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September 20, 2005

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Portals II, Room TW-A325
Washington, DC 20554

Re: Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, MB Docket No. 05-255

Dear Ms. Dortch:

I am enclosing an original and four copies of the Comments of the United States Telecom Association in the above-referenced matter. Please accept these copies as timely filed under Commission rules, including 47 C.F.R. §§ 1.4, 1.46, 1.415, and any other sections that may apply. The filing deadline was 11:59 p.m. yesterday, September 19, 2005. I made two attempts to file the enclosed document electronically before the deadline, yet neither was successful. When I spoke with your office today, I learned that the Electronic Comment Filing System (ECFS) was not operating as it should for several hours before the deadline last night.

Please call me at 202-326-7277, or send me an e-mail message at jlanning@ustelecom.org if you have any questions or need anything else.

Best regards,

Jeffrey S Lanning
Associate General Counsel

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Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
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Annual Assessment of the Status of	)	
Competition in the Market for the	)	MB Docket No. 05-255
Delivery of Video Programming	)	

COMMENTS OF

THE UNITED STATES TELECOM ASSOCIATION

ON THE

NOTICE OF INQUIRY

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September 19, 2005

Table of Contents

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Annual Assessment of the Status of	)	
Competition in the Market for the	)	MB Docket No. 05-255
Delivery of Video Programming	)	

COMMENTS OF THE UNITED STATES TELECOM ASSOCIATION ON THE NOTICE OF INQUIRY

The United States Telecom Association ("USTelecom") respectfully submits these Comments in response to the Commission's Notice of Inquiry in this proceeding. [1]

I. INTRODUCTION AND SUMMARY

Each year, the Commission reports to Congress on the status of competition in the market for the delivery of video programming. This year's Report to Congress, and the actions the Commission takes based on its findings in the report, will be particularly significant for the nation's economic policy. President George W. Bush has established a goal of "universal, affordable access for broadband technology by the year 2007."[2] The Commission has been required to pursue the same goal for nearly a decade, as section 706 of the Telecommunications Act of 1996 Act directs the Commission to take such actions as are necessary to promote broadband deployment.[3]

[1] *Annual Assessment Of The Status Of Competition In The Market For The Delivery Of Video Programming*, MB Dkt. No. 05-255, Notice of Inquiry, __ FCC Rcd ____, FCC 05-155 (Aug. 12, 2005).

[2] The White House, *A New Generation of American Innovation* (April 2004) (http://www.whitehouse.gov/infocus/technology/economic_policy200404/innovation.pdf) at 11.

[3] 47 U.S.C. § 157(a).

Video will play a significant role in the rapid and widespread deployment of advanced broadband technology. Therefore, removing barriers to entry in video distribution markets should be a core objective of the Commission's broadband policy. USTelecom's members include a great many companies that are seeking to serve their customers by expanding their networks to provide multichannel video and broadband Internet access services. We show in these Comments that barriers to multichannel video entry stand in the way of this network expansion and if those barriers are truly removed, broadband deployment will be greatly enhanced.

USTelecom[4] submits six core points in these Comments; taken together, these points demonstrate the importance of Commission action, and recommendations to Congress, to reduce barriers to entry in markets for the distribution of video programming. In particular: (1) video is a key driver for broadband deployment; (2) wireline video competition from local telephone companies (LECs) will benefit consumers; (3) build-out requirements prevent entry; (4) the franchising process slows entry; (5) access to vital programming is necessary for new video entrants to be successful; and (6) the incumbent cable industry is advocating policies that will prevent entry and slow broadband deployment.

Applying the service-specific regulation of cable under Title VI of the Communications Act to broadband video would establish a major barrier to entry for advanced broadband network deployment, and the Commission should take all steps necessary to make sure that such service-specific regulation does not impede or interfere with the nation's goal of ubiquitous and affordable broadband services. The broadband networks of the future will provide many

[4] USTelecom represents a broad range of service providers and suppliers for the converged telecommunications and Internet industries. USTelecom members provide a full array of broadband and traditional voice, data and video services over wireline and wireless networks.

services, including voice, data, and video services evolving from today's offerings, and each of these services makes a significant contribution to the profitability of those broadband networks. Unfortunately, whereas cable system operators gained free entry into local telecommunications markets in the 1996 Act, they self-interestedly argue that LECs and other potential wireline competitors should be subject to substantial regulatory barriers to entry (in the name of "fairness") in markets for the distribution of video programming.

