=&custom= (last visited Aug. 8, 2005).

programming.[104] As described by Brian L. Roberts, Comcast's Chairman and CEO: "In June, our customers viewed over 112 million ON DEMAND programs, a 10 million increase in 3 months, as we continue to provide an unmatched product with more choice and customer value."[105] Mr. Roberts also noted that Comcast customers are on pace to view over *one billion* VOD streams in 2005.[106]

The *Second Further Notice* invites specific comment on the effect that VOD may have on "the opportunity for independent programmers to gain distribution of their programming."[107] As the discussion above reflects, the short answer is that the VOD platform provides substantial opportunities for distribution. Established services like HBO and ESPN are providing VOD programming. New services, like Anime Network, are utilizing VOD. And consumers are watching VOD in substantial and increasing numbers.

To further enhance the opportunity of VOD, Comcast has launched a service known as "Select On Demand" that is specifically designed as an incubator for new programming content. This allows Comcast both to test potential networks that may not yet have enough content, and to carry content that may be too targeted to warrant creation of a traditional linear network.[108]

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[104] *See* Press Release, Comcast Corp., *Big Bird, Barney, and Bob the Builder Come Together in a Whole New Way as PBS Kids Sprout Launches on Comcast* (Apr. 4, 2005), *available at* http://www.cmcsk.com/phoenix.zhtml?c=147565&p=irol-newsArticle&ID=691220&highlight=sprout.

[105] *Comcast 2Q05 Earnings Release* at 1.

[106] *See* Transcript, *Q2 2005 Comcast Corporation Earnings Conference Call*, Thomson StreetEvents Final Transcript, at 2 (Aug. 2, 2005) ("*Comcast Earnings Call Transcript*").

[107] *Second Further Notice* ¶ 55.

[108] *See* Shirley Brady, *Comcast's Matt Strauss Discusses Select On Demand*, CableWorld, June 20, 2005, *available at* http://www.findarticles.com/p/articles/mi_m0DIZ/is_2005_June_20/ai_n14711650 (quoting Matt Strauss, Comcast's Vice President of Video on Demand Investments, as saying: "Roughly 60 to 70% of all digital subs use on demand every month. So when we look at the landscape it's really clear that the future of television is

(footnote continued…)

"Select On Demand" includes 15 new virtual networks that each include a collection of original programming organized by particular themes. For example, a "Wheels and Wings" channel is focused on content for car enthusiasts, while another channel, "Anime Selects," offers a broad array of animation programming.[109] Comcast aims to continue to expand these offerings and give more creative start-up programmers an opportunity to gain exposure and build an audience.

There are numerous other examples of independent programmers using the VOD platform to launch their services. For example, Here!, programming directed at gay consumers, launched as a VOD service.[110] Foreign language and other niche content is also gaining exposure on VOD. For example, Comcast's VOD programming options now include "Gratis en Español" and "Bollywood and Beyond."[111] In addition, Spanish-language children's programming is often delivered via VOD,[112] and World Wrestling Entertainment, Inc. recently

(…footnote continued)

not going to be adding channel 343 to the digital lineup, but it's going to be to migrate more and more programming over to on demand, which really is a superior way to watch programming."); *see also id.* (quoting Matt Strauss as saying: "The genesis of Select on Demand was that as we continue to grow the [VOD] offering and expand the offering, there is really now more than ever a crossroad in cable television where programming that was potentially too targeted to warrant being a linear network, or programming that really couldn't work well in a linear environment, now could have a destination on TV.").

[109] *See id.* More details about Select On Demand are available at http://www.selectondemand.com/.

[110] *See* Jim Finkle, *Out of the Closet and All Over TV*, Broad. & Cable, Mar. 21, 2005 (explaining that Here! has "focused on building out video-on-demand (VOD) and subscription video-on-demand (SVOD) services at their launch, figuring that cable operators would be attracted to a format that many experts believe could be the future of pay TV"), *available at* http://www.broadcastingcable.com/index.asp?layout=articlePrint&articleID=CA511781; *see also* R. Thomas Umstead, *VOD's The Ticket for Some TV Startups, Indie Programmers Make Inroads by Proffering Content On-Demand*, Multichannel News, May 3, 2004, at 76.

[111] *See* Glenn Lovell, *Multicultural TV Programming a Hit*, Contra Costa Times, July 27, 2005, *available at* http://www.fortwayne.com/mld/cctimes/entertainment/12233696.htm?template=contentModules/printstory.jsp (describing Comcast's offering of Bollywood movies on demand). In addition, Comcast's "Gratis en Espanol" service offers on-demand Spanish-language content, including movies, sports, music, and family programming. *See id.*

[112] Paige Albiniak, *Niche Plays*, Broad. & Cable, June 13, 2005, *available at* http://www.broadcastingcable.com/index.asp?layout=articlePrint&articleID=CA607711.

announced the development of Spanish-language on-demand wrestling and sports-entertainment, which it expects to distribute via multiple cable networks.[113]

g. Digital Video Recorders ("DVRs")

DVRs allow consumers to record programming onto a hard drive located in a set-top box, which can then be played back at any time. DVRs thereby enable consumers to view programming whenever they want to, rather than when it airs in real-time. When the Commission last considered the cable ownership issue in 2001, few homes had a DVR. Now, there are over 9 million households with DVRs,[114] and those numbers are projected to increase to 55 million households by 2010.[115] Comcast now has over 575,000 DVR subscribers.[116] Moreover, the functionality of DVRs continues to increase. DVRs today can typically record 80 hours or more of standard definition programming (double the amount of programming from just a few years ago)[117] and some models enable dual tuning, home-networking of programming, and

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[113] *See* R. Thomas Umstead, *WWE To Roll Out Spanish VOD Fare*, Multichannel News, July 25, 2005, *available at* http://www.multichannel.com/index.asp?layout=articlePrint&articleID=CA628921.

[114] *See* Kagan Research LLC, *Kagan Media Index*, Kagan Media Money, July 26, 2005, at 6.

[115] *See* Joel Meyer, *DVRs On the Rise*, Broad & Cable, July 21, 2005, *available at* http://www.broadcastingcable.com/index.asp?layout=articlePrint&articleID=CA628453.

[116] *See In re Applications for Consent to the Assignment and/or Transfer of Control of Licenses from Adelphia Communications Corporation to Time Warner Cable Inc. and Comcast Corporation*, Applications and Public Interest Statement, filed in MB Dkt. No. 05-192, at 47 (May 18, 2005) ("*Adelphia Public Interest Statement*").

[117] *Compare* Daisy Whitney, *Is VOD Cable's Satellite Killer?; Service May Give Wired Providers the Edge Over Dish Competition, But Not All Are Convinced*, Electronic Media, Mar. 4, 2002, at 9 (quoting Yankee Group analyst Adi Kishore as saying that "most current DVR models allow for 30 to 35 hours of storage at any one time"), *with Adelphia Public Interest Statement* at 37 (noting that Comcast's DVR service currently enables consumers to record over 80 hours of analog programming and up to 20 hours of HD programming).

recording of HD programming.[118] In addition, TiVo, a major provider of DVR products and services, announced plans last year to develop a movie download service with Netflix.[119]

h. Home Video Sales and Rentals

The sale and rental of home video, including videotapes and DVDs, provide yet another distribution outlet for video programming.[120] According to the Commission's most recent video competition report, approximately 91% of TV households have VCRs and 70% have DVD players, and U.S. households spend $22.5 billion annually on purchasing and renting DVDs and videocassettes.[121] Moreover, it is easier than ever before for consumers to buy and rent these products. Consumers can purchase DVDs and videocassettes from retail chains, such as Target and Wal-Mart, or from online companies, such as Amazon. According to one source, "For the past eight years, the studios have been able to bank on revenue from sales and rentals of DVDs, which have accounted for 60% of entertainment companies' bottom lines, compared to just 20% taken in ticket sales."[122] Rental options are also expanding. In addition to renting from

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[118] *See, e.g.*, http://broadband.motorola.com/dvr/dct6412.asp (product description for Motorola's DCT-6412, a set-top box with HD, DVR, and dual tuning features); http://www.scientificatlanta.com/consumers_new/Cable Boxes/8300mr.htm (product description of Scientific-Atlanta's Explorer 8300 HD Multi-Room, a set-top box with HD, DVR, dual tuning, and home networking features).

[119] *See* Stefanie Olsen & Richard Shim, *TiVo, Netflix Sign Movies-On-Demand Deal*, CNET News.com, Sept. 30, 2004, *at* http://news.com.com/TiVo,+Netflix+sign+movies-on-demand+deal/2100-1041_3-5390718.html.

[120] *See 11th Annual Report* ¶ 120 (noting that the sale and rental of home videos "are considered part of the video marketplace because they provide services similar to the premium and pay-per-view offerings of MVPDs").

[121] *See id.* ¶ 121.

[122] T.L. Stanley, *Studios Reel as DVDs Show Wear; Hollywood's Cash Cow Drying Up?*, Advertising Age, July 11, 2005, at 1.

Blockbuster stores, for example, consumers can also rent via online services, such as Netflix.[123] Consumers "rented more than one billion DVD units during the first 26 weeks" of 2005.[124]

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In short, there are a wide variety of distribution services and platforms enabling the flow of video programming from program producers to consumers. There is simply no credible marketplace evidence that cable operators are impeding (or can impede) the flow of programming.

2. Cable Operators Are Not Impeding The Development Or Success of Video Programming Networks.

As noted above, the horizontal ownership statute commands the Commission to consider whether a cable operator can unfairly impede the flow of video programming to consumers, rather than focus narrowly on the economic success of video program networks. But even if the Commission were to restrict its focus to the latter -- which would plainly be inconsistent with the statute and wrong as a matter of logic -- there is simply no way the Commission can justify an ownership limit on a claim that there are impediments to the development or success of such networks.

There continues to be explosive growth in the supply of video programming networks. The Commission recently found that there were approximately 388 satellite-delivered national

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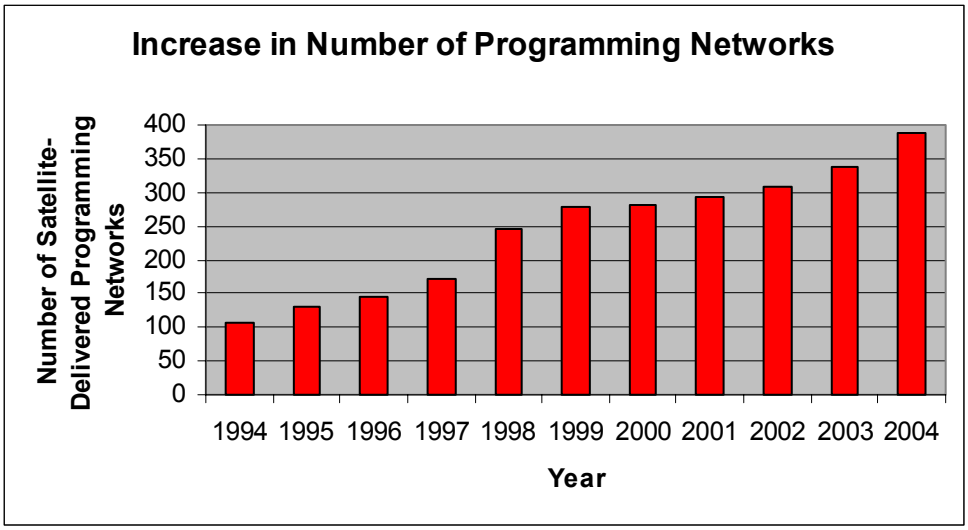
[123] Formed in 1999, Netflix already has attracted 3 million subscribers and now handles the online DVD rental business for Wal-Mart. *See* Michael Liedtke, *Netflix Takes Over Wal-Mart's DVD Rentals*, Associated Press, May 19, 2005 (also noting that Blockbuster operates a competing online rental business).

[124] Press Release, Rentrak Corp., *Rentrak Reports One Billion DVD Units Rented in U.S. Home Video Rental Market During First Half 2005; Video Rental Market Down Slightly at Mid-Year, yet Sustained by Previously-Viewed Sales* (July 14, 2005), *available at* http://www.rentrak.com/mc_press_release?file=071405.

programming networks in 2004, an increase of 49 networks over the 2003 total.[125] As the following chart depicts, since the Commission's first report on video competition, the number of programming networks available to consumers has more than tripled, from 106 networks in 1994 to 388 networks in 2004, *an increase of 266 percent*.



Over the past three years, Comcast alone has reached carriage agreements with over 15 unaffiliated programmers (representing over 50 channels), including some relatively small, independent programmers. Those channels, cumulatively, will reach tens of millions of subscribers. Over the life of these carriage arrangements, the cumulative cost to Comcast will be billions of dollars.

Furthermore, new programming networks now have the ability very rapidly to reach a substantial number of viewers. The following examples illustrate the point:

- **NFL Network:** In less than two years, the NFL Network has more than quadrupled its viewership: the network launched on DBS in November 2003 and

[125] *See 11th Annual Report* ¶ 145.

initially reached 11.5 million homes.[126] Today, less than two years later, NFL Network reaches over 50 million households.[127]

- **LOGO:** Since its launch in June 2005, LOGO, a programming network that serves the gay, lesbian, bisexual, and transgender community, has attracted more than 13 million digital-cable subscribers and is expected to be available in more than 18 million homes after Comcast launches the service in the next few months.[128]

- **TV ONE:** A channel aimed at African American adults, TV One is now available in more than 21 million households 18 months after launch.[129]

- **Fine Living:** Fine Living, which debuted in March 2002, currently boasts more than 24 million subscribers for 100% original lifestyle programming covering adventure, favorite things, transport, personal space, and every day topics.[130]

- **OXYGEN:** Oxygen, the only cable network owned and operated by women, has grown rapidly since its launch in 2000, and it now reaches 55 million homes.[131] Oxygen became profitable in 2004.[132]

- **College Sports TV:** In a little over two years since its launch in April 2003, College Sports TV obtained distribution agreements with MVPDs representing more than 65 million homes.[133] Since its launch, the network has televised more

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[126] *See Power Sweep*: *Steve Bornstein, NFL Network*, CableFAX Magazine, Apr. 2005, at 19.

