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	)	

REPLY COMMENTS OF SBC COMMUNICATIONS, INC.

William R. Richardson, Jr.
Lynn R. Charytan
Jack N. Goodman
Brian W. Murray

WILMER CUTLER PICKERING
HALE AND DORR LLP
2445 M Street, NW
Washington, DC 20037-1420
(202) 663-6000

Paul K. Mancini
Gary L. Phillips
Bruce R. Byrd
Jim Lamoureux

SBC COMMUNICATIONS INC.
1401 Eye Street, NW
Washington, DC 20005
(202) 326-8800

Counsel for SBC Communications Inc.

October 11, 2005

TABLE OF CONTENTS

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SBC Communications, Inc. ("SBC") respectfully submits these reply comments pursuant to the Commission's Notice of Inquiry ("Notice") in this proceeding.

SUMMARY

As the comments in this proceeding show, there is broad agreement by all industry participants — other than the cable incumbents — that competition in the market for multichannel video programming has not kept pace with the robust developments that have occurred in the rest of the communications sector over the past decade, and that the Commission can and should address this problem by steadfastly refusing to impose and, as appropriate, affirmatively removing barriers that deter or delay entry by new providers. Specifically, as almost all new entrants and potential competitors have noted, the legacy cable franchising process serves as a significant burden for providers seeking to compete with incumbents, and the limitations of the program access rules make it difficult for new providers to obtain necessary programming on nondiscriminatory terms.

As a result of these and other obstacles to competitive entry identified in the comments, cable incumbents continue to have a substantial hold on the market, and their claims to the contrary fall flat. The Commission has the authority to address these impediments to

competition as part of its responsibility for national cable policy and in order to carry out Congress's mandate to promote cable communications, and it should do so. The incumbents' arguments to the contrary, which are couched in terms of alleged "regulatory equivalence," are nothing more than an effort to maintain their first-mover advantages. Commission policy over the past decade and even before has consistently recognized that regulations applied to monopoly incumbents can and should be modified when they will have harmful effects on new entry — a policy that has benefited the cable incumbents themselves, who can now compete as voice providers free from the entry, service area, and other requirements that continue to apply to competitors providing legacy telecom services.

DISCUSSION

I. ALL NEW ENTRANTS SHARE SBC'S CONCERNS REGARDING THE PROSPECTIVE BARRIERS TO VIDEO ENTRY.

The comments filed in this proceeding demonstrate the broad range of potential new competitors to cable incumbents. Such new entry is critical if consumers are to enjoy the service diversity and pricing benefits of a competitive video services market, and, more broadly, nationwide broadband deployment. However, as the comments show, all new and potential new entrants share serious concerns about barriers to entry that may delay or deter the development of such competition.

First, there is widespread agreement with SBC's comments that the legacy cable franchising process, designed for cable incumbents when they entered into exclusive franchise agreements years ago, seriously and unnecessarily impedes entry by new providers.[1] As the

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[1] *See*, *e.g.*, BellSouth Comments at 3-12 & Exh. A; Broadband Service Providers Association ("BSPA") Comments at 18-20; CenturyTel Comments at 3; Cincinnati Bell

comments of several new or prospective video entrants note, the franchising process is inherently time-consuming and costly. New entrants typically must expend considerable resources over many months to negotiate and obtain each of the hundreds if not thousands of franchises they may require to provide competitive service — even when there is little dispute concerning the terms of those franchises.[2/] Indeed, the cable incumbents themselves cited similar concerns when they first entered the market, arguing that the Commission should preempt local cable regulation entirely because it had caused "unconscionable delay and confusion."[3/] It was in response to such arguments that the Commission later adopted rules designed to remove the barriers caused by "overlapping and sometimes incompatible regulations" at the local level.[4/]

These intrinsic barriers to entry increase dramatically when (as is often the case) cable incumbents and franchising authorities misuse the franchising process. To begin with, as the Commission similarly has noted with respect to tariff requirements,[5/] the franchising process

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Comments at 5-7; Consumers for Cable Choice Comments at 2-3; USTA Comments at 14-16, 17-19.

2/ *See* CenturyTel Comments at 3 (noting that it needed "several months" to obtain a franchise even under "ideal conditions," when the city was interested in facilitating entry by a competitive video provider and the cable incumbent did not oppose the application); Verizon Comments at 8 (explaining that franchising rules in Massachusetts contain procedural hurdles that themselves take six months even if there is no disagreement on the terms of the franchise); BellSouth Comments at 11-12 (noting "the numerous meetings and negotiations that take place with local professional staff and public officials, attendance at public hearings and the detailed cable ordinance application procedures that are inherent in the local franchising process").

3/ Cable Television Report and Order, *Amendment of Part 74, Subpart K, of the Commission's Rules and Regulations Relative to Community Antenna Television Systems*, 36 F.C.C.2d 141 ¶ 174 (1972) ("*Legacy Cable Standards Order*") (describing NCTA's arguments).

4/ *Id.* ¶ 171 (citing *United States v. Southwestern Cable Co.*, 392 U.S. 157 (1968)).

