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

NCTA

NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION

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REPLY 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

This year's comments are particularly notable for the avid participation of telephone companies. Telephone company claims about the inadequate state of video competition are inaccurate and their corresponding pleas for special regulatory advantages are unavailing. More importantly, the changes they would seek would prove counterproductive to the national goal of ubiquitous competitive broadband. Video competition is thriving, and telco entry only promises to increase consumer choice, through greater competitive efforts from existing players and new offers from telcos. Cable operators, through VoIP and other telephone offerings, are now providing competition in what had been the monopoly preserve of incumbent phone providers. But as VoIP competitors gain ground in telephony, competition is much more advanced in video, where DBS enters its 11th year of competitive service to cable.

Given this robust competition, if reform of cable franchising is appropriate – and it may be – it should be accomplished so that all providers, existing and newcomers, can take advantage of a sensible, streamlined regulatory environment. Similarly, even if expansion of the program access rules were in order – which it is not – such a change should not be directed at cable alone, given the exclusive NFL programming provided to DBS, and it should benefit all competitors.

I. THERE IS NO NEED TO GIVE TELEPHONE COMPANIES UNFAIR REGULATORY ADVANTAGES IN ORDER TO BOOST COMPETITION IN AN ALREADY COMPETITIVE MARKETPLACE

In NCTA's initial comments, we explained why allowing telephone companies to enter the multichannel video marketplace on more favorable regulatory terms than existing cable operators – and, in particular, why relieving them of the obligation to build out and serve entire communities – would distort, not promote, marketplace competition. We showed that allowing telephone companies to serve only what SBC refers to as "high value" customers while existing cable operators are required to serve entire communities would give the telcos a huge and unfair cost advantage, which could enable them to capture subscribers for reasons that have nothing to do with a superior service or greater efficiency.

Moreover, we showed that such an approach would specifically disadvantage rural areas and less affluent urban neighborhoods. SBC and Verizon argue, however, that if they must abide by the same franchise requirements as are imposed on other cable operators, they will be delayed in bringing competition to a marketplace that they characterize as lacking in competition. It's hard to seriously argue that today's video marketplace is anything other than vigorously competitive. The Commission has itself recognized that the nationwide availability of at least three comparable multichannel alternatives – a cable operator and two national DBS services – has already resulted in a fierce competitive struggle to capture customers with the services and prices that provide the greatest value.[1]

Nevertheless, it's easy to see why the telcos need to portray the video marketplace in an unflattering light. It is neither necessary nor appropriate to favor a competitor by giving it unfair regulatory advantages in a marketplace that is already characterized by competition. This is especially inappropriate in the case of incumbent telephone companies who are well-financed and already enjoy advantages such as extensive ownership of utility poles and preexisting consumer relationships by being dominant telephone providers. As the Bells themselves have argued over and over again, like services should be subject to a common regulatory framework. To maximize consumer welfare, success in the marketplace should be determined by marketplace forces – by the ability to provide products and services that are most valuable to consumers in the most efficient manner. Imposing

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1 *See e.g.*, *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").

disparate regulations – and different regulatory costs – on different competitors artificially handicaps the competition in a way that undermines efficient marketplace results.

Sometimes, where there is a lack of marketplace competition, it may be appropriate for government to attempt to "jump start" competition by giving new entrants special regulatory advantages designed to expedite entry or overcome otherwise insurmountable barriers to entry. That's why the telcos assert the view that until they enter the marketplace, cable operators will be able to exercise market power and consumers will not have the benefits of competition. That's why they need to argue that DBS is not effectively competing with cable and that only a wireline alternative can truly constrain cable's alleged market power.

But they cannot make their case. They rely on old arguments that have already been shown to be illogical and fallacious. For example, they contend that DBS and other existing alternatives must not be offering a fully effective alternative because, first, cable rates have been rising faster than inflation, and, second, cable prices are, according to a Government Accountability Office study, lower where there is a wireline competitor than where there is not.

In 2002 and again in 2003, NCTA submitted papers by economists explaining why the rate at which prices *change* tells us nothing at all about whether or not a seller has market power. As economist Dr. Debra Aron wrote, in a paper submitted by NCTA in the Commission's ninth annual inquiry on video competition:

> [T]he observation that an industry's prices are growing at a rate faster than the rate of inflation establishes no inference about market power. A monopolist who is fully exploiting its market power, as it normally has

> every incentive to do, would have no reason to increase its price unless its costs, demand, or technology changed. If it is fully exploiting its market power, it does not benefit from increasing its price because *it is presumably already charging the profit maximizing price*, any deviation from which would simply lower profits.[2]

A year later, Professor Steven Wildman reiterated this point:

> At the heart of the fallacy is a confusion of levels of prices with trends in prices. At any point in time, prices will be higher if the firms serving a market have market power than if they don't. In fact, the ability to set and maintain prices at supra-competitive levels is what we mean by market power. We expect profit-maximizing firms to fully exploit such market power as they have. If they didn't, they wouldn't be maximizing profits. A direct implication of profit maximization, however, is that by themselves trends in prices over time can tell us nothing about whether the firms serving a market have market power. While prices are influenced by the competitiveness of the markets in which firms sell their products, the effect of a market's competitiveness should always be reflected in its prices. That is, if a firm's market power remains constant over time, the effect of that market power on price should also be constant over time. Market power is simply not predictive of movements in prices.[3]

As NCTA has previously shown, prices are a function of costs, and the reason why cable prices have increased more rapidly than inflation is primarily that "cable faces higher-than-average cost increases."[4] Cable operators and programmers have expanded, at considerable expense, the quantity and quality of the services; these expenditures are in order to offer greater value to consumers and to compete more effectively with the offerings of the two major DBS services and other competitors. Moreover, as we have previously shown, cable's costs for labor, programming and other

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2 Statement of Dr. Debra J. Aron, Director, LECG and Professor, Communications Systems, Northwestern University, Appendix A to NCTA Comments, MB Docket No. 02-145 (July 29, 2002)(emphasis in original).

3 S. Wildman, "Assessing Quality-Adjusted Changes in the Real Price of Basic Cable Service," Appendix A to NCTA Comments, MB Docket No. 03-172 (Sept. 11, 2003).

4 NCTA Comments, MB Docket No. 03-172 at 33.

inputs of production have increased faster than inflation, wholly apart from improvements in quantity and quality.[5]

The telcos' argument that prices are more "competitive" when there is wireline competition is similarly misguided. This, too, is not a new argument. Last year, after the Government Accountability Office study reported that prices in its sample of markets were lower where there was wireline competition than where there was not, wireline overbuilders raised the same point in the Commission's video competition inquiry[6] and in Congress. And NCTA

systematically demonstrated why it was wrong. Since the telcos were not interested in the issue until recently, and apparently missed our earlier explanations, we summarize them here.

