

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

In the Matter of:

*Annual Report to Congress on the Status of
Competition in the Satellite Services
Market*

IB Docket No. 06-67

COMMENTS OF DIRECTV, INC.

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TABLE OF CONTENTS

INTRODUCTION AND SUMMARY	1
DISCUSSION	3
I. Satellite Communications Services Market Structure	3
A. Product Market	3
B. Geographic Market	7
II. Competitive Conditions in the Marketplace	11
A. Market Structure	11
B. Competition	12
1. Capacity	12
2. Access to Programming	16
C. Market Entry	19
1. Market Entry is Happening Today	19
2. Entry by DTH Satellite Providers is Possible	22
3. Challenges for Entry	22
D. Market Consolidation	24
III. Data Related to Competition	25
CONCLUSION	29
EXHIBITS A.1-A5	
EXCERPTS FROM THE DIRECTV GROUP, INC ANNUAL REPORTS 2005-01	
EXHIBIT B	
DIRECTV QUARTERLY REPORT	

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INTRODUCTION AND SUMMARY

A decade ago, there was no such thing as multichannel video competition. Yet today, competition means consumers have more choices, customer service and pricing are becoming more responsive, technological innovation is flourishing, and tens of thousands of jobs have been created.

Direct-to-home (“DTH”) satellite has been a large part of this story. DIRECTV, Inc. (“DIRECTV”) thus welcomes the interest that Congress and the Commission have shown toward the satellite industry by initiating this proceeding.¹ By examining the role that DIRECTV and others have played in bringing competition to the video marketplace, decision makers will be better equipped to continue and build upon the policies that enabled competition to emerge in the first place.

From DIRECTV’s perspective, if the Commission takes nothing else away from these comments, it should recognize that DTH satellite operators do not compete only

¹ *IB Invites Comment for Annual Report to Congress on Status of Competition in the Satellite Services Market*, DA 06-635 at 2 (rel. Mar. 20, 2006) (“Notice”); *see also* Communications Satellite Act—Amendment, Pub. L. No. 109-34, 119 Stat. 377 (2005) (“Amendment Act”).

against one another. They compete against incumbent cable operators in every community in the United States, against second or third terrestrial platforms in many communities, and, increasingly, against a host of Internet-based distribution technologies.

Most importantly for purposes of this analysis, they are now faced with competition from the local telephone giants. Armed with fiber networks of nearly limitless capacity and enormous existing customer bases, offerings such as Verizon's FiOS service promise to deliver hundreds upon hundreds of channels to their subscribers. These services are authorized in many states, and are already up and running in communities throughout the United States. These new competitors just now getting off the ground will have a dramatic impact on the nature of MVPD competition.

Thus, there is no such thing as a "Video Services satellite product market."² Instead, as the Commission has concluded on dozens of occasions, DTH operators compete against a wide range of traditional and emerging video distribution platforms. The Commission analyzed this range of distributors most recently only two months ago in its latest *Annual Video Competition Report*.³ It should do the same here, either by incorporating that *Report* explicitly or by conducting a similarly broad analysis.

Indeed, to draft a report discussing DTH satellite operators alone would risk providing Congress with a distorted picture of video competition. A satellite-only report would, for example, ignore some very real advantages possessed by terrestrial platforms, especially in terms of capacity for and access to key local and regional programming. Such a report would also ignore the need for DTH operators such as DIRECTV to

² Notice at 2.

³ *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Report and Order and Further Notice of Proposed Rulemaking, FCC 06-11, MB Docket 05-255 (rel. Mar. 3, 2006) ("2006 Annual Video Competition Report").

counter their terrestrial competitors with new products and services – and the need for them to obtain additional spectrum in order to do so. Public policy based on such incomplete information would risk endangering the competition that has only recently emerged.

In the balance of these comments, DIRECTV provides responses to many of the more detailed questions posed by the Commission. As will become clear, however, each of these responses starts – as it must – from the proposition that DIRECTV competes every day primarily against numerous other distributors, including entrenched terrestrial operators.

DISCUSSION

I. SATELLITE COMMUNICATIONS SERVICES MARKET STRUCTURE

Although the Commission asks about DTH satellite operators, it should not limit its analysis to these entities. To do so would, of course, ignore the incumbent cable operators with whom DTH satellite operators have competed for years. Just as importantly, such an analysis would ignore the entry of the telephone giants into the video space, as well as new distribution technologies that are beginning to compete with more traditional multichannel video programming distributors (“MVPDs”). It is crucial that any analysis both recognize these new competitors and acknowledge the steps that DTH satellite operators must take to compete with them.

A. Product Market

As the *Notice* recognizes, “a meaningful market structure analysis entails defining relevant geographic and product markets.”⁴ The Bureau thus seeks comment on a

⁴ *Notice* at 2.

proposed “Video Services satellite product market,” defined as “video distribution via satellite, video contribution and occasional use satellite services, and direct-to-consumer video services.”⁵ But Congress itself makes no mention of this proposed product market.⁶ Indeed, given the fact that Congress was amending the ORBIT Act – which primarily concerns sellers of wholesale satellite capacity – it seems more likely that Congress is most interested in an examination of wholesale markets rather than direct-to-consumer video.⁷

If it chooses to examine direct-to-consumer video issues, the Bureau should either through incorporation or otherwise follow the lead of the *Annual Video Competition Reports* that the Commission prepares for Congress each year, and which the Bureau cited as a model for the instant proceeding.⁸ These reports have consistently examined a wide range of satellite and terrestrial competitors – to include not only MVPDs but also

⁵ *Id.* at 2 (“[We invite] commenters to address our proposed definitions for the relevant product markets for this report. Are there other services that justify a separate product market? Should we define the product markets based on different criteria? For example, should the relevant product markets be based on satellite frequency band assigned or orbital configuration (*e.g.*, geostationary orbits vs. non-geostationary orbits), rather than by type of service provided?”).

⁶ The relevant statute requires (1) an identification of the number and market share of competitors in domestic and international satellite markets; (2) an analysis of whether there is effective competition in the market for domestic and international satellite services; and (3) a list of any foreign nations in which legal or regulatory practices restrict access to the market for satellite services in such nation in a manner that undermines competition or favors a particular competitor or set of competitors. Amendment Act. § 4. Congress further stipulated that the report include, among other things, identification of the number and market share of competitors and a determination of whether there is effective competition in the market for domestic and international satellite services. *Id.* at §4 (b)(1)-(2).

⁷ The ORBIT Act does, however, place certain restrictions on DTH activity. *See* 47 U.S.C. § 761a(a) (prohibiting Intelsat from engaging in “additional services” prior to privatization); 47 U.S.C. § 769(a)(12)(B) (defining “additional services” to include DTH services). On April 8, 2005, the Commission determined, based on an Intelsat certification, that Intelsat was no longer prohibited from providing “additional services.” *Intelsat, Ltd. Petition for Declaratory Ruling that Intelsat, Ltd. Complies With Section 621(5)(F) of the ORBIT Act*, FCC 05-86, IB Docket 05-18 (rel. April 15, 2005).