Chairman Martin has stated, however, that additional multichannel video competition would "stimulate broadband deployment."[5] Consequently, the Commission can make real progress in promoting broadband deployment by doing all it can to prevent local franchising restrictions, particularly build-out requirements, from delaying or inhibiting entry. These regulations were designed to control and/or ameliorate monopoly power, and it is illogical and counter-productive to apply them to entrants in the name of fairness. In addition, it is essential that all video distributors—entrants and incumbents alike—have access to competitively significant content.

II. VIDEO IS A KEY DRIVER FOR BROADBAND DEPLOYMENT

As described above, the Commission has a primary objective of encouraging the widespread deployment of advanced communications networks to all American households. One important step the Commission can take to fulfill this objective is to allow *all* broadband providers the freedom to offer video on an economically-practical basis, both as a stand-alone service and together with voice and data. This freedom should apply to broadband providers' existing networks, and also to any new network that an entrant constructs to offer broadband.

[5] Leslie Cauley, *FCC Chief Considers Forcing Cable TV Competition*, USA Today (Aug. 22, 2005).

Adding additional services increases the revenue potential of the network, thereby increasing entry.[6] It also reduces payback periods, which makes network investment less risky. This, in turn, allows the firm access to a lower cost of capital (*e.g.*, it can borrow at lower interest rates) so that it can invest in more network building, and do so more quickly.

The video services that LECs deploy over their new broadband networks will drive subscriber growth and, thus, network deployment in significant part because they offer significant new capabilities. For example, SBC Communications is planning to offer services with interactive features far beyond those provided with video programming today.[7] In fact, unlike today's cable offerings, SBC's planned services are designed to permit all end users to tailor much of the content and viewing experiences, as well as engage in transactions. Ultimately, the aim is to permit end users to connect to the Internet, access stored files such as email, voicemail, or directory information, route communications, and use their television sets to aggregate content and screen calls in a manner customized to the end user's preferences

Verizon Communications has also started deploying its next-generation broadband network—fiber optics to the home (FiOS)—with the intent to offer subscribers new and innovative video capabilities that will allow Verizon to more effectively package and add more value to its products and services. Verizon's FiOS high-speed data services are currently available in parts of fifteen states, and Verizon anticipates passing three million premises by the

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[6] G.S. Ford, T.M. Koutsky and L.J. Spiwak, *Competition after Unbundling: Entry, Industry Structure and Convergence,* Phoenix Center Policy Paper No. 21, (http://www.phoenix-center.org/pcpp/PCPP21Final.pdf (July 2005) (*Phoenix Center Paper #21)*

[7] Letter from James C. Smith, Vice President, SBC Communications to Marlene H. Dortch, Secretary, Federal Communications Commission, *IP Enabled Services*, WC Dkt. No. 04-36 (Sep. 14, 2005) (submitting "The Impact And Legal Propriety Of Applying Cable Franchise Regulation To IP-Enabled Video Services") (*SBC Sep 14 ex parte*).

end of the year.[8] Verizon plans to begin offering video on the FiOS network later this year in the locations where it has obtained franchises (after many months and much effort), which will include cable and broadcast channels, hundreds of other digital video channels, high-definition programming, video-on-demand content, music channels and an interactive programming guide.

There are two clear reasons why adding video facilitates such broadband deployment. First, video services add potential revenues[9] and therefore can result in a market structure that will support more facilities-based entry. Video service revenues are an important part of consumers' communication spending. According to a Pew Internet & American Life Project survey, the average household spends $51 per month on multichannel video programming services—a significant portion of their total communications (voice, video, Internet, wireless) spending (which averages about $122 per month per household).[10] If an entrant cannot readily offer a service that serves that large percentage of the average household's communications "pocketbook", then its ability to build new fiber-rich infrastructure will be substantially curtailed.

Second, broadband entry is particularly likely where new technology permits owners of formerly "single use" networks, such as LECs to make investments converting their networks into video distribution systems without having to deploy a new network in its entirety. This allows firms to leverage their assets to enter related markets by reducing entry costs, which can accelerate the pace and scale of deployment. Therefore, regulations that deny existing and

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[8] Verizon Communications, Inc., *Report 10-Q*, at 18-20 (Aug. 8, 2005).

