

**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 COMCAST CORPORATION**

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## **EXECUTIVE SUMMARY**

In this, the Commission's twelfth annual inquiry into the status of competition in the video marketplace, the initial comments clearly establish that the marketplace for video programming is more robustly competitive than ever before. Parties representing the cable industry demonstrated that the video marketplace is characterized by significant competition with new entrants and new technologies presenting consumers with an ever-growing array of options for multichannel video services, video rentals and sales, movie downloads, video streaming, and other means for accessing video programming. Comments by direct broadcast satellite ("DBS") providers, incumbent local exchange carriers ("ILECs"), overbuilders and broadband service providers ("BSPs"), wireless cable operators, broadcasters, and others agreed. ILECs, in particular, strongly touted the additional competition they are bringing to this marketplace.

In the few weeks since the initial comments were filed, even more evidence has emerged of dynamic and ever-growing competition. For example, Qwest announced that it is expanding where it will offer its Qwest Choice TV product; Verizon announced several program carriage agreements (including ones with networks owned by Disney, MTV Networks, E.W. Scripps, The Weather Channel, and Lifetime Television), that it is now taking customer orders for FiOS TV from customers in Keller, Texas, and that it has received franchise approval in several additional markets; and DIRECTV announced enhancements to its channel lineup with the addition of new Spanish-language programming. Developments in broadcast video (including multichannel video) also made headlines in the past few weeks, and perhaps the most attention has been garnered by developments concerning video via the Internet and mobile telephones. Comcast has

responded to this growing competition, announcing new initiatives to attract and keep customers. In short, the video marketplace is vibrant, dynamic, and competitive, with new entrants, technologies, and business models constantly emerging and changing, and with all market participants constantly jockeying to better serve customers.

As in prior years, some of the commenting parties decline to provide the kind of hard facts and information the Commission requested, but instead use this proceeding to rehash time-worn complaints and seek additional government intervention in a highly competitive marketplace. In addition, several cable competitors use this proceeding to argue why the Commission should grant them regulatory concessions, increase the burdens on cable operators, or both. Many of the allegations are perfunctory and devoid of meaningful evidence, and should be readily dismissed. However, we take this opportunity to refute several that are based on gross misstatements or misperceptions, and we also urge that proposals for additional or disparate regulation be deconstructed and rejected. For example:

- Contrary to ILEC assertions, the franchising process does not disadvantage them by providing notice to incumbent cable operators that the ILEC intends to enter the market, and it is certainly not a barrier to entry. As an initial matter, cable operators do not need advance notice that competition is coming. Cable operators have faced competition from at least two competitors in every market they serve for many years now and have been anticipating competition from the ILECs since the ILECs first publicly announced their plans to offer video services in numerous press releases and public filings. The franchising process is not a barrier to entry. Many new entrants (including overbuilders as well as ILECs) have successfully and expeditiously negotiated franchises, including Verizon's just-announced agreement in Fairfax County where only four months passed from proposal to final adoption. The franchising requirements about which the ILECs complain were adopted by Congress to further important public policies. If and to the extent the franchising process is deemed to impose undue regulatory burdens on providers of video programming, or those burdens are no longer necessary to further policies for which Congress adopted them, they should be abolished for *all* providers. But this is a matter for Congress, not the FCC.

- Video programming distributors have not been denied access to any video programming to which they are entitled by law. DBS providers, ILECs, and BSPs continue to perpetuate the myth that programming is being migrated to terrestrial delivery in order to evade the program access rules. Yet the sole example they provide when they allege “evasion” was considered years ago by the Commission and the D.C. Circuit, both of which ruled that evasion had not occurred. Not a single commenter cites a single example of programming covered by the rules to which they have in fact been denied access. Rather, these commenters complain about their inability to obtain programming on the terms they want on a timetable of their choosing. The Commission should reject invitations to create a new and unauthorized regime of wholesale regulation that favors these commenters and to interfere in the lawful private negotiations between programmers and distributors.
- The America Channel (“TAC”) criticizes the Commission’s prior reports for erroneously and inadequately presenting a limited view of the status of competition in the video programming marketplace. TAC also submits a new “analysis,” omitting supporting data, which purports to show that a network’s affiliation with any MVPD or broadcaster dramatically impacts its ability to charge MVPDs license fees. TAC’s claims and “analysis,” however, are severely flawed and based on marketplace fictions. For example, TAC redefines “affiliated” by including networks owned by media companies that do not own cable systems, which is the only situation that Congress sought to address. In TAC’s imaginary world, all content is equal, MVPDs are willing to pay more for a network simply because the network is affiliated with another media company, MVPDs are willing to charge their customers more in order to pay higher license fees to a network affiliated with another media company, and TAC knows what is better for consumers than consumers do. TAC’s assertions are disconnected from reality.
- ILECs attempt to trivialize competition from DBS and urge the Commission to provide them regulatory concessions as a “necessary” incentive to enter the marketplace. The Commission, however, has long recognized the significance of DBS competition and should reject these claims. The DBS companies themselves refute these arguments, and marketplace evidence of cable operators’ significant competitive responses in areas without a wireline competitor further demonstrates the significant effects of DBS competition.
- Certain commenters persist in accusing cable operators of engaging in “predatory” and “discriminatory” pricing, yet they provide no supporting evidence. The price competition these commenters complain about is characteristic of a vibrant, competitive, and appropriately unregulated marketplace, and is precisely the behavior that Congress both anticipated and welcomed. Were such pricing to occur, parties could bring forward the facts and the Commission or other appropriate bodies could act.
- Certain commenters raise a number of grievances about prior Commission decisions and assertions regarding issues pending in other proceedings. For

example, the Consumer Electronics Association (“CEA”) reprises a number of arguments it has made previously regarding the Commission’s rules for navigation devices, but provides no explanation why the Commission should reconsider these issues at all, let alone in its annual video competition inquiry. Similarly, several parties raise issues concerning the proper regulatory classification of multichannel video services provided using Internet Protocol; allege that increased cable consolidation will, among other supposed ills of increased consolidation, impede program access; and rehash their calls for conditions on the sale of the Adelphia cable systems to Comcast and Time Warner. These arguments are properly being considered in other Commission proceedings and are inappropriate for consideration in this inquiry. Finally, the City of Ontario, California requests that Congress and the Commission ensure that municipalities are able to compete against private sector competitors in the provision of video and other communications services. As the Commission has noted in other contexts, and the Supreme Court has affirmed, consideration of this issue belongs primarily to state legislatures and no federal agency should insert itself into the relationship between states and their political subdivisions absent an explicit statutory directive to do so. To the extent the Commission wishes to consider making recommendations to Congress on this subject, it should adhere to its long-standing policy of looking to the private sector for investment, build-out, and operations.

The initial comments this year reinforce the fact that competition in the video marketplace continues to thrive, and is growing every day. Virtually every American already can choose from among three providers of multichannel video programming, no matter where they live, and that does not include the programming that is available over-the-air, at the store, or on the Internet. Many Americans also have the choice of a fourth multichannel provider, and that number will grow rapidly with the entry of more ILECs and broadcasters into the multichannel marketplace. In light of this evidence of competition, the Commission should reaffirm its prior findings regarding the competitive state of the multichannel video marketplace and should dismiss demands to preserve (or, worse, expand) monopoly-era regulations in a competitive environment.

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Comcast Corporation (“Comcast”) hereby replies to the comments submitted in response to the Commission’s Notice of Inquiry (“*Notice*”) in the above-captioned proceeding.<sup>1</sup> These reply comments will also serve the additional purpose of updating the record with additional evidence, accumulated in the three weeks subsequent to the submission of initial comments, attesting to the dynamism of and hearty competition in the video marketplace.<sup>2</sup>

**I. THE VIDEO MARKETPLACE IS COMPETITIVE AND GROWING MORE SO EACH DAY.**

The marketplace for video programming is more robustly competitive than ever before, with new entrants and new technologies presenting consumers with an ever-growing array of options for multichannel video services, video rentals and sales, movie downloads, video streaming, and other means for accessing video programming.

Comcast and NCTA both provided comprehensive portraits of the significant competition

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

<sup>2</sup> The Commission’s Electronic Comment Filing System (“ECFS”) was not functioning properly on the evening of September 19, and several parties, including Comcast, resubmitted their comments on September 20 with attached explanations (or motions to accept late-filed comments through ECFS). Comments filed by The America Channel (“TAC”), however, appear to have been electronically filed on September 27 but are dated September 19. TAC has not explained the discrepancy.

in the video programming marketplace, and other commenters also furnished additional evidence of the growth of competition and consumer benefits.<sup>3</sup>

For example, DIRECTV commented that DBS competition provides “a catalyst for cable providers to improve their services and promote the bundling of their services.”<sup>4</sup> DIRECTV concluded that “[t]his type of competition has clearly resulted in more choices for American viewers.”<sup>5</sup> RCN noted that it “and other BSP competitors have gained a significant toehold in the MVPD market, and delivered to consumers many of the benefits that Congress envisioned in enacting the Telecom Act.”<sup>6</sup> The Broadband Service Providers Association (“BSPA”) further explained that “[a]ll active BSP networks reported last year continue to operate and gain financial strength,” and “continue to invest in existing network expansions and upgrades, expand their customer base and increase the number of services sold.”<sup>7</sup> BSPA noted that many cable operators have responded to competitive pressure “by fully upgrading their legacy networks” to expand their service offerings.<sup>8</sup>

Other parties demonstrated similar success. BellSouth noted that it has 20 franchises covering approximately 1.4 million homes and provides video service in 14

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<sup>3</sup> Comcast Comments at 5-42; NCTA Comments at 6-24. For purposes herein, unless otherwise designated, all citations to comments are to filings made in MB Docket No. 05-255.

<sup>4</sup> DIRECTV Comments at 10-11.

<sup>5</sup> *Id.* at 11.

<sup>6</sup> RCN Comments at 18. RCN reported that its systems pass approximately 1.4 million homes and provide video service to 382,713 customers, or 27.3% of the homes it passes. *See id.* App. A.

<sup>7</sup> BSPA Comments at 6. BSPA noted that “BSPA members continue to have an average customer penetration rate of over 28 percent.” *Id.* at 7.

<sup>8</sup> *Id.* at 9.

different markets.<sup>9</sup> BellSouth also highlighted its “strategic marketing alliance” with DIRECTV, through which “approximately 400,000 BellSouth customers have added DIRECTV service to their communications package.”<sup>10</sup> Qwest noted that it competes for video customers in Arizona, Colorado, and Nebraska with cable operators such as Comcast and Cox, as well as with DBS providers.<sup>11</sup> And W.A.T.C.H. TV Company, a wireless cable company, commented that a digital wireless cable system “can compete successfully against incumbent cable and [DBS] operators” and “attest[ed] to the viability and public interest value of digital wireless cable service that offers consumers the same number and variety of programming options as cable and DBS systems in the same market.”<sup>12</sup>

With respect to broadcast services, the National Association of Broadcasters (“NAB”) pointed out that “broadcasters across the country are fully engaged in developing HD and multicast programming to better serve their viewers and their communities.”<sup>13</sup> Remarking on the advances and innovations brought on by digital technologies, NAB noted that “[h]undreds of local stations are also using their digital channels for multicast services,” which can deliver increased numbers of broadcast channels directly to the homes of consumers.<sup>14</sup> Similarly, the Association of Public Television Stations (“APTS”) noted that local public television stations are also finding

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<sup>9</sup> See BellSouth Comments at 1-2.

<sup>10</sup> *Id.* at 2.

<sup>11</sup> See Qwest Comments at 2.

<sup>12</sup> W.A.T.C.H. TV Comments at 1.

<sup>13</sup> NAB Comments at 7.

<sup>14</sup> *Id.*

innovative and valuable ways to distribute more video programming via digital broadcasting.<sup>15</sup> In particular, APTS lauded the efforts of public television stations in Florida, South Carolina, New York, and Boston for using multicasting capabilities to deliver high-quality content regarding issues of local, state, national, and international importance.<sup>16</sup> The ability to use innovative technologies and business models to bring valuable content to consumers was a common theme among all the commenters.

In the few weeks since parties filed their initial comments, even more evidence has emerged of dynamic and ever-growing competition in the video marketplace. It is essential for the Commission to take note of these developments in order to reach a reasoned determination that the facts of the marketplace trump the rhetoric of special-interest commentators, and that the multichannel marketplace is truly and effectively competitive.

Competition is further intensifying with the deployment of video services by ILECs. For example, Qwest is expanding its video service to new areas; recent news accounts report that it is offering Qwest Choice TV in a planned community of over 13,000 homes in South Jordan, Utah, and plans to deploy this service in Denver, Colorado as well.<sup>17</sup> And Verizon announced it is now taking customer orders for FiOS TV, a video product “designed to compete with cable and satellite and win,” from consumers in Keller, TX.<sup>18</sup> It also announced that it will soon begin offering its FiOS TV

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<sup>15</sup> APTS Comments at 5-7.

<sup>16</sup> *See id.*

<sup>17</sup> *See Qwest Rolls Out a FTTH Community*, Telco Media News, Sept. 20, 2005, available at <http://www.telcomedianews.com/view.cfm?ReleaseID=62>.

<sup>18</sup> *See* Press Release, Verizon Communications, Inc., *Verizon FiOS TV Is Here!* (Sept. 22, 2005), available at <http://newscenter.verizon.com/proactive/newsroom/release.vtml?id=92862>. Bob Ingalls,

service in Wylie, Sachse, and Westlake, Texas,<sup>19</sup> and indicated plans to deploy FiOS TV in five more markets before the end of 2005.<sup>20</sup> Meanwhile, Verizon obtained important franchises in Fairfax County, Virginia (a Washington, DC suburb), Massapequa Park, New York, and Woburn, Massachusetts.<sup>21</sup> By the end of this year, Verizon's fiber network is expected to offer video service to three million households in several states, including California, Florida, New York, Massachusetts, Pennsylvania, New Jersey, and Virginia.<sup>22</sup> Analysts predict that Verizon will have 500,000 video subscribers by the fall

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president of Verizon's Retail Markets Group, says that Verizon has "harnessed the speed and capacity of broadband with the power of broadcast to create a revolutionary, new entertainment experience." *Id.*

<sup>19</sup> See *id.* Verizon also filed with the Texas Public Utility Commission for a franchise to offer FiOS TV to several communities in the Dallas/Fort Worth metropolitan area that are currently served by Comcast and Charter. See Linda Haugsted, *Verizon Files for Texas-Wide Franchise*, Multichannel News, Oct. 3, 2005, available at <http://www.multichannel.com/article/CA6262675.html>. Verizon and Grande Communications (an established overbuilder) have also applied for state-wide video franchises in Texas. See Linda Haugsted, *Texas Statewide Franchise a Grande Idea*, Multichannel News, Oct. 5, 2005 (noting that Guadalupe Valley Communications Systems LP recently obtained the first Texas statewide cable franchise), available at <http://www.multichannel.com/article/CA6263888.html>. Other overbuilders are also expanding in Texas. For example, Optical Entertainment Network has announced that it plans to start deploying fiber to 1.6 million households in Houston, Texas, and will deliver over 300 video channels including HDTV, VOD, and original programming; high-speed Internet access; and IP voice services as part of its FISION fiber-to-the-home service. See *OEN Launches Big FTTH Project*, Light Reading, Oct. 5, 2005, at [http://www.lightreading.com/document.asp?doc\\_id=81855](http://www.lightreading.com/document.asp?doc_id=81855) (last visited Oct. 7, 2005).

