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

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| 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 AMERICA CHANNEL, LLC**

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**COMMENTS OF THE AMERICA CHANNEL, LLC**

The America Channel, LLC. hereby submits its comments on the Notice of Inquiry in the above-captioned proceeding.

The America Channel is a new non-fiction network that will tell the extraordinary stories of ordinary people. It is a 24/7 exploration of what the country is today - a nation of powerful personal stories, diverse people and cultures, wide-ranging opinions, and lofty dreams and ambitions. TAC's programming will showcase American communities, local heroes, and ordinary people who accomplish extraordinary things throughout America.

## I. INTRODUCTION AND SUMMARY

In the introduction to the NOI for this proceeding the Commission states that a primary goal of its Annual Report is to analyze "the effect these [competitive] factors are having on consumers' access to video programming."[1] We believe that this assessment requires a thorough analysis of the state of competition within the video programming market. Competition among distribution outlets and competition among video

[1] MB docket 05-255 at 2

programmers are inextricably linked – both materially impact among other things consumer pricing, consumer choice, and the diversity of information and ideas in the marketplace.

The 2004 Report's treatment of the video programming market focused on reporting the quantity of networks in existence and the ownership structure of each. In our judgment the 2004 Report did not adequately examine the ownership structure of the programming networks in existence, the distribution profiles of the networks in existence, the extremely high percentage of affiliated channels among the top 100 networks, and the direct correlation between wide distribution of a channel, and its ownership.  A more thorough and diligenced examination of programming networks reveals a direct correlation between carriage by the top cable operators, and affiliation of the programming network.  We therefore respectfully suggest that the Report did not thoroughly assess the health of competition in the video programming market or its impact on consumers' access to programming. Yet despite the summary's narrow focus on the gross number of programming networks and exclusion of other factors, this summary and those from other Annual Reports have been regularly cited as proof of healthy competition among affiliated and independent networks by commenting parties in proceedings with broad implications for the structure of both the programming and video delivery markets.[2]  Understanding that the Commission's assessment of the video

[2] For example, in their Application for the proposed Adelphia transactions, Time Warner, Adelphia and Comcast cited statistics from the 2004 Report regarding the total number of networks in existence and the decrease in the percentage of those networks affiliated with an MVPD, to conclude, "there is absolutely no basis for concern that the proposed Transactions will somehow reduce competition in the sale of video programming or the ability of unaffiliated MVPDs to access program services." See MB 05-192 Application of Adelphia, Time Warner and Comcast at 84. Similar treatment of the programming data from the 2004 Report can be found in comments in the Commission's current review of vertical and horizontal ownership limits. See, for example, MM 92-264 Comments of Comcast Corporation at 40-42.

programming market in the 2005 Report will be similarly used, we suggest in these comments that the Commission more thoroughly consider the competitive environment which determines which networks actually reach consumers. For example, among other things, we suggest that the 2005 Report:

(1) Explicitly categorize all networks by their delivery platform (24/7 linear, part-time, VOD or pay-per-view), and make ownership, distribution and other comparisons in the context of their specific delivery platform;

(2) Report the number of subscribers and the ownership structure of each network;

(3) Report the growth rate of independent networks year over year, as compared with affiliated networks (in the same category); and

(4) Acknowledge the importance of the 20 million subscriber threshold and 50 million subscriber threshold for viability of programming networks – both of which milestones numerous affiliated channels have confirmed on the record in other proceedings of the FCC, as being critical milestones.

Independently owned networks play a vital role in strengthening competition, reducing consumer pricing increases, expanding consumer choice and increasing the diversity of ideas and information in the marketplace, all of which inure to the benefit of consumers. In contrast, networks affiliated with MVPDs and broadcasters are found to charge higher license fees on average than independent networks, increase their license fees more than independent networks, and are more likely to require operators to pay license fees in the network's first year(s) of operations, all of which contribute to skyrocketing cable rates.

It is our belief that there are severe dysfunctions in the video programming market, that independent networks are not able to compete fairly for carriage against affiliated networks and that two MVPDs in particular use their size, dominance of key markets and influence over the investment and MVPD communities to favor affiliated networks at the expense of qualified independent networks and to the detriment of consumers.

