Federal Communications Commission
Washington, D.C. 20554

September 22, 2005

Ryan G. Wallach, Esq.
Willkie Farr & Gallagher LLP
1875 K Street, N.W.
Washington, D.C. 20006

DOCKET FILE COPY ORIGINAL

Re: Motion to Accept Filing as Timely Filed in MB Docket No. 05-255

Dear Mr. Wallach:

The Office of the Secretary has received your request for acceptance of the document filed by Willkie Farr & Gallagher LLP on behalf of Comcast Corporation in the above-referenced proceeding as timely filed, due to technical difficulties with the Commission's Electronic Comment Filing System.

In accordance with 47 C.F.R. Section 0.231(i), I have reviewed your request and verified your assertions. After considering the relevant arguments, I have determined that these filings will be accepted as timely filed on September 19, 2005. If we can be of further assistance, please contact the Office of the Secretary.

Sincerely,

Marlene H. Dortch

Marlene H. Dortch
Secretary

cc: Media Bureau

WILLKIE FARR & GALLAGHER LLP

1875 K Street, NW
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SEP 2 1 2005

Federal Communications Commission
Office of the Secretary

September 20, 2005

Marlene H. Dortch, Secretary
Office of the Secretary
Federal Communications Commission
445 12th Street, SW, Suite 5-C140
Washington, DC 20554

Re: Comcast Video Competition Comments, MB Docket No. 05-255

Dear Ms. Dortch:

The undersigned, counsel for Comcast Corporation ("Comcast"), hereby resubmits a copy of Comcast's initial comments in the above-referenced proceeding.

On September 19, 2005, between the hours of 8:30 p.m. and 11:00 p.m., Comcast's counsel repeatedly attempted to file its comments electronically through the Commission's Electronic Comment Filing System ("ECFS") both via the ECFS main link and alternate link, and from two different physical locations (and two different computer systems). Although the web browser indicated that the document uploaded to ECFS, ECFS did not generate and return the standard confirmation notice. We ascertained on September 20, 2005 that ECFS experienced technical difficulties last night and that none of our attempts at uploading the comments were successful.

In light of the lack of any ex parte or disclosure requirements applicable to this proceeding pursuant to 47 C.F.R. § 1.1204(b)(1), the undersigned hereby resubmits the attached for inclusion in the Commission's record.

Please let me know if you have any questions.

Respectfully submitted,

/s/ Ryan G. Wallach

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Federal Communications Commission
Office of the Secretary

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 Delivery of Video Programming	)))	MB Docket No. 05-255

COMMENTS OF COMCAST CORPORATION

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September 19, 2005

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FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

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Competition in the Market for the	)	
Delivery of Video Programming	)	

COMMENTS OF COMCAST CORPORATION

Comcast Corporation ("Comcast") hereby responds to the Commission's Notice of Inquiry ("*Notice*") in the above-captioned proceeding.[1] These comments document the intense and still growing competition among established players and new entrants to deliver video programming to American consumers, as well as the many ways in which Comcast, as the nation's leading cable operator, is continuing its efforts to offer consumers the most compelling entertainment and communications services.

I. INTRODUCTION AND SUMMARY

Beginning with its *First Report*, the Commission has consistently recognized that the video programming choices available to consumers are not limited to those available from "multichannel video programming distributors," or "MVPDs," but also include a variety of other delivery modalities.[2] Nonetheless, the *First Report* and subsequent reports have focused mainly on MVPDs, especially, cable operators, overbuilders, direct broadcast satellite ("DBS") and C-

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1 *In re Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Notice of Inquiry, MB Docket No. 05-255, FCC 05-155 (Aug. 12, 2005) ("*Notice*").

2 *See generally In re Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, First Report, 9 FCC Rcd. 7442 (1994) ("*First Report*").

band satellite providers, local exchange carriers ("LECs"), Multichannel Multipoint Distribution Service ("MMDS"), electric utilities, and satellite master antenna TV ("SMATV") systems. The Commission foresaw significant *potential* competition from these providers of multichannel video programming services but also concluded that "[p]roviders using alternative video programming distribution media have not yet reached the subscribership levels necessary for the Commission to conclude that vigorous rivalry currently exists in the market for multichannel video programming distribution."[3] In subsequent years, considerable efforts have been made to promote alternative distribution modalities -- not just the ones listed above but also others such as Interactive Video and Data Services ("IVDS"), Local Multipoint Distribution Service ("LMDS"), and open video systems.

Year after year, the Commission has tracked new, old, and future competitors, and while some have failed to establish themselves in the marketplace -- e.g., video dialtone, LMDS, and IVDS -- others have turned out to be sustained and effective competitors. This is especially true in the case of DBS, whose two leading providers offer services ubiquitously throughout the continental United States (and to a lesser degree in Hawaii and Alaska) and have captured over 26 million customers (and counting!). Meanwhile, over-the-air broadcasting remains a viable alternative for millions of households, home video sales and rentals have boomed beyond anyone's wildest predictions, the Internet is emerging as the most abundant source of video programming options ever, and after several false starts it now appears that the deep-pocketed Bell companies (having extinguished much of the local phone competition that was intended to result from the Telecommunications Act of 1996 but facing unanticipated challenges from

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[3] *Id.* ¶ 15.

wireless and cable companies for phone customers) are investing heavily to challenge cable and DBS for multichannel video customers.

In short, today's competitive marketplace far exceeds the hopes expressed at the time of the *First Report.* Consumers in every community have true alternatives for how, where, and from whom they obtain their video programming, with even more alternatives on the horizon.[4] Competition is robust and choice abounds. As discussed in greater detail below:

- DBS competition continues to grow and shows no sign of abating.
- LECs, especially the gigantic Bell companies, have joined with DBS operators to market video services to consumers while the LECs continue to build out advanced fiber networks to neighborhoods and homes around the country. The Bell companies' offering of video services over fiber networks is imminent.
- Consumer adoption of video via the Internet has skyrocketed. The availability of video streaming and downloads, and improvements in the quality of transmission and picture signal, has made the Internet a genuine multichannel alternative.
- Broadcast stations are well on their way to becoming full-fledged multichannel alternatives. And more consumers than ever are obtaining huge quantities of video programming from home video rentals and sales.
- Overbuilders, now reborn as broadband service providers ("BSPs"), have solidified their position in the marketplace, and are now looking to further expand their footprints.
- New video programming distribution alternatives, such as video via mobile phones and broadband over power line transmission, show promise for consumers. Investment and innovation in these new, but yet to be proven, technologies -- and in the more established technologies -- is continuing.

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4 As the Commission recently recognized: "Today, 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." *See In re Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Eleventh Annual Report, 20 FCC Rcd. 2755 ¶ 4 (2005) ("*11th Annual Report*"). In the months since those words were written, consumers' choices have continued to grow.

The video distribution marketplace is more competitive and diverse than ever, and a focus solely on traditional MVPDs and traditional services misses a significant portion of the dynamic competition that has developed and continues to develop. The reality now is that "[t]elephone giants, cable titans, computer companies and consumer-electronics makers are all vying to provide the next generation of high-tech entertainment -- a single network of gadgets that lets you view photos, listen to music, record DVDs and tune into whatever TV programs you want to watch, whenever you feel like watching them."[5]

In such a dynamic marketplace, Comcast and other established MVPDs cannot afford to rest for a moment. With its commitment to "be the company that people turn to first for the communications products and services that connect people to what's important in their lives,"[6] Comcast continues its rapid development and deployment of advanced services, including new digital and high-definition television ("HDTV") programming, video-on-demand ("VOD") service with thousands of hours of content, digital video recorder ("DVR") service, high-speed Internet service, and telephone service. In every respect, Comcast's marketplace behavior shows the powerful effects of vibrant marketplace competition. That behavior also demonstrates Comcast's determination to be the provider of choice despite the growing options available to consumers.

The comments that follow focus on factual information regarding video competition, first describing the many different companies, services, and technologies -- other than cable -- that

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5 Michael Totty, *Who's Going To Win the Living-Room Wars?*, Wall St. J., Apr. 25, 2005, at R1.

6 Comcast Corp., *The Comcast Credo -- Turn to Us First, at* http://www.comcast.com/diversity/Credo.html (last visited Sept. 19, 2005).

provide consumers with video programming options, and then discussing the ways in which Comcast has responded to competition by continuously expanding the options that it makes available.[7] The policy implications of the facts presented here will be discussed at greater length in reply comments, especially if (as too often occurs in these proceedings) other parties use this opportunity to plead for increased governmental intervention in the marketplace. For now, it suffices to observe that competition and deregulation in the video marketplace are both integral parts of a virtuous circle that yields greater viewing choices for consumers, with increased competition justifying more deregulation, and more deregulation leading to increased investment, innovation, and competition. In light of these marketplace facts, the Commission should step up its efforts to take additional and even-handed *deregulatory* steps -- treating like services alike -- for this dynamic and intensely competitive marketplace.[8]

II. CONSUMERS IN THE UNITED STATES TODAY ENJOY ABUNDANT CHOICES AMONG VIDEO PROGRAMMING DELIVERY MEDIA.

A. DIRECTV and EchoStar Are Providing Fierce Competition in the Video Marketplace.

For over a decade now, DBS providers have offered consumers a wide array of video programming options. The two current DBS providers, DIRECTV and EchoStar, have grown from obscurity to being the second and third largest MVPDs in the Nation. Together they offer

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[7] Certain of the other questions posed in the *Notice* are addressed in the comments being filed by the National Cable & Telecommunications Association ("NCTA").

[8] It might be observed that the Commission has expended much greater resources in adopting deregulatory measures for incumbent telephone companies than for cable companies, even though the former face much less competition and have maintained much higher market shares in their core business.

service to virtually every community in the United States, and serve over 26 million subscribers,[9] or approximately 28% of all MVPD subscribers nationwide.[10] As the Commission has noted, "DBS operators are the most robust competitors to incumbent cable operators."[11]

DBS providers aggressively market their video services. For example, in May, DIRECTV launched a promotion that included its Total Choice package for $29 per month for the first 3 months, as well as free standard equipment and installation for four rooms.[12] This Summer, EchoStar debuted a promotion offering a 60-channel digital video package for up to four rooms for 3 months at $19.99 per month, plus three free months of HBO and Showtime, a free DVR upgrade, no extra equipment to buy, and free standard installation.[13] In August, EchoStar kicked off a nationwide advertising campaign with the offensive theme that "cable

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9 *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 Second Quarter 2005 Financial Results* (Aug. 9, 2005) ("*EchoStar 2Q05 Earnings Release*") (reporting 11.46 million subscribers as of June 30, 2005), *available at* http://www.corporate-ir.net/ireye/ir_site.zhtml?ticker=dish&script=410&layout=-6&item_id=741012.

10 *See* Kagan Research LLC, *Kagan Media Index,* Kagan Media Money, Aug. 30, 2005, at 8 (reporting 93.5 million MVPD subscribers nationwide).

11 *Notice* ¶ 43. Commissioner Adelstein shares this view, referring to DBS as "one of the great success stories of the FCC in terms of providing competition" in video distribution. Adrianne Kroepsch, *FCC Wants DBS and Satellite Radio to Compete with Terrestrials, Others,* Communications Daily, June 2, 2005, at 3.

