

**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)	

REPLY COMMENTS OF



THE NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION

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The National Cable & Telecommunications Association (“NCTA”) hereby submits its reply comments in the above-captioned proceeding.

I. THE VIDEO MARKETPLACE IS FULLY COMPETITIVE, AND THERE IS NO BASIS FOR THE REGULATORY FAVORS SOUGHT BY CABLE’S COMPETITORS.

The “video mania” that characterizes today’s video marketplace is well-documented in this 13th annual video competition proceeding.¹ The record shows that the already vibrant and highly competitive video marketplace – first acknowledged by the Commission almost three years ago – continues to undergo unprecedented changes as a result of the remarkable growth of competitive alternatives to cable, full-scale telephone company entry and the onslaught of a host of new video outlets powered by digital and IP technology. And as the field of video competitors gets broader and deeper each year, the Commission should recognize even more forcefully in its report to Congress that “there has never in history been such an extraordinary

¹ See generally, Comments of NCTA, Comcast Corporation; “A Video Business Model Ready to Move Beyond Beta,” Richard Siklos, The New York Times, September 17, 2006 at 33 (“video mania is in full swing”).

diversity of programming available to consumers – or so many ways in which they can access it.”²

As competition continues to escalate, the marketplace is solidly grounded in the fact that virtually every American consumer can now choose from among at least three fully competitive multichannel video alternatives, including a local cable operator and two national DBS providers, and increasingly alternative broadband service providers and the local telephone company. And all of these providers face competition from other sources of video programming who too have capitalized on digital technology – from digital broadcasters to home video sales and rentals to mobile video to streaming Internet video offerings. The video marketplace is so drenched in competition that no party in this proceeding can or has credibly made the case that further government intervention is necessary to jumpstart or accelerate competitive new video offerings.

Cable’s competitors pretend nonetheless that competition does not exist. AT&T, apparently trapped in a time warp, asserts that the “facts and concerns” put forth by various parties in the past 12 years of the competition reports “are just as true and compelling today as they were in 1994, when the Commission issued its first Notice of Inquiry.” They claim there are “at best, limited competitive alternatives” to cable, “either from wireline or non-wireline providers” for the delivery of video services. With cable having gone from having 95 percent of the multichannel video marketplace in 1992 to less than 67 percent today, and with nearly 32 million consumers today taking service from a video provider other than their local cable operator – not to mention the plethora of other video options out there – the notion that today’s

² Comments of Comcast at 2. *See also Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 19 FCC Rcd. 1606, 1608 (2003) (10th Annual Report) (“the vast majority of Americans enjoy more choice, more programming and more services than any time in history.”)

video marketplace bears any resemblance to the marketplace of 1994 defies belief. By contrast, more than 87% of all households, as of year-end 2005, still get their telephone service from the incumbent local exchange carrier.³

The Broadband Service Providers (“BSPs”) also assert that the “same basic market conditions that existed in 1992 exist today but they relate to a broader range of competing technologies, a stronger market position of vertically integrated operators, and likely abuse if allowed.”⁴ Incredibly, they argue that vertical ownership among cable operators “is as significant today as it was in 1992” because of further expansion of vertical integration into sports programming.

But, as our comments address in detail, these are the facts: 1) the two national DBS competitors have captured 30% of all multichannel video programming customers over the past decade; 2) cable’s share of the multichannel video marketplace has declined to less than 67 percent; 3) the Bell Operating Companies, with annual revenues that dwarf cable companies, are moving into the video marketplace on a massive scale; 4) Internet video has flooded the marketplace; and 5) as a direct response to this marketplace competition, cable channel capacity continues to increase, investment in original programming continues to flourish, and video-on-demand, DVRs, HDTV and interactive offerings are no longer emerging services.

Moreover, as the Commission has recognized, vertical integration of cable operators and

³ The consumer benefits of facilities-based phone competition is documented in an economic study by Microeconomic Consulting & Research Associates, Inc. (MiCRA), “Consumer Benefits from Cable-Telco Competition,” December 7, 2006; *see* NCTA Media Release, “Phone Choice Could Save Consumers More Than \$100 Billion Over Five Years,” September 21, 2006.

⁴ BSPs Comments at 12.

program networks has decreased from 53% in 1994 to only 21.8% as of 2005.⁵ Retail competition is driving innovation, experimentation, and challenges to established business models, which in turn is maximizing the value of video services for consumers and having a beneficial competitive spillover effect in the provision of non-video services.