[127] *Id*.

[128] *See* Joe Mandese, *The Rainbow Connection; The Gay Community Has Money to Burn, but Few Marketers Know How to Reach It*, Broad. & Cable, July 25, 2005, at 22.

[129] *See* Press Release, TV One, *TV One and Time Warner Announce Affiliation Agreement* (June 22, 2005), *at* http://www.tvoneonline.com/inside_tvone/news_content.asp?ID=1053.

[130] *See* Press Release, Scripps Networks Inc., *Fine Living TV Network Treats Viewers to a Two-Day Winter Wonderland Event Dec. 24-25* (Dec. 17, 2004), *available at* http://www.fineliving.com/fine/press_releases/article/0,1663,FINE_1460_3570198,00.html; Mike Farrell, *Linking Databases, Easing Headaches; Programmers Struggle for Balance In Their Books*, Multichannel News, July 25, 2005, at 58; Linda Moss, *Fine Living Needs New Chief*, Multichannel News, Sept. 6, 2004, at 11.

[131] *See* Press Release, Oxygen Media, *Oxygen Is Worth It! Oxygen Launches Unique Marketing Campaign In Partnership With Cox* (July 25, 2005), *available at* http://www.oxygen.com/pressreleaseuploads/Jul05/OXYGEN%20WORTH%20IT.doc.

[132] *See id.*

[133] *See* CSTV Networks, Inc., *About Us, Company Overview*, *at* http://www.collegesports.com/online/ (last visited Aug. 8, 2005).

> than 6,000 hours of original programming, including more women's sports coverage than any other network.[134]

Moreover, the dramatic increase in the number of programming networks has led to an impressive increase in the diversity of programming available to consumers.[135] For instance, since 2004, several programming networks have launched that target a wide variety of ethnic audiences, including, among many others: ImaginAsian,[136] Sí TV,[137] Africast Television,[138] AZN,[139] ESPN Deportes,[140] and the History Channel en Español.[141] As one experienced industry observer and analyst, Benjamin Compaine, has noted: "The empirical reality does not support the notion that in the United States, in 2004, consumers of content via the media have fewer

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[134] *See id.*

[135] *See* Evie Haskell, *500 Channels! (Really),* The Bridge: Annual Report -- Part IV of V, Apr. 1, 2005, at 1 ("By our latest count, we have something in the neighborhood of 450+ national and regional networks, offered 24/7 via cable systems, DBS purveyors and the like. Not surprisingly, these channels represent a kaleidoscope of different interests and mind sets, from church steeples to Al Jazeera, kids' programming to stuff that would make *Hugh Hefner* blush and more.").

[136] Launched in 2004, ImaginAsian TV is the "nation's first 24-hour Asian American television network." *See* Press Release, ImaginAsian TV, *ImaginAsian TV Sets Premiere for August 30; Nation's First Asian American Network Launches With 5 Million HH* (Aug. 24, 2004), *available at* http://www.iatv.tv/press_release.php.

[137] Sí TV identifies itself as the only "Latino-themed, English-language network in the U.S." *See* Press Release, Sí TV, *Sí TV Launches to Much Fanfare* (Mar. 12, 2004), *available at* http://sitv.com/Press/PressReleases.aspx.

[138] *See* Africast Global Media, Inc., *About Africast* ("The mission of AFRICAST TV is to create a bouquet of destination channels in the U.S. for everything related to Africa and to create a daily window for Americans to experience the diversity, vibrancy and promise of modern Africa."), *at* http://www.africast.tv/africast/aboutus.html?sid=Hl5pBin9AAU3Z5Uct8am (last visited July 29, 2005).

[139] AZN Television is a "cable channel targeting Asian Americans." *See* Press Release, AZN Television, *International Channel Rebrands as AZN Television on March 28* (Mar. 22, 2005), *available at* http://www.i-channel.com/press.aspx.

[140] ESPN Deportes is a "24-hour, Spanish-language sports network." *See* LaughingPlace.Com, *ESPN to Launch New 24-Hour Spanish Language Network*, June 5, 2005, *available at* http://www.laughingplace.com/News-ID10014160.asp?Headline=1&Date=6/5/2005&Section.

[141] The History Channel en Español is a "new, 24-hour television network dedicated to the Spanish-speaking audience." *See* Press Release, AETN Int'l, *The History Channel to Launch The History Channel En Espanol* (Feb. 23, 2004), *available at* http://www.aetninternational.com/news.jsp?id=10382795.

choices of sources or fewer choices than has been available to them in the past. Just the opposite is true for television: viewers have more choice from more sources than at any time in the history of the medium."[142]

Furthermore, as the Commission has also recognized, expanding cable channel capacity has helped facilitate this explosive growth in video programming choices.[143] Channel capacity has grown significantly over the past decade with the substantial system upgrades made by the cable industry. In 1992, there were typically only 36 analog channels available to cable consumers.[144] Today, by contrast, a typical cable operator offers, on average, over 70 analog channels and over 150 digital channels to consumers.[145]

The enormous diversity of programming available to cable subscribers today is easily demonstrated by comparing the programming choices available to a typical cable household today versus the programming choices available to a household that only receives over-the-air broadcast television. The chart below illustrates those differences in a large (New York City), a medium (El Paso, Texas), and a small (Charleston, West Virginia) market.[146]

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[142] *See Compaine Study* at 1; *see also id.* at 40 ("There are two critical messages here that make up a largely untold -- at or least unheard -- side of competition in the media. First, several meaningful measures show that Americans have more choices of media content than before, certainly in the highly popular television medium. Second, they show that there is no pattern that even suggests that cultural diversity or political discourse are more poorly served by large, publicly owned firms than by small mom and pop firms."); *11th Annual Report* at Separate Statement of Chairman Michael K. Powell ("[T]oday's video marketplace is the most competitive and diverse in our nation's history.").

[143] *See Second Further Notice* ¶ 50.

[144] *See id.*

[145] *See id.*

[146] *See* TV Listings: Local Broadcast Listings, *at* http://tvlistings2.zap2it.com (listing broadcast stations in each market), *see also* Cablevision Channel Lineup, *available at* http://www.cablevision.com/index.jhtml?pageType=lineup&regionId=9&digital=1 (listing channels in Cablevision's New York City systems); Time Warner Channel Lineup, *available at*

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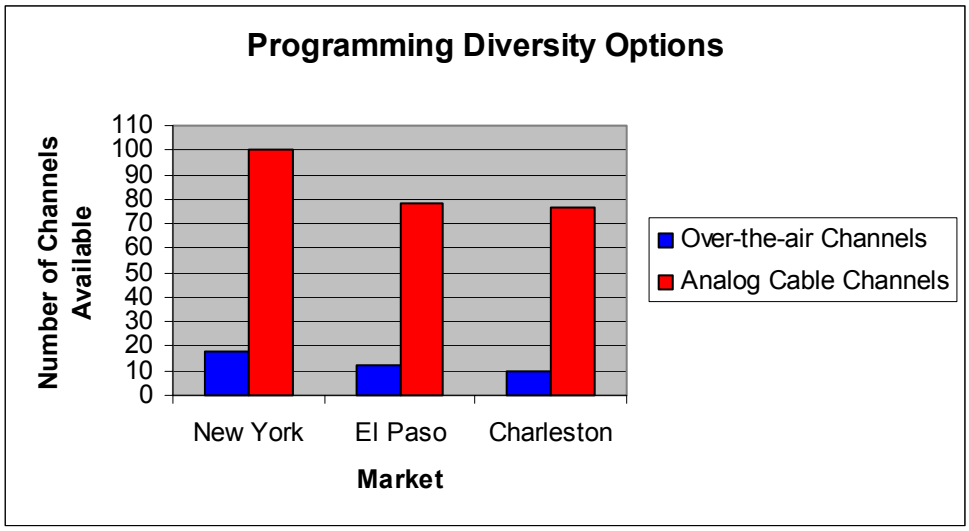


Moreover, the cable systems in all of these markets offer digital tiers of video programming, enabling consumers to access one hundred or more additional channels of programming. In short, the flow of video programming into an MVPD household is immense, especially when compared to a broadcast-only home.[147]

Finally, while the number of programming networks has been *increasing*, the percentage of programming networks that are affiliated with cable operators is steadily *decreasing*. For instance, between 2003 and 2004 alone, the percentage of vertically integrated national programming networks decreased by 10%.[148] This reflects a larger trend: since the

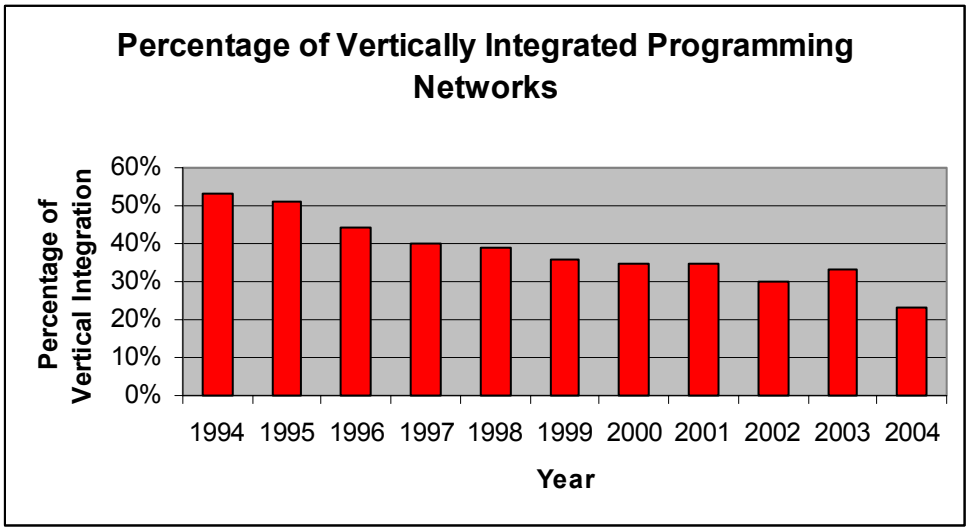
(…footnote continued)

http://www.timewarnercable.com/Media/15/Content Management/Products And Services/documents/elpaso.pdf (listing channels in Time Warner Cable's El Paso system); Charter Channel Lineup, *available at* http://www.charter.com/account/lineup/channel.aspx?ID=625 (listing channels in Charter's Charleston system).

[147] Furthermore, the quality and diversity of cable programming eclipses traditional broadcast content: in 2003, for example, HBO received a record 124 Emmy nominations, "double the number of its closest competitor, NBC." *See* Adam D. Thierer, *Media Myths: Making Sense of the Debate Over Media Ownership* 118 (Progress & Freedom Found. 2005).

[148] *See 11th Annual Report* ¶ 145 (reporting that in 2004, 23% of national programming networks were vertically integrated with at least one cable operator as compared to 33% in 2003).

Commission's first report on video competition in 1994, the percentage of vertically integrated programming networks has fallen from 53% to 23%.



Comcast, for example, owns an attributable interest in only 22 of the 388 programming networks identified by the Commission in its latest video competition report, or 5.6% of the total.[149] Comcast is not vertically affiliated with any of the top-20 rated cable programming networks by subscribership *or* any of the top-15 networks by prime time rating.[150] The attached Comcast channel line-up for Arlington County, Virginia, demonstrates that only a handful of the networks that Comcast distributes are affiliated with Comcast.[151]

A few programmers have complained about their inability to obtain carriage on Comcast cable systems.[152] These programmers attempt to extrapolate their experiences onto the

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149 *See 11th Annual Report* ¶¶ 120-21 & 141-43; *see also Adelphia Public Interest Statement* at 15-16.

150 *See 11th Annual Report* ¶¶ 147-48.

151 *See* Channel Line-up for Comcast's Cable System in Arlington, Virginia, attached hereto.

152 TCR Sports Broad. Holding, L.L.P., *Petition to Impose Conditions or, in the Alternative, to Deny Parts of the Proposed Transaction*, filed in MB Dkt. No. 05-192 (July 21, 2005); The America Channel LLC, *Petition to Deny*, filed in MB Dkt. No. 05-192 (July 21, 2005).

marketplace generally to show that there is a problem with independent programmers gaining carriage on cable systems. But their complaints have no merit. First, as shown above, many independent programmers are distributed on Comcast and other cable systems today. Indeed, the vast majority of program services Comcast carries are unaffiliated with Comcast.

Second, the cable ownership statute is not designed to guarantee that every programming network gets carriage. It is designed to ensure that no single cable operator can impede the flow of programming to consumers. A cable operator, like any other MVPD, must carefully consider every carriage request it gets. It must evaluate the nature of the programming involved, its target demographics, its likely appeal to consumers, its similarities and differences from other available programming, its cost, and numerous other factors. Obtaining a carriage agreement can be a long and difficult process, even in the case of a program service that is based on an attractive idea; that has developed a strategy for translating that idea into specific programming plans; that has attracted management with a demonstrated record of success; and that has raised the capital necessary to support its plans. Notwithstanding these dynamics, it is indisputable that in today's marketplace consumers have access to more and better programming than at any time in history. And the fact that a particular program service may have difficulty obtaining carriage does not prove otherwise.