[9] More precisely, video services offer contributions to investment in the form of incremental revenue (from all sources) that exceeds the incremental cost (from all sources) of providing the additional services.

[10] J.B. Horrigan, *Consumption of Information Goods and Services in the United States*, at 28 Pew Internet & American Life Project (2003), http://www.pewinternet.org/pdfs/PIP_Info_Consumption.pdf.

neighboring networks access to particular markets or otherwise limit the potential revenues to be gained from serving a market will curtail network construction.[11]

When broadband entrants add video to their service mix, they also reduce the risk to their investments, which promotes entry in at least two additional ways. Adding service offerings to the network increases the chance that customers will purchase at least one service from a network that passes their homes, so there is less downside to building the network (fewer instances of zero return on investment for passing a house). Moreover, by offering multiple services, the provider faces less risk of being unable to recover its investment should customers cease to be interested in a particular service (as has happened with stand-alone long distance service, for example).

III. VIDEO CONSUMERS WILL BENEFIT FROM WIRELINE VIDEO COMPETITION

Not only will broadband video entry promote faster and further broadband deployment, but the additional wireline video competition that it brings will also generate substantial benefits that are not realized with satellite-based competition alone. Incumbent cable system operators continue to control over 70% of the video distribution market on average, with the remainder going largely to the two major direct broadcast satellite providers, even though a variety of competitors have been attempting to win market share for well over a decade.[12] At the same time, prices for video services across the country have been *increasing* on average at a pace that

[11] *See, e.g., Phoenix Center Paper #21.*

[12] *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, MB Docket No. 04-227, Eleventh Annual Report, __ FCC Rcd ____, App. B, Table B-1 (2005) (*Eleventh Video Competition Report*) (reporting that as of June 2004, cable incumbents controlled 71.62% of the video distribution programming market).

far surpasses the rate of inflation even though prices for local telephone, long-distance service, wireless and broadband services have plummeted.

Indeed, even with the presence of two DBS competitors, cable operators have been steadily increasing their prices more than 300% as fast as the Consumer Price Index ("CPI").[13] There is one clear exception to this general rule of cable rate increases—where a cable incumbent faces competition from a wire-based video provider (not a DBS service, and not necessarily a competitor also offering broadband), its rates are approximately 15% lower than the same operator's rates elsewhere.[14] Where the cable incumbent faces competition with a broadband service provider offering video service, it appears that the cable operator goes even further, responding "by providing more and better services and by reducing rates and offering special deals."[15] In fact, customers see the benefits of wireline competition in the form of substantially greater price cuts (on average 300% greater) for video services from wireline competition than from satellite competition.[16]

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[13] United States General Accountability Office (GAO), *Report to the Chairman, Comm. on Commerce, Science, and Transportation, U.S. Senate: Telecommunications, Issues Related to Competition and Subscriber Rates in the Cable Television Industry*, GAO-04-8, at 20 (Oct. 2003) (*2003 GAO Report*) (available at http://frwebgate.access.gpo.gov). GAO reported that cable rates increased 40% over a five-year period compared with a 12% increase in the CPI.

[14] *2003 GAO Report* at 3, 10 (cited in S. 1349, 109th Cong., 1st Sess. § 2(3) (2005)).

[15] GAO, *Report to the Subcomm. on Antitrust, Competition Policy, and Consumer Rights, Comm. on the Judiciary, U.S. Senate: Telecommunications, Wire-Based Competition Benefited Consumers in Selected Markets*, GAO-04-241,at 12 (Feb. 2004) (finding that "the monthly rate for cable television service was 41% lower compared with the matched market, and in 2 other [broadband service provider] locations, cable rates were more than 30% lower when compared with their matched markets"). *See also Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, MB Docket No. 03-172, Tenth Annual Report, 19 FCC Rcd 1606 ¶ 11 (2004).

[16] GAO, *Report to the Senate Subcommittee on Antitrust, Competition Policy and Consumer Rights, Committee on the Judiciary: Direct Broadcast Satellite Subscribership Has Grown Rapidly, but Varies across Different Types of Markets*, GAO 05-257 (2005).