The Commission need not solely take cable's word for it. The robust nature of the video marketplace is borne out, for example, in the comments of Verizon and DIRECTV. In describing its all-fiber FiOS TV broadband network, Verizon touts the fact that it carries "substantially more video programming" than cable providers, including "local channels, nearly 200 digital video and music channels, and over 20 high definition television ("HDTV") channels" and "nearly 3,000 On Demand titles."⁶ It also touts its "unique programming packages," "international channels" and "44 premium movie channels" and a sports package with a dozen different sports channels, interactive and customizable services, streaming video-on-demand, DVRs and on and on.⁷ DIRECTV's section headings sum up the marketplace: "subscribership has increased;" system capacity "has expanded;" "diverse programming packages" are being offered at "competitive prices;" local-into-local service "continues to expand;" and "equipment options benefit consumers."⁸ DIRECTV also describes the wide array of competitors in the distribution of video programming.

⁵ *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming (First Annual Report)*, 9 FCC Rcd. 7442, 7522 (1994); *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming (12th Annual Report)*, 21 FCC Rcd. 2503, 2575 (2006); see also Testimony of David L. Cohen, Executive Vice President, Comcast Corporation, U.S. Senate Judiciary Committee Hearing on "Vertically Integrated Sports Programming", December 7, 2006. As discussed in our initial comments, as the percentage of vertically integrated networks continues to decline, cable investment in new and original programming continues to flourish. NCTA Comments at 35-38. In light of this, the comments of parties, such as The America Channel, on their inability to gain carriage have no merit and should be dismissed by the Commission.

⁶ Verizon Comments at 4-5.

⁷ *Id.* at 5-6.

⁸ DIRECTV Comments at 2-9; see also Comments of EchoStar at 20-23.

Meanwhile, Verizon has been awarded 245 franchises since last year and has conceded that the franchising process is not an obstacle to its ability to compete. It reported that its network build-out is “on target” to pass a total of six million premises by year’s end.⁹ AT&T is rolling out its U-verse service in major cities in Texas and has announced service launches in another 13 regions by the end of 2006.¹⁰ In addition, U-verse is now available in three Connecticut metro areas: New Haven, Hartford and Stamford.¹¹ In an effort to surpass cable HDTV offerings, AT&T recently announced that it is adding 27 high definition channels.¹² Broadband Service Providers reported that they “have made significant inroads in the multichannel video programming distribution market” by distinguishing themselves with “the most technically advanced services, bundled in packages.”¹³

Against this factual backdrop – and despite irrefutable evidence of a radically changed video landscape – some of cable’s competitors still look to the government for regulatory hand-outs to enable them to enhance their standing in the marketplace at the expense of cable. They have everything that they need to compete effectively with cable and any other video provider. But that does not stop them from portraying the marketplace as static and marred by barriers to entry as they try to prod the Commission into ill-considered intervention.

First, the telcos argue that franchising relief is necessary to give them a boost in the business of distributing video programming. But as we have shown, no such relief is warranted

⁹ Verizon Comments at 7.

¹⁰ *See e.g.* AT&T 3rdQ '06 Earnings Conference Call at 16;
http://library.corporate-ir.net/library/11/113/113088/items/217052/T3Q06EarningsConfCall_Color.pdf.

¹¹ “AT&T Launches U-verse in Connecticut,” Multichannel Newswire, December 27, 2006 (AT&T also recently launched U-verse service in parts of San Francisco and San Jose, California.)

¹² “AT&T Raises TV Stakes With Bigger HD Lineup, Aiming to Trump Cable,” The Wall Street Journal, December 19, 2006.

¹³ BSPs Comments at 2.

under section 621 of the Communications Act nor is there any reason to believe, nor any record to support, their need for assistance.¹⁴ The franchising process, as Verizon has admitted, is not a barrier to entry.

Second, the telcos, along with the DBS providers and the BSPs, argue (as in previous years) that lack of access to so-called “must have” programming, particularly regional sports networks, is hampering or may hamper their ability to compete.¹⁵ They seek mandatory access to terrestrially-delivered programming and/or an extension of the ban on cable’s ability to enter into exclusive contract arrangements which is scheduled to sunset in 2007. Here again, NCTA has repeatedly shown that there is no statutory basis for the Commission to expand the coverage of program access regulation beyond vertically-integrated, satellite-delivered programming and, even as a policy matter, such increased intrusion in the marketplace would be unwarranted.¹⁶

¹⁴ See NCTA’s Comments and Reply Comments filed February 13, 2006 and March 28, 2006 in MB Docket No. 05-311, *In the Matter of Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984*, [http://www.ncta.com/ContentView.aspx?hidnavlink=true&type+lpubtp5&contentId+2890](http://www.ncta.com/ContentView.aspx?hidnavlink=true&type=lpubtp5&contentId+2890); <http://www.ncta.com/ContentView.aspx?hidnavlink=true&type+lpubtp5&contentId+2891>.