⁸ *See Notice* at 2 (citing to *Annual Video Competition Reports*).

other video offerings such as broadcast television, DVDs and Internet downloads.⁹ (Indeed, as video increasingly migrates to the Internet, this last category of entities becomes even more important.)

Even if it does not discuss the entire range of video competitors, the Bureau should at the very least follow the unbroken line of decisions in which the Commission has analyzed direct-to-consumer video services such as DIRECTV as part of a larger market composed of all MVPDs.¹⁰ More specifically, the Commission has repeatedly analyzed competition among MVPDs in two separate but related product markets: the downstream market for the retail distribution of multichannel video programming to subscribers; and the upstream market for the purchase of video programming.¹¹

The Commission bases these analyses on standard market definition principles derived from antitrust law.¹² Under these principles, a “relevant product market” is one that includes all products reasonably interchangeable by consumers for the same

⁹ See, e.g., “2006 Annual Video Competition Report,” *passim* (discussing broadcasters and Internet content providers along with cable operators, DTH Operators and others). The broadcasters themselves are “fully engaged in developing HD and multicast programming to better serve their viewers and their communities.” Comments of the National Association of Broadcasters in MB Docket No. 05-255 (filed Sept. 19, 2005).

¹⁰ See, e.g., *General Motors Corp., Hughes Electronics Corp. and The News Corporation Ltd.*, 19 FCC Rcd. 473,500-04 (2004) (“*News-Hughes*”); *MCI Telecommunications Corp.*, 16 FCC Rcd. 21608, 21616 and n. 40 (1999) (“Competitors in the MVPD market include cable operators, DBS operators, [and others]”); *Tempo Satellite*, 14 FCC Rcd. 7946, 7952 (1999) (noting that “DBS operators compete with each other and other MVPDs in the distribution of multiple channels of video programming to consumers (the ‘MVPD market’)”); see also *Policies and Rules for the Direct Broadcast Satellite Service*, 17 FCC Rcd. 11331, 11336 (2002) (noting that “DBS continues to represent the single largest competitor to cable in the MVPD market”).

¹¹ See, e.g., *Implementation of the Cable Television Consumer Protection and Competition Act of 1992 – Sunset of Exclusive Contract Prohibition*, 17 FCC Rcd. 12124, 12139-12140 (2002) (“*Exclusivity Sunset Order*”); *EchoStar Communications Corp., General Motors Corp., and Hughes Electronics Corp.*, Hearing Designation Order, 17 FCC Rcd. 20559, 20609 (2002) (“*EchoStar HDO*”); *Comcast Corp. and AT&T Corp.*, 17 FCC Rcd. 23246, 23251 (2002) (“*AT&T-Comcast*”).

¹² Antitrust law “informs” the Commission’s analyses in this area. See, e.g., *SBC Communications, Inc. and AT&T Corporation*, 20 FCC Rcd. 18290, 18302 (2005) (2005); *News-Hughes*, 19 FCC Rcd. at 484; *EchoStar HDO*, 17 FCC Rcd. at 20575.

purposes.¹³ The Commission has correctly determined over the years that multichannel television offerings are reasonably interchangeable.¹⁴

B. Geographic Market

The Bureau proposes to define the geographic markets associated with the “Video Services satellite product market” as: “(1) Domestic markets (services provided within the U.S.); (2) International markets (services provided to and from the U.S.); and (3) Foreign markets (services provided from overseas locations to other overseas locations).”¹⁵ These geographic markets are not consistent with the Commission’s findings for the MVPD product markets in which DIRECTV competes (or the broader market contemplated in the *Annual Video Competition Reports*).¹⁶

In the MVPD retail distribution market, the Commission has generally found the relevant geographic market to be the local cable franchise area.¹⁷ We believe this continues to be the appropriate geographic market to analyze.

The relevant geographic market for purposes of analyzing the MVPD programming market depends on the programming in question. Some programming networks (such as HBO, for example) offer programming of broad interest and seek a

¹³ See *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 395 (1956). More specifically, a “market” is defined as a product or group of products and a geographic area in which the product or products are produced or sold such that a hypothetical profit-maximizing firm likely would impose at least a “small but significant and nontransitory” increase in price, assuming the terms of sale of all other products are held constant. See *United States Department of Justice/Federal Trade Commission Horizontal Merger Guidelines* at § 1.0 (“*Merger Guidelines*”), available at www.usdoj.gov/atr/public/guidelines/horiz_book/hmg1.html.

¹⁴ See cases cited in notes 11-12, above.

¹⁵ Notice at 3.

¹⁶ *Id.* (“We seek comments on our definition of the geographic markets.”).

¹⁷ See, e.g., *News-Hughes*, 19 FCC Rcd. at 505 (noting that the geographic market for MVPD is local, “because consumers make decisions based on the MVPD choices available to them at their residences and are unlikely to change residences to avoid a small, but significant increase in the price of MVPD service”); *EchoStar HDO*, 17 FCC Rcd. at 20610.

nationwide audience. Others (including regional sports networks (“RSNs”) and broadcast stations) are regional or local in scope. Recognizing these differences, the Commission has concluded that “the market(s) that include video programming networks are classic differentiated product markets.”¹⁸ Thus, while it is reasonable to use the entire United States as the geographic market for national cable network programming, the geographic markets for regional and local programming are much smaller.

C. Market Participants

There are now more competitors in the video market than ever before.¹⁹ Most obviously, for purposes of this proceeding, DTH satellite operators DIRECTV and EchoStar each provide service throughout the country.²⁰ Almost everybody can, however, now receive service from an incumbent cable operator. Both the Commission and the National Cable and Telecommunications Association estimate that at least 99 percent of all homes with a television are passed by cable.²¹ Thus, for all intents and purposes, DIRECTV competes everywhere against both EchoStar and the incumbent cable operator.

There are, moreover, a host of new entrants in this space. Perhaps most importantly, local telephone companies are entering the marketplace in earnest. The

¹⁸ *E.g.*, *News-Hughes*, 19 FCC Rcd. at 504.

¹⁹ *See Notice* at 3 (seeking comment on “the number of firms in each relevant product and geographic market.”); *id.* (seeking “identification of the number and market share of competitors in domestic and international satellite markets”); Amendment Act § 4(b)(1). The “buyers of services,” however, differ for the downstream retail and upstream programming markets. *See Notice* at 3 (seeking comment on “the types and number of buyers of services (including both number of firms and number of subscribers) in each product and geographic market”). MVPD subscribers are the buyers of services in the downstream retail market. The MVPDs themselves, however, are the buyers of services in the upstream programming market.

²⁰ DIRECTV’s affiliate, DIRECTV Latin America (“DTVLA”) provides service in Puerto Rico, the U.S. Virgin Islands, and throughout Central and Latin America. These are separate companies, are under separate management, and operate over separate satellite facilities.

²¹ *2006 Annual Video Competition Report*, ¶ 30.