12 The Total Choice package normally costs $41.99 per month. The promotion ran through July 31, 2005. *See* Adrianne Kroepsch, *EchoStar Wants To 'See the Playing Field' Before Making HDTV and Broadband Bets,* Communications Daily, May 6, 2005, at 3.

13 *See Current Promotions from DISH, DIRECTV*, SKYREPORT, July 19, 2005, *available at* http://www.dbstalk.com/showthread.php?t=44150&goto=nextoldest.

sucks," and "depict[ing] unnamed other television providers that literally suck household items -- a purse, dinner and even the cat -- into [their] vortex of poor service and higher prices." [14]

DBS providers' marketing has been successful. DBS providers continue to experience explosive subscriber growth. During 2004, DIRECTV added more new customers "than any other pay television service in the country,"[15] and in the first six months of 2005, it grossed more than 2.1 million new subscribers (730,000 net subscribers after accounting for churn).[16] EchoStar also made significant subscriber gains, adding a total of 550,000 net new subscribers during the first two quarters of 2005,[17] and more than 7.6 million customers over the last five years.[18] When last reported, the two DBS companies were attracting eight out of every ten new multichannel television subscribers.[19] In May 2005, Springfield, Missouri became the first market to have a greater household penetration for satellite TV (39.6%) than cable (39.2%).[20]

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14 Joyzelle Davis, *EchoStar Takes Off Gloves in Latest Ads*, Rocky Mt. News, Aug. 16, 2005, *available at* http://www.rockymountainnews.com/drmn/business/article/0,1299,DRMN_4_4005019,00.html.

15 *See* Press Release, DIRECTV, Inc., *The DIRECTV Group Announces Full Year and Fourth Quarter 2004 Results* 1 (Jan. 27, 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. 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." *Id.*

16 *See DIRECTV 2Q05 Earnings Release.*

17 *See EchoStar 2Q05 Earnings Release.*

18 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.

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

20 *See Satellite TV First: Dish Dominates Cable in DMA*, SKYREPORT, May 10, 2005 (also noting that Meridian, Mississippi became the first DMA to have a satellite penetration of 40%).

Finally, DBS providers are finding ways to simplify MDU delivery, which will help bring DBS video services to even more consumers.[21]

To make their services even more attractive, DBS providers have started to roll-out advanced services, including HDTV, DVRs, and interactive television ("ITV").[22] Both DBS providers have announced plans to expand their HDTV offerings. In fact, EchoStar's Charlie Ergen has stated that "satellite is in a better position than cable on HD offerings in the medium and long terms,"[23] and that DISH Network plans to "deliver more HDTV than anybody else."[24] EchoStar anticipates carrying 50 national and 20 local HD channels, as well as Voom's 21 national HD channels, when it switches to MPEG-4 technology early next year.[25] DIRECTV already counts approximately 600,000 HD subscribers and,[26] with the launch of two high-

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21 For example, DIRECTV has said it will "target [MDUs in] major urban markets for 'single wire' installation." Adrianne Kroepsch, *DirecTV Says Single Wire Simplifies MDO Delivery*, Communications Daily, Aug. 19, 2005, at 3 (noting that the MDU market is "potentially a 26-million residence market" that has been difficult for DBS operators to access for technical reasons).

22 Satellite-delivered broadband services are presently offered by DIRECWAY, Skyway, StarBand, and Wildblue. EchoStar company officials are also "taking a serious look at the satellite broadband business" and have stated that EchoStar Broadband will "seek to provide services including VoIP, Sirius over IP streaming, 2-way satellite Internet Access, broadband over powerline and Wi-Fi." Kroepsch, *supra* note 11, at 3; *see also* Adrianne Kroepsch, *EchoStar Dishes on Management Maneuvers; HD, Broadband Plans Still Blurry*, Communications Daily, Aug. 10, 2005, at 2 (reporting that EchoStar is looking at offering broadband, including WiMAX). According to CEO Chase Carey, DIRECTV is "actively engaged in talking to an array of parties that are participating in (wireless) broadband . . . about various forms of relationships." Carol Wilson, *DirecTV Explores Wireless Broadband*, Telephony Online, Aug. 5, 2005, *at* http://telephonyonline.com/broadband/news/DirecTV_wireless_broadband_080505/.

23 Adrianne Kroepsch, *EchoStar Dishes on Management Maneuvers; HD, Broadband Plans Still Blurry*, Communications Daily, Aug. 10, 2005, at 2.

24 *DISH Network Preparing for More HDTV*, SKYREPORT, June 15, 2005, *available at* http://www.skyretailer.com/view.cfm?ReleaseID=697.

25 *See id.*

26 Monica Hogan, *Sharper Vision for Local Ambitions*, Multichannel News, May 23, 2005, at 68.

powered satellites, plans to have local HD channels available in 30-40 markets by the end of 2005.[27]

DIRECTV recently announced it will be the first nationwide distributor of ESPN2 HD, and that customers who subscribe to its exclusive NFL SUNDAY TICKET SuperFan package will receive, among other things, "access to more than 100 NFL SUNDAY TICKET broadcasts in HD."[28] The NFL SUNDAY TICKET SuperFan package affords consumers the "ability to show eight live NFL games at a time on one screen, interactive statistical feeds, [and] condensed-game replays."[29] The $99 SuperFan package also provides access to "100 games in high definition and has become the only way to get high definition games" as an NFL SUNDAY TICKET subscriber.[30] In addition, DIRECTV plans to launch four satellites in the next two

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27 *See* Mark Seavy, *DirecTV Expects to Have Local HD Available in 30-40 Markets*, Communications Daily, June 2, 2005, at 6; *see also* Press Release, DIRECTV Inc., *DIRECTV 8 Satellite Will Strengthen Service to DIRECTV Customers* (May 21, 2005), *available at* http://www.directv.com/DTVAPP/aboutus/headline.dsp?id=05-21-2005A.

28 Press Release, DIRECTV, Inc., *DIRECTV's New NFL SUNDAY TICKET Superfan Offers "Immaculate Reception" for Football Fans* (Aug. 1, 2005), *available at* http://phx.corporate-ir.net/phoenix.zhtml?c=127160&p=irol-newsArticle&ID=737886&highlight=; *see* Press Release, DIRECTV, Inc., *DIRECTV Delivers First Nationwide Distribution of ESPN2 HD* (Aug. 24, 2005), *available at* http://phx.corporate-ir.net/phoenix.zhtml?c=127160&p=irol-newsArticle&ID=749496&highlight=.

29 Don Steinberg, *For NFL Fans, Highest-Tech - at a Price*, Phil. Inquirer, Sept. 10, 2005 (noting that "[t]he NFL Sunday Ticket package is the reason many football fanatics subscribe to DirecTV"), *available at* http://www.philly.com/mld/inquirer/sports/12606803.htm. The Game Mix channel "puts live video of eight games at a time on one screen. . . . Using the remote, you can highlight any small box of video to select the game you want to hear the audio from, and you can blow up any game to full-screen by selecting it." *Id.* The Red Zone Channel "stays full-screen all the time, continually switching to the game where the most exciting stuff is about to happen." *Id.* An Enhanced Games element incorporates "Internet features to TV, pulling up real-time statistics about the game being watched, or any other game, while the TV picture remains visible. There are game highlights 'on demand,' . . . and also . . . condensed, commercial-free versions of games showing only the action." *Id.*

30 *Id.*

years that will enable it to deliver more than 1,500 local and more than 150 national HD channels by 2007.[31]

Both EchoStar and DIRECTV are also intensifying competition on the DVR front. According to DIRECTV CEO Chase Carey, by "early October the company will launch its own DVR product containing a video-on-demand type service."[32] EchoStar is seeking to provide a VOD-like experience and has begun uploading up to 30 Hollywood titles per month for download by its subscribers with DVR receivers; EchoStar anticipates eventually downloading hundreds of hours of pay and free movies and television programs to its subscribers' receivers.[33] DIRECTV is also utilizing DVR technology to try and counter cable operators' VOD offerings; DIRECTV plans to download content to its DVRs and "devote 60 hrs of [its DVR's] 160-hr capacity to pushing content consumers can pull down and watch at will."[34] DIRECTV currently has more than 2 million subscribers using the TiVo DVR service,[35] and will be launching its own

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31 *Second Spaceway Bird Getting Ready for Launch*, SKYREPORT, May 26, 2005, *available at* http://www.skyreport.com/view.cfm?ReleaseID=1667&SearchCriteria=wildblue#Story1. Local signals will be delivered to 12 major markets including New York, Los Angeles, Chicago, Philadelphia, Boston, San Francisco, Dallas, Washington, Atlanta, Detroit, Houston, and Tampa beginning in September 2005. *See* Hogan, *supra* note 26, at 68.

32 *DIRECTV Dishing DVRs, HD*, SKYREPORT, Aug. 8, 2005, *available at* http://www.skyretailer.com/view.cfm?ReleaseID=727#Story3. In addition, DIRECTV has "dropped the price for current DVRs in the market to zero dollars." *Id.*

33 *See* R. Thomas Umstead, *DBS Tries PPV Discounts, Downloads*, Multichannel News, May 23, 2005, at 10.

34 *War Strategies: DBS, Telco and Cable Share Stage, Game Plans*, CableFAX Daily, Sept. 15, 2005, at 1.

35 *Satellite*, Communications Daily, July 26, 2005, at 12 (explaining that DIRECTV is "readying download-on-demand programming, including previews of fall primetime network TV line-ups and HBO and Showtime content, in a move that stakes out new ground for its TiVo-equipped PVR/satellite receivers").

DVR product, "DirecTV Plus DVR," which is being designed and manufactured by its affiliate, NDS Group, in the near future.[36]

ITV features are another service being developed and deployed by DBS providers. EchoStar claims it is the "largest U.S. provider of interactive TV programs and the world leader in the number of ITV-enabled homes, with more than 20 interactive channels, serving over 10 million customers."[37] EchoStar recently announced the addition of a new feature that will give customers the ability to simultaneously watch six TV channels and use an interactive menu to switch between channels.[38] In May 2005, DIRECTV launched "DIRECTV Active," offering a variety of interactive options including instant access to local weather, horoscopes, lottery updates, "Mix Channels" ("mosaic screens" with interactive links to several networks within a given programming genre), and an enhanced programming guide with video previews.[39] Eric Shanks, DIRECTV's Senior Vice President of advanced services and content, said that the company will "work on probably 10 killer applications" and predicts that the interactive component of the NFL SUNDAY TICKET will be an "unbelievable killer app."[40]

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[36] *See* David Lieberman, *DirecTV Poised To Take on TiVo*, USA Today, Aug. 24, 2005, at B3. As DIRECTV CEO Chase Carrey explains, "'We want to create a DirecTV experience. . . . In the past, there've been too many variations.'" *Id.* (quoting Chase Carey).