5/ *See, e.g.*, Second Report and Order, *Implementation of Section 254(g) of the Communications Act of 1934, as Amended*, 11 FCC Rcd 20730, 20793-96 ¶¶ 119-25 (1996); Report and Order and Notice of Proposed Rulemaking, *Appropriate Framework for Broadband* provides cable incumbents with advance notice of potential competitors' entry strategies,[6/] which the incumbents can use to reinforce their first mover advantage as soon as a franchise grant seems likely. The process also provides incumbents with the opportunity to intervene and delay potential competitive entry by raising challenges and proposing burdensome requirements.[7/] Further, incumbents often seek to use the process to effectively dictate the terms under which their competitors will enter the market.[8/] For example, cable incumbents frequently seek to coerce franchising authorities into imposing conditions on new entrants, such as burdensome build-out requirements that are not tailored for the circumstances of competitive entry.[9/] The comments further show that franchising authorities, for their part, can use the franchising process to extract substantial concessions from new entrants, including large monetary sums and other benefits that are wholly unrelated to the provision of video services.[10/]

Access to the Internet over Wireline Facilities, CC Docket No. 02-33, ¶¶ 71-73 (rel. Sept. 23, 2005) ("*DSL Order*").

6/ Verizon Comments at 7-8.

7/ *See, e.g.*, *Knology, Inc. v. Insight Communications Co.*, No. 3:00CV-723-R, 2001 WL 1750839, at *2 (W.D. Ky. Mar. 20, 2001) (granting preliminary injunction against the enforcement of an ordinance that allowed an "existing franchise holder automatically [to] stay[] the granting of the new franchise by merely asserting the new franchise lacks parity with its own, regardless of whether that assertion is based in fact").

8/ *See, e.g.*, BellSouth Comments at 5-6; CenturyTel Comments at 11.

9/ Qwest Comments at 10; CenturyTel Comments at 11.

10/ Verizon Comments at 12 (noting that one franchising authority demanded that Verizon provide parking for the local library and provide city employees with mobile telephone service). As the *Wall Street Journal* recently observed, this "shakedown" process, which is mirrored by local officials' hijacking of the building permit process to extract municipal "goodies" from real estate developers, makes it "painfully obvious that local regulators have become the bottleneck in the system." David McCourt, *What's a Polite Word for "Shakedown,"* WALL ST. J., Oct. 1, 2005, at A9.

As the comments demonstrate, the inevitable outcome is that competitive entry is delayed if not deterred altogether — a result that is reflected in the contrast between the widespread availability of DBS (which is not subject to franchising requirements) and telco video services. BellSouth's experience vividly illustrates this point. BellSouth reports that it needed nearly a year on average to obtain each of its fourteen current franchises,[11/] often due to the demands posed by the cable incumbent and/or the franchising authority.[12/] In fact, contrary to NCTA's suggestion that the use of incumbent franchises would expedite the process,[13/] BellSouth required *more* time to obtain a franchise in states where competitors were armed with "level playing field" statutes that theoretically required the application of equivalent terms to the incumbent and the new entrant.[14/] BellSouth's experience also demonstrates the domino effect that can result if the efforts to obtain even one franchise are unsuccessful: when the cable incumbent's intervention forced BellSouth to withdraw its application for one franchise in a key part of BellSouth's intended service area, the company was forced to withdraw from that market entirely because it could not construct a viable operation limited only to the remaining communities.[15/]

Second, the comments confirm SBC's concern that the existing program access rules are insufficient to ensure new entrants' access to the programming that is vital to a competitive video

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11/ BellSouth Comments at 3 & Exh. A. This represents only 3.5% of the 400 franchises that BellSouth would need to serve just the top 40 markets in its region. *Id.* at 4.

12/ *See generally id.* at 3-12 (describing BellSouth's experiences in various franchising areas).

13/ NCTA Comments at 19-20, 24.

14/ BellSouth Comments, Rawls Decl. ¶ 4.

15/ BellSouth Comments at 6.

service offering.[16/] In particular, as many commenters have noted, the cable incumbents continue to avail themselves of the "terrestrial loophole" in section 628 of the Cable Act with impunity.[17/] They also use their position in the market to extort exclusive programming deals with unaffiliated video programmers or to demand terms and prices that have the effect of discriminating against new entrants.[18/] For example, RCN reports that it only began to have difficulty obtaining PBS Kids VOD programming when Comcast became the supplier.[19/] According to RCN, Comcast waited weeks to reply to RCN's inquiries concerning pricing and other terms, demanded that RCN carry a new children's channel in which Comcast was a partner, and then terminated RCN's access to the programming altogether, ultimately resulting in an 83 percent drop in usage of RCN's Kids Unlimited VOD service.[20/]

Notwithstanding RCN and other providers' experiences, the incumbent cable commenters are conspicuously silent on program access issues on which the Commission has solicited comment, and on the related question concerning the extent to which key programming is now

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16/ DirecTV Comments at 5-6; Echostar Comments at 3-13; RCN Comments at 7-12; BSPA Comments at 14-15; USTA Comments at 16-17.