Commission reports that there are 652 communities in 46 states currently served at least in part by fiber-to-the-home (“FTTH”) networks, with 322,700 “connected homes.”²²

But this is surely too low a figure. By one estimate, Verizon alone obtained video franchises for communities in California, Delaware, Florida, Maryland, Massachusetts, New York, Pennsylvania, Texas, Virginia, and Indiana, covering more than 1.3 million households.²³ Just last week, for example, Verizon announced the introduction of its “FiOS” video service in a suburb of Boston.²⁴ Verizon describes this service in a way that makes perfectly clear its intention of competing in the MVPD marketplace:

- “A broad collection of all-digital programming and compelling consumer choice – with more than 350 total channels and more on the way.”
- “A lead offer with more than 180 digital video and music channels, for \$34.95 a month with Verizon FiOS Internet Service or a qualifying voice plan or \$39.95 as a stand-alone service.”
- “More than 20 high-definition channels, with extraordinary clarity and theater-quality sound.”
- “More than 2,200 On Demand titles available to customers now, increasing to over 3,500 titles in the next several months.”
- “Channels grouped by genres such as entertainment, sports, news, shopping, movies and family, making it easy for audiences to find their favorite programming.”
- “An easy-to-use interactive programming guide that integrates HD programming, On Demand content and the digital video recorder along with broadcast television into a seamless user experience.”

²² *Id.*, ¶15.

²³ See “Town of Hempstead N.Y. Approves Video Franchise Agreement With Verizon,” Apr. 4, 2006, *available at* http://newscenter.verizon.com/proactive/newsroom/release.vtml?id=93368&PROACTIVE_ID=c6c6cfcbedccc6cdc5cecfcfcf5cecdcf8c6cbcbcfcc7c5cf.

²⁴ See “Verizon Expands FiOS TV Availability in Massachusetts,” Apr. 12, 2006, *available at* http://newscenter.verizon.com/proactive/newsroom/release.vtml?id=93385&PROACTIVE_ID=c6c6cfcacbcfc8bc5cecfcfcf5cecdcf7cecdceccbc7c5cf.

- “A dual-tuner, HD-capable DVR that gives customers the freedom to pause and rewind live TV, record one show while watching another, and fast forward to their favorite part of the program – all without a VCR, tapes or DVDs.”²⁵

Similarly, AT&T provides its “Project Lightspeed” service on a limited basis in San Antonio, and expects to roll out service in more areas later this year.²⁶

Moreover, many smaller telephone companies already provide programming over wireline networks that compete head-to-head with cable systems and DBS providers. The National Telecommunications Cooperative Association (“NTCA”), for example, recently reported that over forty percent of respondents provide video service (as discussed below, often in conjunction with SES Americom).²⁷ As digital video delivery techniques continue to become better and easier to implement – especially with the proliferation of technologies using Internet protocol standards – there is every reason to expect more of these locally dominant telecommunications providers to enter the MVPD market in search of an additional revenue stream.

In addition, there are a number of non-telephone providers of terrestrial video service. The Commission estimates that cable overbuilders – also known as broadband service providers (“BSPs”) – serve more than 1.5 million households,²⁸ and obviously

²⁵ *Id.*

²⁶ *See, e.g.*, “SBC Confirms Project Lightspeed IPTV Field Trial,” Nov. 3, 2005, *available at* <http://www.tvover.net/SBC+Confirms+Project+Lightspeed+IPTV+Field+Trial.aspx>; “Texans Benefiting from Exploding Broadband Investment, TV Choice,” Feb. 10, 2006, *available at* <http://att.sbc.com/gen/press-room?pid=4800&cdvn=news&newsarticleid=22085>.

²⁷ *See* Comments of the NCTA, MB Docket No. 05-255, at 3 (filed Sept. 19, 2005).

²⁸ *2006 Annual Video Competition Report*, ¶ 14.

pass many more.²⁹ Digital wireless cable systems have begun to offer service in some areas.³⁰

U.S. Digital Television (“USDTV”) now offers its multichannel video subscription service using digital broadcast spectrum in five markets.³¹ Having just received \$25.8 million from several large broadcast groups,³² USDTV now proclaims “the time has come for a broadcaster controlled pay-TV platform.”³³ USDTV recently announced its conversion to MPEG-4 technology, which will enable it to offer additional programming.³⁴

Finally, as discussed above, one cannot ignore the impact of Internet video streaming, downloads, and mobile video on the video market. Already, some of the most valuable content previously offered only by broadcasters and MVPDs is available for download.³⁵ And a variety of entities have announced plans to deliver video wirelessly to

²⁹ RCN, to take just one example, describes itself as “one of the largest facilities-based competitive providers of bundled cable, high-speed internet and phone services delivered over its own fiber-optic local network to residential customers in the most densely populated markets in the U.S.,” adding that “RCN provides service in the Boston, New York, Eastern Pennsylvania, Washington, D.C., Chicago, San Francisco and Los Angeles metropolitan markets.” “RCN Responds to EchoStar Chairman & CEO’s Testimony Before the Senate Commerce Committee,” Jan. 20, 2006, *available at* <http://investor.rcn.com/ReleaseDetail.cfm?ReleaseID=184914>.

³⁰ *See, e.g.*, <http://www.watchtv.net/announceSpecials/announceSpecials.php> (describing rollout of W.A.T.C.H. TV in several communities in Ohio); “Network LIVE and MediaFLO USA Inc. Team to Offer Live Entertainment Programming to Wireless Multimedia Subscribers,” Apr. 3, 2006 (describing QUALCOM affiliated entity’s plans to distribute multimedia content wirelessly), *available at* http://www.qualcomm.com/press/releases/2006/060403_network_live_mediaflo.html.

³¹ *See* “USDTV Selects the Norfolk Virginia Market as First East Coast Launch of its All-Digital Low-Cost Cable Alternative,” Jan 5, 2006 (also describing funding).

³² *Id.*

³³ *See* “Catch the Vision of USDTV,” *Broadcasting and Cable*, Apr. 17, 2006, at 8.

³⁴ *See* “USDTV Converting to MPEG-4 AVC,” *Multichannel News*, Apr. 10, 2006, *available at* <http://www.multichannel.com/article/CA6323368.html?display=Breaking+News>.

³⁵ *See, e.g.*, Julie Bosman, “Soon, Catch ‘Lost’ Online, a Day Later,” *N.Y. Times*, Apr. 11, 2006 (describing Disney’s decision to make content available online for free subsequent to its initial broadcast).

handsets and other mobile devices.³⁶ It is entirely reasonable to believe that, within a relatively short amount of time, such offerings will more directly compete with those of cable, telephone, and DTH satellite providers. Such offerings, of course, may not compete against the entire range of products offered by more traditional MVPDs. Yet, in the coming months and years, they will increasingly compete for viewers of particular programs and services.³⁷

II. COMPETITIVE CONDITIONS IN THE MARKETPLACE

Congress has asked the Commission to report on whether there is “effective competition” in the marketplace.³⁸ Again, the correct “marketplace” insofar as DIRECTV is concerned is no narrower than the MVPD market. And, as discussed above, there are a growing number of firms in this space. The extent to which these participants compete on a level playing field, and (perhaps more importantly) whether market conditions will permit such competition in the future, are different questions altogether.