Unfortunately, relatively few consumers see the benefits of the direct competition between wireline multichannel video operators outlined by GAO. Fewer than 2% of the nation's households have a choice in wireline video provider[17] and, chief among the reasons for this state of affairs are: build-out requirements often make entry prohibitive and inefficient; the bureaucratic local franchising process, which subjects entrants to needless paperwork, delay, and rent-seeking behavior; and cable operator actions aimed at enforcing these barriers to entry.

IV. BUILD-OUT REQUIREMENTS PREVENT ENTRY

A major obstacle to the promise of broadband video competition is the application of cable franchise build out requirements. Cable system operators argue that it is only fair that competitors should have to offer service to all of the same areas where they operate, yet this obscures the basic fact that the very notion of imposing build-out requirements on competitors is virtually unheard of in our economy. In fact, the very idea of applying *ex ante* build-out requirements to competitors is utterly inconsistent with the core principles of market economics.

The experience of USTelecom's current Chairman, Gene South, Sr. in Otsego, Minnesota is a prime example of how build-out requirements hamper entry and deprive consumers of the benefits of competition. Mr. South is CEO and General Manager of Lakedale Communications, a small LEC with 11,000 lines. Seeing an opportunity to enter additional markets and deploy broadband facilities, Lakedale joined with the Wright-Hennepin Cooperative Electric Association in 1999 to form WH LINK LLC, to build a system capable of providing video services as well as broadband Internet and voice services to portions of Otsego.[18] WH LINK

[17] *See, e.g., 2003 GAO Report.*

[18] The facts of Lakedale's experience in Otsego are set forth in the opinion of the Minnesota Circuit Court of Appeals. *WH LINK, LLC v. City of Otsego,* 664 N.W. 2d 390 (Minn. Ct. App. 2003).

received authorization to provide local exchange and long distance services in areas including the City of Otsego from the Minnesota Public Utilities Commission on June 15, 2000. With that authorization, and in compliance with Ostego's right-of-way ordinance, WH LINK installed copper and fiber optic network facilities capable of carrying broadband Internet, video, and voice services, and began to provide telephone exchange and Internet access services.

WH LINK subsequently filed an application with the Minnesota Commission for an Open Video System ("OVS") certificate, which was granted on May 3, 2001, and then filed a notice of intent with this Commission (the FCC) to establish an OVS in Otsego and several other communities. WH LINK then began to meet with Otsego officials who stated that the company would have to obtain a cable franchise to provide OVS service. While disagreeing with the city's legal position, and subject to a reservation of its rights, WH LINK applied for such a franchise. On March 25, 2002 Otsego initiated its statutory franchise application process and both WH LINK and the cable incumbent, Charter Communications, which had been operating under an extension permit, applied for franchises. Charter proposed to serve all areas of Otsego with a density of nine homes or more per quarter mile, and WH LINK proposed to serve a smaller area—five residential subdivisions where it was already providing telephone and Internet service—and to expand its network in the future if the system was successful.

Otsego approved Charter's franchise with a seven-year build-out requirement for all areas with a density of nine homes or more per quarter mile. The City approved WH LINK's application conditionally, as well, subject to its acceptance of the same build-out requirement, which it stated was required by Minnesota's "level playing field" statute. WH LINK rejected this requirement as impractical, and appealed to the Minnesota Court of Appeals. Both Charter and the Minnesota Cable Communications Association filed briefs in support of the city. The

Court of Appeals ruled against WH LINK, and the Minnesota Supreme Court denied WH LINK's petition for review on September 16, 2003. Consequently, charter faces no wireline video competition Ostego. Thus, the "level playing field" statute so assiduously defended by the incumbent cable industry has not helped customers but, rather deprived many Otsego citizens of the benefits of video competition. Moreover, WH LINK is deprived of revenues that it could have used to extend its broadband network to additional sections of Otsego.

It makes no sense to apply cable franchise build-out requirements to competitors. Lakedale's experience is far from unique. There is very little congruence between LEC networks and cable networks (defined by their respective franchise areas, which were generally granted in return for market exclusivity). Tellingly, incumbent cable operators do not face build-out requirements when they add services to their networks to compete with broadband providers. The Commission has explicitly held that build-out requirements constitute substantial barriers to entry and, pursuant to Section 253, preempted state laws seeking to impose build-out requirements on local telecommunications entrants.[19] Similarly, the Commission has determined that cable companies cannot be required to build out their cable modem data services.[20] These decisions were made as part of broader Commission policies to promote investment and the deployment of new services more quickly to all consumers.