For this proceeding we offer a perspective on the ability of independently owned networks to compete in a video marketplace dominated by large vertically integrated media companies. While we address a number of the NOI's specific questions regarding the video programming market in these comments, our comments in the MB 05-192 Docket and the MM 92-264 Docket are extremely relevant to many of the Commission's questions and goals in this proceeding and we hereby include those comments in this proceeding by reference.[3]

## II. THE COMMISSION SHOULD EXPAND ITS ANALYSIS OF PROGRAMMING NETWORKS TO FULLY ASSESS THE IMPACT OF COMPETITION ON CONSUMERS' ACCESS TO VIDEO PROGRAMMING

The 2004 Report lists 388 national cable networks and states that 51% of them are not affiliated with an MVPD or other media company and that over the past several years the percentage of non-broadcast programming networks affiliated with cable operators has generally declined.[4] While these broad statements (which we respectfully deconstruct below) describe the *participants* in the video programming market, they do little to assess the health of competition among these participants, reveal the impact of this competition on consumers' access to video programming, or address any dysfunctions in the marketplace. Indeed, based on the statements cited above, it is entirely conceivable that a user of the 2004 Report could conclude that unaffiliated

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[3] See MB Docket 05-192Petition of The America Channel, MM Docket 92-264 Comments of The America Channel.

[4] *2004 Report*, 20 FCC Rcd at 2832 ¶ 145.

networks are just as likely to be carried as affiliated networks, something which the U.S. Government Accountability Office and our own empirical research have proven to be false.[5]

The Commission's stated concern in this proceeding is the effect of market competition on "consumers' access to video programming."[6] The 2004 Report implies that in the assessment of competition in the video programming market and its impact on consumers' access, mere existence of networks is what matters – that so long as there is a sufficient number of networks, diversity and competition are assured. For example, the report simply lists all networks in existence and then counts the total number of affiliated and independent networks without regard to other network characteristics, as if to say that an independent network which only operates a few hours per week, is accessible by less than a million subscribers, or is only available on VOD platforms somehow offsets a 24/7 affiliated network which is seen in 85 million households.[7]

When assessing competition and diversity in the programming market, *reach matters* as does *platform* (for example 24/7 linear carriage, part-time carriage, or VOD-

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[5] Networks affiliated with an MVPD are 62% more likely to be carried than networks which are not. See *Ownership Affiliation And The Programming Decisions Of Cable Operators.* Michael E. Clements and Amy D. Abramowitz U.S. Government Accountability Office p16.

The America Channel's own research showed that over a recent 2 ½ year period, at least 95% of networks affiliated with MVPDs or broadcasters which sought national linear carriage received national linear carriage, whereas only 13% of unaffiliated networks which sought national linear carriage received it. See MM Docket 92-264 Comments of The America Channel at 67 (Exhibit 5).

In addition, The America Channel examined 92 non-broadcast networks with distribution to more than 20 million homes and found that only 9 (plus two CSPAN networks) were not affiliated with an MVPD or broadcaster and that of the 59 networks carried to 50 million homes, only 4 (plus two CSPAN networks) were unaffiliated with an MVPD or broadcaster . See MM Docket 92-264 Comments of The America Channel at 56-58 (Exhibit 2). Note: Oxygen, which is partially owned by Time Warner, was incorrectly designated in that filing as an independent network.

[6] MB Docket 05-255, Notice of Inquiry, at 2

[7] It is reported that there are 388 national networks in existence and that 196 of them are "not affiliated with any cable operators, or other media entities." See 2004Report, 20 FCC Rcd at 79 and Appendix C.

only). We respectfully suggest that by not qualifying these lists with subscriber counts, delivery platform and other distribution information, the 2004 Report fell short of providing users with the information necessary to truly assess the health of competition, consumer choice and diversity in the video programming market. Assessing consumers' access to video programming, as well as the market competition which produces it, can best be accomplished by examining the subscriber data which reveal what networks most consumers actually receive.

For the 2005 Report, we therefore urge the Commission to supplement the raw affiliated/independent network counts with other data which is extremely relevant to the assessment of competition. In addition to listing all networks and whether they are affiliated with an MVPD or other media entity, the 2005 Report should:

(1) Explicitly categorize all networks by their delivery platform (24/7 linear, part-time, VOD or pay-per-view) and make ownership, distribution and other comparisons in the context of their specific delivery platform;

(2) Report the number of subscribers for each network;

(3) Recognize the importance of the 20 million subscriber threshold and 50 million subscriber threshold for viability of programming networks – both of which milestones numerous affiliated channels have confirmed on the record in other proceedings of the FCC as being critical – and report the names and ownership structure of cable networks which have reached each milestone. For example, we know of only four independent networks (plus two CSPAN networks) that have reached the 50 million subscriber threshold[8]; and

(4) Report the growth rate of independent networks year over year, as compared with affiliated networks (in the same category). Our research into networks launched between January 2003 and May 15, 2005 showed that networks affiliated with MVPDs or the major broadcasters grew faster. Of those networks launching, affiliated networks achieved subscriber numbers that were 11 times greater on a median basis and

[8] The four are: The Weather Channel, Home Shopping Network, Hallmark Channel, and EWTN.