A. Market Structure

The Bureau has asked for subscriber figures from DTH operators. As of December 31, 2005, DIRECTV had 15.13 million subscribers, which represents an

³⁶ Sprint, for example, already offers Sprint Power Vision, which allows subscribers to stream content to their phones from sources including ABC News Now, SIRIUS Hits, NFL Network, Fox Sports, Fuse, Fashion TV, ESPN, Fox News Channel, NBC, The Weather Channel, Discovery Channel, Animal Planet, Toon World, Looney Tunes, Comedy Time, and Music Choice. *See* <http://www1.sprintpcs.com/explore/ueContent.jsp?scTopic=multimedia100>. Verizon Wireless’s V-Cast service allows subscribers to download video clips from sources including E!, Sesame Street, Just for Laughs, CNN, MSNBC, MarketWatch, ESPN, and Fox Sports. *See* http://getitnow.vzwshop.com/index.aspx?id=video_learn.

³⁷ For example, it is entirely reasonable to believe that such offerings will initially compete against the Video-on-Demand (“VOD”) offerings of more traditional MVPDs.

³⁸ *See Notice* at 2 (noting that the Amendment Act directs the Commission to analyze “whether or not there is effective competition in the markets for domestic and international satellite services”).

increase from the 13.94 million subscribers it had as of December 31, 2004. The Bureau has also sought information related to sales and capacity.³⁹ Much of this information can be found in DIRECTV's latest annual report, relevant portions of which are attached as Exhibit A.1 to these Comments.⁴⁰ Additional information can be found in DIRECTV's latest Quarterly Results, which are also attached as Exhibit B to these Comments.⁴¹

These subscriber figures provide a reasonable basis for determining market share in the downstream retail MVPD market.⁴² They also provide a reasonable basis for determining market share in the upstream market for national programming. With respect to the upstream market for local and regional programming, by contrast, the Bureau would need to look at subscribership figures applicable to the relevant geographic market – *i.e.*, the “footprint” of the programming in question.

B. Competition

The Bureau has asked generally about competition, and, in particular, whether there is “effective competition” in the marketplace. Without question, there are now more competitors than ever before in the MVPD markets. Yet it is far from clear that competition is “effective” or that it is likely to become effective in the near future. This is because, in several important regards, MVPDs do not compete on a level playing field.

³⁹ See *Notice* at 3 (seeking information on subscriber sales (revenues by product) and capacity data (number of available transponders, number of transponders used or other capacity measures) by participants in each product and geographic market”).

⁴⁰ The DIRECTV Group, Inc., which is the parent company of DIRECTV, files quarterly and annual reports with the Securities and Exchange Commission. Excerpts from four prior annual reports are attached as Exhibits A.2-A.4. These are also available on the Internet at <http://phx.corporate-ir.net/phoenix.zhtml?c=127160&p=irol-sec>.

⁴¹ This information is also available on the Internet. See “The DIRECTV Group Announces 2005 Results,” Feb. 8, 2006 (“Fourth Quarter Results”), *available at* http://media.corporate-ir.net/media_files/irol/12/127160/pdf/Q42005Earnings.pdf.

⁴² See *Notice* at 3 (asking whether there are “any other reasonable measures of market shares, and if so, what are they”).

1. Capacity

One such area is capacity – in particular, capacity for local and regional programming. As the Bureau is aware, DTH satellites are relatively efficient platforms for delivering national programming. Because they are national platforms, however, they are not as efficient at delivering local programming.⁴³ Indeed, it is fair to say that DTH operators' efforts to introduce competition in the MVPD market over the last decade have in large part turned on their ability to overcome this inefficiency in order to offer local and regional programming.

In this regard, DIRECTV has made enormous strides over the last few years. Today, DIRECTV provides “local-into-local” service in 141 markets, representing approximately 94 percent of U.S. television viewers. And it has recently launched two of four new state-of-the-art Ka-band satellites.⁴⁴ Supporting the latest compression, modulation, and related technologies, the combined capacity on these satellites (once successfully launched) will enable DIRECTV to retransmit more than 150 national channels in high definition (“HD”) format, as well as the digital signals of as many as 1500 local broadcasters.

⁴³ See *Satellite Broadcasting and Communications Assoc. v. FCC*, 275 F.3d 337, 359 (4th Cir. 2001) (“*SBCA*”) (“As we have said, satellite carriers currently beam the same signals throughout the nation from satellites orbiting in full CONUS slots. As a result, a carrier who chooses to retransmit the signal of an independent commercial station in Boston beams that station's signal to subscribers nationwide, but blocks out the signal at the homes of all subscribers who do not live in the Boston area. As this example illustrates, local-into-local service is a relatively inefficient use of a carrier's finite channel capacity. National programming uses that capacity more efficiently because it can be expected to draw more viewers across the country as a whole than any local channel, even if the national programming is less popular within individual local markets than the programming of the independent broadcast stations in those markets. As a result, satellite carriers have economic incentives to favor national non-broadcast programming over local broadcast programming.”).

⁴⁴ See “DIRECTV's Spaceway F1 Satellite Launches New Era In High-Definition Programming,” April 26, 2005, *available at* http://www.directv.com/DTVAPP/aboutus/headline.jsp?id=04_26_2005A.

Yet the challenge for DTH operators of finding capacity for programming should not be underestimated – particularly as programmers increasingly transition from standard definition analog to high definition digital signals.⁴⁵ A high definition picture carrying 1920 horizontal pixels in 1080 scan lines comprises over 2 million pixels, about 6 times the amount of picture information in a standard definition analog signal.

This has profound implications for DIRECTV:

- DIRECTV will eventually have to increase by several times its national and local capacity.
- DIRECTV cannot at this time provide all HD local broadcast signals in all 210 markets.
- DIRECTV cannot at this time provide broadcasters' multicast signals in any local market without jeopardizing service in other local markets.

By contrast, terrestrial operators – particularly upgraded coaxial and new fiber-based platforms – stand in a much better position with respect to capacity issues generally and local programming specifically. These platforms, of course, must find capacity for digital and HD signals, just like DTH satellite platforms. Yet terrestrial platforms have a number of advantages over satellite platforms.

- A typical terrestrial system must transmit fewer than twenty local broadcast stations in order provide its customers with every local station. A DTH operator by contrast, must retransmit more than 1750 such stations in order to do the same.⁴⁶
- Cable operators have for years used inefficient analog technology, and have therefore not compressed signals on their basic tiers. The extra capacity they will

⁴⁵ See *Notice* at 3 (“Are existing service providers spectrum constrained? . . . Have these service providers become more spectrum constrained after rolling out advanced services like high-speed Internet access and High Definition Digital Television?”).

⁴⁶ See <http://www.fcc.gov/mb/video/tvq.html> (TV Database Query).

have to use to transmit HD signals will, for the most part, be offset by their ability to use innovative compression techniques for the first time.⁴⁷

- Fiber-to-the-home platforms, such as Verizon's FIOS system, have been described as having "limitless" capacity.⁴⁸

In other words, as the transition to digital television progresses, satellite competitors in the MVPD marketplaces will find it increasingly difficult to offer programming comparable to that offered by their terrestrial counterparts.