<sup>20</sup> See Linda Haugsted, *Verizon Eyes Five More in '05; Keller FiOS Rollout Will Be Joined by Five More Markets*, Multichannel News, Sept. 26, 2005, available at <http://www.multichannel.com/article/CA6260438.html>. After Wylie, Sachse, and Westlake, Texas, Verizon will expand to cities in Florida, Virginia, and California. See Vince Vittore, *Verizon Uses RF for FiOS TV*, Telephony Online, Sept. 26, 2005, at [http://telephonyonline.com/mag/telecom\\_verizon\\_uses\\_rf/](http://telephonyonline.com/mag/telecom_verizon_uses_rf/).

<sup>21</sup> See Elissa Silverman, *Verizon Wins Approval to Sell Cable in Fairfax County*, Wash. Post, Sept. 27, 2005, at D1 (noting that Verizon has several franchises pending in the metropolitan area and has already obtained franchise in some smaller DC-area communities); *FiOS TV Gets Va., N.Y. Franchises*, Multichannel News, Sept. 27, 2005, available at <http://www.multichannel.com/article/CA6261031.html>; *Woburn Grants Video Franchise to Verizon*, Boston Bus. J., Sept. 30, 2005, available at <http://boston.bizjournals.com/boston/stories/2005/09/26/daily86.html>. Recent reports indicate that Verizon is seeking franchise approval in 250 U.S. cities. See Olga Kharif, *Verizon's Muddy TV Picture*, BusinessWeek Online, Sept. 28, 2005, at [http://www.businessweek.com/print/technology/content/sep2005/tc20050928\\_4147.htm?chan=tc](http://www.businessweek.com/print/technology/content/sep2005/tc20050928_4147.htm?chan=tc).

<sup>22</sup> See Peter Grant, *Getting Your MTV from the Phone Company*, Wall St. J., Sept. 21, 2005, at D1. Verizon continues to announce deployment of fiber to new markets, including 32 communities in Staten Island, New York. See Press Release, Verizon Communications, Inc., *Verizon's New High-Fiber 'Diet' for 32 Staten Island Communities: Blazing-Fast Data, Crystal-Clear Voice and Video Capability* (Sept. 29, 2005), available at <http://newscenter.verizon.com/proactive/newsroom/release.vtml?id=92902>.

of 2006,<sup>23</sup> but Verizon chief executive Ivan Seidenberg is even more optimistic: “We’re talking about selling into video between half a million to three quarters of a million homes by early 2006. We’re taking on big counties. We’re looking at trying to cover 60% of our eligible market within five years.”<sup>24</sup>

Verizon has also made significant gains in obtaining access to video programming. Just in the time since initial comments were filed, Verizon announced long-term carriage agreements with the Walt Disney Company (including, among others, ESPN, ESPN2, ESPNU, ABC Family, Disney Channel, SoapNet, Toon Disney, and retransmission consent for the Disney-owned broadcast stations),<sup>25</sup> The Weather Channel (including all-local weather network Weatherscan),<sup>26</sup> E.W. Scripps Company (including Home & Garden Television, Food Network, Do It Yourself, Fine Living, Great American Country, Shop at Home, and retransmission consent for the Scripps’ ABC-affiliated TV stations),<sup>27</sup> Lifetime Television (including Lifetime, Lifetime Movie Network, and Lifetime Real Women),<sup>28</sup> HSN (including HSN and American’s Store),<sup>29</sup> MTV Networks

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<sup>23</sup> See Kharif, *supra* note 21 (citing Albert Lin, an analyst at American Technology Research).

<sup>24</sup> Verizon: “We’ve Got to Fix It”, BusinessWeek Online, Sept. 28, 2005, at [http://www.businessweek.com/print/technology/content/sep2005/tc20050928\\_6174\\_tc057.htm?chan=tc](http://www.businessweek.com/print/technology/content/sep2005/tc20050928_6174_tc057.htm?chan=tc).

<sup>25</sup> See Press Release, Verizon Communications, Inc., *Verizon and the Walt Disney Company Sign Long-Term Programming Agreement* (Sept. 21, 2005), available at <http://newscenter.verizon.com/proactive/newsroom/release.vtml?id=92857>.

<sup>26</sup> See Jay Sherman, *Verizon Inks Deal To Carry Weather Networks on FiOs*, TelevisionWeek, Sept. 29, 2005, available at <http://www.tvweek.com/news.cms?newsId=8638>.

<sup>27</sup> See Linda Moss, *Verizon Inks Scripps Carriage Deal*, Multichannel News, Oct. 3, 2005 (noting that the deal also includes HGTV-HD and Food Network-HD, which will launch next year), available at <http://www.multichannel.com/article/CA6262587.html>.

<sup>28</sup> See *Another Franchise Win, More Programming for FiOs TV*, Telco Media News, Sept. 29, 2005, available at <http://www.telcotvnews.com/view.cfm?ReleaseID=68>.

<sup>29</sup> See *id.*

and BET (including BET, BET Jazz, BET Gospel, CMT, Comedy Central, LOGO, MTV, MTV2, MTV Hits, MTV Jams, MTV Español, Nickelodeon, Nick at Nite, Nick2, Nicktoons, GAS Noggin/The N, Spike TV, TV Land, VH1, VH1 Classic, VH1 Country, VH1 Soul, VH Uno, MTV Chi, MTV Desi, and MTV K),<sup>30</sup> Jewelry Television, and Ovation -- The Arts Network.<sup>31</sup> A programming deal with News Corp. is reported to be imminent.<sup>32</sup> Verizon's Chairman Ivan Seidenberg claims his company has an advantage when striking certain programming deals because its fiber-optic system has more capacity than coaxial cable and gets "a little bit of an advantage" because programmers are interested in new wireless opportunities.<sup>33</sup>

DBS providers DIRECTV and EchoStar have also sought to expand their current offerings through the addition of new content and the integration of new technologies.<sup>34</sup>

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<sup>30</sup> See Press Release, Verizon Communications Inc., *MTV Networks and BET Sign Carriage Agreement with Verizon for FiOS TV* (Oct. 5, 2005) (noting that the deal also includes HD, VOD, and audio content), available at <http://newscenter.verizon.com/proactive/newsroom/release.vtml?id=92913>.

<sup>31</sup> See Jay Sherman, *Verizon Inks Carriage Agreement with Lifetime*, TelevisionWeek, Sept. 28, 2005, available at <http://www.tvweek.com/news.cms?newsId=8633>.

<sup>32</sup> According to News Corp. CEO Rupert Murdoch, his company is "99% there" in striking a deal with Verizon. David Lieberman, *Texas Town Gets First Crack at Verizon TV*, USA Today, Sept. 22, 2005, available at [http://www.usatoday.com/money/industries/telecom/2005-09-22-verizon-tv\\_x.htm](http://www.usatoday.com/money/industries/telecom/2005-09-22-verizon-tv_x.htm).

<sup>33</sup> David B. Wilkerson, *CORRECT: What's Next for Time Warner?*, Investors.com, Sept. 27, 2005, at <http://www.investors.com/breakingnews.asp?journalid=31875462&brk=1>.

<sup>34</sup> For example, DIRECTV has teamed up with XM Satellite Radio to offer XM content to DIRECTV subscribers. See *DIRECTV and XM Deal: Great Exposure for Sat Radio*, SKYREPORT.com, Sept. 30, 2005, at <http://www.skyreport.com/view.cfm?ReleaseID=1757#Story2>. Sirius has struck a similar deal with EchoStar. See *id.* DIRECTV has also just announced a partnership with Showtime to deliver an interactive TV boxing portal. See *Showtime, DIRECTV Take On Interactive Boxing*, SKYRETAILER.com, Sept. 30, 2005, at <http://www.skyretailer.com/view.cfm?ReleaseID=761#Story1>. DIRECTV is also taking advantage of the fact that more consumers than ever are becoming interested in having an MVPD service in their vehicles. See Dee-Ann Durbin, *Next Big Thing: Satellite TV in Cars*, Wash. Post, Oct. 6, 2005 ("If they get DIRECTV in their homes, installing it in their vehicles costs \$4.99 a month. It's \$41.99 a month if they don't get DIRECTV."), available at [http://www.washingtonpost.com/wp-dyn/content/article/2005/10/05/AR2005100501985\\_pf.html](http://www.washingtonpost.com/wp-dyn/content/article/2005/10/05/AR2005100501985_pf.html). Banking on the success of Apple's iPod, EchoStar recently announced that it would offer "PocketDish," a portable media player that can store video, still images, and MP3 files. See Joel Meyer, *EchoStar Turns Out PocketDish*, Broad. & Cable, Oct. 11, 2005 ("With the long-rumored video version of the hit iPod music

EchoStar recently announced that it added ESPNU to its channel lineup.<sup>35</sup> According to Eric Sahl, EchoStar's Senior Vice President of Programming, this addition exemplifies EchoStar's "recently increased . . . emphasis on sports programming."<sup>36</sup> DIRECTV also enhanced its channel lineup, particularly with channels that serve the Spanish-speaking segment of the market; over the past 20 months, DIRECTV has moved to expand its *Para Todos* Spanish-language package by adding 11 new Spanish-language services.<sup>37</sup>

DIRECTV and EchoStar also have been exploring ways to counter cable's bundled offering of video, Internet, and voice, and have investigated the potential use of WiMax to offer voice and data.<sup>38</sup> According to News Corp. CEO Rupert Murdoch, DIRECTV "will certainly have" Voice over Internet Protocol, and "within a measurable time, we'll certainly be able to match" the triple play options offered by cable operators and RBOCs.<sup>39</sup>

Internet video streaming and downloads have had and will continue to exert competitive pressures on the video marketplace.<sup>40</sup> Among the significant developments

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player yet to materialize, EchoStar Communications is trying to beat Apple to the punch."), *available at* <http://www.broadcastingcable.com/article/CA6268924.html>.

<sup>35</sup> See Press Release, EchoStar Communications Corp., *DISH Network Adds ESPNU to Channel Line-Up* (Sept. 22, 2005), *available at* [http://www.corporate-ir.net/ireye/ir\\_site.zhtml?ticker=dish&script=410&layout=-6&item\\_id=760103](http://www.corporate-ir.net/ireye/ir_site.zhtml?ticker=dish&script=410&layout=-6&item_id=760103).

<sup>36</sup> *Id.*

<sup>37</sup> George Winslow, *Redirecting DirecTV*, Multichannel News, Sept. 19, 2005, *available at* <http://www.multichannel.com/article/CA6257806.html>. In previous comments submitted in this proceeding, Comcast outlined its expansive multicultural offerings, noting that it already carries over 50 multicultural networks and is in discussions to carry more. See Comcast Comments at 46.

<sup>38</sup> Steve Donohue, *WiMax Could Be Answer to DBS Broadband Need*, Multichannel News, Sept. 26, 2005, *available at* <http://www.multichannel.com/article/CA6260440.html>.

<sup>39</sup> *Id.*

<sup>40</sup> Comcast Comments at 22-29. A recent Nielsen survey found that 42% of all Americans now have access to broadband at home. See Jon Van, *Broadband Use Growing, Survey Finds*, Chi. Trib., Sept. 29,

just in the past three weeks: (1) Akimbo Systems announced that it is adding Discovery Networks content to its available programs, raising the number of programs available to Akimbo subscribers to 4,000;<sup>41</sup> (2) Google Video announced the completion of a deal to deliver the top-rated UPN show, “Everybody Hates Chris,” in streaming video for free;<sup>42</sup> and (3) America Online and Telepictures are joining resources to form TMZ.com, a multimedia site that will provide viewers with news and features on celebrities in a variety of different formats, including video.<sup>43</sup> More and more companies are understanding that Internet-delivered video and other forms of content will be the foundation of their success.<sup>44</sup>

Recent news regarding broadcast multichannel services has further highlighted the competitive nature of the video marketplace. U.S. Digital Television (“USDTV”), which offers an over-the-air multichannel video subscription service using digital

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2005, available at [http://www.chicagotribune.com/technology/chi-0509290178sep29,1,7689347\\_story?coll=chi-technology-utl](http://www.chicagotribune.com/technology/chi-0509290178sep29,1,7689347_story?coll=chi-technology-utl). Recent news coverage lauds video delivered over the Internet as “quickly shaping up as a way for smaller producers to reach an audience without having to cut deals with movie studios and the big networks that are the traditional gatekeepers of television” and explains that “[t]here seems to be no way to quench people’s thirst for online video programming.” Saul Hansell, *Smaller Video Producers Seek Audiences on Net*, N.Y. Times, Oct. 6, 2005, available at <http://www.nytimes.com/2005/10/06/technology/06video.html>; Jefferson Graham, *Video-Laced Websites Evolve Into Pseudo-TV Stations*, USA Today, Oct. 2, 2005 (quoting Josh Bernoff of Forrester Research as saying, “The viewers are there, in a big way, and so are the advertisers.”), available at [http://www.usatoday.com/tech/news/techinnovations/2005-10-02-video-websites\\_x.htm?csp=34](http://www.usatoday.com/tech/news/techinnovations/2005-10-02-video-websites_x.htm?csp=34).

<sup>41</sup> See Matt Stump, *Akimbo Adds Discovery, New Features, Multichannel News*, Sept. 19, 2005 (also announcing that Akimbo is offering a “download-to-own” feature to subscribers, that will allow subscribers to store titles and, soon, will also allow subscribers to purchase titles for burning onto DVDs), available at <http://www.multichannel.com/article/CA6258220.html>.

<sup>42</sup> See Press Release, Google Inc., *New Google Video and UPN’s “Everybody Hates Chris” Premiere* (Sept. 26, 2005), available at [http://www.google.com/press/annc/video\\_chris.html](http://www.google.com/press/annc/video_chris.html).

<sup>43</sup> See Chris Gaither, *More TV Veterans Are Making Jump to the Internet*, L.A. Times, Sept. 15, 2005, available at <http://www.latimes.com/business/la-fi-tvnet15sep15,1,4124120.story?ctrack=1&cset=true>.