> more than 2 times greater on a mean basis than their independently owned counterparts.[9]

Categorization, as requested in item (1) above, is a crucial step toward an improved assessment of competition, as networks only compete for carriage within their own delivery platform. For example, when looking at the overall list of 388 national networks reported by the Commission in the 2004 Report, we count <u>86</u> which are pay-per-view or VOD channels – not linear channels – and therefore should not, in order to present a fair picture, have been included in the total. (Within the subset of 196 independents there were at least 48 VOD and pay per view networks which incorrectly inflated the total.) Similarly, part time networks which nest their programming within other existing networks do not compete with 24/7 networks for carriage and therefore should also be counted separately. It is apples and oranges to compare a linear network that is in 85 million homes, with a VOD product or a part time network, both of which occupy vastly inferior capacity from a commercial perspective and do not compete directly with linear networks for carriage.

In addition, the 2004 Report's tally of 196 independent networks includes many networks which should not be counted as independent. These include:

- Several "part time networks" which show only a few hours of programming per week, such as Deep Dish TV which programs 1 hour per week aired on PBS and public access channels, My Pet TV which programs only a few hours per day and appears to be distributed only to Veterinarian and Animal Shelter waiting rooms, and others;

- VH1 MegaHits and VH Uno which are both owned by Viacom, and SiTV and Oxygen which are each partially owned by Time Warner, appear to be mistakenly designated as independent;

[9] MB Docket 05-192 Comments of The America Channel at 39—45

- 15 international networks for which Comcast serves as the domestic marketing and affiliate sales arm were designated as independent, despite a financial relationship with an MVPD which appears to be based on securing carriage; and

- Networks which identify themselves as, or in reality are, only a regional service intended for limited markets, such as Boston Kids & Family and others.

The health of competition in the video programming market cannot be assessed through a gross list of networks of the type contained in the 2004 Report, without any further examination or qualification. The Commission must provide additional, highly relevant data on each network (such as subscriber totals) and must categorize networks by type (part-time linear, 24/7 linear, VOD) to make comparisons between affiliated and non-affiliated networks more meaningful and the assessment of both competition in the video programming market and the effect of that competition on consumers' access to video programming, more accurate.

## III. COMPETITION FROM INDEPENDENT PROGRAMMERS WOULD FAVORABLY AFFECT CONSUMER PRICING.

The Commission asks, "*How should we interpret the fact that the average monthly cable rate has risen faster than the general inflation rate?*"[10]

The dramatic increase of cable rates cited in the NOI for this proceeding is a common complaint from consumers, of which Congress regularly takes note, and a common response from the cable community is to cite higher license fees demanded by networks. Indeed, the GAO report on Competition confirms that the increase in

[10] MB Docket 05-255, NOI at ¶7

programming costs has also outpaced the general increase in inflation and is a major contributor to overall cable price increases. [11]

Of course, one reason for this is that certain cable programming networks are "must-haves" and their differentiation from other networks puts upward pressure on the license fees that operators pay. However, an examination of programming license fee data provided by Kagan Research in its 2006 Economics of Basic Cable Networks report, suggests that a network's affiliation with an MVPD or broadcaster dramatically impacts its ability to extract fees from operators.[12]

As demonstrated below, affiliated networks, on average, charge operators higher license fees than do independent networks (networks with no financial ties to MVPDs or broadcasters), increase their license fees more than independent networks do, and are more likely to impose license fees on operators in the network's first year(s) of operations. Considering that the large majority of widely distributed networks are linked to MVPDs or broadcasters, and that the largest MSOs with the most control over network survival continue to favor affiliated networks over independent networks,[13] the effect is dramatic and may be a leading contributor to rising cable rates.

Our analysis of this data is attached to these comments as Exhibit A. Some key findings include:

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[11] Government Accountability Office, "Issues Related to Competition and Subscriber Rates in the Cable Television Industry" October 2003. at 20

[12] Economics of Basic Cable Networks 2006, 12th Annual Edition, Kagan Research p55

[13] The America Channel examined 92 non-broadcast networks with distribution to more than 20 million homes and found that only 9 (plus two CSPAN networks) were not affiliated with an MVPD or broadcaster and that of the 59 networks carried to 50 million homes, only 4 (plus two CSPAN networks) were unaffiliated with an MVPD or broadcaster . See MM Docket 92-264 Comments of The America Channel at 56-58 (Exhibit 2). (Note: Oxygen, which is partially owned by Time Warner, was incorrectly designated in that filing as an independent network.) New affiliated networks also are found to be carried more than unaffiliated networks and distributed to more households. (MB Docket 05-192 Comments of The America Channel at 39—45.)