GAO's study was based on only *six* overbuild systems – approximately 1.5% of all overbuilds. It compared the prices of the overbuilders and the competing cable systems in those communities with the prices of cable operators in six "similar" communities in which there was no overbuild competition. NCTA, however, conducted a more comprehensive study, which examined *all* of the *433* communities with identifiable overbuild systems.

5 *See*, *e.g.*, NCTA White Paper, "Cable Pricing, Value and Costs" (May 1, 2003), http://www.ncta.com/pdf_files/May_2003_White_Paper.pdf. *See also* "Issues Related to Competition and Subscriber Rates in the Cable Television Industry," GAO Report, October 2003, at 20 ("We found that a number of factors contributed to the increase in cable rates. These factors include increased expenditures on programming, infrastructure investments, and costs associated with customer service.")

6 *See* Comments of Broadband Service Providers Association and Comments of RCN Telecom Service, Inc. in MB Docket No. 04-227 (July 23, 2004).

Steven S. Wildman, Professor of Telecommunication Studies at Michigan State University, analyzed the results of NCTA's survey. He concluded, in a white paper submitted to Congress and to the Commission, that although prices were sometimes lower in overbuild communities, the lower prices should not be viewed as more "competitive" prices than those in the non-overbuild communities. As he noted, "[a] close look at overbuilders and the communities they serve shows that it would be imprudent to use prices in these communities as benchmarks for evaluating prices in other cable communities."[7]

What the NCTA study showed was that there were anomalous circumstances in virtually all the overbuild communities that made their rates artificially low. In a number of communities, the low rates charged at the time of the study turned out to be unsustainable; the overbuilder either quickly raised rates or went out of business. As Wildman (and GAO) explained, many overbuilders simply underestimated the extent of competition in the video marketplace. They assumed that what the telcos are now arguing was true – that incumbent cable operators were charging monopoly prices, and that overbuilders could profitably compete and capture customers with lower prices. But it turned out that the incumbents' prices had already been driven down by vigorous competition from DBS.

As a result, overbuilders who sought to price profitably below the cable operators' prices found that their prices were too low to cover their costs and could not be sustained for more than an introductory period. Many therefore either failed

7 Steven S. Wildman, "Assessing the Policy Implications of Overbuild Competition," Attachment A to NCTA Reply Comments in MB Docket No. 04-227, at 27.

or, before long, had to raise their prices to levels comparable to incumbent operators.

As Professor Wildman explained,

> It is not uncommon for firms entering a market to offer their products or services at prices too low to cover their costs over the long term. They do this to rapidly build their customer base to a level large enough to ensure profitability once prices return to sustainable levels. Incumbents often respond to such tactics with lower prices of their own. Because market prices frequently rebound to higher levels once entrants' initial price-cutting strategies have run their course, it is important that prices in markets with recent entry not be used as competitive benchmarks for prices in other markets.[8]

NCTA's study found that some overbuilders were, in fact, able to sustain rates lower than most incumbent cable systems. But this was only because they had bought their systems – at pennies on the dollar – *from* overbuilders that failed. When companies purchase systems for much less than what it cost to build them, they can sustain prices that reflect this discount. But, as Wildman explained, these prices are not indicative of what an economically efficient incumbent or new cable operator facing marketplace competition would or should charge.

Wildman found other reasons why overbuilders' prices were sometimes artificially lower than the prices charged by incumbent cable operators. For example, in some overbuild communities, overbuilders do not have the same franchise requirements as the competing incumbents. In particular, many were allowed to engage in "cream skimming," serving only high-density areas that are less costly to serve on a per-household

[8] *Id.* at 11.

basis. We explained in our initial comments in this proceeding why such rates should not be viewed as more "competitive" and desirable.

The NCTA study also revealed that many overbuilders were municipally owned or owned by cooperatives and operated on a *not-for-profit* basis. Others owned by utilities or are affiliated with a local telecommunications company could be cross-subsidized by the regulated utility's ratepayers. In the end, Wildman found that in 428 of the 433 identifiable overbuild communities – 99% – anomalous circumstances like those described above explained their artificially low prices.

One additional point: overbuilds were found to exist in only 433 cable communities nationwide. But in virtually all of the 33,485 cable communities nationwide, consumers have at least two strong competitive DBS alternatives to their cable system. It makes much more sense to view the prices charged in *those* communities as "competitive," in light of the anomalous circumstances in the small number of overbuild communities.

Telephone companies are well financed and, with their established base of telephone customers, may be able to compete effectively with the cable and DBS alternatives that already exist in most communities. But there is no public policy reason to give them an artificial regulatory advantage over their competitors. Consumers already are benefiting from competition, and whether or not the telcos enter and succeed should be determined by marketplace forces.

II. FRANCHISING OF CABLE SERVICES DOES NOT PRESENT A SIGNIFICANT BARRIER TO ENTRY FOR TELCO ENTRANTS; NOR ARE FRANCHISES RENDERED UNNECESSARY BY EXISTING RIGHTS OF WAY PERMITS

The telcos argue that the franchise process impedes their entry into video services and is unnecessary as a legal and policy matter because telcos have long held authority to occupy rights of way.[9] No doubt there is room for streamlining and reform of Title VI's franchising obligations, for new and existing providers alike. But the idea that the franchise process itself is a barrier to enhanced competition is untenable as a factual matter. And reliance on "pre-existing rights of way" as a method to end-run franchising is not supportable.

First, it is evident that telcos can and do obtain franchises. During the late 1990s, when Ameritech, now part of SBC, decided to avail itself of the 1996 Act's opportunities to provide in-region cable service, it obtained franchises for 111 communities.[10] Ameritech did not complain about the franchising process then. And it operated under Title VI for several years before deciding to exit the video business for reasons that had to do solely with other business priorities and lackluster multi-channel video performance. BellSouth in its comments listed 20 franchises it received in the 1990s,[11] representing 1.4 million potential cable households. But it serves only a fraction of this customer base. Whatever the reasons for its decision not to provide service, franchising did not appear to be the

9 SBC Comments at 10-18; Verizon Comments at 15-24.

10 FCC, Sixth Video Competition Report, ¶ 10 (2000).

11 Bell South Comments at 2.

gating factor. It has more than enough franchise service areas to launch service to tens of thousands immediately, if and when it chooses to do so.[12]

In the last several months, Verizon has been awarded franchises in 11 communities in Texas, California, Florida, New York, Massachusetts and Virginia, covering a population of nearly 500,000, and this does not include Texas communities where the company can secure a statewide franchise.[13] It is negotiating with 250 additional cities and municipalities, and recently obtained a franchise from Massapequa, New York which is awaiting approval by the state PUC. It strains credulity to believe that companies with the regulatory prowess and manpower of SBC and Verizon cannot reach satisfactory agreements with local franchising authorities (LFAs) in a reasonable time period.

