

figure represents a slight decrease from 2004, when seven of the top 20 networks were vertically integrated.⁵⁸⁴ Additionally, it appears that there is some diverse ownership of the most popular networks. Eleven different entities own all or part of one or more of the top 20 programming networks in terms of subscribership.⁵⁸⁵

164. **National Nonbroadcast Programming Networks by Viewership.** Of the 15 top-rated prime time nonbroadcast programming networks, three are vertically integrated with a cable operator (Time Warner owns 100 percent of TNT and TBS, and Cox and Advance/Newhouse each own 25 percent of The Discovery Channel).⁵⁸⁶ The remaining 12 networks are owned by other media entities. News Corp. has ownership interests in Fox News Channel, and Disney has ownership interests in The Disney Channel, Lifetime, Toon Disney, History Channel, and ESPN. Hearst has ownership interests in Lifetime, The History Channel, and ESPN. NBC has ownership interests in USA Network, The History Channel, and the Sci Fi Channel. Viacom has ownership interests in Nickelodeon, Nick at Nite, SpikeTV, and MTV.

165. During the 2004-2005 television season, the combined audience share⁵⁸⁷ of all nonbroadcast networks⁵⁸⁸ was higher than the combined audience share of all broadcast television stations⁵⁸⁹ for both all day viewing and prime time viewing.⁵⁹⁰ For all day viewing, the combined audience share of all nonbroadcast networks was 59, and the combined audience share of all broadcast television stations was 41. For prime time viewing, the combined audience share of all nonbroadcast networks was 53, and the combined audience share of all broadcast television stations was 47. More than half of all prime time viewers watched ad-supported cable networks during the past TV season, the second consecutive year that nonbroadcast networks have topped all national broadcast networks combined for an entire TV season.⁵⁹¹

166. **Regional Programming Networks.** In 2005, we identified 96 regional networks, the same number of networks as last year, despite the exit and entry of several networks.⁵⁹² Many, but not all, regional networks are satellite-delivered. These networks provide programming of local or regional interest and are distributed to subscribers of one or more MVPDs in an area. A significant number of regional networks offer local news or sports programming, but some provide more general programming, such as religious or ethnic programming. Of the 96 regional networks we identified, 44 networks, or 45.8

⁵⁸⁴ See 2004 Report, 20 FCC Rcd at 2901, Appendix C, Table C-6.

⁵⁸⁵ They include: Time Warner, Cox, Disney, General Electric (NBC-Universal), Hearst, Liberty Media, Advance Newhouse, Viacom, Landmark Communications, E.W. Scripps, and C-SPAN (National Cable Satellite Corporation).

⁵⁸⁶ See Appendix C, Table C-6.

⁵⁸⁷ A share is the percent of all households using television during the time period that are viewing the specified station(s) or network(s). Due to simultaneous multiple set viewing, Nielsen reports audience shares that exceed 100 percent when totaled. We have normalized audience shares to equal 100 percent.

⁵⁸⁸ Nonbroadcast network shares include basic (BST and CPST) networks, premium networks, and PPV networks distributed by MVPDs.

⁵⁸⁹ Broadcast shares include network affiliates, independent, and public television stations.

⁵⁹⁰ Prime time viewing is Monday through Saturday, 8 p.m.-11 p.m., and Sunday, 7 p.m.-11 p.m. Nielsen Media Research, *Broadcast Calendar (TV Season) Share of Audience Report, Prime Time and Total Day*, Sept. 2005. The most popular nonbroadcast networks continue to receive a lower audience share for all day and prime time viewing than any of the major broadcast television networks.

⁵⁹¹ NCTA Comments at 41.

⁵⁹² 2004 Report, 20 FCC Rcd at 2895-2897, Appendix C, Table C-3.

percent, were vertically integrated with at least one MSO. Comcast has ownership interests in 14, or 14.6 percent, of all regional networks. Cablevision has ownership interests in 13, or 13.6 percent, of the regional networks. Time Warner has ownership interests in 10, or 10.4 percent, of the regional networks. Cox has ownership interests in six, or 6.2 percent, of the 96 regional networks, and Charter has an ownership interest in one regional network. Although not a cable MSO, News Corp., which holds an interest in DBS operator DIRECTV has ownership interests in 16, or 16.7 percent, of the 96 regional networks.⁵⁹³

167. **Planned Services.** This year, we identified 79 programming services that have been planned but are not yet operational.⁵⁹⁴ The planned-services count includes some overlap from previous years because it can often take several years from the announcement of a new programming network to its initiation of service.⁵⁹⁵

2. Other Programming Issues

168. In this section, we discuss comments we received about the effectiveness of our program access, program carriage, and channel occupancy rules and issues relating to the carriage of local broadcast stations pursuant to must carry and retransmission consent. We also address other matters related to programming channels including sports programming; news programming; public, educational and governmental (PEG) channels; DBS public interest programming; non-English programming; locally originated and community-oriented programming; children's programming; access to programming by persons with disabilities; and packaging of programming services.

a. Regulatory Issues

169. **Program Access and Program Carriage Rules.** The Commission's rules concerning competitive access to cable programming were initially adopted to implement the 1992 Cable Act. These rules seek to promote competition and diversity in the multichannel video programming market by preventing vertically integrated programming suppliers from favoring affiliated video distributors over unaffiliated MVPDs in the sale of satellite-delivered programming and making it more difficult for competing MVPDs to attract subscribers.⁵⁹⁶ Also, these rules are intended to allow program suppliers that are unaffiliated with cable operators to secure carriage on cable systems that are affiliated with programmers. The program access rules apply to cable operators and to programming vendors that are affiliated with cable operators and deliver video programming via satellite to MVPDs. The rules prohibit any cable operator that has an attributable interest in a satellite cable programming vendor from improperly influencing the decisions of the vendor with respect to the sale or delivery, including prices, terms, and conditions of sale or delivery, of satellite-delivered programming to any competing MVPD. The rules also prohibit vertically integrated satellite programming distributors from discriminating in the prices or terms and conditions of sale of satellite-delivered programming to cable operators and competing MVPDs. In addition, cable operators generally are prohibited from entering into exclusive distribution arrangements with vertically integrated programming vendors. The Commission has concluded that the language of Section 628(c) expressly applies to "satellite cable programming and

⁵⁹³ See n.579 *supra*.

⁵⁹⁴ See Appendix C, Table C-4. See also 2004 Report, 20 FCC Rcd at 2885, Appendix C, Table C-5.

⁵⁹⁵ See 1995 Report, 11 FCC Rcd at Appendix H, Tables 3 and 4; 1996 Report, 12 FCC Rcd at Appendix G, Tables 3 and 4; 2004 Report 20 FCC Rcd at 2835 ¶ 152.

⁵⁹⁶ 47 U.S.C. § 548. See also U.S.C. § 521(a)(5)-(6) nt.

satellite broadcast programming,” and that terrestrially delivered programming is “outside the direct coverage of Section 628(c).”⁵⁹⁷

170. As in previous years, a number of commenters address the statutory exemption for terrestrially delivered programming in the existing program access rules. Several commenters, citing past problems accessing terrestrially delivered, Comcast-affiliated programming in Philadelphia and Boston, repeat their concerns regarding incumbent cable operators’ ability to restrict competing MVPDs’ access to terrestrially delivered programming.⁵⁹⁸ RCN and USTA express concern that terrestrial distribution of video signals will become increasingly common as a result of cable operators’ regional clustering of systems.⁵⁹⁹ SBC, USTA, EchoStar, BellSouth, CenturyTel, BSPA, Verizon, RCN, and other commenters urge the Commission to ensure that all competitors have access to so-called “must have” programming and that the Commission eliminate the terrestrial exemption or recommend that Congress do so.⁶⁰⁰ Comcast counters that these concerns are unfounded, stating that commenters provide no examples of programming networks that were migrated to terrestrial delivery other than Comcast SportsNet Philadelphia, and that terrestrial delivery of that network was premised on legitimate business considerations.⁶⁰¹ Comcast adds that its newest sports networks are delivered by satellite.⁶⁰² We are not aware of any comprehensive source for determining the delivery mode for each of the national and regional networks. We will seek such information for our next report on the status of competition in the market for delivery of video programming.

171. Commenters raise various other concerns relating to access to programming. EchoStar and Qwest ask the Commission to recommend that Congress eliminate the sunset of the exclusivity provisions in the program access rules.⁶⁰³ Verizon suggests that the Commission ensure that cable companies are not able to foreclose access to programming by new MVPD entrants through arrangements that give an incumbent an exclusive right to carry particular programming.⁶⁰⁴ CenturyTel proposes that new entrants be granted the right to opt into the terms of the programming agreements entered into by the incumbent cable operator in the market.⁶⁰⁵ NCTA urges the Commission to reject these proposals stating that today’s video marketplace is competitive and that most of the popular and widely viewed nonbroadcast programming networks are available from cable’s MVPD competitors.⁶⁰⁶ Comcast states

⁵⁹⁷ See *Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Development of Competition and Diversity in Video Programming Distribution: Section 628 (c)(5) of the Communications Act, Sunset of Exclusive Contract Prohibition*, 17 FCC Rcd 12124, 12158 ¶ 73 (2002).

⁵⁹⁸ See, e.g., RCN Comments at 12-14; USTA Comments at 16-17; DIRECTV Comments at 4; EchoStar Comments at 4-5; Verizon Comments at 30-33; BSPA Comments at 13; SBC Comments at 21-23.

⁵⁹⁹ RCN Comments at 13; USTA Comments at 17.

⁶⁰⁰ SBC Comments at 22-25; USTA Comments at 17; EchoStar Comments at 11; BellSouth Comments at 16; CenturyTel Comments at 14; BSPA Comments at 15; Verizon Comments at 32; RCN Comments at 16.

⁶⁰¹ Comcast Reply Comments at 25-26.

⁶⁰² *Id.*

⁶⁰³ EchoStar Comments at 13; Qwest Comments at 20. Pursuant to 47 U.S.C. § 325(b)(3)(C)(ii), MVPDs are prohibited from retransmitting the signal of any commercial broadcasting station without the express authority of the originating station. Exclusive retransmission consent agreements are prohibited. Initially, the exclusivity provisions were to sunset on Dec. 31, 2005, but the sunset of the exclusivity provisions was extended to Jan. 1, 2010, in SHVERA.

⁶⁰⁴ Verizon Comments at 35.

⁶⁰⁵ CenturyTel Comments at 12.