[37] Press Release, EchoStar Communications Corp., *DISH Network Delivers Six Networks Simultaneously to Interactive TV Viewers; Mosaic of Popular TV Channels and Interactive Features Entice Viewers* (Aug. 30, 2005), *available at* http://www.corporate-ir.net/ireye/ir_site.zhtml?ticker=dish&script=410&layout=-6&item_id=750438.

[38] *See id.*

[39] *See* Monica Hogan, *The ITV Super Drive*, Multichannel News, May 23, 2005, at 70 (noting that DIRECTV plans to add a game service and movie trailers later this year, and is also considering adding local traffic reports).

[40] *Id.*

B. LECs Offer Consumers Yet Another Alternative Source for Video Programming, and Even More Competition Is Imminent.

LEC entry into the MVPD industry has ebbed and flowed with changes in technologies and regulatory regimes. Over the past decade, LECs have experimented with video dialtone, satellite, wireless cable, OVS, and now fiber technologies. This experimentation has *occasionally* found success, but it has *always* held out promise. Today, the prospect for significant LEC competition in the video business is greater than ever.

In the past year, a tremendous amount of attention has been focused on Bell companies' entry into the video marketplace, with numerous forecasts of when the Bells will become full-fledged wireline video competitors. Far less attention, however, has been paid to the fact that numerous LECs, including the Bell companies, are already offering alternatives to cable through a variety of distribution methods. For instance, many small, rural LECs (and Qwest) already provide video programming over wireline networks that compete head-to-head with cable systems and DBS providers. And each of the Bell companies, as well as many smaller LECs, continues to foster marketing relationships with one of the nation's two DBS providers, enabling them to offer the coveted triple play of voice, video, and data now, even as their fiber networks are being developed and deployed.

1. Numerous LECs Already Provide Video Services and Are Formidable Competitors to Cable and DBS.

Numerous LECs, large and small, have already deployed video services over their own networks and are quickly attracting customers. Last year, the National Telecommunications Cooperative Association ("NTCA") reported that 216 of its members were providing cable television service.[41] NTCA's May 2004 survey also found that an additional ten percent of members planned to offer cable service by the end of 2004, and 23% more planned to do so by 2006.[42] LECs have utilized a variety of technologies to deliver video, including video-over-DSL, video via IP, and others. The small size of many of these LECs is not hampering them from gaining a substantial foothold in the markets they serve.

One LEC already offering video via IP service is Pioneer Telephone Cooperative, based in Kingfisher, Oklahoma. "Pioneer . . . began building its network in phases a year ago and is ahead of schedule in the buildout."[43] Pioneer currently offers subscribers a basic digital package for $42.95 per month.[44] For that amount, customers receive "local networks, 60 channels, an interactive program guide, on-screen Caller ID, parental controls, access to pay-per-view, and a local community channel."[45] Pioneer also offers a deluxe package for $5.00 more, which includes 80 more channels and CD-quality music channels.[46] After one year in service, Pioneer boasts 2,600 video via IP customers with 270 more awaiting installation.[47] The company

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41 Comments of the National Telecomm. Coop. Ass'n, filed in MB Docket. No. 04-227, at 1 (July 23, 2004).

42 *Id.* at 2.

43 Carol Wilson, *Telco Video: Is the Third Time Charmed?*, Telephony, July 11, 2005, at 20.

44 Leslie Cauley, *Telecoms' Quest for Customers Leads to IPTV*, USA Today, Aug. 16, 2005, at 2B, *available at* http://www.usatoday.com/tech/products/services/2005-08-16-telecoms-iptv_x.htm.

45 *Id.*

46 *See id.*

47 *See id.*

forecasts that 35% of its 35,000 telephone customers (or about 12,000 subscribers) will sign up within two years, and it projects 50% penetration in four years.[48]

Another rural LEC, Progressive Rural Telephone in central Georgia, plans to offer its customers 141 programming networks, six local channels, and 35 music channels, all via MPEG-2 technology.[49] Larry Stevenson, central office supervisor at Progressive, says that a survey of existing customers "found that more than 80% of respondents were interested in replacing their current TV service with one from the local phone company."[50]

Beyond Communications (formerly DSSI Technologies) deployed UTStarcom's end-to-end video solution in Alabama and along the Gulf Coast, achieving 95% to 100% penetration of its services in MDUs.[51] The company's success led it to plan deployment of fiber-to-the home networks into nearby rural communities. Beyond will offer a "118-channel package that doesn't require a set-top box" via analog, digital, and video via IP.[52]

Current video offerings are not limited to small, rural providers. Qwest provides its Choice TV product, which utilizes VDSL and fiber-to-the neighborhood technologies, to approximately 43,000 customers in Phoenix, Arizona, Highlands Ranch and Boulder, Colorado,

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48 *Id.*; Wilson, *supra* note 43, at 20.

49 Ken Kerschbaumer, *Telco TV: Smaller Is Quicker*, Broad. & Cable, June 13, 2005, at 28, *available at* http://www.broadcastingcable.com/article/CA607718.html?display=Search+Results&text=telco+tv.

50 *Id.* Farmer's Telephone Cooperative in Kingstree, S.C., plans on providing its 60,000 customers with a similar service using MPEG-4 technology. *See id.*

51 *See* Wilson, *supra* note 43, at 20.

52 *Id.* (quoting Gary Stepanian, DSSI's chief technology officer).

and Omaha, Nebraska.[53] Choice TV delivers more than 200 channels of digital programming via a digital gateway box that interconnects individual TV sets, personal computers, telephones, and audio equipment to deliver a "whole house digital solution."[54] Choice TV also integrates video and voice features. For instance, caller ID numbers appear on the TV screen, and voice messages are indicated by a light on the digital gateway box.[55]

2. LECs' Partnerships with DBS Providers Have Been a Success.

Although many LECs have yet to deploy their own video delivery systems, they have already found ways to offer customers the "triple play" of video, voice, and data. All four of the regional Bell companies have reached agreements with DBS providers to provide bundled packages of services (often including wireless phone service) to the Bell companies' customers.[56] BellSouth, Qwest, and Verizon have partnered with DIRECTV,[57] while SBC has partnered with EchoStar.[58]

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53 *See* Carol Wilson, *DSL Video: Here Today, Tomorrow, Next Year?*, Telephony Online, Feb. 14, 2005, *at* http://telephonyonline.com/mag/telecom_dsl_video_today/; *see generally* Qwest, *Qwest Choice TV & Online - VDSL Technology, Overview, at* http://www.qwest.com/vdsl/learn/overview.html (last visited Sept. 6, 2005); Qwest, *Qwest Choice TV & Online - VDSL Technology, Current Markets, at* http://www.qwest.com/vdsl/learn/markets.html (last visited Sept. 6, 2005).

54 *See* Qwest, *Qwest Choice TV & Online - VDSL Technology, Product Features, at* http://www.qwest.com/vdsl/learn/features.html (last visited Sept. 6, 2005). The digital gateway delivers multiple and independent video streams to all TVs in the home simultaneously, allowing customers to simultaneously accomplish multiple tasks through a single phone line, including viewing video programming, accessing the Internet, and talking on the phone.

55 *See* Qwest, *Qwest Choice TV & Online - VDSL Technology, Overview, at* http://www.qwest.com/vdsl/learn/overview.html (last visited Sept. 6, 2005).

56 This strategy is not limited to the Bell companies; NTCA reported last year that 79 of its member companies offered DBS services. NTCA Comments at 1.

57 *See* Press Release, DIRECTV, Inc., *BellSouth and DIRECTV Announce Agreement to Sell Digital Satellite Television Service as Part of BellSouth Answers Bundle* (Aug. 27, 2003), *available at* http://www.directv.com/DTVAPP/aboutus/headline.dsp?id=08_27_2003A; Press Release, DIRECTV, Inc., *Qwest and DIRECTV to Deliver Fully-Integrated Satellite TV Services to Customers* (Oct. 7, 2004), *available at*

(footnoted continued...)

The Bell companies have specifically targeted existing cable customers with their video offerings. SBC has offered customers switching from cable three free months of Yahoo! DSL and DISH Network services.[59] BellSouth has tried to lure cable customers with a suite of deeply discounted services, providing a cash refund of up to $125 to those who sign up for its quadruple play of DSL, DIRECTV, traditional phone service, and Cingular wireless.[60] These promotions have succeeded in attracting hundreds of thousands of new DBS subscribers. For instance, BellSouth announced in July 2005 that more than 394,000 customers had added DIRECTV service to their BellSouth packages, with 80,000 subscribing in the second quarter of 2005.[61] Similarly, SBC added 10,000 EchoStar subscribers in the second quarter, bringing its total EchoStar additions to approximately 406,000.[62]

(...footnote continued)

http://www.directv.com/DTVAPP/aboutus/headline.dsp?id=10_07_2004A; Press Release, DIRECTV, Inc., *Verizon Adds DIRECTV Service, Creating the Most Comprehensive, Top-Quality Service Bundle in the Market* (Jan. 29, 2004), *available at* http://www.directv.com/DTVAPP/aboutus/headline.dsp?id=01_29_2004A.

58 *See* Paula Bernier, *Building on Bundles: SBC, Qwest Significantly Expand Resale of Satellite TV*, xchange, Sept. 1, 2003, *at* http://www.xchangemag.com/articles/391consumer1.html.

59 *See* Press Release, SBC Communications Inc., *SBC Communications Offers Relief for Consumers Fed Up with Pricey Cable TV Bills* (June 7, 2005), *available at* http://www.sbc.com/gen/press-room?pid=4800&cdvn=news&newsarticleid=21700.

60 *Bellheads*, CableFAX Daily, Jan. 4, 2005, at 2.

61 *BellSouth Talks Fiber, DSL Adds for 2Q*, Telco Media News, July 26, 2005, *at* http://www.telcotvnews.com/view.cfm?ReleaseID=30.

62 *See DISH Deceleration*, CableFAX Daily, July 22, 2005, at 1; *Telco Competition*, CableFAX Daily, Jan. 27, 2005, at 3.

3. Bell Companies Are Making Substantial Progress on Fiber Deployments, Positioning Them To Compete with Cable and DBS in Even More Markets.

The Bell companies' joint marketing relationships with DBS providers appear to be placeholders, pending a much more direct and substantial entry into the video business. Having achieved substantial reductions in their unbundling and other market-opening obligations, the Bells now have an unprecedented opportunity to move aggressively into the video business. At the same time, with their wireline phone business losing customers to wireless and now cable competition, the Bells now face a new imperative to market the so-called "triple play" of voice, data, and video.

In the coming months, Verizon and SBC are expected to offer video programming over fiber networks. Both companies report that they are spending billions of dollars to expand fiber networks and improve technology in order to offer video. The Bell companies are also acquiring programming rights, obtaining franchises to provide video service, contracting with major consumer electronics manufacturers for necessary hardware, and hiring talent with MVPD and programming experience. The level of effort underway is quite significant, and so is the expected payoff; according to PricewaterhouseCoopers, "By 2009, seven million subscribers are expected to get TV programs from a phone company."[63]

Verizon is aggressively deploying fiber-to-the-premises ("FTTP") in 15 states to offer its FiOS TV service.[64] Verizon states that FiOS TV will deliver hundreds of channels of digital

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[63] Matt Richtel & Ken Belson, *Increasingly, the Bells See Their Future on a Screen*, N.Y. Times, Apr. 4, 2005, at C4.