And in fact they do. Verizon's Beaumont, California franchise application took less than a month from filing to approval.[14] Verizon filed for its Fairfax, Virginia franchise July 15, 2005; it was approved two months, 11 days later. Its Keller, Texas franchise negotiations began in June 2004; its franchise was granted on Jan. 18, 2005, about seven months in toto.[15] Verizon submitted its franchise application in Manatee County, Florida, on March 16, 2005. It was granted on

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12 Indeed, in urging Congress and the Commission to reject the RBOC's request for relief from local franchise requirements, RCN points out that such requirements have "not prevented competitors like RCN from entering the market" and that "despite being far smaller than the RBOCs", the company has "successfully obtained some 130 local cable franchise and open video system ("OVS") agreements." RCN Comments at 18, iii.

13 UBS Investment Research, "TelcoTV Update- Full Steam Ahead," Sept. 22, 2005, at www.ubs.com/investmentresearch.

14 Telephone interview with Shelby Hanvy, Beaumont City Clerk's Office, Sept. 26, 2005.

15 Telephone interview with Keller, Texas city clerk's office, Sept. 26, 2005.

August 30, 2005. Verizon holds at least 12 franchises covering a population of approximately 1.5 million.

While franchising can be a protracted process, it is worth noting that the telcos' dust-up over this matter has focused the attention of LFAs on prompt and business-like dealings with these new entrants. Not that much was required; LFAs welcome competitive entry. SBC itself cites myriad waivers of state requirements, *initiated by LFAs,* to "streamline [their] franchise procedures so as to promote competition."[16] At least one state's LFAs – Texas – have even abided the statutory elimination of local franchising in the interest of market entry by telcos.[17] Recently revised cable regulations in New York allow competing providers to receive a franchise in as little as 30 days by signing the incumbent operator's franchise.[18] Hospitality, not hostility, awaits new entrants on the steps of City Hall.

Moreover, caviling over the process of obtaining franchises – "the very process of going town-to-town to negotiate video franchises is inherently expensive

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[16] SBC Comments at 12 n.20, citing *Petition of the Town of Clarkstown (Rockland County) for Waiver of Certain Provisions of 9 NYCRR Part 594 of the Commission's Rules to Provide Television Serv., Case No. 05-V-0059 (N.Y. Pub. Serv. Comm'n, May 20, 2005)* at 3.

[17] "Act Relating to Furthering Competition in the Communications Industry," S.B. 5, 79th Leg., 2d Sess. (Tx. 2005), available at www.capitol.state.tx.us.

[18] 16 NYCRR 2d § 894.7(e)(4) (providing that if the prospective franchisee states in its application the willingness to provide service on the same terms and conditions as those in the existing franchise, the hearing on the application must be held in 30 days and the municipality may approve the application at such hearing). While publicly representing to municipalities in New York that it intends to "meet or exceed the terms or conditions" of the incumbent operator's franchise (*see*, *e.g.*, remarks of Paul Trane, Verizon franchising consultant, November 10, 2004, to the Town of Greenburgh, NY) and while pursuing franchises in dozens of municipalities, Verizon has refused to sign the incumbent operator's agreement in any such municipality. So, notwithstanding its claims that the franchising process is overly burdensome, Verizon could avail itself of a quick and easy way to enter the market. Its unwillingness to do so shows that what it really finds unacceptable and seeks to avoid are cable's longstanding commitments to municipalities and residents.

and slow," as Verizon puts it[19] – is suspect in light of the ability of companies like TCI, AT&T, Comcast, Adelphia, and Time Warner to complete thousands of transfer approvals with LFAs in the matter of a few months in major merger cases.[20] Surely telcos would want to apprise local regulators if amendments to existing wiring in rights of way or other construction matters are going to occur in readying plant to provide video. Working through the franchise process has not been shown to be the barrier to entry characterized by the telcos.

Secondly, SBC's argument that existing rights of way authority vitiates the need for any further contact with LFAs is unsupportable.[21] That an entity has an existing right of way tells you nothing about the regulatory treatment of businesses that use that right of way. A bank may have an ATM network that uses extensive rights of way to connect its ATM machines with a home office computer. But if the bank wanted to enter the telephone or video business using that network, it could hardly claim that its rights of way for its banking network meant no further regulatory inquiry.

More directly, as the cable industry has entered the telephone industry, the fact that it held existing rights of way did not excuse it from complying with applicable telephone laws and regulations. Whether operating as certificated

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19 Verizon Comments at 7.

20 And these cases can themselves be contentious. It was, after all, AT&T's request to transfer TCI's Portland, Oregon franchise that spawned litigation that led to the dispute that was resolved in *NCTA v. Brand X Internet Services., Inc.*, 125 S.Ct. 2688 (2005). Still, AT&T completed its transfers of the thousands of TCI franchises.

21 "These [SBC's] networks *already* have the right to use local rights of way, and the transmission of these video packets will involve no additional burden on those rights of way." SBC Comments at 19 (emphasis in original).

CLECs or under the emerging VoIP regime, cable has never viewed itself immune from regulations because its use of existing rights of way "involves no additional burden,"[22] as SBC puts it.

As traditional CLECs, cable companies have complied with state certification requirements, state and local universal service fund obligations, services for disabled customers, E911, CALEA, disconnection and other state regulations. As VoIP providers, cable has worked hard to comply with CALEA, E911, universal service and other requirements as the FCC develops the regulatory regime, and NCTA on behalf of cable operators has vigorously supported the assignment of appropriate responsibilities for this new service.[23]

What the cable industry has *not* done is to claim that because VoIP imposes no greater burden on pre-existing rights of way, it is free of relevant social policies appropriate for a number-based telephone service like VoIP.

Similarly, NCTA has maintained that a similar "rights/responsibilities" blueprint be applied to video going forward.[24] NCTA advocates that like services should be regulated alike, with no greater regulation than necessary to ensure the fulfillment of important social responsibilities and objectives. These responsibilities

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[22] We and myriad CLECS have argued, and courts have agreed, that Sec. 253(c)'s "fair and reasonable compensation" provision for use of rights of way" is cost-based, not rent-based. In that sense the "no additional burden" argument becomes relevant. If fees under Sec. 253(c) are cost based, then costs (or burdens) can be measured. If no additional costs of providing telecommunications services are imposed, then no additional fees should be collected.

[23] NCTA White Paper, "Balancing Responsibilities and Rights: A Regulatory Model for Facilities-Based VoIP Competition (Feb. 2004). Comments of NCTA, IP-Enabled Services, WM Docket No. 40-36, filed May 28, 2004.

in the video context include: making service available to all residents, regardless of income; protecting subscriber privacy; equal employment opportunities, channel blocking equipment; meeting local information needs of the community; and complying with consumer protection obligations.