<sup>44</sup> See Brian Deagon, *Web Giants Face Issues in Content*, Investors Bus. Daily, Sept. 21, 2005, available at [http://news.yahoo.com/news?tmpl=story&u=/ibd/20050921/bs\\_ibd\\_ibd/2005921tech01](http://news.yahoo.com/news?tmpl=story&u=/ibd/20050921/bs_ibd_ibd/2005921tech01).

broadcast spectrum, recently received an infusion of \$25.8 million from several leading broadcast groups.<sup>45</sup> With these funds, USDTV plans to deploy its service in several additional large markets, as well as upgrade its offering to include video-on-demand (“VOD”) and digital video recorder (“DVR”) services.<sup>46</sup> The group of broadcasters, including News Corp.’s Fox Television Stations, Hearst-Argyle Television Inc., McGraw-Hill Broadcasting, LIN TV Corp., Morgan-Murphy Stations, and Telcom DTV LLC, will have a controlling interest in USDTV.<sup>47</sup>

On the mobile front, the Commission recently permitted television station WLNY-TV New York to “flash-cut” to digital-only broadcasts, speeding the transfer of its analog signals to Qualcomm, which plans to use the spectrum “to deploy its MediaFLO USA video service to wireless phones.”<sup>48</sup> Crown Castle is also working on a mobile live-video service.<sup>49</sup> Sprint recently launched Sprint TV Live, a video service

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<sup>45</sup> See Linda Moss, *USDTV Gets Cash Infusion*, Multichannel News, Sept. 26, 2005, available at <http://www.multichannel.com/article/CA6260559.html>. A launch in several markets, including one of the ten largest cities, is expected by the end of the year. See Linda Moss & Ted Hearn, *Wireless Pay-TV Service To Roll Out*, Multichannel News, Oct. 3, 2005, available at <http://www.multichannel.com/article/CA6262222.html>.

<sup>46</sup> See Moss & Hearn, *supra* note 45.

<sup>47</sup> *Id.* Broadcasters are also expanding their programming options in other ways. See, e.g., Todd Shields, *CBS Planning Second General-Entertainment Channel*, Mediaweek.com, Oct. 5, 2005 (“CBS is ‘pretty far along’ in plans for a second, general-entertainment digital programming stream, and should be able to launch the new service within a year.”), at [http://www.mediaweek.com/mw/news/recent\\_display.jsp?vnu\\_content\\_id=1001261209](http://www.mediaweek.com/mw/news/recent_display.jsp?vnu_content_id=1001261209).

<sup>48</sup> John Eggerton, *N.Y. TV Makes Way for Mobile Video*, Broad. & Cable, Sept. 21, 2005, available at <http://www.broadcastingcable.com/article/CA6258999.html>. Qualcomm, which recently purchased future rights to television channel 55 nationwide, has been paying stations to switch to a digital-only signal early to speed the deployment of its MediaFLO services. See *id.*

<sup>49</sup> Ken Kerschbaumer, *A Lot Goes into a Little TV*, Broad. & Cable, Sept. 26, 2005, available at <http://www.broadcastingcable.com/article/CA6260416.html>. According to one industry analyst, “Verizon Wireless plans to add to its media line-up by using tower operator Crown Castle’s network to send live TV to its phones in the first quarter of 2006.” *Verizon Wireless Seen Offering TV Via Crown Castle*, Reuters, Oct. 3, 2005, available at <http://today.reuters.com/news/newsArticleSearch.aspx?storyID=214220+03-Oct-2005+RTRS&srch=crown>. Crown Castle’s network is expected to cover the top 30 U.S. markets. See *id.*

powered by MobiTV, which will allow subscribers on the go to access “19 services, including Fox News Channel and ABC News Now, video highlights from the NFL Network, Fox Sports, The Discovery Channel, Learning Channel, The Weather Channel, and C-SPAN.”<sup>50</sup> Likewise, Cingular plans to introduce a video service using RealNetworks technology by the end of the year.<sup>51</sup> Although these plans are only recently announced, “major media executives are excited already. Cellphone TV is one of the new media products in which they see a clear business model out of the gate.”<sup>52</sup>

Content providers also see great promise in mobile video, and they are tailoring their content accordingly. For example, cable networks such as Nickelodeon, E!, VH1, Comedy Central, CNN, and ESPN are allowing subscribers to Verizon Wireless’s V-Cast service to download video clips of their favorite shows, such as Comedy Central’s *The Daily Show*.<sup>53</sup> MTV recently announced it will deliver short video clips to cell phones.<sup>54</sup> Separately, MTV Networks and Sprint announced that, beginning this month, Sprint PCS subscribers will have access to video content from Comedy Central, VH1, CMT,

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<sup>50</sup> See John Eggerton, *Sprint Launches New Cell Channel*, Broad. & Cable, Sept. 27, 2005, available at <http://www.broadcastingcable.com/article/CA6260822.html>. MobiTV is one of the fastest growing mobile video providers in the country, as it just recently crossed the 500,000 subscriber threshold. See Mike Dano, *MobiTV Hits 500,000 Wireless TV Subscribers*, RCRWireless News, Sept. 27, 2005, available at <http://www.rcrnews.com/printwindow.cms?newsId=24294&pageType=news>.

<sup>51</sup> See *RealNetworks To Run Cingular Mobile Video Service*, Reuters, Sept. 28, 2005, available at [http://www.infoworld.com/article/05/09/28/HNrealnetcingular\\_1.html](http://www.infoworld.com/article/05/09/28/HNrealnetcingular_1.html) (reporting that the service will run over a high-speed network that Cingular plans to build in up to twenty markets by year end).

<sup>52</sup> See John M. Higgins, *TV To Go*, Broad. & Cable, Sept. 26, 2005, available at <http://www.broadcastingcable.com/article/CA6260415.html>. One technology research firm, Yankee Group, estimates that there are already “about half a million cellular-TV and video-service subscribers in the U.S.” and “predicts the number could reach 1.3 million by year end and 10.8 million by 2008,” leading to revenue that “could exceed \$750 million in 2008.” Li Yuan, *Now, the Very Small Screen*, Wall St. J., Sept. 22, 2005, at B1.

<sup>53</sup> See Joe Flint & Li Yuan, *Short Soaps, Three Stooges*, Wall St. J., Sept. 22, 2005, at B1.

<sup>54</sup> John Eggerton, *MTVN, Warner Music Strike Mobile Deal*, Broad. & Cable, Sept. 26, 2005, available at <http://www.broadcastingcable.com/article/CA6260462.html>.

Nickelodeon, and The N.<sup>55</sup> ESPN is launching its own cellular phone network, offering “everything from e-mail alerts about players on a subscriber’s fantasy football team to ‘pushed’ highlights of each game from the hometown baseball team.”<sup>56</sup> ESPN plans to roll out this service in early 2006, although it will be available on a limited basis before the official launch.<sup>57</sup>

In the past three weeks, Comcast also has been actively responding to competition. For example, Comcast has made several significant announcements with respect to its programming activities: Comcast and PBS launched PBS KIDS Sprout, a 24-hour channel aimed at pre-school children;<sup>58</sup> Comcast, Time Warner, and Sterling Entertainment announced the launch of SportsNet New York, which will feature New York Mets baseball games, Big East and Big Ten basketball and football games, and morning and evening sports highlight shows;<sup>59</sup> Comcast announced that it will put CN8’s exclusive interviews with candidates for the New Jersey governorship on its VOD platform;<sup>60</sup> and Comcast announced the launch of AZN, an Asian-American

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<sup>55</sup> See Mike Shields, *MTV Providing Content for Sprint PCS*, Mediaweek.com, Sept. 28, 2005 at [http://www.mediaweek.com/mw/news/interactive/article\\_display.jsp?vnu\\_content\\_id=1001217501#](http://www.mediaweek.com/mw/news/interactive/article_display.jsp?vnu_content_id=1001217501#).

<sup>56</sup> Higgins, *supra* note 52.

<sup>57</sup> See Ken Kerschbaumer, *ESPN Sets Date for Mobile Service*, Broad. & Cable, Sept. 27, 2005, available at <http://www.broadcastingcable.com/article/CA6261030.html>.

<sup>58</sup> See Elizabeth Jensen, *A TV Channel Takes Aim at Toddlers*, N.Y. Times, Sept. 26, 2005, at C2.

<sup>59</sup> See R. Thomas Umstead, *Mets Take Swing at New Network*, Multichannel News, Sept. 29, 2005, available at <http://www.multichannel.com/article/CA6261640.html>.

<sup>60</sup> See CN8: *N.J. Gov. Candidates On-Demand*, Multichannel News, Oct. 3, 2005, available at <http://www.multichannel.com/article/CA6262205.html>. Comcast systems nationwide continue to provide as wide an array of VOD programming as possible (targeting different age, race, and personal-interest demographics) to appeal to the many diverse interests of its customers. See e.g., *Comcast Puts T-Birds ON DEMAND for a Second Season*, OurSports Central.com, Oct. 4, 2005 (“The addition of the Seattle Thunderbirds to ON DEMAND for the second year adds significant value to the local sports options now available to our customers.”), at <http://www.oursportscentral.com/services/releases/?id=3228468>. In Washington, DC, for example, Comcast offers the following broad range of programming categories on

programming network, in the D.C. metropolitan area.<sup>61</sup> Comcast is also bolstering its programming options in other ways. For example, Comcast's broadband customers are now able to watch one of two live NHL games each night on their personal computers.<sup>62</sup> On the digital voice front, Comcast announced on September 19, 2005, that its digital voice product is currently launched in 10 markets and Comcast expects to serve 250,000 subscribers by the end of this year.<sup>63</sup> In addition, Comcast again demonstrated its commitment to the communities it serves during the fifth annual Comcast Cares Day held on October 1, 2005 -- more than 30,000 Comcast employees and their families donated 180,000 hours of service at over 280 volunteer projects nationwide.<sup>64</sup>

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VOD: Kids & Teens (including programming from Nickelodeon, Cartoon Network, Sprout, and others), Lifestyle (including programming such as Ask This Old House, Coding Class, The Knot Wedding, and others), News & Info (including programming from the local NBC affiliate, CNN, and others), Spotlight (including Comcast Cares, which features short programming segments dealing with topics such as AIDS awareness, Big Brothers-Big Sisters, colon cancer, and drunk driving), and Sports & Fitness (including various sports programming).

<sup>61</sup> See Mike Reynolds, *Comcast Adds AZN in D.C. Area*, Multichannel News, Sept. 29, 2005, available at <http://www.multichannel.com/article/CA6261498.html>.

<sup>62</sup> See Matt Stump, *NHL Goes Online with Comcast*, Multichannel News, Oct. 4, 2005 (noting that "high-speed customers will have access to archives of streamed games up to 48 hours after airing, video clips of game highlights, previews, reviews and interviews, links to OLN's TV schedule, links to the NHL schedule and merchandise and the NHL scoreboard") available at <http://www.multichannel.com/article/CA6263339.html>.

<sup>63</sup> See Presentation, Comcast Corp., *Banc of America Securities 35th Annual Investment Conference*, slide 14 (Sept. 19, 2005), available at [http://library.corporate-ir.net/library/11/118/118591/items/165808/CMCSA\\_091905.pdf](http://library.corporate-ir.net/library/11/118/118591/items/165808/CMCSA_091905.pdf).

<sup>64</sup> See Press Release, Comcast Corp., *30,000 Comcast Volunteers Provide More than 180,000 Hours of Service on Nearly 300 Different Community Projects Nationwide* (Oct. 5, 2005) (noting that the Comcast Foundation is also donating over \$1 million in grants to the community partner organizations with which the employee volunteers worked on October 1, 2005), available at <http://www.cmcsk.com/phoenix.zhtml?c=147565&p=irol-newsArticle&t=Regular&id=764547&>; see also Adam Folk, *Comcast Employees Work To Renovate Augusta Club*, Augusta Chronicle, Oct. 1, 2005 ("In addition to painting, volunteers installed new computers, constructed picnic tables and raked and mowed the [Boys and Girls Club of Augusta's] grounds."); Teresa Black, *Comcast Workers Help Spruce Up D300 Schools*, The Courier News (Suburban Chicago Newspapers), Oct. 2, 2005 ("About 540 volunteers painted fences, planted trees and spread mulch at district schools in what amounted to a \$50,000 project."), available at <http://www.suburbanchicagonews.com/couriernews/city/e02comcast.htm>.

In short, the video marketplace is a vibrant, dynamic, competitive market with new entrants, technologies, and business models constantly emerging and changing -- and with all market participants constantly seeking better ways to serve customers. As the Denver Post recently reported: “Savvy consumers . . . have discovered they can take advantage of the fierce and growing competition among big-name companies to provide phone, subscription TV and Internet service.”<sup>65</sup> It is against this record of marketplace success that the Commission should evaluate the special interest pleas for regulatory advantages discussed in the following section.

## **II. THE COMMISSION’S REPORT SHOULD GIVE NO CREDENCE TO UNSUPPORTED ALLEGATIONS OF GRIEVANCES OR UNFOUNDED REQUESTS FOR GOVERNMENTAL INTERVENTION IN THE MARKETPLACE.**

In 1942, the noted economist Joseph Schumpeter coined the term “creative destruction” to describe the disruptive impact of innovation on a marketplace. Some 60 years later, the video marketplace finds itself in such a period, as innovation forces companies to shed old technologies and business models lest they fall behind, and new players find their place and make their mark. Not everybody will make it through this process unscathed. Yet “creative destruction” is ultimately about the development of a marketplace that is innovative, efficient, and competitive. And in such a marketplace, the heavy hand of regulation can stymie this creativity -- or distort the evolution of the marketplace.

As in prior years, some of the commenting parties decline to provide the kind of hard facts and information requested by the Commission, but instead use this proceeding

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<sup>65</sup> Ross Wehner, *Keeping TV, Telecom Customers a Big Deal*, Denver Post, Sept. 19, 2005, available at [http://denverpost.com/portlet/article/html/fragments/print\\_article.jsp?article=3041485](http://denverpost.com/portlet/article/html/fragments/print_article.jsp?article=3041485).

to rehash timeworn complaints and to seek additional government intervention in this highly competitive marketplace. This year, after years of largely ignoring this proceeding, several ILECs have decided to burden the record with the same old allegations and conjecture about “potential harms” that have been alleged for years and that have never materialized. Many of the allegations are so perfunctory, and so devoid of meaningful evidence, that they can readily be dismissed. A handful of allegations, however, must not remain unchallenged. In addition, this section responds to several proposals from cable competitors about why the Commission should free them from the burdens of regulation, why it should increase the regulatory burdens on cable operators, or both.