17/ RCN Comments at 12-14; Verizon Comments at 29-32; Echostar Comments at 4.

18/ Cincinnati Bell Comments at 10-11; DIRECTV Comments at 6-7; RCN Comments at 10-11, 14-16; Verizon Comments at 33-35; Echostar Comments at 6-8; *see also* Ex Parte Letter from William M. Wiltshire, Counsel for DIRECTV, Inc., to Marlene H. Dortch, Secretary, Federal Communications Commission, at 1, filed in MB Docket 05-192, Oct. 4, 2005 (stating that Comcast and Time Warner "have arranged to withhold or raise the cost of key regional sports programming in a number of markets").

19/ RCN Comments at 11.

20/ *Id.*

owned by the cable incumbents.[21/] But that silence does not change the fact that these program access issues, in addition to the operation of the incumbent franchising process, are a major impediment to vigorous competition and may deter some competition altogether.

II. THE COMMISSION SHOULD ADDRESS THESE BARRIERS TO ENTRY SO THAT THE POTENTIAL FOR VIDEO COMPETITION CAN FINALLY BE REALIZED.

It is essential that the Commission address these serious problems. Despite the entry of DBS, the market for multichannel video programming continues to be dominated by incumbent cable operators, free of any significant constraints on pricing or service decisions, even though Congress barred exclusive franchises in 1992. Consumers have consistently noted that their options are limited and have demanded the benefits of a competitive video marketplace[22/] — benefits that they will not enjoy unless nascent competitors are given a fair and realistic chance to enter the market and vigorously compete.[23/]

21/ Notice ¶¶ 17-19. NCTA does not even mention program access. Comcast suggests that Verizon has been successful in obtaining access to programming by listing programmers with which Verizon has reportedly concluded agreements, *see* Comcast Comments at 19, but notably absent from that list are regional programmers. Access to this regional content is, as the Commission has recognized, one of the core program issues. *See* Memorandum Opinion and Order, *Application for Transfer of Control, General Motors Corp. and Hughes Elec. Corp., Transferors, and News Corp. Limited, Transferee*, 19 FCC Rcd 473, 543 ¶ 148 (2004); *see also* SBC Comments at 20.

22/ For example, a recent poll overwhelmingly found that consumers demand more video providers. *See* Consumers for Cable Choice, *available at* http://www.consumers4choice.org/site/PageServer?pagename=release_20050926.

23/ Indeed, in the handful of markets where wireline video competition has begun to take root, those benefits are immediately obvious. For example, Charter Communications recently lowered its cable prices in Keller, Texas in direct response to Verizon's entry in the video market there. *See* Anthony Massucci, *Charter, Facing Verizon's FiOS Threat, Cuts Prices*, BLOOMBERG, Oct. 4, 2005. This is consistent with the findings described in SBC's opening comments that cable prices are significantly lower in the presence of a wireline-based competitor, *see* SBC Comments at 5-6, a sentiment echoed by various members of Congress in

While the comments of the cable incumbents in this proceeding attempt to paint a portrait of vibrant video competition in order to minimize cable's overwhelming hold on the market,[24/] they provide very few answers to the specific competition questions directed to them in the Notice — including whether the statutory 36/70/70 trigger has now been met.[25/] And the truth is in fact very different. Indeed, twenty years after Congress first espoused a national policy to promote a competitive MVPD market, cable continues to enjoy a significant lead, and new entry has thus far been ineffective in restraining rates and anti-competitive practices.

The cable commenters' effort to trumpet the current market impact of potential video competitors is a creative one. Most of the competitors to which they point either do not yet exist, are at a nascent stage in development, or still clearly serve as complementary — rather than substitutable — products to cable. Streaming Internet and mobile video are likely to one day serve as robust video alternatives and certainly, as the Commission just recently observed,[26/] are

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introducing pending bills designed to revamp the cable franchising rules. *See* S. 1349, 109th Cong., 1st Sess. § 2(3) (2005) (finding that "[i]t is only through wire-based video competition that price competition exists").

24/ *See* NCTA Comments at 1-16; Comcast Comments at 5-37.

25/ Notice ¶ 41.

26/ *See* Tenth Report, *Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Services*, WT Docket No. 05-71 (rel. Sept. 30, 2005) ("*Tenth Mobile Report*"). While the Commission noted that some wireless providers are expanding their offerings to include video, the report does not suggest widespread subscription to such services; in fact, the Commission's discussion of how consumers are using mobile services does not even mention video programming. *See, e.g.*, *id.* ¶ 173. The Commission also repeated its earlier finding concerning the technical problems that currently limit the quality of mobile video. *See id.* ¶ 142 ("As noted in the *Ninth Report*, the slow speeds offered by earlier wireless network technologies adversely affect the viewing quality of video streamed onto cellphones by reducing the rate at which frames are shown.").

expanding and exciting products.[27] But there is no evidence that any substantial number of consumers relies on these services today as a *substitute* for cable service,[28] or relatedly, that these nascent services exercise *any* pricing or other competitive constraints on cable incumbents. And traditional broadcast video lacks the channel capacity to offer the range of programming that an MVPD typically offers. Similarly, while home video and DVDs may offer some measure of competition to certain tiers of cable programming (such as premium movie channels), they are not, standing alone, a genuine substitute product for cable.[29]

