

# **Attachment A**

**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	)	

**COMMENTS OF COMCAST CORPORATION**

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**COMMENTS OF COMCAST CORPORATION**

Comcast Corporation (“Comcast”) hereby responds to the above-captioned Notice of Inquiry (“*Notice*”).<sup>1</sup> These comments address many of the questions posed in the *Notice*, supplying information about the video marketplace in general and Comcast’s role in particular. The facts and evidence herein show indisputably that the quantity and diversity of programming available to American consumers continues to expand rapidly, the means by which consumers can access video programming continue to proliferate, and the public policy rationales underlying many of the laws and regulations that apply only to a subset of video providers -- traditional cable television operators -- have eroded.

**I. INTRODUCTION AND SUMMARY.**

Over the nearly 15 years since Congress first directed the Commission to report annually on the status of competition in the video marketplace, that marketplace has changed radically. And the pace of change is still accelerating. Video distribution technologies are evolving rapidly, and established models and expectations are constantly being challenged by seismic

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<sup>1</sup> *In re Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Notice of Inquiry, 21 FCC Rcd. 12229 (2006) (“*Notice*”).

changes, including the fundamentally and irrevocably disruptive role of broadband Internet, the proliferation of distribution outlets, the micro-fragmentation of audiences, and the inexorable movement away from traditional linear networks and audience passivity toward on-demand viewing and consumer sovereignty.

To serve its statutory purpose of effectively informing the deliberations of Congress, it is essential that the Commission's video competition report objectively survey the entire video landscape and fully and fairly detail the abundance and diversity of competition that characterize the video marketplace. The Commission cannot responsibly fulfill its charge unless it acknowledges, catalogs, and understands the dramatic changes that have occurred in recent years -- and especially in recent months. With these Comments, we attempt to assist the Commission in that task.

There has never in history been such an extraordinary diversity of programming available to consumers -- or so many ways in which they can access it. As recently reported in *The New York Times*:

Video mania is in full swing. Amazon is finally doing movie downloads. Apple is touting a new wireless gizmo to beam movies from laptops to TV screens. NBC is introducing a video syndication service that might pit it against Google and Yahoo, and it's joining the other big networks in putting its shows online for free with advertising. MTV is working with Google to populate its video content all over the Web.<sup>2</sup>

And that describes only a fraction of the *newest* developments in the video marketplace.

Meanwhile, there is a wide variety of established distribution outlets available to consumers -- including cable systems, direct broadcast satellite ("DBS") providers, broadcasters, home video sales and rentals, and so on -- with new options, including telephone companies and Internet

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<sup>2</sup> Richard Siklos, *A Video Business Model Ready To Move Beyond Beta*, N.Y. Times, Sept. 17, 2006, at 33.

video providers, constantly emerging. Consumers' appetite for video programming appears to be nearly insatiable, and technology has evolved to help feed that appetite. Anyone with a video camera and a broadband connection can now distribute his or her content to a potential audience that far exceeds the number of TV households in the United States. For consumers, video can be consumed anytime and anywhere; as Internet and mobile video programming and time-shifting technologies become increasingly widespread, consumers face an explosion of choices, including alternatives to the types of experience traditionally offered by cable operators and other MVPDs. Although some viewers still choose to view *The Office* or *Dancing with the Stars* at the scheduled time on the living room television, others may prefer to watch these shows later, on a different device at a different location, or instead to view videos from YouTube or thousands of other Internet sites.

Although no one can possibly know what the future holds in the video marketplace, every informed participant and observer sees rapid changes, intensifying competition and choice, and greater empowerment of consumers. Here is just a sampling from the press about the video explosion during the last few months:

- “We will see greater changes in the media industry in the next five years than we have seen in the last 50 years.”<sup>3</sup>
- “What is happening to storefront commerce is what we think is happening with content: It’s adapting to the broadband era. . . . Change is now measured in nanoseconds.”<sup>4</sup>

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<sup>3</sup> Meg James & Maria Elena Fernandez, *NBC’s Cuts Will Alter the Look of Prime Time*, L.A. Times, Oct. 20, 2006 (quoting Jeff Zucker, chief executive of NBC Universal Television Group), available at <http://www.latimes.com/entertainment/news/la-fi-nbc20oct20,1,7942683.story>.

<sup>4</sup> *Take Risks*, Broad. & Cable, Oct. 9, 2006 (noting that we are in a “world of boundless entertainment choices”), available at <http://www.broadcastingcable.com/article/CA6378929.html>.

- “Nobody can predict the future of the digital business because the viewers will drive that. . . . Viewers now have the upper hand and show no sign of giving it back.”<sup>5</sup>
- This is “a digital world teeming with platforms.”<sup>6</sup>
- “Technological advances mean companies that previously provided different services are now in a race to meet customers’ entire range of communications needs, in what is being called the ‘battle for the bundle.’”<sup>7</sup>
- “Change or die.”<sup>8</sup>
- “The changes are taking place so rapidly that Leslie Moonves, CEO of CBS, has said, ‘We are changing our tires on a car going 80 miles an hour.’”<sup>9</sup>
- “The war for your living room is getting more heated. Beyond Apple, the [telephone companies] are trying to enter video, Microsoft is improving [M]edia [C]enter, satellite operators are trying to enter broadband, and sooner or later Sony will get PS3 out with next-gen DVD technology built in.”<sup>10</sup>
- “And if the cable operators and phone companies don’t pay attention to what their customers want to watch, they risk leaving money on the table because people will go other places to get it.”<sup>11</sup>
- “The brave new world of TV programming, combined with a little know-how, a broadband Internet connection and a digital video recorder, allows you to control

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<sup>5</sup> Audrey Stuart, *Viewers Have the Upper Hand in Today’s New Digital TV World*, Yahoo! News, Oct. 9, 2006 (quoting Anne Sweeney, co-chair of Disney Media Networks and chief executive of Disney-ABC Television Group), at [http://news.yahoo.com/s/afp/20061009/tc\\_afp/afpentertainmentmedia](http://news.yahoo.com/s/afp/20061009/tc_afp/afpentertainmentmedia).

<sup>6</sup> John Eggerton, *Ratings Council Studies Multimedia Consumption*, Broad. & Cable, Oct. 17, 2006, available at <http://www.broadcastingcable.com/article/CA6382257.html>.

<sup>7</sup> Paul Taylor & Aline Van Duyn, *Line of Sight: Why the Battle of the Bundle Is at the Doorstep*, Fin. Times, Mar. 17, 2006, at 13.

<sup>8</sup> Diane Mermigas, *News Corp. Sculpting Bold Plan for Growth*, Hollywood Rep., July 26, 2006, at 1 (quoting “the war cry of News Corp. chairman and CEO Rupert Murdoch and his trusted No. 2, Peter Chernin”).

<sup>9</sup> Charlie McCollum, *McCollum: TV Industry Latching on to Evolving Technologies*, Mercury News, Oct. 16, 2006, available at <http://www.mercurynews.com/mld/mercurynews/entertainment/television/15757000.htm>.

<sup>10</sup> Brian Garrity, *Living Room War Heats Up*, Billboard Mag., Sept. 23, 2006, at 7 (quoting Rich Greenfield, Analyst, Pali Capital).

<sup>11</sup> Marguerite Reardon, *Phone, Cable Companies Embracing Web 2.0*, CNET News.com, Nov. 8, 2006 (quoting Michael Cai, director of broadband and gaming for the research firm Parks Associates), at [http://news.com.com/2102-1033\\_3-6133451.html?tag=st.util.print](http://news.com.com/2102-1033_3-6133451.html?tag=st.util.print).

your prime-time viewing habits as never before. . . . All the networks continue to experiment with alternate viewing options . . . .”<sup>12</sup>

- “We embrace all new media. . . . [Consumer] habits are changing and we have to be there where they want us, on the device they want us on. . . . The truth is we don’t know where we’re headed, only that we’re going on a ride. . . . It’s a big experiment but we have a willing audience so we have to be at the forefront.”<sup>13</sup>
- “[T]here’s more and more competition for the digital media living room. . . . Every day there’s more of a push, whether it’s from Apple or Sony . . . more and more players are trying it.”<sup>14</sup>

What does this mean for competition and for competitors in the video marketplace? It means constant change and the need to adapt to change. It means that complacency is the enemy of every video provider, and innovation is essential to survival. It means that regulatory policies based on the notions that the video marketplace is static and that regulators have a prescience that these competitors do not share threaten to skew investment and innovation. It means that regulatory intervention that is intended to impose an agency’s view of how the marketplace should work onto a marketplace that won’t hold still long enough to be fully understood is bound to fail.

The extraordinary marketplace evolution chronicled in the comments above shows why policymakers should be extremely wary of regulatory intervention that could hinder the rapid pace of progress, and why the elimination of outdated rules that apply only to certain segments of the video distribution marketplace should be a top policy priority.

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<sup>12</sup> Sean L. McCarthy, *Take Control: Watch Your Fave TV Shows - Even if They’re on at the Same Time*, Boston Herald, Oct. 12, 2006, at 47.