⁶⁰⁶ NCTA Reply Comments at 22.

that differentiation of program offerings is a normal and expected behavior in a competitive marketplace.⁶⁰⁷

172. Various commenters discuss programming cost differentials. BSPA is concerned about discounts cable incumbents receive when purchasing programming, which it asserts are discriminatory.⁶⁰⁸ EchoStar asserts that vertically integrated programmers offer lower prices to incumbent cable operators and discriminate against EchoStar in other terms and conditions as well.⁶⁰⁹ ACA estimates that the dominant media conglomerates charge smaller MVPDs programming rates that are between 30 percent and 55 percent higher than rates paid by larger MVPDs.⁶¹⁰ ACA states that when a smaller MVPD acquires a cable system from a major MSO, programming costs increase solely due to price discrimination against smaller providers. RCN states that vertically integrated programmers should be subject to affiliate transaction restrictions that would require sales between affiliated companies to be recorded at arm's-length market prices (*i.e.*, that prices be disclosed) and that the price of cable services reflect the market price.⁶¹¹ Cincinnati Bell and OPASTCO state that the cost of such programming may serve as a barrier to entry into the video market by small and rural IPTV providers. OPASTCO states that it is virtually impossible for rural video providers to know the true market rates for programming because of nondisclosure agreements between programming providers and large cable companies.⁶¹² Comcast claims 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. Comcast adds that government interference in the video marketplace would be inconsistent with Congressional intent to leave negotiations between MVPDs and program suppliers to the marketplace.⁶¹³

173. Commenters also discuss programmers' ability to secure distribution. DIRECTV contends that clustering has enabled MSOs to concentrate their subscribers and achieve market share levels throughout many of the largest DMAs that they previously enjoyed only in their individual franchise areas, thus becoming indispensable to local and regional programmers seeking distribution.⁶¹⁴ The America Channel argues that carriage by both Comcast and Time Warner is essential for survival of advertiser-supported networks and that denial of carriage by either of these MSOs impacts a network's ability to procure funding and the minimal carriage necessary for market entry. The America Channel also states that new networks that are affiliated with cable operators or broadcasters are more likely to be carried than independent programming networks.⁶¹⁵ It maintains that programming networks developed by cable operators and other media companies are launched as linear networks (*i.e.*, basic nonbroadcast networks), while unaffiliated programming networks are able to gain carriage only through VOD distribution. The America Channel also claims that networks affiliated with MVPDs charge higher rates

⁶⁰⁷ Comcast Reply Comments at 42.

⁶⁰⁸ BSPA Comments at 16.

⁶⁰⁹ EchoStar Comments at 13.

⁶¹⁰ ACA Comments at 6. ACA does not identify the media conglomerates.

⁶¹¹ RCN Comments at 17.

⁶¹² Cincinnati Bell Comments at 10; OPASTCO Comments at 5.

⁶¹³ Comcast Reply Comments at 29-30.

⁶¹⁴ DIRECTV Comments at 15.

⁶¹⁵ TAC Comments at 13-14. We note earlier that 257 of the 531 and all of the top 15 non-broadcast programming networks are affiliated with a cable operator and/or another media entity. We will seek further information and comment on program carriage issues and their impact on various types of independent programming networks, including minority programming networks, for our next report on the status of competition in the market for delivery of video programming.

than those of independent networks.⁶¹⁶ The America Channel submits that unfair discrimination, not bandwidth constraints, underlie independent networks' inability to gain carriage. The America Channel requests that the Commission require MVPDs to disclose sufficient information regarding capacity and constraints so it can determine: (1) the digital bandwidth capabilities of the largest MVPDs on a per-system basis; (2) how many digital channels each can carry today; and (3) MVPDs' plans with respect to digital capacity in the future and how they will affect access for independent networks.⁶¹⁷

174. Comcast states that cable operators and other MVPDs choose programming networks that they believe consumers will demand. It states that MVPDs consider many factors in making carriage decisions, including the content of the network, the necessity or desirability of its presentation as a linear network, the financing of the network, the experience and proven capability of the network's management team, the distribution arrangement the network has already secured, and the fees and terms of carriage. Comcast denies that carriage by Comcast or Time Warner is necessary for a programming network to be carried by other MVPDs. Comcast and Time Warner note that The Sportsman Channel launched successfully without any carriage agreements, secured its first carriage agreement with NCTC, and then signed agreements with 18 other cable operators before signing with Comcast.⁶¹⁸ Time Warner states that The America Channel's claim that affiliated networks charge higher license fees than independent networks is directly contradicted by a GAO report to Congress that found that ownership affiliations with broadcasters or cable operators had no influence on cable networks' license fees.⁶¹⁹

175. **Must Carry and Retransmission Consent.** In 1992, Congress enacted statutory provisions concerning the carriage of local broadcast television stations by cable operators and subsequently extended similar provisions to DBS providers in 1999. Among the reasons for enacting broadcast signal provisions, Congress found that broadcasters and consumers benefit from the carriage of local television stations and that cable operators derive benefits from offering this popular programming. It also concluded that cable carriage of broadcast television signals without consent or copyright liability resulted in broadcasters subsidizing cable operators, creating a competitive imbalance between these two industries that compete for audience, advertising, and programming.⁶²⁰

176. Under Sections 614 and 615 of the Communications Act, cable operators must set aside up to one third of their channel capacity for the carriage of commercial television stations and additional channels for noncommercial stations depending on the system's channel capacity.⁶²¹ Pursuant to the SHVIA, DBS operators may provide local-into-local broadcast television service.⁶²² Unlike cable operators, which are required to carry local television stations in every market they serve, a DBS operator must carry all stations in any market where it chooses to carry any local television station ("carry one, carry all").⁶²³ In both the cable and DBS contexts, commercial broadcasters may elect to be carried pursuant to must carry status or retransmission consent.⁶²⁴ Where a station elects must carry, it is

⁶¹⁶ TAC Comments at 21-24. It submits a license fee analysis based on information provided in Kagan Research's *Economics of Basic Cable Networks 2006, 12th Annual Edition*, to illustrate this difference. *Id.* at Exhibit A.

⁶¹⁷ TAC Comments at 16-19.

⁶¹⁸ Comcast Reply Comments at 32-35; Time Warner Reply Comments at 6-7.

⁶¹⁹ Time Warner Reply Comments at 5-6. *See also*, GAO, *Tele-communications: Issues Related to Competition and Subscriber Rates in the Cable Television Industry*, GAO-04-08, Oct. 2003, at 29.

⁶²⁰ 47 U.S.C. § 521(a)(19) note; Pub. L. No. 102-385, 106 Stat. 1460, Oct. 5, 1992.

⁶²¹ 47 U.S.C. §§ 534(b), 535(b). *See also* 47 C.F.R. § 76.56.

⁶²² Pub. L. No. 106-113, 113 Stat. 1501, 1501A-526 to 1501A-545 (Nov. 29, 1999).

⁶²³ 47 C.F.R. § 76.66.

⁶²⁴ 47 C.F.R. § 76.64.

generally guaranteed carriage, but it is prohibited from receiving compensation for this carriage.⁶²⁵ Under retransmission consent, the broadcaster and cable or DBS operator negotiate an agreement that may involve compensation in return for permission to retransmit the broadcast signal. The current rules apply to the carriage of analog television stations only.

177. As we observed in last year's report, through the retransmission consent process, broadcasters can receive cash or consideration comparable to cash in exchange for granting MVPDs the right to retransmit their signals.⁶²⁶ In this year's *Notice*, we asked for information on the extent to which cable television and DBS retransmission consent negotiations are providing broadcasters with an additional revenue source, either through direct compensation or through indirect benefits such as, for example, contracts for the carriage of affiliated programming. We asked what forms of compensation broadcasters are receiving for retransmission consent, and how they account for indirect compensation.⁶²⁷

178. Joint Cable Commenters state that retransmission consent has been a key driver of cable rate increases because it has been used to launch and broaden the carriage of broadcaster-owned nonbroadcast networks.⁶²⁸ ACA and OPASTCO claim that when dealing with small- and medium-size cable companies, networks and major affiliate groups are demanding monthly fees of \$0.50 to \$1.00 per subscriber or more for each network-affiliated station, adding \$2.50-\$5.00 or more per month to basic cable rates in smaller markets.⁶²⁹ ACA contends that this could cost smaller cable companies and their customers an additional \$1 billion over the next three years.⁶³⁰ BSPA also expresses concern about the ability of broadcasters to leverage retransmission consent to demand exorbitant compensation for programming and asks the Commission to monitor this situation and be prepared to take corrective action.⁶³¹ Qwest states that Section 548 of the Communications Act – which prohibits unfair practices, undue influence and price discrimination – does not go far enough to protect new MVPDs from television stations that may adopt a “pay cash or else” stance in the upcoming retransmission consent negotiations. It adds that the Commission should address this problem or, if necessary, make specific recommendations to Congress to correct the problem.⁶³² NRTC members are concerned about their ability to secure retransmission rights to local off-air signals on fair and reasonable terms, and urge the Commission to continue to monitor retransmission consent issues and to view those issues from the perspective of the small telco IPTV operator.⁶³³

179. NAB states that cable companies rarely pay cash for retransmission consent and that even if broadcasters could obtain cash payments in return for carriage of their signals, the \$1 billion figure cited by ACA is “fanciful at best.”⁶³⁴ According to the Affiliates Associations, some broadcasters negotiated for and received consideration of other kinds, such as agreements by cable operators to purchase advertising on the stations; agreements by cable operators to allow a broadcast station to sell local advertising time in cable programming; and/or agreements by cable operators to carry local news

⁶²⁵ 47 C.F.R. § 76.60.

⁶²⁶ See *2004 Report*, 20 FCC Rcd at 2805 ¶ 79.

⁶²⁷ See *Notice*, 20 FCC Rcd at 14140 ¶ 64.

⁶²⁸ Joint Cable Commenters Reply Comments at 17.

⁶²⁹ ACA Comments at 7-8; OPASTCO Reply Comments at 5.

⁶³⁰ *Id.*

⁶³¹ BSPA Comments at 24.

⁶³² Qwest Comments at 22-23.

⁶³³ NRTC Comments at 8.

⁶³⁴ NAB Reply Comments at 2-3.

programs or other programming owned by the broadcast company.⁶³⁵ Some broadcasters do, however, receive cash payments that can be substantial. For example, Hearst Argyle Television Inc. reported a \$2.3 million increase in retransmission revenues for the period ending September 30, 2005.⁶³⁶

180. Disney states that there is no justification for any changes in the retransmission consent statute or regulations. It states that broadcasters, just like any other business, should be compensated for their product if it is distributed and resold by another entity. Disney adds that broadcasters invest billions of dollars annually to create valuable programming and are entitled to compensation.⁶³⁷ Network Affiliates contend that the current retransmission consent process furthers the interest of competition in the programming marketplace. It asserts that past retransmission consent election cycles, as well as individual negotiations, show no evidence of a break-down in the process or in the marketplace, and it states that additional government intrusion into these private contractual negotiations is not needed.⁶³⁸ NAB concurs with Disney and the Affiliates Associations regarding compensation for cable operators' carriage of broadcast signals, especially given cable operators' increasing competition with broadcasters for local advertising revenue. NAB adds that ACA's comments regarding retransmission consent do not accurately depict competitive realities in medium and small television markets, and that television broadcasters in these markets are facing severe financial pressures.⁶³⁹

181. Several commenters address the issue of retransmission consent agreements that require MVPDs to carry certain nonbroadcast networks in return for the right to carry local broadcast signals. EchoStar states that the use of such terms is widespread, and it claims that the broadcast networks leverage their ability to withhold must have broadcast programming to obtain carriage of affiliated programming. EchoStar maintains that such practices often violate antitrust law, although violations are difficult to prove because the Commission generally does not allow discovery in retransmission consent proceedings. It urges the Commission to provide for discovery in such proceedings.⁶⁴⁰ OPASTCO states that the tying of retransmission consent for carriage of local broadcast networks to carriage of unwanted cable networks prevents rural carriers from crafting tiers that reflect the demands of their local markets.⁶⁴¹ Joint Cable Commenters believe that broadcasters' use of retransmission consent to launch and broaden the carriage of nonbroadcast programming networks has been a major factor in shaping the price and composition of the expanded basic package.⁶⁴²

182. Disney states that it negotiates retransmission consent only for its 10 owned-and-operated ABC affiliates. It indicates that it offers cable and satellite operators a stand-alone cash retransmission consent deal with no requirement to carry affiliated networks, but that it also offers alternatives that involve the carriage of nonbroadcast programming networks. According to Disney, it works with the MVPD to meet each operator's needs.⁶⁴³ We will continue to monitor the issues raised by commenters and will seek further information and comment on them for our next report on the status of competition in the market for delivery of video programming.

