Federal Communications Commission
Washington, D.C. 20554

September 22, 2005 DOCKET FILE COPY ORIGINAL

Loretta P. Polk, Esq.
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Re: Motion to Accept Filing as Timely Filed in MB Docket No. 05-255

Dear Ms. Polk:

The Office of the Secretary has received your request for acceptance of the document filed by NCTA 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

NCTA
NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION

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Federal Communications Commission
Office of Secretary

September 20, 2005

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
	)	

MOTION TO ACCEPT FILING AS TIMELY FILED

The National Cable & Telecommunications Association (NCTA) requests that the Commission accept as timely filed the accompanying comments in the above-captioned proceeding.

NCTA repeatedly attempted to file its comments electronically yesterday – the day that they were due – until approximately 10:30 p.m., but the Commission's Electronic Comment Filing System ("ECFS") was apparently down and would not accept the filing. NCTA attempted to file the document using both main and alternate routes on the ECFS system. NCTA was able successfully to submit its comments electronically this morning.

For the foregoing reasons, NCTA requests that its motion to accept the filing as timely filed be granted.

Respectfully submitted,

Loretta Polk

Loretta P. Polk

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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

COMMENTS OF

NCTA

NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION

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September 19, 2005

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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

COMMENTS OF
THE NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION

The National Cable & Telecommunications Association ("NCTA"), by its attorneys, submits the following comments on the status of competition in the market for the delivery of video programming. NCTA is the principal trade association of the cable television industry. Its members provide video programming, broadband Internet and other services throughout the United States. NCTA also represents programmers and suppliers of equipment to the cable television industry.

INTRODUCTION AND SUMMARY

The Commission's last two annual reports to Congress on the status of competition confirmed the sweeping changes in the video marketplace over the past decade. As the FCC concluded in the 10th Annual Report, the "vast majority of Americans enjoy more choice, more programming and more services than any time in history."[1] Earlier this year, in the 11th Annual Report, the Commission reported that "almost all U.S. consumers have the choice between over-the-air broadcast television, a cable service, and at least two direct broadcast satellite (DBS)

[1] *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 19 FCC Rcd 1606, 1608 (2003) ("10th Annual Report") (2003).

providers."[2] And in some areas, the FCC found, "consumers also can choose to receive service via one or more emerging technologies, including digital broadcast spectrum, fiber, and video over the Internet."[3] The Commission should recognize in this upcoming report that video competition is more intense, and much fiercer, than ever before. There is a battle on, and consumers are benefiting.

With direct broadcast satellite (DBS) companies having grown from zero to 25 million customers over the past eleven years, and accounting for one in four video subscribers, DBS and cable wage war for every customer, old and new. The two nationwide DBS providers now serve 22 percent of all multichannel video households and their penetration relative to cable reaches 25 percent or greater in at least 25 states. In the first quarter of 2005, surpassing analysts' predictions, DirecTV increased its subscriber base by a record 505,000 net customers, and EchoStar grew by 325,000 customers.[4] Cable made significant gains in digital cable and high speed Internet customers this year, but its share of multichannel video customers continued to decline to 69 percent.

This already vibrantly competitive marketplace is gaining another strong competitor. A decade after promising to compete in the video marketplace – and a decade after the cable industry began fulfilling its promise to upgrade its facilities to compete in the provision of telephone service – the regional Bell operating companies are preparing to enter the video marketplace. SBC is spending $4 billion over the next three years to install fiber optic cable to

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2 *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 20 FCC Rcd 2755, 2757 (2005)("11th Annual Report").

3 Id.

4 "Further to Fly; DirecTV Continues to Grab Market Share Despite Stepped Up Competition," Multichannel News, May 23, 2005; "EchoStar Swings Into the Black Amid Strong Subscriber Growth," The Wall Street Journal, May 6, 2005.

serve up to 18 million homes and plans to deliver television services using Internet protocol (IP) technology.[5] Verizon is spending $6 billion over five years to lay fiber direct to the home to reach up to 16 million households in its service areas.[6]

Telco entry, however, comes with a catch. The telcos argue that their ability to add their services to the competitive mix will be delayed, if not thwarted, if they are required to obtain franchises from local franchising authorities and build out their facilities to serve entire communities, as all other cable operators have been required to do. But, as the attached economic analysis by Michael Baumann of Economists Incorporated explains, relieving telephone companies from the build-out and anti-redlining obligations imposed on other cable operators would not only give telephone companies an unfair and artificial competitive advantage. It would also undermine the social policy underlying those obligations – which is to ensure that video programming and broadband services are ubiquitously available to all areas of the country and all segments of the population.