[64] *See* Press Release, Verizon Communications Inc., *Verizon Signs Distribution Deal with Black Family Channel* (July 25, 2005), *at* http://newscenter.verizon.com/proactive/newsroom/release.vtml?id=92763; *Verizon Expands FTTH in New Jersey*, Telco Media News, Sept. 19, 2005 (reporting that Verizon is currently building its

(footnoted continued...)

video and music, HD programming, VOD content, an interactive programming guide, and other user-friendly features.[65] Verizon also states that FiOS TV will offer multimedia and interactive capabilities to share family videos, play 3-D games, and set camera angles for sporting events.[66] Despite the use of fiber, Verizon is following a standard cable bandwidth scheme, with frequencies below 550 MHz used for delivery of analog channels and digital services being delivered using 550-860 MHz.[67]

Verizon is rapidly obtaining local franchises for FiOS TV, boasting agreements in Northern Virginia (including Herndon and the Quantico Marine Corps Base), North Texas (including Sachse, Keller/Westlake, and Wylie), California (Beaumont and Murrieta), and Florida (Temple Terrace and Manatee County).[68] Verizon also has applications pending in a number of other municipalities including Fairfax County, Virginia, Bowie, Maryland, and

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(...footnote continued)

FTTP in 66 New Jersey communities), *available at* http://www.telcomedianews.com/. "Verizon alone accounted for about half of the 1.9 million homes passed by FTTP last year, and the carrier's stated goal is to literally double its efforts" in 2005. Ed Gubbins, *FTTP Awakening*, Telephony, May 9, 2005, at 40. FTTP deployment, especially on the scale of Verizon's efforts, is lowering the cost of the technology. "Generally speaking the cost of connecting a home with fiber in 2004 was about 60% of what it cost in 2002." *Id.*

65 *See* Press Release, Verizon Communications Inc., *Verizon Signs Distribution Deal with Black Family Channel* (July 25, 2005), *available at* http://newscenter.verizon.com/proactive/newsroom/release.vtml?id=92763. Verizon recently launched its broadband-based computer gaming services, which are tailored for gaming enthusiasts of all ages and levels. *See Verizon Gets into Video Games, Inks GSN Deal*, Telco Media News, Sept. 14, 2005, *available at* http://www.telcomedianews.com/view.cfm?ReleaseID=59. Computer gaming, especially online gaming, is for many consumers increasingly substitutable for more traditional forms of video programming.

66 *See* Press Release, Verizon Communications Inc., *Verizon FiOS TV Will Offer a New Customer Experience, Seidenberg Says* (Apr. 18, 2005), *available at* http://newscenter.verizon.com/proactive/newsroom/release.vtml?id=90601.

67 *See* Verizon Ex Parte, filed in WC Docket No. 04-242 attachment 2, at 3 (Mar. 1, 2005).

68 *See generally* Verizon Communications Inc., *News Archive* (FiOS TV press releases from September 7, August 30, July 28, July 20, and May 18, 2005), *at* http://newscenter.verizon.com/nr/; Steve Donohue, *FiOS TV's $50 Factor*, Multichannel News, May 2, 2005, at 1, *at* http://multichannel.com/article/CA528840.html. The Manatee County, FL franchise will bring FiOS TV services to 235,000 residents.

Howard County, Maryland.[69] "By year's end, [Verizon] will likely have filed for franchises in 250 municipalities."[70] Recent studies predict "an initial take rate of 15% in the early years and 37.5% in 2010. That will produce 13 million homes passed by that date and 4.875 million video service subscribers."[71]

Verizon has aggressively pursued carriage agreements, and to date reports agreements with Discovery Networks, Turner Broadcasting System, Inc., Starz Entertainment Group, NBC Universal, A&E Television Networks, and Showtime Networks, among others, with new agreements being announced on a regular basis.[72] FiOS TV is well on its way to "offer[ing] about 300 video and audio channels, along with about 2,000 video-on-demand titles, by the time it launches."[73]

Verizon is not waiting until the roll out of FiOS TV to initiate a marketing war with cable and DBS providers. Rather, Verizon appears to be following a "seize and freeze" marketing strategy in which it lures customers in with promotional offerings for voice, DBS video, and

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69 *See State Telecom Activities*, Communications Daily, July 21, 2005, at 8; Press Release, Verizon Communications Inc., *Verizon Seeks Franchise to Bring Fairfax County Residents Choice for Their Cable TV Service* (July 28, 2005), *at* http://newscenter.verizon.com/proactive/newsroom/release.vtml?id=92782; Steve Donohue, *Wealthy Targets*, Multichannel News, Apr. 18, 2005 (noting that initial FiOS rollouts are "taking place in some of the most prosperous cities of the country"), *available at* http://www.multichannel.com/article/CA525531.html?display=Search+Results&text=wealthy+targets.

70 Jon Van, *Telecom Giants May Seek U.S. Help*, Chi. Trib., June 2, 2005, at C1.

71 *See* Wilson, *supra* note 43, at 20.

72 *See generally* Verizon Communications Inc., *News Archive* (FiOS TV press releases from July 6, May 17, May 4, April 29, April 26, April 22, April 18, and April 14, 2005 and December 15, 2004), *at* http://newscenter.verizon.com/nr/; *Verizon Gets into Video Games, Inks GSN Deal*, *supra* note 65 (reporting a new carriage agreement for distribution of both GSN (Game Show Network) and GSNi, GSN's new interactive service).

73 *Verizon Signs First Video Deal with Time Warner*, Reuters, July 6, 2005 (quoting Terry Denson, vice president of programming and marketing for FiOS TV). A copy of Verizon's Keller/Westlake, Texas channel lineup is attached as Exhibit 1.

existing FiOS-branded high-speed data services, and "freezes" them in long-term contracts with the promise of a superior video offering in the near future. This strategy helps to explain Verizon's recent introduction of a $15-per-month DSL service with a one-year contract.[74] Verizon also has created three low-priced programming packages for FiOS TV in an attempt to "provide a better value proposition . . . at more attractive price points by offering premium content at a price that most cable operators charge for digital basic."[75]

Project Lightspeed is SBC's $4 billion capital initiative to expand its fiber network further into selected neighborhoods.[76] SBC will use the network to deliver "U-Verse" TV, voice, and high-speed Internet access services via fiber-to-the node ("FTTN") and FTTP technologies.[77] SBC plans to use FTTN architecture in existing neighborhoods, allowing for simultaneous delivery to each home of four streams of TV programming (including HDTV), Internet access, and IP voice on a single IP network platform. FTTP architecture will be used in new housing developments and some MDUs.[78] SBC plans an initial controlled market entry for U-Verse TV

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[74] Dionne Searcey, *Verizon Cuts Price of Internet Plan*, Wall St. J., Aug. 24, 2005, at D5.

[75] Steve Donohue, *FiOS TV's $50 Factor*, Multichannel News, May 2, 2005, at 1, *available at* http://multichannel.com/article/CA528840.html. A copy of Verizon's rate card in Keller/Westlake, Texas is attached as Exhibit 2.

[76] *See* Leslie Cauley, *SBC's $4 Billion IPTV Investment 'Not Much Money'*, USA Today, Aug. 16, 2005, *available at* http://www.usatoday.com/tech/products/gear/2005-08-16-iptv-sbc_x.htm; Investor Presentation, SBC Communications, *Project Lightspeed, SBC Communications Conference Call* slide 14 (Nov. 11, 2004) (reporting that Project Lightspeed "deployment will cover approximately 90% of high-value and 70% of medium-value customers," but only 5% of "low value" customers).

[77] *See* Press Release, SBC Communications Inc., *SBC Communications Selects Amdocs for Project Lightspeed* (May 4, 2005), *available at* http://www.sbc.com/gen/press-room?pid=4800&cdvn=news&newsarticleid=21663.

[78] *See* Press Release, SBC Communications Inc., *SBC Communications to Detail Plans for New IP-Based Advanced Television, Data and Voice Network* (Nov. 11, 2004), *available at* http://www.sbc.com/gen/press-room?pid=4800&cdvn=news&newsarticleid=21458.

in late 2005 or early 2006, with entry to more markets scheduled for mid-2006.[79] SBC will also add more features and functionality in mid-2006, including whole-home DVR and HD functionality, and projects that 18 million households in 13 states will have access to U-Verse TV by the end of 2007.[80]

SBC has reached numerous agreements with major consumer electronics and software manufacturers to ensure that its video services will be comparable to those of cable operators. On November 17, 2004, SBC announced that Microsoft Corp. will provide next-generation TV services using Microsoft TV IPTV Edition software platform.[81] On March 31, 2005, SBC awarded a $195 million, multi-year contract to Scientific Atlanta to provide IP-based video equipment, encoders, satellite dishes, video routers, and professional services.[82] And on August 18, 2005, SBC announced that Scientific Atlanta and Motorola would produce next-generation set-top boxes to enable consumers to access multiple video streams.[83]

BellSouth also is expanding its fiber network and has laid more than 5.4 million miles of fiber to pass more than 1.1 million homes.[84] BellSouth is currently testing ADSL2+ technology

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79 *See* Press Release, SBC Communications Inc., *SBC Communications Selects Motorola and Scientific-Atlanta as Set-Top Box Suppliers for SBC U-Verse TV* (Aug. 18, 2005), *available at* http://www.sbc.com/gen/press-room?pid=4800&cdvn=news&newsarticleid=21772.

80 *See id.*; SBC Press Release, *supra* note 77.

81 *See* Press Release, SBC Communications Inc., *SBC Communications Selects Microsoft TV for Advanced IP Television Service* (Nov. 17, 2004), *available at* http://www.sbc.com/gen/press-room?pid=4800&cdvn=news&newsarticleid=21463.

82 *See* SBC Communications Inc., *SBC Communications Chooses Scientific-Atlanta as IP Video Equipment Supplier for Project Lightspeed* (Mar. 31, 2005), *available at* http://www.sbc.com/gen/press-room?pid=4800&cdvn=news&newsarticleid=21633.

83 *See* SBC Press Release, *supra* note 79.

84 *BellSouth Talks Fiber, DSL Adds for 2Q*, Telco Media News, July 26, 2005, *at* http://www.telcotvnews.com/view.cfm?ReleaseID=30.

for video offerings, as well as examining video via IP.[85] Industry analysts predict that BellSouth will pass 500,000 homes with a video offering by the end of 2006, but will then dramatically ramp up its rollout to "reach 9.5 million homes by 2010" and will achieve a video "take rate . . . of 35% to achieve 3.325 million video services customers."[86] Meanwhile, Qwest is "continuing to evaluate whether or not to expand" its video service offerings.[87] Although Qwest has not announced specific plans, industry analysts predict that the company will begin a video-over-IP rollout in 2008 and pass 2.5 million homes by 2010, achieving a take rate of 25% to reach 625,000 video subscribers.[88]

C. Internet Video Has Become a Significant Competitor in the Video Marketplace.

In last year's video competition report, the Commission noted that video provided over the Internet "promises to become an increasingly strong participant in the market for the delivery of video programming."[89] During the past year, this "promise" has become a reality: "The rapid growth of high-speed Internet access is turning your computer into a TV alternative."[90] There

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85 *See id.* France Telecom recently announced that it has successfully achieved data transmission at speeds of up to 100Mbps over traditional copper wires using VDSL2 technology. *See* Press Release, France Telecom, *VDSL2 World Preview* (June 30, 2005) (reporting that "implementation of a pre-VDSL2 transmission device is being tested that can be used simultaneously for TV reception, video calls and Internet"), *available at* http://www.francetelecom.com/en/group/rd/news/inshort/CP_old/b20050630.html.