<sup>13</sup> Valerie Milano, *Tassler Says CBS To ‘Embrace’ New Delivery Technologies*, Communications Daily, Jan. 19, 2006, at 9-10 (quoting Nina Tassler, President, CBS Entertainment).

<sup>14</sup> Janet Whitman, *Big Media Marches on TV Turf*, N.Y. Post, Nov. 8, 2006 (quoting Rich Greenfield, Analyst, Pali Research), available at [http://www.nypost.com/seven/11082006/business/big\\_media\\_marches\\_on\\_tv\\_turf\\_business\\_janet\\_whitman.htm](http://www.nypost.com/seven/11082006/business/big_media_marches_on_tv_turf_business_janet_whitman.htm).

To maximize the utility of its report to Congress, it is important that the Commission's policy analysis be driven by marketplace facts, not preconceived notions. When the facts are examined, they show tremendous, positive, pro-consumer change. A tectonic shift in viewing is taking place, where consumers increasingly watch what they want when they want, and this is driving competition in the video marketplace to an entirely new level. The traditional multichannel video providers continue to grow -- DIRECTV and EchoStar now collectively serve approximately 28.5 million customers, and are the second and fourth largest MVPDs, respectively. The telephone companies ("telcos") are rapidly deploying networks capable of offering video, broadband Internet, and voice; are bolstering the programming they offer; and are actively signing up subscribers. And the figures on consumer usage of video-on-demand ("VOD"), high-definition television ("HDTV"), digital video recorders ("DVRs"), Internet video downloads and streaming, and mobile video are astonishing. Consumers' options for obtaining video are increasing by the day, and "[n]o one has a clue as to how all this is going to turn out."<sup>15</sup>

Law and regulation need to be tailored to this modern, dynamic, and unpredictable marketplace, not to a static marketplace that has long since ceased to exist. Many of the cable regulations that were prescribed under the 1992 Cable Act (when DBS had no subscribers, it was illegal for the telcos to provide video services, the DVD had yet to be introduced, the first graphical Internet browser had yet to be invented, residential broadband was a distant dream, and mobile phones looked like grey bricks or were carried in a bag and could only display numbers on their screens) make no sense in 2006. The Commission should extend its deregulatory thrust -- which has served it well in broadband -- to the video marketplace and focus on eliminating

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<sup>15</sup> Steve Effros, *Think About That For a Minute...*, CableFAX Daily, June 22, 2006, at 4.

outdated, unnecessary, and counterproductive regulations. And, of course, it should refrain from entertaining new proposals for backward-looking regulation. As Congress made clear in 1996, competition is preferable to regulation.<sup>16</sup>

## **II. CONSUMERS' VIDEO OPTIONS ABOUND AND CONTINUE TO INCREASE ON A DAILY BASIS.**

Consumers today have more ways to obtain video programming than ever before.

Technological innovation has changed the video marketplace in ways that no one could have ever imagined. From the introduction of broadcast television in the late-1920s, to the explosion of video cassette recorders and “video stores” in the 1980s, to the maturity of consumer satellite technologies in the early 1990s, to the development of hybrid fiber-coaxial cable broadband systems in the late 1990s, and now the deployment of hybrid fiber-twisted pair and all-fiber broadband networks and advanced wireless broadband video, the common result has been more consumer choices of video programming and more competitive options for means of accessing that programming.

### **A. DIRECTV and EchoStar Are Significant Sources for Video Programming and Formidable Competitors in the Video Marketplace.**

The two major DBS providers, DIRECTV and EchoStar, offer consumers a wide array of video programming options in virtually every community in the United States, and together they serve over 28.43 million subscribers,<sup>17</sup> or approximately 29.6% of all multichannel video

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<sup>16</sup> See H.R. Rep. 104-458, at 1 (1996) (Conf. Rep.), as reprinted in 1996 U.S.C.A.A.N. 124 (stating that the 1996 Telecom Act was enacted “to provide for a pro-competitive, de-regulatory national policy framework”).

<sup>17</sup> See Press Release, DIRECTV, Inc., *The DIRECTV Group Announces Third Quarter 2006 Results* (Nov. 8, 2006) (“*DIRECTV 3Q Release*”) (reporting that, as of September 30, 2006, DIRECTV had approximately 15.678 million customers), available at [http://phx.corporate-ir.net/phoenix.zhtml?c=127160&p=irol-newsArticle&ID=928358&highlight=](http://phx.corporate-ir.net/phoenix.zhtml?c=127160&p=irol-newsArticle&ID=928358&highlight=;); Press Release, EchoStar Communications Corp., *EchoStar Reports Third Quarter 2006 Financial Results* (Nov. 7, 2006) (“*EchoStar 3Q Release*”) (reporting that, as of September 30, 2006, (footnote continued...))

subscribers nationwide.<sup>18</sup> In the multichannel video segment of the marketplace alone, DIRECTV and EchoStar are now the second and fourth largest multichannel video programming distributors (“MVPDs”) in the United States.<sup>19</sup> DBS growth has been and is expected to remain strong in all areas of the country.<sup>20</sup> Kagan projects that satellite video will grow to more than 33.5 million subscribers by 2015.<sup>21</sup>

DBS providers use a variety of strategies to market their individual programming services. For example, earlier this year, DIRECTV aggressively promoted its exclusive NFL SUNDAY TICKET programming by offering a deal that included access to 250 programming networks (including NFL SUNDAY TICKET, local broadcast stations, and 31 movie channels), four months of HD programming and an HD receiver, free installation, and a free DVR or HD

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(...footnote continued)

DISH Network had approximately 12.755 million customers), available at <http://phx.corporate-ir.net/phoenix.zhtml?c=68854&p=irol-newsArticle&ID=927674&highlight=>.

<sup>18</sup> See Kagan Research LLC, *Kagan Media Index*, Kagan Media Money, Oct. 17, 2006, at 5 (reporting 96.2 million multichannel subscribers nationwide).

<sup>19</sup> Compare *DIRECTV 3Q Release and EchoStar 3Q Release*, with NCTA, *Statistics: Top 25 MSOs*, at <http://www.ncta.com/ContentView.aspx?contentId=73> (last visited Nov. 12, 2006). Prior to the consummation of Time Warner’s acquisition of certain Adelphia systems, and exchange of certain systems with Comcast, DIRECTV and EchoStar were the second and third largest MVPDs, respectively. See *In re Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Twelfth Annual Report, 21 FCC Rcd. 2503, ¶ 6 (2006) (“12<sup>th</sup> Annual Report”). Another DBS option, which bills itself as “America’s premier Christian satellite service,” is available from Dominion Video Satellite, Inc., marketed as skyangel.

<sup>20</sup> See *12<sup>th</sup> Annual Report* ¶ 72 n.263 (“According to GAO, in 2001, DBS penetration rates were nearly 26 percent in rural areas, 14 percent in suburban areas, and about 9 percent in urban areas. By 2004, DBS penetration rates had increased to approximately 29 percent in rural areas, 18 percent in suburban areas, and 13 percent in urban areas. Over the 2001 to 2004 time frame, the DBS penetration rate grew about 50 percent and 32 percent in urban and suburban areas, respectively, compared with a growth rate of 15 percent in rural areas.” (citing U.S. Gov’t Accountability Office, *Direct Broadcast Satellite Subscribership Has Grown Rapidly, but Varies Across Different Types of Markets*, GAO-05-257, at 3 (Apr. 2005))).

<sup>21</sup> See Linda Moss, *Study Sees DBS Growth*, Multichannel News, Sept. 28, 2006, available at <http://www.multichannel.com/article/CA6376012.html>.

upgrade for \$64.99 per month for four months.<sup>22</sup> Likewise, EchoStar is an aggressive marketer and competitor, offering programming packages starting at just \$19.99 and extras such as free DVRs.<sup>23</sup>

In response to competition from cable and other alternative sources for video programming, DBS providers are becoming far more innovative, rolling out advanced services including HDTV, DVRs, and what they call “interactive” television. Eric Shanks, Executive Vice President at DIRECTV, explained that launching advanced services fights churn and attracts new customers: “It’s about providing an aggregate, superior TV experience that combines all these services and that people feel they simply can’t do without. If they feel they can’t do without this superior TV experience, they’re not going to switch.”<sup>24</sup>

The launch of new satellites has allowed DBS providers to add even more service options, with new ones already in the works.<sup>25</sup> For example, over the past year, DBS providers

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<sup>22</sup> See *NFL Sunday Ticket Offer*, DIRECTV, Inc., at <http://www.directv.com/DTVAPP/global/content/Page.jsp?assetId=400002&CMP=ILC-Q306-HPtext-save540> (last visited Aug. 22, 2006). The deal ran through October 2, 2006. See *id.* Also, earlier this year, DIRECTV launched its “\$7,500 per-year luxury ‘elite’ programming package” to appeal to subscribers who want every video option. Linda Moss, *DIRECTV To Give ‘Titanium’ Subs Everything*, Multichannel News, June 20, 2006, available at <http://www.multichannel.com/article/CA6345634.html> (noting that the package includes unlimited access to all of DIRECTV’s programming networks; 24-hour concierge customer service; unlimited access to all pay-per view movies, events and sports packages; priority “white-glove” service and immediate VIP installation; HDTV channels; and up to 10 receivers, including HD DVRs).

