

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

In the Matter of)
)
Annual Assessment of the Status of) MB Docket No. 06-189
Competition in the Market for the)
Delivery of Video Programming)

AT&T'S REPLY COMMENTS

One inescapable conclusion pervades this proceeding: more than twenty years after the Cable Act was enacted, there remain limited competitive alternatives to the incumbent cable operators in the distribution of multichannel video programming. That conclusion is supported both by direct evidence of the lack of meaningful competition, as well as the marketplace effect such lack of meaningful competition has had on consumers of multichannel video services.

As for direct evidence, the Commission itself found in its *Twelfth Annual Report* that incumbent cable operators continue to hold a 69% share of the MVPD market and that the “competitive presence of MVPDs other than cable or DBS declined. The number of MVPD subscribers choosing all other delivery technologies decreased, representing 2.9 percent of all subscribers in June 2005, as compared to 3.3 percent in June 2004.”¹ Statistics from the incumbent cable operators themselves confirm that competition in the delivery of multichannel video services from providers other than DBS operators remains miniscule,² and thus bear out the Commission’s conclusion in its *Twelfth Annual Report* that relatively few consumers “have a

¹ Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, *Twelfth Annual Report*, 21 FCC Rcd. 2503, MB Docket No. 05-255 ¶ 8 (rel. March 3, 2006) (“*Twelfth Annual Report*”).

² See *NCTA Comments* at 9 (“overbuild” customers represent only .7% of nearly 100 million total MVPD subscribers as of September 2006. Even the combination of “overbuild” and all other non-cable or DBS categories comprise only 3.1% of total MVPD customers.)

second wireline alternative, such as an overbuild cable system.”³ In short, the Cable Act’s promise of a competitive marketplace for the distribution of multichannel video services remains unfulfilled. Indeed, the drought of competitive entry was the basis for the Commission’s recent action to reform and streamline franchising for competitive cable operators.⁴

The conclusion that consumers face limited meaningful alternatives in their choice of multichannel video service providers is further supported by the lack of marketplace constraints on the ability of incumbent cable operators to raise their rates for cable service. Cable rates again rose faster than the rate of inflation from 2004 to 2005 (5.2% increase in cable rates vs. 3% increase in inflation), and have increased an astonishing 93% since 1995,⁵ in stark contrast with the prices for every other communications service regulated by the Commission, which have decreased since 1995.⁶ And it appears that cable operators will once again increase their rates

³ *Twelfth Annual Report* ¶ 144.

⁴ See Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended by the Cable Television Consumer Protection and Competition Act of 1992, Report and Order and Further Notice of Proposed Rulemaking, *Statement of Chairman Kevin J. Martin* at 1, MB Docket No. 05-311 (Dec. 20, 2006), available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-269111A2.doc (“Such unreasonable [franchise] requirements are especially troubling because competition is desperately needed in the video market.”).

⁵ Implementation of Section 3 of the Cable Television Consumer Protection and Competition Act of 1992, Statistical Report on Average Rates for Basic Service, Cable Programming Service, and Equipment, *Report on Cable Industry Prices* ¶¶ 10, 18 MM Docket No. 92-266 (rel. Dec. 27, 2006), available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-06-179A1.doc. (“2006 Cable Price Report”).

⁶ Implementation of Section 3 of the Cable Television Consumer Protection and Competition Act of 1992, Statistical Report on Average Rates for Basic Service, Cable Programming Service, and Equipment, *Report on Cable Industry Prices*, Statement of Chairman Kevin J. Martin at 1, MM Docket No. 92-266 (Dec. 27, 2006), available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-06-179A2.doc. The Commission’s reports show that during nearly the same time frame, the overall consumer price index for telephone services *decreased* by 0.1%. Industry Analysis and Technology Division, Wireline Competition Bureau, Federal Communications Commission, *Trends in Telephone Service*, Tables 12.1 – 12.2 (April 2005), available at http://www.fcc.gov/Bureaus/Common_Carrier/Reports/FCC-State_Link/IAD/trend605.pdf. Perhaps more telling, prices for high speed Internet access offered by the incumbent cable operators—which competes against DSL and other broadband services—have remained steady during the meteoric rise in cable rates over the last several years. See, e.g., John B. Horrigan,

faster than inflation in 2007,⁷ demonstrating that “competitive intensity in the pay TV market remains restrained.”⁸

In the face of such evidence, the comments of the large incumbent cable operators largely seek to divert the Commission’s attention. They point to the Commission’s finding in its *Twelfth Annual Report* that DBS subscribers now represent almost one third of total MVPD customers.⁹ While gains in DBS subscribership certainly are laudable, studies demonstrate that wireline competition offers the greatest consumer benefit potential as an alternative to the incumbent cable operators.¹⁰ Indeed, as the Commission’s recent report on cable prices finds, “Cable prices decrease substantially when a second wireline cable operator enters the market. It does not appear from these results that DBS effectively constrains cable prices. Thus in the large number of communities in which there has been a finding that the statutory test for effective competition

Home Broadband Adoption 2006 at 7 (Pew Internet & American Life Project, May 28, 2006), available at http://www.pewinternet.org/pdfs/PIP_Broadband_trends2006.pdf. (cable modem prices remained flat from February 2004 through December 2005).