Plainly, if DTH satellite operators are to continue offering an alternative to incumbent cable operators and the local telephone giants, they will have to find additional capacity. In this regard, DIRECTV would urge the Commission and Congress to actively look for additional spectrum for DTH services.⁴⁹ DIRECTV notes, for example, that the Commission allocated additional spectrum for DTH systems in 2000, but has yet to propose licensing and service rules that would allow DTH operators to proceed with systems in this band.⁵⁰

Policy-makers should also take into consideration these capacity constraints when making determinations regarding satellite carriage issues. To take just one example, mandatory carriage of the multicast signals of local broadcast stations would place an

⁴⁷ See, e.g., Written Testimony of Richard Slenker Executive Vice President, Technology and Engineering Operations, DIRECTV, Inc. before the Senate Committee on Commerce, Science and Transportation, July 12, 2004.

⁴⁸ See, e.g., Marguerite Reardon, "Verizon's TV Dreams," CNET News.com, Oct. 13, 2005, available at http://news.com.com/Verizons+TV+dreams/2100-1034_3-5894645.html.

⁴⁹ Notice at 4 (asking "[h]ow important is capacity expansion to the competitive strategies of communications satellite operators").

⁵⁰ See *Redesignation of the 17.7-19.7 GHz Frequency Band, Blanket Licensing of Satellite Earth Stations in the 17.7-20.2 GHz and 27.5-30.0 GHz Frequency Bands, and the Allocation of Additional Spectrum in the 17.3-17.8 GHz and 24.75-25.25 GHz Frequency Bands for Broadcast Satellite-Service Use*, 15 FCC Rcd. 13430 (2000).

enormous burden on satellite operators.⁵¹ If such carriage were required, DTH operators would be forced to re-allocate capacity to meet this increased burden, reducing the number of markets where local-into-local service would be available. For instance, the Commission's determination that DIRECTV must retransmit multicast signals in Alaska and Hawaii will prevent DIRECTV from providing any HD local service at all in a number of mainland markets.⁵²

2. *Access to Programming*

Another area in which MVPDs do not compete on a level playing field is in the upstream market for access to programming. For years now, MVPDs with the highest market shares in the relevant geographic markets – incumbent cable operators – have sought to deny their rivals access to key programming, or to raise the price of such programming to their rivals. Indeed, these concerns led Congress to enact prohibitions against exclusivity and price discrimination for cable-affiliated programming nearly a decade ago.⁵³ It is fair to say that, without these prohibitions, DTH operators would never have been able to compete against incumbent cable rivals.

Since then, the national market share of both DIRECTV and EchoStar has grown, making it less economically feasible for cable-affiliated programmers to withhold or price discriminate with respect to national programming. At the same time, however, cable operators such as Comcast and Time Warner have dramatically increased their *regional* market shares in key areas through clustering. This makes the withholding of

⁵¹ See DIRECTV Inc., Reply to Opposition to Petition for Reconsideration, MB Docket No. 05-181 at 3 (filed Dec. 19, 2005).

⁵² *Id.*

⁵³ See 47 U.S.C. § 548; 47 C.F.R. § 76.1000 *et seq.*

local and regional programming – particularly “must have” RSN programming – more economically feasible.⁵⁴

At the same time, sophisticated cable operators have also discovered ways around the program access rules (at least arguably making such anticompetitive practices legal).⁵⁵

- *The “terrestrial loophole.”* If a cable-affiliated programmer distributes programming by fiber rather than by satellite, it can offer affiliates exclusive deals. (Comcast does this in Philadelphia, and Cox does this in San Diego.)⁵⁶
- *Non-affiliation.* Only programmers “affiliated” with cable operators are subject to the exclusivity and discrimination prohibitions.⁵⁷ So, rather than owning

⁵⁴ *News/Hughes*, 19 FCC Rcd. at 519-20 (“If [the vertically integrated programmer] removes its RSN from a rival MVPD it loses the advertising revenues with all of those subscribers. . . . In addition to a loss in advertising revenue, there is also the loss in the affiliate fees paid by the rival MVPD for the right to carry the RSN. The gain to [the vertically integrated programmer] of a permanent withholding strategy is its share of the joint profits earned from the consumers that switch from the rival MVPD, as well as the affiliate fees and advertising revenues those consumers bring with them.”).

⁵⁵ *See, e.g.*, Comments of DIRECTV, Inc. in MB Docket No. 05-192 at 13-25 (filed July 21, 2005) (“DIRECTV Adelphia Comments”).

⁵⁶ The program access rules apply to any “satellite cable programming vendor” that is affiliated with a cable operator. 47 C.F.R. § 76.1002. To the extent programming is not distributed to MVPDs via satellite, however, it is not subject to the prohibitions on exclusivity. *See EchoStar Communications Corp. v. Comcast Corp.*, 14 FCC Rcd. 2089, 2100-2101 (1999); *see also EchoStar Communications Corp. v. Comcast Corp.*, 15 FCC Rcd. 22802, 22807 (2000), *rev. denied sub nom. EchoStar Communications Corp. v. FCC*, 292 F.3d 749 (D.C. Cir. 2002).

⁵⁷ 47 C.F.R. § 76.1002(b) provides:

Discrimination in prices, terms or conditions. No satellite cable programming vendor in which a cable operator has an attributable interest, or satellite broadcast programming vendor, shall discriminate in the prices, terms, and conditions of sale or delivery of satellite cable programming or satellite broadcast programming among or between competing cable systems, competing cable operators, or any competing multichannel video programming distributors.

47 C.F.R. § 76.1002(c) provides:

Exclusive contracts and practices -- (1) Unserved areas. No cable operator shall engage in any practice or activity or enter into any understanding or arrangement, including exclusive contracts, with a satellite cable programming vendor or satellite broadcast programming vendor for satellite cable programming or satellite broadcast programming that prevents a multichannel video programming distributor from obtaining such programming from any satellite cable programming vendor in which a cable operator has an attributable interest, or any satellite broadcast programming vendor in which a cable operator has an attributable interest for distribution to persons in areas not served by a cable operator as of October 5, 1992. (2) Served areas. No cable operator shall enter into

programmers, cable operators can instead use their market power to secure exclusive distribution agreements. (Time Warner does this in Charlotte.)