Baumann shows that cable operators who have been required to build out and serve all areas of a community may, in some circumstances, rely on areas with lower costs and higher expected revenues to make service available and affordable in areas that have higher costs and generate lower returns. This community-wide offering would not be sustainable if new entrants were allowed to serve only what SBC has called the "high value" areas while ignoring "low value" customers. Faced with such cream skimming, cable operators would face artificially higher per-customer costs than their new competitors. This telco skimming enables a new

5 "SBC and Comcast Want it All," San Francisco Chronicle, July 31, 2005.

6 "Verizon, DirecTV Get Closer," Boston Globe, February 22, 2005.

entrant to capture customers for reasons that have nothing to do with superior efficiency or a superior product.

Cable operators could not continue to compete effectively in the areas served by telcos while still sustaining the higher costs of serving the areas that the telco chose not to enter. As Baumann shows, a cable operator might not be able to upgrade service in those areas or might not be able to continue serving them at all. It might even be the case that, given its sunk costs and the regulatory disparity, a cable operator would be so disadvantaged that it eventually was forced to exit the entire franchise area – again, for reasons that had nothing to do with marketplace inefficiency or competitive inferiority. In other words, if the public policy of ensuring service – and deployment of new broadband services – for all the nation's households remains an important social objective, it cannot be effectively achieved without applying similar buildout obligations on *all* similar competitors.

Consumers are finally seeing the fruition of the deregulatory impetus of the 1996 Telecommunications Act – a cable platform that is forging facilities--based competition with telephone companies and telco entry into the video marketplace. Consumers have fueled the dramatic growth of DBS as a full-fledged competitor to cable. They partake of innovative new services such as video-on-demand and digital video recorders and bundled packages of video, voice and data, and soon-to-be-added wireless services. They consider joint marketing and other business arrangements between major players and new upstarts. And their lives have been changed by the ever-expanding array of competitive entertainment and information services brought about by the Internet revolution. Telco entry can add to these choices to the benefit of consumers.

The Commission's 12^{th} Annual Report would not be complete if it did not fully acknowledge a video landscape marked not only by intense cable, satellite and telephone rivalry but from Internet-based video delivery media too. Cable, satellite and soon telephone companies face new ways for consumers to access video content – from digital cell phones and other portable devices to beefed up websites to enhanced in-home consumer electronics and computer equipment with high definition DVD or streaming video-capability. Not surprisingly, Internet companies, such as Yahoo and Google, have now declared themselves to be media companies offering multiple competitive services to cable's bundle.

As put by one observer: the ethos of New TV can be captured in a single sweeping mantra: *anything you want to see, any time, on any device.*"[7] Another puts it this way:

> It's the key battleground in what promises to be one of the most bruising – and important- global corporate fights in the next couple of years. Telephone giants, cable titans, computer companies and consumer electronics makers are all vying to provide the next generation of high-tech entertainment –a single network or 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.[8]

There is no denying that this onslaught of new delivery modes – the mating of digital communications and computing with entertainment and information at your fingertips – is making all industry players compete more aggressively to stay in the game. As one media analyst recently said, "from an investment standpoint, I don't think we've ever before seen such a

7 "Television Reloaded," Newsweek, May 30, 2005.

8 "Who's going to win the living room wars?", The Wall Street Journal, April 25, 2005.

competitive landscape."[9] The Commission should faithfully report to Congress in its 12th Annual Report what others so conspicuously see.