⁶³⁵ Affiliates Associations Reply Comments at 8.

⁶³⁶ Hearst Argyle Television Inc., *SEC 10-Q Filing for Period Ending September 30, 2005*, at 16.

⁶³⁷ Disney Comments at 37-38.

⁶³⁸ Affiliates Associations Reply Comments at 6-9.

⁶³⁹ NAB Reply Comments at 3-5.

⁶⁴⁰ EchoStar Comments at 8-9.

⁶⁴¹ OPASTCO Reply Comments at 6.

⁶⁴² Joint Cable Commenters Reply Comments at 17.

⁶⁴³ Disney Comments at 39.

a. Sports Programming

183. We continue to monitor the availability of sports programming which many MVPDs consider must have programming in order to compete effectively in the video market.⁶⁴⁴ There are 37 regional networks devoted to sports programming, a decrease from the 38 we identified last year.⁶⁴⁵ Regional sports networks now represent approximately 38.5 percent of the 96 regional networks.⁶⁴⁶ Of the 37 regional sports networks, 17, or 45.9 percent are vertically integrated with a cable MSO. Fox continues to be the leader in the distribution of regional sports networks, owning or holding an ownership interest in 16, or 43.2 percent, of all regional sports networks.⁶⁴⁷

184. While we report no new regional sports networks this year, in March 2005, ESPN launched an additional national sports channel, ESPNU, which carries regular season collegiate athletic events and the NCAA championships.⁶⁴⁸ News Corp. and Cablevision restructured their ownership of several jointly owned regional sports channels. News Corp. owns 100 percent of Fox Sports Net and FSN Ohio, FSN Florida, and National Advertising Partners. Cablevision controls 100 percent of MSG and its properties, the New York Knicks, Rangers, and Liberty. Cablevision and News Corp. continue to own 20 percent and 40 percent, respectively, of FSN Bay Area, with Cablevision managing the network.⁶⁴⁹ On March 7, 2005, the Empire Sports Network, which was owned by Adelphia and featured Buffalo Sabres NHL games, terminated its service.⁶⁵⁰ C-SET, a regional sports network that carried sports programming in the Carolinas, terminated its service on June 30, 2005.⁶⁵¹ In addition, in 2005, the Baltimore Orioles and Major League Baseball formed a new network, the Mid Atlantic Sports Network (MASN). The network initially was formed to carry the Washington Nationals baseball games during the 2005 season, with plans to become a full-time network in 2006, and to carry the Baltimore Orioles baseball games once the Orioles' current agreement with Comcast Sports Net expires following the 2006 baseball season.⁶⁵²

⁶⁴⁴ 2004 Report, 20 FCC Rcd at 28462841 ¶ 166. See, e.g., SBC Comments at 22-25; USTA Comments at 17; EchoStar Comments at 11; BellSouth Comments at 16; CenturyTel Comments at 14; BSPA Comments at 15; Verizon Comments at 32; RCN Comments at 16.

⁶⁴⁵ See Appendix C, Table C-3.

⁶⁴⁶ *Id.*

⁶⁴⁷ The Commission remains cognizant that Fox's ownership of numerous regional sports programming networks may pose a public harm when combined with DIRECTV's nationwide distribution platform. The Commission imposed conditions on News Corp. requiring it to enter into arbitration where negotiations fail to produce a mutually acceptable set of prices, terms and conditions. In addition, News Corp. cannot offer any existing or future regional programming services on an exclusive basis to any MVPD and shall make such services available to all MVPDs on a non-exclusive basis. See *News Corp Order*, 19 FCC Rcd at 531-2, 543, 552-555, 626, ¶¶ 127, 147-48, 172-79, 366.

⁶⁴⁸ NCTA, *Directory of Programming Services*, Cable Developments 2005, at 84-85.

⁶⁴⁹ News Corp., *Cablevision Swap Sports Nets*, SATELLITE BUSINESS NEWS FAXUPDATE, Feb. 23, 2005, at 2.

⁶⁵⁰ R. Thomas Umstead, *The End of an Empire*, MULTICHANNEL NEWS, Jan. 21, 2005, at <http://www.multichannel.com/article/CA498108.html> (visited Jan. 26, 2005).

⁶⁵¹ National Basketball Association, at http://www.nba.com/bobcats/news/c-set_050628.html (visited Oct. 27, 2005).

⁶⁵² CABLEFAX Daily, Oct. 28, 2005, at 1.

Due to a dispute between Comcast and MASN, which is being addressed in a separate proceeding,⁶⁵³ MASN has been available only to RCN and DIRECTV subscribers in the Washington, D.C., area.⁶⁵⁴

b. News Programming

185. We requested comment on the extent to which MVPDs provide local news and community affairs programming because such programming allows MVPDs to provide a unique service that meets the interests and needs of their communities.⁶⁵⁵ This year, of the 96 regional programming networks identified, 45, or 46.9 percent, are regional news networks.⁶⁵⁶ A news channel may concentrate on a single metropolitan area, as do NY1, the News 12 networks, Bay News 9, and News 8 Austin. They may originate their own content, or repurpose news content from co-owned broadcast channels. NewsChannel 5+ in Nashville, NewsWatch 15 in New Orleans, NewsChannel5 in San Diego, and News on One in Omaha are examples of this model. In several markets, cable operators offer local news through VOD services. In Los Angeles, Time Warner is offering VOD newscasts from KNBC; Buckeye Cable offers its Toledo subscribers VOD news from NBC affiliate WNWO; Comcast Cable provides VOD news to its subscribers in Philadelphia, Baltimore, Minneapolis, Boston, San Francisco, Denver and Salt Lake City.⁶⁵⁷ Cablevision launched two new News 12 networks, News 12 Brooklyn and News 12 Hudson Valley, this year.⁶⁵⁸

c. Other Programming

186. In the Notice we requested comment on a variety of other types of programming, including PEG programming, DBS public interest programming, non-English programming, locally originated and community-oriented programming, children's programming, and access to programming

⁶⁵³ On June 14, 2005, TCR Sports Broadcasting Holding, L.L.P. (TCR) d/b/a Mid-Atlantic Sports Network, Inc. (MASN) filed a Carriage Agreement Complaint and an Emergency Petition for Injunctive Relief requesting that the Commission direct Comcast to comply with 47 C.F.R. § 76.1301 by ceasing its discriminatory activities against TCR and mandate carriage of TCR's programming of Washington Nationals games on MASN on Comcast's systems in the Washington region. Prior to TCR's filings with the Commission, Comcast filed a related lawsuit against TCR in Montgomery County, Maryland, Circuit Court on April 21, 2005, claiming that TCR had violated its agreement with Comcast for the production and exhibition of Baltimore Orioles games. In October, 2005, the Maryland Circuit Court dismissed Comcast's lawsuit, and in November, 2005, Comcast appealed the judgment. See *Comcast SportsNet Mid-Atlantic, L.P., Plaintiff v. Baltimore Orioles L. P., TCR Sports Broadcasting Holding, L.L.P., Major League Baseball, Mid-Atlantic Sports Network*, Complaint, Civ. Action No. 260751-V (Md. Circ. Ct), filed April 21, 2005. See also *Comcast SportsNet Mid-Atlantic, L.P., Plaintiff v. Baltimore Orioles L. P., TCR Sports Broadcasting Holding, L.L.P., Major League Baseball, Mid-Atlantic Sports Network, Defendants*, Court's Order and Notice of Judgment, Civ. Action No. 260751-V (Md. Circ. Ct), entered October 6, 2005; see also *Comcast SportsNet Mid-Atlantic, L.P., Plaintiff v. Baltimore Orioles L. P., TCR Sports Broadcasting Holding, L.L.P., Major League Baseball, Mid-Atlantic Sports Network, Defendants*, Notice of Appeal, Civ. Action No. 260751-V (Md. Circ. Ct), dated November 2, 2005.

⁶⁵⁴ RCN Comments at 12; DIRECTV Comments at Appendix B2. In October 2005, Charter announced an agreement to carry MASN. CABLEFAXDAILY, Oct. 28, 2005, Jat 1. In a meeting with Media Bureau Staff, Comcast noted that it disputes the complaint and that the Commission is actively addressing the resolution of this issue in another proceeding. Comcast meeting with Media Bureau Staff, Nov. 21, 2005.

⁶⁵⁵ See Notice, 20 FCC Rcd at 14122 ¶ 14.

⁶⁵⁶ See Appendix C, Table C-3.

⁶⁵⁷ Allison Romano, *Local News Taps Into Cable VOD*, BROADCASTING & CABLE, May 2, 2005, at 10.

⁶⁵⁸ CABLEFAXDAILY, June 2, 2005, at 3.

by persons with disabilities. MVPDs use these types of programming to compete more effectively and to serve specific groups in their local communities.⁶⁵⁹

187. **PEG Programming.** Many cable operators set aside one or more channels on a cable system for public, educational, and governmental programming. Generally, these channels provide programming produced by community groups and individuals.⁶⁶⁰ Local franchising authorities may request, as part of the franchising process, that operators devote a certain amount of channel capacity and equipment for this purpose.⁶⁶¹ According to the Consumer's Union, these channels are heavily used in some communities, but other communities have not sought PEG channels.⁶⁶² In Vermont, which regulates cable television at the state level, each cable system is required to set aside channels for PEG programming.⁶⁶³

188. **DBS Public Interest Programming:** DBS operators are required to reserve 4 percent of their channel capacity for "noncommercial programming of an educational or informational nature."⁶⁶⁴ To qualify for carriage on this reserved capacity, programmers must be organized for a noncommercial, nonprofit purpose; they must be a national educational programming supplier; and they must be responsible for 50 percent of the direct costs incurred by the DBS operator in making the programming available. Furthermore, the programming offered by such programmers must contain no advertisements, must be of an educational or informative nature, and must be available on a regular schedule.⁶⁶⁵ EchoStar reports that it provides 13 channels of public interest programming.⁶⁶⁶ DIRECTV provides 12 channels of public interest programming.⁶⁶⁷

189. **Non-English Programming.** Cable and DBS operators continue to add non-English language programming either as part of their general packages or as themed tiers. EchoStar states that it is offering the Hispanic Information & Telecommunications Network as a Spanish educational,

⁶⁵⁹ See Notice, 20 FCC Rcd at 14122 ¶ 14.

⁶⁶⁰ Mike Rhodes, *Media Democracy and the Struggle for Cable Access*, San Francisco Bay Area Independent Media Center, Aug. 9, 2004, at <http://www.fresnoalliance.com/home/pegca/leaccess.htm> (visited Oct. 20, 2005).

⁶⁶¹ 47 U.S.C. § 531. Local franchise authorities are allowed to establish procedures under which the cable operator may utilize unused PEG channel capacity for other services. 47 U.S.C. § 531(d)(1).