⁷ See, e.g., Craig Moffett, *Decoding Comcast Rate Hikes*, Multichannel News (Nov. 30, 2006), available at <http://www.multichannel.com/article/CA6395995.html?display=Breaking+News.com> (“Bernstein Research added up announced 2007 rate increases in Comcast markets, and they average out to 5.4% for analog video.”).

⁸ *Id.*

⁹ See, e.g., *NCTA Comments* at 9.

¹⁰ See, e.g., U.S. General Accounting Office, Report to the Chairman, Comm. on Commerce, Science, and Transportation, U.S. Senate: Telecommunications, Issues Related to Competition and Subscriber Rates in the Cable Television Industry, at 3, 10 (Oct. 2003), available at <http://frwebgate.access.gpo.gov/cgi-bin/useftp.cgi?IPaddress=162.140.64.21&filename=d048.pdf&directory=/diskb/wais/data/gao> (“2003 GAO Report”). See also American Consumer Institute, “Does Cable Competition Really Work? A Survey of Cable TV Subscribers in Texas” at 2 (Mar. 2, 2006)(survey conducted in Texas, which adopted state-wide streamlined video franchising rules that spurred competitive entry by competing wireline video service providers, found that half of the cable customers who switched to a competitor reported “significant savings off their cable bills, averaging \$22.30 per month;” and customers who stayed with the incumbent provider “reported to have saved, on average, \$26.83 per month off their average cable TV bills as a direct result of competition”), available at <http://www.theamericanconsumer.org/Consumers%20Saving%20from%20Competition.pdf>.

has been met due to the presence of DBS service, competition does not appear to be restraining price as it does in the small number of communities with a second cable operator.”¹¹ Similarly, the Wall Street Journal reported that “cable companies that are facing the early waves of phone company competition are showing the most restraint in raising prices.”¹² No amount of hype alters the fact that the large cable incumbent operators, even though they control *only* 70% of the total MVPD market, still control nearly all of the market for wireline video distribution. Thus, statistics demonstrating increases in the number of DBS subscribers do not alter the conclusion that consumers lack meaningful competitive alternatives to the large incumbent cable operators.

The incumbent cable operators also seek to divert attention from the lack of meaningful competition in the distribution of video services by complaining about their ability to compete in the market for telecommunications services. Despite the crocodile tears of the incumbent cable operators, however, the contrast in the success enjoyed by cable operators in providing telephone service with that of incumbent LECs in providing video services vividly demonstrates the paucity of competition in the distribution of multichannel video services. Cable telephony continues to grow at a supersonic pace compared to the glacial advance in video services offered by incumbent LECs.

All of the large incumbent cable operators offer telephone service in their markets. By the end of 2006, the number of cable homes where cable companies will be able to market their VoIP services will be an estimated 68.7 million.¹³ Already, cable telephone service is “being

¹¹ *2006 Cable Price Report* ¶ 14.

¹² Wall Street Journal, Dec. 7, 2006, at D4-5.

¹³ “Kagan Reports on Cable VoIP,” Light Reading Newswire Feed, Aug. 31, 2006, available at http://www.lightreading.com/document.asp?doc_id=102635.

purchased by 8.5 million customers,”¹⁴ and incumbent cable operators are projected to have nearly 24.5 million telephone customers by the end of 2009.¹⁵ In contrast, the provision of video service by LECs remains “limited”¹⁶ and “nascent.”¹⁷ And even the best projections the cable incumbents can point to is that “telcos will have about 10 million total video subscribers by 2015.”¹⁸ The contrast in the statistics in the telephony and video services markets confirms the continued lack of meaningful competitive alternatives to the incumbent cable operators in the distribution of multichannel video services.

That contrast, moreover, underscores the public policy imperatives necessary to remedy the lack of meaningful competition. The anemic development of competitive wireline alternatives to multichannel video services is due in no small part to the entry barriers erected by application of legacy cable franchising rules to competitive video service providers. The record before the Commission in multiple proceedings provides abundant proof that the legacy franchise process has served as a barrier to entry for wireline video providers and the deployment of broadband infrastructure.¹⁹

¹⁴ *NCTA Comments* at 45.