I. THE VIDEO MARKETPLACE IS VIBRANTLY COMPETITIVE WITH A VARIETY OF DELIVERY MODES AND MEANS TO ACCESS VIDEO CONTENT

The starting point for the Commission's annual assessment of the state of competition in the video marketplace is multichannel video programming distributors (MVPDs). Leichtman Research Group (LRG) conducts an annual study on the multichannel video universe and here is what this year's report had to say about the state of competition:

> With over 80% of households in the United States subscribing to either cable or Direct Broadcast Satellite (DBS) television, and telephone companies poised to enter the market, the multi-channel video marketplace has become more competitive than ever before.[10]

As shown below, DBS continues to increase its share of MVPD customers, while cable fights back to maintain and enhance the value and attractiveness of its service. Cable and DBS are also up against a host of other video delivery media, including broadband service providers (BSPs), utilities, municipal overbuilders, Internet video providers, broadcasters and home video outlets.

Direct Broadcast Satellite. In the 11th Annual Report, the Commission found that "DBS subscribership continues to increase at nearly double-digit rates of growth, and its share of the marketplace is increasing."[11] This trend continues. In the first quarter of 2005, DirecTV had its best subscriber growth to date: 505,000 net new customers. EchoStar had a strong performance

9 "Panelists See Communications Services Converging," Communications Daily, June 2, 2005, quoting Richard Greenfield of Fulcrum Global Partners. See also, "Who's going to win the living room wars?", The Wall Street Journal, April 25, 2005.

10 Cable & DBS: Competing for Customers, Research Study, Leichtman Research Group, 2005.

11 11th Annual Report at 2758.

at 325,000 net additions.[12] The two leading DBS providers report their total number of subscribers increased from 23.16 million to 26.13 million between June 2004 and June 2005, an increase of 12.8 percent.[13] DirecTV now has more customers (14.67 million) than all but one cable operator (Comcast). EchoStar, the second largest DBS provider with 11.46 million subscribers, ranks third among MVPDs.

DBS operators are continuing to experience strong subscriber growth in virtually every market where the companies offer local channel service.[14] And, according to Strategy Analytics, "DBS has robbed cable of the slow-but-steady growth it enjoyed up until the late 1990s, but its broader impact has been to expand the total base of multichannel TV homes."[15]

The Government Accountability Office (GAO) found that "DBS penetration rates have been and remain highest in rural areas, but since 2001, DBS penetration has grown most rapidly in urban and suburban areas, where the penetration rates were originally low. . . . In short, over the 2001 to 2004 time frame, the DBS penetration rate grew about 50 percent and 32 percent in urban and suburban areas, respectively, compared with a growth rate of 15 percent in rural areas."[16]

As we explained last year, the growth in direct-to-home ("DTH") penetration on a state-by-state basis confirms the national trend. This continues to be the case. Indeed, as Chart 1

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[12] "Basics on the Rise, DBS Rocks, Ops Roll in 1Q," Multichannel News, May 9, 2005; "EchoStar Swings Into the Black Amid Strong Subscriber Growth," The Wall Street Journal, May 6, 2005.

[13] NCTA estimates based on data from Kagan Research LLC.

[14] "Cable's Unique Market Opportunity," Investment Dealers Digest, February 21, 2005.

[15] "US Multichannel TV Update: Satellite Gains, But Does Cable Lose?" Strategy Analytics, Inc., April 1, 2005.

[16] Statement by Mark L. Goldstein, Director, Physical Infrastructure Issues, Government Accountability Office, Congressional Quarterly, GAO Report, April 2005 at 3.

shows, DTH penetration of television households, as of August 2005, exceeded 30 percent in 10 states, 20 percent in 37 states, and 15 percent in 46 states.

Chart 1
States with Direct-To-Home (DTH) Dish Penetration of Fifteen Percent or More
August 2005

State	Penetration Rate	State	Penetration Rate
Vermont	41.59%	Arizona	25.09%
Utah	38.08%	South Carolina	25.01%
Montana	37.91%	Oregon	24.84%
Idaho	36.90%	Wisconsin	24.10%
Wyoming	35.49%	South Dakota	23.40%
Mississippi	33.59%	North Dakota	23.31%
Missouri	33.52%	Illinois	23.09%
Arkansas	32.08%	Alaska	22.70%
Georgia	30.75%	Nebraska	22.59%
Colorado	30.09%	Washington	22.54%
Oklahoma	29.17%	Maine	22.40%
New Mexico	29.13%	Michigan	22.25%
Alabama	27.40%	Florida	21.97%
Indiana	27.18%	Kansas	21.97%
Iowa	26.92%	Ohio	18.34%
California	26.67%	Nevada	18.29%
Tennessee	26.39%	Louisiana	18.27%
Virginia	26.08%	Maryland	17.79%
North Carolina	26.04%	Delaware	17.56%
Texas	26.03%	New York	16.57%
West Virginia	25.88%	New Hampshire	16.50%
Kentucky	25.82%	New Jersey	15.57%
Minnesota	25.31%	Pennsylvania	15.16%