86 Wilson, *supra* note 43, at 20 (citing a report by Clif Holiday of B&C Consulting).

87 Wilson, *supra* note 53.

88 Wilson, *supra* note 43, at 20.

89 *Notice* ¶ 61; *11th Annual Report* ¶ 113. Last year's report provided several examples of video content already being streamed on the Web, including sports, news, and entertainment programming. *See id.* ¶ 116.

90 David Hiltbrand, *Log On, Tune In*, Phil. Inquirer, July 31, 2005, at A1 (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; *see*

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are now over 35 million broadband subscribers in the United States, all of whom have access to video over the Internet, and many of whom access such video on a daily basis.[91] Moreover, the widespread availability of broadband access combined with innovative technologies that have made video via the Internet "approach[] TV-like quality" are setting the stage for even broader consumer adoption.[92] "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."[93]

Established media players are moving quickly to make video available over the Internet. "Virtually every major media company is recognizing that as people begin to feed Internet signals to TV sets as well as computers, millions may want to pick news, entertainment and sports they want to see off the Web rather than from packages of conventional TV channels offered by a cable, satellite, or phone company."[94] For example:

(...footnote continued)

Benjamin M. Compaine, *The Media Monopoly Myth: How New Competition Is Expanding Our Sources of Information and Entertainment* 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.

91 *See* Hiltbrand, *supra* note 90.

92 David Lieberman, *Can the Future of TV Be Seen on the Web?*, USA Today, July 12, 2005 (quoting Paul Saga, CEO of Internet service company Akamai).

93 *Compaine Study* at 31.

94 *See* Lieberman, *supra* note 92. Major news events have accelerated consumer adoption of video via the Internet. *See* Mike Shields, *Online Video Grows Up in the Shadow of Katrina*, MediaWeek.com, Sept. 19, 2005 (quoting Bert Solivan, executive vice president, Fox Interactive Media as stating that "with every big event, you get these new eyeballs, and you retain a percentage of them"). During the week of August 29, 2005, when Hurricane Katrina struck the Gulf Coast, "[h]urricane video shattered streaming records for nearly every major news

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- CBS News has announced a 24-hour, Internet-based video news service from which viewers can choose the stories they want to watch.[95]
- Scripps Networks, the owner of HGTV and the Food Network, has announced that it will launch ten Web channels by the end of 2006.[96]
- Nickelodeon 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 Internet programming.[97]
- ESPN.com is partnering with Major League Baseball ("MLB") to stream MLB games to fans.[98] Fans can access streams of complete baseball games, condensed versions, expanded highlights, and individual play highlights.[99] In addition, the games are archived so they can be accessed at any time.[100] 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.[101]
- CSTV (College Sports TV) has begun streaming live video feeds of some college football games as part of its College Football All-Access package, which also offers over 100 live audio broadcasts of football games as well as on-demand video and audio clips.[102]
- CNN is now offering an advertiser-supported video service.[103] According to Jim Walton, the president of CNN News Group, "There is critical mass with high-speed Internet

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organizations' Web site. . . . For example, 4.6 million users streamed nearly 50 million videos on MSNBC.com that week, three times the number streamed on 9/11, the previous record holder." *Id.*

95 *See* Lieberman, *supra* note 92.

96 *See id.*

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

98 *See* ESPN Internet Ventures, *MLB.TV*, *at* http://mlb.mlb.com/NASApp/mlb/mlb/video/mlb_tv.jsp (last visited Sept. 1, 2005).

99 *See id.*

100 *See id.*

101 *See* Press Release, World Championships Sports Network LLC, *Groundbreaking Webcast of World Track & Field Championships To Be Available* (July 22, 2005), *available at* http://www.wcsn.com/news/press_release.jsp?ymd=20050722&content_id=0001.

102 *See* CSTV Networks, Inc., *CSTV All-Access*, *at* http://allaccess.cstv.com/media/index.jsp?gSportId=9&ngSportId=9 (last visited Sept. 19, 2005).

connections, so video is a good user experience. And that means there can be critical mass for advertisers."[104]

- MTV has launched an advertiser-supported Web service, known as MTV Overdrive, featuring music videos, newscasts, artist interviews, and supplements to hit programs like "The Real World."[105]
- Content from Comedy Central's hit program "The Daily Show" is being accessed via the Internet by hundreds of thousands of people. Jon Stewart, host of the program, notes that "[e]verything is geared toward more individualized consumption. Getting it off the Internet is no different than getting it off TV."[106]
- Time Warner recently teamed up with RealNetworks, to make "the convergence of the TV and the PC real" by providing 9,000 of its high-speed Internet customers in San Diego access to up to 75 cable channels, including CNN, MTV, and ESPN, on their computers.[107]

Positioning themselves to compete with these established media players, the major web portals are also rapidly entering the Internet video distribution business. For example:

- 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.[108] A recent *Wired* article noted that more music videos are being watched on AOL than on MTV.[109]

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

104 Saul Hansell, *More People Turn to the Web to Watch TV*, NY Times, Aug. 1, 2005, at C1 ("Internet commercials typically cost about $15 to $20 for each 1,000 viewers, nearly as much as broadcast networks charge."); *see also* Hiltbrand, *supra* note 90 (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.").

105 *See* MTV Networks, *MTV Overdrive, at* http://www.mtv.com/overdrive/ (last visited Sept. 1, 2005).

106 Thomas Goetz, *Reinventing Television*, Wired, Sept. 2005, at 102.

107 Ken Kerschbaumer, *TV on the PC Gets Real, Time Warner Launches Trial in San Diego*, Broad. & Cable, Aug. 8, 2005, *available at* http://www.broadcastingcable.com/index.asp?layout=articlePrint&articleID=CA632697.

108 *See* Hansell, *supra* note 104 (also noting that consumers rated AOL's coverage of the Live 8 concerts more highly than MTV's competing coverage).

109 *See* Josh McHugh, *The Super Network*, Wired, Sept. 2005, at 106.

- Lloyd Braun, Yahoo!'s director of programming development (and the former head of ABC Television), 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."[110] Yahoo! recently announced agreements to use video content from CNN.com and ABC News.[111] It also served as the online host for *The Apprentice*, streaming clips of the show via the Internet,[112] and carried Pepsi Smash, a TV music concert series aired on the WB Network the past two summers.[113] Jeremy Allaire, founder of Brightcove, a new video distribution startup, noted that Yahoo! is "clearly thinking of themselves as the fifth network."[114]
- Google is actively recruiting networks and producers to participate in "Google Video."[115] Google's recent investment in a broadband-over-power line service provider is fueling speculation that the company is building a network capable of carrying vast amounts of video programming.[116]
- 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

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110 Hansell, *supra* note 104.

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

112 *See* McHugh, *supra* note 109 (noting that Yahoo! is also delivering fans to advertisers who have contracted with Yahoo!, Mark Burnett Productions, and NBC). Yahoo! will also stream and promote *Fat Actress*, the Showtime faux-reality show. *See id.*

113 *See* Jefferson Graham, *Major Sites Hope to Keep Users 'Tuned in'*, USA Today, June 15, 2005 (quoting Katie Lacey, a Pepsi marketing executive, as saying that 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"), *available at* http://www.usatoday.com/money/industries/technology/2005-06-15-webnetworks_x.htm.

114 *See* McHugh, *supra* note 109, at 106.

115 *See* Graham, *supra* note 113.

116 *See, e.g.*, Jennifer Mears & John Fontana, *Google Dives Deeper Into Networking*, Network World, Aug. 29, 2005, at 1 (reporting that "Google executives would not comment on the reasoning behind that investment, nor would they comment on rumors that the company is buying up dark fiber to ultimately create a nationwide broadband network, which some speculate would eventually support free Wi-Fi, as well as a plethora of multimedia services such as on-demand television"); Michael Bazeley, *'Father Of Internet' Returns To Roots with New Google Job*, San Jose Mercury News (Cal.), Sept. 9, 2005, at 1 ("'They're thinking 10 years from now, you don't turn to channel 4 or whatever on your TV, you log on to Google and find whatever you want.'" (quoting Dave Burstein, editor of the DSL Prime newsletter)).

focusing on music and comedy performances through the Internet, satellite, and other third party global media platforms.[117]

- 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.[118] 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."[119]

New entrants in the Internet video space are constantly emerging to offer innovative services, including niche services tailored to the interests of particular consumers.[120] 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).[121] Recently, Akimbo announced that it will deliver Major League Baseball highlights and condensed games.[122] DaveTV, an Atlanta-based media distributor, will soon begin offering over 100,000 hours of niche video programming over broadband Internet

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[117] *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.

[118] *See* Graham, *supra* note 113.

[119] *See* Hiltbrand, *supra* note 90 (quoting Craig Stadler, CEO of East Bay Technology, which manufacturers a popular video-content finder).

[120] *See* Sean Captain, *TV 2.0, Six New Ways To Watch*, Wired, Sept. 2005, at 105 ("A host of new startups -- led by Akimbo, Brightcove, and DaveTV -- have cut deals with copyright owners for video clips that viewers can download over the Internet to a TV or a PC.").

[121] *See* Akimbo Systems, *What's On, at* http://www.akimbo.com/whatson.html (last visited Sept. 9, 2005); *see also* Matt Stump, *Akimbo Makes Full Cable Pitch*, Multichannel News, Aug. 1, 2005, at 59 (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.

[122] *See* Ken Kerschbaumer, *Akimbo Hits Home Run*, Broad. & Cable, Aug. 22, 2005, *available at* http://www.broadcastingcable.com/index.asp?layout=articlePrint&articleID=CA6250170. Akimbo has also introduced the ability for video bloggers to upload their content onto the Akimbo service. *See* Vince Vittore, *Akimbo Puts Bloggers on TV*, Telephony, July 11, 2005, at 8.

connections.[123] Brightcove promises that, with its service, "[v]iewers will get access to an online service that offers new levels of control over their use of video and television."[124] Wi-FiTV launched a Web site that offers 200 live TV channels from around the world (including TBN, BYU TV, and a live Web Cam from Times Square).[125]

Another rapidly growing Web-based video delivery option, downloadable video, is also gaining in popularity.[126] For example, CinemaNow offers "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," on a pay-per-view, download-to-own (also known as "digital sell-through"), or subscription basis.[127] Starz Ticket, another downloadable video provider, gives consumers access to unlimited movie downloads in

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123 *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.