<sup>23</sup> See EchoStar Satellite L.L.C., *Current Offers*, at <http://www.dishnetwork.com/offers.jsp> (last visited Nov. 2, 2006). Curiously, although EchoStar often highlights low-priced packages in its advertising, its average revenue per subscriber is a robust \$62.86. See EchoStar Communications Corp., *SEC Form 10-Q, For the Quarterly Period Ended Sept. 30, 2006*, at 28 (filed Nov. 7, 2006), available at <http://phx.corporate-ir.net/phoenix.zhtml?c=68854&p=irol-sec>.

<sup>24</sup> Tracy Swedlow, *Interview: Eric Shanks, EVP of Entertainment, DIRECTV*, itvt Newsletter, Oct. 16, 2006, Issue 6.99, available at <http://www.itvt.com/vwuiitvtissue6.99.html#interview.01>.

<sup>25</sup> See generally EchoStar Communications Corp., *About Us: Satellites*, at <http://www.dishnetwork.com/content/aboutus/satellites/index.shtml> (last visited Nov. 13, 2006); Press Release, DIRECTV, Inc., *DIRECTV 9S* (footnote continued...)

have expanded greatly their HDTV offerings. DIRECTV announced that it will carry local HD broadcast stations in 25 more markets before the end of 2006, bringing its total to 67 local markets, or approximately 74% of all U.S. TV households.<sup>26</sup> DIRECTV states that it is undertaking a “nationwide expansion of HD programming that will culminate in 2007, when DIRECTV will have the ability to deliver more than 1,500 local HD channels and more than 150 national HD channels, establishing DIRECTV as the leading provider of HD programming.”<sup>27</sup> Likewise, EchoStar is actively expanding its local HD services, offering local HD channels in 24 cities to date and planning to reach “more than 50% of U.S. TV households with local HD channels by year end.”<sup>28</sup> EchoStar also continues to increase the collection of national HD channels it offers and exclaims on its website that “DishHD offers twice as many national HD channels as any other provider!”<sup>29</sup>

DIRECTV and EchoStar also compete aggressively against other video distributors on the DVR front. Twenty-six percent of EchoStar customers and 19% of DIRECTV customers

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(...footnote continued)

*Satellite Launches Successfully; Expands DIRECTV Fleet to Nine Spacecraft* (Oct. 13, 2006), available at <http://phx.corporate-ir.net/phoenix.zhtml?c=127160&p=irol-newsArticle&ID=916210&highlight=>.

<sup>26</sup> See *DIRECTV To Add 25 HD Markets*, Multichannel News, Oct. 10, 2005, available at <http://www.multichannel.com/article/CA6379766.html>.

<sup>27</sup> Press Release, DIRECTV, Inc., *DIRECTV Activates HD Local Channel Service in Austin, Texas, Cincinnati and Las Vegas*, (Sept. 27, 2006), available at <http://phx.corporate-ir.net/phoenix.zhtml?c=127160&p=irol-newsArticle&ID=910053&highlight=>.

<sup>28</sup> Press Release, EchoStar Communications Corp., *DISH Network Launches Local TV Stations in High Definition via Satellite in 11 Cities* (May 17, 2006) (EchoStar claims to offer “the most comprehensive lineup of HD programming in the pay-TV industry”), available at <http://phx.corporate-ir.net/phoenix.zhtml?c=68854&p=irol-newsArticle&ID=858026&highlight=>; Karen Brown, *Dish Beams Local HD into Detroit*, Multichannel News, July 7, 2006, available at <http://www.multichannel.com/article/CA6350458.html>.

<sup>29</sup> EchoStar Satellite L.L.C., *DishHD Programming* (listing thirty HD programmers, including ESPNHD, DiscoveryHD, Food NetworkHD, HDNet, and many others), at <http://www.dishnetwork.com/content/programming/dishhd/programming/index.shtml> (last visited Oct. 23, 2006).

subscribe to the providers' DVR services.<sup>30</sup> "Coupled with new content, DIRECTV has also rolled out its most advanced set-top receiver, the DIRECTV Plus(R) HD DVR, which has the ability to record up to 200 hours of standard definition content or up to 50 hours of HD (MPEG4) programming and enables customers to experience the world's first HD interactive content via the NFL SUNDAY TICKET(TM) SuperFan subscription."<sup>31</sup> EchoStar offers three different models of portable DVRs, known as the PocketDISH, which allow subscribers to quickly transfer up to 20 hours of programming from certain EchoStar DVR receivers to PocketDISH devices.<sup>32</sup>

DBS providers are using DVR technology to offer VOD-like services.<sup>33</sup> Significant examples include:

- DIRECTV's agreement with Fox Entertainment Group whereby DIRECTV viewers get a "first look" at prime time hits from FOX and FX a day before their initial broadcasts;<sup>34</sup>

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<sup>30</sup> Vijay Jayant, *Cable & Satellite Communications Industry Overview*, Lehman Brothers Cable/DBS Data Book: 2Q 2006, Sept. 29, 2006, at 2.

<sup>31</sup> Press Release, DIRECTV, Inc., *DIRECTV Opens New Technical Call Center To Support Growth, New Products and Services* (Sept. 25, 2006) (reporting that DIRECTV opened its fourth call center capable of employing up to 1,000 customer service professionals "to further strengthen its ability to provide technical support for its customers as it continues to expand its advanced products and services"), available at <http://phx.corporate-ir.net/phoenix.zhtml?c=127160&p=irol-newsArticle&ID=908874&highlight=>.

<sup>32</sup> EchoStar Satellite L.L.C., *PocketDISH, Get One*, at <http://www.pocketdish.com/get.jsp> (last visited Nov. 15, 2006). The PocketDISH can also be used as an MP3 player, with the capacity to hold 20,000 songs. EchoStar Satellite L.L.C., *AV700E Widescreen Wonder*, at <http://www.pocketdish.com/av700e.jsp> (last visited Nov. 15, 2006).

<sup>33</sup> This quasi-VOD service does not provide fully on-demand VOD services. See Craig Kuhl, *Coming Soon Video-On-Demand*, CED Mag., Jan. 1, 2006, available at <http://www.cedmagazine.com/article/CA6294438.html>.

<sup>34</sup> See Press Release, DIRECTV, Inc., *Fox Entertainment Group and DIRECTV Launch Partnership To Offer Best of FOX and FX Network Programming On Demand* (Jan. 5, 2006), available at <http://phx.corporate-ir.net/phoenix.zhtml?c=127160&p=irol-newsArticle&ID=801049&highlight=>; see also News Release, EchoStar Communications Corp., *DISH Network(TM) to Feature Sneak Preview of NBC Series Premiere of "Friday Night Lights"* (Sept. 21, 2006), available at <http://phx.corporate-ir.net/phoenix.zhtml?c=68854&p=irol-newsArticle&ID=908100&highlight=>.

- EchoStar's recent deals with Warner Brothers and Lionsgate Entertainment to increase its near-on-demand programming library.<sup>35</sup>

Likewise, DBS providers continue to develop interactive television offerings.<sup>36</sup>

- Earlier this year, DIRECTV partnered with YES Network to provide YES subscribers with an interactive baseball application that gives live YES statistics and scores of other games on demand and a camera angle available only to YES viewers.<sup>37</sup>
- In 2007, DIRECTV will launch the Championship Gaming Series, a professional video gaming league that will involve televised league play utilizing new interactive technology that takes viewers "inside the actual game competitions."<sup>38</sup>
- Similarly, EchoStar will roll out DishGAMES, which will feature 16 games and include score submission, leader board, and tournament capabilities, as well as prizes for the winners.<sup>39</sup>

DBS providers also continue to expand their linear programming offerings.<sup>40</sup> For

example:

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<sup>35</sup> See Press Release, EchoStar Communications Corp., *DISH Network(TM) & Lionsgate Entertainment Sign Video On Demand Movie Deal* (Nov. 7, 2006), available at <http://phx.corporate-ir.net/phoenix.zhtml?c=68854&p=irol-newsArticle&ID=928218&highlight=vod>; Press Release, EchoStar Communications Corp., *DISH Network(TM) & Warner Bros. Home Entertainment Group Sign Video On Demand Movie Deal; Video On Demand and Pay-Per-View Movies Now Available on DISH Network* (Aug. 24, 2006), available at <http://phx.corporate-ir.net/phoenix.zhtml?c=68854&p=irol-newsArticle&ID=899197&highlight=vod>.

<sup>36</sup> See, e.g., Press Release, DIRECTV, Inc., *DIRECTV, USA Network, and USTA Serve Up the First-Ever Interactive TV Coverage of 2006 Open* (Aug. 14, 2006), available at <http://phx.corporate-ir.net/phoenix.zhtml?c=127160&p=irol-newsArticle&ID=895598&highlight=>; Press Release, Reebok, Ltd., *Reebok Launches Interactive TV Monday Night Football Campaign* (Sept. 19, 2006), available at [http://media.corporate-ir.net/media\\_files/irol/68/68854/pressreleases/ReebokiTVcampaignnewsrelease\\_sept19.pdf](http://media.corporate-ir.net/media_files/irol/68/68854/pressreleases/ReebokiTVcampaignnewsrelease_sept19.pdf).