The relatively few cable overbuilders that now exist serve only a limited area and are beset with program access difficulties.[30] And while the cable commenters conveniently point to telco video systems as a potential source of competition, they are simultaneously acting to

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27/ *See* Reinhardt Krause, *WiMax Wireless May Directly Usher Disney Into The Living Room*, INVESTOR'S BUS. DAILY, Sept. 20, 2005 (describing Disney's plan to use WiMax to deliver movies, interactive gaming, and other services directly to homes); Aaron O. Patrick, *BBC Test May Push Internet TV Viewing Closer to Mainstream*, WALL ST. J., Sept. 21, 2005, at A15 (describing a test being run by the BBC that makes video available over the Internet).

28/ In fact, only a few years ago, NCTA was arguing that Internet video services were fundamentally different from broadcast television and thus not "video programming" under the Act. *See* Memorandum Opinion and Order, *Internet Ventures, Inc.; Internet On-Ramp, Inc., Petition for Declaratory Ruling that Internet Service Providers are Entitled to Leased Access to Cable Facilities Under Section 612 of the Communications Act*, 15 FCC Rcd 3247, 3252 ¶ 9 (2000).

29/ Cable has sung this song for a long time. In testimony before Congress in 1990, cable was already pointing to VCRs as competition. *See Competitive Problems in the Cable Television Industry: Hearing Before the Subcommittee on Antitrust, Monopolies and Business Rights of the Senate Committee on the Judiciary*, 101st Cong. 250-51 (1990) (statement of James P. Mooney, President of NCTA). As cable conceded, the competitive pressure from home video even then prevented increases in the rates for premium services, but had no effect on the rates for cable service generally. *Id.* at 253. There is no reason to believe that home video has any greater competitive impact now.

30/ *See* BSPA Comments at 14-15.

restrain that competition in order to protect their own market advantage, as discussed above.[31/] In short, while potential new entry or competition can, in some circumstances, exercise a useful constraint on the market, the existence of such potential competition in the MVPD market for two full decades clearly has not had that effect.

The only established, widely available competitor to incumbent cable systems today is DBS, and it is far from clear whether the role of DBS in the market is growing, and accordingly, whether the service is exerting a serious constraint on cable market practices. In the *Eleventh Report*, the Commission concluded that DBS's share of the MVPD market reached 25.1 percent as of June 2004.[32/] NCTA's comments now say that DBS serves "22 percent of all multichannel video households."[33/] Comcast, relying on a Kagan study, says the number is 28 percent.[34/] On the other hand, DIRECTV continues to point to the General Accountability Office ("GAO") conclusion that DBS has only a 17 percent share of the MVPD market.[35/] None of these figures suggests that cable's lead is seriously diminishing. And the Commission certainly cannot just accept the incumbents' suggestion that the competitive picture is rosy without concrete data. The cable and satellite companies have in their hands the data on how many customers they serve; in order to fulfill Congress's mandate that the Commission evaluate the level of video

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31/ *See supra* Part I.

32/ Eleventh Annual Report, *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 20 FCC Rcd 2755, 2759 ¶ 7 (2005) ("*Eleventh Report*").

33/ NCTA Comments at 2.

34/ Comcast Comments at 6.

35/ DIRECTV Comments at 10.

competition, the Commission should require MVPDs to provide up-to-date customer data on a consistent basis.[36]

Indeed, recent events confirm SBC's demonstration (and GAO's conclusion) that incumbent cable operators can still increase cable prices at will. Time Warner in Houston increased cable rates last month, blaming the increase on higher energy costs resulting from Hurricane Katrina.[37] Notably, however, Time Warner increased *only* its cable rates: "Time Warner said it will *not* raise rates for its high-speed Internet or Web-based telephone services."[38] Presumably, Time Warner's telephony and Internet access business operations face the same purported rising energy costs as its video services. Of course, Internet access and telephone services are where incumbent cable operators face real competition, and they accordingly *do* face some limits on their ability to raise prices for these services. For video, however, it is plain that Time Warner was not similarly restrained. In short, despite NCTA's and Comcast's bland assurances to the contrary, incumbent cable providers still control the MVPD market without facing strong local competitors.

In order to foster a truly competitive video marketplace, the Commission should address the barriers to entry described above. In fact, it is obligated to do so: Congress made clear in Title VI of the Communications Act that the "national policy concerning cable communications" that the Commission must establish,[39] as well as the "guidelines for the exercise of Federal, State

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36/ NRTC Comments at 7.

37/ John C. Roper, *Rates for Cable Going Up*, HOUSTON CHRON., Sept. 20, 2005, *available at* 2005 WLNR 14811761.

38/ *Id.* (emphasis added).