124 *Brightcove, at* http://www.brightcove.com/. Brightcove also notes that, with its service, "[c]ontent owners, video rights-holders and independent producers will get an empowering new direct-to-consumer distribution channel." *Id.*

125 *Broadband*, CableFAX Daily, Aug. 23, 2005, at 1. The site also features free PC-to-PC and PC-to-phone VoIP calls. *See id.*

126 *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.").

127 CinemaNow, Inc., *About CinemaNow, at* http://www.cinemanow.com/AboutUs-Background.aspx (last visited Sept. 9, 2005). CinemaNow recently reached a deal to distribute programming from HDNet, marking the first time HD content has been available for downloading over the Internet. *See* Ken Kerschbaumer, *CinemaNow Adds High-Def*, Broad. & Cable, July 27, 2005, *available at* http://www.broadcastingcable.com/index.asp?layout=articlePrint&articleID=CA630101.

addition to a streaming version of the Starz linear service.[128] Greencine, primarily a DVD rental business, also offers downloadable versions of alternative films.[129]

And additional sources for video programming over the Internet are constantly being created. Netflix, an extremely popular DVD rental service described below, recently announced that it plans to offer downloadable movies by the end of the year.[130] TiVo will soon allow customers to download certain TV shows via the Internet, even before the shows air on TV.[131] ClickStar, a joint venture announced by actor Morgan Freeman and Intel Corp., was formed recently to focus on the distribution of premium movies directly to consumers over the Internet.[132] One industry observer described the sea change this way: "The attitude used to be that the Internet is the place to go for information. It's changing to the notion that the Internet is the place you go to watch things."[133]

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128 *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.

129 *See generally* GreenCine LLC, *at* http://www.greencine.com/main (last visited Sept. 9, 2005).

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

131 *See* Greg Sandoval, *TiVo Tests Internet Download Service*, Associated Press, Aug. 16, 2005.

132 *See* Press Release, Intel Corp., *Intel and Revelations Drive New Online Film Distribution Models* (July 6, 2005), *available at* http://www.intel.com/pressroom/archive/releases/20050706corp_a.htm ("ClickStar's strategy is to create an online service in which consumers can access, pay for, and download first-run, pre-DVD-release films and artist-created entertainment channels in their homes."). Ultimately, their goal is to make first-run films "easier to buy than to pirate." *Id.* (quoting Paul Otellini, Intel President and CEO).

133 *See* Hiltbrand, *supra* note 90 (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.").

D. Broadcast Stations Are Offering Consumers an Increasing Array of Video Programming.

Consumers who do not wish to take advantage of the services offered by cable operators, DBS providers, overbuilders, or the numerous Internet video distributors also have the option of receiving their video programming the old fashioned way -- from free, over-the-air broadcasting. The Commission has long recognized that broadcast television stations are, and always have been, significant suppliers and distributors of video programming.[134] In fact, in the early years of cable, the Commission found "that broadcasters offer some competition to cable systems," and "if enough signals were available, broadcast television could have some constraining effect on basic cable pricing."[135]

As of June 30, 2004, there were 1,747 commercial and noncommercial broadcast television stations nationwide that collectively provide video programming to nearly every one of the 110 million TV households.[136] Many of these stations have been broadcasting since long before the deployment of cable, DBS, or the Internet, and they continue to exert an important competitive influence on the market. A recent survey by the Consumers Union and the Consumer Federation of America "found that 39 percent of U.S. television-viewing households . . . receive some or all of their television programming from over-the-air broadcast signals."[137]

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134 *See First Report* ¶ 43.

135 *Id.* ¶¶ 43-44.

136 *See 11th Annual Report* ¶ 78. Obviously, many consumers receive these signals from cable, DBS, or other MVPDs, rather than directly from over-the-air transmissions, but the point here is that these services are available ubiquitously, can be accessed without payment of monthly fees, and can demand carriage by cable and satellite operators.

137 Mark Cooper, Consumer Fed. of Am., *Estimating Consumer Costs of a Federally Mandated Digital TV Transition: Consumer Survey Results* 1 (June 29, 2005), *available at* http://www.nab.org/newsroom/pressrel/Statements/ConsUnion_DTV_Survey_Report-_Final_6-29-05.pdf.

And, the Commission has approvingly cited analysts estimates that, "as of July 2004, 15.99 million households, or 14.75 percent of U.S. households, rely *exclusively* on over-the-air television for video programming."[138]

Despite the proliferation of viewing choices for consumers, broadcast television continues to attract substantial audiences. Fears by some that new technologies like the DVR would adversely impact broadcast television have not come to light, and there are several signs that the opposite is true. In fact, evidence suggests that DVR usage has actually boosted viewing.[139] Networks and other ad-supported programmers are adapting to these new technologies by developing alternative ad formats, programming, and technologies, such as interactive advertising,[140] that are geared to minimize ad skipping or its impact.[141]

The broadcast industry, just like cable, has undergone a technological evolution and can now distribute more video programming to more people than ever before. Broadcasters' conversion to digital is revolutionizing the industry. As of September 12, 2005, there were 1,525 stations in 211 markets broadcasting digital signals.[142] With the conversion to digital, broadcasters are now able to transmit high-definition and multiple standard definition over-the-air signals that are available to any consumer in their service area that also has converted to digital. This multicasting capability will allow stations that have taken advantage of their free

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138 *11th Annual Report* ¶ 81 (emphasis added).

139 *See* Douglas Shapiro, *Media Memo,* Equity Research, July 11, 2005.

140 Press Release, TiVo Inc., *TiVo Launches Direct Response Interactive Advertising Program* (Aug. 1, 2005), *available at* http://www.tivo.com/cms_static/press_53.html.

141 *See* Shapiro, *supra* note 139.

142 *See* Nat'l. Ass'n of Broadcasters, *DTV Stations in Operation, at* http://www.nab.org/newsroom/issues/digitaltv/dtvstations.asp (last visited Sept. 12, 2005).

digital spectrum to offer consumers more services and content, thereby increasing broadcasters' competitive impact in the multichannel video marketplace. As if to underscore this fact, Eddie Fritts, CEO and President of the National Association of Broadcasters, remarked that "[m]ulticasting is about more competition to cable."[143] Where broadcasters use their multicast capability to offer attractive services, cable operators have readily negotiated carriage agreements without governmental compulsion.[144] But even without such carriage agreements, the move by a number of broadcasters to multicasting enhances multichannel video competition.

E. Broadband Service Providers/Overbuilders Are Serving Consumers' Video Programming Needs In Various Markets, Both Large and Small.

BSPs and overbuilders (collectively referred to as "overbuilders") offer many consumers yet another video programming alternative, and are effectively competing in various markets across the country. These competitors continue to expand their service areas, enhance their service offerings, and otherwise seek to offer consumers an attractive competitive alternative.

Grande Communications, an overbuilder headquartered in San Marcos, TX, was recently named to the "Texas Technology Top 50," a list of the 50 fastest growing technology companies in Texas.[145] Over the past 5 years, Grande's revenue has grown 369%,[146] and Grande recently reported positive EBITDA, a total of 131,538 customers, and expansion of its network to offer its

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143 Press Release, Nat'l. Ass'n of Broadcasters, *NAB Urges Passage of Pro-Consumer Multicast DTV Mandate* (Aug. 31, 2005), *available at* http://www.nab.org/newsroom/pressrel/Releases/083105_DTVNewsConference.htm.

144 *See infra* notes 204-205 and accompanying text.

145 *See Deloitte & Touche Reveals Fastest Growing Technology Companies in Texas*, Business Wire (Sept. 6, 2005), *available at* http://home.businesswire.com/portal/site/google/index.jsp?ndmViewId=news_view&newsId=20050906005058&newsLang=en.

146 *Id.*

services to a total of 325,581 households.[147] WideOpenWest, operating systems purchased on the cheap from Ameritech, serves approximately 286,000 customers.[148] Everest Connections also continues to serve customers in Kansas, and recently announced the addition of new high-definition and digital channels to its existing channel lineup,[149] as well as the deployment of its "Caller ID on TV" service, which "displays a caller's name and phone number on a customer's TV a few seconds before their phone rings."[150]

Although some overbuilders experienced some financial difficulties in the past few years, most have emerged as strong competitors in the video programming (as well as broadband and telephone) marketplace. For example, within the past year, RCN successfully emerged from bankruptcy having "converted approximately $1.2 billion in unsecured obligations into . . . new equity, and eliminated approximately $1.8 billion in preferred share obligations."[151] Company executives now believe it is strong enough "to take on every competitor it comes across."[152]

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147 *See* Press Release, Grande Communications Holdings, Inc., *Grande Communications Holdings Inc. Announces Results for the Quarter Ended June 30, 2005 and Guidance for 2005* (Aug. 15, 2005), *available at* http://www.grandecom.com/pdf/Quarterly_Results_Release_Q205.pdf.

148 *See* NCTA, *Industry Overview, at* http://www.ncta.com/industry_overview/top50mso.cfm (last visited Sept. 9, 2005).

149 *See* Press Release, Everest Connections, *Everest Launches New Channels to Growing Customer Base* (2005), *available at* http://www.everestgt.com/about/news/new_channels.shtml.

150 Press Release, Everest Connections, *New Caller ID on TV Service Deployed* (2005), *available at* http://www.everestgt.com/about/news/callID_TV.shtml.

151 Press Release, RCN Corp., *RCN Corporation Announces Emergence from Bankruptcy* (Dec. 21, 2004), *available at* http://investor.rcn.com/ReleaseDetail.cfm?ReleaseID=160363.

152 K.C. Neel, *Fresh Start For RCN*, Multichannel News, Apr. 18, 2005, at 29-30 ("Wall Street also seems happy with RCN these days. Since the company came back to NASDAQ on March 21, the stock has stayed somewhat steady at around $20 a share. It's early in the game, but UBS Warburg LLC's top media analyst Aryeh Bourkoff believes RCN is well poised to do well in its markets going forward."), *available at* http://www.multichannel.com/article/CA525198.html?display=Special+Report/.

Bobbie Herbs, RCN's Senior Vice President of marketing, explains that RCN "did a 360-degree overview of the company and its image. We found that our customers love our three-product bundle, and they like our customer service. They also believe we're innovators with all our new service offerings."[153] In the second quarter of 2005, RCN reported 413,000 customers, revenue of $141 million, and positive EBITDA of $19.8 million.[154] In addition, RCN reported that it is moving forward with the initiation of its buildout program, continuing to expand the content it offers, and building its VOD library.[155]

Knology also successfully refinanced much of its debt and emerged in a stronger competitive position.[156] Knology's chief financial officer Robert Mills explained that the company's primary goal "is to create liquidity for our business so that we can continue to grow revenue . . . and this transaction will allow the business to grow in a way that creates value for our investors and other constituents."[157] Knology recently reported record revenue and EBITDA; continued customer growth in its video, telephone, and broadband services; and

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[153] K.C. Neel, *More Than Skin Deep, RCN's Rebranding Effort Involves a Big Focus on Customer Service,* Multichannel News, Apr. 18, 2005, at 31.