⁶⁶² *What's at Stake: Community Access*, at <http://www.hearusnow.org/tvradiocable/whatsatstake/communityaccess> (visited Oct. 20, 2005).

⁶⁶³ The Vermont Public Service Board has established PEG obligations based on cable system channel capacity. Cable systems with a channel capacity of less than 21 channels must provide at least one full-time activated PEG channel and higher capacity systems are required to have up to three channels for such use, with one channel designated for each type of programming (*i.e.*, public, educational, and governmental programming). See Vermont Department of Public Service, at <http://publicservice.vermont.gov/cable/cable-pegaccess.html> (visited Oct. 25, 2005).

⁶⁶⁴ See *Implementation of Section 25 of the Cable Television Consumer Protection and Competition Act of 1992, Direct Broadcast Satellite Public Interest Obligation*, 19 FCC Rcd 5647 (2004).

⁶⁶⁵ See 47 U.S.C. § 25.701.

⁶⁶⁶ EchoStar currently carries the following public interest channels: Brigham Young University, Classic Arts Showcase, Colours TV, Free Speech TV, Good Samaritan Network, Hispanic Information & Telecommunications Network, Worldlink TV, Northern Arizona University, Panhandle Area Education, PBS YOU, Research Channel, RFD-TV, University of California, and University of Washington. EchoStar Comments at 13.

⁶⁶⁷ DIRECTV currently carries the following public interest channels: HITN-TV, C-SPAN 1, Daystar, EWTN, Link TV, NASA TV, PBS YOU, TBN, The WORD Network, ONCE Mexico, BYU TV, and RFD-TV. *HITN-TV To Join DIRECTV Programming Lineup*, DIRECTV In The News, at http://www.directv.com?DTVAPP/aboutus/headline.jsp?newsId=06_13_2004A (visited Oct. 24, 2005).

instructional, and cultural programming channel in its public interest line-up. It also states that it offers the broadcast signals of Univision, Telefutera, Telemundo, and TV Azteca affiliates, as well as the signals of 88 local independent broadcast stations, which include ethnic, religious, Spanish, and shopping programming. In addition, it also offers three Latino packages consisting of 30, 120, or 160 nonbroadcast channels, as well as international programming packages in various languages, including African, Arabic, Armenian, Chinese, Farsi, French, German, Greek, Hebrew, Italian, Japanese, Korean, Polish, Portuguese, Russian, South Asian, Tagalog, and Urdu.⁶⁶⁸ DIRECTV offers Univision, Galavision, ONCE Mexico, CCTV-9 (Chinese), and DIRECTV Para Todos, a 99-channel package of Spanish language programming.⁶⁶⁹ Comcast reports that it offers a broad selection of Hispanic programming networks, including Discovery en Español, CNN en Español, and Toon Disney Español. It also states that in the past year it has launched several services catering to multicultural audiences and that, in total, Comcast carries over 50 multicultural channels and plans to add several more in English or other languages.⁶⁷⁰

190. **Locally Originated and Community-Oriented Programming:** APTS states that the nation's 356 local public television stations provide programming of interest to their communities. According to APTS, these stations are owned and operated by local community foundations, colleges, universities and school districts, as well as locally responsive state commissions. While these stations are 15 percent funded by the Federal government, the remaining 85 percent is donated by local residents, businesses, state and local governments, local colleges and universities, and foundations.⁶⁷¹ Comcast states that its CN8, which provides news and sports programming with local appeal to subscribers in the Mid-Atlantic states and New England, has expanded its service area to include Pittsburgh.⁶⁷² Comcast's VOD service provides local content, including local public affairs programming and newscasts from local broadcast stations that it makes available for as many as three days after the broadcast has occurred.⁶⁷³ NAB states that broadcast stations remain the leading source of vital public safety information and are a significant source of local, diverse programming. It also states that the broadcast stations carried on cable systems continue to provide a guaranteed minimum of local and diverse voices for subscribers.⁶⁷⁴

191. **Children's Programming.** Nonbroadcast networks continue to attract a growing audience among children and families. Total day viewing of expanded basic networks by children (ages 2-11) increased from a 28.3 share in 1993/1994 to a 56.4 share during the 2004/2005 television season.⁶⁷⁵ PBS Kids Sprout, a joint venture of Comcast, Sesame Workshop, HITS Entertainment, and PBS Kids, launched on VOD in early 2005.⁶⁷⁶ Comcast began distributing the network in September 2005 as a full-time network on some of its systems.⁶⁷⁷ According to RCN, PBS Kids Sprout is a must have network for

⁶⁶⁸ EchoStar Comments at 13-16.

⁶⁶⁹ DIRECTV Comments at Exhibit D.

⁶⁷⁰ Comcast Comments at 46.

⁶⁷¹ APTS Comments at 3-4.

⁶⁷² Radio-Television News Directors Foundation, *A Look At Regional News Channels and State Public Affairs Networks*, May 2004, at 12; Comcast Comments at 44.

⁶⁷³ See Letter from Martha E. Heller, Wiley, Rein & Fielding, to Marlene Dortch, Secretary, FCC, MB Docket No. 05-192 (Nov. 15, 2005) at Attachment; Comcast meeting with Media Bureau Staff, Nov. 21, 2005. See also Comcast Corp., *Comcast and CBS Announce Deal to Offer Hit Shows through Video on Demand* (press release), Nov. 7, 2005. See also Comcast Comments at 49-50. Comcast's local VOD service also includes programming on community service initiatives addressing issues such as literacy and substance abuse. *Id.*

⁶⁷⁴ NAB Comments at 4.

⁶⁷⁵ NCTA Comments at 42-43.

⁶⁷⁶ *2004 Report*, 20 FCC Rcd at 2846 ¶ 175.

⁶⁷⁷ Comcast Comments at 44.

the children's demographic. Before Comcast acquired an interest in the network, RCN received PBS Kids Sprout through programming supplier TVN as part of its children's VOD package, Kids Unlimited. RCN claims that since Comcast acquired an interest in the network, RCN has experienced difficulties obtaining access to the programming. In spring 2005, RCN lost access to it, resulting in an 83 percent drop in its customers' usage of its Kids Unlimited VOD service.⁶⁷⁸

192. *Access to Programming by Persons with Disabilities.* We invited comment and information regarding the accessibility of closed captioning and video description to persons with disabilities.⁶⁷⁹ In particular we sought comment regarding the quality, accuracy, placement, technology, and instances of delayed or missing captioning. Currently, video programming distributors are required to provide at least 1,350 hours of captioned "new" nonexempt programming on each channel during each calendar quarter.⁶⁸⁰ As of January 1, 2006, the transition period for new programming ends and video programming distributors then will be required to provide captioning for 100 percent of all new nonexempt programming.⁶⁸¹ In addition, a video programming distributor must include captioning in 30 percent of its "pre-rule" nonexempt programming on each channel during each calendar quarter.⁶⁸² The rules exempt several specific classes of programming from the closed captioning requirements.⁶⁸³ Video programming providers may also petition the Commission for an exemption from the closed captioning rules if the requirements would impose an undue burden.⁶⁸⁴ The closed captioning rules are enforced through a complaint process, with the complaint initially directed to the video programming distributor responsible for compliance with the rules.⁶⁸⁵

193. Only one commenter provided information on closed captioning. DIRECTV states that it passes along all NTSC closed captioning information in line 21, fields 1 and 2 of the Vertical Blanking Interval (VBI). It adds that programmers are able to use the Secondary Audio Programming (SAP) channels for video description if they do not currently use them for other purposes. DIRECTV currently carries a SAP channel on 39 nonbroadcast channels and over 200 broadcast channels, but it leaves the decision on how to use the SAP channel to programmers. DIRECTV does not monitor the SAP channels on a regular basis. It is unaware of any current HD programming that is being authored with native CEA-708B closed captioning, but it has tested its own receivers, which all functioned properly during testing.⁶⁸⁶

⁶⁷⁸ RCN Comments at 10-11.

⁶⁷⁹ Notice, 20 FCC Rcd at 14124 ¶ 20. In 1997, the Commission adopted phase-in schedules to increase the amount of closed captioned video programming over time. See *Closed Captioning and Video Description of Video Programming, Implementation of Section 305 of the Telecommunications Act of 1996, Video Programming Accessibility*, Report and Order, 13 FCC Rcd 3272 (1998); Order on Reconsideration, 13 FCC Rcd 19973 (1998).

⁶⁸⁰ 47 C.F.R. § 79.1(b)(1) (phase-in schedule for "new" programming which is defined as programming first published or exhibited on or after January 1, 1998). Video programming first published or exhibited for display on television receivers equipped for display of digital transmissions or formatted for such transmission is defined as "new" as of July 1, 2002. 47 C.F.R. § 79.1(a)(6)(ii). See *Closed Captioning Requirements for Digital Television Receivers*, 15 FCC Rcd 16788, 16808-09 ¶ 60 (2000) (*Digital Captioning Order*). A separate phase-in schedule applies for Spanish programming. 47 C.F.R. § 79.1(b)(3)-(4).

⁶⁸¹ 47 C.F.R. § 79.1(b)(iv).

⁶⁸² 47 C.F.R. § 79.1(b)(2) (phase-in schedule for "pre-rule" programming). See also 47 C.F.R. § 79.1(a)(6) (definition of pre-rule programming).

⁶⁸³ 47 C.F.R. § 79.1(d).

⁶⁸⁴ 47 C.F.R. § 79.1(f).

⁶⁸⁵ 47 C.F.R. § 79.1(g).

⁶⁸⁶ DIRECTV Comments at 16.

194. On July 21, 2005, the Commission released a *Notice of Proposed Rulemaking* seeking comment about: (1) the current status of the Commission's closed captioning rules in ensuring that video programming is accessible to deaf and hard of hearing Americans and whether any revisions should be made to enhance the effectiveness of those rules; and (2) several compliance and quality issues relating to closed captioning that were raised in a *Petition for Rulemaking* filed by Telecommunications for the Deaf, Inc., the National Association of the Deaf, Self Help for Hard of Hearing People, Inc., the Association for Late Deafened Adults, and the Deaf and Hard of Hearing Consumer Advocacy Network.⁶⁸⁷ This proceeding is pending.

d. Packaging of Programming Services

195. In the *Notice*, we sought information on how video programming distributors package and market their programming. We also sought comment concerning the extent that MVPDs offer or plan to offer consumers more choice in channel selection rather than traditional tiering of programming services.⁶⁸⁸ The commenters indicate that MVPDs generally continue to offer packages or tiers of service that include a large number of programming networks, including a variety of family-friendly services. Generally, however, parents cannot subscribe to those channels alone.⁶⁸⁹ Instead, they must buy the channels they do not want their families to view in order to receive the family-friendly channels they desire. Commenters note that by offering programming on a theme tier or smaller package basis, MVPDs can address consumers' concerns regarding their inability to prevent objectionable content from coming into their homes, can differentiate their service offerings, and can allow subscribers to pay only for those programming services they regularly watch.⁶⁹⁰

196. Recently, a number of cable operators have announced plans to offer family-friendly programming tiers.⁶⁹¹ For example, on December 15, 2005, Time Warner announced that it would launch a family tier in the first quarter of 2006.⁶⁹² Consisting of 15 channels, the tier will be priced at an additional \$12.99 a month above the monthly cost of the basic service tier, which averages about \$12 across Time Warner's systems, and generally will require a digital set-top box for every television in the home that will receive the family tier.⁶⁹³ On December 22, 2005, Comcast announced that it will launch a family tier with an average of 35-40 channels beginning in early 2006.⁶⁹⁴ In addition to the 20-25

⁶⁸⁷ See also *2004 Report*, 20 FCC Rcd at 2848 at ¶ 178. See *Closed Captioning of Video Programming, Telecommunications for the Deaf, Inc., Petition for Rulemaking*, 20 FCC Rcd 13211 (2005).