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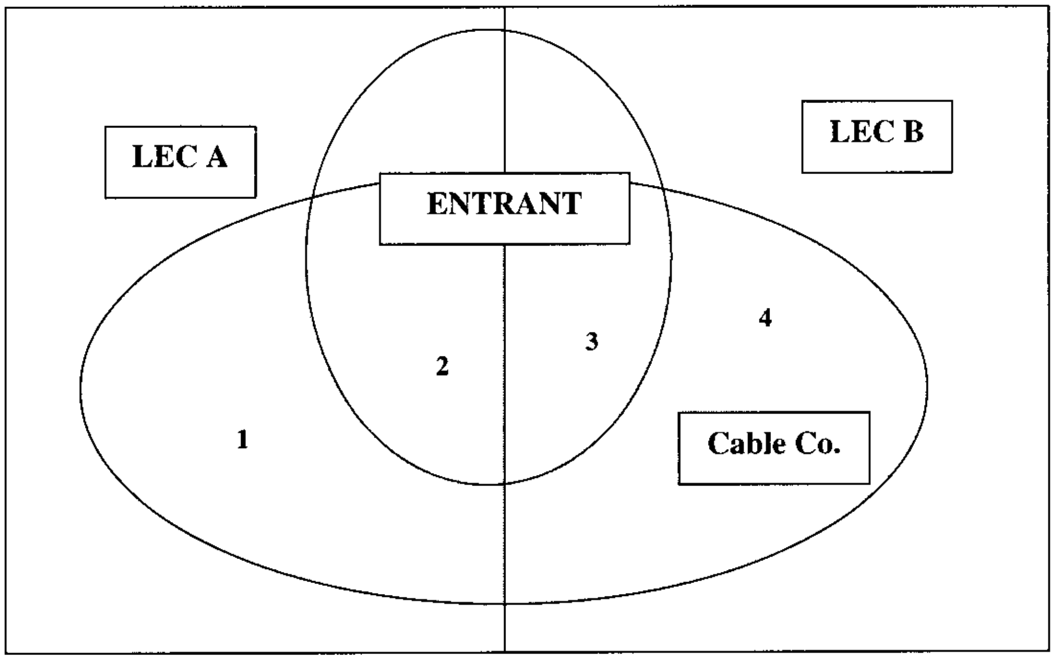
[19] Significantly, the FCC struck down a competitive local exchange build-out requirement in Texas, noting "build-out requirements are of central importance to competitive entry because these requirements impact the threshold question of whether a potential competitor will enter the local exchange market at all." *In the Matter of The Public Utility Commission of Texas*, CCB Dkt. No. 96-13, Memorandum Opinion and Order, 13 FCC Rcd 3460 ¶ 13 (1997).

[20] *Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities*, CS Docket No. 02-52, Declaratory Ruling and Notice of Proposed Rulemaking, 17 FCC Rcd 4798 (20020).

Cable system operators are seeking, however, to require video competitors to build-out entire cable franchise areas. Rather than encourage additional broadband deployment, however, this asymmetry could often prevent all providers other than the incumbent cable operator from achieving the triple play.[21] In fact, the real unfairness from a uniform build-out requirement would be that all competitors *but for the incumbent cable operator* would be required to expand their network into new areas just to offer their existing customers "triple play" service packages. Therefore, imposing cable franchise area build-out requirements on competitors seeking to offer broadband video in competition with the incumbent cable operator would create illogical, even perverse market outcomes.

[21] This is so because the necessary investment (and high risks) from an upfront commitment to rapid network expansion and entry into additional telecommunications and data markets just to obtain the right to offer video to current subscribers could often outweigh the potential returns in the new markets, particularly where there already are additional wireline competitors beside the incumbent in the new markets.