Source: SkyTRENDS SkyMAP, August 2005; www.skyreport.com; TV Household data from A.C. Nielsen.

DirecTV CEO Chase Carey acknowledges that many cable operators have improved their video service in recent years, "which is why we have to continue to improve."[17] In an effort to keep pace with cable's video-on-demand movie service, DirecTV and EchoStar have stepped up

[17] "Further to Fly; DirecTV Continues to Grab Market Share Despite Stepped Up Competition," Multichannel News, May 23, 2005.

marketing and promotion of their pay-per-view movie services.[18] In addition to EchoStar's standalone pay-per-view channels, the company's Dish on Demand service launched January 2005 with 30 titles downloaded to subscribers using the company's DISHPlayer DVR. DirecTV has promoted its pay-per-view business with discounts on recent Hollywood releases. EchoStar is rolling out the first portable DVR device, called the Pocket-Dish, in an effort "to get a leg up in its battle with cable and satellite TV rivals."[19] EchoStar is also purchasing Cablevision's satellite assets.[20] And EchoStar has teamed up with Frontier, a telecommunications provider, to offer a bundled package of satellite television, Internet and telephone service in 24 states.[21] This is in addition to the joint marketing arrangements DirecTV and EchoStar have with the Bell companies.

Broadband Service Providers and Municipal Overbuilders. Although DirecTV and EchoStar are cable's largest MVPD competitors at this time, cable operators continue to face competition from other facilities-based providers in major U.S. markets. Broadband service providers ("BSPs"), which include independent, municipal and CLEC overbuilders, are offering bundles of video, voice and data services over a single, often state-of-the-art, network.[22] RCN, the largest BSP, has 371,000 cable subscribers and ranks as the twelfth largest MSO. It operates in major metropolitan areas, including San Francisco, Chicago, Boston, New York and

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18 "DBS Tries PPV Discounts, Downloads," Multichannel News, May 23, 2005.

19 "EchoStar to Roll Out Portable DVR Device," Investor's Business Daily, May 26, 2005.

20 "EchoStar to proceed with satellite deal," Financial Times, March 31, 2005.

21 "Frontier, EchoStar Form Strategic Alliance," Satellite News, April 5, 2005.

22 11th Annual Report at 2801, n. 362.

Washington, D.C. RCN's video, telephone and high speed data service passes nearly 1.5 million homes.[23]

Wide Open West, the fourteenth largest MSO, serves an estimated 292,500 subscribers, and passes an estimated 1.4 million homes.[24] Knology Holdings, the twenty-first largest MSO, reports 179,800 cable subscribers, and passes 780,000 subscribers.[25] Grande Communications, the thirtieth largest MSO, provides cable service to 85,400 subscribers and passes more than 325,000 homes.[26]

Municipally-owned cable systems, in selected areas, also continue to compete with cable systems and other MVPDs. According to a survey by the American Public Power Association ("APPA") of its members, conducted at the end of 2004, 102 municipally-owned utilities offered cable television service.[27] The APPA survey also reported 81 municipally-owned utilities were offering cable modem or DSL service, and 52 municipal utilities offered telephone service.[28]

Mobile video. Last year's report did not include video over wireless phones or other portable devices among the array of video programming distributors. Their arrival since then demonstrates how abruptly entry in video can occur, just as the ringtone market erupted in the mobile space earlier in this decade. Verizon Wireless rolled out V Cast, a service that offers video programming to cellular telephone users, in February 2005.[29] V Cast currently provides

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[23] "Cable TV Investor: Deals and Finance," Kagan Research, Inc., August 25, 2005, at 11.