These obligations, we believe, are important to current and future video regimes. Even if there are differences as to which responsibilities should apply, it is specious to claim that *no* obligations need apply simply because a would-be provider has already obtained rights of way for another purpose and now proposes to initiate video service.

As to the requirements that should be applied to a new video entrant, we agree with those – from the telco, cable, and LFA[25] sides – who suggest a fresh look is appropriate. Franchising regulations and requirements that were adopted in the era of competitive, winner-take-all franchising (a practice explicitly outlawed with the 1992 Cable Act[26]) need to be examined, as applied to existing operator and new providers alike.

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24 NCTA White Paper, "Working Toward a Deregulated Video Marketplace," (June 2005), filed in WC Docket No. 04-36. *See ex parte* letter from Neal M. Goldberg, NCTA to Marlene Dortch, June 23, 2005.

25 "Cities are willing to consider streamlining the franchising process, [National League of Cities Chairman of Information & Technology Communications Committee and Arvada, Colo. Mayor Ken] Fellman said. … He said he believes personally that discussion of public, educational and govt. (PEG) access channels and financial support usually slow the franchising process. Devising 'across-the-board standards' for PEG capacity and funding and obviating the need for negotiations on that issue would speed the process, he said: 'There are some benefits of federalizing some of these issues and narrowing the issues that get negotiated.'" Communications Daily, Sept. 22, 2005.

26 "[A] franchising authority may not grant an exclusive franchise and may not unreasonably refuse to award an additional competitive franchise." 47 U.S.C. § 541.

Verizon in particular emphasizes "reasonable" time limits, "reasonable" interpretations of level playing field and build-out, and "reasonable" LFA demands, drawing the focus on "reasonableness" from the statutory use of that term in Section 621(a) *passim* relating to general franchise requirements.[27] One can hardly object to invoking reasonableness in LFA-cable operator relationships. But, as the foregoing discussion of responsibilities indicates and Verizon's own articulation of the issue demonstrates, deciding what is "reasonable" (for both newcomers and existing operators) is best handled by looking at each requirement individually, not by wholesale eradication of a franchising process altogether, as SBC seems to be suggesting.

Two specific instances of what is "reasonable," raised in the telco submissions, merit comment. SBC argues that LFAs do not "need capacity on a duplicative institutional network. In addition such requirements significantly increase costs and risks for a prospective entrant."[28] There may be communities where such an I-net could indeed be wastefully duplicative.[29] But there is no logic in simply laying off the costs of providing the I-net only on an existing provider and excusing a newcomer from contributing to its cost. Either I-nets make sense in a community or not. If they do (and many existing franchises provide for them), then it makes sense for all providers to contribute to their maintenance. There is

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[27] Verizon Comments at 12-25.

[28] SBC Comments at 13. I-nets typically connect schools, libraries, hospitals, police stations, fire stations, and other municipal buildings, providing a physically separate network for municipal communications.

nothing about the incumbent provider's position in the market that makes it *ipso facto* the sole provider or supporter of such a service.

Second, the telcos use this proceeding to rail anew about build-out requirements, being careful here not to allow their advocacy to descend into a condemnation of the Cable Act's anti "red-lining" language in Section 621(a)(3).[30] Section 621(a)(4), the reasonable build-out requirement enacted in 1992, states: "In awarding a franchise, the franchising authority … shall allow the applicant's cable system a reasonable period of time to become capable of providing cable service to *all* households in the franchise area."[31] The words are rather plain that "all," not cherry-picked, households are to be included within the system's footprint, and *all* are to be provided service, on a non-discriminatory basis, within a reasonable period of time.

Congress's support for build-out is further evidenced from the legislative history of the related provision, also added in 1992, to eliminate the vestiges of franchise exclusivity. That provision bars local franchising authorities from "unreasonably" refusing to grant a "competitive" franchise. The House Report explains that a franchise could be reasonably refused if "for example, it is on the ground: …(5) of *inadequate assurance* that the cable operator will, within a reasonable period of time, provide *universal service throughout the franchise*

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29 It is by no means clear that every LFA would reach this conclusion after assessing their needs, however.

30 *See* Verizon Comments at 16.

31 47 U.S.C. § 541(a)(4)(A)(emphasis supplied).

area."[32] Thus, even in the context of opening up the franchising process to multiple providers, Congress anticipated that providers, new and old, would be required build-out the entire service area.[33]

In our Comments, NCTA pointed out why reasonable build-out requirements on all competitors increase competition and preserve service, including broadband service, throughout a franchise territory.[34] As US Telecom explained in its Comments, video facilitates broadband by allowing firms to leverage assets to enter related markets and reduce the risk of investments.[35] The Administration's stated desire for broadband deployment and broadband competition, and the general policy agreement in the U.S. in support of these broadband goals, dovetails nicely with the 1992 build-out and anti-discrimination provisions.

Cable operators – whether existing video networks or fiber-rich telco plant – are the likeliest providers of residential facilities-based broadband, as US Telecom itself points out. Maintenance of the build-out requirement therefore benefits broadband policy objectives because *competitive* broadband will be nearly ubiquitous, but only so long as reasonable build-out requirements are in place.

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[32] H. Report 92-628, H.R. 4850, 102d Cong., 2d Sess. 90 (1992) (emphasis supplied).

[33] The House Report on the 1984 Act, in describing Sec. 621(a)(3), mentions a similar requirement: "In other words, cable systems will not be permitted to "redline" (the practice of denying service to lower income areas). Under this provision, a franchising authority in the franchise process shall require the wiring of <u>all</u> areas of the franchise areas to avoid this type of practice." H. Report 98-934, H.R. 4103, 98th Cong., 2d Sess. 59 (1984) (emphasis supplied). Subsequent review of this language by the FCC and the court indicated that the language did not explicitly require build-out, *ACLU v. FCC*, 823 F.2d 1554, 1580 (D.C. Cir. 1987). But it nevertheless shows Congress's concern about redlining and contemplated build-out as a reliable way to avoid the hint of redlining.

[34] NCTA Comments at 21-22 (discussing Economists Inc.'s Michael Bauman paper).

[35] Comments of US Telecom at 5-6.

That is why US Telecom's opposition to reasonable build-out requirements[36] undermines its otherwise valid point that video entry will promote broadband. If allowed to cherry-pick neighborhoods they serve, telcos offering video will benefit only those selected neighborhoods with competitive broadband. And as the Baumann paper attached to NCTA's Comments demonstrates, that will lead to less, just the opposite result sought by the national policy favoring broadband.