The following diagram shows how franchise cable build-out rules would be applied to prevent video entry by LEC networks:



1. The Cable Company decides to add the full range of residential voice services over its network, which provides video and broadband Internet: subscribers receive triple play with no network buildout.
2. LEC A chooses to add video to its current voice and broadband Internet services (whether in response to the Cable Company or on its own initiative: subscribers may receive triple play, but only if the network buildout required in area 3 (in competition with 3 other providers) and area 4 (in competition with 2 other providers) is profitable with limited broadband, voice, and video penetration.
3. Similarly, if LEC B chooses to add video to its current voice and broadband Internet services (whether in response to the Cable Company or on its own initiative: subscribers may receive triple play, but only if the network buildout required in area 1 (in competition with 2 other providers) and area 2 (in competition with 3 other providers) is profitable with limited broadband, voice, and video penetration.
4. Entrant (*e.g.*, a powerline broadband provider) wants to enter with video, voice, and broadband internet services (whether in response to the cable company, LEC A, LEC B, or on its own initiative: network buildout required in area 1 (in competition with 2 other providers) and area 4 (in competition with 2 other providers): subscribers are unlikely to receive any offering from entrant because the total build-out is more than double its original planned investment.

In the end, the Cable Company is unaffected by the build-out requirement, and it likely offers additional broadband services (e.g., voice services) to its existing subscribers. Conversely, there is a significantly reduced chance of the Entrant coming into the market. Also, both of the existing LECs face greater costs, and more risk, in adding additional broadband services which, on average, reduces broadband service availability across their subscriber bases (as it is hard to market to only part of a network).

On the other hand, if there were no build-out requirements, all of the networks—Cable, LEC A, LEC B, and Entrant—would be likely to add broadband video service offerings. Moreover, as some of the existing full-service providers became more successful than the others, the successful companies would likely extend their networks to new areas, in competition with other existing networks. Thus, there would be more network deployment over time *without* build-out requirements than with them.

In sum, a substantial reduction in LEC and other competitive entry is the most likely result of build-out requirements, which is a result that would deny broadband and video customers the benefits of competition and ubiquitous deployment.[22] This analysis is consistent with prior empirical finding regarding the negative effect of build-out requirements[23] and, with this experience, the Commission should not make the mistake of imposing build-out requirements on broadband video services. Rather, the Commission should follow the example of most markets in our economy, so that entrants can add services incrementally starting with

[22] *See, e.g.*, G.S. Ford, T.M. Koutsky & L.J. Spiwak, *The Consumer Welfare Cost of Cable "Build-out" Rules,* Phoenix Center Public Policy Paper No. 22, (2005) (available at http://www.phoenix-center.org/pcpp/PCPP22Final.pdf) (showing that *ex ante* "build-out" rules, when imposed on new entrants, deter entry significantly and force new entrants to bypass communities entirely) and citations therein.

[23] *E.g.*, T.W. Hazlett & G.S. Ford, *The Fallacy of Regulatory Symmetry: An Economic Analysis of the Level Playing Field in Cable TV Franchising Statutes*, 3 Business & Politics 21-46 (2001).

their existing networks. Then, as competition between fully-utilized broadband networks matures, the owners can follow market incentives to expand their network footprints in search of growth opportunities. Requiring competitors to make build-out commitments for new markets before successfully establishing their own markets, however, simply deters entry.

In practice, build-out requirements are also perverse as they deter entry when the stated objective is likely to occur without such requirements because it appears likely to be profitable in nearly all neighborhoods to add video services to a broadband network. Research has concluded that low-income households subscribe to video service at roughly the same rate as higher income households,[24] so the financial case for fiber deployment in low-income neighborhoods is disproportionately improved by adding video to the services deployed over fiber. Therefore, a new entrant will have the incentive to pass substantially more low-income households if it can provide video services in addition to voice and broadband Internet access services than it will if its ability to sell video services were sharply curtailed or delayed.

V. THE FRANCHISING PROCESS SLOWS ENTRY

The Commission concluded that the franchise process and franchise obligations are the most significant barrier to entry in video distribution markets in the first of these annual reports to Congress pursuant to the Cable Act of 1992.[25] That conclusion remains as important today as it was then, and the video franchise process itself still delays competitive entry and, thus, stands as a barrier to advanced broadband deployment. There are two substantial reasons franchising

[24] *See, e.g.*, R. Kieschnick and B. D. McCullough, *Why Do People Not Subscribe to Cable Television: A Review of the Evidence,* Presented at the Telecommunications Policy Research Conference (1998) (available at: http://www.tprc.org/abstracts98/kieschnick.pdf).