**Average license Fees**

- The average license fee in 2005 for networks affiliated with MVPDs is 225% greater than the average license fee for independent networks (defined as networks with no financial ties to an MVPD or broadcaster).
- The average 2005 license fee for networks (excluding ESPN) that are affiliated with a media company is 161% greater than the average 2005 license fee for independent networks.
  - Including ESPN, the average 2005 license fee received by networks affiliated with a media company, is 203% greater than that for independent networks.
- The average 2005 license fee for Time Warner owned networks is 341% greater than the average 2005 license fee for independent networks.
- The average 2005 license fee for Comcast owned networks is 121% greater than the average 2005 license fee for independent networks.

**License Fee Increases, 2002 to 2005**

- Over the past three years (2002 to 2005), the license fees charged by networks affiliated with an MVPD or broadcaster increased more, on average, than did the fees charged by independent networks.[14]
- The average license fee increase from 2002 to 2005 for a network affiliated with an MVPD was 88% greater than that of an independent network.
- The average license fee increase from 2002 to 2005 for a Time Warner affiliated network was 5.1¢, more than double that of an independent network.
- The average license fee increase from 2002 to 2005 for a Comcast affiliated network was 3.3¢, more than 30% greater than that of independent networks.
- Excluding ESPN (which posted a $1.00 increase in license fees), the average license fee increase for a network affiliated with any media company (MVPD or broadcaster) was 40% greater than that of an independent network.
  - Including ESPN, the average increase for networks affiliated with an MVPD or broadcaster was 84% greater than that of an independent network.
- The average license fee increase (excluding ESPN) for all networks was 3.3¢ per subscriber per month.
  - Only 17.6% of independent networks exceeded this average, while 28.9% of affiliated networks exceeded the average.
  - 33.3% of Comcast owned networks exceeded this average, making a Comcast network almost two times more likely to exceed the average license fee increase than an independent network. In addition, Comcast-owned network TV One – which does not have three years of license fee data available and therefore was not included in this analysis – has already marked a 6¢ increase in its license fees since its 2004 launch. When TV One is included in the analysis, 43% of Comcast-owned networks exceeded the average fee increase.

[14] Only networks with license fee data for all three years were included in this analysis.

- 44.4% of Time Warner affiliated networks exceeded the average rate increase, making a Time Warner affiliated network two-and-a-half times more likely to exceed the average increase than an independent network.

As demonstrated above, the addition of independent networks to a cable system is less likely to increase cable rates than the addition of comparable networks affiliated with MVPDs or broadcasters. In addition, free competition from these independent networks for carriage, tier placement, channel assignments and more would also put downward pressure on the license fees which MVPDs are required to pay to many comparable networks, affiliated and independent. The removal of unreasonable barriers to entry for cheaper and more efficient independent networks and the competition which such entry brings can cause high-priced affiliated networks to become more efficient, reduce their rates or otherwise improve their value proposition – all of which would inure to the benefit of the consumer. It is not the entry of one more Viacom or Time Warner network that will create this downward pressure on consumer pricing. These and other conglomerates who own the majority of widely distributed networks have little incentive to encourage price competition among networks. The public, however, has an interest in fair access for entrepreneurial ventures – independent programmers – which will expand competition in the marketplace and likely place downward pressure on license fees paid. The continued restrictions on entry have had and will continue to have the opposite effect: steady increases in programming costs and hence, upward pressure on consumer pricing.

## IV. TWO MVPDS CURRENTLY CAN PREVENT NETWORKS FROM REACHING 25 MILLION HOUSEHOLDS, WHICH ADVERSELY AFFECTS MARKET ENTRY, COMPETITION, CONSUMER PRICING CONSUMER CHOICE AND THE DIVERSITY OF IDEAS IN THE MARKETPLACE

The NOI in this proceeding asks, *"Is carriage by one or more of the largest MVPDs necessary for the successful launch of a new programming network?"*[15]

We believe that carriage by Comcast and Time Warner is essential for the long term survival of advertising supported networks. Extensive analysis of the gatekeeping ability of these two MSOs and its subsequent impact on competition, consumer choice, consumer pricing and the diversity of ideas and information in the marketplace, is included in our Petition to Deny the proposed Adelphia transactions (MB Docket 05-192). We direct and invite the Commission's attention to that filing in connection with these proceedings by reference.[16]

Among other things, that filing documents that as a result of their (1) subscriber levels, (2) presence in all but 4 of the top 50 DMAs, and (3) corollary influence over the carriage decisions of one another and smaller MVPDs, carriage by both Comcast and Time Warner has been required for cable networks to reach even 25 million households (in itself an unsustainable level of distribution for an advertising supported network). Denial of carriage by even one of these two MSOs materially impacts a network's ability to project profitability which can prevent the funding and minimal carriage necessary for market entry by a new independent network. In short, carriage by both is necessary for ad supported networks to reach critical thresholds of viability and therefore it is the carriage decisions of these two which determine to a large extent the health of competition in the video programming market.