Finally, if any program service feels aggrieved about its inability to obtain the carriage it seeks, the Commission's program carriage rules are available to address the situation. Comcast notes, however, that in the twelve years since the program carriage rules were adopted, the

Commission has not issued a single decision finding that a cable operator has violated the rules.[153]

In sum, there is simply no basis for a claim that any cable operator can unfairly impede the flow of video programming to consumers. There continues to be explosive growth in the number and diversity of video programming services, and consumers today have more programming choices than ever before.

3. Cable Operators Are Not Impeding The Flow Of Programming To Consumers On A Regional Basis.

The *Second Further Notice* also invites comment on the flow of programming in regional markets.[154] As is the case with national programming services, the number of regional networks is growing dramatically. In 2004 alone, the Commission identified 96 regional programming networks, an increase of 12 networks over the 2003 total.[155] Moreover, as the following chart illustrates, the number of regional networks has grown from 61 to 96 since 1998, an increase of approximately 57%:

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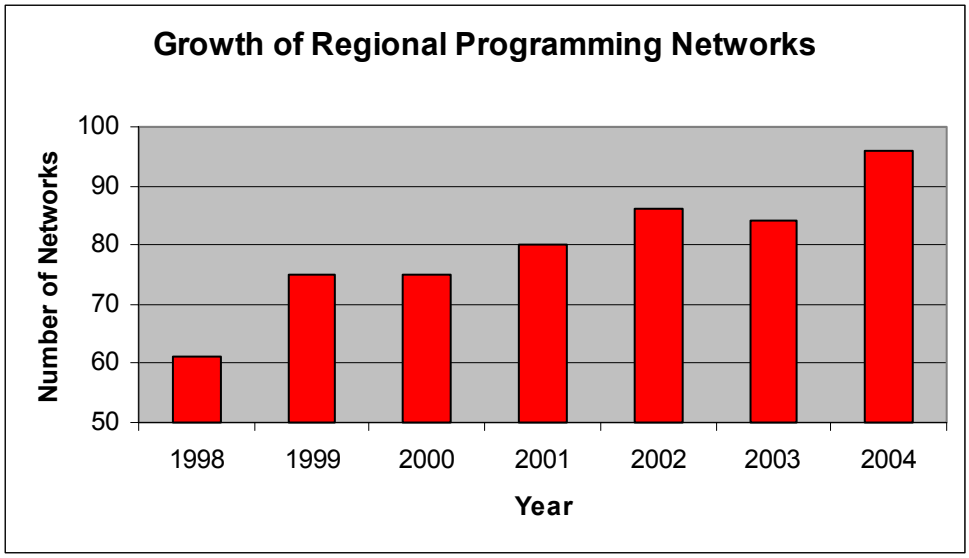
[153] TCR Sports Broadcasting Holding, L.L.P. recently filed a program carriage compliant against Comcast Corp. *See In re TCR Sports Broad. Holding, L.L.P. v. Comcast Corp.*, File No. CSR-6911-N, Carriage Complaint, (June 14, 2005). There is no reason to respond here to all of the misleading and erroneous claims TCR presented in its Complaint. TCR's assertions have been fully rebutted by Comcast in its Answer to the Complaint, which Comcast incorporates herein by reference. *TCR Sports Broad. Holding, L.L.P. v. Comcast Corp.*, File No. CSR-6911-N, Answer of Comcast Corp. at 7-15 (July 14, 2005) ("*Comcast Answer to TCR Carriage Complaint*"). For present purposes, it suffices to explain that TCR's new regional sports network, Mid-Atlantic Regional Sports Network ("MASN"), purports to hold the MVPD rights to the games of the Washington Nationals and, after 2006, of the Baltimore Orioles. TCR's assertion of those rights, and indeed the very existence of MASN, results directly from the breach of the contractual rights of Comcast SportsNet by TCR, the Baltimore Orioles, and Major League Baseball. For reasons explained at length in Comcast's answer to TCR's complaint, Comcast has declined the offers it has received from MASN for proposed carriage agreements, and Comcast fully expects that the Commission will conclude in due course that Comcast has not violated the program carriage rules in declining those carriage proposals. *Id*.

[154] *See Second Further Notice* ¶ 70.

[155] *See 11th Annual Report* ¶ 149.



The growth in regional programming services is particularly evident in sports and news. Regional sports networks, for example, have increased in number from 29 in 1998 to 38 in 2004, and those networks are owned by cable companies (*e.g.*, the RSNs owned by Comcast and Cablevision), broadcast networks (*e.g.*, the RSNs owned by Fox), individual teams (*e.g.*, YES Network, Mid-Atlantic Sports Network), and other independent entities (*e.g.*, Altitude Sports).[156] Likewise, there have been a growing number of news-oriented regional networks. In 1998, there were 25 such news networks; by 2004, that number grew to 40.[157] These various local and regional news networks both complement and compete with CNN, Fox News, and other national news networks.[158]

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[156] *Compare In re Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Fifth Annual Report, 13 FCC Rcd. 24284 ¶ 13 (1998) (*5th Annual Report*) (finding 29 regional sports networks), *with 11th Annual Report* ¶ 14 (finding 38 regional sports networks).

[157] *Compare 5th Annual Report* ¶ 13 (finding 25 local and regional news networks), *with 11th Annual Report* ¶ 15 (finding 40 local and regional news networks).

[158] *See* National Cable & Telecommunications Association, *2004 Year-End Industry Overview*, at 28 (2004) ("*NCTA 2004 Industry Overview*") (quoting Barbara Cochran, President of the Radio and Television News Directors

(footnote continued…)

In sum, the data indicate a healthy growth in regional programming networks which amounts to compelling evidence that there are no impediments to the flow of programming to consumers on a regional level.

4. The Global Marketplace For Video Programming Also Reduces Concerns About The Flow Of Programming To U.S. Consumers.

The global marketplace for video programming increasingly provides program producers and aggregators with significant alternative outlets for their content. Today, video programmers -- both producers and aggregators -- obtain a large part of their revenue from sales of their programming in markets outside the U.S.

U.S. cable operators serve only 24% of cable subscribers worldwide (*i.e.*, 65.7 million out of 276.5 million) and only 18% of global MVPD subscribers (*i.e.*, 65.7 million out of 372 million).[159] Media companies that operate programming networks in the U.S. also have a very strong presence in these overseas markets. For instance:

- Discovery has grown from its core property, the Discovery Channel, first launched in the United States in 1985, to current global operations in more than 160 countries and territories with 1.2 billion cumulative subscribers.[160]
- Bloomberg Television, a 24-hour business and financial news channel, distributes 10 networks in seven languages, reaching more than 200 million homes around the world, including in Asia, Europe, South America, and Australia.[161]

(…footnote continued)

Foundation, as saying: "These channels are of great value to citizens in the communities they serve, providing local news and public affairs coverage that might not otherwise be available.").

[159] *See* Kagan Research LLC, *Kagan Media Index*, Kagan Media Money, July 26, 2005, at 6 (noting that there are 93.3 million MVPD customers as of June 30, 2005); The Bridge, *The 2003 Media Business Annual Report*, at 39-43 (2003) (counting at least 210.8 million cable and 67.9 million DBS customers outside of the U.S.).

[160] Discovery Communications Inc., *Discovery Communications at a Glance*, *at* http://corporate.discovery.com/utilities/aboutus.html (last visited Aug. 4, 2005).

- MTV claims to be the "world's most widely distributed television network," having approximately 419 million subscribers in 164 countries and territories. Interbrand has named MTV the world's most valuable media brand for the past four consecutive years. MTV currently offers a total of 80 different music programming services in Canada, Asia, Europe, Australia, Latin America, the Caribbean and Africa.[162]

- Nickelodeon now reaches "more than 179 million households in 163 territories worldwide via 28 channels, 21 branded program blocks and two broadband services across Africa, Asia and the Pacific Rim, CIS/Baltic Republics, Europe, Latin America and the United States." Third party broadcasters also air Nickelodeon in major territories around the world, raising the network's audience to 669 million households.[163]

- BET reaches more than 90 million subscribers in the United States, Canada and the Caribbean.[164]

- HBO-branded services are distributed in more than 50 countries in Latin America, Asia and Central Europe.[165]

- CNN now reaches more than 200 countries.[166]

- Scripps Networks' programming from DiY, Home & Garden Television ("HGTV"), Food Network, Fine Living, and Great American Country is currently available in more than 100 countries in six continents. Scripps recently licensed over 65 hours of programming from Home & Garden Television and Fine Living

(…footnote continued)

[161] Bloomberg Media, *Bloomberg Television: Watch. Wherever You Are*, *at* http://about.bloomberg.com/about/media/tv.html (last visited Aug. 4, 2005).

[162] *See* Viacom, *MTV: Music Television*, *at* http://www.viacom.com/view_brand.jhtml?inID=4&sectionid=2 (last visited Aug. 4, 2005).

[163] *See* Viacom, *Nickelodeon*, *at* http://www.viacom.com/view_brand.jhtml?inID=6&sectionid=2 (last visited Aug. 4, 2005).

[164] *See* Viacom, *BET*, *at* http://www.viacom.com/view_brand.jhtml?inID=7&sectionid=2 (last visited Aug. 4, 2005).

[165] *See* Time Warner, *HBO*, *at* http://www.timewarner.com/corp/businesses/detail/hbo/index.html (last visited Aug. 4, 2005).

[166] *See* Time Warner, *Turner Broadcasting System* (providing information on a number of Turner brands, including CNN), *at* http://www.timewarner.com/corp/businesses/detail/turner_broadcasting/index.html (last visited Aug. 4, 2005).

to The Home Channel based in South Africa, which reaches approximately one million viewers throughout nine Southern African countries.[167]

- ESPN International owns, has interests in, or programs 30 networks in 12 languages. ESPN also markets localized versions of its franchises around the world. In addition, ESPN owns six international Web sites and broadcasts localized ESPN radio programming in 13 countries.[168]

Many media companies view international sales as critical to their profit margins. For example, international business made up 22% of Disney's $30.8 billion in revenue during 2004, and delivered 35% of the company's $4.5 billion in operating profit. Moreover, international revenue has been rising at 10% annually over the last five years, and Robert Iger, Disney's incoming CEO, has said that he wants international operations to provide *half* of Disney's global profit within the next five years.[169]

Other companies are taking a similar view with respect to international distribution of their programming. Discovery, for example, will be investing over $100 million over the next several years developing its international subscriber base. Currently, about 60% of the programs produced by Discovery's U.S. channels are reused abroad, but the company plans to sink more money into producing original shows for its international viewers.[170]

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[167] *See* Press Release, Home & Garden Television, *HGTV and Fine Living Programming Premiere in Africa* (Apr. 28, 2005), *available at* http://www.hgtv.com/hgtv/press_release/article/0,1783,HGTV_3657_3886960,00.html.

[168] *See* The Walt Disney Co., *The Walt Disney Company 2004 Annual Report*, at 47 (Nov. 25, 2004).

[169] *See* Eric Pfanner, *Disney's World Seeks Ubiquity*, Int'l Herald Trib., June 13, 2005, at 9. Disney is launching new channels overseas, particularly in Asia. *See id.* ("In May, the Disney Channel and the Playhouse Disney channel started broadcasting via cable television in Vietnam, the 14th market in the Asia-Pacific region for the Disney Channel.").

[170] *See* Annys Shin, *Discovery at 20: Global Strategy*, Wash. Post, June 20, 2005, at D1.

Revenues from international sales contribute substantially to programmers' ability to produce new programming and/or increase the quality of existing programming available domestically as well as abroad.[171] As a result, these international revenues impact directly on the amount, diversity, and quality of programming that is available to U.S. consumers, as well as consumers abroad. The tentative conclusion in the *Second Further Notice* to ignore international distribution is plainly wrong given the increasing importance of that market to the health and vitality of programmers.[172] In fact, the robust growth in overseas distribution detailed above further weakens claims that the flow of programming to U.S. consumers is being impaired.

D. An Ownership Limit Would Ignore The Substantial Pro-Consumer Benefits Associated With Increased Cable Ownership, Particularly The Clustering Of Cable Systems.

As the ownership statute requires and the court in *Time Warner II* emphasized, an analysis of ownership limits must give significant weight to "*any efficiencies and other benefits*" of increased cable ownership.[173] The Commission and other federal agencies have recognized these benefits on numerous occasions over the years. Moreover, Comcast's success in upgrading

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[171] Given the importance of international markets to program producers and aggregators, the Commission should include international program purchase and distribution in its definition of the relevant geographic market for cable services.

[172] *See Second Further Notice* ¶ 70 (tentatively concluding that the "relevant geographic market is, for purposes of the Section 613(f) analysis, not greater than the United States").

[173] 47 U.S.C. § 533(f)(2)(D) (emphasis added); *see also Time Warner II*, 240 F.3d at 1136 ("After all, Congress also sought to 'ensure that cable operators continue to expand, where economically justified, their capacity' and it specifically directed the FCC, in setting the ownership limit, to take into account the 'efficiencies and other benefits that might be gained through increased ownership or control.'" (citing ownership statute)); *Second Further Notice* ¶ 1 ("At the same time, Congress recognized that multiple system ownership could provide benefits to consumers by allowing efficiencies in the administration, distribution and procurement of programming, and by providing capital and a ready subscriber base to promote the introduction of new programming services.").

cable systems previously owned by AT&T Broadband demonstrates that these pro-consumer benefits are genuine, not merely theoretical.