[25] *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 Delivery of Video Programming*, 9 FCC Rcd 7442, Appendix H at ¶ 375 (1994).

delays and blocks entry: (1) the process of obtaining the vast number of franchises needed to provide service ubiquitously imposes substantial transaction costs; and (2) franchise obligations are not competitively neutral but, rather, favor incumbents.

Franchising imposes substantial delay and transaction costs; the uncertainty generated by the process raises the cost of capital for prospective entrants. USTelecom members report average negotiation periods of nine months to one year for *each* franchise area, with some examples taking as long as three years, which could prove to be a fatal delay in a rapidly-changing, innovative market such as we see for broadband and other advanced services. It can be seen that this is a major obstacle to broadband deployment should cable franchises be required for broadband video services. In fact, there are more than 30,000 franchise areas in the country, and entrants obviously cannot collectively negotiate all 30,000 required agreements simultaneously. Moreover, the transaction costs created by franchise negotiations impact entry even in many individual cities because there are often ten or more franchise authorities in a relevant economic area. While some franchise areas can be negotiated with as a group, this generally does not reduce the overall manpower needed to conclude the negotiation.

In addition to build-out requirements and rate regulation, many other franchise obligations, such as requirements to provide studio facilities and public, educational, and governmental programming channels, arose as mechanisms to ameliorate undesirable consequences of monopoly cable franchises, which would have the incentive to restrict output and raise prices. Therefore, it is not surprising that franchise obligations make it harder for competitors to succeed in competition with the incumbent cable monopoly. The original cable operator likely was willing to agree to greater franchise obligations than would a competitive firm because it was receiving exclusivity, and the relatively certain high subscribership that goes with it. Competitive entrants receive no such benefits of exclusivity, or even first-mover advantages. Accordingly, extending the same regulatory treatment to competitors as is faced by the incumbent cable operator is far from competitively neutral; to the contrary, the "level playing field" is anything but level.

VI. ENTRANTS MUST HAVE COMPETITIVELY NEUTRAL ACCESS TO VITAL PROGRAMMING

A central concern of the 1992 Cable Act was ensuring competitors could access the programming they needed to compete effectively, and program access remains vital today for video distribution entrants. Companies will find it imprudent to invest in advanced networks capable of delivering broadband video without first ensuring access to most popular programming content. As the Commission has reported on several occasions, some programming is particularly important to competition, such as regional sports programming.[26] This was demonstrated rather clearly during the past decade in Philadelphia, where DIRECTV and EchoStar have been unable to show many of the local professional sports teams' games.[27] It has been reported that satellite penetration in the Philadelphia area is among the lowest in any metropolitan area in the country, and this has been attributed to the fact that the satellite-based competitors have been denied access to the local sports programming.[28]

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[26] Memorandum Opinion and Order, *Application for Transfer of Control, General Motors Corp. and Hughes Elec. Corp., Transferors, and News Corp. Limited, Transferee*, 19 FCC Rcd 473, 543 ¶ 148 (2004) ("*Hughes/News Corp. Merger Order*").

[27] The relevant facts were summarized by the Cable Service Bureau of the Commission in *DIRECTV v. Comcast*, CSR 5112-P, Memorandum Opinion and Order, 13 FCC Rcd 21822 (1998).

[28] "Nationally, direct-broadcast-satellite companies now serve about 21 percent of U.S. households, according to Centris Inc., a market-tracking firm. In Philadelphia, they reach only about 12 percent - compared with 81 percent for cable, giving Philadelphia one of the highest

The program access rules established in the 1992 Cable Act have been successful in that DIRECTV, EchoStar, USTelecom members, and cable overbuilders (such as RCN) generally have been able to access the programming they need to compete. Increasingly, however, the program access rules are likely to be circumvented by technology as terrestrial distribution of video signals is increasingly common.[29] Accordingly, the Commission and Congress may need to take greater steps to deal with ensure the equal access to programming that is essential for an efficient, competitive market for broadband video services.