Indeed, US Telecom seems to be arguing the benefits of sustained franchised wireline competition at the beginning of its Comments,[37] only to retreat to advocacy of cherry-picking at the end. As noted earlier in these Replies and in previous submissions, NCTA has demonstrated that much of existing wireline competition, prior to the full-bore, triple-play entry of companies like SBC and Verizon, represent anomalous cases.[38] Franchising requirements, including build-out and state-adopted level playing field statutes, have had little to do with the success or failure of these efforts.

Thus, it is wrong to attribute success or failure of past, or future, overbuilding efforts to these requirements. They have not been shown to be a factor in the past, US Telecom's assertions about "empirical" evidence to the contrary notwithstanding.[39] And given the pro-broadband value that build-out policies now

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[36] *Id.* at 8-14.

[37] *Id.* at 6-8.

[38] *See* Section I, *supra*.

[39] US Telecom, at 13 n. 23, cites T.W. Hazlett & G.S. Ford, *The Fallacy of Regulatory Symmetry: An Economic Analysis of the Level Playing Field in Cable TV Franchising Statutes,* 3 Bus. & Politics 21-46 (2001), as providing a "prior empirical finding regarding the negative effort of build-out requirements." That paper reviews prior literature on the topic of video market newcomers and

promote, there is even more reason to maintain them for all providers. If build-out policy is so fundamentally flawed, then it should be discontinued for any provider, existing or new. What makes no policy sense is to impose them only on the existing provider of services.

III. THE COMMISSION SHOULD NOT ADOPT IN A VACUUM RULES RELIEVING NEW ENTRANTS OF OBLIGATIONS UNDER SECTION 621

For reasons similar to those just discussed, the Commission should reject Verizon's proposal that it adopt standards for determining whether requirements imposed by franchising authorities on new entrants are "unreasonable," for purposes of Section 621(a). As noted above, that section prohibits franchising authorities from granting exclusive franchises or from "unreasonably refus[ing] to award an additional competitive franchise."[40] Verizon would have the Commission use this section as the basis for ruling that certain regulations and requirements that may lawfully be applied to the first cable operator in a community are inherently unreasonable and therefore unlawful when applied to additional competitive cable operators. As noted, it may be that some requirements that are permissible under Title VI are no longer appropriate or reasonable in a competitive

provides a case study of FiberVision, a cable TV entrant in Connecticut. But this "empirical" example hardly supports US Telecom's assertions regarding build-out. As the authors note, FiberVision ultimately was granted the franchises it sought but declined to enter the market because a second wireline overbuilder, the incumbent telco SNET, also decided to enter the market. The franchises were granted in the largest market, Hartford, a little more than seven months after FiberVision's franchise application was filed with the state commission that issues cable franchises in that state. *See* T.W Hazlett and G.S. Ford, p.33. While litigation ensued over the grants, it is by no means clear that FiberVision was prevented from commencing construction; what is clear is that FiberVision never commenced construction, and even when all litigation ended in its favor it relinquished its franchises in the face of additional competition from SNET. This anecdote hardly proves that build-out was the cause of, or even contributed to, FiberVision's voluntary decision to relinquish its franchises in the face of SNET's entry.

marketplace, or no longer are deemed necessary to ensure that cable operators meet certain social responsibilities – but to the extent that is true, such requirements should no longer be applied to *any* cable operators facing competition, including incumbent cable operators.

In this regard, Section 621(a) must be read in the context of Section 601, which details the purposes and goals of Title VI. Those purposes and goals do not distinguish between existing providers and newcomers. Thus, one purpose of Title VI is to encourage "the growth and development of cable systems,"[41] not just newcomers. It aims to "assure that cable communications provide and are encouraged to provide the widest possible diversity of information sources and services to the public,"[42] not narrowly focus on jump-starting newcomers to the long term detriment of the community's communications system.

As the Baumann paper showed, disparate build-out requirements – and asymmetrical regulatory treatment generally – do not encourage the "growth and development" of cable systems or encourage the widest possible of diversity of services. If the FCC considers proceeding under Section 621(a), it must consider the regulatory treatment of all providers.

Some benefits under the Cable Act do accrue specifically to a new entrant – its rates are wholly unregulated, for example, as they should be inasmuch as the new provider is facing effective competition from the existing provider. There may

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[40] 47 U.S.C. § 541(a).

[41] *Id.*, § 521(1).

[42] *Id.*, § 521(4).

be other areas where an inquiry under Section 621(a) that look at new providers differently as well.[43] But it would be inappropriate to initiate an inquiry whose sole or primary intent is to relieve new competitors alone of core Title VI obligations, while incumbent cable operators remain subject to such requirements and responsibilities. In particular, relieving telcos of the build-out and service requirements that are applicable to other franchised cable operators would often do more harm than good, distorting marketplace competition and disadvantaging residents of rural and less affluent areas.

IV. THE COMMISSION SHOULD REJECT PROPOSALS TO EXPAND PROGRAM ACCESS REGULATION AND TO FURTHER LIMIT EXCLUSIVITY ARRANGEMENTS TO THE BENEFIT OF CERTAIN MVPDS AND AT THE EXPENSE OF OTHERS

As in years past, cable's competitors argue that access to programming is a competitive impediment or barrier to entry in the video marketplace.[44] They reflexively seek to expand the program access regime in an effort to unfairly benefit their businesses at the expense of competing cable operators and programmers. Based on unsupported allegations and pure speculation, they ask the Commission to interfere in what is and should continue to be the subject of marketplace negotiations.

These program access claims ring particularly hollow in light of the profoundly competitive video marketplace that exists today: a marketplace where

[43] As noted earlier, the newcomer might simply make a contribution to the cost and maintenance of an already-existing I-net rather than having to duplicate the I-net, if such duplication were wasteful.

virtually all of the most popular and widely viewed cable program networks are available from DBS and other multichannel video distributors; where vertical integration between cable operators and programmers has declined to 23%;[45] and where even one of cable's major competitors concedes that "cable networks have thus far withheld programming from satellite operators in a relatively few instances" and that wide-scale access to programming is the "norm" rather than the exception.[46] This is a marketplace with no legal or policy basis to expand the program access rules, and where the underpinnings of the entire program access regime should be called into question.

Yet in this year's video competition proceeding, the usual advocates for expansive program access regulation – RCN, EchoStar and DirecTV – are joined by the four Regional Bell Operating Companies (RBOCs) – Verizon, SBC, BellSouth, and Qwest – in urging the Commission to mandate an even greater expansion of government intrusion into private programming negotiations. Ignoring the facts and years of Commission precedent, they argue for government-mandated access to *all* programming, *i.e.*, whether satellite or terrestrially-delivered, vertically or non-vertically integrated. Incredibly, one commenter in their camp goes so far as to seek application of the program access rules "to a broader range of competing

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44 *See* Comments of SBC, Verizon, BellSouth, Qwest, RCN, EchoStar, DirecTV, Broadband Service Providers Association ("BSPA"), and United States Telecom Association.