<sup>37</sup> See Paul J. Gogh, *New Ballgame for YES, DIRECTV*, Reuters, July 26, 2006, available at [http://us.rd.yahoo.com/dailynews/rss/entertainment/\\*http://news.yahoo.com/s/nm/20060726/tv\\_nm/directv\\_dc](http://us.rd.yahoo.com/dailynews/rss/entertainment/*http://news.yahoo.com/s/nm/20060726/tv_nm/directv_dc).

<sup>38</sup> See Press Release, DIRECTV, Inc., *DIRECTV, IGN Entertainment and Key Partners Join Forces to Create New Video Gaming Professional Sports League* (May 8, 2006), available at <http://phx.corporate-ir.net/phoenix.zhtml?c=127160&p=irol-newsArticle&ID=853359&highlight=>.

<sup>39</sup> See Press Release, EchoStar Communications Corp., *DISH Network Expands Interactive TV Offerings; With DishGAMES Customers Have Access to over 16 Popular Video Games* (June 9, 2006), available at <http://phx.corporate-ir.net/phoenix.zhtml?c=68854&p=irol-newsArticle&ID=871064&highlight=>.

<sup>40</sup> DIRECTV and EchoStar have introduced "family tiers" offering approximately 30-40 family-friendly channels. See *Indecency Legislation Likely But Not Soon*, TVTechnology NewsBytes, Jan. 20, 2006, available at <http://www.tvtechnology.com/dailynews/issue.php?w=2006-01-20>.

- DIRECTV delivers standard-definition digital local programming in 142 local markets, representing 94% of U.S. television households;<sup>41</sup>
- EchoStar enhanced its local programming services by teaming up with The Weather Channel to provide customers with targeted weather information determined by ZIP code;<sup>42</sup>
- DIRECTV has *exclusive* rights in BabyFirstTV, a linear channel featuring 80% original content customized for infants and toddlers under 3 years old;<sup>43</sup> and
- both DBS providers continue to strengthen and expand their international programming offerings.<sup>44</sup>

DBS operators are also exploring new technologies and novel methods of delivering their programming:

- DIRECTV is now offering TOTAL CHOICE Mobile, a 185-channel package, delivered to mobile customers on their car video screens.<sup>45</sup>
- DIRECTV is also producing “behind-the-scenes podcasts” from its CD USA original concert series, and making the podcasts available via DIRECTV’s video lounge

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<sup>41</sup> See Press Release, DIRECTV, Inc., *DIRECTV Delivers Live Local Channels to Motorists on the Open Road for the First Time* (Aug. 23, 2006), available at <http://phx.corporate-ir.net/phoenix.zhtml?c=127160&p=irol-newsArticle&ID=898472&highlight=>.

<sup>42</sup> See *DISH, TWC To Provide Local Weather*, Multichannel News, Nov. 8, 2006, available at <http://www.multichannel.com/article/CA6389697.html>.

<sup>43</sup> See Press Release, DIRECTV, Inc., *DIRECTV and BabyFirstTV Transform Traditional Television with the Launch of First-of-its-Kind Channel Dedicated to Babies and Toddlers* (May 11, 2006), available at <http://phx.corporate-ir.net/phoenix.zhtml?c=127160&p=irol-newsArticle&ID=855513&highlight=>.

<sup>44</sup> See, e.g., Press Release, DIRECTV, Inc., *DIRECTV Expands International Programming Platform To Include Korean-Language Package* (Apr. 11, 2006), available at <http://phx.corporate-ir.net/phoenix.zhtml?c=127160&p=irol-newsArticle&ID=841709&highlight=>; Press Release, EchoStar Satellite LLC, *EchoStar Acquires Distribution Rights for England vs. Sri Lanka and England vs. Pakistan Cricket Tours* (May 4, 2006), available at <http://phx.corporate-ir.net/phoenix.zhtml?c=68854&p=irol-newsArticle&ID=853120&highlight=>; Press Release, DIRECTV, Inc., *New Mandarin Programming Package from DIRECTV Features Leading Chinese News and Entertainment Channel* (Aug. 18, 2006), available at [http://phx.corporate-ir.net/phoenix.zhtml?c=127160&p=irol-newsArticle\\_print&ID=897218&highlight=](http://phx.corporate-ir.net/phoenix.zhtml?c=127160&p=irol-newsArticle_print&ID=897218&highlight=); *DIRECTV Launches Arabic Package*, Multichannel News, Oct. 23, 2006, available at <http://www.multichannel.com/article/CA6384013.html>.

<sup>45</sup> See DIRECTV, Inc., *supra* note 41.

(DIRECTV.feedroom.com), Apple Computer's iTunes Music Store, the CD USA site, and IGN.com.<sup>46</sup>

DBS providers are also offering bundles of services,<sup>47</sup> most notably, by partnering with telcos to offer the "triple play" of video, voice, and data. This strategy has proven extremely successful with larger telcos -- in the first quarter of 2006 alone, "the four big telcos delivered 247,000 customer additions to DIRECTV and EchoStar's DISH Network"<sup>48</sup> -- as well as smaller, rural telcos.<sup>49</sup>

**AT&T/EchoStar.** AT&T partnered with EchoStar to offer video service in areas where it has yet to deploy cable service. The partnership gives both companies a "triple play."<sup>50</sup> As of October 2006, 583,000 AT&T subscribers are purchasing their video service through the AT&T/EchoStar partnership.<sup>51</sup> Despite its investment in network upgrades to provide cable service, AT&T's CEO Ed Whitacre affirmed in May that AT&T's relationship with EchoStar was "part of [AT&T's] strategy" and that he does not "see that changing."<sup>52</sup> In July, AT&T and EchoStar announced the launch of "Homezone," which allows DBS subscribers to access on-demand content, a feature missing from regular

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<sup>46</sup> *DIRECTV Gets into Podcasting*, Multichannel News, Sept. 15, 2006, available at <http://www.multichannel.com/article/CA6372694.html>.

<sup>47</sup> DBS companies "which for years have taken subscribers away from cable by offering often better channel choices, are trying to find a way around the limits of satellite technology that restrict their ability to offer internet and telephone services." See Taylor & Van Duyn, *supra* note 7, at 13. But see Joyzelle Davis, *Cable Packages Lure New Subscribers from Satellite TV*, Rocky Mtn. News, June 2, 2006 (quoting EchoStar's Chief Executive, Charlie Ergen, as saying that EchoStar is looking into Internet service, but "it's certainly not a life-or-death situation to have broadband by any means"), available at [http://insidedenver.com/drmn/tech/article/0,2777,DRMN\\_23910\\_4744356,00.html](http://insidedenver.com/drmn/tech/article/0,2777,DRMN_23910_4744356,00.html).

<sup>48</sup> *Telcos Net 247K for DBS in 1Q*, SKYREPORT, June 5, 2006, available at <http://www.mail-archive.com/skyreport-text@mediabizcorp.com/msg00478.html>.

<sup>49</sup> See, e.g., NRTC, *DIRECTV*, at <http://www.nrtc.coop/sub/videoservices/directv.jsp> (last visited Nov. 9, 2006).

<sup>50</sup> Joyzelle Davis, *EchoStar, AT&T Team Up for Homezone Service*, Rocky Mtn. News, Oct. 6, 2006, available at [http://www.rockymountainnews.com/drmn/tech/article/0,2777,DRMN\\_23910\\_5046219,00.html](http://www.rockymountainnews.com/drmn/tech/article/0,2777,DRMN_23910_5046219,00.html).

<sup>51</sup> See AT&T Inc., *AT&T Third Quarter Investor Briefing*, Oct. 23, 2006, at 16, available at [http://att.sbc.com/Investor/Financial/Earning\\_Info/docs/3Q\\_06\\_IB\\_FINAL.pdf](http://att.sbc.com/Investor/Financial/Earning_Info/docs/3Q_06_IB_FINAL.pdf).

<sup>52</sup> *AT&T CEO: We're Sticking with DISH*, SKYREPORT, June 1, 2006, available at <http://www.mail-archive.com/skyreport-text@mediabizcorp.com/msg00476.html>.

DBS offerings.<sup>53</sup> AT&T expects that the combined efforts of its cable service and Homezone will allow it to reach nearly 80% of the consumers served by AT&T's local telephone facilities.<sup>54</sup>

**BellSouth/DIRECTV.** BellSouth's partnership with DIRECTV has been highly successful for both companies. This February, BellSouth and DIRECTV agreed to extend their relationship for five years, noting that, "[s]ince 2004, more than 523,000 BellSouth customers have tapped DIRECTV for video."<sup>55</sup> That number continues to increase: during the third quarter of 2006, BellSouth reported that "[n]early 65,000 customers added DIRECTV service to their bundle, resulting in a total of 756,000 [BellSouth] customers who included DIRECTV service in their BellSouth Answers bundles."<sup>56</sup> In September, BellSouth and DIRECTV announced that they are extending the relationship to packages specifically designed for consumers who live in multi-dwelling units.<sup>57</sup>

**Verizon/DIRECTV.** Verizon partnered with DIRECTV to provide a video offering in those portions of its service area it has yet to reach (or has no plans to reach) with its cable service. Verizon reported that, in the third quarter of 2006, it added 64,000 customers with a bundle that included DIRECTV video service, for a total of 496,000 customers as of September 30, 2006.<sup>58</sup> Verizon, like BellSouth, has announced that it is extending this partnership to develop services specifically to cover the multi-dwelling unit market.<sup>59</sup>

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<sup>53</sup> See Davis, *supra* note 50.