[24] Id.

[25] Id.

[26] Id.

[27] "Powering the 21st Century Through Community Broadband Services," American Public Power Association, Sept. 2005.

[28] Id.

[29] "On-Demand In The Palm Of Your Hand: Verizon Wireless Launches 'VCAST' – Nation's First And Only Consumer 3G Multimedia Service," Verizon press release, January 7, 2005.

news updates, sports highlights, celebrity news, stock quotes and market information, weather, and games for $15 per month. Its television-like video, at high bit rates, allows customers to download music videos and other high quality content. It is also reportedly working on its own original, reality programming.

Sprint Corporation began broadcasting live video over its wireless phones in August 2004.[30] Sprint PCS customers can now see news, video clips and other content real time over their cell phone. MobiTV, a video service available to Sprint PCS, Cingular and several regional carriers' customers, sends programs to cell phones and currently has 300,000 subscribers. Qualcomm recently introduced its TV-cell phone service, MediaFlo.[31]

The drive to deliver TV content to portable devices is picking up steam, as some providers prepare to launch Hollywood films and short format cinema in the near term.[32] HBO and Cingular Wireless are reportedly considering a wireless content distribution arrangement.[33] In addition to making the network's existing programming available, HBO may create new entertainment channels for the service.

Meanwhile, Sony's new portable PlayStation game device, known as PSP, is another mobile video play. It is capable of downloading TV shows and video information. It has been called "a plasma screen in your pocket."[34]

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30 "Sprint Will Start TV Service for Wireless," Kansas City Business Journal, August 13, 2004.

31 "Qualcomm Goes with the MediaFLO; Armed with New Chip, company to join the TV-cell phone scramble," Broadcasting & Cable, May 16, 2005.

32 "The Movie Theater in Your Pocket; Direct from Cellywood: Cell-phone cinema isn't exactly like the bit screen kind, but its potential sure is attracting attention," Business Week Online, June 22, 2005.

33 "HBO Unplugged," MSNBC.com, August 9, 2005.

34 "The Handy Future of TV; With Internet Uploads to Portable Players, the Airwaves are Wide Open," Kansas City Star, April 20, 2005.

Cable operators are beginning to add wireless options as part of their bundle of services. Time Warner Cable, for example, began testing cell phone service in partnership with Sprint in Kansas City.[35]

Digital video recorders and video-on-demand services have fueled consumer awareness and appetite for the technology for watching TV shows *whenever* you like. It seems inevitable that video providers would offer the ability to watch TV *wherever* you like. While a nascent service, one survey predicts that about 125 million consumers will be watching television-á-go-go on their mobile phone in five years.[36]

Internet Video. The Commission has recognized that video provided over the Internet has grown and promises to become an increasingly strong participant in the video programming marketplace.[37] Growing consumer demand for compelling content on the Internet combined with a burgeoning variety of broadband platforms is spurring this growth. As broadband Internet offers broadcast-quality video, consumers are increasingly turning to Internet-based means of accessing video content, including downloading movies and other high value video content traditionally available only through broadcast, cable, satellite or home video outlets. Libraries of video content, containing *thousands* of hours of video programming, are becoming available to consumers on a personalized, customized basis.

Internet companies are providing their own unique content or partnering with other established content providers and video distributors. New entrants, like Akimbo Systems, offer a

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35 "Bells' Bundles undercut cable TV operators," Atlanta Constitution, April 8, 2005.

36 "TV for Mobile Phones Set to Reach Masses," ExtremeTech.com, May 3, 2005.

37 11th Annual Report at 2762.

mix of established TV fare and unique content via the Web. Akimbo charges $10 a month and offers about 1600 programs, some for an extra fee. The company's chief executive predicts that Akimbo "will do what eBay has done for retailing."[38] Google, Yahoo! and Microsoft are developing video search engines to harness video content via their portal service.[39] Over the past year, Yahoo! predicted a 1 billion subscriber base for its multiple media services by decade's end.[40] BitTorrent, an Internet file-sharing method enables video enthusiasts to trade video files on-line. iFilm and other websites offer video clips to millions of customers. Wi-FiTV, a broadband Web site that features more than 200 TV channels from around the world, recently launched.