45 In the 10th Annual Video Competition Report, the Commission found that "vertical integration of national programming services between cable operators and programmers has decreased from 53% at year-end 1994 to 33% as of June 2003." One year later, in the 11th Annual Report, the Commission reported that vertical integration between cable operators and programmers had decreased further to 23% as of June 2004.

46 Comments of DirecTV at 5.

technologies" on the grounds that "the same basic market conditions that existed in 1992 exist today."[47]

Of course, no matter how they couch the argument – with euphemisms about the need for "harmonizing" the law,[48] or claims that Congress expressed no opinion on access to non-satellite delivered programming,[49] or unsubstantiated assertions about "anti-competitive behavior" by cable operators now or in the future[50] – there is no escaping the scope of the relevant statute, Section 628 of the Communications Act. As the Commission explained:

> The language of Section 628(c) expressly applies to "satellite cable programming and satellite broadcast programming," and that terrestrially delivered programming is "outside of the direct coverage of Section 628(c)." We have been presented with no basis to alter that conclusion in this proceeding. To the contrary, the legislative history to Section 628 reinforces our conclusion.[51]

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47 Comments of Broadband Service Providers Association at 13.

48 Comments of Qwest at 23.

49 Comments of SBC at 25.

50 Comments of US Telecom. SBC, for example, asserts that cable operators will deny telcos "the programming that is essential to their ability to compete in the first place." And that alleged "anti-competitive practices by cable incumbents are likely to increase in both number and severity in light of imminent telco entry." SBC Comments at 22. Verizon argues that its concerns "are the result of both loopholes in the current program access regulations and anticompetitive practices by some market participants intent on disadvantaging competitive providers." Verizon Comments at 3.

51 Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Development of Competition and Diversity in Video Programming Distribution: § 628(c)(5) of the Communications Act, Sunset of the Exclusive Contract Prohibition, CS Docket No. 01-290, 17 FCC Rcd 12124, 12158 (2002)(*2002 Extension of Program Exclusivity Order*). The Commission explained, by reference to the legislative history of the 1992 Act, that Congress considered, in the course of adopting the program access provision, whether the program access rules should apply to satellite-delivered and terrestrially-delivered programming (the Senate version), or to just satellite-delivered programming (the House version). As explained in the Conference Report, by adopting the House version Congress decisively rejected the application of the program access rules to terrestrially-delivered programming, and limited their application to "satellite cable programming vendor[s] affiliated with a cable operator." *See* H.R. Conf. Rep. No. 102-862, 102nd Cong., 2nd Sess. at 91-3 (1992).

Based upon its evaluation of the statutory language and Congressional intent, the Commission found that "given this express decision by Congress to limit the scope of the program access provisions to satellite delivered programming, we continue to believe that the statute is specific in that it applies only to satellite delivered cable and broadcast programming."[52] Nothing has occurred since the Commission's 2002 decision that provides any basis for altering this conclusion. That should be the end of the story with respect to the scope of existing law.

Nor is there any policy reason for altering the law to expand the range of programming to which cable's competitors are entitled. Some of those competitors persist in alleging that government intervention is necessary to address the *possibility* that a cable company may move programming from satellite to terrestrial delivery for the express purpose of evading the program access requirement. The Commission has repeatedly and consistently rejected such claims, and the D.C. Circuit has affirmed those decisions.[53]

The Commission found no evidence then of migration from satellite to terrestrial delivery to evade program access rules, and there is no evidence that vertically-integrated programming networks will do so. As the Commission recognized, there are wholly legitimate reasons to distribute programming

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52 *Id.* at 12158.

53 *See DIRECTV, Inc. v. Comcast Corporation*, 15 FCC Rcd 22802, 22807 (2000), *aff'g. EchoStar Communications Corporation v. Comcast Corporation*, 14 FCC Rcd 2089 (1999), *DIRECTV, Inc. v. Comcast Corporation*, 13 FCC Rcd 21822 (1998), *aff'd sub nom. EchoStar Communications Corporation v. FCC*, 292 F. 3d 749 (D.C. Cir. 2002); *RCN Telecom Services of New York, Inc. v. Cablevision Systems Corp.*, 16 FCC Rcd 12048 (2001).

terrestrially rather than by satellite,[54] including lower costs, greater efficiency and existing terrestrial distribution systems.[55] Regional sports programming, for example, is designed to serve a restricted geographic area instead of the entire continental United States. But national programming services reach national audiences and, for the foreseeable future, satellite delivery is the preferred mechanism for distributing such services.

Congress struck a deliberate balance in 1992: to ensure that cable's fledgling competitors would have sufficient access to popular programming while preserving the pro-competitive benefits of exclusivity in order to foster new program networks – especially local and regional networks. And, in fact, the terrestrial exemption has led cable operators to invest in local news, sports and other community programming – which is often most economically delivered by terrestrial means – to the benefit of cable customers. It also enabled cable operators to distinguish themselves from their fast-growing competitors – which is fully consistent with a competitive marketplace.

So for all their talk about problems with access to vital programming, the marketplace has worked just as Congress intended. Cable's competitors would now have the government deny cable operators the ability in all circumstances to enter into exclusive programming arrangements, to no pro-competitive end. As the

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54 *DIRECTV, Inc. v. Comcast Corporation, Memorandum Opinion and Order*, 13 FCC Rcd 21822, 21837 (1998). *See also EchoStar Communications Corp. v. Comcast Corporation*, 14 FCC Rcd 2089 (1999).

55 *DIRECTV, Inc. v. Comcast Corporation and EchoStar v. Comcast Corporation, Application for Review of Orders of the Cable Services Bureau Denying Program Access Complaints*, Memorandum Opinion and Order, 15 FCC Rcd 22802 (2002).

Commission noted in 2002, "Congress recognized that exclusivity can be a legitimate business practice where there is competition."[56] It banned certain exclusive arrangements – a departure from the normal workings of the marketplace and, thus, limited to the continuing need to protect competition – at a time when cable had virtually the entire multichannel video customer base and there was significant vertical integration in the industry.

How times have changed. The multichannel and multimedia video marketplace has flourished with the growth of significant facilities-based competitors and more choices in video content delivery. And cable's competitors, themselves, have used exclusivity as a means of competing with cable operators and with each other.

DirecTV's NFL football package, for example, is not available to cable operators. Yet satellite providers and telcos would have the Commission require that all programmers who sell to cable operators make their services available to every competing MVPD at virtually identical prices, terms and conditions. It is simply unfair in a vibrantly competitive video marketplace to consider a policy that bans or significantly limits exclusive arrangements for one set of MVPDs, namely cable, while other MVPDs, namely satellite and telco providers, are free to engage in privately negotiated, market-driven programming arrangements. If there is going to be any reduction in exclusivity – which we believe would be unwise – it should apply equally to all video providers.