<sup>54</sup> See *Applications for Consent to the Transfer of Control of BellSouth Corp. to AT&T Inc.*, Public Interest Statement, WC Dkt. No. 06-74, at 22 n.67 (Mar. 31, 2006) ("AT&T/BellSouth Application"); Sanford Nowlin, *AT&T Expanding Homezone Service Across 13 States*, San Antonio Express-News, Nov. 1, 2006, (announcing that Homezone will now be available across most of AT&T's 13-state territory and noting that AT&T has been offering the service in San Antonio, San Diego, and parts of Ohio since July), available at <http://www.mysanantonio.com/business/stories/MYSA110206.06E.Homezone.2724e43.html>.

<sup>55</sup> *BellSouth, DIRECTV Extend Video Distribution Deal*, Communications Daily, Feb. 15, 2006, at 10.

<sup>56</sup> Press Release, BellSouth Corp., *BellSouth Reports Third Quarter Earnings* (Oct. 24, 2006), available at [http://media.corporate-ir.net/media\\_files/irol/95/95539/3q06\\_press.pdf](http://media.corporate-ir.net/media_files/irol/95/95539/3q06_press.pdf).

<sup>57</sup> See Linda Moss, *BellSouth Inks DIRECTV MDU Pacts*, Multichannel News, Sept. 19, 2006, available at <http://www.multichannel.com/article/CA6373484.html>.

<sup>58</sup> See Todd Spangler, *FiOS TV Subs Double in 3Q*, Multichannel News, Oct. 30, 2006 (noting that Verizon added 170,000 DIRECTV subscribers during the first nine months of 2006), available at <http://www.multichannel.com/article/CA6386511.html>

<sup>59</sup> See Ed Gubbins, *Verizon Uses DIRECTV for MDUs*, Telephony, Sept. 15, 2006, available at [http://telephonyonline.com/broadband/marketing/Verizon\\_DB\\_S\\_MDUs\\_091506/](http://telephonyonline.com/broadband/marketing/Verizon_DB_S_MDUs_091506/); *Verizon, DIRECTV Bundle Up*, Multichannel News, Sept. 14, 2006, available at <http://www.multichannel.com/article/CA6372239.html>. In

(footnote continued...)

**Qwest/DIRECTV.** Qwest partnered with DIRECTV to bundle DIRECTV's video service with Qwest's phone and broadband offerings. Qwest reported that it had 311,000 DIRECTV customers as of the end of the third quarter of 2006,<sup>60</sup> "with customers growing more than 45 percent from the second quarter [213,000] and more than three times from a year ago."<sup>61</sup>

In addition to these partnerships, DBS providers are experimenting with other methods of providing bundled services. Last summer, satellite Internet provider WildBlue announced five-year wholesale distribution agreements with DIRECTV and EchoStar that will allow both companies to distribute satellite-based Internet solutions under their brand names.<sup>62</sup> DIRECTV partnered with EarthLink to resell Internet service to its customers on EarthLink's municipal Wi-

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(...footnote continued)

in addition, Verizon and DIRECTV have partnered on a triple-play bundle that Verizon is offering to its wholesale customers. Under this partnership, providers who use Verizon's "Wholesale Advantage" service can also receive DIRECTV's DBS service and market all three as a triple play bundle. See Linda Moss, *Wholesale Triple Play from Verizon, DIRECTV*, Multichannel News, June 7, 2006, available at <http://www.multichannel.com/article/CA6341855.html>.

<sup>60</sup> See Press Release, Qwest Communications Int'l Inc., *Qwest Reports Strong Third Quarter Results* (Oct. 31, 2006) (noting that Qwest and DIRECTV launched the 'Qwest Football Bundle,' including Qwest high-speed Internet service, digital voice, and DIRECTV programming, including its college football and exclusive professional football package subscriptions, "just in time for the football season"), available at [http://www.qwest.com/about/media/pressroom/1,1281,1996\\_archive.00.html](http://www.qwest.com/about/media/pressroom/1,1281,1996_archive.00.html).

<sup>61</sup> *Id.* Qwest recently announced that its video programming and high-speed Internet service is available "at 110 Best Buy stores throughout Qwest's 14-state local service area." Press Release, Qwest Communications Int'l Inc., *Qwest High-Speed Internet and Digital TV Service Now Available at Best Buy Stores in Qwest Service Areas* (Nov. 2, 2006), available at [http://www.qwest.com/about/media/pressroom/1,1281,1998\\_archive.00.html](http://www.qwest.com/about/media/pressroom/1,1281,1998_archive.00.html).

<sup>62</sup> See Press Release, WildBlue Communications, Inc., *WildBlue Signs Wholesale Distribution Agreements with DIRECTV and EchoStar* (June 9, 2006), available at <http://www.wildblue.com/company/doPressReleaseDetailsAction.do?pressReleaseID=31>. This fall, EchoStar officially launched the service. See *DISH Officially Launches WildBlue Sales Effort*, SKYREPORT, Oct. 20, 2006 (reporting that the service starts at \$49.95 per month and includes "multiple email addresses, web hosting space, and 24/7 DISH Network technical support"), available at <http://www.skyreport.com/view.cfm?ReleaseID=47>. According to an EchoStar executive, DISH subscribers will now have "access to affordable broadband Internet via satellite with speeds comparable to DSL or cable modem." *Id.* (quoting Jim DeFranco, executive vice president at EchoStar). With the launch of its new satellite, WildBlue-1, scheduled for early December 2006, WildBlue will be able to triple its customer capacity in the United States. See *WildBlue-1 Completes Pre-Launch*, SKYREPORT, Nov. 17, 2006, available at <http://www.skyreport.com/view.cfm?ReleaseID=67>.

Fi networks.<sup>63</sup> In addition, EchoStar announced that it will add technology made by GetConnected that allows retailers to identify the best DSL option available to individual DISH subscribers and to offer a combination of video and data services.<sup>64</sup>

**B. LECs Continue To Rapidly Build Networks That Provide Video Services to Consumers, and the Impact on Competition Is Already Being Seen.**

For over a decade, the Commission and Congress have taken significant steps to make it easy for telephone companies to offer video services.<sup>65</sup> Yet, until recently, the telcos have chosen to forego this opportunity, and they have even abandoned previous video businesses for their own business reasons. But now -- driven by growing competition in their core phone business -- they are at last entering the video business on a vastly broader scale. They are doing so both through strategic partnerships with DBS providers,<sup>66</sup> and -- increasingly -- direct provision of cable services over their own facilities.

In fact, the prospect of significant and meaningful telco entry into the video marketplace all over the country is greater than ever.<sup>67</sup> Telcos of all shapes and sizes have invested and continue to invest significant amounts of time, energy, and resources to develop new cable

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<sup>63</sup> See Press Release, EarthLink, Inc., *EarthLink Launches the City of Anaheim Municipal Wireless Network*, (June 29, 2006), available at [http://www.earthlink.net/about/press/pr\\_muni\\_anaheim\\_launch/](http://www.earthlink.net/about/press/pr_muni_anaheim_launch/).

<sup>64</sup> See Linda Moss, *Dish: GetConnected with DSL*, Multichannel News, Sept. 21, 2006, available at <http://www.multichannel.com/article/CA6374283.html>.

<sup>65</sup> The Commission's video-dialtone orders in the early 1990s, followed by Congress's decision in the 1996 Act to give LECs four different options for entry into the video marketplace, including as a cable operator or open video system ("OVS") provider, gave telcos opportunity after opportunity to enter the video marketplace.

<sup>66</sup> See *supra* notes 50-61 and accompanying text.

<sup>67</sup> Some reports have indicated that the phone companies have almost doubled their total number of video subscribers in the past year, from 1.2 million to 2 million, via the expansion of existing cable operations and their partnerships with DBS providers. See Andy Vuong, *The Tortoise and the Payer*, *Denv. Post*, Sept. 24, 2006, available at [http://www.denverpost.com/ci\\_4388369?source=rss](http://www.denverpost.com/ci_4388369?source=rss).

operations or expand existing ones. Their rapid progress in entering the video marketplace, despite their frequent representations to the contrary in Commission proceedings, is compelling evidence that neither the regulatory environment nor the video programming marketplace is an impediment.