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[15] MB Docket 05-255, NOI at ¶15

[16] See MB Docket 05-192, Petition of The America Channel

Additionally, the Commission has expressed interest in examining the adoption patterns of new independent networks and has requested information regarding subscriber counts of recently launched independents as part of this proceeding.[17] We direct the Commission's attention to our evaluation of the proposed Adelphia transactions included in these proceedings through reference (see above). In those comments we reviewed the adoption of new affiliated and independent networks based on publicly available information during the period of January 1, 2003 to May 15, 2005 (a nearly 2 ½-year period).[18] Among the results, we found that across all MVPDs, affiliated networks which launched during the study period achieved subscriber numbers considerably higher than independent networks. For example:

- The median subscriber count for the affiliated networks which received Standard carriage is eleven times (11x) greater than that of unaffiliated networks. The median subscriber count for the affiliated networks which received Standard carriage is 11 million; for the unaffiliated nets receiving Standard carriage it is 1 million.

- The mean subscriber count for the affiliated networks which received Standard carriage is more than double (2x greater) that of unaffiliated networks. The mean subscriber count for the affiliated networks which received Standard carriage is 12.67 million; for the unaffiliated nets receiving Standard carriage it is 5.7 million.

These findings are consistent with those of the U.S. GAO, whose research on carriage showed that the criterion which has the greatest impact on a network's carriage is its ownership by an MVPD. According to its report, cable operators in general were 62% more likely to carry affiliated programming over independent programming.[19] Furthermore, of the ten variables tested in the GAO study, <u>ownership by a cable operator</u>

[17] 05-255 Notice of Inquiry at 5
[18] See MB Docket 05-192 Petition of The America Channel at 34—37
[19] *Ownership Affiliation And The Programming Decisions Of Cable Operators.* Michael E. Clements and Amy D. Abramowitz U.S. Government Accountability Office p16.

had by far the largest marginal effect on predicting carriage of a network.[20] (The GAO study concluded, "These results can also indicate the foreclosure of competition in the upstream cable network market, as independent cable networks are less likely to be carried than are affiliated networks."[21])

The NOI for this proceeding posits that perhaps it is the presence of existing competitors which limits distribution for new networks.[22] Empirical data supports the conclusion that, as suggested by the GAO study, it is MVPD ownership and not a lack of competitors which ensures the successful launch of a network. By way of example, Comcast's newest networks, TV One and PBS Sprout (scheduled to launch as a linear network in September 2005) both entered programming genres with existing direct competitors. TV One, targeted to the African-American community, launched in January 2004 and has surpassed 21 million homes at break-neck speed - within 17 months (according to a June 2005 corporate press release). As a result, it now counts more subscribers than one of its closest competitors, the independently-owned Black Family Channel.[23] In addition, at least five independent networks targeting African-Americans did not secure any linear carriage as of the date of The America Channel's study: Africast Television Network, Black Education Network, Black Television News Channel, Black Women's TV and The Real Hip Hop Network. Other examples of carriage disparity

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[20] Id. at 14. Majority ownership by a cable operator added 27.78 percentage points to a network's likelihood of gaining carriage.

[21] Id. at 16

[22] 05-255 NOI at 6: "To what extent do new programming services that provide a genre of programming already offered by a competing and established network have difficulty obtaining carriage?

[23] Black Family projects distribution to 15.8 million subscribers by YE 2005. See Kagan Research Economics of Basic Cable Networks 2006 at 142.

between affiliated networks and independent networks with similar content and themes include:

- LOGO (owned by Viacom), targeted toward the gay and lesbian community, launched on June 30, 2005 to an estimated 13 million subscribers and is carried as a non-premium channel by Time Warner Cable, Comcast, Adelphia, DirecTV, Charter, Cablevision and RCN. Q Television is an independent network with a similar focus. Q launched in September 2004 and has since received carriage as a premium network by RCN and Cox and some distribution as a premium network by Time Warner.

- SiTV and Voy both target the young, English-speaking Latin community. SiTV is owned in substantial part by Time Warner, while Voy is independent. SiTV launched in February 2004 and has received carriage deals with both Comcast and Time Warner. It is available in 10 million homes, primarily as a non-premium channel. As of the date of the research study, Voy had not received any carriage commitments.