[154] *See* Press Release, RCN Inc., *RCN Reports Second Quarter 2005 Results; Achieves $141.4 Million in Revenue, $19.8 Million in EBITDA* (Aug. 10, 2005), *available at* http://investor.rcn.com/ReleaseDetail.cfm?ReleaseID=170652

[155] *See id.* RCN recently announced that it had reached a long-term affiliation agreement with Starz to carry all thirteen of the Starz premium services through 2009, including access to VOD and HD content. *See RCN, Starz Ink Long-Term Pact,* Multichannel News, Aug. 8, 2005, *available at* http://www.multichannel.com/index.asp?layout=articlePrint&articleid=CA633232.

[156] *Knology Wraps Up Refinancing*, Multichannel News, June 30, 2005 (quoting CEO Rodger Johnson: "The new debt facilities combined with the $9.2 million equity we recently raised, will significantly improve our liquidity position."), *available at* http://www.multichannel.com/article/CA622489.html.

[157] *Id.*

expansion of its service area.[158] Knology now offers its services to approximately 745,000 homes and provides video to 173,268 of those homes.[159] In addition, Comcast competes against a number of municipally-owned overbuilders including Braintree Electric Light Department and Tacoma, Washington's Click! Network.

F. Home Video Sales and Rentals Are Popular Sources of Video Programming.

Consumers are not limited to the video services provided by the local cable operator, two DBS providers, an overbuilder, the Internet, or local broadcasters. As the Commission has recognized repeatedly, the sale and rental of home video, including videotapes and DVDs, provide another distribution outlet for video programming.[160] Traditional home video technologies, such as VCRs and DVD players, continue to have an indelible impact on the marketplace. 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.[161] Sales and rentals of DVDs "have accounted for 60% of entertainment companies' bottom lines" over the past eight years.[162] And, as more companies enter the market for sale and rental of home video, consumers are finding it is easier than ever before to buy and rent these products.

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[158] Press Release, Knology, Inc., *Knology Reports Record Revenue and EBITDA in Second Quarter 2005* (Aug. 1, 2005), *available at* http://phx.corporate-ir.net/phoenix.zhtml?c=130221&p=irol-newsArticle&ID=737994&highlight=.

[159] *See id.*

[160] *See First Report* ¶¶ 134-135; *11th Annual Report* ¶ 120.

[161] *See id.* ¶ 121.

[162] T.L. Stanley, *Studios Reel as DVDs Show Wear; Hollywood's Cash Cow Drying Up?*, Advertising Age, July 11, 2005, at 1. DVD recordings of broadcast and cable network television programs are gaining in popularity;

(footnoted continued...)

Consumers can purchase DVDs and videocassettes from retail chains, such as Target and Wal-Mart, or from online companies, such as Amazon.[163] Rental options are also expanding. In addition to renting from Blockbuster stores, for example, consumers can also rent via online services, such as Netflix. In the second quarter of 2005, Netflix added 178,000 subscribers, bringing its total to 3.2 million, and it is estimated that Netflix will have between 3.85 to 4.05 million subscribers at the end of 2005.[164] In fact, Netflix recently forecast that it will have 5 million subscribers by the end of 2006.[165]

Earlier this year, Wal-Mart and Netflix entered a partnership whereby Netflix will promote Wal-Mart DVD sales to its subscribers, and Wal-Mart will offer its online customers the opportunity to sign up with Netflix at Wal-Mart's current rate for a year.[166] Blockbuster is reported to have a million online DVD rental subscribers, and it expects to double this number

(...footnote continued)

so far this year, such recordings are up 26% from the comparable period in 2004. *See* Judith McCourt, *Total Control: TV-DVD Sales Jump 26%*, The Hollywood Reporter, Sept. 2, 2005 (citing figures from Nielsen VideoScan).

163 Amazon and other retailers have become increasingly more important avenues for selling DVDs, as some traditional retailers have cut back. Amazon's revenue from home media for the past year through March was $5.3 billion, up from $2.2 billion in 2000. Paul Bond, *Amazon's New Lease on Shelf Life for DVDs, CDs*, Hollywood Reporter, July 26, 2005 ("Amazon.com, along with some other online retailers, has become an important avenue for moving DVDs and CDs that are being removed from shelves of traditional stores more quickly than ever."). Nevertheless, Amazon still "accounts for only about 5% of a studio's DVD sales, insiders say, while Wal-Mart can sell up to 35% and Best Buy up to 25%." *Id.*

164 *See* Press Release, Netflix, *Netflix Announces Q2 2005 Financial Results* (July 25, 2005), *available at* http://a408.g.akamai.net/f/408/1284/24h/image.netflix.com/NetFlix_Assets/pdf/2Q05_financial_results.pdf.

165 Bloomberg News, *Netflix Sees 2006 Pretax Profit of $50 Million*, LATimes.com, Sept. 9, 2005, *available at* http://www.latimes.com/business/la-fi-calbriefs9.5sep09,1,1716666.story?coll=la-headlines-business.

166 *Wal-Mart, Netflix Agree on DVD Deal*, Reuters, May 19, 2005 (noting that Blockbuster and Netflix have been "locked in an expensive price war since last fall, when Blockbuster launched its online service and twice undercut Netflix's subscription price"), *available at* http://news.zdnet.com/2100-9595_22-5713298.html.

by the end of the first quarter of 2006.[167] And new entrants are pursuing a strategy of competitive differentiation; GreenCine, for example, now markets itself as the "#1 DVD Rent-by-Mail site for the alternative scene."[168] These distribution alternatives have had a significant impact on the video programming marketplace.[169] Consumers "rented more than one billion DVD units during the first 26 weeks" of 2005.[170]

III. NEW PLAYERS CONTINUE TO PRESENT INNOVATIVE VIDEO DISTRIBUTION OPTIONS.

In addition to these well-established video programming distributors, consumers are being introduced to new sources on an ongoing basis. The dynamic nature of the video marketplace has provided a constant evolution in technology. This has resulted in the transformation from analog to digital; conversion from black-and-white video to color video to HDTV where the colors are so vibrant it "feels like you are there"; the migration from a few over-the-air broadcast channels to hundreds of broadcast and cable networks; and the shift from rushing home to watch a primetime show to setting the VCR to tape a program to having a DVR record every episode of the program that is shown (or using VOD to access thousands of hours of additional programming). Technological innovation promises even greater opportunities for consumers to watch their programming whenever and wherever they want. Mobility and

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167 *See* Lorne Manly, *Extinction Long Seen, Video Stores Hang On*, N.Y. Times, Aug. 23, 2005, at C1.

168 GreenCine, LLC, *Home Page*, *at* http://www.greencine.com/main (last visited Sept. 11, 2005). GreenCine features "the best selection of independent, international, documentary, classic films and other esoteric fare." *Id.*

169 *See* Kagan Research LLC, *Netflix Rebounds on Solid Q2 Results*, Kagan Media Money, Aug. 2, 2005, at 1-2. Amazon.com is also expected to enter the online DVD rental business. *See* Reuters, *supra* note 166.

170 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.

pervasiveness hold the promise of even more alternatives for consumers. And though such new alternatives must still prove their mettle in the marketplace, their presence underscores the potent nature of technological innovation and the certainty that new modes of video delivery will continue to be developed.

A. Mobile Telephones Are Presenting the Opportunity for a "Third Screen."

Although consumers may not ultimately use video screens on mobile phones as a full substitute for their home television sets, video delivered by mobile phones is becoming an important source of video programming.[171] Mobile phone providers increasingly are offering video that includes content from traditional cable programming networks, as well as pre-recorded content from a host of other video producers, as a new service and a means to distinguish their product from that of their competitors.

For example, in late 2003, Sprint launched MobiTV, the world's first television content service delivered to mobile phones, as part of its PCS Vision services.[172] MobiTV provides linear network programming from popular cable channels such as the Discovery Channel, ESPN,

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[171] Media analysts at Kagan Research predict that, from an operator perspective, wireless video represents an incremental revenue 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."). Content producers are increasingly exploring distribution opportunities in the wireless medium. For example, NBC Universal is "asking all of the producers of all of [its] shows this fall to think interactive, and to provide snippets out of their shows that can be viewed on cell phones and other broadband devices." Diane Mermigas, *'Think Interactive' Is NBC Uni's Fall Mantra*, Hollywood Reporter, Sept. 15, 2005 (quoting Bob Wright, chairman and CEO of NBC Universal). Next year, content from NBC Universal will be available on Verizon digital cell phones. *See id.*

[172] *See* Paul Farhi, *Channel Surfing, Erosion & Networks Treading Water*, Wash. Post, Sept. 18, 2005, at N1 ("TV is increasingly going mobile. New video-capable cell phones and personal digital assistants (PDAs) can play brief news and sports clips, as well as short entertainment serials known as 'mobisodes.'"); 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*, Associated Press, Dec. 1, 2004, *available at* http://sports.espn.go.com/espn/print?id=1935907&type=story.

the Weather Channel, and Fox News Channel.[173] 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,[174] and is working toward offering live video of baseball games.[175] Sprint also makes available to its customers original video content, including teen-oriented Varsity Mobile.[176]

Other mobile phone carriers are also offering an increasing amount of video content. For example, Verizon's V-CAST provides pre-recorded video clips from ESPN, Nickelodeon, and RealNetworks' rTV, among others.[177] V-CAST video clips include hits like "The Daily Show With Jon Stewart."[178] Verizon has reported strong uptake on its V-CAST wireless video program since it launched in early February.[179]

The research firm, the Yankee Group, estimates that "there were 280,000 subscribers to cellular TV in the U.S. at the end of 2005," and that "the number of subscribers could reach

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173 *See* MobiTV, *MobiTV Channels* (listing programming networks carried by MobiTV), *at* http://www.mobitv.com/channels/sprint.html (last visited Sept. 19, 2005).

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

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

176 *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.

177 *See* Johnnie L. Roberts, *Keepin' It on the Download*, Newsweek, Aug. 1, 2005, at 42.

178 *See id.*

179 *See* Kagan Research, LLC, *supra* note 171, at 3.

1.3 million by the end of this year and 10.8 million by 2008."[180] Not all of this viewing represents a one-for-one substitution for the viewing of programming delivered via broadcast, cable, DBS, or in other ways, but still the effects are significant. The growing appeal of third-screen video creates one more factor that disciplines the marketplace even as it expands consumers' choices.

B. Broadband over Power Line ("BPL") Technology, Although Nascent, Has the Potential To Provide Additional Video Distribution Competition.

In its *11th Annual Report*, the Commission recognized the potential for BPL companies to provide video services.[181] At the time, BPL was thought to only be able to provide transmission speeds sufficient for streaming video, but a lot has changed since then. Advances in BPL technology are making traditional video via BPL a technological possibility.

BPL technology is currently being utilized in Manassas, Virginia, but is also being tested in a number of other markets. Tests are underway in as many as 18 states, including a partnership in Cincinnati between utility Cinergy Corp. and BPL provider Current Communications Group.[182] In addition, San Diego Gas & Electric began a test of BPL technology just a few weeks ago, which may continue for up to a year.[183] Some tests have already yielded positive results. CenterPoint's BPL pilot with IBM in Houston has shown that

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180 Li Yuan, *TV -- Anytime, Anywhere*, Wall St. J., Sept. 12, 2005, at R4.