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[56] 2002 Extension of Program Exclusivity Order at 12127.

Moreover, it is hard to swallow the telcos' attempts to portray themselves as lacking the wherewithal to negotiate deals for carriage of video programming in a competitive marketplace without government largesse. Qwest, for example, states that wireline competitors "do not have the bargaining leverage necessary to acquire programming on nondiscriminatory terms and conditions."[57] Yet, according to the qwest.com website, Qwest Choice TV offers 240 channels of video in Denver.

To date, Verizon has signed programming deals with a broad array of established and newer program networks, including Discovery Networks, Starz Entertainment Group, NBC Universal Cable, A&E Television Networks, Showtime, the Movie Channel, NFL Network, Sí TV, Turner Broadcasting networks, Black Family Channel, GSN, and many others.[58] Just this month, Verizon and the Walt Disney Company signed a long-term programming agreement for carriage of 12

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57 Comments of Qwest at 22.

58 "Verizon rings up Disney in time for video service," TheHollywoodReporter.com, Sept. 22, 2005; "Verizon's TV Lineup to Feature Discovery Networks," Verizon News Release, Dec. 15, 2004; "Verizon Signs Long-Term Deal with Starz Entertainment Group for Premium Movie Services," Verizon News Release, Apr. 14, 2005; "Verizon and NBC Universal Cable Reach Extensive Agreement for Distribution of NBCU Cable and Broadcast Networks," Verizon News Release, Apr. 18, 2005; Verizon and A&E Television Networks Sign Deal for Distribution of All of Its Networks," Verizon News Release, Apr. 22, 2005; "Verizon Signs Agreement with Showtime Networks for Premium Movie Services," Verizon News Release, Apr. 26, 2005; Verizon Signs Additional Programmiong Deals for FiOS TV," Verizon News Release, Apr. 29, 2005; "Verizon Adds NFL Network to Expanding List of Content Agreements," Verizon Press Release, May 4, 2005; "Verizon Signs Distribution Deal with Sí TV," Verizon News Release, May 17, 2005; "Verizon and TBS, Inc. Sign Programming Deal," Verizon News Release, July 6, 2005; "Verizon Signs Distribution Deal with Black Family Channel," Verizon News Release, July 25, 2005; "Verizon Signs 5 Additional Programming Deals for Verizon FiOS TV," Verizon News Release, Aug. 29, 2005; "Verizon and GSN, the Network for Games, Sign Distribution Deal," Verizon News Release, Sept. 13, 2005.

Disney and ESPN networks.[59] And Verizon also recently concluded a deal for carriage of MTV Networks and BET program services for FiOS TV.[60]

SBC notes that it is "currently in the midst of negotiations – and hopes it will be able to enter into commercial arrangements – for access to programming."[61] Despite its hefty bargaining position, it would still have the government put a thumb on the scale of these negotiations. The RBOCs have annual revenues of $147 billion (as compared to cable's $58 billion) and there is no reason to believe that there is programming out of their reach that would foreclose their ability to compete.[62] As for DBS providers, DirecTV is the second largest multichannel video programming distributor and EchoStar ranks third. It is without question that the telcos and DBS operators need no further guaranteed access to programming to compete effectively with cable companies.

Legislation to mandate access to terrestrially-delivered programming and non-vertically integrated satellite programming would be a step in the wrong direction.[63] By leaving terrestrially-delivered programming options to the

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59 "Verizon and the Walt Disney Company Sign Long-Term Programming Agreement, Verizon Press Release, September 21, 2005.

60 "MTV Networks and BET Sign Carriage Agreement with Verizon for FiOS TV," Verizon News Release, Oct. 5, 2005. A deal is reportedly in the works with News Corporation's programming networks as well. "Verizon rings up Disney in time for video service," TheHollywoodReporter.com, Sept. 22, 2005.

61 Comments of SBC at 20.

62 If telcos operating as cable systems believe they are disadvantaged by their size, they may seek to avail themselves of the National Cable Television Cooperative, Inc. ("NCTC"), a programming and hardware buying cooperative. Verizon is, in fact, an NCTC member.

63 Along with its pursuit of legislative action, SBC seeks to influence the competitive market by urging the Commission to initiate proceedings to explore "remedial schemes" to promote video competition. And Verizon urges the Commission to impose reporting requirements on cable operators to ensure that their programming arrangements comply with Sections 616 and 628 of

marketplace, Congress has given programmers the choice of striking carriage arrangements with distributors of terrestrially-delivered programming on an exclusive or multi-provider basis.

In sum, given the judgment of Congress that the program access rules should be limited to satellite-delivered programming (and even then that these rules should be applied for a limited period, and may be extended by the Commission only upon a specific finding that they are necessary to preserve competition and diversity), the Commission should reject RBOC and satellite proposals to expand the program access regime. It should encourage these companies to negotiate for programming in the marketplace and to use their substantial resources to invest in and develop new programming of interest to their subscribers. Over the past thirteen years, the current law has preserved incentives to engage in the significant financial risk-taking necessary to launch and promote local and regional program services. And no party has shown that limited exclusivity for a few channels among the hundreds otherwise available has had the effect of thwarting competition.

V. GIVEN ONGOING FCC PROCEEDINGS, THIS INQUIRY IS NOT THE PLACE TO ADDRESS ISSUES RELATED TO INTEGRATED SET-TOP BOX EQUIPMENT

In its comments, the Consumer Electronics Association ("CEA") briefly addresses the availability of navigation devices and their compatibility with cable services.[64] While acknowledging that "[c]able, their vendors, and CE have worked

the Act. These types of proposals simply evidence that cable's competitors will pursue whatever it takes to hamper the free flow of competition.

[64] CEA at 9-12.

in good faith to ensure the successful implementation of CableCARD modules,"[65] CEA's main point – as it has repeatedly argued to the Commission – is that cable operator equipment should "rely on the *same* security technology that competitive market entrants must use," and that equipment must not have conditional access integrated with other features. As CEA concedes,[66] it has pursued the ban on cable operator provision of integrated set-top boxes with the Commission in numerous previous filings. Nevertheless, it again urges the Commission to "maintain July 1, 2007, as the date by which digital devices supplied by cable operators must meet these requirements."[67]

NCTA and other cable parties have responded to CEA's arguments on this and related issues on numerous occasions in several FCC proceedings. In fact, the Commission has a specific proceeding (CS Docket No. 97-80) pending which is addressing these issues.[68] Moreover, in its most recent decision in that proceeding, the Commission said that it "resolved" the issue of whether the cable industry must "rely on the same security function as their consumer electronics competition," while leaving open the possibility that downloadable conditional access may satisfy the Commission's requirements although perhaps not by July 1, 2007.[69] A number

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65 *Id.* at 12.