**A. The Cable Franchising Process Is Not a Barrier to Entry, and the Commission Should Reject Proposals That It Circumvent the Regulatory Framework Established by Congress.**

ILECs seeking regulatory advantages try to exploit the Commission’s commitment to competition to win special regulatory favors that violate the cable franchising process established by Congress. For example, ILECs claim the franchising process provides notice to the incumbent cable operator that competition is coming, it is expensive and slow, and build out and anti-redlining requirements to which all cable operators (incumbents and overbuilders alike) must adhere have the effect of preventing entry and are unfair if imposed on a “new entrant.”<sup>66</sup> Qwest alleges that financial obligations for PEG channels that mirror those of cable operators are burdensome and not

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<sup>66</sup> Qwest Comments at 9-14; Verizon Comments at 6-12; Cincinnati Bell Comments at 6-8; CenturyTel Comments at 6-7; BellSouth Comments at 3-12; SBC Comments at 11-14; *see also* USTA Comments at 8-16

financially justifiable for a new entrant.<sup>67</sup> And Century/Tel claims that franchise fees put new entrants at a competitive disadvantage because cable operators do not have to pay franchise fees for the provision of VoIP service and can offer a bundle of services at a cheaper price.<sup>68</sup> Each of these arguments is consistent with the ILECs' history of seeking special regulatory concessions at the expense of competing cable operators and the interests of local communities.<sup>69</sup> Although Comcast agrees that the franchising process can impose regulatory burdens, such burdens clearly are not meaningful barriers to entry, and to the extent the Commission determines that regulatory burdens should be decreased, it should (1) refrain from interfering with the regime established by Congress and (2) recommend to Congress that such burdens be decreased for *all* competitors.

As an initial matter, the notion that the franchising process gives cable operators some kind of unfair "advance warning" of new ILEC competition is silly. The ILECs issue a barrage of press releases and statements promising their shareholders, Congress, and the Commission that they will be entering the video marketplace, and they often try to leverage those promises into obtaining regulatory concessions.<sup>70</sup> The ILECs are more

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<sup>67</sup> Qwest Comments at 14.

<sup>68</sup> Century Tel Comments at 6.

<sup>69</sup> The ILECs contradict themselves in asking for all kinds of exemptions from statutory requirements to give them a leg up in the video business while elsewhere stressing their many advantages in head-to-head competition with cable and DBS companies. *Compare* SBC Comments at 9 (boasting about Project Lightspeed's advantages over cable), *with* SBC Comments at 10-19 (lamenting the regulatory burdens they face and seeking regulatory concessions). If anything, the ILECs understate the resources they can draw upon. They already have networks passing every home to which they plan to offer video services. They already have commercial relationships with virtually every one of those households -- relationships that in many cases date back decades. They enjoy access to capital at rates well below what cable and DBS companies pay. And they enjoy enormous profits, quarter after quarter after quarter (while most cable companies remain in debt). And yet the ILECs unabashedly plead for regulatory favoritism to further strengthen their positions.

<sup>70</sup> *See, e.g., Communications Law Reform: Hearing Before the Subcomm. on Telecommunications and Finance of the House Comm. on Commerce, 109<sup>th</sup> Congress, at 140 (1995) (Statement of Richard H. Brown, Vice Chairman, Ameritech Corp.)* ("In January 1993, we announced our plans to invest \$4.4 billion

likely to “give notice” of their plans to a cable operator through the extensive damage they cause to cable operators’ plant and the repeated disruption to consumers’ cable service resulting from their negligence in laying fiber.<sup>71</sup>

Nor do other aspects of the franchising process operate as barriers to entry. It is important to distinguish between a burden and a barrier. For example, getting on a bus in the morning to go to work is a burden because it costs a certain amount of money and requires a certain amount of time. The schedule of the bus, which is set by the local transit authority, does not always comport with an individual’s schedule, which could result in a greater burden. Waiting a half hour for a bus to get into work because of delays in the schedule is an even greater burden, and although frustrating, does not create a barrier to getting to work. Most commuters already know that the bus schedule can vary, so they go to the bus stop early in order to ensure they get into work on time.<sup>72</sup>

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to construct a digital video network that will connect 6 million customers . . . to interactive information, entertainment and traditional cable television services.”); Pacific Bell, *Form 10-K Annual Report for the Fiscal Year Ended Dec. 31, 2003*, 16 (Mar. 31, 1994) (“In November 1993, Pacific Bell announced a capital investment plan totaling \$16 billion . . . to upgrade core network infrastructure . . . [to] provid[e] advanced voice, data and video services. Using a combination of fiber optics and coaxial cable, Pacific Bell expects to provide broadband services to more than 1.5 million homes by the end of 1996, and more than 5 million homes by the end of the decade.”); Press Release, Bell Atlantic Corp., *Bell Atlantic Selects Equipment Supplier for Initial Switched Broadband Network Deployment* (July 15, 1996) (“Later this year, Bell Atlantic will begin installing fiber-optic facilities and electronics . . . . The company plans to add digital video broadcast capabilities to this ‘fiber-to-the-curb,’ switched broadband network by the third quarter of 1997, and broadband Internet access, data communications and interactive multimedia capabilities in late 1997 or early 1998.”), available at <http://newscenter.verizon.com/proactive/newsroom/release.vtml?id=37942>.

<sup>71</sup> See, e.g., Elissa Silverman, *Verizon Wins Approval To Sell Cable in Fairfax County*, Wash. Post, Sept. 27, 2005, at D1 (noting that Verizon’s “conversion to fiber optics has angered some Fairfax residents, who have complained that underground digging near utility lines has caused service outages and other damage,” and that the “county’s consumer-protection agency has received 166 complaints since last September about property damage attributed to Verizon”).

<sup>72</sup> Only in rare circumstances does the bus show up an hour or two late, or not at all, and the passengers get to work late and may lose their jobs (in which case the bus would have been a barrier). Even then, the delay caused by the bus may simply be a burden and not a barrier depending on the individual circumstances of the passengers (e.g., if a passenger is not required to be at work by a certain time, if the passenger is the boss, etc.). Of course, there is always the alternative of taking a cab or driving to work, but those alternatives also have their own burdens.

In the case of the ILECs, they essentially want to show up late to the bus stop (they have been promising to enter the video marketplace for over a decade and have known all along about the franchise process), commandeer the bus (establish a regulatory process that meets their specific needs), throw everyone else off (require existing competitors to continue to be subject to the burdens of regulation), throw the bus driver under the wheels (remove LFAs' authority to manage the rights of ways and PEG requirements), ignore the speed limit and drive wherever they want (ignore anti-redlining and build out requirements), and get to work ahead of everyone else. Or looked at another way, they want the Secret Service (or the Commission) to pick them up in a limo and drive them into work so they do not have to take the bus with everyone else.

In the case of the provision of cable service, the timing of the franchise process may not always comport with the schedule that new entrants want to follow, but new entrants already know this so they account (or should account) for potential delays by filing applications early and hiring sufficient staff to prosecute these applications. By doing so, they can ameliorate much, if any, burden imposed by delays in the franchising process. ILEC commenters complain that the franchising process can take several months to more than a year.<sup>73</sup> Knowing this, the ILECs should have been working on obtaining their franchises for some time now -- and some of them have done so. For example, Verizon indicated its intention to enter the video marketplace over a year ago,<sup>74</sup>

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<sup>73</sup> See BellSouth Comments at 3 (“On average, the length of time required to negotiate the cable franchises currently held by BellSouth was approximately 11 months.”); SBC Comments at 12 (“taking at least several months to more than a year”); Verizon Comments at 8 (“routinely takes many months, and often more than a year”).

<sup>74</sup> See Verizon Comments, filed in MB Docket No. 04-227, at 1-2 (July 23, 2004).

and Verizon's CEO Ivan Seidenberg has acknowledged that the franchising process has gone smoothly: "We haven't been turned down anywhere we've gone."<sup>75</sup>

SBC likewise announced its Project Lightspeed video plans over a year ago,<sup>76</sup> and it too could have used the intervening period to secure franchises. Instead, it has declined to seek the franchise approvals necessary to provide video services, having made a calculated (if dubious) decision to spend its time and money on lobbying Congress, the Commission, and State governments to grant it regulatory concessions.<sup>77</sup> Had SBC dedicated its time and resources to obtaining the necessary franchises over the past year, by its own estimations, it likely would have already obtained most if not all of the necessary approvals.

In addition, the franchising process for the ILECs is significantly easier than it was for cable operators because local governments are now experienced in awarding franchises and are eager for even more competition for video services.<sup>78</sup> Moreover, new

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<sup>75</sup> Kharif, *supra* note 21.

<sup>76</sup> See Roger O. Crockett, *SBC: Tying Up Rivals with More Cable?*, BusinessWeek Online, June 23, 2004 (explaining that the fiber deployment will "make offerings such as video more easily available"), at [http://www.businessweek.com/technology/content/jun2004/tc20040623\\_4278\\_tc024.htm](http://www.businessweek.com/technology/content/jun2004/tc20040623_4278_tc024.htm).

<sup>77</sup> See Jonathan Krim, *Phone, Cable Firms Take Lobbying Local*, Wash. Post, Sept. 29, 2005, at D5 (reporting that SBC topped the list for money spent on lobbying in the states (\$16.3 million over the past two years), and spent \$58 million on Federal lobbying from 1998-2004).

<sup>78</sup> See Letter from Donald J. Borut, Executive Director, Nat'l League of Cities, to The Honorable Ted Stevens, Chairman, U.S. Senate Comm. on Commerce, Science and Transp., & The Honorable Daniel Inouye, Co-Chairman, U.S. Senate Comm. on Commerce, Science & Transp. (June 9, 2005) ("Local government strongly endorses promoting competition for all consumers and treating like services alike. The elected leaders of our nation's cities and towns stand ready and willing to welcome video competition in their communities."), available at <http://www.nlc.org/content/Files/Telecom - Stevens and Inouye Letter 06 09 05.pdf>; Nat'l Ass'n of Telecomm. Officers & Advisors, *NATOA Letter in Opposition S.1504* ("Local governments support competition and are excited to see the introduction of new services within our communities. We have a long and very successful history of supporting the introduction of such services, and are proud of the extensive successful deployment of broadband infrastructure by the cable industry, a successful deployment made possible in large part by the current system of local cable franchising."), at [http://www.natoa.org/public/articles/Letter\\_in\\_Opposition.pdf](http://www.natoa.org/public/articles/Letter_in_Opposition.pdf) (last visited Oct. 7, 2005).

entrants know precisely what the expectations are for their entry into each franchise area. They need only look at the existing publicly available franchise agreements. Thus, many of the burdens of negotiating can simply be resolved by accepting the terms of existing franchise agreements.<sup>79</sup> The most likely source of delays is the determination by ILECs to demand materially more favorable terms than those that apply to the existing cable operator -- in direct contravention of the principle that the ILECs seemed to cherish (until it did not fit their interests): “regulatory parity.”

Cable operators have lived with the “burdens” of the franchising process for over two decades, yet the process has not been a barrier to entry. RCN and other small overbuilders also have successfully navigated the franchising process and entered the video marketplace to compete effectively.<sup>80</sup> Moreover, ILECs such as BellSouth, Qwest, SNET and Ameritech have been using the franchising process, without complaint, for

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<sup>79</sup> ILECs try to make light of the burdens cable operators must overcome to offer voice services. *See, e.g.*, USTA Comments at 10; Verizon Comments at 11. In fact, the delay associated with a cable operator negotiating (and possibly arbitrating) an interconnection agreement to provide voice service is analogous to the perceived delay in ILECs negotiating for a franchise, except that a cable operator seeking to offer voice services is not negotiating with a party that has an incentive to enter into an agreement; rather, the cable operator is negotiating with an ILEC that has every incentive *not* to reach an agreement. To enter the voice market, in addition to negotiating interconnection agreements with ILECs, cable operators must: (1) in a number of states, obtain certificates of public convenience and necessity from the state utility commissions prior to offering service; (2) comply with rules governing the E911 capabilities of VoIP services (and the corresponding customer notification and acknowledgment requirements); (3) comply with new CALEA rules for VoIP services; and (4) rely on the ILECs’ cooperation in matters involving exchange of traffic, access to numbering resources, porting of telephone numbers, inclusion in directory databases, customer records exchange, and reciprocal compensation.

<sup>80</sup> *See* RCN Comments at iii (“RCN, despite being far smaller than the RBOCs, successfully obtained some 130 local cable franchise and open video system (‘OVS’) agreements.”); BSPA Comments at 7 (“BSPs continue to have over 16 million households under active franchises where they offer service, and have 2 million additional households under franchise in anticipation of future access to the capital necessary to build.”). These companies are able to compete and overcome the regulatory burdens despite being at a significant financial disadvantage vis-à-vis ILECs. For example, the market capitalization of RCN (\$781 million), one of the largest BSPs in the country is a small fraction of that of Verizon (\$90 billion, or 115 times that of RCN), SBC (\$79 billion, or 101 times that of RCN), BellSouth (\$48 billion, or 61 times that of RCN), and Qwest (\$7.3 billion, or 9 times that of RCN). The differences are even more staggering when examining revenues. In fact, the total revenue reported for the 2Q of 2005 by the top four ILECs (Verizon, SBC, BellSouth, Qwest) nearly doubled that of the top four cable operators (Comcast, Time Warner, Cox, Charter) in the same time period - \$37.5 billion to \$19.3 billion.

nearly a decade to enter the video marketplace and offer video programming to consumers.<sup>81</sup> Any delays the ILECs are encountering now are primarily of their own making.

It is important to note that the rules that the ILECs claim are burdensome and barriers to entry are ones that Congress has determined are in the public interest. It was *Congress* that decided that a cable operator must have a franchise and must follow the other rules about which the ILECs complain.<sup>82</sup> Anti-redlining rules, reinforced by rules requiring reasonable build-out schedules, prevent providers from discriminating against customers on the basis of income -- a requirement that seems especially important in light of SBC's plan to avoid serving what it deems "low-value" customers.<sup>83</sup> PEG rules ensure that consumers have better access to information about their local governments as well as other public and educational programming.<sup>84</sup> And franchise fees compensate local communities (as opposed to the State or Federal treasury) for the use of local rights-of-

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<sup>81</sup> See BellSouth Comments at 1-2 ("BellSouth currently holds 20 franchises to provide cable 'overbuild' service in local markets throughout its telephone service area."); Qwest Comments at ii ("Qwest has been operating as an MVPD distributor for nine years and currently serves approximately 60,000 video subscribers in Arizona, Colorado, and Nebraska."); *In re Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming*, Sixth Annual Report, 15 FCC Rcd. 978 ¶ 10 (2000) ("Ameritech now holds 111 cable franchises and reports that it serves approximately 250,000 subscribers.").

<sup>82</sup> See 47 U.S.C. § 541(b) (stating that "a cable operator may not provide cable service without a franchise" unless it was doing so prior to 1984 or is a municipally-owned cable operator).