39/ 47 U.S.C. § 521(1).

and local authority with respect to the regulation of cable systems" that it must develop,[40/] must "promote competition in cable communications and minimize unnecessary regulation[.]"[41/] As many commenters note, the Commission has ample authority to carry out that mandate, both through its explicit authority under various provisions of Title VI and in light of its clear ancillary authority over many aspects of the MVPD marketplace.[42/]

There are many steps the Commission can explore that could advance these goals and significantly improve the competitive situation. For example, many commenters, like SBC, have urged the Commission to definitively clarify that the legacy franchising rules do not apply in the first place to any IP-based, two-way interactive video service, because these are not "cable service[s]" offered over a "cable system."[43/] Such a determination would go far toward clearing the way for new entrants to swiftly provide a variety of innovative new video services.

40/ *Id.* § 521(3).

41/ *Id.* § 521(6); *see also* H.R. CONF. REP. NO. 104-458, at 172, 177 (1996) (explaining that the Telecommunications Act of 1996 was intended to encourage competition in all markets, including specifically "[telephone company] entry" into video markets, by providing "multiple entry options to promote competition, to encourage investment in new technologies and to maximize consumer choice of services").

42/ *See, e.g.*, CenturyTel Comments at 14; Cincinnati Bell Comments at 6, 10-11; DirecTV Comments at 12; RCN Comments at 16-18; Verizon Comments at 15-29.

43/ *See* Cincinnati Bell Comments at 6; Verizon Comments at 29 (stating that "any services that are two-way or that qualify as interactive on-demand service are not subject to a franchise requirement or to the payment of franchise fees under existing law"); *see also* CenturyTel Comments at 9 (stating that "IPTV systems are fundamentally different from cable systems"). As one commentator recently explained:

> IPTV will customize the customer's viewing experience. Being tapped into the IP network, carriers can offer extensive data information, such as live stats in a sports program or breaking stories in a newscast. Customers will be able to transmit photos or videos from their PC right onto the TV, or send instant messages to friends who are watching at the same time. In addition, IPTV is best

APTS submitted comments arguing that the Commission should reject this legal argument and regulate new telco video services "on an equivalent basis with cable."[44/] But there is no legal basis for that position. APTS both fails to address the legal arguments advanced by SBC concerning the proper classification of IP-based, interactive video services, and collapses the separate and equally relevant questions of whether video service provided over such a system is a "cable service" and whether the system is a "cable system."[45/] Further, APTS's real concern appears to be to ensure that telco video entrants share the carriage obligation imposed upon cable operators by section 615.[46/] That concern is unfounded. New broadband video providers have every incentive to carry the full range of qualified commercial *and* noncommercial stations in each market. Indeed, APTS's concern about the section 615 carriage obligation is wholly unrelated to the burdensome franchising requirements APTS would have the Commission impose on new IP video services. The franchising process is not a prerequisite to the Commission's authority over programming issues. Rather, if any telco video provider were to fail to carry noncommercial educational stations, the Commission would have ancillary authority to address the matter, which it could do in light of the facts and circumstances involved and the specific technology at issue.

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suited to interact with enhanced services like video on demand and Internet telephony.

Ari Bensinger, *IPTV: Big Potential — But When?*, BUS. WEEK, Oct. 4, 2005.

44/ APTS Comments at 31.

45/ *Id.* at 29-30 & n.85.

46/ *Id.* at 31.

The Commission also could significantly improve the competitive landscape by initiating proceedings to explore whether it can or should remedy the terrestrial loophole and other program access problems. In addition, the Commission should explore the availability of its authority under section 612(g) to address these problems. That authority is phrased in sweeping terms to allow the Commission to adopt "any additional rules necessary to provide diversity of information sources," and is triggered if cable systems with 36 or more activated channels are available to 70 percent of all households and are subscribed to by 70 percent of those households.[47/] Significantly, NCTA chose not to respond to the Commission's inquiries concerning the number of homes that are passed by cable systems with less than 36 channels, or whether section 612(g) of the Act has been triggered.[48/] Here again, the Commission can and should require the regulated entities that have control over the relevant data to provide the information necessary for the agency to fulfill its statutory mandate. But even without any information from cable operators, there is good reason to believe that the statutory trigger has now been met.

In the *Eleventh Report*, the Commission concluded that the first 70 percent statutory threshold has been met: 79.8 percent of all occupied households are now passed by cable systems with 36 or more channels.[49/] However, it also found that the second 70 percent statutory

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47/ 47 U.S.C. § 532(g); *see* Notice ¶ 41.

48/ Notice ¶ 28.

49/ *Eleventh Report* at 2768 ¶ 20.

threshold had not been met: of the 84,415,707 occupied households passed by systems with 36 or more channels, only 58,177,885 (or 68.9 percent) subscribed to cable.[50/]

NCTA's own updated data now suggest that this 68.9 percent figure may have increased to well beyond 70%. NCTA's website states that, as of February 2005, there were 73,219,360 total subscribers to cable service.[51/] Last year, the Commission found that there were 8,063,920 subscribers to cable systems with *less* than 36 channels.[52/] It is reasonable to conclude that this number has not increased over the past year, because it is unlikely that anyone would construct a new system with such limited capacity. It is far more likely that some such small systems have been *upgraded* in the last year. But using this same number of 8,063,920 subscribers to smaller systems, that would leave at least 65,155,440 subscribers to cable systems with 36 or more channels, or 77.2 percent of all households the Commission found were passed by systems with 36 or more channels (at least as of its last report).