¹⁵ *Id.*

¹⁶ *Twelfth Annual Report* ¶ 144.

¹⁷ “Adelstein Talks Satellite, Raises a Few Regulatory Concerns,” *Communications Daily*, Nov. 29, 2006, at 5.

¹⁸ *Comcast Comments* at 18.

¹⁹ *See, e.g.*, Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended by the Cable Television Protection and Competition Act of 1992, *Comments of AT&T, Inc.*, MB Docket No. 05-311 (filed Feb. 13, 2006); Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended by the Cable Television Protection and Competition Act of 1992, *Reply Comments of AT&T, Inc.*, MB Docket No. 05-311 (filed March 28, 2006). NATOA’s continued insistence that application of legacy cable franchising to new entrants is not a barrier to entry is belied not only by that record; it also is based on dubious and highly misleading factual assertions. Thus,

Based on that record, and supported by clear-cut and profuse legal authority, the Commission recently took action to reduce the barriers to entry imposed on new entrants by streamlining the franchising process. The Commission is to be commended for its recognition that the legacy franchising process has deterred competitive entry and for its prompt effort to redress the obstacles that have impeded the development of competitive alternatives and the deployment of broadband infrastructure. By taking steps to streamline the franchising process, the Commission recognized the need to increase customer choice among providers of multichannel video service by knocking down barriers to entry. Notwithstanding the antagonism to the Commission's efforts already voiced by some franchising authorities,²⁰ it may be hoped that such action will help fulfill the Commission's mandate to promote video competition, as well as its commitment to providing necessary incentives to the deployment of broadband infrastructure throughout the country and the provision of advanced services over that infrastructure.

In order to turn that commitment into practical reality, the Commission should take one additional measure to ensure that incumbent cable operators cannot abuse their control over

NATOA's claim that in 2001 telcos held franchises covering 63 million homes largely reflects the fact that numerous incumbent franchises were *transferred* from incumbent cable operators to telecommunications carriers, including legacy AT&T, which acquired TCI, and thus says nothing about the ability of incumbent LECs to obtain franchises in the first instance. The conclusions reached in the underlying study referenced in NATOA's comments also rely on the fact that Ameritech New Media managed to acquire 111 franchises throughout its service territory. However, the study author and NATOA fail to acknowledge that it took years to obtain those franchises, that those franchises represented only a fraction of the total number of franchises necessary to serve the entire Ameritech serving area, and that Ameritech New Media abandoned efforts to negotiate franchises in numerous communities as a result of unreasonable demands by franchise authorities. *See* Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended by the Cable Television Protection and Competition Act of 1992, *Reply Comments of AT&T, Inc.*, MB Docket No. 05-311, App. C (filed March 28, 2006).

²⁰For example, even before the Commission has released its written order, the Los Angeles City Council has adopted a resolution opposing the Commission actions. *See* Letter from Gerard Lavery Lederer, Miller & Van Eaton, to Marlene H. Dortch, Secretary, Federal Communications Commission, Docket No. 05-311 (Dec. 21, 2006).

critical programming assets to deny competitors access to regional sports and other vital programming, and thus prevent competitive networks from actually being used to provide competitive video services. There is widespread agreement among new entrants that such action is necessary to sustain competition in the market for wireline delivery of multichannel video services.²¹

If incumbent cable operators continue to bar new entrants from obtaining such critical “core” programming, they will succeed not only in forestalling the launch of meaningful video competition, but also the pace of broadband deployment and the rollout of other advanced services, thus frustrating the Commission’s efforts to accelerate new entry by streamlining the franchise process for new entrants. Simply put, a franchise is of little value if a video service provider can not actually provide the video services demanded by its customers. Accordingly, the Commission should act promptly to begin a proceeding to forestall the sunset of its current restriction on exclusive programming by vertically integrated satellite cable programming vendors. In addition, the Commission should act promptly to close the terrestrial loophole to the restriction against exclusive programming. By ensuring access to vital programming, the Commission can take another important step—in addition to its efforts to streamline franchising

²¹ See, e.g., *Broadband Service Provider Comments* at 11-14; *EchoStar Comments* at 19-22; *NTCA Comments* at 17; *USTelecom Comments* at 5-16; *Verizon Comments* at 29-30.

for new entrants—toward fulfilling its mandates to promote video competition and foster broadband deployment and thus enhance consumer choice.

Respectfully submitted,

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