<sup>83</sup> It is important to note that build out and anti-redlining rules were expressly imposed by Congress and are not implemented at the Commission's discretion. See *id.* §§ 541(a)(3), (a)(4)(A). Section 621(a)(3) was adopted as part of the Cable Act of 1984. The House Report to that Act makes clear that the intent of Congress was for franchising authorities to use this provision to require cable operators to build out to the entire franchise area. H.R. Rep. No. 98-934, at 59 (1984) ("Under this provision [(Section 621(a)(3))], a franchising authority in the franchise process shall require the wiring of all areas of the franchise area to avoid [redlining]."). Kathryn Brown, Senior Vice President for Verizon, recently stated, "We support maintaining the current federal anti-discrimination provisions. We are not redlining and we do not discriminate." Ted Hearn, *Mixed Signals from Verizon on Buildout*, Multichannel News, Sept. 23, 2005, available at <http://www.multichannel.com/article/CA6260399.html>.

<sup>84</sup> See 47 U.S.C. § 531.

way.<sup>85</sup> If and to the extent that these and other franchising requirements are no longer necessary to further the policies for which Congress adopted them, they should be abolished for *all* providers.<sup>86</sup> Like services should be treated alike and these requirements should be applied to all service providers, on a technology-neutral basis.<sup>87</sup> But, so long as Congress has deemed these requirements necessary to advance public policies, the Commission must enforce them and should not be cajoled into trying to circumvent them.<sup>88</sup>

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<sup>85</sup> *See id.* § 542.

<sup>86</sup> Verizon correctly notes that there is potential for local governments to abuse the franchise process and impose requirements and demand concessions that are wholly unrelated to the provision of video programming. *See* Verizon Comments at 12 (“Many local franchising authorities unfortunately view the franchising process as an opportunity to garner from a potential new video entrant concessions that are in no way related to video services or to the rationales for requiring franchises.”). Comcast supports deregulatory actions Congress or the Commission may take to lessen the burdens such non-cable related requirements impose on *all* distributors of video programming.

<sup>87</sup> To the extent it believes that ILECs need regulatory relief in order to offer the “triple play” of voice, video, and data services, the Commission should similarly consider how to enable cable operators to offer the “quadruple play” of voice, video, data, and wireless that most ILECs will be able to offer. If government must bend the rules to give the ILECs a better chance to compete in video, surely it must also do something to equalize the advantage granted to the ILECs in wireless by awarding them -- for free -- 50% of the spectrum used for cellular services. Under the current system, cable companies that want to offer wireless services have to buy access to spectrum, which -- at least by the ILECs’ logic -- is a manifest injustice that cries out for correction.

<sup>88</sup> Contrary to the ILECs’ requests, the Commission cannot simply eliminate the franchising process established by Congress. Section 621(a) expressly authorizes franchising authorities to award franchises for the construction of a cable system, and Section 621(b) unambiguously declares that “a cable operator may not provide cable service without a franchise” except in very limited circumstances that do not apply to the ILECs. 47 U.S.C. § 541(b). Nowhere in Title VI is the Commission granted authority to eliminate, displace, or circumvent the franchising requirement. To the extent SBC claims that it can provide video programming to consumers under Title VI without obtaining a franchise but while enjoying the other protections of Title VI, e.g., program access, such claims are contrary to the express terms of the statute and will be more fully refuted in a more appropriate Commission proceeding, e.g., WC Docket No. 04-36.

**B. Video Programming Distributors Have Marketplace Access to All Programming Services to Which They Are Entitled by Law.**

Recycling tired claims from past years, certain commenters once again allege that they have difficulty obtaining access to programming.<sup>89</sup> This year, however, they are joined by the ILECs, several of which already have successfully negotiated multiple carriage contracts.<sup>90</sup> All of these commenters persist in exaggerating their claimed difficulties in obtaining programming. Some commenters reiterate complaints (now approaching their ninth anniversary) about Comcast SportsNet Philadelphia (“CSN Philadelphia”), which is exempt from the program access rules. But not a single commenter cites a single example of programming covered by the rules to which they have been denied access. Rather, these commenters complain about their inability to obtain the terms they want on a timetable of their choosing. They essentially seek to have the Commission create a new and unauthorized regime of wholesale regulation to establish programming agreements on terms that favor them through government mandate.<sup>91</sup>

**Terrestrial Delivery.** DIRECTV, EchoStar, and RCN again allege that they are denied access to programming that has been “migrated” from satellite to terrestrial

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<sup>89</sup> See DIRECTV Comments at 14-15; EchoStar Comments at 3-5; RCN Comments at 7-13; BSPA Comments at 12-15.

<sup>90</sup> See Verizon Comments at 33-34 (alleging that it has difficulties obtaining programming despite the fact that it has entered into carriage contracts with virtually every major programming network); SBC Comments at 20-24 (asserting that, although it is currently in negotiations for carriage contracts and has not yet been denied any programming, it is concerned that at some point it might be); Qwest Comments at 19-24 (urging the Commission to adopt new program access rules to address a variety of issues including terrestrial delivery, despite no indication that Qwest ever entered into negotiations for such programming, let alone was denied such programming); Cincinnati Bell Comments at 14.

<sup>91</sup> In many ways, this is the same complaint the ILECs have about franchise obligations: if LFAs will not agree to the ILECs’ terms, however unreasonable, the LFA is portrayed as denying the ILEC’s entry and the Commission is entreated to mandate that franchise agreements include only those terms that are favorable to the ILECs in an expedited timeframe.

delivery.<sup>92</sup> BellSouth, Qwest, SBC, USTA, and Verizon parrot these allegations.<sup>93</sup> But in all the years this argument has been made, these commenters cannot point to any trend by programming networks to use terrestrial delivery, or a single example of a programming network that was “migrated” to terrestrial delivery in order to evade the program access rules.

These commenters point only to the well-settled case of CSN Philadelphia. CSN Philadelphia is not subject to the program access law enacted by Congress, which exempted terrestrially delivered networks based on full knowledge that some networks were delivered terrestrially. The Commission rejected DIRECTV’s and EchoStar’s complaints that CSN Philadelphia was improperly “migrated” to terrestrial delivery and found “the unchallenged cost advantages of terrestrial distribution” to be a legitimate

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<sup>92</sup> DIRECTV Comments at 5-6; EchoStar Comments at 3-5; RCN Comments at 9-13; *see also* BSPA Comments at 13-15. As Comcast noted in its reply comments in 2003, “With respect to the so-called ‘terrestrial migration’ of programming, and the exclusive distribution of such programming, DIRECTV -- which has benefited enormously over the intervening period because of its exclusive control of the NFL Sunday Ticket --- has made the same argument for the past seven years; RCN has echoed this argument for just as long and ever since its first filing in the Commission’s video competition proceedings; BSPA also joined the chorus on its first filing in a video competition proceeding [in 2002]. Constant repetition, however, adds no force to this bankrupt argument.” Comcast Reply Comments, filed in MB Docket No. 03-172, at 13-14 (Sept. 26, 2003) (citations omitted) (“*2003 Comcast Reply Comments*”). In the two years since those reply comments were filed, nothing has changed with respect to “terrestrial migration”; not one new example of migrated programming has been found.

<sup>93</sup> BellSouth Comments at 14 (“[C]lustering facilitates expanded linkage of cable television systems via fiber, which in turn provides cable programmers with unprecedented opportunities to evade their program access obligations by migrating programming from satellite to fiber delivery.”); Qwest Comments at 24 (“[Congress should] amend the federal program access statute so that the full protections of the law applies equally to all CATV programming, regardless of whether it is satellite-delivered or vertically integrated . . . .”); SBC Comments at 3 (“As the Commission is aware, this problem is particularly acute where incumbent cable operators refuse to provide such programming to their competitors on nondiscriminatory terms and conditions, or can negotiate exclusive contracts, simply because the programming can be transmitted to them without using a satellite.”); USTA Comments at 17 (“Increasingly, however, the program access rules are likely to be circumvented by technology as terrestrial distribution of video signals is increasingly common.”); Verizon Comments at 31 (alleging that “[w]ithout access to much terrestrially delivered programming . . . new entrants are at a serious disadvantage when competing against incumbent cable companies” and referencing the CSN situation in Philadelphia as an example).

business consideration.<sup>94</sup> The D.C. Circuit upheld the Commission.<sup>95</sup> The two national DBS providers, to which CSN Philadelphia has chosen not to offer carriage rights,<sup>96</sup> fail to provide any evidence that the lack of such carriage has prevented them from competing successfully; indeed, the subscribership statistics they recently reported clearly demonstrate otherwise.<sup>97</sup> To be sure, DBS penetration varies from market to market based on a variety of factors, including the intensity of marketing and advertising, the range, quality, and pricing of competing services, the presence of high-rise buildings, and others. Given that DBS penetration in Philadelphia (9.45%) is comparable to that in other cities including Boston (9.76%) and New Orleans (9.82%), and is ahead of others including Providence-New Bedford (9.18%) and Hartford (8.3%),<sup>98</sup> this would be an excellent time for the DBS providers to drop their years-long campaign to turn a molehill into a mountain.

Commenters provide no other examples of programming networks that they claim were “migrated” to terrestrial delivery. All of their arguments are based on the

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<sup>94</sup> *In re DIRECTV, Inc. v. Comcast Corp.*, Memorandum Opinion & Order, 13 FCC Rcd. 21,822 ¶ 29 (1998); *In re EchoStar Communications Corp. v. Comcast Corp.*, Memorandum Opinion & Order, 14 FCC Rcd. 2089 ¶ 25 (1999).

<sup>95</sup> *See EchoStar Communications Corp. v. F.C.C.*, 292 F.3d 749 (D.C. Cir. 2002).

<sup>96</sup> Contrary to what its comments imply, RCN has carried CSN Philadelphia without interruption since the network signed on in October 1997. RCN has always been offered the same terms and conditions as all other affiliates, despite the fact that CSN Philadelphia is not required to offer RCN any terms for carriage. After 18 months of refusing to sign a contract, RCN subsequently signed a new 5-year affiliation agreement with CSN -- on the same terms as every other affiliate. It is truly unfortunate that RCN repeats the same misstatements over and over again, and that Comcast must correct the record over and over again.

<sup>97</sup> *See* Press Release, DIRECTV Group, Inc., *The DIRECTV Group Announces Second Quarter 2005 Results* (Aug. 4, 2005) (reporting 14.67 million subscribers as of June 30, 2005), available at <http://phx.corporate-ir.net/phoenix.zhtml?c=127160&p=irol-newsArticle&ID=739619&highlight=>; Press Release, EchoStar Communications Corp., *EchoStar Reports Second Quarter 2005 Financial Results* (Aug. 9, 2005) (reporting 11.46 million subscribers as of June 30, 2005), available at [http://www.corporate-ir.net/ireve/ir\\_site.zhtml?ticker=dish&script=410&layout=-6&item\\_id=741012](http://www.corporate-ir.net/ireve/ir_site.zhtml?ticker=dish&script=410&layout=-6&item_id=741012).

<sup>98</sup> Media Bus. Corp., *DataBRIDGE: DBS vs Digital Cable by DMA* (2005).

hypothetical migration of unspecified networks. But marketplace evidence shows just the opposite. When Comcast launched its newest SportsNet networks, including Comcast SportsNet West and Comcast SportsNet Chicago, it chose satellite delivery, and (as with Comcast SportsNet Mid-Atlantic) these networks are available to and are carried by DIRECTV and EchoStar.<sup>99</sup> In short, claims of “terrestrial migration” are a fairytale that is getting hoarier with each retelling. The Commission should give these claims no credence.<sup>100</sup>

**Access to Programming.** RCN complains that it has “experienced a host of difficulties in accessing” programming, including having its request for pricing “unanswered for weeks,” having its carriage of children’s VOD programming from PBS and Comcast’s PBS KIDS Sprout network conditioned on carriage of the corresponding PBS KIDS Sprout linear channel, and having to invest in licensing and equipment necessary to receive the programming.<sup>101</sup> Of course, these are no different than the terms that were asked of every MVPD, whether or not affiliated with PBS KIDS Sprout. RCN does not explain why it should receive preferential treatment for carriage as compared to any other MVPD, nor does it explain why the Commission should interfere in normal, everyday business negotiations.

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<sup>99</sup> See DIRECTV, *DIRECTV Channel Lineup and Package Comparison*, at [http://www.directv.com/DTVAPP/learn/Packages\\_Comparison.dsp](http://www.directv.com/DTVAPP/learn/Packages_Comparison.dsp) (last visited Sept. 29, 2005); EchoStar Satellite LLC, *Basic Packages: Sports*, at [http://www.dishnetwork.com/content/programming/packages/sports/multi\\_sport/index.asp?viewby=1&packid=10161&sortby=1](http://www.dishnetwork.com/content/programming/packages/sports/multi_sport/index.asp?viewby=1&packid=10161&sortby=1) (last visited Sept. 29, 2005).

<sup>100</sup> “Despite all the overwrought comments and hand-wringing, the salient facts are these: one, Congress deliberately chose not to extend the prohibition on exclusive contracts for vertically integrated programming to programming that is delivered terrestrially; and two, not one commenter has produced a shred of evidence that any video programming network has ever been ‘migrated’ from satellite to terrestrial delivery for the purpose of ‘evading’ the program access rules. . . . Thus, as the Commission repeatedly has determined: it is unnecessary and inappropriate to expand the program access rules to include terrestrially-delivered programming.” *2003 Comcast Reply Comments* at 14.

<sup>101</sup> RCN Comments at 11.

The ILECs complain that an inability to access programming is a barrier to entry, although they do not cite a single example of programming to which they have been denied access.<sup>102</sup> EchoStar encourages the Commission to “use its conditioning authority to prevent undue discrimination . . . by large unaffiliated programmers” and to “gather information about [cable operator carriage contracts with unaffiliated programmers] and make a report to Congress, including a recommendation that the program access rules extend to unaffiliated programmers.”<sup>103</sup> Several of the ILECs also encourage the Commission to extend the program access rules to unaffiliated programming.<sup>104</sup>

There is no factual, legal, or economic basis for more regulation or more reports. The ILECs can do no more than hypothesize about being denied access to programming. In fact, based on Verizon’s success in negotiating carriage contracts with numerous programmers, it appears that ILECs’ concerns about access to programming are completely unfounded.<sup>105</sup> The Commission should reject calls to provide a “fix” for problems that do not exist and to intervene in private negotiations between programmers and distributors.

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<sup>102</sup> See SBC Comments at 20 (“SBC is currently in the midst of negotiations -- and hopes it will be able to enter into commercial arrangements -- for access to programming. However, a substantial impediment to the development of video competition is the ability and incentive of the cable incumbents to restrict or deny access to such programming to new entrants[.]”); see also BellSouth Comments at 12-16; Qwest Comments at 19-24; USTA Comments at 16-17; Verizon Comments at 29-35.

<sup>103</sup> EchoStar Comments at 7-8.

<sup>104</sup> BellSouth Comments at 15 (claiming that “the statute’s vertical integration requirement has become outdated and no longer serves its original objective of ensuring that cable’s competitors are afforded nondiscriminatory access to programming” and urging the Commission to extend program access rules to nonvertically integrated programmers); cf. Qwest Comments at 24 (urging the Commission to “[a]sk Congress to amend the federal program access statute so that the full protections of the law applies equally to *all* CATV programming, regardless of whether it is satellite-delivered or vertically integrated”).