Thus, there appears to be reason to believe that the conditions needed to invoke section 612(g) have arrived, even if the Commission assumes some growth in the number of homes passed by larger cable systems. To be sure, it may be that the numbers on which the Commission relied in the *Eleventh Report* and the numbers that NCTA cites on its web site rest on different data sets about cable service and subscribers. But that does not answer the inquiry, and in light of its statutory mandate to promote video competition, the Commission cannot

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50/ *Id.*

51/ http://www.ncta.com/Docs/PageContent.cfm?pageID=86 (visited Sept. 30, 2005).

52/ *Eleventh Report* at 2768 ¶ 20. The Commission arrived at this number by subtracting the foregoing 58,177,885 subscribers to cable systems with 36 or more channels from the total number of subscribers to cable systems of all sizes (66,241,805).

simply throw up its hands in the face of conflicting data. Instead, it should insist that the cable industry provide it with the relevant data calculated on a consistent and transparent basis.[53/] Such data is particularly important in light of the statutory authority to address the foregoing problems through "any additional rules necessary to provide diversity of information sources" under section 612(g).[54/]

III. NCTA'S ARGUMENTS FOR SELECTIVELY MAINTAINING BARRIERS TO ENTRY FOR VIDEO ARE UNAVAILING.

Despite arguing in other proceedings for the removal of legacy regulations with respect to cable companies when they are new entrants into the voice market,[55/] NCTA insists that video competition can develop only if telephone companies are required to "agree to the same franchise obligations as existing cable operators" — in particular, the requirements to obtain a franchise and to overbuild the entire cable network.[56/] According to NCTA, anything else would "artificially skew[]" competition by "unfairly giv[ing] some competitors an unfair advantage over others."[57/]

53/ *See* NRTC Comments at 7.

54/ 47 U.S.C. § 532(g).

55/ *See, e.g.*, Reply Comments of NCTA, Inquiry Concerning High-Speed Access to the Internet over Cable and Other Facilities, filed in GEN Docket 00-185, Jan. 10, 2001, at 36 (arguing that the "Commission should not impose new regulations on new participants" in an evolving marketplace).

56/ NCTA Comments at 19-20.

57/ *Id.* at 17. Comcast does not directly address this issue in its opening comments in this docket, although it has made this same point in the past. *See, e.g.*, Patrick Lester, *TV Competition Could Be Coming*, THE INTELLIGENCER, May 21, 2005, at 1A (quoting Comcast spokesman, Jeff Alexander, as saying that the company welcomes the competition from Verizon "[b]ut we feel strongly that it must occur on a level playing field without Verizon trying to skirt franchise rules that govern television providers").

NCTA's arguments in favor of perpetuating barriers to entry for *video* in the name of regulatory "parity" fall flat. The legacy franchise requirements under Title VI and existing incumbent cable franchises were designed for a very different market, in which the incumbents were the exclusive providers and were willing to assume certain obligations in exchange for monopoly rents that offset the resulting costs.[58/] New entrants, of course, do not enjoy a similar bargain. Thus, as Verizon points out, the inevitable result of the nominal regulatory "parity" achieved by applying legacy requirements to new entrants is that new entrants are *disparately* burdened, because they enter the market in the face of the incumbent's entrenched market share, must build up quickly and obtain expensive programming in order to have any real chance to succeed, and have little certainty that they will recover their costs at all.[59/]

58/ *See, e.g.*, Verizon Comments at 10 (citing Thomas W. Hazlett & George S. Ford, *The Fallacy of Regulatory Symmetry: An Economic Analysis of the "Level Playing Field" in Cable TV Franchising Statutes*, 3 BUS. & POL. 21, 24 (2001)).

59/ Verizon Comments at 23. NCTA asserts that the cable incumbents are still incurring costs to compete, because they may still need to upgrade their systems. NCTA Comments, Attach. A, Michael G. Baumann, *The Adverse Effects of Asymmetric Build-Out Requirements in Cable Television*, at 6 (Sept. 14, 2005). But this argument is unavailing. As the Commission has recognized, and NCTA itself has argued, the major cable MSOs have *already* used their monopoly rents to upgrade the vast bulk of their systems. *See, e.g.*, Report and Order and Notice of Proposed Rulemaking, *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, CC Docket No. 02-33, ¶ 52 (rel. Sept. 23, 2005) (finding that "approximately 91 percent of the nation's cable systems have been upgraded to include the two-way digital capability that supports cable modem service"); *Eleventh Report* at 2777 ¶¶ 34-35 ("Over the last decade, cable companies have invested heavily to rebuild and upgrade cable systems."); *id.* at 2786 ¶ 45 ("NCTA maintains that the numbers indicate that the cable industry is close to completing the systems upgrades necessary to offer high-speed Internet service and other advanced services to every home passed by cable."); *see also* NCTA Comments at 25 ("The fruits of cable's investment in a broadband two-way network are evident in the number of advanced services offered on virtually every cable system today."). And in any event, any costs they might still incur are far easier to absorb compared with new entrants, given their existing competitive advantage. Finally, any suggestion that these costs could cause incumbents to abandon these facilities entirely is unpersuasive, since they continue to earn revenue from them.