- *Pricing Strategies.* Cable-affiliated programmers can engage in a number of pricing strategies that harm cable's rivals. This could involve overcharging everybody the same nominal price for RSN programming while providing the dominant cable operators a much lower "net effective rate" through offsetting income generated by ownership interests or other arrangements. (Comcast does this in Chicago, Time Warner does this in Cleveland, and both are doing this in New York.) Or it could involve facially neutral terms that discriminate against non-cable platforms. (Comcast does this in Sacramento).⁵⁸

Exacerbating the situation, Comcast and Time Warner – the two largest and most concentrated cable operators – are now seeking the Commission's permission to divide the systems of Adelphia Communications Corporation (and swap systems of their own) in the hopes of further enhancing their regional concentration.⁵⁹ In the last few weeks alone, these two cable giants have helped launch two *new* sports networks – SportsTime Ohio, with rights to the Cleveland Indians, and SportsNet New York, with rights to the Mets – for which they demanded huge price increases from DIRECTV.⁶⁰ DIRECTV believes that Comcast and Time Warner intend to replicate this strategy in other markets where the Adelphia Transactions will increase their market power.

any exclusive contracts, or engage in any practice, activity or arrangement tantamount to an exclusive contract, for satellite cable programming or satellite broadcast programming with a satellite cable programming vendor in which a cable operator has an attributable interest or a satellite broadcast programming vendor in which a cable operator has an attributable interest, with respect to areas served by a cable operator, unless the Commission determines in accordance with paragraph (c)(4) of this section that such contract, practice, activity or arrangement is in the public interest.

⁵⁸ See, e.g., DIRECTV Adelphia Comments at 9-11.

⁵⁹ See, e.g., Letter from William M. Wiltshire to Marlene H. Dortch, MB Docket No. 05-192 (filed Feb. 14, 2006); Letter from William M. Wiltshire to Marlene H. Dortch MB Docket No. 15-192 (filed Mar. 15, 2006) (each describing issues related to launch of SportsTime Ohio and SportsNet New York).

⁶⁰ See Adelphia Communications Corporation *et al.*, Applications for Consent to the Assignment and/or Transfer of Control of Licenses, Application and Public Interest Statement, MB Docket No. 05-192, at 72 (filed May 18, 2005) ("Adelphia Application"). DIRECTV recently signed carriage agreements with both RSNs, choosing to pay an above-market rate rather than deny subscribers access to these teams and hand Time Warner a de facto exclusive.

These tactics have a significant effect on competition in the upstream MVPD market for programming, which, in turn, harms competition in the downstream MVPD retail market. Clustered cable incumbents such as Comcast and Time Warner will be able to obtain key programming at relatively low prices. Rivals with lower regional market share, such as DIRECTV, EchoStar, and the telephone companies, will pay inflated prices for this programming – resulting in higher prices for consumers. Or they may be forced to forego that programming – handing cable a *de facto* exclusive and denying consumers a choice among MVPDs. Nothing would hinder the goal of “effective competition” more than allowing this strategy to continue.

C. Market Entry

1. Market Entry is Happening Today

The Bureau has asked a number of questions regarding market entry, including several related to the “ease of market entry and exit.”⁶¹ Not only is entry into the MVPD market possible, it is proceeding at a formidable rate.

Indeed, as discussed above, perhaps the biggest story in the MVPD market is the rapid entry into the market by the local telephone companies.⁶² This promises to accelerate over the next few years. Verizon, for example, believes its FiOS service will be available to 15 million subscribers in a few years, while AT&T intends to make its “Project Lightspeed” even more widely available.⁶³ And it is not unreasonable to think

⁶¹ See Notice at 3 (seeking information regarding “market entry conditions in each product and geographic markets – specifically . . . cost structures in each relevant market, especially information on the presence of large sunk costs that would influence the ease of market entry and exit.”).

⁶² The entry of the telephone companies suggests that “first mover” advantages are not sufficient to deter such entry. See Notice at 3 (seeking information related to first mover advantages).

⁶³ See, e.g., “Battling for the Eyes of Texas,” BusinessWeek Online, Mar. 20, 2005 (stating that Verizon is preparing to “make its [FiOS] service available to 15 million homes by the end of

that both technological advances⁶⁴ and perhaps even merger activity⁶⁵ will promote still further entry. In addition to the phone companies, a wide variety of broadband platforms are poised to offer their own video services. Current Communications and TXU Electric Delivery, for example, seek to deliver broadband over power lines to more than two million customers in northern Texas.⁶⁶ It appears, moreover, that this service will include a video offering – perhaps one directly competitive with those offered by other MVPDs.⁶⁷ In this regard, international standards setting organizations have recently adopted standards by which broadband over power line technology can stream high definition video.⁶⁸

2009”), *available at* http://www.businessweek.com/magazine/content/06_12/b3976057.htm?chan=tc&chan=technology_technology+index+page_best+of+the+magazine; “Texans Benefiting from Exploding Broadband Investment, TV Choice,” Feb. 10, 2006 (“Working with companies such as Alcatel, Microsoft, and Scientific-Atlanta, AT&T is deploying a two-way, interactive, switched IP video network and extending approximately 40,000 miles of new fiber optics to initially reach 18 million households by the end of 2008 - reaching more customers faster than any other company with a fiber deployment plan in the United States.”), *available at* <http://att.sbc.com/gen/press-room?pid=4800&cdvn=news&newsarticleid=22085>.

⁶⁴ *See, e.g.*, “Envivio Debuts MPEG-4 HD IPTV Triple Play Solution,” Apr. 13, 2006 (describing an “innovative method for service providers to deliver standard definition (SD) and high definition (HD) IP video, video on demand (VOD) and middleware with an electronic program guide (EPG) -- all within a complete MPEG-4 environment”), *available at* http://www.envivio.com/news/2006/041306_ip_tv.php.

⁶⁵ *See, e.g.*, David Mildeberg, “AT&T Deal May Boost BellSouth’s TV Plan,” *Charlotte Business Journal*, Mar. 10, 2006 (stating that AT&T’s proposed merger with BellSouth will speed telco video entry) *available at* <http://www.bizjournals.com/charlotte/stories/2006/03/13/story3.html>.

⁶⁶ *See* “High Speed Internet Over Power Lines Could Serve Millions,” *Wall St. J.*, Dec. 19, 2005.

⁶⁷ *See 2006 Annual Video Competition Report*, Statement of Commissioner Tate (stating that the Commissioner was able to watch “high quality video streamed over the Internet” on the Current Communications System).

⁶⁸ Dinesh Kumar, “IEEE Group to Address BPL Specs, DSL Interference Next Week,” *Communications Daily*, March 23, 2006 (“The standards process is accelerating. The EU-backed Open PLC European Research Alliance recently approved the first universal access BPL specification based on DS2 technology. Then the Universal Powerline Alliance (UPA), whose members use DS2 technology as well, drafted a home networking specification that would enable HD video streaming, online gambling and audio distribution without new cables And by April the Consumer Electronics Powerline Communications Alliance (CEPCA) expects to approve a final PLC system specification allowing coexistence among BPL technologies. Industry

DIRECTV would also note that a number of recent developments in the satellite industry may make it even easier for non-satellite operators to enter the MVPD markets. SES Americom offers an “IP Prime” distribution platform that makes high-end digital video programming available for terrestrial distributors through authorized video hubs nationwide.⁶⁹ The National Rural Telecommunications Cooperative (“NRTC”) recently signed a multi-year deal making SES’s programming available to nearly 1000 independent and local telcos, including many in rural areas. Similarly, PanAmSat has recently launched its Vis-a-TV platform, through which cable, broadband, and IPTV systems can acquire international programming.⁷⁰ Eagle Broadband and GlobeCast have announced the introduction of a similar service.⁷¹ And most recently, Intelsat announced its own offering, “Ampiage,” which it described a “super head-end for content distribution.”⁷²

expects specifications to encourage utilities to roll out high-speed, low-cost broadband access, voice and video services, plus utility applications.”).