<sup>105</sup> See Comcast Comments at 19 (highlighting Verizon’s carriage contracts); discussion *supra* Section I (describing Verizon’s most recent carriage contracts).

With respect to proposals to extend program access rules to unaffiliated programming,<sup>106</sup> as EchoStar correctly notes, “[t]he program access rules *clearly* reach only programmers in which a cable operator has an attributable interest.”<sup>107</sup> There is no evidence that unaffiliated programmers are engaging in conduct that is anticompetitive or otherwise against public policy. In fact, such proposals simply seek to shift the distribution of profits from programmers to distributors, which would only exacerbate problems of funding for additional networks.<sup>108</sup>

**Rates, Terms, and Conditions of Carriage.** Several commenters continue to urge the Commission to take an active role in establishing the rates, terms, and conditions for carriage of programming. Cincinnati Bell acknowledges that, “while *access* to programming is not an issue for Cincinnati Bell at this time, Cincinnati Bell uses this opportunity to inform the Commission that the *cost* of such programming may serve as a barrier to entry into the video market.”<sup>109</sup> Cincinnati Bell also expresses concerns about its ability to negotiate “reasonable channel carriage and program tiering flexibility.”<sup>110</sup> BellSouth renews criticism of Congress’s decision to permit programmers to offer volume discounts to their largest customers, just as vendors (including BellSouth) do in

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<sup>106</sup> See EchoStar Comments at 7-8; BellSouth Comments at 15.

<sup>107</sup> EchoStar Comments at 7 (emphasis in original).

<sup>108</sup> See Comcast Reply Comments, filed in MB Docket No. 92-264, Exhibit 1, at 5, 7-8 (Sept. 23, 2005) (“*Comcast Ownership Reply Comments*”) (attaching an economic analysis by Janusz A. Ordover and Richard Higgins that discusses the likely effects of reallocating the distribution of profits between programmers and distributors). As long as DIRECTV continues to maintain exclusive access to unaffiliated programming provided in the NFL SUNDAY TICKET, it becomes difficult to understand why any cable programming remains subject to the exclusivity prohibition, which was originally scheduled to sunset in October 2002. See 47 U.S.C. § 548(c)(5).

<sup>109</sup> Cincinnati Bell Comments at 10 (emphasis in original).

<sup>110</sup> *Id.*

all kinds of competitive markets.<sup>111</sup> CenturyTel encourages the Commission to extend illegally the provisions of Section 628 to permit any distributor of video programming, regardless of its size, to “opt in” to the rates, terms, and conditions of any carriage contract negotiated by a cable operator.<sup>112</sup> And where a programmer clearly is not discriminating and charges every distributor the same price, Verizon, DIRECTV, and EchoStar urge the Commission to adopt a novel theory to program access and find violations of the program access rules where the nondiscriminatory rate has a “disparate impact” on one distributor compared to others.<sup>113</sup>

As an initial matter, consider the source. The ILECs, and particularly the Bell companies, have suddenly developed an affection for detailed, intrusive, wholesale regulation of the kind they have spent over a decade fighting off. Having killed the wholesale regime Congress *authorized* for telephone service, the ILECs now demand that the Commission create a regime of wholesale regulation that Congress has *not* authorized.<sup>114</sup>

The essence of many of these complaints is that these commenters want the Commission to mandate terms of carriage on their behalf so that they need not negotiate with programmers in the marketplace. Instead of following the same marketplace

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<sup>111</sup> See BellSouth Comments at 14.

<sup>112</sup> See CenturyTel Comments at 11-12.

<sup>113</sup> See EchoStar Comments at 5-6; Verizon Comments at 33-34. These commenters cite pending program access complaints alleging that iN DEMAND is discriminating against DBS operators by charging all MVPDs the same per-digital-subscriber rate for its INHD services. iN DEMAND has fully answered these allegations and the novel disparate impact theory, and the Commission continues to review the case.

<sup>114</sup> Congress chose to establish a detailed regime of wholesale regulation of telephone service in Sections 251 and 252 of the Communications Act. The ILECs have been enormously successful, by any measure, in undercutting, evading, obstructing, and ultimately eviscerating that regime.

processes that every other MVPD does, whether it be a cable operator, DBS provider, overbuilder, or any other distributor, they would rather have the government interject itself into the negotiating process. That is not how a free marketplace works.

Government interference in the video marketplace has consistently led to marketplace distortions.<sup>115</sup> Greater Commission involvement in setting the rates, terms, and conditions for carriage of programming would have similarly adverse consequences, and would be inconsistent with the Congressional admonition to “rely on the marketplace, to the maximum extent feasible.”<sup>116</sup>

Commenters’ complaints about volume discounts are misplaced. Volume discounts are common throughout the economy, and are expressly authorized in the video programming marketplace by both Congress and the Commission.<sup>117</sup> There is little doubt that the ILECs are the beneficiaries of volume discounts on everything from electronic switching equipment and fiber optic cable to the rates they are charged for capital and office supplies -- discounts not available to their smaller competitors.<sup>118</sup> As they build volume in their video business, they will similarly be entitled to discounts.

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<sup>115</sup> For example, government regulation of cable operators’ enhanced basic tier had the effect of depressing investment in the development of new programming since the rates that could be charged for such programming were severely restricted and did not offer sufficient incentives for investment. *See* Comcast Comments, filed in MB Docket No. 04-207, at 11-15 (July 15, 2004).

<sup>116</sup> Cable Television Consumer Protection and Competition Act of 1992, Pub.L.No. 102-385, § 2(b), 106 Stat. 1460 (1992).

<sup>117</sup> Section 628(c)(2)(B)(iii) provides that a vertically integrated programmer “shall not be prohibited from . . . establishing different prices, terms, and conditions which take into account economies of scale, cost savings, or other direct and legitimate economic benefits reasonably attributable to the number of subscribers served by the distributor.” 47 U.S.C. § 548(c)(2)(B)(iii); *see* 47 C.F.R. § 76.1002(b)(3).

<sup>118</sup> In addition to volume discounts from suppliers, the ILECs receive more substantial subsidies from the government in the form of Universal Service support. These subsidies are not available to cable operators or their customers even in the same exact areas where ILECs receive such subsidies.

**C. The America Channel’s Comments Do Not Provide a Realistic Picture of the Video Marketplace.**

TAC, which claims to be “a new non-fiction network,”<sup>119</sup> asserts that the Commission’s prior reports have erroneously and inadequately presented a limited view of the status of competition in the video marketplace. More specifically, TAC claims that the Commission’s prior reports have failed to account for how different programming networks are distributed, whether the networks are “affiliated” as TAC defines that term, the number of subscribers that can access the programming, or whether the networks are growing.<sup>120</sup> In addition, TAC claims that an “analysis” of programming license fees for various “affiliated” and “independent” programming networks “suggests that a network’s affiliation with an MVPD or broadcaster dramatically impacts its ability to extract fees from operators.”<sup>121</sup> TAC’s claims and analysis are significantly flawed, and are not based on marketplace facts.

- **Definition of “Affiliated.”** Throughout its comments, TAC constantly refers to “affiliated networks” and “independent networks” and claims that the former are more likely to be carried on cable systems than the latter. TAC, however, defines an “affiliated network” as a programming network that is affiliated with *any* media company, be it a cable operator, DBS provider, or broadcaster.<sup>122</sup> In addition, TAC asserts that the Commission erroneously includes as independent networks “[s]everal ‘part time networks’ which show only a few hours of programming per week,” “VH1 MegaHits and VH Uno which are both owned by Viacom, and SiTV and Oxygen which are each partially owned by Time Warner,” and “15 international networks for which Comcast serves as the domestic

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<sup>119</sup> TAC Comments at 2. Ironically, TAC relies heavily on fiction when it comes to its representations to the Commission. For example, TAC’s characterization of itself as an existing 24/7 linear network, *id.*, is simply false. As Comcast has explained previously, *see, e.g., Comcast Ownership Reply Comments* at 7, TAC is at most a would-be programmer. Although TAC has some programming ideas, to the best of Comcast’s knowledge (and TAC has yet to provide evidence to the contrary), TAC has yet to produce a single hour of video programming, let alone enough programming to sustain an entire network.

<sup>120</sup> *See* TAC Comments at 7-8.

<sup>121</sup> *Id.* at 10.

<sup>122</sup> *See id. passim.*

marketing and affiliate sales arm.”<sup>123</sup>

TAC blithely ignores that Congress and the Commission have focused on the affiliation by ownership between a network and a *cable operator* because of the possibility of favoritism in such situations. TAC essentially asks Congress and the Commission to revise their definition of what is an affiliated network to include networks owned by any media company or networks that “have a financial relationship with an MVPD which appears to be based on securing carriage,”<sup>124</sup> which, if read literally, is *every* programming network an MVPD carries. Congress did not intend for every business relationship between a cable operator and a programmer to constitute an affiliation; it intentionally limited its rules to affiliation based on cable system ownership of an attributable stake in a programmer (and not to networks that cable operators may assist in marketing and affiliate sales). Cable operators have no incentive to favor a DBS-affiliated network or a broadcaster-affiliated network over an “independent” network; in fact, contrary to the rationale underlying the current rules, cable operators have no incentive to favor other cable operators’ affiliated networks over any other network. Nor do cable operators have an incentive to favor (over “independent” networks) programmers with which they have business relationships negotiated at arm’s length where there is no ownership interest.

- **Alleged Likelihood of Carriage Based on Affiliation.** TAC alleges that its “own empirical research” and the Government Accountability Office (“GAO”) have proven that “independent” programming networks are not as likely to be carried as “affiliated” programming networks.<sup>125</sup> As an initial matter, the “GAO report” cited by TAC is not the work of the GAO, but rather the personal views of two researchers who work for GAO -- the very first footnote of that report makes the distinction explicitly clear.<sup>126</sup> Moreover, TAC’s conclusions about carriage decisions imply malfeasance and collusion whereas the more likely explanation for carriage decisions is simply demand, or lack thereof. TAC refuses to acknowledge that cable operators and other MVPDs choose to carry the programming networks that they believe consumers demand, even as other independent programmers do acknowledge these facts.<sup>127</sup> The fact is that Comcast and other MVPDs consider numerous factors in making carriage decisions, including the content and theme of the network, the necessity or

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<sup>123</sup> See *id.* at 8-9.

<sup>124</sup> *Id.* at 9.

<sup>125</sup> *Id.* at 5-6.

<sup>126</sup> See Michael E. Clements & Amy D. Abramowitz, *Ownership Affiliation and the Programming Decisions of Cable Operators* 1 n.1 (2004) (“The opinions expressed in this paper are solely those of the authors and do not necessarily represent the positions of the U.S. Government Accountability Office.”).

<sup>127</sup> See C. Michael Cooley, *How I Started a Network -- Without Comcast*, Multichannel News, Oct. 3, 2005, available at <http://www.multichannel.com/article/CA6262211.html>.

desirability of its presentation as a linear network, the financing of the network, the experience and proven capability of the management team to effectuate the vision, the distribution secured by the network elsewhere, and the fees and terms of carriage.<sup>128</sup> It is apparently the view of almost every MVPD in the marketplace that TAC has not demonstrated that it meets these criteria.<sup>129</sup> In contrast, the programming networks that have earned carriage, both “affiliated” and “independent,” have established that there is audience demand and shown themselves capable of meeting that demand. It bears emphasis that every MVPD carries much more unaffiliated programming than affiliated programming (when those terms are used correctly). Comcast, for example, has ownership interests in less than 10% of the networks it carries.<sup>130</sup>

- **Categorization of Programming Networks.** TAC criticizes the Commission for failing to distinguish between (i) programming networks that are distributed by VOD or on a part-time basis and (ii) 24/7 linear networks.<sup>131</sup> TAC claims “[i]t is apples and oranges to compare a linear network that is in 85 million homes, with a VOD product or a part-time network, both of which occupy vastly inferior capacity from a commercial perspective and do not compete directly with linear networks for carriage.”<sup>132</sup> Although it is clear that there are distinctions between carriage on a 24/7 basis and carriage on VOD or a part-time basis, such distinctions do not diminish the fact that there is vibrant competition for carriage and limited channel capacity. Nor do they indicate that the Commission has erred in the twelve years it has been conducting this inquiry. Quality is the name of the content game.<sup>133</sup> Business models for program producers vary greatly, and simply because TAC fancies itself a 24/7 programming network, even absent the

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<sup>128</sup> It is important to note that not all producers are equal in terms of the likelihood of creating successful programming. Certain producers have a solid track record of producing programming that consumers consistently demand. Not every good idea translates into a viable program or programming network.

<sup>129</sup> See *Comcast Ownership Reply Comments* at 7. For example, TAC has yet to produce a single hour of programming for MVPDs to review, has virtually no in-house programming expertise, has no reliable source of funding, and has been denied carriage by virtually every other MVPD in the marketplace.

<sup>130</sup> Comcast Comments, filed in MB Docket No. 92-264, at 41 & Exhibit (Aug. 8, 2005).

<sup>131</sup> See TAC Comments at 6-8.

<sup>132</sup> *Id.* at 8.

<sup>133</sup> For example, My Pet TV, which is in alliance with the Humane Society of America and has provided 8-hours per day of programming targeted to pet owners since 1996, has succeeded in securing a place on the dial for its programming by offering unique and creative content. And, programming networks such as HereTV! have obtained VOD carriage in an effort to build demand for their product. See Comcast Comments at 51.

necessary programming, does not mean that it competes any more vigorously than other programming networks for carriage.<sup>134</sup>

- **Carriage by Comcast or Time Warner.** For the third time in three months, TAC reasserts that the only way a network can succeed in the marketplace is to secure carriage by Comcast or Time Warner.<sup>135</sup> Comcast has refuted this conclusion twice already, most recently explaining that:

TAC provides no evidence whatsoever for the proposition that a decision by Comcast or Time Warner in effect controls the decisions of all the other MVPDs, including DIRECTV and EchoStar, which collectively serve over 26 million subscribers. A better explanation for TAC's "evidence" is that the programming networks that have reached 25 million subscribers produced programming that many MVPDs, including Comcast and/or Time Warner, consider valuable to consumers.<sup>136</sup>

TAC has yet to submit any new evidence to support its theory or explain why Comcast's analysis is flawed.

In any event, marketplace evidence shows that a programmer is not reliant on Comcast to launch successfully.<sup>137</sup> There are numerous examples of programming services that obtained most of their initial carriage on DBS.<sup>138</sup> In addition, The Sportsman Channel ("TSC") successfully launched without any carriage agreements, secured its first carriage agreement with the National Cable Television Cooperative, and signed agreements with 18 other cable operators

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<sup>134</sup> Of particular note, TAC does not include a category for itself, *i.e.*, a would-be programming network without any programming.