1. The Commission And Other Federal Agencies Have Repeatedly Acknowledged The Pro-Consumer Benefits Of Clustering.

As early as its first video competition report, the Commission recognized that "[f]uture cable networks that offer multiple services (voice, video, and data) may require companies to serve larger markets in order to fully take advantage of economies of scale and scope."[174] In particular, the Commission observed that:

> Interlinked cable systems will eliminate the need for costly duplication of expensive capital equipment required for these new services. If duplication is required, the access costs related to innovative services may not warrant their provision in less densely populated or rural cable markets. However, if a group of markets were all served from a central location, a standard product could be served to all customers within the cluster. If so, consumers will benefit as the new services will be deployed more rapidly to all markets.[175]

The Commission has underscored these pro-consumer benefits in subsequent video competition reports.[176]

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[174] *In re Implementation of Section 19 of the Cable Television Consumer Protection and Competition Act of 1992, Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, First Report, 9 FCC Rcd. 7442 ¶ 153 (1994).

[175] *Id.* ¶ 152.

[176] *See In re Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming,* Eighth Annual Report, 17 FCC Rcd. 1244 ¶ 140 (2002) (noting benefits of clustering); *7th Annual Report* ¶ 166 (noting that the 30% ownership limit "permits cable operators to acquire and cluster systems in order to gain efficiencies related to economies of scale and scope resulting in lower administrative costs, enhanced deployment of new technologies, and encouraging the extension into previously unserved areas"); *In re Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming*, Sixth Annual Report, 15 FCC Rcd. 978 ¶¶ 161-65 (2000) ("*6th Annual Report*") (noting that clustering "can create greater economies of scale and size," thereby enabling "cable operators to offer a wider variety of broadband services at lower prices to customers in geographic areas that are larger than single cable franchise areas," and thus, "make cable operators more effective competitors to LECs whose local service areas are usually much larger than a single cable franchise area"); *5th Annual Report* ¶¶ 144-48.

The Government Accountability Office ("GAO") and the National Telecommunications and Information Administration ("NTIA") have recognized the benefits of clustering, as well. In a July 1999 report, the GAO noted that "ownership ties and clustering strategies provide important cost savings as well as possible competitive advantages to cable companies."[177] Ownership ties in the cable industry, including "clustering of cable systems," were found to provide "efficiencies to cable operators that help to decrease their cost of providing cable service."[178] Specifically, cable operators studied by the GAO noted that:

> [T]hey could obtain greater economies of scale from [clustering] as compared to having cable systems that were noncontiguous and more geographically spread out. In particular, the clustering strategy enables firms to consolidate facilities for receiving and transmitting programming, reduce the number of repair crews, have regional customer service centers, reduce management, and compete more effectively for local advertising dollars.[179]

In addition, the GAO reported that "clustering provides the critical mass of subscribers necessary to support the huge capital investment needed to make system upgrades designed to enable companies to enter other lines of telecommunications services, such as Internet access and local phone service."[180] The GAO's statements with respect to clustering were echoed by officials at NTIA. For instance, in January 2000, Larry Irving, then-Assistant Secretary of

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[177] U.S. Gov't Accountability Office, *Telecommunications: The Changing Status of Competition to Cable Television*, RCED-99-158, at 16 (July 1999)("*GAO Study*").

[178] *Id.* at 19.

[179] *Id.* at 20; s*ee also Adelphia Public Interest Statement* at 57-60 (noting that clustering allows cable operators to: (1) enhance the rollout of advanced new services, including digital voice, to consumers currently serviced by more fragmented systems; (2) create marketing efficiencies that are particularly important with respect the deployment of new services that require aggressive -- and expensive -- marketing campaigns to educate and attract consumers; (3) facilitate overhead efficiencies, such as the more efficient deployment of management and other employees over a larger, more contiguous service area; (4) provide important cost-reducing infrastructure efficiencies such as the consolidation of headend facilities; and (5) enhance local and regional advertising opportunities by giving local and regional advertisers a simple and effective way to reach their audiences).

[180] *GAO Study* at 20.

Commerce and head of NTIA, noted that clustering is essential to the future of telecommunications. He also noted that any potential harms of clustering are "largely conjectural, speculative, or de minimis."[181]

Clustering enables cable operators to compete with DBS and ILEC competitors that operate with national or broad regional footprints. Only through clustering will cable operators be able to achieve efficiencies that come "naturally" to their competitors. For example, DIRECTV and EchoStar utilize their ubiquitous national coverage to mount cost-effective national advertising campaigns with tie-ins to national retail chains to aggressively market services and promotions.[182] Their efforts have proved immensely successful. In slightly over a decade, DIRECTV and EchoStar have gained more than 25 million subscribers.[183] It took more than three decades for the entire cable industry to achieve the same subscriber threshold.[184] Moreover, a recent GAO study found that DBS subscriber growth continues to occur steadily throughout all parts of the country, again highlighting the effectiveness of running national promotions.[185]

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[181] Letter from Larry Irving, Asst. Secretary of Commerce, to the Honorable Janet D. Steiger, Chairman, Federal Trade Commission, Jan. 12, 1995, at 2.

[182] *See, e.g.*, Press Release, DIRECTV, *DIRECTV Launches New Brand and Advertising Campaign* (Feb 7, 2005), *at* http://www.directv.com/DTVAPP/aboutus/headline.dsp?id=02_07_2005A; Press Release, DIRECTV, *DIRECTV Launches National High-Definition Television Bundled Equipment Offer at Circuit City* (Nov. 19, 2003), *at* http://www.directv.com/DTVAPP/aboutus/headline.dsp?id=11_19_2003A; Jeff Baumgartner, *Radio Shack Goes Satellite Exclusive with EchoStar and Sirius*, CED Broadband Direct, Feb. 12, 2004.

[183] *See supra* note 21.

[184] *See* Nat'l Cable & Telecom. Ass'n, *Cable Television Developments 2004*, *at* http://www.ncta.com/Docs/PageContent.cfm?pageID=279 (last visited July 29, 2005).

[185] *See* U. S. Gov't Accountability Office, *Telecommunications: Direct Broadcast Satellite Subscribership Has Grown Rapidly, But Varies Across Different Types of Markets*, GAO-05-257 (Apr. 2005).

Clustering also will enable cable operators to compete with the ILECs. Major ILECs provide telephone and high-speed data services throughout expansive, multi-state geographic areas and are now beginning to press into the market for video services.[186] The Commission has previously held that accelerating cable's deployment of telephony services is a public interest benefit.[187] The Commission has also recognized the positive correlation between the enhancement of a cable operator's geographic scope and the provisioning of telephony and broadband services by that operator.[188] Hence, clustering enables cable operators to become more like the ILECs with respect to geographic scope.[189] Comcast, in particular, has already announced launches of its digital voice service in Boston, Hartford, Philadelphia, Portland, Chicago, Indianapolis, and Springfield, Massachusetts, and will be marketing the service to 15

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[186] *See, e.g.*, Matt Richtel & Ken Belson, *Increasingly, The Bells See Their Future on a Screen*, N.Y. Times, Apr. 4, 2005, at C-4 (explaining that ILECs are "pushing to sell an array of services - Internet connections, wireless and television - in a bundle" in an effort to compete with cable operators); Jim Hu, *Video Gamble for the Bells*, Tech Republic, Nov. 22, 2004, *at* http://techrepublic.com.com/5100-22_11-5462551.html# (stating that, like other RBOCs, "SBC is spending billions of dollars to upgrade its network in a bid to fend off cable television giants... In the next year, it hopes to turn the tables by converting its antiquated infrastructure into a digital dynamo, serving everything from high-speed Internet access and phone service to multichannel high-definition TV.").

[187] *See Comcast/AT&T Order* ¶ 199; *In re Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from; MediaOne Group, Inc., Transferor, To AT&T Corp. Transferee,* Memorandum Opinion & Order, 15 FCC Rcd. 9816 ¶ 178 (2000).

[188] *See 5th Annual Report* ¶¶ 13, 144 (explaining that clustering may "facilitate the provision of cable and other services, such as telephony…[and] better position[] cable as a potential competitor for local exchange services." Clustering "enables cable providers to offer… broadband services at lower prices to customers in a geographic area that is larger than a single cable franchise area. For this reason, clustering makes cable providers a more effective competitor to LECs whose service areas are usually larger than a single cable franchise area."); *see also 6th Annual Report* ¶ 162 (asserting that clusters "make cable operators more effective competitors to LECs whose local service areas are usually much larger than a single cable franchise area."); *In re Implementation of Section 11(c) of the Cable Television Consumers Protection and Competition Act of 1992*, Third Report & Order, 14 FCC Rcd. 19098 ¶ 63 (1999) (noting the "benefits of clustering - including market efficiencies and deployment of telephony and Internet access services").

[189] The Commission has asserted that "clustering makes cable providers a more effective competitor to LECs whose service areas are usually larger than a single cable franchise area." *5th Annual Report* ¶ 144; *see also In re Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming*, Fourth Annual Report, 13 FCC Rcd. 1034 ¶ 140 (1998) (stating that clustering may "enhance MSOs' ability to compete successfully in the future with LECs… as providers of data transmission and local telephone services.").

million homes by the end of 2005.[190] Comcast aims to have 250,000 digital voice customers by the end of this year and an additional 1 million customers by the end of next year.[191]

Clustering efficiencies can also stimulate investment in and delivery of new local and regional programming services. Comcast and other operators have launched local and regional news services in many large clusters. cn8, a regional news service created by Comcast, serves approximately 4 million homes in Pennsylvania, New Jersey, Delaware, and Maryland. Comcast has also launched a local programming service in the Chicago market, the Comcast Network, that emphasizes local high school sports and community activities.[192] Comcast has created a similar service for its Colorado systems, known as CET 5.[193] Other cable operators are launching such services as well. Time Warner Cable, for example, operates News 14 Carolina in the Charlotte, North Carolina market, and Bright House Networks runs two news channels in Central Florida, Bay News 9 and Central Florida News 13.[194] These investments serve longstanding Commission goals of promoting localism and diversity in programming.

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190 *See Comcast Earnings Call Transcript* at 5.

191 *See id.; see also* Peter Grant, *Cable Companies Call Up New Growth Story*, Wall St. J., Aug. 2, 2005, at C1 ("Comcast alone could reap as much as $1 billion in annual Ebitda from phone in five years, predicts Glenn Greenberg, managing director of Chieftain Capital Management, Inc."); *id.* (noting analyst predictions that cable companies could eventually capture 30% of the residential phone market). At the end of the first quarter of 2005, cable operators served more than 3.5 million residential phone customers (including circuit-switched and VoIP) across the country. *See* Nat'l Cable & Telecom. Ass'n, *2005 Mid-Year Industry Overview*, at 10 (2005).

192 *See* Comcast Network, *Turn To Us First*, *at* http://www.comcastnetwork.tv/ (last visited Aug. 4, 2005).

193 *See* CET: Comcast Entertainment Network, *Programming Schedule*, *at* http://www.comcast.com/cet/ (last visited Aug. 4, 2005).

194 *See NCTA 2004 Industry Overview* at 28-29.

2. Comcast's Success In Upgrading Cable Systems As A Result Of The AT&T Broadband Acquisition Provides Concrete Evidence Of The Pro-Consumer Benefits Of Clustering.

The pro-consumer benefits of clustering are not merely theoretical. During the transaction to acquire AT&T Broadband's cable systems in 2002, Comcast made several assurances to the Commission that it would make investments in the AT&T Broadband systems necessary to upgrade the systems and improve the number of quality of services offered to consumers, most notably advanced, broadband services. Since the Commission's approval, Comcast has met or exceeded each of these commitments, resulting in a vastly improved customer experience. As the charts below depict, consumers in Chicago, Jacksonville, and San Francisco have enjoyed an across the board increase in the amount and quality of services available to them as a direct result of Comcast's acquisition of the former AT&T Broadband systems in these areas.

CHICAGO AREA

Comcast's Greater Chicago Region system is the country's largest contiguous cable system, covering over 4,000 square miles and serving 4,000 local communities in Illinois, Northwest Indiana, and Southwest Michigan. More than 35,000 miles of fiber and coaxial cable pass 4.2 million homes, and 1.76 million customers receive Comcast's basic cable service.

After Comcast acquired AT&T Broadband's Chicago-area cable systems, it invested $450 million over a two-year period to upgrade to a broadband network. The Chicago systems now offer a full range of broadband products and services, including over 230 channels of digital programming (up from 75 channels in some systems) and 70 channels of video programming (up

from 30 channels in some systems) as well as VOD, HDTV, and DVRs. Comcast is also beginning to test its digital voice product in the greater Chicago region.[195]

The following chart highlights the improvements made to the Chicago-area systems after the acquisition:

Chicago-Area Systems Pre-Acquisition and Post-Acquisition		
	Pre-Acquisition	**Post-Acquisition**
Cable System Capacity (MHz)	34% of systems at or above 750 MHz	98.6% of systems at or above 750 MHz
Number of Analog Channels	30-70	72-76
Number of Digital Channels	75-200	230+
VOD Availability	No	Yes
Networks in High Definition	None	16
Number of Minority-Oriented Programming Channels	6	11
Number of Foreign Language Programming Channels	4	42
DVR / Set Top Box Functionality	No	Yes
Availability (and speed) of High-Speed Internet Service	Available at speeds up to 1.5 Mbps	Available at speeds up to 6 Mbps
Voice (VoIP, etc) Offerings	No[196]	Yes (30% today, 90% by 2Q06)

[195] Comcast has also been very active in community activities and organizations in the Chicago. For example, Comcast has supported over 100 community organizations throughout the region with donations totaling more than $500,000 in 2003.