Program networks are beefing up their Internet presence to gain viewers and advertising dollars. These web "channels" contain specially made programming, short videos targeting niche interests, and repackaged TV content.[41] MTV Overdrive, a mix of news, live performances and on-demand music videos launched in April. Networks such as Home & Garden Television, Food Network, CNN, Fox News Channel, and MSNBC are offering more video content on their sites. According to one analyst, Internet advertising is headed toward a 25% increase over the last year, to upwards of $8.8 billion in 2005.[42]

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[38] "Merger of TV and Web May Hit Cable Industry Before It's Prepared," The Wall Street Journal, April 18, 2005.

[39] "Next Via the Internet: Tailored TV," Associated Press Online, May 16, 2005.

[40] "Mermigas on Media," The Hollywood Reporter, April 5, 2005.

[41] See e.g., "CNN.com plans Internet live news service," Financial Times, May 16, 2005.

[42] WSJ On-Line, May 16, 2005.

AOL saw a jump of 120 percent in its on-demand video streaming in 2004 and drew in 5 million viewers for its exclusive live coverage of the July 2, 2005 Live 8 concert.[43] ManiaTV.com, the interactive television website, had 1.6 million users in July alone.

As Internet companies and website operators grow their video on-line businesses, consumer electronics manufacturers are developing ways to exploit the World Wide Web via equipment. Toshiba and Matsushita, for example, offer digital TVs that allow users to download and store online video, along with DVD recording capability.[44] PC makers are developing new "media center" PCs that can play and record movies, television and music accessed on-line. As described by PC magazine online, "there is going to be a big battle for dominance in people's living rooms. What we've seen is a mini-explosion of set top boxes for Internet television."[45]

The flurry of announcements and deals in recent months shows that all players in the video marketplace are positioning themselves to compete in the IPTV arena.

Broadcasting. Broadcasters are still formidable competitors to cable and other multichannel providers. The competition for viewers is manifested in the battle for advertising dollars. After a 10-year decline in viewers aged 18 to 49, the broadcast networks posted an increase in this key demographic for the 2004-2005 television season. It all came down to the big four broadcast networks' crop of breakout hit shows. Some network shows turned in performances "akin to the days before cable became a serious competitor."[46] This has boosted advertising commitments for the coming year on all broadcast networks.

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43 "Extreme TV; ManiaTV.com offers college kids a broadband barrage of chat, sport, music and film. Is this the perfect media for the digital generation?" MSNBC.com, August 24, 2005.

44 "Format Wars," Financial Times, Comment & Analysis, March 3, 2005.

45 "The Web: Internet TV Ready for Prime Time," Gene Koporwski, UPI, March 9, 2005.

46 "Desperate No More? Networks See a Rebound in Viewers," The Wall Street Journal, May 26, 2005.

While the broadcast share of television viewing has declined in recent years as television viewers have increasingly opted for the multitude of choices available on cable, broadcast television remains a potent force. Broadcasting's share of the viewing day continues to exceed 40 percent.[47] Moreover, approximately 15 percent of television households do not subscribe to any multichannel service. These television households continue to find broadcast television alone or in combination with non-MVPD video sources (such as DVDs) to be their preferred means of receiving video programming. And a significant percentage of MVPD households include television sets that are not connected to multichannel service.

Home Video. In the heated battle for consumers' time and entertainment dollars, DVDs, video cassettes and laser discs continue to provide competitive alternatives to MVPD viewing options. There are approximately 47,000 DVD titles available for purchase or rental today, compared to 30,000 a year ago.[48] Consumers spent $24.5 billion renting or purchasing DVD and VHS last year, while generating $9.4 billion in domestic box office revenue.[49] In addition to theatrical releases, many highly popular previously broadcast television series are now available in DVD format, frequently accompanied by major advertising campaigns. Popular cable network shows are also available on DVD.

The growth in sales of DVD-formatted programming has been facilitated by gains in the sale of DVD hardware. U.S. consumers purchased 37 million DVD players in 2004, an eight percent increase over the previous year, and during the first half of 2005, nearly 14 million DVD

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[47] Cabletelevision Advertising Bureau, 2005 Cable TV Facts, www.onetvworld.org/?modula-displaystory+story_id=1257xformat=html

[48] The Digital Entertainment Group, "DVD Household Penetration reaches 75 Million," (press release), July 26, 2005.