<sup>135</sup> See TAC Comments at 13; TAC Comments, filed in MB Docket No. 92-264, at 28-30 (Aug. 8, 2005); TAC Petition to Deny, filed in MB Docket No. 05-192, at 45-47 (July 21, 2005).

<sup>136</sup> *Comcast Ownership Reply Comments* at 6-7 (footnotes omitted).

<sup>137</sup> TAC has yet to explain why programming networks are reliant on carriage by Time Warner but not DIRECTV or EchoStar, even though both DBS providers have more subscribers than Time Warner.

<sup>138</sup> *Comcast Ownership Reply Comments* at 7 & n.21 (listing BBC America, CNBC World, Bloomberg Television, ESPNU, Classic Sports/ESPN Classic, Go!TV, DIY, Boomerang, The Independent Film Channel, and NFL Network as examples of networks that obtained most of their initial carriage on DBS). Other networks were also launched without considerable carriage agreements in place with incumbents, yet achieved a level of distribution they needed to remain viable. See, e.g., Mike Reynolds, *Fox Reality Gets Original*, Multichannel News, June 6, 2005, at 55 (stating that Fox Reality "counted some 14.4 million DIRECTV Inc. subscribers and about 600,000 Insight Communications Corp. customers at launch"); Allison Romano, *Hallmark Gets Serious; Relunched Cable Net Pays \$11 Per Sub for DirecTV Carriage*; Broad. & Cable, Aug. 27, 2001, at 11 (explaining that Hallmark obtained carriage from DIRECTV, but "still need[ed] widespread carriage on Cablevision, Comcast and Cox, systems on which it has little or no distribution."); Linda Moss, *Soap Nets' Cliffhanger: Who'll Carry Them?*, Multichannel News, Jan. 17, 2000, at 10 (noting that "SoapNet, part of Disney/ABC Cable Networks, [had] a carriage deal with DIRECTV Inc. as part of retransmission-consent pacts for ABC-owned TV stations").

prior to obtaining carriage from Comcast.<sup>139</sup> As TSC's president and CEO explains: "We are living proof that channels can survive without Comcast, contrary to the belief of many. TSC has been around for over two years and our channel, which is dedicated exclusively to hunting and fishing programming, is not just surviving, but flourishing."<sup>140</sup>

- **License Fees.** TAC claims that its analysis shows that the average license fees of "affiliated" programming networks are higher than the average license fees of "independent" networks.<sup>141</sup> TAC's analysis is flawed. First, although TAC criticizes the Commission for failing to "categorize" national programming networks and, instead, listing all national programming networks as though they are comparable and interchangeable with one another,<sup>142</sup> TAC *does the exact same thing in its "analysis" of license fees.* Ignoring the license fee differences that are attributable to variations in programming networks' content, distribution, tier placement, audience demand, etc., TAC lumps all "affiliated" programming networks together and does the same with "independent" programming networks.<sup>143</sup> Thus, TAC is comparing apples, oranges, watermelons, kumquats, and about 300 other fruits to each other and claiming they all are supposed to taste the same.

Second, TAC ignores the fact that every programming network has the incentive to charge MVPDs as high a license fee as the network can obtain and every MVPD has the incentive to minimize the license fees it must pay to programming networks. The programming networks that TAC considers "affiliated" are the programming networks that consumers demand and that are able to command higher license fees because of their quality. They also tend to be the programming networks that are most attractive to investors and other companies, which is likely why they have come to be affiliated with a media company.<sup>144</sup>

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<sup>139</sup> See Cooley, *supra* note 127. C. Michael Cooley, President and CEO of The Sportsman Channel, explains that while "[s]ecuring carriage is the key, . . . there is a formula: Provide a superior quality channel with lower subscriber fees that draws subscribers. Our team focuses on quality customer service and first-class marketing tactics to our affiliates, for an 'If you can prove yourself, they will come' approach." *Id.*

<sup>140</sup> *Id.*; see also Joel Brown, *Outdoor Cable Networks Find Their Own Space*, *Broad. & Cable*, Oct. 10, 2005 (noting that The Outdoor Channel is profitable with carriage to 25.6 million homes), available at <http://www.broadcastingcable.com/article/CA6265579.html>.

<sup>141</sup> See TAC Comments at 10-12, Ex. A.

<sup>142</sup> See *id.* at 6-8.

<sup>143</sup> TAC's own analysis acknowledges the shortcomings of its methodology. TAC singles out ESPN as a programming network that deserves a category of its own for examining licensing fees. Yet TAC's analysis stops at ESPN and assumes that all other programming is comparable.

<sup>144</sup> Certain of the successful networks that TAC labels as "affiliated" because of their ownership by a media company achieved success first and "affiliation" second. BET, launched as an independent network in 1980 and acquired by Viacom in 2000, is a typical example. See Black Entertainment Television, Inc.,

Finally, TAC implies that there is a link between the number of subscribers a cable operator serves and the amount its affiliated programmers charge in license fees, but its own “analysis” fails to substantiate the asserted linkage.<sup>145</sup> TAC claims that Time Warner’s affiliated programming collects license fees that are “341% greater than the average 2005 license fee for independent networks,”<sup>146</sup> while Comcast’s affiliated networks collect license fees that are “121% greater than the average 2005 license fee for independent networks.”<sup>147</sup> Given that Comcast has nearly twice as many cable subscribers as Time Warner, TAC’s logic would support that Comcast, not Time Warner, should command the higher fees.

In TAC’s imaginary world, all content is equal (consumers supposedly value The America Channel as much as they value TBS, Discovery, or Disney); MVPDs are supposed to ignore differences in network financing, management, and programming expertise when choosing which networks to carry; MVPDs are willing to pay more for a network simply because the network is affiliated with another media company; MVPDs are willing to charge their customers more in order to pay higher license fees to a network affiliated with another media company; and TAC knows what is better for consumers than consumers do. In short, TAC is oblivious to the realities of the video marketplace. It could not be more clear that TAC’s inability to succeed in the marketplace is attributable entirely to its own failed business plan, and no amount of vitriol toward cable operators will change that.

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*Archives: BET Corporate, BET.com Robert L. Johnson, Founder, at*  
[http://www.bet.com/BETCorporate/Archives/BET.com+-+Robert+L.+Johnson\\_+Founder+46.htm](http://www.bet.com/BETCorporate/Archives/BET.com+-+Robert+L.+Johnson_+Founder+46.htm).

<sup>145</sup> TAC Comments at 10 (“Considering that the large majority of widely distributed networks are linked to MVPDs or broadcasters, and that the largest MSOs with the most control over network survival continue to favor affiliated networks over independent networks, the effect is dramatic and may be leading to rising cable rates.”).

<sup>146</sup> *Id.* at 11 (emphasis omitted).

<sup>147</sup> *Id.*

**D. The Commission Should Reject Calls To Devalue the Importance of DBS Competition.**

Certain overbuilders persist in claiming that DBS competition is not meaningful and that only competition from wireline-based competitors really counts.<sup>148</sup> But now ILECs are jumping on the bandwagon to urge the Commission to give them regulatory concessions (concessions that even overbuilders did not receive) as a “necessary” incentive for them to enter the marketplace.<sup>149</sup> As Comcast explained last year,<sup>150</sup> and the marketplace evidence over the past year makes even clearer,<sup>151</sup> a decade of history convincingly proves that DBS provides meaningful competition to cable.<sup>152</sup> One need look no further than the Commission’s chronology of DBS competition, DBS providers’ own accounts, and cable operators’ competitive responses to see the dramatic effects DBS has had on competition in the video marketplace.

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<sup>148</sup> See BSPA Comments at 8-12; RCN Comments at 3-5.

<sup>149</sup> See SBC Comments at 2, 3, 5; Verizon Comments at 1-2; Qwest Comments at 4-7; USTA Comments at 7-8; BellSouth Comments at 4 n.9. SBC speaks of the “limited inroads” that competitors have made in the video marketplace. SBC Comments at 3-7. However, there is *vastly* more competition in the video marketplace than in telephony. In terms of the availability of facilities-based competitors, video offers a minimum of three choices in virtually every community, while it remains extremely rare to have a facilities-based alternative for telephone service. In terms of customers who have actually chosen providers other than the incumbent, there are 26 million DBS households out of 93.5 million MVPD homes, or 27.8% (and this figure does not account for customers who have opted for MVPD competitors other than the two DBS providers). See Comcast Comments at 6. In contrast, in terms of switched access telephone lines, CLECs serve 19.8 million out of 132.1 million wired switched access lines for residential and small business customers, or approximately 15.0%. See Press Release, FCC, *FCC Releases Data On Local Telephone Competition* (July 8, 2005) at Table 2, available at [http://www.fcc.gov/Bureaus/Common\\_Carrier/Reports/FCC-State\\_Link/IAD/lcom0705.pdf](http://www.fcc.gov/Bureaus/Common_Carrier/Reports/FCC-State_Link/IAD/lcom0705.pdf). Plus, it is likely that most of those competitive access lines are supplied to businesses, not residences. In any event, the lion’s share of all CLEC-switched access lines are provided using resale of ILEC services (16.5%) or ILEC-supplied loops (57.7%), in which case the ILECs continue to be paid, rather than by CLEC-owned facilities (25.9%). See *id.* at Table 3.

<sup>150</sup> See Comcast Reply Comments, filed in MB Docket No. 04-227, at 12-17 (Aug. 25, 2004) (“*Comcast 2004 Reply*”).

<sup>151</sup> See *supra* notes 5-6, 36-41, and accompanying text; Comcast Comments at 5-11; NCTA Comments at 6-9; DIRECTV Comments at 3-4, 9-10.

<sup>152</sup> As noted in Comcast’s comments, the Commission itself has found that “DBS operators are the most robust competitors to incumbent cable operators.” Comcast Comments at 6 (quoting *Notice* ¶ 43).

The Commission has long recognized that DBS provides meaningful MVPD competition.<sup>153</sup> The Commission recently reported that DBS providers serve approximately 25% of all MVPD subscribers and explained that

[s]everal reasons account for DBS' continued subscriber growth, including offers of free set-top box equipment, increased availability of local broadcast stations, and an increase in niche programming, such as EchoStar's Armenian, Urdu, Tagalog, and Portuguese-language channels, and DIRECTV's CricketTicket sports network, and Hindi, Vietnamese, and Tamil-language channels.<sup>154</sup>

Thus, it is no surprise that Commissioner Adelstein has referred to DBS as “one of the great success stories of the FCC in terms of providing competition.”<sup>155</sup> Or that the Commission recently noted “DBS, which was first authorized by the Commission in 1988, and took until 1993 to begin offering MVPD services, has become the most significant national competitor to cable. Today, most consumers have the additional choice of at least two national DBS providers.”<sup>156</sup>

The DBS companies themselves refute the argument that they do not provide meaningful competition.<sup>157</sup> As DIRECTV explains, “DBS service is the primary

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<sup>153</sup> *In re Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Second Annual Report, 11 FCC Rcd. 2060 ¶ 49 (1995) (reporting that DBS subscribership increased rapidly during 1995, growing “from approximately 600,000 to about 1.7 million households” and that “the availability of DBS service expanded from 23 states to all 48 contiguous states and Alaska”). The Commission also noted several DBS service launches were expected, including a DBS service from EchoStar. *See id.* ¶ 52.

<sup>154</sup> *In re Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Eleventh Annual Report, 20 FCC Rcd. 2755 ¶ 54 (2005) (also noting that DBS operators continue to rank high in customer satisfaction surveys).

<sup>155</sup> Comcast Comments at 6 n.11 (quoting Adrienne Kroepsch, *FCC Wants DBS and Satellite Radio To Compete with Terrestrials, Others*, Communications Daily, June 2, 2005, at 3).

<sup>156</sup> *In re Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Tenth Annual Report, 19 FCC Rcd. 1606 ¶ 5 (2004) (“*Tenth Annual Report*”).

<sup>157</sup> In its filing last year, the Satellite Broadcasting and Communications Association (“SBCA”) confirmed the point that DBS provides enormous competitive pressure on cable operators: “DBS offers subscribers high quality, competitive pricing, superior customer service, and a growing product line of advanced digital services and an expanding channel line-up (including local broadcast signals to more consumers and high-definition programming).” SBCA Comments, filed in MB Docket No. 04-227, at 8 (July 23, 2004). With respect to claims that DBS providers do not provide effective price competition,

competitor to cable services” and such competition has “clearly resulted in more choices for American viewers.”<sup>158</sup> EchoStar’s CEO, Charlie Ergen, has also acknowledged cable operators’ various customer retention efforts, including dish buyback programs.<sup>159</sup>

Marketplace evidence of cable operators’ competitive responses further demonstrates the effects of DBS on competition even more clearly. Every cable company faces fierce competition from DBS providers in every market. In its initial comments, Comcast submitted extensive evidence of its responses to competition, including its investment in its systems and programming, innovation, customer service efforts, and community involvement.<sup>160</sup> The majority of these competitive responses have taken place in areas where there is no wireline competition; thus, the catalyst for Comcast’s competitive response in these markets was clearly DBS competition.<sup>161</sup>

Whether the competitive threat is from outer space (DBS), cyberspace (the Internet), in the air (broadcasters and wireless cable), or on the ground (overbuilders and ILECs),

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SBCA noted that 22% of the DBS subscribers polled in a Taylor Group study said they “chose DBS based on price.” *Id.* at 9.

<sup>158</sup> DIRECTV Comments at 10-11. In comments filed last year, DIRECTV further explained: “In the decade since DIRECTV first began operations, cable operators have found themselves offering more digital programming, improving the quality of their cable plant, revamping their customer service offerings, and otherwise improving their product. As DIRECTV continues to implement [its] latest round of advances, cable operators will have to either try to match DIRECTV’s innovations or lose customers in the marketplace. All this is patently to the benefit of the American viewer.” DIRECTV Comments, filed in MB Docket No. 04-277, at 3-4 (July 23, 2004).

<sup>159</sup> See Mike Farrell, *Stealing Subs*, Multichannel News, Aug. 16, 2004, available at <http://www.multichannel.com/article/CA445132?display>. EchoStar’s CEO also stated that the “consumer is voting with their [sic] pocketbook and saying they prefer satellite,” *id.*, thereby suggesting that he does not believe the assertion made in EchoStar’s Comments that, “[c]able competitors still do not discipline cable prices regardless of whether these competitors are experiencing healthy growth.” EchoStar Comments at 2.

<sup>160</sup> See Comcast Comments at 42-58.

<sup>161</sup> It is not just the 26 million households that already subscribe to DBS that provide market discipline; it is also the potential for millions of additional customers to switch, on a moment’s notice, in response to attractive incentives and with virtually no up-front cost. As Comcast explained last year, “[w]inning back lost customers is difficult and expensive, so every cable company understands the importance of keeping customers satisfied and loyal.” *Comcast 2004 Reply* at 15.

Comcast will continue to respond to competition in all of its markets by offering better products, better value, and better service.