**1. Telcos Large and Small Continue To Expand Their Cable Offerings and Provide Vigorous Competition.**

The past year has seen telcos large and small ramping up their efforts to enter the video marketplace. The most visible examples are AT&T and Verizon, which are following through on their announced plans to invest a combined \$27.5 billion to upgrade their networks to provide video and faster broadband service in order to better compete with existing cable operators.<sup>68</sup> The other Bell companies, Qwest and BellSouth, already have some cable operations and, at least in the case of Qwest, have made some effort to expand those operations. And smaller, rural telcos have made significant strides in their deployments of video service. These efforts have led some analysts to predict that telcos will have about 10 million total video subscribers by 2015.<sup>69</sup>

Of the four largest telcos, Verizon has made the greatest progress in the past year to enter the video marketplace. In the *12<sup>th</sup> Annual Report*, the Commission reported that Verizon was offering its FiOS service to consumers in just over a dozen towns.<sup>70</sup> Today, Verizon has video franchises covering over 200 franchise areas that encompass over 3.6 million households, and it is offering its video service to over 1.2 million households (expected to grow to 1.8 million by

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<sup>68</sup> Verizon is reportedly investing \$22.9 billion in its fiber-to-the-premises project dubbed FiOS, while AT&T is reportedly planning on investing \$4.6 billion on its fiber-to-the-node project dubbed Project Lightspeed. *See Verizon's Fiber Plan Comes with \$22.9b Price Tag*, Boston Globe, Sept. 28, 2006.

<sup>69</sup> *A Decade of Change*, CableFAX Databriefs, Oct. 2, 2006.

<sup>70</sup> *12th Annual Report* ¶ 124.

year end) in approximately 100 communities in Texas, California, Florida, Virginia, Maryland, Massachusetts, and New York.<sup>71</sup> In fact, within the past month alone, Verizon has announced new franchises in 31 communities, including franchises for Montgomery County and Prince George's County in Maryland.<sup>72</sup>

As of September 30, 2006, Verizon served almost 120,000 video customers (10% of the homes where its video service is available).<sup>73</sup> Verizon estimates that about two-thirds of its cable subscribers have switched from other cable services.<sup>74</sup> As Verizon has repeatedly stated,

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<sup>71</sup> See Press Release, Verizon Communications Inc., *Tarrytown, N.Y., Consumers One Step Closer to Real Choice for Cable TV* (Nov. 16, 2006) (“*Tarrytown News Release*”), available at <http://newscenter.verizon.com/press-releases/verizon/2006/tarrytown-ny-consumers.html>. Verizon expects to add New Jersey to that list in short order. See Press Release, Verizon Communications Inc., *Verizon To File First Application Under New Jersey's Pro-Consumer Video Franchise Law* (Nov. 2, 2006) (reporting that Verizon expects to start offering video service to certain areas in New Jersey in December 2006), available at <http://newscenter.verizon.com/press-releases/verizon/2006/verizon-to-file-first.html>.

<sup>72</sup> See Press Release, Verizon Communications Inc., *Verizon Receives Franchise Approval To Offer FiOS TV in Montgomery County, Maryland* (Nov. 28, 2006) (“Verizon plans to begin offering FiOS TV by the end of December to more than 75,000 households in parts of the county where it has upgraded to an all-fiber network.”), available at <http://newscenter.verizon.com/press-releases/verizon/2006/verizon-receives-franchise.html>; Press Release, Verizon Communications Inc., *Prince George's County, Maryland, Awards Verizon Franchise for FiOS TV* (Nov. 28, 2006) (noting that Verizon now has video franchises that cover more than 888,000 Maryland households), available at <http://newscenter.verizon.com/press-releases/verizon/2006/prince-georges-county.html>; see generally Verizon Communications Corp., *News Archive*, at <http://newscenter.verizon.com/press-releases/>.

<sup>73</sup> See Press Release, Verizon Communications Inc., *Verizon Communications Posts Strong Third-Quarter Results as Organic Growth Initiatives Gain Momentum* (Oct. 30, 2006), available at <http://newscenter.verizon.com/press-releases/verizon/2006/verizon-communications-posts.html>. In some communities in Texas and Florida, Verizon offers its cable services as part of its “home run” bundle of integrated voice, data, video, and wireless services. Linda Haugsted, *Verizon Throws Four at Bright House*, Multichannel News, Oct. 17, 2006, available at <http://www.multichannel.com/article/CA6382061.html>. Verizon is also reportedly engaged in trials with Verizon Wireless on technology “that would allow customers to operate their personal video recorders remotely through their mobile phones.” *Verizon Details FTTP Cost Curves and ROI*, Telephony, Sept. 27, 2006, available at [http://telephonyonline.com/fttp/finance/verizon\\_fttp\\_roi\\_092706/](http://telephonyonline.com/fttp/finance/verizon_fttp_roi_092706/).

<sup>74</sup> See Press Release, Verizon Communications Inc., *Verizon Executive Tells Industry Council That Fiber-to-the-Home Network Provides Best Broadband and Video Services, and Greatest Promise for Innovation* (Oct. 4, 2006), available at <http://newscenter.verizon.com/press-releases/verizon/2006/verizon-executive-tells.html>. Further, Verizon reports that about 80% of its cable subscribers buy Verizon's “triple-play” bundle, and 60% of its cable subscribers also have a digital-video recorder, an HD set-top box, or both. See Steve Donohue, *FiOS Gains Steam for Verizon*, Multichannel News, Aug. 1, 2006, available at <http://www.multichannel.com/article/CA6358069.html>.

“Verizon’s FiOS TV is designed to be a formidable competitor to cable and satellite,”<sup>75</sup> and by the end of 2010, it expects to pass 18 million households with its video service, and have four million video subscribers.<sup>76</sup>

AT&T also is moving toward providing more competition in the video marketplace. Although reports indicate that AT&T is still working out technological issues and has limited its offering of video service to a trial of 30,000 homes in San Antonio -- it currently has approximately 3,000 subscribers -- it says that it expects to offer its cable service in fifteen - twenty markets by year-end 2006.<sup>77</sup>

As part of its acquisition of BellSouth, AT&T will inherit a modest, but fully-functional, cable operation, along with a significant infrastructure upgrade that will allow AT&T to deploy cable service throughout the BellSouth service area. BellSouth currently has over 40,000 cable customers,<sup>78</sup> and offers its service in Jacksonville, FL, Miami/Ft. Lauderdale FL, Atlanta, GA, and Vestavia Hills, AL.<sup>79</sup> In addition, BellSouth has been making significant investments in

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<sup>75</sup> See Press Release, Verizon Communications Inc., *Verizon Expands FiOS TV Service to More New York Consumers, Providing Choice and Greater Value* (Nov. 1, 2006), available at <http://newscenter.verizon.com/press-releases/verizon/2006/verizon-expands-fios-tv-10.html>.

<sup>76</sup> See Press Release, Verizon Communications Inc., *Verizon Provides New Financial and Operational Details on its Fiber Network as Deployment Gains Momentum*, Sept. 27, 2006, available at <http://investor.verizon.com/news/view.aspx?NewsID=773>; see also Tilde Herrera, *Verizon Expands FiOS TV Service*, Bradenton Herald, Oct. 4, 2006, at 1.

<sup>77</sup> See AT&T Inc., *supra* note 51, at 6. AT&T’s reported price for these services is not much different from other cable operators’ prices -- its U200 tier costs \$69 per month and includes about 100 channels and broadband; its U300 tier costs \$89 per month and includes about 150 channels and broadband. AT&T also has a premium tier in which it offers 175-plus channels, including HBO and Cinemax, plus broadband, for \$114 per month. See *U-verse Universe: AT&T Officially Launches Video in San Antonio*, CableFAX Daily, June 27, 2006, at 1.

<sup>78</sup> *AT&T/BellSouth Application*, *supra* note 54, at 23, n.69.

<sup>79</sup> See BellSouth Corp., *BellSouth Cable TV Service*, at <http://www.bims.bellsouth.net/index.htm> (last visited Nov. 13, 2006).

upgrading its network infrastructure, and according to AT&T, the network infrastructure upgrades that BellSouth has already made will allow the combined company to expand its cable offerings in the BellSouth service area.<sup>80</sup>

For its part, Qwest also has cable operations in select cities, and continues to take steps to expand those operations. Qwest offers customers in Phoenix and Denver its “Choice TV” package that includes over 230 channels, and other tiers of service that include 40 additional Spanish-language and high-definition channels.<sup>81</sup> In an op-ed column in the Rocky Mountain News, Qwest president for Colorado Chuck Ward stated plainly, “Qwest is working to obtain video franchises in a number of communities to deliver competitive TV services.”<sup>82</sup>

The Bells are not the only telcos making inroads to the video marketplace. Small, rural telcos are also upgrading their infrastructure to deliver broadband and video services to their customers. A recent report by the National Exchange Carriers Association found that “customer expectations for ‘triple play’ multimedia services . . . are driving the need for much higher delivery speeds in the ‘last mile.’”<sup>83</sup> The National Telecommunications Cooperative Association

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<sup>80</sup> See *AT&T/BellSouth Application*, *supra* note 54, at 22. As Comcast noted last year, BellSouth has expanded and upgraded its existing network infrastructure. See Comments of Comcast Corp., filed in MB Dkt. 05-255, at 21 (filed Sept. 19, 2005).

<sup>81</sup> See generally Qwest Communications, Inc., *Residential: Video/TV*, at <http://www.qwest.com/residential/products/tv/> (last visited Nov. 2, 2006).