⁶⁸⁸ *Notice*, 20 FCC Rcd at 14122 ¶ 16.

⁶⁸⁹ The one exception is Sky Angel's DBS service, which offers a family-friendly, faith-based programming service. See para. 73 *supra*.

⁶⁹⁰ ACA Comments at 12; BSPA Comments at 15; see, e.g., Consumers Union and Consumer Federation of America Comments and Reply Comments, MB Docket No. 04-207, July 15, 2004. See Oral Statement of Kevin J. Martin, Chairman, FCC, Before the Committee on Commerce, Science and Transportation, U.S. Senate, *Open Forum on Decency*, Nov. 29, 2005; *Chairman Kevin J. Martin's Statement on the Announcement that Cable Companies May Voluntarily Offer Family Tier* (FCC News Release) Dec. 12, 2005.

⁶⁹¹ According to NCTA, six of the largest MSOs plan to introduce family tiers, although they may have different approaches to launching these tiers, which are in various stages of development. These cable operators are Time Warner, Comcast, Advance/Newhouse Communications (Bright House Networks), Insight Communications, Bresnan Communications, and Midcontinent Communications. See Glen Dickson, *Family Tiering Gets Technical*, BROADCASTING & CABLE, Dec. 19, 2005, at 24.

⁶⁹² See Time Warner, *Time Warner Cable Launches Family Choice Tier* (press release), Dec. 15, 2005.

⁶⁹³ The 15 channels are: Broomerang, C-SPAN 2, C-SPAN 3, CNN Headline News, The Science Channel, Discovery Kids, Disney Channel, DIY Network, FIT-TV, Food Network, HGTV, La Familia, Nick Games & Sports, The Weather Channel, and Toon Disney. *Id.*

⁶⁹⁴ See Comcast Corp., *Comcast Announces Family Tier* (press release), Dec. 22, 2005.

channels that customers receive on their basic service tier, Comcast's family tier will include 16 family-friendly networks of primarily G-rated content.⁶⁹⁵ According to Comcast, the Family Tier package will cost an average of \$31.20 per month, which will reflect its national average for basic service of \$12, the 16-channel Family Tier for \$14.95, and a digital cable set-top box at a national average price of \$4.25 per month. In January 10, 2006, Cox announced it would launch a Family Tier in early 2006, which will consist of an average of 40 channels of programming, including local broadcast stations and broad-based general entertainment, news, and sports programming.⁶⁹⁶ Cox's Family Tier will be offered at a national average price of \$32 per month for the programming package, set-top box with electronic/interactive program guild capability and parental controls for specific programs and channels. On January 17, 2006, Insight announced that it would offer a Family Tier as a digital package that will include 15 channels of programming for \$13 per month. This new tier will be available as an add-on to the 21-channel basic service tier.⁶⁹⁷ Other cable operators, such as Midcontinent and Charter, have stated they are committed to developing family-friendly offerings, but have not yet announced specific plans.⁶⁹⁸ In addition, DIRECTV plans to offer a Family Tier with more than 40 channels that will include local broadcast stations and nonbroadcast networks at a price of \$34.99 per month.⁶⁹⁹ On February 1, 2006, EchoStar began offering a family tier with approximately 40 channels at a price of \$19.99 per month for nonbroadcast channels, and \$24.99 per month with local channels.⁷⁰⁰

⁶⁹⁵ The 16 networks include: Disney Channel, Toon Disney, PBS KIDS Sprout, Discovery Kids, Science Channel (Discovery), Nickelodeon/Nick Too, Nickelodeon GAS (Games and Sports), TBN (Trinity Broadcasting), HGTV, Food Network, DIY, CNN Headline News, The Weather Channel, National Geographic, C-SPAN, and C-SPAN 2. *Id.*

⁶⁹⁶ Cox Communications, Inc., *Cox communications Announces Family Friendly Package* (press release), Jan. 10, 2006. The 40 channels include: local affiliates of ABC, CBS, NBC, PBS, Fox, WB, UPN, and Univision, and C-SPAN, WGN, home shopping channels, TV Guide Channel, local public, education, and government access channels, and the Disney Channel, Discovery Kids, Headline News, National Geographic Channel, Home & Garden TV, DIY (Do It Yourself), Nickelodeon, Fit TV, Sprout, Discovery Science, Boomerang, and GSN. Local systems will be able to tailor the package with The Weather Channel or Weatherscan Local, C-SPAN 2 or 3, and additional religious and Spanish-language programming.

⁶⁹⁷ Insight Communications Company, *Insight Communication Announces Plans for Family-Friendly Tier of Programming* (press release), Jan. 17, 2006. The new tier of programming will include: Home & Garden Television, Food Network, DIY Network, C-SPAN 2, CNBS, CNN Headline News, The History Channel, The Weather Channel, Discovery Kids, Discovery Science, Nick Games & Sports, The Disney Channel, Toon Disney, PBS KIDS Sprout, and Trinity Broadcasting Network (TBN).

⁶⁹⁸ See Midcontinent, *Midcontinent Communications to Develop Family Friendly Choice* (press release), Dec. 12, 2005; Jean Spenner, *Cable TV Planning "Family Friendly" Tier*, THE SAGINAW NEWS, Dec. 16, 2005, at <http://www.mlive.com/business/sinews/index.ssf?/base/business-1/1134746428242260.xr..> (visited Dec. 29, 2005).

⁶⁹⁹ DIRECTV, Inc., *DIRECTV to Offer Family Programming Package* (press release), Jan. 18, 2006. DIRECTV's package of programming will include: Bloomberg, Boomerang, BYU TV, CNN Headline News, C-SPAN 1, C-SPAN-2, Daystar, Discovery Kids, Disney East, Disney West, DIY Network, EWTN, Food Network, Hallmark Channel, HGTV, HITN, HSN, Link TV, NASA TV, National Geographic Channel, Nickelodeon/Nick at Night East, Nickelodeon/Nick at Night West, Nicktoons, Noggin/The N, NRB Network, Once TV, PBS Kids Sprout, QVC, RFD TV, Shop at Home, Shop NBC, TCT Network, The Science Channel, The Weather Channel, Toon Disney, Trinity Broadcasting Network, Word Network, World Harvest Network, XM Disney Radio, and XM Kids.

⁷⁰⁰ EchoStar Communications Corporation, *DISH Network Introduces "DishFAMILY" Programming Tier* (press release), Jan. 19, 2006. EchoStar's programming package includes: Animal Planet, The Biography Channel, Bloomberg TV, Boomerang, BYUTV, C-SPAN, C-SPAN 2, CSTV, Discovery Kids, Discovery Times, Do It Yourself Network, EWTN, Food Network, Fox News Channel, Great American Country, CNN Headline News, HSN, NASA, Nickelodeon East, Nickelodeon West, Nick Games & Sports, Nick Toons, Outdoor Channel, RFDTV, Shop at Home, ShopNBC, The Science Channel, The Weather Channel, TBN, TV Land, and QVC.

197. Alternatively, a number of groups have raised issue with the voluntary industry proposals to offer family tiers. For example, the Parents Television Council contends that “family tiers are not the same as providing consumers with cable choice, the ability to take and pay for only what they want.”⁷⁰¹ In a joint letter to Congress, Consumers Union, the Consumer Federation of America, and Free Press state that the recently announced family tiers are a good first step and demonstrate that cable operators can offer smaller, specialized bundles of service.⁷⁰² It, however, is concerned that cable operators, along with broadcasters, have decided which channels will be included and the tiers offer consumers very little choice. In addition, The Concerned Women for America (CWA) assert that parents, rather than the cable industry, should be the ones to decide what is appropriate for their children to watch and that control is taken out of parents’ hands when the cable operators determine which channel to include in their family tiers.⁷⁰³ Because the announcement and availability of family tiers is a recent development, we are unable to evaluate the effectiveness of these programming packages in this Report.

198. In response to the request for comment on the packaging of programming in the *Notice*, ACA states that many small- and medium-sized cable operators would like to offer themed tiers at a lower cost, and a more family-friendly expanded basic tier, but that major programming providers prevent it by imposing various types of distribution restrictions and requirements. ACA reports that if its members were permitted to move sports services to a separate tier, they would do so because their subscribers would prefer a lower cost expanded basic package and less sports programming. ACA also states that some of its members would like to be able to respond to customers who find the content on certain entertainment networks that carry mature programming to be objectionable and would like to move these networks to a “Contemporary Adult” tier. It adds that these networks carry partial nudity, sexually explicit content, and profanity. According to ACA, this would reduce wholesale costs for the expanded basic tier, ease retail rate pressure, and address subscribers’ concerns.⁷⁰⁴

199. BSPA recognizes that the issue of tiering flexibility, and a la carte service raise many questions which need to be addressed in the marketplace, rather than on paper at the Commission before any decision can be made regarding the final costs and benefits of such offerings (whether to consumers, programmers, or distributors). Accordingly, BSPA proposes that several of its members, with those program suppliers and other cable providers who agree to participate, initiate focused, multi-year market tests in selected local markets, involving a la carte-type offerings. BSPA asserts that its proposed market tests would shed light on a number of questions, including (1) how many subscribers would choose the current structure over a voluntary a la carte option; (2) what level of a la carte would balance the needs of consumers, distributors, and content producers; (3) how many new customers would subscribe to MVPD service if they had a greater choice of offerings; (4) how advertising rates and structures are affected; (5) which networks or types of content would fail to garner significant numbers of subscribers; and (6) the potential financial impact on content producers and distributors. BSPA adds that a market test would improve the Commission’s understanding of the key issues and would better inform the legislative debate in Congress regarding consumer choice, pricing, and indecency issues. BSPA asks the Commission to endorse and support the industry’s pursuit of limited market tests of a la carte offerings.⁷⁰⁵

⁷⁰¹ See Parents Television Council, *PTC Calls “Family Tiers” a “Red Herring”* (press release), Dec. 12, 2005.

⁷⁰² See Letter from Jeannine Kenney, Consumers Union, Mark Cooper, Consumer Federation of America, and Ben Scott, Free Press, to Senators Ted Stevens and Daniel Inouye, Co-Chairmen, Committee on Commerce, Science and Transportation, U.S. Senate (Jan. 18, 2006).

⁷⁰³ See Concerned Women for America, *CWA: Family-Friendly Tiers are Not the Answer* (press release), Dec. 12, 2005.

⁷⁰⁴ ACA Comments at 12-13.

⁷⁰⁵ BSPA Comments at 26-27.