[196] Circuit-switched landline phone service was available.

JACKSONVILLE

When Comcast took over management of the Jacksonville, Florida system in November 2002, the company faced a formidable task of rehabilitating a neglected system with a stalled rebuild, strained relations with local franchise officials, and virtually no senior management structure. In the year prior to Comcast's acquisition, the system lost 16,000 subscribers -- 6% of its total subscriber base. The Commission had also investigated the system for signal leakage problems and shut down a hub headend as a result.

Comcast moved quickly to address these challenges. It installed a veteran management team, beefed up customer service support, and invested substantial resources in upgrading the system. As a result of these efforts, the rebuild project was completed ahead of schedule, all signal leakage problems were addressed, customer complaints dropped dramatically -- from a high of 1,100 per month under AT&T Broadband to only a handful in recent months -- and new products and services were deployed, including over 150 channels of digital programming (up from 40) and 75 channels of analog programming (up from 50), as well as HDTV and VOD.[197]

According to Howard Conner, the cable administrator for the City of Jacksonville: "When Comcast took over the system [in October 2002], we saw a noticeable difference right away. The Comcast people were more receptive to talking to us and their customers. Everything they've promised to do they've done, and in some cases they've done it ahead of when they said they would."[198]

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[197] *See, e.g.*, Mark Basch, *Comcast's New Cable Option Emphasizes 'When You Want It' Viewing*, Times-Union, Jan. 6, 2004 (highlighting Comcast On Demand service in Jacksonville market); Mark Basch, *Changing the Way You View TV*, Times-Union, June 30, 2004 (noting rollout of Comcast's DVR service in Jacksonville market).

[198] *See* K.C. Neel, *Jacksonville Says Goodbye to Muzak*, Cable World, May 5, 2003, at 20; *see also* Beth Davis, *Cable Merger Shows Decline in Complaints*, Jacksonville Bus. J., Jan. 10, 2003 (quoting Howard Conner as

(footnote continued…)

The following chart highlights the improvements made to the Jacksonville system after the acquisition from AT&T Broadband:

Jacksonville System Pre-Acquisition and Post-Acquisition		
	Pre-Acquisition	**Post-Acquisition**
Cable System Capacity (MHz)	550 MHz	750-860 MHz
Number of Analog Channels	50	75
Number of Digital Channels	40	150+
VOD Availability	No	Yes
Networks in High Definition	None	14
Number of Minority-Oriented Programming Channels	3	4
Number of Foreign Language Programming Channels	1	11
DVR / Set Top Box Functionality	No	Yes
Availability (and speed) of High-Speed Internet Service	Available at speeds of 3-4 Mbps	Available soon at speeds of 6-8 Mbps
Voice (VoIP, etc) Offerings	No[199]	Available soon

SAN FRANCISCO AREA

Comcast serves 1.6 million customers in 128 franchises in the San Francisco Bay Area. In November, 2002, when Comcast took over management of AT&T Broadband's Bay Area

(…footnote continued)

saying that the number of customer complaints dropped from more than 2,000 in the summer of 2001 to 50 in December 2002).

[199] Circuit-switched landline voice service was available.

systems, many customers were still served by largely outdated systems. In response, Comcast launched a two-year, $600 million project to upgrade technical plant and expand system capacity. Comcast placed over 11,000 miles of fiber-optic plant throughout the service area and made other improvements to its broadband network. As a result, more local customers have access to HDTV, VOD, DVRs, and enhanced high-speed Internet service.[200] The number of digital programming channels has increased from 51 to 139 and the number of analog channels has increased from 56 to 80.

Moreover, Comcast has devoted significant resources to improving customer service in the area. AT&T Broadband had used a highly centralized approach to managing its Bay Area cable systems. This management approach proved to be especially inefficient and stymied communication between the operator and customers. Comcast overhauled the operation and management of these systems, decentralized its Bay Area operations, and created five largely autonomous system offices with their own local management teams. It also established two new local call centers and expanded a third.[201] Customer service surveys have shown a marked improvement in subscriber satisfaction.

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[200] *See* John Woolfolk, *Movies at the Press of a Button*, San Jose Mercury News, Dec. 27, 2004, at 1A (noting launch of Comcast's VOD service in San Jose and Campbell, California).

[201] *See* David Whelan, *Comcast to Staff Concord Call Center*, Contra Costa Times, Mar. 13, 2003, at C1 (noting Comcast's announcement that it was adding 300 to 350 new employees to its facility in North Concord, California to answer customer service calls).

The following chart highlights the improvements made to San Francisco-area cable systems after the acquisition from AT&T Broadband:

San Francisco Systems Pre-Acquisition and Post-Acquisition		
	Pre-Acquisition	**Post-Acquisition**
Cable System Capacity (MHz)	Below 550 MHz	860 MHz
Number of Analog Channels	56	80
Number of Digital Channels	51	139
VOD Availability	No	Yes
Networks in High Definition	None	16
Number of Minority-Oriented Programming Channels	5	9
Number of Foreign Language Programming Channels	4	42
DVR / Set Top Box Functionality	No	Yes
Availability (and speed) of High-Speed Internet Service	No	Available at speeds of 3 Mbps
Voice (VoIP, etc) Offerings	No	Available in 2Q06

* * * *

While advocates of cable ownership limits offer *conjectural* theories of anticompetitive harm, the empirical evidence provided by the merger of Comcast and AT&T Broadband highlights the *real and tangible* consumer benefits that can result. Given this example of how increased cable ownership significantly *expanded* consumers' programming options, it would be extremely difficult for the Commission to conclude in this proceeding that increased cable ownership would *impede* the flow of video programming to consumers.

In sum, there is no credible marketplace evidence supporting the adoption of a national cable ownership limit. Moreover, the clear benefits of clustering, when combined with the explosive growth of video programming services at the national and regional level (described above), also undercut any basis for establishing a regional ownership limit.[202]

III. CABLE OPERATORS HAVE NEITHER THE INCENTIVE NOR THE ABILITY TO IMPEDE THE FLOW OF VIDEO PROGRAMMING TO CONSUMERS.

The two principal concerns that led Congress to adopt the horizontal ownership limits were that cable operators might: 1) refuse to carry non-affiliated services in order to protect their affiliated networks ("vertical foreclosure") and 2) inefficiently suppress programming by exercising market power in their role as buyers ("monopsony power").[203] In the present economic environment, there is no evidence that cable operators could or would engage in such behavior.

A. Cable Operators Have Neither The Ability Nor The Incentive To Foreclose Rival Program Services.

The concern with vertical foreclosure is misplaced. Cable operators have neither the incentive nor the ability to foreclose program services owned by non-affiliated program producers. Hence, foreclosure concerns cannot be used to justify a horizontal ownership cap.

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[202] *See Second Further Notice* ¶ 70 (seeking comment on whether to adopt a regional ownership limit). There are substantial questions as to whether the Commission has the necessary statutory authority to impose a regional ownership limit under Section 613(f). The legislative history makes plain that Congress enacted this provision as part of the 1992 Cable Act "[t]o address the issue of *national* concentration in the cable industry." S. Rep. No. 102-92, at 34 (Senate Report accompanying the 1992 Cable Act, reprinted in U.S.C.A.A.N. 1133, 1165-67 (1991) (emphasis added); *see also id.* at 64 (directing the Commission to prescribe rules on "the number of subscribers a cable operator can reach *nationwide*" (emphasis added)).

[203] *See id.* at 32-34; H. Rep. No. 102-628 at 42-43 (June 29, 1992) (House Report accompanying H.R. 4850).

1. Cable Operators Do Not Have The Ability to Foreclose Rival Program Services.

Even if a cable system operator wanted to block a non-affiliated programmer from getting access to distribution, the cable operator would be unable to do it. This is true today, and it would continue to be true in the absence of a horizontal ownership limit. Simply put, there are too many alternative programming outlets for a cable operator to be able to foreclose an unaffiliated programmer. First, even if the analysis is restricted to MVPDs, a programmer could readily obtain carriage regardless of a particular cable operator's intentions. For example, a programmer with attractive programming could gain carriage on DIRECTV and EchoStar, both of which are available to virtually all cable subscribers, and both of which serve a significant and growing number of subscribers.[204] With the entry of large telephone companies into the video distribution marketplace, the range of alternative outlets will only grow. Moreover, a programmer could obtain carriage on a cable system even without the cable operator's cooperation by entering into a carriage arrangement with a must-carry broadcast station or by utilizing the Commission's leased access rules.[205] Second, as discussed in great detail above, there is a wide variety of distribution outlets beyond traditional MVPDs.

The conclusion that a cable operator could not foreclose unaffiliated programmers is reinforced by the fact that many programmers are owned by powerful media companies, such as Fox and Viacom.[206] There are several reasons why the existence of these powerful owners even

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[204] *See 11th Annual Report* ¶ 4; *see also Time Warner II*, 240 F.3d at 1134 (noting that "availability of competition" affects a company's ability to exercise market power).

[205] *See* 47 U.S.C. §§ 534 (must-carry) & 532 (leased access).

[206] *See generally 11th Annual Report*, Table C-3. ¶

more strongly ensures that a cable operator has no ability to foreclose. First, these media companies have ample financial resources to launch a channel and to sustain it while it builds a critical mass of viewers. Second, several of these companies own their own video distribution platforms, so that they can unilaterally choose to make their programming available to the public. Third, these companies often offer multiple program services, which they can and do bundle to demand carriage. For all of these reasons, it cannot plausibly be claimed that these media companies need carriage on a cable system in order to launch or that a cable operator could drive their programming from the market.

Proponents of an ownership cap might nonetheless argue that small, independent programmers need to be protected. This argument fails to recognize that a small programming company could ally with a big company in order to obtain distribution. Indeed, many companies do. Maya Pictures, for example, has a multiple-film distribution deal with HBO.[207] Similarly, HBO has also distributed content created by the Broadway Television Network.[208] Discovery Communications announced a partnership with independent Brian Waddell Productions Ltd. to co-produce a documentary centering on "Steve Fossett's upcoming attempt to complete the first solo nonstop flight around the world in the Virgin Atlantic GlobalFlyer."[209] Partnerships of this kind are a routine occurrence, announced almost daily in The Hollywood Reporter or Daily Variety.

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[207] David Bernstein, *A New Multiplex Is Aiming to Capture a Bilingual Audience*, N.Y. TIMES, Aug. 1, 2005, *available at* http://www.nytimes.com/2005/08/01/business/worldbusiness/01maya.html?pagewanted=1.

[208] R. Thomas Umstead, *BTN Inks HBO Deal, Sets Sights on Live Play*, Multichannel News, Dec. 2, 2002.

[209] *Discovery Takes Flight with GlobalFlyer*, Multichannel News, Feb. 2, 2005.

Large media companies are not the only potential allies for a small programmer. If a programmer has valuable programming but was (hypothetically) being denied carriage by a cable operator for anticompetitive reasons, other MVPDs -- who might be adversely affected by the foreclosure strategy -- could choose to pay higher license fees to the foreclosed program service to ensure its viability.[210] They would be doing this, of course, not out of a sense of charity but acting in their economic self-interest. If the allegedly foreclosed programming is valued by consumers, then these rival MVPDs would gain competitive advantage by promoting that programming. The effect of these market forces would be to make foreclosure even less likely to succeed.

The explosive growth in programming services over the last decade (as detailed above) underscores that there are no significant barriers to entry in the video programming marketplace for any content for which there is a meaningful audience, and that there is no evidence of even a nascent problem. In a highly competitive environment such as this one, it would be unsurprising if some programmer were unable to negotiate the carriage deals they would like. If there were such situations, they would very likely indicate the competitive nature of the market -- in which some programmers succeed and some fail -- rather than a public policy problem. A pro-consumer, pro-competitive public policy does not seek to guarantee carriage to all programmers without regard to the quality of their programming.[211]

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[210] *See* Declaration of Stanley Besen ¶ 18 ("*Besen Decl.*") (appended to AT&T Corp. Comments, filed in CS Dkt. No. 98-82 (Jan. 4, 2002) ("*AT&T Comments*")).

[211] Carriage negotiations are highly complex, and carriage decisions are typically informed by a wide range of considerations. In general, as Comcast has stated on the record in prior Commission proceedings, cable operators and other MVPDs make carriage decisions based on, among other things, an understanding of the nature of the programming involved, its target demographics, its likely appeal to consumers, its similarities and differences from other programming available to the MVPD, its cost, and other factors. *See* Comcast *Ex Parte*, filed in CS Dkt. No.

(footnote continued…)

2. Cable Operators Do Not Have The Incentive To Foreclose Rival Program Services.

In addition to lacking the ability to engage in foreclosure, cable companies do not have economic incentives to harm non-affiliated programmers.

The first reason that a cable operator has no incentive to deny carriage for anticompetitive reasons is that doing so would harm the cable operator. If carriage of an unaffiliated programmer's offerings would be beneficial to a cable operator -- ignoring any effects on its programming affiliate -- then a refusal to carry that programming will simply generate a competitive advantage for rival video programming distributors, to the detriment of the cable operator. The unaffiliated programming would still be competing in the marketplace with the affiliated programming and rival distributors would be able to offer consumers programming that they desired but that was not available on the cable operator's systems.