<sup>82</sup> Chuck Ward, *Everyone Wins: Qwest Says Competition Will Bring Prices Down*, Rocky Mtn. News, Oct. 7, 2006, available at [http://www.rockymountainnews.com/drmn/other\\_business/article/0,2777,DRMN\\_23916\\_5049692,00.html](http://www.rockymountainnews.com/drmn/other_business/article/0,2777,DRMN_23916_5049692,00.html). Qwest has contacted several franchise authorities in Colorado about seeking cable franchises, though it has yet to follow through. See Joyzelle Davis & Jeff Smith, *Qwest Eyes State Pay-TV Law*, Rocky Mtn. News, Oct. 3, 2006, available at [http://www.rockymountainnews.com/drmn/tech/article/0,2777,DRMN\\_23910\\_5038185,00.html](http://www.rockymountainnews.com/drmn/tech/article/0,2777,DRMN_23910_5038185,00.html).

<sup>83</sup> Nat’l Exchange Carrier Ass’n, *The Packet Train Needs to Stop at Every Door*, Executive Summary, June 2006, at 1, available at [http://www.neca.org/media/Executive\\_Summary\\_061406.pdf](http://www.neca.org/media/Executive_Summary_061406.pdf).

(“NTCA”) reports that 59% of its members already have a video offering this year, while last year only 42% offered some form of video service.<sup>84</sup> An additional 9% of NTCA’s members expect to have a video offering by the end of 2006, and another 16% of its members expect to have a video offering by year-end 2008.<sup>85</sup>

**2. The Telcos’ Success in Deploying Video Offerings Is Strong Evidence That There Are No Significant Regulatory Impediments to Competition.**

The Commission asks whether there are any regulatory impediments that are slowing the entry of competitive cable providers. Specifically, the Commission asks whether competitors’ entry into the video marketplace has been impeded by the franchising process or a lack of access to programming. The honest answer to both questions, no matter what the telcos may say in Washington, is “no.”

**a. The Franchising Process Has Not Impeded Telco Entry into the Video Marketplace.**

On the franchising front, for over a decade, telco competitors have successfully obtained franchises to offer video services whenever they seriously pursued them. More recently, Verizon has been the most active large telco pursuing franchises, and has made it very clear that the franchising process has not impeded its deployment of video services. As Verizon Telecom President Virginia Ruesterholz said in no uncertain terms, franchising “isn’t holding us back in

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<sup>84</sup> See National Telecommunications Cooperative Association, *NTCA 2006 Broadband/Internet Availability Survey Report*, August 2006, at 4, available at [http://www.ntca.org/ka/ka-3.cfm?content\\_item\\_id=4500&folder\\_id=534](http://www.ntca.org/ka/ka-3.cfm?content_item_id=4500&folder_id=534) (“NTCA Report”).

<sup>85</sup> See *id.* at 12.

our deployment of video.”<sup>86</sup> According to Ruesterholz, Verizon “has been able to match the pace of franchise agreements to the buildout of” its cable service.<sup>87</sup> As Verizon’s Chairman and CEO, Ivan Seidenberg, said last year, “We haven’t been turned down anywhere we’ve gone.”<sup>88</sup>

Of course, the facts speak for themselves: as of November 16, 2006, Verizon had acquired over 200 franchises in nine states covering over 3.6 million households, and that number continues to increase almost on a weekly basis.<sup>89</sup> Verizon’s experience in “match[ing] its pace of franchise agreements to the buildout of” its cable service shows that the only impediments to entering the video marketplace have been those of capital, technology, manpower, and business priorities, not the franchising process. Moreover, the fact that Verizon has been able to reach franchise agreements “anywhere [it has] gone” evidences that local franchise authorities have acted reasonably, and in a timely manner, in approving franchise agreements. In fact, Verizon’s success completely undermines the rationales underlying the telcos’ continued pleas for regulatory favoritism from the Commission.<sup>90</sup>

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<sup>86</sup> Glen Dickson & John M. Higgins, *Verizon Details TV Progress*, Broad. & Cable, Sept. 27, 2006, available at <http://www.broadcastingcable.com/article/CA6375527.html>.

<sup>87</sup> *Id.*

<sup>88</sup> Olga Kharif, *Verizon’s Muddy TV Picture*, Bus. Wk. Online, Sept. 28, 2005, available at [http://www.businessweek.com/print/technology/content/sep2005/tc20050928\\_4147.htm?chan=tc](http://www.businessweek.com/print/technology/content/sep2005/tc20050928_4147.htm?chan=tc).

<sup>89</sup> *Tarrytown News Release*, *supra* note 71.

<sup>90</sup> Despite Verizon’s success in obtaining local franchises, it has continued to push for state legislation to ease its way into the video business. Verizon, along with AT&T, has successfully convinced some states to adopt legislation to free telcos of many of the regulations that apply to existing cable operators. Texas, California, Indiana, Kansas, New Jersey, Virginia, North Carolina, and South Carolina have adopted legislation streamlining the existing franchising regimes. *See Passage of Ca. Video Bill Expands Franchising Revamps to 1/3 of U.S. Population*, State Tel. Reg. Rep., Sept. 8, 2006, at 3. In none of these states have the telcos exploited more than a small fraction of the opportunities that are available to them. This further evidences that the regulatory process, including franchising obligations, is no impediment to their entry into the video marketplace.

Because Verizon is the furthest along of all the large telcos in deploying its cable service, its record provides useful information in response to the Commission’s question of whether telcos are targeting “specific residential areas.”<sup>91</sup> A review of the communities that Verizon has chosen to serve first reveals that it is targeting predominantly affluent areas with “high value” customers.<sup>92</sup> Earlier this year, the New Jersey Division of the Ratepayer Advocate discovered that, of the 40 communities to which Verizon was deploying its FiOS network, four-fifths had household incomes higher than the statewide median, and fully half (20 communities) had household incomes at least 50% higher.<sup>93</sup>

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<sup>91</sup> Notice ¶ 49.

<sup>92</sup> See Jon Chesto, *SLOW CONNECTION: Verizon Steadily Expands its Cable TV Service With Town-by-Town Approach*, Quincy Patriot Ledger, Sept. 9, 2006 (“[Verizon spokesman Rick] Colon said Verizon is attracted to communities that already have a high broadband usage. Those communities often tend to be well-to-do suburbs.”), available at <http://ledger.southofboston.com/articles/2006/09/09/business/biz01.txt>. To date, Verizon has obtained franchises in all or parts of six of the top ten counties in the United States with the highest median household income, and has applied for franchises in the remaining four. Compare U.S. Census Bureau, Bruce H. Webster Jr. & Alemayehu Bishaw, *Income, Earnings, and Poverty Data From the 2005 American Community Survey*, August 2006, at 6, available at <http://www.census.gov/prod/2006pubs/acs-02.pdf>, with Press Release, Verizon Communications Inc., *Consumer Choice for Cable Service Leaps Forward in Washington Metropolitan Area* (June 20, 2006) (Loudon County, VA); Press Release, Verizon Communications Inc., *130,000 Prince William County Households One Step Closer to Real Choice for Cable TV* (May 17, 2006) (Fairfax County, VA; Howard County, MD; Prince William County, VA); Verizon Communications Inc., *supra* note 72 (Montgomery County, MD); Press Release, Verizon Communications Inc., *Eastchester, N.Y., Consumers One Step Closer to Real Choice for Cable TV* (Nov. 28, 2006) (Rockland County, NY). These Verizon press releases are available at <http://newscenter.verizon.com/press-releases/>. AT&T, because it has not deployed its service in any meaningful fashion, has yet to show whether it will, as it assured the financial community, serve large numbers of “high value” and “medium-value” customers, while bypassing all but a few “low-value” customers. See *Project Lightspeed*, SBC Communications Conference Call, at 14 (Nov. 11, 2004); see also Leslie Cauley, *Cable, Phone Companies Duke It Out For Customers*, USA Today (May 22, 2005) (“During a slide show for analysts, SBC said it planned to focus almost exclusively on affluent neighborhoods. SBC broke out its deployment plans by customer spending levels: It boasted that Lightspeed would be available to 90% of its ‘high-value’ customers -- those who spend \$160 to \$200 a month on telecom and entertainment services -- and 70% of its ‘medium-value’ customers, who spend \$110 to \$160 a month. SBC noted that less than 5% of Lightspeed’s deployment would be in ‘low-value’ neighborhoods -- places where people spend less than \$110 a month. SBC’s message: It would focus on high-income neighborhoods, at least initially, to turn a profit faster.”).

<sup>93</sup> See Comments of the New Jersey Division of the Ratepayer Advocate, filed in WC Dkt. No. 05-337, at Table 2 (Mar. 27, 2006).