200. OPASTCO states that practices that require rural carriers to carry channels that most of their customers do not demand, or that compel them to place less popular channels in certain tiers, prevent these carriers from creating tiers that match the demands of their individual markets.⁷⁰⁶ Cincinnati Bell states that although it would like to offer differentiated programming packages, pricing options, and bundled services that compete with packages offered by incumbent cable or satellite providers, it will not be able to do so unless it can obtain reasonably priced programming, as well as carriage and tiering flexibility.⁷⁰⁷

201. Consumers for Cable Choice complain that cable's spectrum limitations keep valuable programming from special interest and minority markets. It claims that only those willing to pay a substantial premium can access additional channels and services of interest, if they are available at all. It adds that broadband-based networks offer the promise of substantially more programming options for these important markets. Consumers for Cable Choice point to the Latino market as an example, stating that many cable providers make available only one or two Spanish-speaking networks, and often no English-speaking Latino networks. It claims that IPTV technology could expand the amount of programming available to minority groups and special interests.⁷⁰⁸

202. Disney claims that MVPD subscribers enjoy many program packaging options that typically include retransmission of local broadcast signals, PEG channels, and selected other programming services.⁷⁰⁹ DIRECTV provides examples of its programming packages, which include various packages targeted to specific audiences. Its Total Choice package includes sports, movies, family entertainment, music and local channels. It also offers premium channel packages, such as HBO, Starz, Showtime, and Cinemax, as well as several sports and international packages.⁷¹⁰ Dominion Video Satellite, Inc., through its Sky Angel DBS service, provides faith-based programming, as well as news and family-oriented entertainment networks. It states that it serves the needs of an audience that desires a multichannel service that offers a wide variety of both faith-based and family-friendly channels without being required to receive and subsidize programming that is overtly in conflict with their values.⁷¹¹

C. Other Competitive Issues

1. Competitive Developments in Small and Rural Markets

203. In the *Notice*, we requested information and comment regarding issues specific to video programming distribution in rural and smaller markets.⁷¹² Small cable operators and telephone companies

⁷⁰⁶ OPASTCO Reply Comments at 6.

⁷⁰⁷ Cincinnati Bell Comments at 10.

⁷⁰⁸ Consumers for Cable Choice Comments at 3-4.

⁷⁰⁹ Disney Comments at 4-6. Disney attached its comments in response to the Commission's *Public Notice* in the *A La Carte* proceeding, MB Docket No. 04-207, filed July 15, 2004, to its comments in this proceeding. In those comments, Disney stated that any form of a la carte or tiering would result in consumers paying more for less.

⁷¹⁰ DIRECTV Comments at Exhibits B, C, and D.

⁷¹¹ E-mail from Nancy Christopher, Vice President, Public Relations, Dominion Sky Angel DBS Television and Radio System, Nov. 15, 2005.

⁷¹² *Notice*, 20 FCC Rcd at 14125-6 ¶ 23. Pursuant to Section 208 of SHVERA, the Commission conducted an inquiry and submitted a Report to Congress on the impact on competition in the MVPD market of the retransmission consent, network nonduplication, syndicated exclusivity, and sports blackout rules, including the impact of those rules on the ability of rural cable operators to compete with the direct broadcast satellite industry in the provision of digital broadcast television signals to consumers. See *Retransmission Consent and Exclusivity Rules: Report to Congress Pursuant to Section 208 of the Satellite Home Viewer Extension and Reauthorization Act of 2004*, Sept. 8, 2005.

have video subscribership ranging from 50 subscribers up to 100,000 subscribers. These relatively small numbers belie the fact that in the aggregate small cable operators and telephone companies serve a significant percentage of the MVPD market. The American Cable Association reports that its 1,100 members serve approximately eight million subscribers, or 12 percent of total U.S. cable subscribers.⁷¹³ Their principal competitors are DBS operators DIRECTV and EchoStar, which have higher penetration rates in rural markets than in urban or suburban markets.⁷¹⁴ Many small and rural MVPDs are rolling out advanced services, including Internet access, VoIP, DVR and VOD.⁷¹⁵ OPASTCO states that its members experience increased subscription rates when they bundle broadband services with video services.⁷¹⁶

204. Generally, small and rural cable operators and telephone companies serve very small numbers of subscribers in communities that experience little or no population growth. These demographics can limit their ability to raise capital for plant and equipment upgrades that will allow these small operators to compete with MVPDs having larger regional or national distribution platforms, such as cable MSOs and DBS, respectively. Thus, small and rural cable operators and telephone companies argue that a major factor limiting their ability to compete is the lack of a cost-effective means to receive and distribute video services.⁷¹⁷ NRTC, which represents approximately 1,200 rural utilities and affiliates in 47 states, states that many of its members distribute DIRECTV's service, but many also are pursuing a multi-platform approach, including satellite, wireless technologies, fiber platforms, and broadband-over-power line technologies, in order to compete for video subscribers.⁷¹⁸ OPASTCO reports that its rural LEC members are becoming MVPDs by exploiting newer technologies.⁷¹⁹ NRTC states that it is focused on providing its members with cost-effective access to television programming by using a low-cost, end-to-end IPTV delivery system, with commercial deployment expected in early 2006.⁷²⁰ NRTC reports that

⁷¹³ ACA Comments at 2. According to one analyst, small cable operators serve approximately 22 percent of total U.S. cable subscribers. See Michael Hopkins, *Thriving (Albeit Small) Empires*, THE BRIDGE, Sept. 30, 2005, at 1.

⁷¹⁴ See 2005 GAO Report at 9-15; Michael Hopkins, *Thriving (Albeit Small) Empires*, THE BRIDGE, Sept. 30, 2005. For example, in Vermont, The Bridge reports DTH penetration to be 35 percent compared to almost 47 percent for cable; in Utah, DTH and cable penetration are tied at approximately 33 percent; in Montana, DTH penetration is 32 percent and cable penetration 48 percent; in Idaho, DTH penetration is 32 percent and cable penetration is 45 percent; in Missouri, DTH penetration is 30 percent and cable penetration is 44 percent. DTH's national average penetration rate is 20 percent and cable's is 54 percent. *Id.* at 8.

⁷¹⁵ See, e.g., Michael Hopkins, *Thriving (Albeit Small) Empires*, THE BRIDGE, Sept. 30, 2005, at 8; Gerry Blackwell, *Rural Cooperative Does IPTV*, ISP Technology, Aug. 22, 2005; Stewart Schley, *Declaration of Innovation; Indie Ops Fight Rivals by Blazing New Trails*, MULTICHANNEL NEWS, Aug. 1, 2005; Matt Stump, *Co-op Brings IPTV to OK*, MULTICHANNEL NEWS, May 2, 2005; Linda Moss, *Telecom: Key to Rural Happiness*, MULTICHANNEL NEWS, Mar. 28, 2005.

⁷¹⁶ OPASTCO Comments at 7.

⁷¹⁷ See, e.g., OPASTCO Comments at 4; NTCA Comments at 12.

⁷¹⁸ NRTC Comments at 2. NRTC reports that, in March 2005, it and the National Rural Electric Cooperative Association's Cooperative Research Network entered into a partnership to conduct two pilot projects to study the performance of broadband-over-powerline in rural communities. NRTC Comments at 4.

⁷¹⁹ OPASTCO reports that based on a survey of its membership, approximately 50 percent use coaxial cable/hybrid fiber coax; 20 percent use IPTV over DSL; 14 percent use radio frequency based fiber to the home; 13 percent use asynchronous transfer mode; 8 percent use IP-based fiber to the home; and one percent use IP-based VDSL. Some members use more than one technology. OPASTCO Comments at 3, n.7.

⁷²⁰ NRTC Comments at 4. NRTC states that a majority of rural telephone companies are exploring video distribution systems using IPTV over digital subscriber lines (DSL). NRTC asserts that video platform costs are a limiting factor for small and rural LECs seeking to provide video services in their territories. According to NRTC, a head-end supporting the MPEG-2 video compression standard costs \$1 million, and a system using the newer (continued....)

it has entered into an agreement with satellite operator SES-AMERICOM to support and market to its members a service called “IP-Prime,” a centralized, satellite-delivered IPTV/MPEG-4 video distribution platform, which will enable small and rural operators to use standard headends to receive signals that can be bundled with standard-definition and HD programming, high-speed Internet, and telephony services.⁷²¹ NRTC reports that a commercial rollout of the IP Prime system is expected in the second quarter of 2006.⁷²²

205. Access to must have programming, including major national cable networks and regional sports networks, on a timely basis and at competitive rates is a key competitive issue for all MVPDs. Small and rural cable operators and LECs planning to offer video programming complain that securing access to programming is cumbersome and expensive.⁷²³ NTCA, a trade association representing more than 560 rural telecommunications providers, reports that small providers lack leverage in their negotiations with video content providers. It states that its members who provide video service spend approximately 50 percent of their operating expenses for programming, adding that it expects that percentage to increase in the future. NTCA adds that rural subscribers are penalized because its member companies serve fewer subscribers than medium- and large-sized MSOs.⁷²⁴ In addition, NTCA states that some of its members that have analog cable systems are being required to upgrade their facilities to digital in order to gain rights to carry certain programming.⁷²⁵ NRTC believes that programming providers are hesitant to enter into programming agreements with small and rural LECs that plan to use an IPTV platform due to concerns about digital content copyright infringement.⁷²⁶ ACA, which represents small cable operators, states that more than half of its members serve fewer than 1,000 subscribers. ACA states that many of its members lack leverage in dealing with large programmers, and that retransmission consent fees will add approximately \$1 billion to the cost of basic cable service in the small cable sector.⁷²⁷ ACA asserts that “lighter regulatory burdens and costs” of DBS have ensured its success in competing against cable operators in small and rural markets.⁷²⁸

206. Many small cable operators purchase video programming through buying cooperatives, such as the National Cable Television Cooperative (NCTC), which represents approximately 1,000

(Continued from previous page)

MPEG-4 compression standard can cost \$3 million, but due to the limited number of households served by the average rural cable operator or LEC, such an investment is not feasible. NRTC Comments at 5-6. According to NRTC, its members believe they must choose IPTV-over-DSL platforms that support the more costly MPEG-4 standard because it will allow them to deliver multiple channels simultaneously and enable delivery of HD programming, which is not possible using MPEG-2 compression over DSL. *Id.* at 5 n.5.

⁷²¹ NRTC Comments at 6. NRTC states that the initial capital cost for a fully deployed IPTV/MPEG-4 system capable of delivering up to 200 channels of video programming will be \$100,000.

⁷²² NRTC Comments at 6.

⁷²³ Michael Hopkins, *Thriving (Albeit Small) Empires*, THE BRIDGE, Sept. 30, 2005. According to one small cable operator executive, most cable operators face a rise in programming costs of 10 percent to 20 percent annually. *Id.* at 6.

⁷²⁴ NTCA Comments at 3-6.

⁷²⁵ *Id.* at 12. NTCA reports that one of its members, which provides analog cable television service to only 50 subscribers, would be required to incur an expenditure of \$180,000-\$250,000 to upgrade its network to a digital platform, but the cost of the upgrade would require a substantial increase in rates that would put it at a disadvantage relative to DBS operators. *Id.*

⁷²⁶ NRTC Comments at 5.

⁷²⁷ ACA Comments at 15.