66 *Id.* at 10.

67 *Id.* at 11.

68 *See Implementation of Section 304 of the Telecommunications Act of 1996, Commercial Availability of Navigation Devices*, *Second Report and Order*, 20 FCC Rcd 6794 (2005), *appeal pending sub nom. Advance/Newhouse Communications v. FCC*, Docket No. 05-1237 (D.C. Cir., filed July 5, 2005).

69 *Id.* at 6812-13 and n.142.

of filings are due on these and related issues in the upcoming months. For that reason, rather than debate those issues in this proceeding as well, we incorporate by reference the filings NCTA and other cable parties have made in CS Docket No. 97-80 responding to CEA claims on these issues.

VI. THE COMMISSION SHOULD REJECT PROPOSALS TO LIMIT CABLELABS' ABILITY TO ESTABLISH CABLE INDUSTRY SPECIFICATIONS

Verizon argues that the Commission should forbid Cable Television Laboratories, Inc. ("CableLabs") from establishing industry specifications and compel the substitution of interactive DOCSIS with another technology. CableLabs' ability to establish common interface specifications for manufacturers to build cable equipment is essential for cable operators to respond to a competitive market in which DBS, telephone companies, and other service providers implement their own, often proprietary, solutions for network and service innovation.

CableLabs' development of DOCSIS is a case in point. In the mid-1980's cable modems were proprietary, and cost, on average, over $500. Today, the DOCSIS® standard has led to cable modems which can be purchased for less than $50, and has spurred direct DSL competition.

CableLabs, a nonprofit research and development consortium established under the National Cooperative Research Act, is instrumental in the effort to draft and promote such common technical specifications. CableLabs projects such as OpenCable, PacketCable, Cable Home and Cable Modem/DOCSIS[70] have allowed for

[70] CableLabs®, DOCSIS®, PacketCable™, OpenCable™, OCAP™, CableCARD™, CableHome™ and Go2Broadband℠ are trademarks and servicemarks of Cable Television Laboratories, Inc.

the widespread deployment of integrated digital televisions, cable modems, VoIP equipment, and other interoperable equipment bringing new digital broadband, voice, and video services to the American consumer at a significantly reduced cost. As previously described to the Commission, CableLabs specifications are drafted with input from the CE, IT, content, and other *non-cable* communities, as well as the public.[71] In fact, over 150 visiting engineers from non-cable companies work full time or part time at CableLabs. Most CableLabs specifications are then submitted to traditional standards bodies such as the ANSI/SCTE, ATSC, CEA, DVB, and even the ITU for world-wide adoption. For example, CableLabs' OCAP Specification is now ANSI/SCTE-90, CableLabs' DOCSIS 2.0 Specification is now ANSI/SCTE-79 and ITU J.122, and eDOCSIS is ANSI/SCTE-107 and ITU J.126. This has enabled considerable U.S. leadership in international telecommunications policy.

Verizon itself, as well as other ILECs, have greatly benefited from the efforts of CableLabs and cable industry standards. CableLabs was instrumental in finalizing the MPEG-2 standard, and establishing the licensing authority for it (MPEG LA). Verizon is also using mature, cable-initiated standards for its connectors [ANSI/SCTE 01 1996R2001 and ANSI/SCTE 02 1997], frequency plan [ANSI/SCTE 40 2004], quadrature amplitude modulation (QAM) [ITU J.83-B], digital transmission standards [ANSI/SCTE 07 2000], content encryption [ANSI/SCTE 52 2003], closed caption carriage [ANSI/SCTE 20 2004], and copy protection [ANSI/SCTE 41 2004].

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71 *See, e.g.,* NCTA Reply Comments, CS Docket No. 97-80, Apr. 28, 2003, at 22-25; NCTA Comments, CS Docket No. 97-80, Feb. 13, 2004, at 8-11; NCTA Reply Comments, Mar. 15, 2004,

Today, DBS, SBC and Verizon plan to deliver services to televisions via set-top boxes. Cable operators must also provide service via CableCARD, and CableLabs helped develop the DTV requirements to make such cards work when manufacturers opt to provide card slots. With Verizon's choice of Motorola as its digital set-top solution, Verizon can also take advantage of the CableCARD interface standards [ANSI/SCTE 28 2004 and ANSI/SCTE 41 2004] with the Motorola CableCARD. Verizon may also provide or specify set-tops with their interfaces and outputs of choice, just as DBS does.

CableLabs' ability to rapidly formulate specifications has been essential not only for a competitive marketplace, but for the cable industry to be responsive to government needs. For example, CableLabs was recently recognized by the FBI for a specification for PacketCable that facilitates VoIP compliance with the Communications Assistance for Law Enforcement Act (CALEA), and meets the lawful access needs of federal, state and local law enforcement. The cable industry's voluntary effort to enable its VoIP services to comply with CALEA began years before Verizon and other companies providing VoIP decided to address the issue, and led to a groundbreaking PacketCable Electronic Surveillance Specification in 2004.[72]

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at 8-10.

72 *Federal Bureau of Investigation Calls CableLabs' Release of its PacketCableTM Technical Specification "A Positive Development" for Cable Industry Compliance with the Communications Assistance for Law Enforcement Act (CALEA) and the Lawful Access Needs of Federal, State, and Local Law Enforcement*, FBI National Press Office, rel. Sept. 8, 2004 ("*FBI Press Release*"). Comments of the United States Department of Justice at 54-56, ET Docket No. 04-295, November 8, 2004 ("CableLabs [and AMTA] have done an admirable job of setting CALEA standards even though neither one is affiliated with or accredited by ANSI." CableLabs has the "technical

Contrary to any assertions by Verizon, CableLabs has proven to be a respected enabler of innovation – not an impediment. It has been emulated by WIMAX, DSLHome, and most recently MovieLabs. Verizon's contrarian suggestion that DOCSIS be replaced by one specific technology to be used for network access on all competing networks, regardless of the underlying access network, would displace innovative marketplace solutions. Verizon may no more compel the cable industry to abandon DOCSIS than cable could require LECs, wireless, or DBS to abandon their own network innovations.

CONCLUSION

The vigorously competitive video market is being made even more spirited by the entry of the nation's largest communications companies, the incumbent telcos. Despite their claims for special treatment upon entry due to existing rights of way or more exotic assertions about a technology basis for a complete regulatory embargo, they can and are entering the video market, buoyed by their substantial existing customer base. Competition is thriving, and the Commission should, we respectfully suggest, so report to Congress.

Respectfully submitted,

/s/ Daniel L. Brenner

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expertise to engage in the specialized process of developing a technical telecommunications standard" and "would of course qualify" as a safeharbor standards setting body for CALEA.)

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