In its recent decision in that proceeding, the Commission on a 3-2 vote concluded that certain aspects of the franchising process constitute unreasonable barriers to entry and imposed timeframes and other standards to eliminate such perceived barriers. NCTA believes that the facts do not support this decision and that the decision (the text of which has not yet been released) does not provide a fair and level playing field – a concept that has been universally supported up until now at federal, state, and local levels. Moreover, as we have argued in the section 621 proceeding, the Commission lacks the legal authority to regulate at all pursuant to Section 621, much less to establish separate regimes for incumbents and new entrants in today’s highly competitive marketplace.

¹⁵ See Comments of AT&T, EchoStar Satellite LLC, United States Telecom Association, Broadband Service Providers.

¹⁶ See e.g. *In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, MB Docket No. 05-255, NCTA Comments filed September 19, 2005; <http://www.ncta.com/ContentView.aspx?hidnavlink=true&type=lpubtp5&contentId=2672>; NCTA Reply Comments filed October 11, 2005; <http://www.ncta.com/ContentView.aspx?hidnavlink=true&type=lpubtp5&contentId=2793> *In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, MB Docket No. 04-227, NCTA Comments filed July 23, 2004; <http://www.ncta.com/ContentView.aspx?hidnavlink=true&type=lpubtp5&contentId=2806> NCTA Reply Comments filed August 25, 2004; <http://www.ncta.com/ContentView.aspx?hidnavlink=true&type=lpubtp5&contentId=2805>. The Commission is expected to address the exclusivity ban in an upcoming proceeding.

As we have shown, Congress recognized that exclusivity can be a legitimate business practice where there is competition.¹⁷ It banned certain exclusive arrangements – a departure from the normal workings of the marketplace and, thus, limited to the continuing need to protect competition – at a time when cable had the lion’s share of the multichannel video customer base and there was significant vertical integration in the industry. As the record shows, competition is now flourishing in the multichannel and multimedia video marketplace (and vertical integration has dropped). And cable’s competitors, themselves, have used exclusivity as a means of competing with cable operators and with each other.

Even as AT&T seeks to burden cable with more expansive program access regulation, it acknowledges that “issues involving access to programming should continue to be resolved through commercial negotiations.”¹⁸ Marketplace negotiations *are* clearly working: the telephone company channel line-ups and recent announcements show it. Last September, for example, AT&T entered into a distribution agreement with Comcast to deliver E! Entertainment Television, the Golf Channel, Versus, AZN Television, PBS Kids Sprout, Style Network, G4, and various regional sports networks.¹⁹ And Verizon recently struck a deal with Comcast to add Comcast’s SportsNet Philadelphia, PBS Kids Sprout, the Golf Channel and Versus to the FiOS TV lineup.²⁰

¹⁷ *In the Matter of 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, 12127 (2002).

¹⁸ See Comments of AT&T at 15.

¹⁹ “AT&T U-verse TV to Include Comcast Networks’ Content,” AT&T Press Release, September 14, 2006.

²⁰ “Verizon set to take on Comcast: Its TV service, with SportsNet, starts Monday,” Philadelphia Inquirer, December 3, 2006; “Verizon Signs Agreements with Comcast for Comcast SportsNet Philadelphia, PBS Kids Sprout and Versus,” PR Newswire, December 4, 2006.

Finally, apart from franchising and program access, cable's competitors seek a host of other regulatory favors that have been extensively addressed in other ongoing FCC proceedings. We incorporate by reference our filings on such matters as exclusivity in multiple dwelling units (MDUs),²¹ the "70/70" test in Section 612(g),²² cable horizontal and vertical ownership,²³ à la carte,²⁴ multicast must carry,²⁵ and the commercial availability of navigation

²¹ See e.g. Comments of USTA at 16-18, Verizon at 24-28. See *In the Matter of Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended by the Cable Television Consumer Protection & Competition Act of 1992*, MB Docket No. 05-311, NCTA Ex Parte Letter filed September 8, 2006; <http://www.ncta.com/ContentView.aspx?hidenavlink=true&type=lpubtp5&contentId=3666>.