The Commission's policies in every other market since the 1970s have recognized the irrationality of applying legacy, monopoly regulations to new services and providers when those regulations will deter entry and innovation.[60/] And, as NCTA itself has conceded, the need for classic common-carrier "economic" regulations as well as "social" regulations should be reexamined in light of competitive considerations.[61/] Indeed, the Commission just recently spared providers of VoIP, including specifically cable VoIP providers, from complying with the legacy entry requirements applicable to their narrowband telecom competitors precisely because it correctly perceived that these requirements could serve as a significant barrier to entry.[62/] The fact that the legacy competitors had already complied with the same requirements was not seen as a legitimate basis to apply them to new services and thus deter competition and innovation. Cable telco entrants also benefited from laws in many states that excuse such new voice entrants

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[60/] *See* SBC Comments at 10-11 (citing Memorandum Opinion and Order, Declaratory Ruling and Order, *Earth Satellite Communications, Inc.*, 95 F.C.C.2d 1223, 1233-34 (1983), *aff'd sub nom. New York State Comm'n on Cable Television v. FCC*, 749 F.2d 804 (D.C. Cir. 1984)); *see also* Daniel Brenner, *The 2005 Communications Act of Unintended Consequences*, 57 FED. COMM. L.J. 175, 176 (2005) ("The 1970s saw the start of a revolution in communications regulation. Most of the new thinking can be tied to regulators addressing the demands of new competitors."); George S. Ford *et al.*, *The Impact of Video Service Regulation on the Construction of Broadband Networks to Low-Income Households*, Phoenix Center Policy Paper Number 23, Sept. 2005, at 4 ("Phoenix Study") ("Build-out and anti-redlining requirements are not imposed on new entrants in any other sector of the telecommunications industry and are certainly not the general rule in the U.S. economy . . . .").

[61/] NCTA Comments at 18.

[62/] Memorandum Opinion and Order, *Vonage Holdings Corp.*, 19 FCC Rcd 22404, 22416-17 ¶¶ 20-21 (2004) (determining that new entrants should be exempt from legacy "entry and certification requirements" which it found could "take months" and could "introduce[] substantial delay in time-to-market").

from carrier of last resort and similar legacy obligations.[63] The mere fact that, here, cable is the incumbent rather than the new entrant is surely not a valid basis to reach a different outcome.

That some new entrants in the video market itself already escape legacy regulation further robs the incumbents' position of any merit. As noted above, the cable commenters themselves suggest that new streaming Internet video and mobile video providers are or soon will be significant competitors to cable.[64] Yet these providers are exempt from franchise and build-out requirements,[65] and, at least to date, the incumbents have not argued that it should be otherwise. It is senseless to assert, as the cable incumbents do, that "fairness," consumer protection, or any other concern somehow requires that one class of new entrants — specifically, telco video entrants — must comply with legacy requirements, when other players in the same market do not. Rather than produce a level playing field, this will only ensure that one class of entrants continues to face unique deterrents.

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[63] Those laws typically apply to any CLEC, even one using circuit-switched rather than VoIP technology. Order Adopting Rules, *Competitive Provisions of Local Telecommunications Service in Areas Served by Local Telephone Companies with Less than 50,000 Subscribers*, Docket No. P-999/R-97-608, 186 P.U.R.4th 117, 1998 WL 317592 (Minn. P.U.C. May 12, 1998); *see also* Ruling on Applications for Rehearing, Reargument, or Reconsideration, *U S West Communications, Inc.*, Docket No. 99A-577T, 2002 WL 31487766, at *4 (Colo. P.U.C. Apr. 17, 2002) ("CLECs do not have the same provider-of-last resort obligations . . . ."); Order, *Existing Local Exchange Competition Guidelines*, Case Nos. 99-998-TP-COI, 99-563-TP-COI, 2002 WL 32003187, at *7 (Ohio P.U.C. Nov. 21, 2002); OKLA. ADMIN. CODE § 165:55-17-29 (2004); KAN. STAT. ANN. § 66-2009(a) (2003); NEV. ADMIN. CODE ch. 704 § 6802(2) (2004).

[64] Comcast Comments at 22-29, 37-42 (describing video services offered over the Internet, mobile networks, and powerlines offered by diverse entities, including "established media players"); NCTA Comments at 10-14 (describing mobile and Internet-based video services offered by various providers).

[65] *See Tenth Mobile Report* ¶¶ 67-92 (listing the only potential barriers to entry in mobile communications as access to spectrum, advertising expenditures, economies of scale, and difficulties in financing start-ups).