## V. THE FALSE PROMISE OF VIDEO ON DEMAND

The Commission asks: "*With the accelerating rollout of video-on-demand platforms, are new networks finding they must demonstrate demand for their service through VOD before they can negotiate for placement on analog or digital programming tiers?*"[24]

Empirical evidence suggests that the answer depends on the ownership of the new network – that independently owned networks are routinely herded to VOD while MVPDs launch their own affiliated networks and those affiliated with other media companies on vastly superior linear capacity.

As suggested by the NOI's question, independent networks are often lured to VOD-only carriage with the promise of potential migration to linear carriage, once market demand is "proved." This promise is illusory. Independent linear networks compete with affiliated networks for advertising revenue, technical capacity, license fees, viewership and the corresponding wealth generated by asset appreciation. VOD-only carriage for independent networks limits that competition. As a result, MVPDs do not

[24] MB Docket 05-255, NOI at ¶15

appear to have an incentive to migrate channels from VOD networks to linear platforms, and we are not aware of examples in which this has occurred.

To date, the economic model for VOD-only carriage is unproven and does not approach the model for a linear network. As a result, the large cable MVPDs and media conglomerates view VOD mainly as a secondary outlet for existing programming, and they continue to develop and launch linear networks. For example, in May 2005, News Corp launched Fox Reality as a *linear* network. In June 2005, Viacom launched LOGO as a *linear* channel. A&E Networks[25] is launching Military History and Crime and Investigation Network as *linear* channels; Fox News is developing a business news Channel as a *linear* network; Viacom is launching MTV Desi and other new networks as linear channels.

Comcast has become one of the most vocal proponents of Video on Demand distribution, particularly for new, independent networks.[26] Despite this, Comcast continues to make extensive use of linear and even analog capacity for its own networks. 100% of Comcast's 20 networks are linear, and Comcast has granted almost all of them analog carriage on its own systems. TV One, owned in part by Comcast, was launched in January 2004 and reached 21 million subscribers in just over 17 months. TV One is a linear channel, with analog carriage on Comcast in several markets – no small feat for a new channel. Comcast's new PBS Sprout channel will launch on linear capacity. Other

[25] A&E Television Networks is jointly owned by Disney, NBC Universal and Hearst Corporation.

[26] In a recent interview published in CableWORLD, Matt Strauss, Comcast's VP of Video On Demand Programming Investments, said that, "the future of television is 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." He further claimed that VOD was the correct place to launch new services: "A lot of our enthusiasm about on demand, and about programming for on demand," Strauss went on to say, "isn't so much that there's bandwidth constraints on launching more linear channels, it's because we actually know and believe that on demand's a better viewing experience and platform, especially for new forms of content." See CableWorld June 20, 2005.

new Comcast channel initiatives, like Comcast SportsNet West, Comcast SportsNet Chicago, Comcast's New York Mets channel and Comcast's Dallas Cowboys channel, exist or are planned as linear channels.

## VI. THE FALLACY OF CHANNEL CAPACITY

The Commission asks, "*With the increase in MVPDs' channel capacities and the creation of digital tiers on cable, is channel capacity still a barrier to obtaining distribution*?"[27]

Despite touting the benefits of expanded cable systems to the public, MSOs still cite bandwidth constraints as a reason for denying access to independent networks. We respectfully submit, however, that the real constraint is not related to physical bandwidth, but rather to MVPDs practice of favoring affiliated networks with regard to carriage. For example, if Comcast was indeed facing a bandwidth constraint, as they have claimed in correspondence with The America Channel,[28] Comcast's own affiliated new networks would experience the same difficulty in launching that unaffiliated networks do. Yet Comcast continues to make extensive use of analog and digital capacity for its affiliated networks. For example, Comcast currently carries all seven of its own national networks (and all eight of its regional networks) on *analog* platforms in at least one market.[29] And when Comcast recently moved five of its affiliated channels in Los Angeles from digital to analog in advance of the system swap with Time Warner, <u>this filled capacity</u>

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[27] MB Docket 05-255, NOI at ¶15

[28] See MB 05-192, Comment of The America Channel at 1.

[29] A table detailing Comcast's practices with respect to carriage of its own networks is included in MB 92-264 Comments of The America Channel at 47.

equivalent to up to 50 digital channels (because each analog channel consumes capacity equivalent to approximately ten digital channels).[30]

In addition, many MSOs are aggressively deploying "digital simulcast." Comcast recently announced on an analyst call that it expects to have at least 75% of its markets under this program by year end.[31] With digital simulcast, cable operators transmit their entire analog lineup in both analog and digital formats. This program, intended to reduce churn and increase revenue for the MSOs, requires significant usage of capacity – every analog network which is simulcast in digital format uses additional capacity which could otherwise be allocated to a new network. For a typical system this is capacity equivalent to approximately 80 networks.