²² Comments of AT&T at 17. See *In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, MB Docket No. 05-255, NCTA Comments filed April 3, 2006, <http://www.ncta.com/ContentView.aspx?hidenavlink=true&type=lpubtp5&contentId=3744>; NCTA Reply Comments filed April 25, 2006, <http://www.ncta.com/ContentView.aspx?hidenavlink=true&type=lpubtp5&contentId=3085>; NCTA Ex Parte filed December 15, 2005, <http://www.ncta.com/ContentView.aspx?hidenavlink=true&type=lpubtp5&contentId=2791>; *In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, MB Docket No. 04-227, NCTA Ex Parte filed December 17, 2004, <http://www.ncta.com/ContentView.aspx?hidenavlink=true&type=lpubtp5&contentId=2804>.

²³ Comments of DIRECTV at 14. See *In the Matter of The Commission's Cable Horizontal and Vertical Ownership*, MB Docket No. 92-264, NCTA Comments filed August 8, 2005, <http://www.ncta.com/ContentView.aspx?hidenavlink=true&type=lpubtp5&contentId=2691>.

²⁴ Comments of EchoStar at 6. See *In the Matter of À La Carte & Themed Programming and Pricing Options for Programming Distribution on Cable Television and Direct Broadcast Satellite Systems*, MB Docket No. 04-207, NCTA Comments filed July 15, 2004, <http://www.ncta.com/ContentView.aspx?hidenavlink=true&type=lpubtp5&contentId=2690>; NCTA Reply Comments filed August 13, 2004, <http://www.ncta.com/ContentView.aspx?hidenavlink=true&type=lpubtp5&contentId=2689>; NCTA Response to Staff Further Report on À La Carte March 15, 2006, <http://www.ncta.com/ContentView.aspx?hidenavlink=true&type=lpubtp5&contentId=2822>.

²⁵ Comments of NAB at 8. See *In the Matter of Carriage of Digital Television Broadcast Signals; Amendments to Part 76 of the Commission's Rules*, CS Docket No. 98-120, NCTA Opposition to Petition for Reconsideration filed May 26, 2006, <http://www.ncta.com/ContentView.aspx?hidenavlink=true&type=lpubtp5&contentId=2822>.

devices.²⁶ And ultimately we urge the Commission to reject telco, satellite, BSP and others pleas for preferential treatment in these areas in its annual report to Congress.

II. CABLE PRICES, LIKE CABLE SERVICES, REFLECT A VIBRANTLY COMPETITIVE MARKETPLACE.

Despite the dramatic growth of DBS – and the equally dramatic competitive responses of cable described above – several parties assert that only *wireline* competition affects the *price* of cable service. They continue to cite, as they have in previous years, the fact that cable prices have risen faster than inflation. And they continue to point to findings by the General Accountability Office and the Commission that prices are lower in communities that have wireline competition than in communities that do not.²⁷

In previous comments in these annual proceedings, NCTA has demonstrated why these arguments do not hold water. First, we have submitted papers from two economists attesting to

²⁶ Comments of Consumer Electronics Association at 9-12. *See e.g. In the Matter of Commercial Availability of Navigation Devices*, CS Docket No. 97-80, NCTA Letter filed November 30, 2005; NCTA Status Report filed December 22, 2006, <http://www.ncta.com/ContentView.aspx?hiddenavlink=true&type=lpubtp5&contentId=3747>. On the matter of the commercial availability of navigation devices under section 629 of the Communications Act, we wholeheartedly agree with the United States Telephone Association in calling for the Commission to recommend to Congress “that it undertake a comprehensive re-examination of the need for Section 629 in light of current industry dynamics and technology evolution.” With respect to the CEA’s comments on the development of two-way digital cable ready products, we refer the Commission to NCTA’s November 30, 2005 submission proposing a framework for promptly bringing such products to market and NCTA’s December 11, 2006 submission addressing the recent proposal by certain CE and IT companies referenced in the CEA comments.