Suppose, for the sake of argument, that by refusing carriage on its systems a cable operator could somehow drive a programmer completely out of business. Even then, it still would be against the cable operator's interest to do so if the unaffiliated programmer had programming that would be attractive but for the effects on the operator's affiliated programming. The reason is that cable operators are under competitive pressure to *increase*, rather than decrease, the flow of programming to consumers.[212] The Commission can simply

(…footnote continued)

98-120 (Sept. 6, 2002) (citing comments from Mr. Alan Dannenbaum, Vice President of Programming for Comcast).

[212] Even if a cable operator were a monopolist, and none is, the operator would have incentives to carry programming that consumers value by more than its cost.

One might be concerned that this argument proves too much in that it would deny that foreclosure could ever be a problem. It does not. The modern theory of foreclosure recognizes that a monopolist may have incentives to foreclose entry into a related market because it fears that such entry will provide a necessary steppingstone into the

(footnote continued…)

look at Comcast's actions to confirm that consumers are demanding a broader selection of content and competitive pressures are driving Comcast to respond. As described above, Comcast has invested substantial sums in system improvements and has developed a large number of new services for consumers, including digital programming, VOD, HD channels, and other advanced services. Comcast has done this in order to attract and retain subscribers. In contrast, a foreclosure strategy would likely drive cable subscribers away from Comcast to DBS and other competing services that offered the foreclosed programming.[213]

A foreclosure strategy might also invite retaliation by media companies adversely affected by the foreclosure strategy. For example, many programmers own several different networks. By foreclosing one of the programmer's second-tier networks, a cable operator could provoke a retaliatory response from the programmer that would deny the operator access to a popular network. Moreover, if the programmer were vertically affiliated with an MVPD, that MVPD could retaliate against the programming affiliated with the cable operator.[214]

(…footnote continued)

monopolist's home market. The U.S. Department of Justice argued such a theory when it asserted that Microsoft monopolized browsers to prevent competition in operating systems. Clearly, there is no basis for asserting that a cable operator would foreclose a new programmer out of fear that the programmer would otherwise become a significant MVPD competitor. Even if programming experience were a prerequisite for cable entry, there already are many programmers.

Another strain of the modern theory of foreclosure focuses on situations where competition is highly imperfect and the monopolist seeks to extract the profits that would otherwise be earned by competing programmers. However, if a cable operator had the economic power that the foreclosure theory posits, the operator would be able to extract these profits through its bargaining over carriage terms. There would be no need to engage in foreclosure.

[213] *Time Warner II*, 240 F.3d at 1134 ("If an MVPD refuses to offer new programming, customers with access to an alternative MVPD may switch.").

[214] For the reasons stated above, such retaliation could be expected to be unprofitable. Our point here is that, if one believed that foreclosure could be successful, one would have to recognize that it would give rise to the counterstrategy described in the text.

Finally, where several unaffiliated programmers compete with the cable operator's programming, the successful foreclosure of one of them might have little effect on overall competition that the operator's programming faces.[215] The need to foreclose multiple programmers would increase the cost of foreclosure, as well as the likelihood that a foreclosure strategy would fail. Moreover, even if a cable operator could drive a competing programmer out of business and doing so significantly weakened competition, much of the benefit in terms of higher prices would accrue to the remaining programmers who had been competing with the now-extinct programmer. Thus, the cable operator would bear all of the costs of driving the rival programmer out of business but would reap only a small fraction of the benefits. When a rational decision-maker bears all of the costs of an action but only a portion of the benefits, that decision maker's incentive to engage in the activity is low.[216]

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[215] It is important to note in this regard that a broad range of programming networks compete with one another. In fact, at one level, all programming networks compete with one another for MVPD carriage, viewer attention, and advertiser dollars. For example, even ESPN and HBO, which would normally be considered distinct networks, compete on both sports and dramas.

[216] As noted, *see supra* note 153153, TCR Sports Broadcasting Holding, L.L.P. recently filed a program carriage complaint against Comcast Corp. TCR's assertions have been fully rebutted by Comcast in its Answer, which is incorporated herein by reference. Contrary to what TCR alleges, Comcast's decision not to carry MASN is *not* the product of discrimination based on affiliation or nonaffiliation. As Comcast showed in its Answer, there are seven other cities in which rival sports networks compete, and in every one of those cities Comcast carries both affiliated *and unaffiliated* networks. *Comcast Answer to TCR Carriage Complaint* at 17-19. And, of course, the vast majority of the programming that Comcast carries is programming in which Comcast has no ownership interest. *See id*. at 19. TCR's argument is deficient in another respect: it ignores the significant head-to-head competition that disciplines Comcast's behavior and destroys the foundation of TCR's "foreclosure" argument. The simple fact is that there is *no* area within which Comcast can foreclose distribution of MASN. In every community that Comcast serves, it now faces strong competition from two satellite providers -- DIRECTV and EchoStar. In addition, Comcast faces competition from RCN in several communities in the Maryland suburbs and Washington, D.C. In contrast to what TCR says in its Complaint, MASN spokesman Vince Wladika has publicly stated that the DIRECTV deal "*frees Comcast's stranglehold* on Nationals games" and "gives Nats fans an alternative to see all the games they want." *DIRECTV to Broadcast Nationals Games*, Associated Press, Apr. 29, 2005 (emphasis added). Mr. Wladika has also said that the DIRECTV deal is "great news for Nationals fans because it *no longer means they're held hostage* by Comcast." Eric Fisher, *MASN Makes Debut on DIRECTV*, Wash. Times (Apr. 30, 2005) (emphasis added). In short, according to Mr. Wladika, even if Comcast did have an incentive to foreclose MASN -- which it does not -- the strategy would not work because of the presence of DBS and other distributors.

B. Cable Operators Have Neither The Ability Nor Incentive to Harm Consumers or Efficiency by Exercising Monopsony Power as Program Purchasers

A cable operator will seek to pay lower rather than higher prices for programming of a given quality. This is not unusual. Any economically rational firm will seek to minimize the price it pays for a particular amount of an input of given quality. In addition to being economically rational from the operator's perspective, such behavior is efficient, pro-competitive, and benefits consumers. It promotes competition and consumer welfare because lower input prices generate economic incentives for the cable operator to charge lower retail prices. These lower prices benefit consumer directly and indirectly, the latter by creating competitive pressures for rival video distributors to improve their offerings in response.

1. The Regulatory Objective Is To Protect Consumers, Not Programming Suppliers.

Although consumers benefit when a cable operator is successful at obtaining a lower price for particular programming, the supplier of the programmer is typically worse off. This demonstrates that consumer interests and programmer interests are not aligned. In contrast, consumer and cable operator interests are aligned in this regard: both would like to see the operator obtain the highest quality programming at the lowest possible cost. A pro-consumer public policy will recognize the divergence between consumer and programmer interests and will allow market forces to work, even if programmers seek protection from market forces. This issue is not unique to the question of horizontal ownership limits. It arises with many other

policies that are intended to promote competition. In the United States, a bedrock principle is that antitrust policy seeks to "protect competition, not competitors."[217]

The central question for a consumer-oriented public policy is whether a horizontal ownership limit is necessary to prevent a cable operator from obtaining a bargaining position in which it would act to harm *consumers* by bargaining too hard and effectively to control programming prices. There is no credible basis in today's marketplace to suggest that such a limit is necessary.

2. The Monopsony Model Does Not Apply To Cable Operators' Programming Purchases.

Economic theory has identified a specific set of circumstances under which a buyer's efforts to obtain lower input prices leads to consumer harm and a loss of economic efficiency. Those circumstances are known as the monopsony model. Under the monopsony model, an input buyer faces an upward-sloping supply curve (*i.e.,* the more of the input the buyer wishes to purchase, the more it must pay for *all* units of the input that it buys).[218] When a firm facing such a supply curve contemplates whether to buy an additional unit of the input, the firm recognizes that, not only does it have to pay the price of that additional unit of the input, but it also has to pay a higher price for all of the units it already was going to buy. These latter units are known as "infra-marginal" units because they are not the marginal unit under consideration in the purchase decision. Recognizing this effect on the price of "infra-marginal" units, the firm purchases *fewer* units of the input than it otherwise would. This restriction in the purchase of inputs can lead to

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[217] *See Brown Shoe Co. v. U.S.*, 370 U.S. 294, 320 (1962).

[218] *See* Jonathan M. Jacobson & Gary J. Dorman, *Monopsony Revisited: A Comment on Blair & Harrison*, The Antitrust Bulletin at 154 (Spring 1992) (noting that monopsony power can only be exercised in an industry having an upward-sloping supply curve).

inefficient production (*i.e.*, if the buyer substitutes other inputs that have higher social costs) and, in some circumstances, less output, which can harm consumers.[219]

However, the conditions of the monopsony model do not apply to cable operators' purchases of programming, and there is no basis for projecting that imposition of a horizontal ownership limit would lead to consumer harm. Even if a horizontal ownership limit were theoretically able to reduce cable operator bargaining power, there is no evidence that such a reduction is necessary or that there is any anticompetitive conduct that it would prevent. Instead, the facts indicate that the current situation -- in the absence of a limit -- is both pro-consumer and pro-competitive.

Suppose, counterfactually, that a large cable operator were a textbook monopsonist. Then it would have the ability significantly to reduce the amount of programming sold by programming producers in order to hold down the prices the operator pays for program services generally and, thus, its cost of programming.[220] However, the economic characteristics of the programming marketplace do not fit standard monopsony theory.

There are several factors indicating that a cable operator does not face an upward sloping supply curve -- in which the price increases as the quantity purchased increases -- of the type in

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[219] Social cost measures the true resource costs to society. The buyer's private costs measure the expenditures made by the buyer to obtain the input. A simple numerical example illustrates the difference between the two costs in this context. Consider an input such that the first unit costs $10 to produce, while the second unit costs $15 to produce. Then $10 and $15 are the social costs of the first and second units, respectively. Suppose that the input is competitively supplied. Then the monopsonist can buy one unit for $10, and that is the private cost of the first unit. In order to purchase two units, the monopsonist would have to pay $15 per unit in order to provide incentives to produce the more expensive unit. Observe that the private cost of the second unit is $20 = 2 ×$15 – $10, which exceeds the social cost by $5. $5 represents the increase in the price of the first unit that the monopsonist has to pay even though the resource cost of the first unit is unchanged by production of the second unit.

[220] *See* Roger D. Blair & Jeffrey L. Harrison, *Monopsony: Antitrust Law and Economics* 42 (1993) ("Monopsony power involves the power to lower input prices below competitive levels. This requires the ability to restrict demand for the input.").

the monopsony model. However, before one can describe these factors, one has to address the question of what supply curve is under consideration.

If the concern is that there is an upward sloping supply curve with respect to the number of households for which a cable operator is licensed to offer a given network then the concern is misplaced in the cable industry. Programming is an information good with big first-copy or fixed costs, but then extremely low marginal costs. Consequently, a cable operator typically will face a flat or declining supply curve with respect to the number of subscribers for which it takes a license.

If, instead, the concern is with an upward sloping supply curve for which the "quantity" is the number of cable networks, then one must confront the issue of whether apples are being compared to oranges. ESPN and The Weather Channel are very different products, and their price differs for a wide variety of reasons, such as differing program input costs, audience demand, and audience demographics; the differences in their prices are not due to which comes first on an aggregate supply curve for programming. Hence, the monopsony model would not apply, and its conclusions are irrelevant to the analysis of a cable ownership cap.

Suppose that one could get past these problems and could somehow construct a meaningful supply curve for programming. There would remain a number of factors all indicating that the traditional monopsony model is inappropriate.

First, as described above, there are many other programming buyers. Thus, the supply curve that the cable operator faces is not identical to the market supply curve (as it is in the monopsony model), and a cable operator's ability to exercise monopsony power will be

constrained by the elasticity of demand in the video programming marketplace.[221] In particular, the ability of other buyers to increase purchases in response to an artificially depressed price will dampen the power of a putative cable monopsonist.[222] As noted, the buyer marketplace is already robustly competitive and the entry of telcos will only make it more so.[223]

Second, a cable operator's system has fixed capacity in the short run, and a cable operator's business decision is one of picking the best programming to run over that capacity. Thus, the choice of which programming to make available on a system has *no effect at all* on the total amount of programming. Proponents of an ownership cap might argue that, in the long run, a cable operator would exercise monopsony power by choosing inefficiently little system capacity. There is, however, no factual basis for such a claim. Cable operators are under tremendous pressure to *add* channel capacity to compete with DBS and, increasingly, the Internet. As noted, Comcast is responding to this pressure by investing in system expansion and deploying digital programming, VOD, HD channels, and other advanced services.

Third, the monopsony model is inappropriate because cable operators engaged in individualized bargaining with programming suppliers. In other words, modeling a cable operator as facing a supply curve fails to capture the reality of the marketplace. This failure is critical, because individualized bargaining gives rise to a fundamentally different outcome than does the textbook monopsony model. Rather than reduce the quantity supplied, an economically

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221 *See id.* at 83.

222 *Id.* ("The greater the number of good substitutes from the point of view of sellers, the more easily sellers may substitute away from low paying buyers in favor of higher paying buyers.").