⁶⁹ See “NRTC to Market SES AMERICOM’s IP Prime, Nov. 8, 2005, *available at* www.nrtc.coop/export/main/news_policy/pdfreleases/2005_Press_Releases/NRTC_SES_final_final_release.pdf.

⁷⁰ See <http://www.panamsat.com/vis-a-tv/index.asp> (describing Vis-a-TV service).

⁷¹ See “Eagle Broadband and GlobeCast Join Forces and Launch IPTVComplete, the First Turnkey IPTV Solution that Enables Broadband Providers to Rapidly Deliver More than 200 Channels of IP Video Anywhere in America,” Feb. 16, 2005, *available at* http://www.globecast.com/_2004/_0_library/press_releases/pr051602_eagle.htm.

⁷² See “New Intelsat Broadcast Video Service Will Accelerate Deployment of IPTV,” April 12, 2006, *available at* http://www.intelsat.com/press/release_details.aspx?year=2006&art=20060412_01_EN.xml&lang=en&footer=2http://www.intelsat.com/press/release_details.aspx?year=2006&art=20060412_01_EN.xml&lang=en&footer=2.

2. *Entry by DTH Satellite Providers is Possible*

Entry into the MVPD market by DTH providers is also possible, if difficult.⁷³ Design, construction, and launch of any one satellite cost hundreds of millions of dollars (and, correspondingly, the leasing of satellite facilities can also be expensive).⁷⁴ DIRECTV, for example, estimates that the cost of its four new Ka-band satellites and associated equipment will run into the billions of dollars.

Entry into the MVPD market by DTH providers also requires securing orbital locations capable of “seeing” the United States.⁷⁵ In this regard, the Commission’s recent “first come, first served” mechanism for distribution of orbital slots is highly effective, and represents a substantial improvement over earlier policies.⁷⁶ This system works well; the Commission has established sharing parameters applicable to all comers, and all qualified applicants have the opportunity to execute any business plan consistent with those parameters – so long as performance is timely.⁷⁷

3. *Challenges for Entry*

Although MVPD entry is feasible, substantial concerns remain. Access to programming, for example, will be a concern for any new entrant. Indeed, as important as this issue is to an MVPD in the position of DIRECTV, it may be of even greater

⁷³ See Notice at 3 (asking “what are the most significant barriers to entry today in the satellite communications services industry?”).

⁷⁴ DIRECTV is less able to comment on specific cost structures – sunk or otherwise – of MVPD platforms, other than noting the obvious fact that there does appear to be very significant new entry. See *id.* (seeking comment on cost structures).

⁷⁵ See *id.* (seeking information regarding to capacity); see also <http://svartifoss2.fcc.gov/myibfs/qReportExternal.do> (containing satellite space station queue).

⁷⁶ See Notice at 3 (seeking comments on “the allocation of orbital locations, as well as effects of regulation and policies of governments”); *Amendment of the Commission’s Space Station Licensing Rules and Policies*, 18 FCC Rcd. 12507, 12507 (2003).

⁷⁷ See Notice at 3. (asking whether “potential entrants have sufficient opportunities to access spectrum and orbital locations”).

importance to firms just entering the market, or considering entry. For this reason alone, the Commission must vigilantly enforce – and should consider strengthening – its program access regulations.⁷⁸

For firms considering entry into the MVPD market as DTH satellite operators, a secondary concern is finding capacity.⁷⁹ Just as with existing providers, if new DTH entrants are to compete with terrestrial platforms (particularly fiber-based platforms with essentially unlimited capacity) they are going to have to find the capacity to make this transition. Plainly, finding additional spectrum for DTH services will help matters for new entrants and existing operators alike.

Policy makers should *not*, however, in their zeal to encourage new entry by DTH operators, take actions that would reduce the ability of existing operators to implement new technologies and business plans that respond to changing market conditions while making the most intensive use of valuable spectrum/orbital resources possible. For example, DIRECTV is on record as having expressed concerns that proposed “tweener satellites” could restrain DBS innovation to deploy improved technology and new services.⁸⁰

⁷⁸ *See id.* (seeking comment on the effects of “regulation and policies of governments” on market entry).

⁷⁹ *See id.* (asking “whether inability to access spectrum is a barrier to entry in the satellite communications services industry”).

⁸⁰ *See, e.g.*, Letter from William Wiltshire to Marlene Dortch, Report No. SPB-196 (filed Sept. 9, 2004) (containing attachment describing interference); Comments of DIRECTV, Inc. in Report No. SPB-196 at 1-2 (filed Jan. 28, 2004); Reply Comments of DIRECTV, Inc. in Report No. SPB-196 at 12-21 (filed Feb. 13, 2004).

D. Market Consolidation

The Bureau invites comment on market consolidation in the “satellite services industry.”⁸¹ Again, however, insofar as DIRECTV is concerned the proper focus of inquiry here is (at the narrowest) the MVPD marketplace, not the “satellite services industry.” Nevertheless, there has been recent consolidation among DTH operators, most notably EchoStar’s recent purchase of Voom.⁸² As the Commission itself noted in approving that purchase, although Voom was run by one of the most experienced MVPD operators (the owner of which personally contributed hundreds of millions of dollars),⁸³ it was not a commercial success.⁸⁴ This at least in part was because Voom lacked sufficient capacity to offer programming comparable to that offered by other MVPD competitors.⁸⁵ In the end, the Commission determined that the highest and best use of Voom’s relatively limited capacity was to augment EchoStar’s capacity – that is, to allow EchoStar to achieve economies of scope and scale in order to better compete in the MVPD market.⁸⁶

⁸¹ Notice at 4.

⁸² See *EchoStar/Voom*, 20 FCC Rcd. at 16868.

⁸³ See *id.* at 16878 (“Rainbow DBS never achieved more than a relatively small number of subscribers for its VOOM service. In addition, VOOM had high rates of subscriber loss and non-payment, and lost hundreds of millions of dollars during its operation. Despite high interest within the company for continuing to provide DBS service, ultimately Cablevision’s board of directors decided that Rainbow DBS could not become a profitable business and it was unwilling to continue funding hundreds of millions of dollars of losses.”).

⁸⁴ See *id.* at 16876 (“The Applicants argue that despite the expertise of Rainbow DBS’s parent, Cablevision, in programming and program distribution, VOOM was not a commercial success. As of September 2004, there were approximately 26,000 activated subscribers. Rainbow DBS experienced very high levels of subscriber loss, and a large portion of its accounts were 90 days or more past due. For the nine months ended September 2004, Rainbow DBS reported net operating losses of \$211.6 million.”).

⁸⁵ See *id.* at 16877 (“In particular, Applicants contend that Rainbow DBS’s VOOM service was a niche product that did not compete fully with other MVPD services and may have been closest to cable providers’ digital offerings.”).