²⁷ In their comments, Verizon and AT&T cite a highly flawed study conducted by the American Consumer Institute. The study applies a series of unsupportable extrapolations to a survey of “1,077 Texans” residing in Keller, Texas and two neighboring towns, conducted a few months after the launch of Verizon’s FiOS service. The study’s many shortcomings include: imprecise survey questions; unfounded extrapolations of the feedback from 147 respondents who reported a decrease in monthly charges; overt disregard of the offsetting costs from respondents who reported an increase in monthly charges upon switching to FiOS. Moreover, it is likely that discounting was being offered by all participants in these nascent markets. The study also blindly assumes these temporary discounted levels would perpetuate and be replicated across the country. There is no basis to assume that 147 households, the findings from which were not offset by 29 households that ended up paying more, could then be projected upon 100 million households nationwide.

the fact that prices rising faster than inflation indicate absolutely *nothing* about the presence or absence of competition in the marketplace.²⁸ All things being equal, a monopolist's price at any given time is higher than the price that a competitive firm would charge. But there is no reason to expect that, over time, a monopolist's price would increase faster than a competitive firm's. Prices are a function of costs, and if prices are increasing faster than inflation, that is because costs are increasing faster than inflation – not because the provider lacks competition.

Second, we have previously submitted a comprehensive study of all 433 wireline overbuild communities that existed in 2003.²⁹ That study showed that in virtually every case, lower prices – to the extent that they existed – were attributable to anomalous circumstances that had nothing to do with wireline overbuilders being more “competitive” than DBS or other competitors. In many of those communities, the overbuilder erroneously underestimated the effects of DBS on cable prices and services and initially set prices at unsustainable prices – leading either to rapid price increases or rapid bankruptcy. In others, overbuilders had purchased their systems from bankrupt owners at pennies on the dollar, allowing them to avoid the full costs of building a system. Other overbuild systems were operated on a not-for-profit basis by municipalities or co-ops. None of these circumstances would, of course, apply to new telco overbuilders, who are constructing their own massively expensive facilities and who presumably do not intend to operate their systems on a not-for-profit basis.

In any event, the price increases and price differentials cited by the telcos and others seeking a regulatory boost are based on old and obsolete data. The pricing survey just adopted by the Commission is based on information that is already *two years old*. The evolution of the

²⁸ See attached papers by Dr. Debra J. Aron, July 29, 2002 and Steven S. Wildman, “Assessing Quality-Adjusted Changes in the Real Price of Basic Cable Service,” September 10, 2003.

²⁹ See Steven Wildman “Assessing the Policy Implications of Overbuild Competition,” February 9, 2004 at <http://www.ncta.com/ContentView.aspx?hidenavlink=true&type=1pubtp1&contentId=2884>.

competitive video and broadband marketplaces in just the last two years makes reliance on older data completely useless.

As the headline of a Wall Street Journal article recently reported, “Cable Rate Increases Are Smallest in Years.”³⁰ Indeed, in each of the last two years – which are not included in the recent price report – cable’s nominal price increases were lower than in any of the previous ten years. Moreover, reporting on nominal rate-card prices fails to account not only for promotional pricing but also for the much lower prices available to the huge and growing number of customers who purchase their basic and enhanced basic tiers of video as part of a bundle that may also include digital tiers, high-speed Internet service and telephone service.

Nor, of course, does reporting of nominal monthly prices take into account usage – and, specifically, *increases* in usage – of cable service. As we’ve shown before, cable customers watch more and more cable programming every year. In fact, the nominal price of cable service *per viewing hour*, based on ratings of cable programming, has hardly increased at all in recent years. When adjusted for inflation, that price has *decreased*.³¹ And those trends do not even take into account the lower prices attributable to bundling and promotions.

Only by willfully ignoring all these facts and economic realities – none of which are presented here for the first time – is it possible to continue to point to cable prices as an indication that the video marketplace is anything but fully competitive. Consumers not only have more choices than ever before, but those choices are available at prices that reflect more value than ever before.

³⁰ “Cable Rate Increases Are Smallest in Years,” The Wall Street Journal, December 7, 2006, at D1, D5.

³¹ See Cable Price Talking Points, December 19, 2006 at <http://www.ncta.com/ContentView.aspx?hidenavlink=true&type=1pubtp10&contentId=3741>.

CONCLUSION

The Commission should report to Congress once and for all that the delivery of video programming is fully competitive. And in light of this, the Commission should reject proposals for further government intrusion in the workings of the competitive marketplace and should encourage Congress to do the same. The real story is the need for Commission oversight, and intervention where appropriate, to ensure that the government protects the fledgling competitive delivery of bundled video, voice and data services now that cable operators, through VoIP and other telephone offerings, are providing facilities-based voice service in what had been the monopoly preserve of incumbent phone providers. Indeed, as NCTA discussed in its initial comments, telephone service has been the toughest communications marketplace in which to introduce real and sustained choice and competition.

Respectfully submitted,

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