223 *See Monopsony Revisited*, *supra* note 218, at 162 ("Absent an upward-sloping supply curve, a substantial share of the purchases on the buying side of the market, and impediments to entry or expansion by competing buyers, monopsony power cannot exist at all.").

rational cable operator and programmer bargaining over carriage have incentives to bargain for an efficient quantity and then haggle over the price. Hence, there would be no adverse efficiency effects and consumers would not be harmed by a reduction in quantity because there would not be one.

Fourth, input substitution is limited, so that a cable operator that reduces its supply of programming would have a less attractive product and be less able to compete. Squeezing program suppliers too hard would likely harm a cable operator trying to meet the competitive challenge from DBS and other MVPDs. In such circumstances, a program supplier would respond by pursuing one of two cost-cutting measures -- exiting the business or reducing its investment in programming. The first outcome reduces the number of programming services, while the second reduces the quality of programming. Neither outcome would serve the business or economic interests of the putative monopsonist.

The last point is related to one more argument that is sometimes mistakenly put forth as a rationale for imposing an ownership cap. According to this argument, a cable operator faces an upward-sloping supply curve for programming quality, which leads to a monopsonistic suppression of programming quality. There are two versions of the alleged problem.

In one version, the cable operator inefficiently drives down programming quality by forcing down the price that it pays to programming suppliers in order to reduce the operator's programming costs. A fatal flaw with this argument is that it assumes the cable operator is economically irrational. An economically rational cable operator will bargain with a programming supplier for the latter to offer programming that is of the profit-maximizing quality level, where that level accounts both for consumers' demand for higher quality programming and the programmer's costs of producing higher quality programming. The model of rational cable

operators clearly fits the real world better than does the monopsony-quality model: many of the most widely carried programming networks are among the highest quality and most expensive to the operator. In short, cable operators have shown a great willingness to pay for quality.

There is a second version of the argument that cable operators will pay to little for quality programming. This argument builds on the fact that most of the costs of creating programming are fixed costs, which are independent of the total number of viewers of the programming. According to this argument, each programming buyer tries to minimize its contribution toward coverage of the costs of programming production, leading to inefficiently low quality. Up to this point, the economic logic of this argument is sound. However, this logic is *not* an argument for an ownership cap. In fact, it is the opposite. The reason is the following one. A large cable operator enjoys greater benefit from higher quality programming because it has more subscribers willing to pay for that programming. Hence, one larger operator would be willing to pay for more for a high-quality programming network than would two smaller cable operators each of which had half as many subscribers. Hence, the first quality-reduction argument is fatally flawed, and the second is an argument for ownership floors not caps.

3. The Commission Has No Reasoned Basis For Setting A Specific Numerical Cap Based On The Monopsony Model.

Even if the structure of the monopsony model somehow fit the cable industry -- which it does not -- the Commission would still lack any basis for determining a ceiling on horizontal ownership. There is no basis in the record, for example, for equating an increase in operator size with an increase in the degree of monopsony power.

Any attempt to assert a simplistic negative relationship between the size of a cable operator and the prices that it pays for programming is doomed by the facts. For some programming, Comcast pays lower prices per subscriber than do other cable operators, which

would appear to support the size-pricing hypothesis. But Comcast pays higher prices per subscriber for other programming. To anyone knowledgeable of the industry, this finding should not be surprising. The bargaining between cable operators and programmers is complex, multi-dimensional, and depends on a range of factors.

Moreover, even if increased operator size often does give rise to lower prices, then those price reductions: (a) would very likely benefit consumers, not harm them; and (b) may be due to the increased efficiency of dealing with a large cable operator (*i.e.,* a single contract and distribution point) rather than the exercise of market power.

In short, attempting to use the specter of monopsony power to derive a specific cap on horizontal ownership will inevitably lead to an arbitrary and unsupportable number.

IV. THERE ARE SERIOUS PROBLEMS WITH THE "OPEN FIELD" APPROACH.

As numerous commenters argued in response to the *2001 Further Notice*, the "open field" approach is riddled with problems.[224] First, it is a static model that does not account for market dynamism in assessing the "field" open to a programmer that is denied cable carriage.[225] It entirely ignores not only the ability of DBS and other cable competitors to attract cable customers in the face of any refusal by a large cable company to carry programming that customers want, but also the many non-MVPD and non-U.S. distribution and revenue options open to video programmers in today's marketplace.

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[224] *See AT&T Comments* at 61-66; *Besen Decl.* ¶¶ 3, 11, 14; Declaration of Janusz Ordover ¶ 145 (appended to *AT&T Comments*); Time Warner Comments, filed in CS Dkt. No. 98-82, at 19-28 (Jan. 4, 2002); Time Warner Reply Comments, filed in CS Dkt. No. 98-82, at 14-18 (Feb. 19, 2002).

[225] *See Time Warner II*, 240 F.3d at 1133-34; 47 U.S.C. § 533(f)(2)(E).

Second, a critical part of the Commission's "open field" analysis was that cable operators would collude, essentially combining their horizontal reach to harm programmers. But, as the *Time Warner II* court pointed out, the Commission provided no evidence of collusion when it last considered the open field, and there is no such evidence now.

Third, no open field-based limit could be sustained because it is based on a series of arbitrary and unsupportable assumptions. The open field analysis focuses on the viability of individual networks. As discussed above, the Commission must look at other program sources, not just cable program networks, and the full range of distribution outlets. Moreover, the discussion in the *Second Further Notice* regarding network survivability is off the mark. Networks can launch and remain in operation with far fewer than 40-60 million subscribers.[226] As the *Second Further Notice* acknowledges, "[c]learly different types of networks need access to different numbers of subscribers."[227] There are numerous examples of national programming networks that are thriving today with fewer than 40 million subscribers, including, among others: Bloomberg Television (34.1 million); DIY (31 million); Fine Living (25 million), the Independent Film Channel (34.6 million); Fuse (36.8 million); and the NFL Network (24 million).[228] Likewise, many regional programming services are succeeding, despite serving

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[226] In the *Second Further Notice*, the Commission states that CFA believes that a "far greater open field may be necessary for competitive entry by a new programmer, as much as 30 to 40 million subscribers instead of the 15 million figure previously relied on by the Commission." *Second Further Notice* ¶ 79. We note that this assertion is at odds with CU/CFA filings in the Commission's proceeding on program packaging. There, CU/CFA claimed that program services can be, and are, viable even if they reach fewer than 15 million United States MVPD subscribers. *See* CU/CFA Reply Comments, filed in MB Dkt. 04-207, at 22-23 (Aug. 13, 2004); *see also* Fed. Communications Comm'n, *Report On the Packaging and Sale of Video Programming Services To the Public* (2004) (noting CU/CFA comments on the issue), *available at* www.fcc.gov/Document_Indexes/ Media/2004_index_MB_Report.html.

[227] *Second Further Notice* ¶ 76.

[228] *See* Nat'l Cable & Telecom. Ass'n, *Industry Overview, Cable Program Networks* (listing subscriber information for various networks), *available at* http://www.ncta.com/industry_overview/programList.cfm.

substantially fewer than 15 million subscribers. The Commission's *2004 Video Competition Report* identified at least 96 regional networks.[229] Approximately 80% of these regional networks have been in operation for more than five years,[230] and many, including several well-known and well established regional networks (*e.g.*, the D.C. area's News Channel 8 and Chicago's ChicagoLand Television News) continue to serve three million or fewer subscribers.[231] A number of these regional networks (including County Television Network San Diego and Pittsburgh Cable News Channel) have been operating for at least five years with fewer than 1 million subscribers.[232]

In addition, the trend in the video programming marketplace is toward niche services that target specific demographic groups and do not require mass market distribution for their success. For example, in the last five years alone, more than a dozen networks have been launched that focus on the Latino community.[233] Likewise, Comcast just launched AZN, a network aimed at

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229 *11th Annual Report* ¶¶ 15, 149.

230 *See id.* at Table C-4 (showing that 77 of the networks have been in existence for at least five years).

231 *See* Nat'l Cable & Telecom. Ass'n, *Industry Overview, Cable Program Networks, News Channel 8* (stating that as of May 2005, NewsChannel 8 had 1.2 million subscribers), *available at* http://www.ncta.com/industry_overview/programList.cfm?network_id=887&detail=1; Nat'l Cable & Telecom. Ass'n, *Industry Overview, Cable Program Networks, Chicagoland Television News (CLTV)* (providing a subscribership number of 1.8 million for Chicagoland Television News), *available at* http://www.ncta.com/industry_overview/programList.cfm?network_id=872&detail=1.

232 *See* Nat'l Cable & Telecom. Ass'n, *Industry Overview, Cable Program Networks, County Television Network San Diego* (estimating County Television Network San Diego subscribership at 708,700), *available at* http://www.ncta.com/industry_overview/programList.cfm? network_id=949&detail=1; Nat'l Cable & Telecom. Ass'n, *Industry Overview, Cable Program Networks, Pittsburgh Cable News Channel (PCNC)* (stating that Pittsburgh Cable News Channel subscribership remains around 642,000), *available at* http://www.ncta.com/industry_overview/programList.cfm?network_id=892&detail=1.

233 According to the Commission's *11th Annual Report*, the following Latino services have launched since January 2000: De Pelicula, De Pelicula Classico, HBO Latino, ESPN Deportes, Gol TV, History Channel en Espanol, Infinito, La Familia Network, SiTV, and Sorpresa!. *See 11th Annual Report*, Tables C-1 & C-2. Discovery Kids en Espanol and Discovery Viajar y Vivir (Travel and Living) launched on June 17, 2005. *See* Abbey Klaassen, *Discovery, Nickelodeon Offer More Than Soap Operas To Hispanic Viewers; Kids, Travel Channels Part of Plan to*

(footnote continued…)

Asian-Americans.[234] The recently launched programming network ImaginAsian[235] also targets the Asian-American market. Similarly, Africast Television[236] and the Africa Channel[237] are two new networks focusing on programming related to Africa. These niche services do not necessarily have to rely on mass audiences to build viewership and attract advertisers. In fact, the business models for these services may be predicated on reaching certain demographics in certain markets. For example, a network targeting a specific ethnic group would seek carriage in regions of the country where that ethnic group is concentrated.[238] In addition, these niche services can be successful in attracting advertising since advertisers are looking for ways to deliver their messages to narrower, more targeted audiences. For example, while P&G's overall

(…footnote continued)

Establish Roots in Fertile Market, Advertising Age, Apr. 11, 2005, at 85 (announcing that the new Discovery networks will launch June 17, 2005).

[234] *See* Press Release, AZN Television, *International Channel Rebrands as AZN Television on March 28* (Mar. 22, 2005), *available at* http://www.i-channel.com/press.aspx.

[235] *See* Press Release, ImaginAsian TV, *ImaginAsian TV Sets Premiere for August 30; Nation's First Asian American Network Launches With 5 Million HH* (Aug. 24, 2004), *available at* http://www.iatv.tv/press_release.php.

[236] *See* Africast Global Media, Inc., *About Africast*, *at* http://www.africast.tv/africast/aboutus.html?sid=Hl5pBin9AAU3Z5Uct8am (last visited Aug. 2, 2005).

[237] *See* Press Release, *The Africa Channel to Provide American TV Viewers with Daily Window into Modern Africa; New Independent Network Reaches Corporate Agreement with Cox Communications* (July 18, 2005), *available at* http://home.businesswire.com/portal/site/google/index.jsp?ndmViewId=news_view&newsId=20050718005232&newsLang=en.

[238] *See, e.g.,* R. Thomas Umstead, *Raising the Marketing Volume; Independent Ethnic Networks Find Innovative Ways to Get Their Messages Heard*, Multichannel News, July 11, 2005, at 28 ("Networks such as Colours Television, Black Family Channel and ImaginAsian TV are hoping to reach their respective target audiences the old-fashioned way: by going directly to the consumer with a traditional grassroots marketing effort."); John Hecht, *International*, HollywoodReporter.com, June 8, 2005 (noting that Spanish-language channel Canal 52MX will launch in seven key U.S. Hispanic territories, including areas of California, Illinois, Florida and Texas).

TV advertising on its Tide detergent brand fell by 16% from 1999 to 2003, P&G doubled its TV spending on Tide on Hispanic networks.[239]

Finally, the Commission's own economic analysis regarding the survivability of cable networks suggests that networks can survive with far fewer than 40 to 60 million subscribers.[240] This Commission study was never put out for comment and Comcast has not had an opportunity to assess its methodology and findings. However, assuming arguendo the accuracy of the Media Bureau report, its findings do not support the conclusion that 40-60 million subscribers are needed for survivability. Rather, the study concludes, in part, that: "According to the piecewise-constant estimates, a network requires only 10.18 million subscribers from day one to have a survival probability of 70% over its first five years, and 13.94 million subscribers from day one to have a survival probability of 70% over its first ten years."[241]

Stated another way, if a new network can gain carriage on either EchoStar or DIRECTV (both of which have over 10.18 million subscribers), it has a 70% probability of surviving for the first five years of existence. And, even if the network can only gain carriage on DIRECTV (which has over 14.67 million subscribers), it has a 70% probability of surviving for its first ten years.[242] Of course, new networks can and do gain carriage on cable and other MVPD systems,

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[239] *See* Anthony Bianco, *The Vanishing Mass Market*, Business Week, July 12, 2004, at 60; *see also* George Winslow, *The New Multiethnic Math; Recent Research Is Changing the Way Operators and Networks View Multicultural Audiences*, Multichannel News, July 11, 2005, at 34.

[240] *See* Keith Brown, *A Survival Analysis of Cable Networks*, Media Bureau Staff Research Paper, at 29 (Dec. 7, 2004) ("*Bureau Analysis*").