We believe that the Commission has an interest in establishing exactly what the capacity of the largest MVPDs is and should therefore require MVPDs to disclose sufficient information regarding capacity and constraints such that the Commission may determine: (a) what are the digital bandwidth capabilities of the largest MVPDs on a per system basis; (b) how many digital channels can each carry today; and (c) what are these MVPDs' plans with respect to digital capacity in the future and how will the same affect access for independent networks.

## VII. CONCLUSION

Our analysis of the video programming market for this proceeding and for MB Docket 05-192 and MM Docket 92-264 (our comments to which we incorporate in this

[30] CableWORLD June 20, 2005. Are Independents' Days Over? "Comcast moved Comcast-owned networks Style, TV One, Outdoor Life, AZN and G4 from digital to expanded basic in advance of the market's pending system swap with Time Warner Cable."

[31] Q2 2005 Comcast Corporate Earnings Conference Call 08/02/2005, recording of which is available on www.comcaast.com.

proceeding by reference) reveal severe dysfunctions in the marketplace which negatively impact consumer pricing, consumer choice, competition and diversity. We urge the Commission to expand its analysis of the video programming market for the 2005 Report to include the data and comparisons necessary to thoroughly assess the state of competition in the video programming market and its effect on consumers' access to video programming. We believe that the current market dynamics have not provided consumers with the robust and fair competition in the video programming market needed to ensure the Commission's goals, and encourage the Commission to conclude the same in its 2005 Report.

Respectfully submitted,

______// signed // ____

Kathleen Wallman

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**120 International Parkway Suite 220**
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September 19, 2005

# Exhibit A

**License Fee Analysis**

This study is based on information provided in Kagan Research's Economics of Basic Cable Networks 2006, 12th Annual Edition ("the Kagan Report"). The Kagan Report provides license fee information for 123 linear networks which have commercially launched. License fees are provided on a per subscriber per month basis for each year beginning with 1999 and ending with 2006 (projected). The Kagan Report also reports ownership information for these networks.

**Characteristics of population studied:**

| | |
|---|---|
| Total number of networks included in study | 123 |
| Total number of networks affiliated with an MVPD | 43 |
| Total number of networks affiliated with any MVPD or broadcast company | 100 |
| Total number of independent networks (networks with no financial ties to any MVPD or broadcaster) | 23 |

**Preliminary findings include:**

**Average license Fees**

- The average license fee in 2005 for networks affiliated with MVPDs is 225% greater than the average license fee for independent networks.
- The average 2005 license fee for networks (excluding ESPN) that are affiliated with a media company is 161% greater than the average 2005 license fee for independent networks.
    - Including ESPN, the average 2005 license fee received by networks affiliated with a media company, is 203% greater than that for independent networks.
- The average 2005 license fee for Time Warner owned networks is 341% greater than the average 2005 license fee for independent networks.
- The average 2005 license fee for Comcast owned networks is 121% greater than the average 2005 license fee for independent networks.

| Average 2005 license fees per sub per month | License fee | Comparison to avg. independent network fee |
|---|---|---|
| All launched networks | 15.5 ¢ | 265% |
| All launched networks (excluding ESPN) | 13.5 ¢ | 231% |
| Nets affiliated with an MVPD | 19.1 ¢ | 325% |
| Nets affiliated with a media company | 17.8 ¢ | 303% |
| Nets affiliated with a media company (excluding ESPN) | 15.3 ¢ | 261% |

| | | |
|---|---|---|
| Independent networks (no media affiliation) | 5.9 ¢ | 100% |
| Comcast owned networks | 13.0 ¢ | 221% |
| Time Warner owned networks | 25.9 ¢ | 441% |