181 *See 11th Annual Report* ¶ 133.

182 *See* Tim Kridel, *Pipe Dream*, Telephony, June 6, 2005; Akweli Parker, *Broadband's New Outlet*, Phil. Inquirer, Sept. 11, 2005, at C1. The Current-Cinergy operation is also preparing to "deploy VoIP with quality of service late this year." Louis Trager, *FCC Tech Official Says Agency's in Good Company Pushing BPL*, Communications Daily, Mar. 7, 2005, at 6.

183 Linda Haugsted, *San Diego Utility Gears for BPL Trial*, Multichannel News, Aug. 1, 2005, at 32.

BPL technology is "viable" and "worth serious consideration," said Chuck Hackney, CenterPoint's manager of telecom delivery services.[184] CenterPoint expects to expand BPL deployment next year.[185]

BPL technology is attracting investment from a wide variety of companies, including many prominent Internet and media corporations, which may help position it as a future media for delivery of video programming. In July 2005, Current attracted investments totaling $100 million from companies such as Google, Hearst Corp., and Goldman Sachs.[186] Current's Vice President Jay Birnbaum indicated that the funds would go to "expand[ing] into video-on-demand and IPTV."[187] Strong support for BPL technology is also coming from Intel and Motorola with their equity investments in BPL chipmaker Intellon, their membership in the HomePlug Powerline Alliance ("HPPA") standards group, and the selection of Intel's manager of powerline initiatives, Matt Theall, as the new HPPA president.[188]

In addition, the inclusion of Intel, Cisco Systems/Linksys, and Motorola as sponsor members of HPPA is expected to boost the alliance's efforts to have its audio-video and BPL

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184 *New Technologies*, Communications Daily, Sept. 2, 2005, at 10. CenterPoint is an electric transmission & distribution company serving 5 million customers in Texas, Arkansas, Louisiana, Minnesota, Mississippi, and Oklahoma.

185 *See id.*

186 Ken Kerschbaumer, *Plug-and-Play Internet; Wall-Outlet Broadband Attracts Heavy Hitters*, Broad. & Cable, July 18, 2005, at 20.

187 *Industry Notes*, Wash. Internet Daily, July 8, 2005.

188 Ed Gubbins, *Intel Gets Behind BPL*, Telephony, Sept. 5, 2005. "IBM believes that video and VOD can be pushed through the [BPL] pipe." Kerschbaumer, *supra* note 186, at 20.

standards accepted by the IEEE and other standards organizations.[189] Major consumer electronic players such as Panasonic, Sony, and Mitsubishi also have been involved in the standard setting process for BPL, which is reportedly "moving briskly."[190] The new BPL standards and technologies include the potential for video offerings. For example, HPPA's "AV" standard "is important because it replaces HPPA's previous 14 Mb/s standard (yielding 5 Mb/s throughputs) with a 200 Mb/s one (yielding throughputs between 70 Mb/s to 140 Mb/s), the better to serve . . . emerging apps like video."[191] The AV standard is "aimed squarely at Internet Protocol Television and triple-play uses."[192]

IV. COMCAST CONTINUES TO INVEST AND INNOVATE TO KEEP PACE WITH THE CHALLENGES OF AN INCREASINGLY COMPETITIVE MARKETPLACE.

The widespread availability of video programming from numerous sources has had profound effects on the cable industry. Cable operators have been compelled by this expansive and expanding competition to upgrade their networks to offer their customers an ever-increasing array of new programming and services. The cable industry as a whole invested nearly $100

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189 *See* Loring Wirbel, *HomePlug Body Regroups for Powerline Charge*, Elec. Eng'g Times, Aug. 29, 2005, at 6. EchoStar is also a member of HPPA. As one publication noted, while EchoStar's membership is unexpected, [i]f BPL technology evolves to be substantially cheaper than satellite and equally able to deliver such services as video to rural users, EchoStar had better know about it and start planning strategy now." *Alliance Opts for Interoperable Powerline Broadband Specs*, Broadband Bus. Forecast, Jan. 11, 2005.

190 Dinesh Kumar, *Broadband Over Power Line Standard-Setting Moving Quickly*, Wash. Internet Daily, Aug. 23, 2005. An IEEE MAC-5 subcommittee charged with developing standards for access and in-home BPL co-existence and interoperability aims to finish work before 2007, for approval by the IEEE Standards Board. *See id.*

191 Ed Gubbins, *Intel Gets Behind BPL*, Telephony, Sept. 5, 2005. HomePlug AV integrated circuits will enable whole-house distribution of multiple high-definition video and digital audio over existing home electrical wiring and coaxial cable, with robust quality of service and tight control of latency and jitter. *See Intellon Corporation Raises $24.5 Million in Financing*, Asia Pulse, Aug. 25, 2005; *HomePlug Update*, Broadband Bus. Forecast, June 15, 2005.

192 *High-Speed Home BPL Spec OK'd*, Broadband Bus. Rep., Aug. 23, 2005.

billion since 1996 (over $10 billion in 2004 alone) on capital expenditures.[193] Comcast (and AT&T Broadband, its predecessor in some systems) has invested over $39 billion to upgrade its network and develop and deploy new services.[194] As a result of these upgrades, "Comcast subscribers and cable customers nationwide have seen more new services in the past few years than they saw in the previous ten, a reflection of how the once-staid industry is adapting to remain competitive."[195] Moreover, Comcast continues to show its commitment to its customers and their communities through its community outreach events and active involvement in each and every community it serves.[196]

In the face of potent competition, Comcast knows that the key to success is enhancing its existing services while also adding new services. As Stephen Burke, Comcast's Executive Vice President and Chief Operating Officer recently explained, "We intend on winning this battle. . . . We're creating all sorts of new products, some of which are better than what the competition has and others that the competition doesn't have at all."[197] Many of these innovations are intended to

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193 *See* NCTA, *2005 Mid-Year Industry Overview* 7 (July 2005) ("*2005 Mid-Year Industry Overview*"), *available at* http://www.ncta.com/industry_overview/CableMid-YearOverview05FINAL.pdf.

194 Over the past year, Comcast completed a $72 million upgrade in the District of Columbia cable system, a $350 million broadband network upgrade in Chicago, and $70 million upgrade of its Dallas system. Discussing the upgrade, D.C. Chamber of Commerce president Barbara Lang noted that Comcast has been truly "committed to the District and has shown it in every possible way." *See Comcast Hails New Center, D.C. Investment,* The Current, June 15, 2005, at 11.

195 Chris Walsh, *Comcast Ready To Rumble: Upgrades Crucial in Fight with Satellites,* Rocky Mt. News, Dec. 20, 2004, at 1B.

196 To the extent not provided in the discussion that follows, the attached second-quarter earnings report (especially Table 5) provides answers to a number of the questions posed in the *Notice. See generally* Press Release, Comcast Corp., *Comcast Reports Second Quarter 2005 Results* (Aug. 2, 2005) (attached as Attachment 3), *available at* http://www.cmcsk.com/phoenix.zhtml?c=118591&p=irol-newsArticle&ID=738204&highlight=.

197 Chris Walsh, *Comcast Set To Use TV as Springboard,* Rocky Mtn. News, Mar. 29, 2005, at 1B.

counter advantages enjoyed by DBS providers: "'What we're really trying to do is give people things with cable that they can't do with satellite.'"[198]

A. Comcast Continues To Improve Its Video Services and Develop New Technologies That Will Further Enhance Those Services.

Over the past year, Comcast has expended substantial resources to further improve its video services. From the familiar basic and expanded basic analog cable services to new digital tiers and specialty tiers, HDTV line-ups, VOD, and DVR services, Comcast has sought to provide existing and potential customers with the best possible video experience and value for their money.

Program Offerings. Comcast continues to develop new programming networks and options and increase the availability of high-quality programming services. This Fall, Comcast will launch PBS Kids Sprout, a new channel that will provide high-quality children's programming that features Sesame Street, Barney, and other well known children's programming from PBS and others.[199] CN8, The Comcast Network, has expanded its East Coast service area to include subscribers in the Pittsburgh market. CN8 "offers news programming and sports, from minor-league baseball and college teams to high-school football, with strong regional appeal,"[200] and in the eight years since it launched, CN8 has garnered 209 Emmy nominations and 28 Emmys.[201]

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198 Don Steinberg, *At Comcast, Sports Mania*, Phil. Inquirer, Mar. 7, 2005, at A1 (quoting Stephen Burke).

199 Frank Ahrens, *Comcast, PBS Plan New Service*, Wash. Post, Apr. 5, 2005, at E4. As discussed below, PBS Kids Sprout launched earlier this year on VOD to great success.

200 Mike Reynolds, *8-Year-Old CN8 Won't Stop at 8 Million*, Multichannel News, Oct. 25, 2004, at 14.

201 *See CN8 Sends Signal Into Steel City*, Multichannel News, June 3, 2005, *available at* http://www.multichannel.com/article/CA606135.html?display=Programming.

To address the local programming needs of Comcast's customers in Southern California, Comcast has begun inserting five-minute segments of Comcast Local Edition into CNN Headline News.[202] Meanwhile, in Northern California, Comcast SportsNet West has signed a five-year deal with the University of California, Berkeley to televise basketball, football, and other sports programming.[203] And, Comcast continues to enter into voluntary agreements with broadcasters to carry their local multicast digital signals; as of mid-September of this year, Comcast had agreements with over 200 commercial broadcast stations located in 72 markets across the nation.[204] In addition, Comcast was a signatory to and ratified the historic carriage agreement between NCTA, the Association of Public Television Stations, and PBS for the carriage of noncommercial broadcasters' multicast signals; Comcast expects that by October of this year, it will be carrying the digital signals of 58 noncommercial broadcast stations in 62 markets, the majority of which are multicasting.[205]

Comcast consumers have a plethora of programming options from which to choose. In a typical Comcast system, Comcast's customers can choose from:

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[202] *See* Stuart Miller, *Comcast, a Local Edition for Sprawling Los Angeles*, Broad. & Cable, June 27, 2005, at 22. Among other things, the segments provide an opportunity for elected officials and community groups to explain who they are and what they do. *See id.*

[203] *See* Eric Young, *Comcast SportsNet To Televise Cal Football, Basketball Games*, S.F. Bus. Times, Aug. 19, 2005.

[204] For example, "in the Washington metropolitan area, Comcast is carrying WJLA's local Weather Now channel (ABC) and WRC's Weather Plus channel (NBC), as well as WETA's Prime, Kids, and Plus channels (PBS)." *Completing the Transition to Digital Television; Hearing Before the S. Comm. on Commerce, Science, and Transportation*, 109th Cong. 14 (2005) (statement of Kyle McSlarrow, President and CEO, NCTA).

[205] *See* Press Release, NCTA, *PTV Stations and Cable Systems Approve Agreement Between APTS, NCTA and PBS for Digital Cable Carriage During and After the Digital TV Transition* (Apr. 14, 2005), *available at* http://www.ncta.com/press/press.cfm?PRid=597&showArticles=ok.