[241] *Id.*

[242] *See DIRECTV 2Q05 Earnings Release* (noting that DIRECTV has over 14.67 million subscribers as of June 30, 2005); *EchoStar 1Q05 Earnings Release* (noting that EchoStar has over 11.23 million subscribers as of March 31, 2005).

as well, so any combination of carriage agreements that reached these threshold subscribership levels would, according to the study, provide a 70% probability of survival in the 5-10 year time frame. The point is, however, that, applying the Commission staff analysis, there are two non-cable MVPDs -- DIRECTV and EchoStar -- that can provide a path to survivability without requiring the network to seek cable carriage at all.

Indeed, there are numerous examples of programming services that got most of their early carriage on DBS, including: BBC America, CNBC World, Bloomberg Television, ESPN U, Classic Sports/ESPN Classic, GolTV, DIY, Boomerang, The Independent Film Channel, and NFL Network.[243] In addition, DBS operators have historically been industry leaders in launching non-English programming networks.[244]

In short, the open field approach, because it is based on a number of factors that are prohibited under *Time Warner II* -- a static market analysis, collusion, the necessity to achieve 40-60 million subscribers for viability -- is fatally flawed.[245]

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[243] *See, e.g.*, John M. Higgins, *Hooked Up*, Broad. & Cable, July 17, 2000, at 42 (noting launch of BBC America); *Dish Launches CNBC World*, Multichannel News, Jan. 6, 2003, *available at* http://www.multichannel.com/index.asp?layout=articlePrint&articleid=CA269188; Will Lee, *Bloomberg Jumps Ahead In Net Race*, CableWORLD, July 23, 2001, *available at* http://www.cableworld.com/cgi/cw/show_mag.cgi?pub=cw&mon=072301&file=bloomberg_jumps_ahead.inc; *ESPNU Prepares for Kickoff*, Broad. & Cable, Feb. 23, 2005, at 4; Magaly Morales, *The Latino Playing Field; Hispanic Sports Gains Muscle as More Networks and Distributors Get in the Game*, Multichannel News, Oct. 11, 2004, at 58 (explaining that GolTV launched on DISH); Stuart Miller, *Beaming Into the Digital-TV Darkness*, Multichannel News, May 8, 2000, at 140 (noting carriage of Boomerang on DISH and DIRECTV); The E.W. Scripps Company, *2000 Annual Report*, at 16 (2001) (noting launch of DIY on DIRECTV and Dish Network); Steve Zipay, *They're All Classics*, Newsday, Sept. 26, 1996, at A86 (noting Classic Sports Network's carriage deal with DIRECTV and Primestar); Andrew Grossman, *The Very Independent IFC*, Multichannel News, Dec. 13, 2004, at 22 (noting that "[m]ost of [IFC's] carriage is on direct-broadcast satellite carriers DIRECTV Inc. and EchoStar Communications Corp.'s Dish Network…"); R. Thomas Umstead, *New Nets Abundant at National Show*, Multichannel News, May 3, 2004, at 14 (noting that NFL Network launched on DBS).

[244] *11th Annual Report* ¶ 173.

[245] As the Commission points out in the *Notice*, Comcast previously raised a "soft cap" as a possible approach for addressing the statute in a manner that is consistent with the current marketplace and the restrictions imposed by

(footnote continued…)

V. CONCLUSION

The sole congressionally authorized purpose of this proceeding is to determine whether there is any demonstrable current need to impose a cap on the total number of customers a single cable operator may serve in order to prevent unfair impediments to the flow of video programming to consumers. As detailed above, competition, investment, and innovation ensure consumer access to a wide range of video programming choices, and there is simply no marketplace evidence that program producers are impaired in any way from delivering programming to consumers. Comcast therefore urges the Commission to consider (1) whether the law and the record can sustain any cable ownership limits consistent with the statutory

(…footnote continued)

the court in *Time Warner II*. *See Second Further Notice* ¶¶ 41-42. Under this approach, the Commission could adopt a limit (for example, a percentage of MVPD subscribers tied to and adjusted in terms of the total number of MVPD subscribers nationwide) that was, in effect, a procedural trigger which would signal the agency's intentions with respect to concentration above and below the trigger. Proponents of mergers above the trigger would bear the burden of proving, by a preponderance of the evidence, that the proposed transaction, on balance, serves the public interest. Proponents of mergers below the trigger would still have the ultimate burden of proving that the proposed merger is in the public interest. However, they would be able to establish a *prima facie* case that the merger is in the public interest -- at least with regard to the types of competitive concerns that underlie the subscriber limit -- by demonstrating that the combined entity's size does not exceed the limit. Comcast will reserve further comment on the possibility of a soft cap approach until other parties have been given a chance to comment in the opening round of this proceeding. Comcast notes, however, that even if the Commission were to pursue this approach, any limit, even the type of procedural trigger contemplated by the soft cap, that it ultimately selects will have to take account of, and be fully consistent with, the factual and legal burdens cited herein.

directive and *Time Warner II* mandates, and (2) whether adopting such limits would actually impair the ability of cable operators to compete against DBS and the ILECs in providing a growing array of facilities-based, broadband services to U.S. consumers.

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August 8, 2005

EXHIBIT

Channel Line-up for Comcast's Cable System in Arlington, Virginia

ARLINGTON COUNTY, VA CHANNEL LINE-UP (Highlighted networks are affiliated with Comcast)

2	TV Guide
3	WBDC-50 (WB D.C.)
4	WRC-4 (NBC D.C.)
5	WTTG-5 (FOX D.C.)
6	QVC
7	WJLA-7 (ABC D.C.)
8	NewsChannel 8
9	WUSA-9 (CBS D.C.)
10	Comcast SportsNet
11	ESPN
12	ESPN2
13	USA
14	WFDC-14 Telefutura
15	WMDO-30 (Univision D.C.)
17	WPXW-66 (PAX D.C.)
18	ABC Family
19	WHUT-32 (PBS D.C.)
20	WDCA-20 (UPN D.C.)
21	WZDC-64 (Telemundo D.C.)
22	MPT-22 (PBS Annapolis)
23	HSN
24	MHz (56 Pub D.C.)
25	MHz2 (53 Pub D.C.)
26	WETA-26 (PBS D.C.)
27	The Weather Channel
28	CNN Headline News
29	CNN
30	MSNBC
31	CNBC
32	Fox News
33	FX
34	TNN
35	TBS
36	TNT
37	The History Channel
38	A&E
39	Bravo
40	AMC
41	Turner Classic Movies
42	TV Land
43	Nickelodeon
44	Disney Channel
45	Cartoon Network
46	Animal Planet
47	TLC
48	Discovery
49	Discovery Health
50	Lifetime
51	style.
52	HGTV
53	TV One
54	Food Network
55	The Game Show Network
56	E!
57	VH-1
58	CMT
59	MTV
60	BET
61	Comedy Central
62	Sci-Fi
63	Speed Channel
64	Outdoor Life
65	The Golf Channel
66	Court TV
67	WGN
68	Hallmark Channel
69	ACT
70	Arl Cty Pub Schools 1
71	AVN
72	Arl Cty Pub Schools 2
73	Arl Cty Pub Schools 3
74	AVN
75	Sneak Peek
76	C-SPAN
77	C-SPAN 2
80	Travel Channel
81	G4/Tech TV
95	Leased Acces/Access TV/ shop nbc
96	Great American Country
101	Weatherscan Local
102	ESPNews
105	C-SPAN 3
109	National Geographic
110	The Science Channel
111	Discovery Times
112	Military Channel
113	Discovery Home
115	Biography Channel
116	History International
120	SoapNet
121	Do-It-Yourself
122	Fine Living
129	Nick Toons
130	Discovery Kids
131	Noggin
132	Nick Too West
133	Nick Games & Sports
134	WAM!
135	Toon Disney
139	MTV Hits
140	MTV 2
141	MTV Español
142	MTV Jams
144	VH-1 Classic
145	VH-1 Soul
146	VH-1 Country
150	Encore East
151	Encore West
152	Encore Action East
153	Encore Action West
154	Encore Mystery East
155	Encore Mystery West
156	Encore Love East
157	Encore Love West
158	Encore True Stories East
159	Encore True Stories West
160	Encore Westerns East
161	Encore Westerns West
162	G4techTV
165	Sundance East
166	Sundance West
170	Flix East
171	Flix West
180	NFL Network
199	Comcast On Demand
200	WETA Prime-HD (PBS D.C.)
201	WETA Kids-HD (PBS D.C.)
202	WETA Plus-HD (PBS D.C.)
204	Doug Hill's Weather Now
208	NBC Weather Plus
210	WJLA-HD (ABC D.C.)
211	WRC-HD (NBC D.C.)
212	WUSA-HD (CBS D.C.)
213	WTTG-HD (Fox D.C.)
214	WBDC-HD (WB D.C.)
220	WETA-HD (PBS D.C.)
225	Discovery Theater HD
226	iN Demand 1 HDTV
227	iN Demand 2 HDTV
228	HBO HDTV
233	Cinemax HD
238	Showtime HDTV
248	Starz! HD
249	TNT HD
251	Comcast SportsNet HD
252	ESPN-HD
259	HorseRacing TV
260	TV Games
262	Fox College Sports - Atlantic
263	Fox College Sports - Central
264	Fox College Sports - Pacific
265	ESPN Classic
267	Fox Soccer Channel
268	Gol TV
273	NBA TV
274	College Sports TV
275	NFL Network
277	The Tennis Channel
282	Jewelry TV
290	Trinity Broadcast Network
291	Eternal Word Television Network
294	The Word
295	The Inspirational Network
299	HBO SVOD
300	HBO HDTV
301	HBO East
302	HBO Plus East
303	HBO Signature East
304	HBO Family East
305	HBO Comedy East
306	HBO West
307	HBO Plus West
308	HBO Signature West
309	HBO Family West
310	HBO Zone East
311	HBO Latino East
312	HBO Latino West
318	Cinemax SVOD
319	Cinemax HD
320	Cinemax East
321	More MAX East
322	Cinemax West
323	More MAX West
325	Thriller MAX East
326	Action MAX West
327	WMAX East
328	@MAX East
329	5 StarMAX East
330	OuterMAX East
338	Showtime SVOD
339	Showtime HDTV
340	Showtime East
341	Showtime Too East
342	Showtime 3 East
343	Showtime West
344	Showtime Too West
345	Showtime 3 West
346	Showtime Beyond East
347	Showtime Extreme East
348	Showtime Extreme West
349	Showtime Beyond West
350	TMC East
351	TMC West
352	TMC Extra East
353	TMC Extra West
354	TMC SVOD
368	STARZ! SVOD
369	STARZ! HD
370	Starz East
371	STARZ! Edge East
372	STARZ! in Black East
373	STARZ! Kids & Family
374	Starz Cinema East
375	STARZ! Comedy
376	Starz West
380	Starz Cinema West
401	Showcase
402	Today's Country
403	Classic Country
405	Bluegrass
406	R&B and Hip-Hop
407	Classic R&B
408	Smooth R&B
409	Rap
410	Metal
411	Rock
412	Arena Rock
413	Classic Rock
414	Alternative Rock
415	Electronica
416	Dance
417	Progressive
418	Soft Rock
419	Hit List
420	Party Favorites
421	'80s
422	Retro-Active
423	'70s
424	Solid Gold Oldies
425	Singers & Standards
426	Big Band & Swing
427	Easy Listening
428	Smooth Jazz
429	Jazz
430	Blues
431	Reggae
432	Soundscapes
433	Classical Masterpieces
434	Opera
435	Light Classical
436	Show Tunes
437	Contemporary Christian
438	Gospel
439	Radio Disney
440	Sounds of the Seasons
441	Musica Urbana
442	Salsa Merengue
443	Rock en Español
444	Pop Latino
450	DMX 1 Latin Contemporary
451	DMX 3 Rock en Espanol
452	DMX 7 Salsa
453	DMX 6 Tejano
454	DMX 4 Latin Jazz
455	DMX 5 Regional Mexican
456	DMX 8 Musica of the Americas
457	DMX 2 Latin Dance
500	iN DEMAND Barker
501	iN DEMAND 1
502	iN DEMAND 2
506	Hot Choice
524-531	Comcast iN DEMAND
544	Playboy
545	Spice
546	Spice 2
547	Pleasure Network
601	Discovery Espanol
602	CNN Espanol
603	Fox Sports en Espanol
604	Toon Disney Espanol
605	MTV Espanol
606	History Channel en Espanol
607	Canal 52
608	CineLatino
609	CASA
610	Cine Mexicano
619	Grandes Documentales
621	Canal 24-Horas
622	Gol TV
628	Canal Sur
637	Eternal Word Television Network (En Espanol)
665	TV Asia
666	Zee TV
684	ART
700	ESPN Now
604	Toon Disney Espanol
605	MTV Espanol
606	History Channel en Espanol
607	Canal 52
608	CineLatino
609	CASA
610	Cine Mexicano
619	Grandes Documentales
621	Canal 24-Horas
622	Gol TV
628	Canal Sur
637	Eternal Word Television Network (En Espanol)
665	TV Asia
666	Zee TV
684	ART
700	ESPN Now
701	MLS/ESPN
750	NBA.com
751	NBA
771	NHL
900	Digital Cable for Me
901	Using your Digital Remote
902	Using your On Screen Interactive Guide
903	Browser & Customizing
904	Using Pay Per View
905	Using Music Choice