[49] The Digital Entertainment Group, "Industry Boosted by $21.2 Billion in Annual DVD Sales and Rentals," (press release), January 6, 2005; "Movie Income Rises in 2004, but Ticket Numbers Sag Slightly," The Associated Press, January 5, 2005 at http://www.post-gazeette.com/pg05005/437134.stm.

players were sold to consumers, more than a six percent increase over the same period last year. Household penetration is expected to reach 80 percent by year-end 2005, with over 45 percent of DVD owners having more than one player.[50] When accounting for computers with DVD-ROM drives and DVD-enabled video game consoles, an estimated 79 million households currently have the capability to play DVD, approaching three-fourths of all U.S. TV households.[51] And on-line provider Netflix recently teamed with retail giant, WalMart, to offer their customers access to more than 40,000 titles of video programming.[52]

Overall, consumers spent $15.5 billion in 2004 on DVD sales, an increase of 33 percent over 2003, while revenues from DVD rentals increased 26 percent over 2003, as consumers spent more than $5.7 billion.[53]

II. TELCO ENTRY CAN ENHANCE CONSUMER CHOICE AND COMPETITION SO LONG AS SUCH COMPETITION IS NOT DISTORTED OR THWARTED BY DISPARATE REGULATION

Now that DBS has transformed the video marketplace so that virtually all television households can now choose from among at least three vigorously competitive multichannel video alternatives, it's easy to forget that only a decade ago, it was the large local telephone companies that were promising to provide a competitive alternative to cable – just as cable operators were promising to provide a competitive alternative to the telephone companies. Congress took these promises seriously. The Telecommunications Act of 1996, by removing barriers to telcos' entry

[50] Id.

[51] Id.

[52] "Walmart.com and Netflix Announce New Promotional Agreement," Press Release, May 19, 2005.

[53] Id.

into cable[54] and cable's entry into the provision of local exchange service,[55] was intended to promote the competitive convergence of voice, video and data services in a competitive marketplace.

The cable industry took its promise seriously, too. In the last decade, cable operators invested more than $100 billion to upgrade their facilities, and, in addition to providing a wealth of new video programming alternatives including digital tiers, video on demand, and high definition television, now offer robust high-speed Internet service and telephone service. Meanwhile, during most of that period, the telephone companies' promises to enter the video marketplace went unfulfilled.

Now, however, the telephone companies are reviving their plans to provide a multichannel video programming service. Telephone companies are not only touting their proposed video offerings but are actively deploying facilities and beginning to make video service available.[56]

Although there is already vigorous competition in the video marketplace, the prospect of a major new competitor with the resources of the Bell Operating Companies should be beneficial to consumers – as long as competition is governed by marketplace forces and is not artificially skewed by rules and regulations that unfairly give some competitors an unfair advantage over others. The marketplace will impel competitors – old and new – to innovate in the development

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[54] See generally Section 302 of the Telecommunications Act establishing new sections 651-653 of the Communications Act, 47 U.S.C. §§ 571-573.

[55] See Section 303 of the Telecommunications Act, establishing Section 621(b)(3) of the Act, 48 U.S.C. § 541(b)(3), to facilitate cable provisions of telecommunications services.

[56] "SBC Communications to Detail Plans for New IP-Based Advanced Television, Data and Voice Network," SBC Press Release, Nov. 11, 2004; "Verizon's New High-Fiber 'Diet' for New Jersey, Blazing Fast Data, Crystal Clear Voice, Video Capability," Verizon Press Release, Sept. 15, 2005.

of new services and in the packaging and pricing of their offerings to maximize value to consumers.

To the extent that telephone companies intend to offer many of the broadcast signals and cable program networks currently available to cable subscribers, there is a comprehensive federal regulatory framework already in place – Title VI of the Communications Act – to govern their video activities. Some telephone companies argue, however, that they should not be subject to the same regulatory framework as other cable operators. They maintain that compliance with the obligations and requirements of TitleVI would impede their ability to compete as quickly as possible in the video marketplace.