**License Fee Increases, 2002 to 2005**

- Over the past three years (2002 to 2005), the license fees charged by networks affiliated with an MVPD or broadcaster increased more, on average, than did the fees charged by independent networks.[32] Whereas most networks posted a license fee gain of a few cents, Disney-owned ESPN was able to increase its license fees by $1.00 during this period. Because this data point is such an extreme outlier, ESPN was excluded in many of the calculations, as noted.
    - The average license fee increase from 2002 to 2005 for a network affiliated with an MVPD was 88% greater than that of an independent network. The average increase for an affiliated network was 4.7¢ per subscriber per month; for an independent network it was 2.5¢ per subscriber per month.
    - The average license fee increase from 2002 to 2005 for a Time Warner affiliated network was 5.1¢, more than double that of an independent network.
    - The average license fee increase from 2002 to 2005 for a Comcast affiliated network was 3.3¢, more than 30% greater than that of independent networks.
    - Excluding ESPN (which posted a $1.00 increase in license fees), the average license fee increase for a network affiliated with any media company (MVPD or broadcaster) was 40% greater than that of an independent network. The average increase for networks (excluding ESPN) affiliated with any media company was 3.5¢ per subscriber per month, for an independent network it was 2.5¢ per subscriber per month.
        - Including ESPN, the average increase for networks affiliated with an MVPD or broadcaster was 84% greater than that of an independent network.
    - The average license fee increase (excluding ESPN) for all networks was 3.3¢ per subscriber per month.
        - Only 17.6% of independent networks exceeded this average, while 28.9% of affiliated networks exceeded the average.
        - 33.3% of Comcast owned networks exceeded this average, making a Comcast network almost two times more likely to exceed the average license fee increase than an independent network. In addition, Comcast-owned network TV One – which does not have three years of license fee data available and therefore was not included in this analysis – has already marked a 6¢ increase in its license fees since its 2004 launch. When TV One is included in the analysis, 43% of Comcast-owned networks exceeded the average fee increase.
        - 44.4% of Time Warner affiliated networks exceeded the average rate increase, making a Time Warner affiliated network two-and-a-half times more likely to exceed the average increase than an independent network.

[32] Only networks with license fee data for all three years were included in this analysis.

| License Fee Increase 2002 to 2005 (per sub per month) | |
|---|---|
| Total networks in report with data since 2002 | 107 |
| Affiliated networks in report with data since 2002 | 90 |
| Independent networks in report with data since 2002 | 17 |
| Average license fee increase 2002 to 2005 of all 107 networks in report | 4.2¢ |
| Average license fee increase 2002 to 2005 excluding ESPN | 3.3¢ |
| Average license fee increase 2002 to 2005 for independent networks | 2.5¢ |
| Average license fee increase 2002 to 2005 for Comcast affiliated networks | 3.3¢ |
| Average license fee increase 2002 to 2005 for Time Warner affiliated networks | 5.1¢ |
| Average license fee increase 2002 to 2005 for networks (excluding ESPN) affiliated with any media company | 3.5¢ |
| Average license fee increase 2002 to 2005 for networks affiliated with MVPDs | 4.7¢ |
| Total number of nets in report with increase greater than 3.3¢ non-ESPN average | 29 |
| Number of independents with increase above average | 3 |
| % of independents with increase above average | 17.6% |
| % of nets affiliated with an MVPD with increase above average | 30.0% |
| % of nets affiliated with Comcast with increase at or above average | 33.3% |
| % of nets affiliated with Time Warner with increase at or above average | 44.4% |

**License Fees in Year 1 of Network Operations**

- The data reported by Kagan suggest that networks affiliated with MVPDs and other media companies are two times more likely to charge operators license fees in their first year(s) of operations than are independent networks.

  The Kagan Report's license fee data covers 39 networks which launched during the recorded period (1999 to present), 24 of these networks were affiliated with a media company at the time of launch and 15 were independent at the time of launch.
  - Of the 24 affiliated networks which launched, 13 (54%) were able to secure license fees in their first year of operations.

- Of the 15 independent networks which launched, only 4 (27%) were able to secure license fees in their first year of operations. Three were sports networks: NFL Network, NBA TV (now partly owned by Time Warner), and CSTV. The remaining "independent" network to secure fees was Oxygen, which had close ties to, but not a direct investment from Charter Communications, a leading cable MSO.[33]
- Sports networks are more likely to secure license fees than non-sports networks. 67% of sports networks that launched during this period were able to secure license fees in their first year of operations. There were three sports networks however, which were unable to secure license fees in their first year of operations -- 100% of them are independently owned.
- The Kagan report covered 30 non-sports networks which launched since 1999. Of these, 21 were affiliated with a media company and 9 were independent. 10 of the 21 affiliated networks were able to secure license fees in their first year of operations, a 48% success rate. Of the 9 independents, only one, Oxygen – with its strong ties to Charter Communications (see footnote) – was able to secure a fee in their first year of operations, an 11% success rate for non-sports independents.
- Comcast launched two networks during the reporting period, G4 and TV One. Both of these networks were able to secure license fees in their first year of operations, a 100% success rate. (This compared to a 48% success rate for all affiliated non-sports networks, and an 11% success rate for non-sports independent networks.)

[33] Oxygen Media received a $100 million investment from Paul Allen's Vulcan Ventures in June of 1999. Paul Allen controls 91% of Charter Communication's voting stock.