Commenters arguing that DBS does not provide meaningful competition rely largely on a report by GAO, which purported to evaluate the effect of wireline overbuilders on the prices for cable services.<sup>162</sup> As Comcast explained in comments submitted last year, the report's analysis has important deficiencies.<sup>163</sup> A few key facts should be noted:

- The report is based on an extremely small sample; it examined only six “matched pairs” of markets that were hypothesized to be comparable in every way except for the presence of an overbuilder in one of every two paired cities.
- The study overweights small markets, which tend to have larger estimated competitive differentials.<sup>164</sup>
- The report may also overweight markets with low DBS penetration since four of the six markets with an overbuilder had DBS penetration well below the national average.<sup>165</sup>
- The report fails to calculate quality-adjusted prices but merely compares the nominal prices for packages of services, ignoring potentially significant differences in the number or nature of channels in the package.
- No effort was made to determine whether the service prices observed in overbuilt markets are sustainable.
- There is no indication that GAO took into account, among other things: (1) whether the overbuilder competes in the entire franchise area or only in selected neighborhoods (meaning the “benefits” of price competition are limited to the most demographically attractive neighborhoods); (2) how long the overbuilder has been in business, and whether this price differential has persisted for a lengthy period of time; (3) whether the overbuilder is a private entity or one established by local government (leading to explicit or implicit government subsidies); or (4) whether the overbuilder, the cable operator, or both have rebuilt their systems (in fact, GAO seems to find that the presence of an overbuilder does not affect overall quality improvements).

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<sup>162</sup> See Gen. Accounting Office, *Telecommunications: Wire-Based Competition Benefited Consumers in Selected Markets*, GAO-04-241, (Feb. 2004) (“GAO Report”).

<sup>163</sup> See *Comcast 2004 Reply* at 14-15.

<sup>164</sup> See *GAO Report* at 29.

<sup>165</sup> See *id.* at 26 n.17.

The authors of the report themselves properly acknowledge that their “results are *not generalizable* to the universe of cable systems.”<sup>166</sup> Commenters conveniently ignore GAO’s findings that, in one of the market pairs, cable prices were actually higher where the overbuilder (a fourth competitor) was present than in the paired market that had “only” three competitors.<sup>167</sup> Moreover, these commenters overlook that, even if markets with overbuilders were shown to have lower prices than markets without, any pricing differentials are more likely attributable to the fact that such markets have four MVPDs (rather than three) competing for consumers’ business as opposed to the fact that the fourth competitor happens to be a wireline competitor.

**E. Cable Operators’ Competitive Pricing Practices Are Entirely Appropriate and Lawful.**

Echoing arguments from previous years, certain parties, including RCN, BSPA, and NTCA, repeated their allegations that cable operators engage in “predatory” and “discriminatory” pricing.<sup>168</sup> If they believe that they can demonstrate such behavior, these parties should file formal complaints. As it stands, what they are in fact complaining about is behavior that is indicative of a vibrant, competitive and appropriately unregulated marketplace.<sup>169</sup>

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<sup>166</sup> *Id.* at 29 (emphasis added).

<sup>167</sup> *Id.* at 4.

<sup>168</sup> Perhaps most striking about the commenters raising this issue is that they are the same ones that champion themselves as the only meaningful competition to cable operators because they compel cable operators to lower cable rates. *See supra* Section III.D. It is hard to understand how they can champion that they are the only reason cable rates have decreased in certain markets and then turn around and complain about the decrease in cable rates in those markets.

<sup>169</sup> *See Orloff v. FCC*, 352 F.3d 415, 421 (D.C. Cir. 2003) (finding that “[c]onsumers . . . can only benefit” when service providers adopt a “competitive marketing strategy” of making individualized offers that “respond immediately to changes in the marketplace and to individual customer demand when existing plans and promotions were inadequate” (quoting *Orloff v. v. Vodafone AirTouch Licenses LLC*, 17 FCC Rcd. 8987, 8998-99 (2002))).

RCN alleges that Comcast's competitive practices are directed at "driv[ing] competitors out of the market[.]"<sup>170</sup> RCN and a few others have made these allegations year after year.<sup>171</sup> They are not true. Overbuilders remain a viable choice for consumers in numerous markets throughout the country because they offer desirable programming and alternatives to consumers. These options motivate Comcast to compete harder and to continue improving its service offerings and bundles. Offering promotional discounts in these circumstances with an eye to recruiting new customers, retaining existing customers, and regaining lost customers are normal and expected behaviors in a competitive marketplace. And contrary to RCN's, BSPA's, and NTCA's allegations, Comcast's offering of win back and price promotions is not restricted to customers of overbuilders. In every market Comcast serves, Comcast must create promotions to retain customers who are considering switching to a competitor or to win-back subscribers that have already switched, regardless of whether the competitor is an overbuilder, an ILEC, or a DBS provider.<sup>172</sup>

The price competition of which RCN, BSPA, and NTCA complain is characteristic of the behavior that Congress both anticipated and welcomed in amending

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<sup>170</sup> RCN Comments at 16; *see also* BSPA Comments at 15-18; NTCA Comments at 7-9.

<sup>171</sup> *See, e.g.*, BSPA Comments, filed in MB Docket No. 04-227, at 14 (July 23, 2004); RCN Comments, filed in MB Docket No. 04-227, at 10 (July 23, 2004); BSPA Comments, filed in MB Docket No. 03-172, at 34-37 (Sept. 11, 2003); RCN Comments, filed in MB Docket No. 03-172, at 11-14 (Sept. 11, 2003); BSPA Comments, filed in MB Docket No. 02-145, at 10-11 (July 29, 2002).

<sup>172</sup> As usual, BSPA, NTCA, and RCN have proffered various alternative methods by which Congress or the Commission could intervene in the current competitive free market to raise consumer prices. Yet Congress has already stepped in, specifically ending rate regulation for the services to which the discounts described by these commenters are applied. Congress made its choice years ago, when it embraced an environment of unregulated competition. It was the decision to end rate regulation that triggered the \$95 billion of investment the cable industry made over the past ten years.

the law. Once again, if any party believes there has been a violation of the Commission's pricing rules, the proper procedure is to file a complaint with the Commission.

**F. The Commission Should Ignore Grievances About Prior Commission Decisions and Assertions Regarding Issues Pending in Other Proceedings.**

As in prior years, some parties abuse this annual inquiry by airing grievances concerning a host of issues that are irrelevant to the issue of competition in the video marketplace, that are the subject of other Commission proceedings, or both. Other parties deposit the kitchen sink of complaints into this proceeding -- with some allegations so vague and conjectural that a response is impossible.<sup>173</sup> There is no merit to these attempts by various parties to have the Commission perpetuate regulations that will inure to the parties' benefit.

In particular, the following allegations should be dismissed:

- **Cable Consumer Electronics Compatibility:** In its comments, CEA reprises a number of arguments it has made previously regarding the Commission's rules for navigation devices.<sup>174</sup> Whatever the navigation device problem was thought to be in 1996, growing competition has forced cable operators to cooperate with consumer electronics manufacturers and retailers.<sup>175</sup> This relationship, much

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<sup>173</sup> For example, USTA alleges that an unnamed rural LEC was denied the opportunity to purchase advertising "on a particular cable channel." USTA Comments at 19. Of course, this would be meaningless even if USTA had provided meaningful detail; after all, the LEC in question could not possibly have been prevented from advertising on broadcast television, broadcast radio, billboards, direct mail, bill stuffers, newspapers, and so on.

<sup>174</sup> See CEA Comments at 9-12.

<sup>175</sup> CEA's continued attempts to use a statute that applies equally to all MVPDs as a basis for writing aggressive cable-only rules is increasingly nonsensical, especially given that the cable industry has gone much further than its competitors to enable and support the competitive availability of navigation devices. Furthermore, the cable industry is working with ever-greater cooperativeness with multiple consumer electronics manufacturers and retailers, even as the DBS industry is closing off opportunities for TiVo in favor of in-house affiliates. See, e.g., Press Release, Comcast Corp., *Comcast and TiVo Announce Strategic Partnership* (Mar. 15, 2005), available at <http://www.cmcsk.com/phoenix.zhtml?c=147565&p=irol-newsArticle&ID=685606&highlight=tivo>; Jane Levere, *In a Challenge to TiVo, DIRECTV Promotes Its Own Box*, N.Y. Times, Oct. 7, 2005 (describing DIRECTV's "first widespread public effort to distance itself from TiVo"), available at <http://www.nytimes.com/2005/10/07/business/07adco.html>.

more than the Commission's rules, is ensuring that the consumer electronics industry continues to have robust opportunities for innovation. In any event, these regulatory issues are under review in CS Docket 97-80 and in the Charter and Advanced/Newhouse appeal of the Commission's March 17, 2005 order,<sup>176</sup> and no evidence has been adduced that cable operators are not complying fully with their obligations under the law and the Commission's rules.

- **Video Via IP Regulatory Classification:** A number of parties assert in their video competition comments that Title VI cable regulations do not apply to multichannel video services that are delivered using Internet Protocol.<sup>177</sup> SBC recently presented this argument for the first time in WC Docket No. 04-36, and the cable industry will respond to this insupportable position in due course. For present purposes, it suffices to note that Section 651 provides four options for telco entry into video programming distribution, and SBC has presented no plausible basis for creating a fifth.<sup>178</sup> This issue cannot be appropriately addressed in an inquiry regarding the status of competition in the video distribution marketplace, though the Commission might wish to note that granting preferential treatment on the basis of a delivery technology would violate regulatory parity, technological neutrality, and elementary principles of fairness.
- **Cable Ownership:** A few commenters allege that increased cable consolidation will, among other supposed ills of increased consolidation, impede program access.<sup>179</sup> Ownership is being addressed in MM Docket No. 92-264, and in that proceeding, only three parties advocated an ownership limit, and *none* of them were able to provide the factual or economic basis necessary to justify an ownership limit capable of being reconciled with the constraints imposed on the Commission by the *Time Warner* cases.<sup>180</sup>
- **Adelphia Transaction:** DIRECTV, RCN, and TAC rehash their calls for conditions on the sale of the Adelphia cable systems to Comcast and Time Warner.<sup>181</sup> The parties to the proposed transactions have presented abundant facts, analysis, and economic testimony on these issues in MB Docket No. 05-

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<sup>176</sup> See *Advance/Newhouse Communications v. FCC*, No. 05-1237 (D.C. Cir. filed July 5, 2005).

<sup>177</sup> See CenturyTel Comments at 2, 3-6; Cincinnati Bell Comments at 5-9; SBC Comments at 10-15.

<sup>178</sup> See 47 U.S.C. § 571.

<sup>179</sup> See BellSouth Comments at 13-16; BSPA Comments at 13-14; DIRECTV Comments at 6, 14-15.

<sup>180</sup> See generally Comcast Ownership Reply Comments.

<sup>181</sup> RCN Comments at ii, 5-6, 17; DIRECTV Comments at 5-6, 14; TAC Comments at 13-14. A handful of other parties, who did not file comments in Docket 05-192, raise concerns with the proposed sale of Adelphia here. See BellSouth Comments at 13-14; SBC Comments at 22; BSPA Comments at 13-14. Purportedly, if these parties felt strongly enough about the issues, they would have raised their concerns in the proper forum.

192.<sup>182</sup> Comcast incorporates those submissions by reference here. In short, the transactions do not pose any concerns about competitive harm but will provide consumers numerous benefits.

- **Competition from Municipal Providers:** The City of Ontario, California requests that Congress and the Commission “eliminate any state or federal legal requirements that may prohibit, or have the effect of prohibiting, the ability of any municipality to deploy and operate a FTTH network.”<sup>183</sup> First, consideration of this issue belongs primarily to state legislatures. As the Commission has noted in other contexts,<sup>184</sup> and the Supreme Court has affirmed,<sup>185</sup> no federal agency should insert itself into the relationship between the states and their political subdivisions absent the most explicit statutory directive to do so. Second, it is unnecessary for the Commission to insert itself into the debate because Congress is presently considering bills that address the issue. Finally, to the extent the Commission wishes to consider making recommendations to Congress on this subject, it should adhere to its long-standing policy of looking to the private sector for investment, build-out, and operations<sup>186</sup> and it should continue to advocate separation between operational and regulatory functions.<sup>187</sup>

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<sup>182</sup> See, e.g., *In re Applications for Consent to the Assignment and/or Transfer of Control of Licenses from Adelphia Communications Corporation to Time Warner Cable Inc. and Comcast Corporation*, Applications and Public Interest Statement, filed in MB Docket No. 05-192 (May 18, 2005); Reply Comments of Adelphia, Time Warner, and Comcast, filed in MB Dkt. No. 05-192 (Aug. 5, 2005).

<sup>183</sup> City of Ontario Comments at 3.

<sup>184</sup> See *In re Pub. Util. Comm’n of Texas*, Memorandum Opinion & Order, 13 FCC Rcd. 3460 (1997), *aff’d* *Abilene v. FCC*, 164 F.3d 49 (D.C. Cir. 1999).

<sup>185</sup> See *Nixon v. Missouri Mun. League*, 541 U.S. 125, 140-41 (2004).

<sup>186</sup> The Conference Report accompanying the 1996 Act explained that the Act was designed “to provide for a pro-competitive, de-regulatory national policy framework designed to accelerate rapidly *private sector* deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition.” H.R. Conf. Rep. No. 104-458, at 1 (1996) (emphasis added); see also Kevin J. Martin, Commissioner, FCC, Remarks at the ITU World Telecommunication Development Conference, Istanbul, Turkey: “Seizing Digital Opportunities” (Mar. 18, 2002) (“Regulators are necessary to ensure an environment that will promote private sector investment to the benefit of our citizens. . . . The more private sector interest we can generate in our markets, the more services will be available to our consumers and at prices they can afford. . . . [R]eliance on the private sector is the most realistic and practical way to bring digital technologies to people.”), available at <http://www.fcc.gov/Speeches/Martin/2002/spkjm204.html>.

<sup>187</sup> At present, hundreds of cities and towns across the nation are resisting ILEC efforts to eliminate or circumvent video franchising requirements. Municipalities certainly have principled arguments to make in seeking to preserve their regulatory authority over commercial video providers, but the credibility of the municipalities’ position diminishes markedly if they seek simultaneously to compete directly with those they would regulate.

### III. CONCLUSION

The Commission's *Tenth Annual Report* highlighted the conclusion that, due to legislative and regulatory initiatives, technological advances, and investment in new platforms for delivering video programming, "*the vast majority of Americans enjoy more choice, more programming and more services than any time in history.*"<sup>188</sup> That statement was amply justified when made, and is only more true today. The Commission should forcefully state its findings, and should dismiss demands to preserve (or, worse, expand) monopoly-era regulations in a competitive environment.

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<sup>188</sup> *Tenth Annual Report* ¶ 4 (emphasis added).