VII. CABLE OPERATORS' EFFORTS TO PREVENT ENTRY AND SLOW BROADBAND DEPLOYMENT

The Federal Communications Commission has explicitly found that the "local franchise process is, perhaps, the most important policy-relevant barrier to competitive entry in local cable markets."[30] Cable system operator behavior is consistent with this finding; cable system operators historically have brought lawsuits challenging the grant of franchises to competitors—cable engages in litigation to *prevent* entry. Cable resistance to competitive entry is often styled as being in the interest of "fairness"—the incumbent cable operators argue that new entrants should have to overcome and face the same hurdles that the incumbent faced (which runs counter to the application of communications law and policy in most circumstances).

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cable penetrations in the country." David Gelles, Philadelphia Inquirer, http://www.philly.com/mld/inquirer/business/7976554.htm.

[29] *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: Section 628(c)(5) of the Communications Act; Sunset of Exclusive Contract Prohibition*, Report and Order, 17 FCC Rcd 12124, 12158 ¶ 73 (2002) ("*Sunset Order*") (finding that "that terrestrial distribution of programming could have a substantial impact on the ability of competitive MVPDs to compete in the MVPD market").

[30] *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 Delivery of Video Programming*, 9 FCC Rcd 7442, Appendix H at ¶ 375 (1994)

For example, franchising authorities: impose "requirements for facilities and equipment" on incumbent cable companies; require the dedication of capacity on any "institutional network" for the benefit of the municipality; set unspecified "construction- related requirements;" and impose build-out requirements and schedules that may be especially difficult for a new entrant to meet before it has begun to attract consumers and earn revenues. While many of these requirements would be completely redundant for a new entrant—municipalities should not, for example, need capacity on a duplicative institutional network—the cable incumbents have threatened legal action against franchising authorities that seek to ease the way for new franchises for telecommunications carriers by tailoring them to reflect reasonable differences between the entrenched cable incumbent and the new entrant.[31]

Most recently, cable operators in Texas have sought to enjoin the Act Relating to Furthering Competition in the Communications Industry, which extensively deregulates *both* cable and competitors.[32] They ostensibly took this action because they remain subject to existing franchise agreements until they expire. Both incumbents and competitors can negotiate new, deregulated agreements on a forward-looking basis, however, so the cable operators are not, in reality, disadvantaged. Rather, it appears that the Texas cable operators value the protective effect of cable franchise obligations, and wish only to slow competitive entry.

[31] *See, e.g.*, Hazlett, Predation in Local Cable TV Markets, 15 The Antitrust Bulletin 609 (1995). Indeed, as a cable overbuilder intending to compete against incumbent cable operators, Ameritech faced similar lawsuits that slowed down and altered the course of franchise negotiations.

[32] Complaint, *Texas Cable & Telecommunications Ass'n v. Perry, et al.*, Case No. A05CA721-LY (W.D. Tex.), filed Sept. 8, 2005 at ¶ 23; Texas Cable & Telecommunications Association, *TCTA Sues State of Texas over New Telecom Law,* Press Release, (September 8, 2005) (available at http://www.txcable.com/News/PressReleases/PressRelease20050908.asp).

Cable operators have also used the power of their incumbency to increase entrants' marketing costs by denying them access to lower-cost, and more effective, cable channel advertising spots for the purpose of advertising the entrant's services. For example, one rural LEC sought to purchase advertising on a particular cable channel at the prevailing market rate to target an offer tailored for a customer segment that favored the channel, but was refused the opportunity to purchase the spot. The cable representative stated that the company didn't accept advertising from the LEC's categories of business (voice, broadband, and resale of DIRECTV). This refusal only makes business sense (as the cable operator was declining its stated price) if the cable operator was calculating that it would prevent subscriber losses by denying access to the advertising spot. In sum, whereas cable systems gained free entry into telephony through the 1996 Act, they continue in their attempts to deny comparably free entry into video markets.

VIII. CONCLUSION

The Commission should find in its Report to Congress that: (1) video is a key driver for broadband deployment; (2) wireline video competition from LECs will benefit consumers; (3) build-out requirements prevent entry; (4) the franchising process slows entry; (5) access to vital programming is necessary for new video entrants to be successful; and (6) the incumbent cable industry is advocating policies that will prevent entry and slow broadband deployment.

Respectfully submitted,

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