It is not unreasonable to consider, from time to time, whether existing regulations and requirements continue to serve important governmental purposes – for *all* competitors subject to those regulations. For example, *economic* regulations (such as rate regulation) that are imposed on entities presumed to have market power may serve no purpose if that market power has been eroded by marketplace competition. Other regulations may have nothing to do with market power and may, in the case of Title VI, represent a consensus of policymakers regarding the social obligations that should apply to all providers of video programming services because of the unique role and importance of television in society. In those cases, it is reasonable to reconsider whether the social obligations continue to make sense and whether the particular requirements and obligations are necessary, in a competitive environment, to ensure that such obligations are met.[57]

[57] With respect to the entry of new IP-based competitors in the provision of telephone service, NCTA has advocated a similar approach of eliminating unnecessary economic regulation of providers facing competition while maintaining those regulations that are still deemed to embody important social responsibilities of all telco providers:

If those obligations and responsibilities do continue to make sense, they should be shared by all competing providers of like services. If not, then there is no basis for imposing them on any of the competitors. To arbitrarily subject some competitors to obligations and burdens not imposed on others would only serve to distort the competitive marketplace.

Congress included in Title VI a self-correcting mechanism that removes the burdens of economic regulation from cable operators that face "effective competition."[58] Rate regulation, uniform pricing, "buy-through" restrictions and other provisions in Section 623 of the Act do not apply to new entrants, including telephone companies, because those competitors face "effective competition" from the existing cable operators as soon as they enter the marketplace.

In addition, Congress amended Title VI in 1992 to bar *exclusive* cable franchises and to prohibit franchising authorities from unreasonably refusing to grant additional competitive franchises. A telephone company or other potential new entrant whose application for such a franchise has been denied for reasons that it believes to be unreasonable may appeal such a denial in federal or state court.[59]

Therefore, the requirement that telephone companies *obtain* a franchise should not be a significant barrier to competitive entry. If telephone companies were simply to agree to the same

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> Protecting VoIP services from unnecessary regulation does not require that important public policies be neglected. Even under a generally deregulatory regime, any VoIP service that meets a baseline test as proposed herein1 can, and should, meet certain public policy responsibilities and requirements such as the principles set forth in the Communications Assistance for Law Enforcement Act ("CALEA"), the offering of 911/E911, access for the disabled, and appropriate contributions to universal service. But the overall direction of public policy should be toward a deregulatory environment in which even the most vital public policy objectives are secured through the lightest possible regulation, so as not to forestall the many benefits of these new services.

NCTA, "Balancing Responsibilities and Rights: A Regulatory Model for Facilities-Based VoIP Competition," http://www.ncta.com/pdf_files/whitepapers/VoIPWhitePaper.pdf?PageID=365 at 4 (2005).

58 See 47 U.S.C. § 543(a)(2).

59 See 47 U.S.C. § 541(a)(1).

franchise obligations as existing cable operators, a franchising authority would be hard pressed not to grant a franchise expeditiously. What the telephone companies urge, however, is that they *not* be subject to the same social obligations and responsibilities as competing cable operators.

In particular, telephone companies object to being required, like other cable operators, to offer service throughout a community. Section 621 of the Communications Act directs franchising authorities to "assure that access to cable service is not denied to any group of potential residential cable subscribers because of the income of the residents of the local area in which such group resides."[60] In addition to this restriction on economic "redlining," most franchising authorities require cable operators to build out their facilities to serve all but the most sparsely populated areas of their communities.

Section 621 requires franchising authorities to allow franchise applicants "a reasonable period of time to become capable of providing cable service to all households in the franchise area"[61] – but this is not sufficient for the telephone companies. They claim that buildout and anti-redlining obligations are unwarranted barriers to entry that will keep them from offering their competitive services.

It's clearly not the just the costs of construction that the telephone companies are worried about – although some areas may, in fact, be more costly to serve than others. What they have also recognized is that some areas of the community are likely to generate substantially more revenue than others, wholly apart from the costs of serving them. Thus, as SBC, for example,

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[60] 47 U.S.C. § 541(a)(3).

[61] 47 U.S.C. § 541(a)(4).