⁸⁶ See *id.* at 16879 (“On the other hand, we find that allowing EchoStar to purchase these assets may increase competition by creating a more effective competitor both to other MVPD providers in general and to the other major DBS provider.”).

There has also been consolidation among non-satellite MVPD competitors, the most recent being Comcast's and Time Warner's proposed acquisition of Adelphia's cable systems.⁸⁷ Because cable operators have declined to compete against one another, cable consolidation has to date involved merely switching one cable operator for another (rather than eliminating an existing option available to a given consumer). Thus, although some studies indicate that prices are higher, service is worse,⁸⁸ and competitive entry is less likely in areas served by the largest cable system operators, such consolidation has had little direct effect on the retail MVPD market structure.⁸⁹ It does, however, have an enormous effect in the *upstream* MVPD programming market.⁹⁰ To the extent that incumbent cable operators increase their regional market share through consolidation, they are better able to engage in the foreclosure of key regional and local content, especially sports content. As discussed above, this makes market entry more difficult and adversely affects competition and consumers.

III. DATA RELATED TO COMPETITION

The Commission has asked a number of questions regarding pricing and price competition. Because DIRECTV offers retail service, many of the questions do not

⁸⁷ See Adelphia Application, n. 60, above.

⁸⁸ See *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Notice of Inquiry, 15 FCC Rcd. 13563, 13568 (2000) (emphasis added).

⁸⁹ Because large cable MSOs have preferred to allow each other to operate as terrestrial monopolists within their respective franchise areas, there is no change in the number of MVPD alternatives available to a given household where, as here, one MSO steps into the shoes of another.

⁹⁰ See, e.g., Andrew Stewart Wise and Kiran Duwad, *Competition Between Cable Television and Direct Broadcast Satellite – It's More Complicated Than You Think*, at 19 (rel. Jan. 2005) (describing three methods by which cable operators can affect retail competition through the foreclosure of programming), available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-255869A1.pdf.

readily apply to it.⁹¹ Much of DIRECTV's pricing information, moreover, is publicly available on the Internet.⁹²

DIRECTV's pricing is driven by changes in its variable costs, of which programming is by far the largest component. DIRECTV believes that it pays more for programming than do the dominant incumbent cable operators with which it competes. Nonetheless, those cable operators have increased prices at a much faster annual rate than have DBS operators. By wringing additional efficiencies from its operations and accepting lower profit margins, DIRECTV has been able to charge consumers lower prices for video services. Because cable operators are able to offer a greater variety of services than DIRECTV can currently provide, such an advantage in retail pricing is especially important for DIRECTV's continued competitive position in the market.

DIRECTV also competes against all of these rivals on non-price issues, including the quality of its offerings and the quality of its customer service.⁹³ In this regard, DIRECTV would note that it takes particular pride in offering what it believes to be the very best television experience available. This, in large part, is due to the significant investments DIRECTV is making in new technology, research and development, and customer service.⁹⁴ The pace of this investment, moreover, has increased dramatically in

⁹¹ See Notice at 4 (seeking comment on "pricing plans that include price per transponder or portion thereof (transponder lease rates or satellite capacity sales prices) by the relevant markets listed above"); *id.* (asking "to what extent is transponder pricing determined by bilateral negotiations between satellite service providers and their customers"); *id.* (asking "the extent to which satellite firms in their pricing plans differentiate between different types of satellite communications services"); *id.* (asking whether "satellite firms offer short-term or long-term pricing plans").

⁹² See *id.* (asking "what distinct characteristics, if any, affect the pricing practices observed in the satellite services industry"); <http://www.directv.com/DTVAPP/packages/Landing.jsp>.

⁹³ See Notice at 4. (seeking comment on "any non-price rivalry among satellite firms, especially competition based on quality differences").

⁹⁴ See *id.* (asking "[t]o what extent do communications satellite operators invest in research and development to gain competitive advantage").

the last several years in the wake of an investment by News Corporation.⁹⁵ DIRECTV also engages in considerable marketing efforts to compete with its MVPD rivals.⁹⁶ In this context, DIRECTV – as with other MVPD competitors – makes a great deal of information available on the Internet.⁹⁷

The Bureau also asks whether purchasers of satellite service have “buyer power.”⁹⁸ In part because of the efforts of DIRECTV and others, consumers everywhere now have the choice of multiple MVPD providers. And these subscribers can and do switch providers for a variety of reasons related to price and quality.⁹⁹ For the most part, this is evidence of the MVPD markets functioning as they should. Switching due to RSN withholding, however, is an unfortunate exception. When cable operators arrange to withhold RSN programming, subscribers switch from satellite to cable, or refuse to switch to satellite in the first place.¹⁰⁰ Correspondingly, satellite penetration in such markets is far lower than it is in other areas, and far lower than it would be predicted to be based on other factors. This is not market competition – it is anticompetitive activity, and the Commission should stop it.

⁹⁵ See *id.* (asking whether “capital expenditures by satellite firms have increased (or decreased) in the last five years”).

⁹⁶ See *id.* (asking whether “satellite firms have adopted new marketing strategies in last five years”).

⁹⁷ *Notice* at 4 (seeking information on “the development of consumer information sources for satellite communications service”); *id.* (asking whether “there are new avenues for consumers to gain information, such as retailers providing on-line and in-store comparisons of pricing plans, services, and equipment”).

⁹⁸ See *id.* (asking “to what extent can buyers exercise buyer power in communications satellite service markets”).

⁹⁹ See *id.* (asking if “there is a significant churn/switching by consumers/buyers” and whether “this [is] in response to price differences, coverage, and/or quality of service differences”).

¹⁰⁰ DIRECTV has described this phenomenon in some detail with respect to the Philadelphia market, where Comcast has for years arranged to withhold the Comcast SportsNet Philadelphia channel. See Lexecon, *Analysis of Effect of RSN Availability on DBS Penetration*, attached to Surreply of DIRECTV in MB Docket No. 05-192 (filed Oct. 12, 2005).

Finally, the Commission has asked for a number of “market performance metrics” over a five-year time period.¹⁰¹ Some of this information is competitively sensitive. To the extent this information is made public, it is most readily available in DIRECTV’s annual reports. DIRECTV has provided excerpts from its last five annual reports to these Comments.

¹⁰¹ See *Notice* at 4 (stating that “the Bureau intends to analyze various market performance metrics including pricing levels and trends, subscriber growth and penetration, innovation and diffusion of services, quality of service,” seeking “5-year time-series data” on revenues, profitability, cash flows, cash-flow margins for the relevant satellite communications services markets,” and asking “whether there are other metrics that would add significantly to the Bureau’s analysis of these markets, whether they are available on a national or international level, and whether they are available for a 5-year time period”).

CONCLUSION

DIRECTV believes that, if Congress and the Commission continue to pursue wise public policy, competition will become even more intense in the MVPD markets. A prerequisite to the creation of such policy, however, is the recognition that firms such as DIRECTV do not compete in a satellite-only subset of those markets. DIRECTV appreciates the opportunity to raise these issues with the Bureau, and would be happy to work further with Bureau staff as it prepares its report in this proceeding.

Respectfully Submitted,

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