⁷²⁸ *Id.* at 3-4.

independent cable operators serving approximately 14 million subscribers nationwide.⁷²⁹ NCTC negotiates master agreements with cable programming networks, cable hardware and equipment manufacturers, and other service providers on behalf of its membership. Through NCTC, small cable operators earn volume discounts to which they would not be entitled on their own. Disney states that it provides volume discounts to NCTC on behalf of rural cable operators for each of its national programming services, and adds that 99 percent of NCTC's members opted into ESPN's most recent carriage agreement negotiated with NCTC.⁷³⁰

2. Competitive Developments in the MDU Market

207. Multiple dwelling units (MDUs) comprise a separate segment of the MVPD market because alternative video providers may have difficulty offering service in MDUs in competition with an incumbent provider.⁷³¹ To some extent, competitive choices for MDU residents have been limited, especially from DBS, since many MDU residents do not have the line-of-sight necessary to receive DBS service.⁷³² DIRECTV reports, however, that it has simplified the delivery of its satellite TV to customers living in apartment buildings.⁷³³ It announced a "single wire" distribution system that makes it possible for DIRECTV to combine all signals from its satellites on a single wire running to multiple set-top boxes in a building.

208. Exclusive contracts are those that specify that video service in an MDU will be provided only by a particular MVPD. Perpetual contracts are those which grant an MVPD the right to provide service for an indefinite or very long period of time, or which have automatic renewal provisions (sometimes referred to as "evergreen" clauses). Competitive entrants into the MVPD market have raised concerns with these kinds of contracts for the past several years. As it did the last two years, BSPA identifies exclusive, long-term MDU access contracts as a barrier to entry.⁷³⁴ Verizon also raises this issue.⁷³⁵

IV. TECHNICAL ISSUES

209. Technology changes have important consequences for the state of video competition. Accordingly, we report on a number of developments in this area that affect the manner and state of competition. We examine both regulatory developments and market developments that may affect competition in the video market in the coming years.

A. Navigation and Reception Devices

210. *Tuner Mandate.* The DTV reception requirement initially was implemented in phases based on classes of screen size, mandating a date by which 50 percent of manufactured sets of a certain size must include the capability to receive digital television signals and a later date by which 100 percent of sets of a certain size must contain the necessary circuitry. For television sets 36" and larger, July 1,

⁷²⁹ NCTC, at <http://www.cabletvcoop.org/welcome.asp?t=/index.asp>.

⁷³⁰ Disney Comments at 5.

⁷³¹ The incumbent provider is not necessarily the incumbent cable operator. Private cable operators are the incumbent video provider for many MDUs. We note that a Commission proceeding regarding certain issues of inside and home run wiring is still pending. See *Telecommunications Services Inside Wiring, Customer Premises Equipment*, 19 FCC Rcd 1498 (2004).

⁷³² DIRECTV estimates that as many as half of MDU residents cannot receive DIRECTV service. DIRECTV Comments at 9.

⁷³³ *DirectV Says Single Wire Simplifies MDU Delivery*, COMMUNICATIONS DAILY, Aug. 19, 2005, at 3.

⁷³⁴ BSPA Comments at 20-23.

⁷³⁵ Verizon Comments at 35-39.

2005 was the effective date on which all televisions with an analog tuner were required to include a DTV tuner.⁷³⁶ On June 9, 2005, the Commission modified the schedule by which new televisions and other receiving devices, such as VCRs and digital video recorders, are required to include the capability to receive over-the-air digital broadcast signals.⁷³⁷ Specifically, the Commission advanced the date on which 100 percent of TV receivers with screen sizes 25"-36" must include DTV tuners to March 1, 2006.⁷³⁸ On November 8, 2005, the Commission amended its rules to advance to March 1, 2007 the date on which new television receivers with screen sizes 13"-24" and certain other receiving devices, such as VCRs and digital video recorders, must include the capability to receive digital television signals.⁷³⁹ The Commission also amended its rules to apply the DTV reception requirement to new receivers with screen sizes smaller than 13" on the same schedule.⁷⁴⁰ The Commission made these changes to ensure greater commercial availability and better match the consumer electronics manufacturers' normal product introduction cycle.

211. *CableCARDS and Navigation Devices.* The development and deployment of CableCARDS continued in 2005. As of November 30, 2005, there were 375 certified or verified models of CableCARD products from 22 manufacturers,⁷⁴¹ up from 60 models from 11 manufacturers the previous year.⁷⁴² CableCARDS permit the reception of secured digital cable services without the addition of a set-top box. CableCARDS have been deployed to more than 90,000 subscribers by the 10 largest MSOs.⁷⁴³ While consumers currently need a set-top box to receive two-way services (e.g. VOD, PPV),⁷⁴⁴ efforts to develop multi-stream and two-way CableCARDS have continued. Multi-stream unidirectional CableCARDS will permit the development of multi-tuner DVRs without requiring the use of multiple CableCARDS to access each stream. Two-way digital television finally will permit full-featured interactivity without a set-top box. In August 2005, Samsung became the first manufacturer to gain CableLabs certification for a two-way digital television.⁷⁴⁵ Additional manufacturers, including Panasonic, LG, Diego, Video Without Boundaries, and Thomson, signed the two-way Cable Host Interface License Agreement (CHILA) in late 2005, enabling them to develop two-way products.⁷⁴⁶

⁷³⁶ See *Review of the Commission's Rules and Policies Affecting the Conversion to Digital Television*, 17 FCC Rcd 15978 (2002).

⁷³⁷ See *Requirements for Digital Television Receiving Capability*, 20 FCC Rcd 11196 (2005).

⁷³⁸ See *id.* ¶ 1. Previously, the deadline for 100 percent compliance was July 1, 2006. The date for 50 percent compliance for TV receivers with screen sizes 25"-36" remained July 1, 2005.

⁷³⁹ See *Requirements for Digital Television Receiving Capability*, 20 FCC Rcd 18607 (2005). Previously, the deadline for small sets (13"-24") and for other TV receiving devices was July 1, 2007.

⁷⁴⁰ See *id.* ¶ 1.

⁷⁴¹ NCTA Comments, CS Docket No. 97-80, filed Dec. 29, 2005; see also NCTA Comments, CS Docket No. 97-80, filed Oct. 3, 2005.

⁷⁴² See *2004 Report*, 20 FCC Rcd at 2852 ¶ 187.

⁷⁴³ NCTA Comments, CS Docket No. 97-80, filed Dec. 29, 2005.

⁷⁴⁴ *Implementation of Section 304 of the Telecommunications Act of 1996: Commercial Availability of Navigation Devices; Compatibility Between Cable Systems and Consumer Electronics Equipment*, 18 FCC 20885 (2003). Video-on-demand and pay-per-view each require two way communications to function properly, VOD for ordering and program control and PPV for ordering. With unidirectional CableCARDS, VOD will not function and PPV requires a separate ordering method. Some interactive electronic program guides (EPGs) also require two-way communication.

⁷⁴⁵ CableLabs, *Samsung Electronics Gains CableLabs Certification on 2-Way Digital Television* (press release), Aug. 23, 2005.

⁷⁴⁶ See Alan Breznick, *NCTA Unveils Downloadable Conditional Access Plan*, CABLE DIGITAL NEWS, Jan. 1, 2006.

212. In March 2005, the Commission issued a *Second Report and Order* maintaining the ban on cable operator deployment of integrated set-top boxes, but deferring the effective date of the ban by 12 months from July 2006 to July 2007.⁷⁴⁷ In doing so, the Commission allowed time for the development of software-based downloadable conditional access and established a December 1, 2005, deadline for the cable industry to report to the Commission on the feasibility of deploying such a conditional access solution.⁷⁴⁸ Downloadable conditional access relies upon development of a common hardware platform capable of securely downloading software from any cable operator that will then mimic the cable operator's existing hardware-based conditional access. If a subscriber removes the set-top box and uses it with a different cable operator, the new cable operator downloads a new security system compatible with its conditional access system and erases the previous software-based conditional access code. In July 2005, Comcast, in conjunction with Motorola, Scientific-Atlanta, and NagraVision, demonstrated early development units capable of downloadable conditional access.⁷⁴⁹ In November 2005, Comcast hosted a second demonstration in which Motorola, Scientific-Atlanta, and Samsung demonstrated new prototypes capable of more advanced downloadable conditional access functions.⁷⁵⁰ On November 30, 2005, NCTA submitted to the Commission the required downloadable security report, which contained a detailed timeline for the development and deployment of downloadable conditional access.⁷⁵¹ NCTA stated that it expected cable operators nationwide to deploy downloadable conditional access by July 1, 2008.⁷⁵²

213. Verizon urges the Commission to adopt technology-neutral standards to ensure that FTTP and other modes of video delivery can emerge and compete with traditional cable technology. Verizon contends that CableLabs serves the needs of the cable industry, and it cannot be relied upon to make impartial determinations on technologies that affect competitors to traditional cable operators. Verizon indicates that the International Electrical and Electronic Engineers (IEEE), the Alliance for Telecommunications Industry Solutions (ATIS), the Multimedia over Coax Alliance (MOCA), and other neutral, standards-setting bodies are developing open, competitively neutral standards to govern a variety of other technical issues, such as the transport of digital content over home networks and IPTV.

214. Specifically, Verizon states that the Commission should consider technology-neutral standards in proceedings such as the so-called Plug and Play docket.⁷⁵³ It argues that the Commission should not adopt DOCSIS 2.0 or any other standard centered on technology only used by traditional cable

⁷⁴⁷ *Implementation of Section 304 of the Telecommunications Act of 1996: Commercial Availability of Navigation Devices*, 20 FCC Rcd 6794 (2005) (*Second Report and Order*). "Integrated" set-top boxes are those that have not separated conditional access and security functions from the tuning, navigation, and other features of the box. To ensure cable compliance with the third-party compatibility requirements of separated security, the Commission has determined a date on which cable operators must rely on separated security. Currently, the Commission plans to ban the "integration" of set-top box functionality and security after July 1, 2007.

⁷⁴⁸ *Id.* Conditional access is the means by which cable operators restrict access to their programming. It is generally considered to consist of an encryption technology, which makes digital content inaccessible, and an access provisioning system by which access is granted.

⁷⁴⁹ Letter from James L. Casserly, Counsel for Comcast, to Marlene H. Dortch, Secretary, FCC, CS Docket 97-80 (July 18, 2005).

⁷⁵⁰ Letter from James L. Casserly, Counsel for Comcast, to Marlene H. Dortch, Secretary, FCC, CS Docket 97-80, (Nov. 30, 2005).

⁷⁵¹ Letter from Daniel L. Brenner, Senior Vice President for NCTA, to Marlene H. Dortch, Secretary, FCC, CS Docket 97-80 (Nov. 30, 2005).

⁷⁵² *Id.*

⁷⁵³ "Plug and Play" refers to *Implementation of Section 304 of the Telecommunications Act of 1996, Commercial Availability of Navigation Devices, Compatibility Between Cable Systems and Consumer Electronics Equipment*, 18 FCC Rcd 20885 (2003) (*Plug and Play Rules*), recon. pending.

operators when it considers standards for two-way digital television receivers. Verizon observes that the DOCSIS 2.0 specifications do not address the needs of competing technologies, such as FTTP and digital broadcast satellite.⁷⁵⁴ Verizon contends that acceptance of CableLabs' standards, such as DOCSIS 2.0, would lead to the development of equipment (e.g., connectors, set-top boxes, and interfaces built into the television sets) that would impose additional costs on competitors that need to connect to FTTP or digital broadcast satellite infrastructures. Verizon recommends that the Commission adopt the IEEE 802.3i framework, or an alternative that will work with all competing technologies, as the two-way standard.