Finally, NCTA's focus on the need to impose mandatory build-out requirements on new entrants is simply a distraction, because such requirements are unnecessary. SBC and other telcos already have extensive networks, unlike cable systems which had no facilities when they received their franchises.[66/] There is no question that the telcos all intend to upgrade significant portions of their networks to broadband, IP technology. Indeed, the Commission recently recognized that such an upgrade is a critical component of the telcos' ability to compete with cable for broadband and VoIP.[67/] Those upgrades will, in turn, ultimately ensure widespread availability of telco broadband video, as well. But imposing a requirement that forecloses telcos from offering such video unless they comply with stringent build-out requirements, as NCTA advocates, would deter the deployment of both video and broadband generally, as some commentators have observed — a result directly contrary to the goals of section 706.[68/]

Further, mandatory build-out requirements are anachronisms that were designed for the monopoly environment in which the cable incumbents first rolled out their services. In 1972, the Commission adopted rules setting forth minimum standards that franchising authorities had to employ,[69/] which included requirements concerning how cable operators should build out their systems. As the Commission explained, such rules were necessary at the time because "cable

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66/ Indeed, that is why the traditional rights-of-way management rationale for franchising does not apply to telcos, because their existing networks already are deployed in the rights of way, and that use already is regulated. *See* SBC Comments at 15-19.

67/ *DSL Order* ¶¶ 51-52, 56-57.

68/ *See, e.g.*, Phoenix Study at 23 (finding that "policies that facilitate and promote the ability of broadband networks to provide video directly to consumers" will "result in wider deployment of broadband Internet services, and, in particular, wider deployment in low-income neighborhoods").

69/ *See Legacy Cable Standards Order* ¶ 177.

television has tended to develop on a noncompetitive, monopolistic basis in the areas served, thus denying cable subscribers the normal protection afforded consumers by providing a choice between alternative suppliers."[70] In contrast, when it opened the door for new MVPD entry in its 1992 amendments to the Cable Act, Congress specifically did not impose any sort of video "universal service" requirements.[71] Rather, it established a policy of gradual build-out, providing in section 621(a) that new entrants be allowed "a reasonable period of time to become capable of providing cable service to all households in the franchise area."[72] Thus, there is no basis in the law for the build-out requirements NCTA urges are necessary.[73]

NCTA nevertheless insists that legacy regulation is necessary to ensure that new entrants do not engage in unlawful "redlining" — though again this concern apparently applies only to new *telco* video entrants, and not to Internet or mobile video entrants.[74] As a recent study shows, however, the demand for MVPD service does not turn on income.[75] NCTA's trumped-

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70/ *Id.* ¶ 2 (internal quotation marks and citation omitted).

71/ Verizon Comments at 17-18; *ACLU v. FCC*, 823 F.2d 1554, 1580 (D.C. Cir. 1987) (holding that section 621(a)(3) of the Cable Act "manifestly does not require universal service").

72/ 47 U.S.C. § 541(a)(4)(A).

73/ NCTA is silent on the precise terms of any such build-out requirements. To the extent it believes that new entrants must quickly build ubiquitous networks serving the incumbent's entire service area, NCTA's arguments are off base and contrary to its own advocacy when the cable incumbents were themselves new entrants. When the Commission adopted build-out standards in 1972 that were designed to guide and rein in local franchising authorities, NCTA argued that build-out rules "must be reasonable and economically justifi[able]." Report and Order, *Amendment of Subparts B and C of Part 76 of the Commission's Rules Pertaining to Applications for Certificates of Compliance and Federal-State/Local Regulatory Relationships*, 66 F.C.C.2d 380 ¶ 24 (1977).

74/ NCTA Comments at 20.

75/ Phoenix Study at 10.

up concern is simply a distortion of SBC's reasonable plan to build out its systems over time. As several commenters argue, new entrants should be allowed to deploy their new networks rationally in response to demand,[76] just as the Commission recognized when it first allowed new MVPDs into the market — and just as CLECs and VoIP providers are permitted to build their networks and provide service to whomever they choose.

CONCLUSION

The opening comments emphasize the serious need for the Commission to address and remedy ongoing barriers to video entry. It should do so now, by initiating proceedings consistent with its policies in other markets that draw appropriate distinctions between new entrants and incumbents.

Respectfully submitted,

/s/ Jim Lamoureux

William R. Richardson, Jr.
Lynn R. Charytan
Jack N. Goodman
Brian W. Murray

WILMER CUTLER PICKERING HALE AND DORR LLP
2445 M Street, NW
Washington, DC 20037-1420
(202) 663-6000

Paul K. Mancini
Gary L. Phillips
Bruce R. Byrd
Jim Lamoureux

SBC COMMUNICATIONS INC.
1401 Eye Street, NW
Washington, DC 20005
(202) 326-8800

Counsel for SBC Communications Inc.

October 11, 2005

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[76] *See, e.g.*, BSPA Comments at 19 ("Regardless of the technology employed, the competitive entrant must be able to deploy its network based on its success, or lack thereof, in the market, not on an artificial regulatory requirement that has no relevance in today's varied-technology and multi-provider environment."); CenturyTel Comments at 7 ("New entrants are in the best position to determine where it is most efficient to deploy their competitive services.").