215. **OCAP and Interactive Television.** The development and deployment of CableLabs' Open Cable Application Platform (OCAP) middleware solution continued in 2005,⁷⁵⁵ with 28 firms demonstrating hardware platforms, middleware implementations, interactive TV applications, and network equipment that is OCAP compatible in August 2005.⁷⁵⁶ Once a manufacturer adapts OCAP to a specific device, no further customization is required of the application developers. Operators have access to a simplified development, testing, and support environment by limiting the number of versions of each piece of software deployed to customers. Further, manufacturers can develop products that will support all services (including bi-directional services) delivered by cable operators as well as future Interactive Television (ITV) applications and services.

216. As reported earlier, ITV is a service that supports subscriber-initiated choices or actions that are related to one or more video programming streams (e.g., t-commerce, data enhancements, and interactive gaming).⁷⁵⁷ Cable operators, DBS operators, application developers, and consumer electronics manufacturers continue to explore a variety of ITV services in order to increase revenue and subscribership. ITV services may also reduce subscriber churn (i.e., subscriber loss). The development and deployment of ITV services will advance as OCAP is implemented and developers create programs capable of running on OCAP platforms and reaching different types of audiences. In their October 14, 2005 update, CEA and NCTA agreed to incorporate support for OCAP in interactive Digital Cable Ready (iDCR) devices, although the two organizations continue to negotiate technical details.⁷⁵⁸

217. In January 2005, Samsung entered into an agreement with three major MSOs, Time Warner, Bright House Cable, and Charter Cable, to implement bi-directional OCAP software in cable set-top boxes.⁷⁵⁹ Bi-directional OCAP is a necessary component to allow third parties to produce two-way capable third party set-top boxes. In January 2006, several MSOs announced they would begin trials of

⁷⁵⁴ Specifically, that DOCSIS 2.0 specifies an upstream path that is not consistent with the IP over Ethernet (IEEE 802.3i) alternative for upstream transmission.

⁷⁵⁵ Middleware is a term of art for software that acts as an interpretation layer between the operating system and specific devices of a piece of hardware and software. OCAP is related to the more familiar Java platform developed by SUN Microsystems. For each operating system (such as Microsoft Windows or Apple Mac OS), a version of the Java Virtual Machine must be adapted. Once this is done, any program written in Java will run properly. Once OCAP has been tested and certified on a platform (or set-top box, television, or other consumer electronics device), application developers, including the MSOs themselves, may write a single version of their application and test it on one OCAP implementation and be assured it will run on all OCAP implementations.

⁷⁵⁶ CableLabs, *Twenty-eight Firms Demonstrate Interoperability on OCAP and eTV Platforms at CableLabs Event* (press release), Aug. 17, 2005.

⁷⁵⁷ See 2003 Report, 19 FCC Rcd at 1712-5 ¶¶ 187-192. See also *Nondiscrimination in the Distribution of Interactive Television Services Over Cable*, 16 FCC Rcd 1321 (2001) (ITV NOI).

⁷⁵⁸ Letter from Neal M. Goldberg, General Counsel, NCTA, to Marlene H. Dortch, Secretary, FCC, CS-Docket 97-80, (Oct. 14, 2005).

⁷⁵⁹ Rodolfo La Maestra, *2005 HDTV Report, Part 4: Satellite, Cable, Broadcasting*, HDTV MAGAZINE, Oct. 14, 2005, at http://www.hdtvmagazine.com/articles/2005/10/2005_hdtv_repor_2.php?page=1, at 3 (visited Dec. 8, 2005).

OCAP in select markets: Comcast in Philadelphia, Denver, Boston, and Union, New Jersey; Time Warner in New York, Milwaukee, Green Bay, Lincoln and Waco; Advance/Newhouse in Indianapolis. Cox, Cablevision, and Charter made similar announcements, but did not specify the markets where the trials would occur.⁷⁶⁰ Samsung also recently achieved certification status and began testing an OCAP-enabled interactive digital television set, thereby becoming the first consumer electronics manufacturer to build a two-way integrated digital television capable of handling interactive digital cable content and services, including VOD.⁷⁶¹ Panasonic and LG also have joined Samsung in entering into agreements with CableLabs, allowing them to implement OCAP middleware on cable-ready digital TVs, set-top boxes, and other products to support two-way, interactive cable services.⁷⁶² Panasonic has announced it will become the first major manufacturer to supply OCAP based set-top boxes in an agreement with Comcast.⁷⁶³

218. In addition, the Advanced Television Systems Committee (ATSC) recently approved the Advanced Common Application Platform (ACAP), which synchronizes the ATSC DTV Application Software Environment (DASE) Standard with OCAP. The new standard provides consumers with advanced interactive services, while providing content creators, broadcasters, cable operators and consumer electronics manufacturers with the technical details necessary for the development of services and products interoperable with both cable and broadcast.⁷⁶⁴ The cost and complexity of design, implementation, and support decrease by having a common application platform on which to develop services.

B. Emerging Technologies

219. **Fiber Optic Delivery of Video.** Fiber to the Premises (FTTP) and Fiber to the Node (FTTN) are emerging as competitive methods for the delivery of voice, video, and data. Both Verizon and SBC are deploying Broadband Passive Optical Networks (BPON). In September 2005, Verizon launched FiOS TV, which was expected to offer video programming to an anticipated three million homes passed by their FTTP plant by the end of 2005.⁷⁶⁵ Verizon delivers video programming from two national super-headends to regional video hub offices via its Sonet network. Verizon inserts local broadcast signals and public, educational, and government channels at the hub offices, and then transmits the signals to the central offices (COs) for distribution to customer premises. All VOD content and the interactive program guide are sent using the Internet Protocol (IP).⁷⁶⁶ Video entering as an IP stream will

⁷⁶⁰ CableLabs, *Cable Television Industry Voices Support for OCAP and Two-Way Digital Cable-Ready Product Deployments* (press release), Jan. 11, 2006.

⁷⁶¹ CableLabs, *Samsung Electronics Gains CableLabs Certification on 2-Way Digital Television* (press release), Aug. 23, 2005. Samsung, *Samsung and Time Warner Cable Deploy World's First Interactive OCAP TV* (press release), Jan. 11, 2006.

⁷⁶² *Panasonic Signs CableLabs Licenses for Two-Way Digital Cable Products*, SPECS NEWS AND TECHNOLOGY VOL. 17 NO. 2, March/April 2005, at http://www.cablelabs.com/news/newsletter/SPECS/MarApr_2005 (visited Dec. 8, 2005).

⁷⁶³ Panasonic, *Panasonic and Comcast Announce Industry-First Agreement for Enhanced OCAP HD-DVR Set-Top Boxes and OCAP Software License* (press release), Jan. 4, 2006.

⁷⁶⁴ Advanced Television Systems Committee, *ATSC Publishes "ACAP" Standard For Interactive Television* (press release), Sept. 6, 2005.

⁷⁶⁵ Linda Haugsted, *Verizon, FiOS TV Launch is "Seismic,"* MULTICHANNEL NEWS, May 22, 2005, at <http://www.multichannel.com/article/CA6259344.html> (visited Sept. 22, 2005).

⁷⁶⁶ Vince Vittore, *Verizon Uses RF for FiOS TV*, Telephony Online, Sept. 26, 2005, at http://telephonyonline.com/ftp/marketing/telecom_verizon_uses_rf/index.html (visited Sept. 26, 2005).

be sent to the set-tops using Multimedia over Coax (MoCA) technology.⁷⁶⁷ Verizon is expected to use MoCA for set-top upstream capabilities. Currently, Verizon plans deployment of its high-speed data, voice, and video networks in 15 states.⁷⁶⁸ SBC projects it will pass nearly 18 million households in 13 states by the end of 2007 with its FTTN Project Lightspeed.⁷⁶⁹ Both Verizon FiOS and SBC Project Lightspeed will offer data speeds in excess of current average broadband speeds and will provide video services competitive with existing offerings from the major MSOs.⁷⁷⁰

220. Other FTTP deployments also are occurring. Developers of active FTTP architectures are entering into agreements primarily with smaller telephone companies, municipalities, and utilities. Active networks use active electronic devices (*e.g.*, amplifiers, splitters), and the platform enables sending only the channel the subscriber is watching, providing more efficient use of spectrum and preventing signal theft through compromised or unauthorized set-top boxes. For example, the Utah Telecommunications Open Infrastructure Agency (UTOPIA) and iProvo are using active FTTP architecture. UTOPIA connects 140,000 homes and businesses in Salt Lake City.⁷⁷¹ iProvo is building out a network that reaches 27,000 homes and 4,100 businesses and has recently completed Phase 5 of its deployment.⁷⁷²

221. *Distributed Transmission of Digital Television (DTS/DTx)*. A DTV distributed transmission system employs multiple synchronized transmitters spread around a television station's service area. Each transmitter broadcasts the station's DTV signal on the same channel, relying on the performance of "adaptive equalizer" circuitry in DTV receivers to cancel or combine the multiple signals plus any reflected signals to produce a single signal. Such distributed transmitters are considered to be similar to analog TV booster stations, a secondary, low-power service used to "fill in" gaps in the parent station's coverage area, but DTV technology has the potential to enable this type of operation more efficiently than its analog predecessor.⁷⁷³

222. In the *Second DTV Periodic Report and Order*, the Commission approved, in principle, the use of distributed transmission system (DTS) technologies but deferred to a separate proceeding the development of rules for DTS operation and the examination of several policy issues related to its use.⁷⁷⁴ In November 2005, the Commission issued a *Notice of Proposed Rulemaking* to examine the issues related to the use of DTS and proposed rules for future DTS operation.⁷⁷⁵ The proposed rules would permit an existing authorized broadcast station to use DTS after the new, post-transition DTV Table of Allotments is established and the current freeze on the filing of most applications is lifted. This would

⁷⁶⁷ *Id.* See paras. 224-5 *infra*.

⁷⁶⁸ *Id.* at 18.

⁷⁶⁹ *Id.* at 21.

⁷⁷⁰ Verizon, *Verizon FiOS FAQ*, at <http://www22.verizon.com/FiOSforhome/channels/FiOS/root/faq.asp> (visited Oct. 19, 2005).

⁷⁷¹ Utah Telecommunications Open Infrastructure, at <http://www.utopianet.org/> (visited Oct. 19, 2005).

⁷⁷² Provo City Telecom, *iProvo General Information*, at http://www.iprovo.net/modules/xoopsfaq/index.php?cat_id=1 (visited Oct. 19, 2005).

⁷⁷³ The Commission's Spectrum Policy Task Force has recommended that digital television broadcasters be permitted to operate single frequency low power distributed transmission systems within their present service areas. See *Spectrum Policy Task Force Report*, ET Docket No. 02-135 (Nov. 2002), available at <http://www.fcc.gov/sptf/reports.html>.

⁷⁷⁴ *Second Periodic Review of the Commission's Rules and Policies Affecting the Conversion to Digital Television*, 19 FCC Rcd 18279, 18283, 18355-57, ¶¶ 9, 174-78 (2004) (*Second DTV Periodic Report and Order*).

⁷⁷⁵ *Digital Television Distributed Transmission System Technologies*, 20 FCC Rcd 17797 (2005).