For its part, AT&T has thus far limited deployment of its cable service to a test market in San Antonio, TX. However, it is currently building a cable system in Houston,<sup>94</sup> and reportedly plans to deploy its service to 15 to 20 communities before year end 2006.<sup>95</sup> AT&T's slow start cannot possibly be blamed on the franchise process.<sup>96</sup> There is simply no evidence that AT&T has even tried to negotiate franchises with local franchise authorities beyond its test market or that, when it is ready to deploy its services in new markets, it will not be able to do so in a reasonable and timely manner, as Verizon has successfully done. In fact, in a number of states, AT&T will have an even easier franchising process because it will be able to take advantage of the statewide franchising legislation that exempts it from the same burdens cable operators faced when entering the video marketplace. In Indiana, AT&T has already received a statewide franchise to deploy its service.<sup>97</sup> AT&T expects that by year-end 2008, its cable service will be available to approximately 19 million households.<sup>98</sup>

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<sup>94</sup> See Press Release, AT&T Inc., *AT&T To Build Fiber-To-The-Premises Network To Deliver U-verse Services to 20,000-Home Community in Houston Area* (June 21, 2006), available at <http://att.sbc.com/gen/press-room?pid=5097&cdvn=news&newsarticleid=22348>.

<sup>95</sup> See Carol Wilson, *AT&T Inks First Cable Content Deal*, *Telephony*, Sept. 14, 2006, available at [http://telephonyonline.com/broadband/marketing/att\\_comcast\\_ipvtv\\_091406/](http://telephonyonline.com/broadband/marketing/att_comcast_ipvtv_091406/).

<sup>96</sup> AT&T's delays in deploying its video services more widely than its test markets are reportedly due to continued technical difficulties it is working to overcome. See Scott Moritz, *AT&T's Jumpy TV Picture*, *TheStreet.com*, Sept. 15, 2006 at <http://www.thestreet.com/newsanalysis/techstockupdate/10309139.html> (noting that "one person familiar with [AT&T's video] effort says not all the pieces will be fully in place when the service debuts").

<sup>97</sup> See Mike Smith, *AT&T Could Offer TV Services*, *Ft. Wayne News-Sentinel*, Aug. 9, 2006, available at <http://www.fortwayne.com/mld/newssentinel/15233532.htm>. AT&T also filed for a statewide franchise in Texas, but limited its prospective service area to 21 communities. See Linda Haugsted, *SBC's Turn for Texas Franchise*, *Multichannel News*, Oct. 11, 2005, available at <http://www.multichannel.com/article/CA6268930.html>. The Texas law makes obtaining franchises a simple and expeditious matter, but for the most part AT&T has chosen not to even ask for them.

<sup>98</sup> See Sanford Nowlin, *AT&T's Video Service Gets Mixed Reviews*, *San Antonio Express-News*, Oct. 10, 2006, at E1. Most of these households will be served using AT&T's fiber-to-the-node network architecture.

(footnote continued...)

Like AT&T, Qwest and BellSouth have not actively sought franchises, despite their rhetoric. In the *Franchising Proceeding*, BellSouth provided 10-year-old examples of problems in areas where it actually *obtained favorable franchises*, and no recent examples of problems.<sup>99</sup> And, although Qwest contacted several municipalities in Colorado to inform them of its intention to offer cable service in their communities,<sup>100</sup> it has yet to seek franchises. Thus, there is no credible evidence that it is the franchise process will unreasonably impede BellSouth's and Qwest's expansion of their cable services.

Small, rural carriers also seem to be obtaining the franchises they seek when they ask for them. One interesting example is Arkwest Communications, a small, family-owned telephone company in rural Arkansas that chose to offer video to its customers using IPTV, the same technology that AT&T is using for its cable service. Arkwest worked with the local franchise authority and secured a cable franchise,<sup>101</sup> and it now offers video service in its service area.<sup>102</sup> The numbers provided by the recently published NTCA survey -- 59% of its members offering

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(...footnote continued)

However, AT&T is using a fiber-to-the-home architecture for the "occasional upscale development deployment." Karl Bode, *AT&T Sticks to Its Copper Guns*, BroadbandReports.com, Oct. 17, 2006, at <http://www.dslreports.com/shownews/78881>; see also, Press Release, AT&T Inc., *AT&T Deploys Next-Generation Fiber-To-The-Premises Network in Northern Nevada at Kiley Ranch* (Feb. 13, 2006), available at <http://att.sbc.com/gen/press-room?pid=4800&cdvn=news&newsarticleid=22091>.

<sup>99</sup> Reply Comments of Comcast Corp, filed in MB Dkt. No. 05-311, at 8 (Mar. 28, 2006).

<sup>100</sup> Davis & Smith, *supra* note 82.

<sup>101</sup> See Wesley Brown, *Small Rural Telecom to Launch Internet TV Ahead of Phone Giant AT&T*, Arkansas News Bureau, June 7, 2006, available at <http://www.arkansasnews.com/archive/2006/06/07/News/336521.html>.

<sup>102</sup> See Arkwest Communications, arkwest tv, at <http://www.arkwest.com/arktv/tv.html> (last visited Nov. 13, 2006).

video, 94% of those under a cable franchise -- strongly suggests that Arkwest is not alone in its ability to secure a cable franchise, despite its small size.<sup>103</sup>

**b. Telcos Have No Apparent Difficulties in Securing Carriage Agreements for Video Programming.**

Telcos have been able to obtain the programming they need to compete in the video marketplace. For example, Verizon has secured programming agreements from many different programming networks, including CBS and the NFL Network.<sup>104</sup> Verizon also has successfully secured programming agreements with cable-affiliated networks such as those owned by Comcast, Time Warner, and Cablevision.<sup>105</sup> In its Washington, DC service area, Verizon offers over 140 channels on its “Premiere” tier of service, with over 130 “Premium” networks available in different packages, 24 HD channels, and a variety of international channels.<sup>106</sup> Verizon is also working on integrating interactive services, such as weather and traffic reports, with traditional linear programming services. These services will be designed to allow users to display weather

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<sup>103</sup> See *NTCA Report*, *supra* note 84.

<sup>104</sup> See Linda Moss, *CBS, Verizon Ink Retrans Pact*, Multichannel News, Mar. 20, 2006, available at <http://www.multichannel.com/article/CA6317249.html>; *Mass Media Notes*, Communications Daily, July 20, 2006, at 16; *Verizon Can Hear Football Fans Now*, Multichannel News, July 19, 2006, available at <http://www.multichannel.com/article/CA6354752.html>.

<sup>105</sup> See Press Release, Verizon Communications Inc., *Verizon and Rainbow Media Holdings Sign Programming Deal* (Nov. 16, 2006), available at <http://newscenter.verizon.com/press-releases/verizon/2006/verizon-and-rainbow-media.html>; Press Release, Verizon Communications Inc., *Verizon and New England Cable News Sign Agreement* (May 31, 2006), available at <http://newscenter.verizon.com/press-releases/verizon/2006/page.jsp?itemID=29670483>; *Verizon Signs First Video Deal with Time Warner*, Reuters, July 6, 2005. Verizon carries many Comcast-affiliated networks, including Comcast SportsNet Mid-Atlantic, Style, E! Entertainment Television, the Golf Channel, Versus, and others. See Verizon Communications Inc., *Verizon FiOS TV Washington, DC Metro Channel Lineup* (attached hereto as Exhibit 1).

<sup>106</sup> See Exhibit 1; see also Bob Wallace, *Verizon Adds International Content to FiOS IPTV Lineup*, xChange Online, Oct. 12, 2006, available at <http://www.x-changemag.com/hotnews/6ah12115024.html>.

and traffic icons without interrupting video programs.<sup>107</sup> Further, Verizon is also considering ways to expand these interactive services, such as by offering personalized news, sports scores, and even fantasy league results.<sup>108</sup> Verizon also just announced that it is partnering with YouTube to bring the web site's videos to Verizon wireless phones, and possibly to television sets as well.<sup>109</sup>

Like Verizon, AT&T and Qwest have successfully expanded their programming offerings to include a diverse variety of programming networks, including networks affiliated with cable operators, such as Time Warner and Comcast.<sup>110</sup> AT&T has signed an agreement allowing it "to deliver Comcast networks' linear and on-demand programming" as part of its cable service programming lineup.<sup>111</sup> According to AT&T, its basic cable tier offers over 190 channels, with its premium tiers offering more than 300 channels.<sup>112</sup> In addition, AT&T is

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<sup>107</sup> See Press Release, Verizon Communications Inc., *Verizon Launches FiOS TV Widgets* (June 1, 2006), available at <http://newscenter.verizon.com/press-releases/verizon/2006/page.jsp?itemID=29670429>.

<sup>108</sup> See *id.*; see also Press Release, Verizon Communications Inc., *Verizon Combines Its Home and Verizon Wireless Services in Single Plan, Offering Convenience, Simplicity* (Oct. 16, 2006), available at <http://newscenter.verizon.com/press-releases/verizon/2006/verizon-combines-its-home-and-1.html>.

<sup>109</sup> See Yuki Noguchi, *Hello, Cellphone? YouTube Calling, Verizon Deal Is Latest to Link Voice, Video Firms*, Wash. Post, Nov. 28, 2006, at D1 (noting that the YouTube deal is exclusive to Verizon Wireless for an unspecified length of time); Matt Richtel, *YouTube Coming Soon to Cellphones*, N.Y. Times, Nov. 28, 2006, at C3 (noting that Verizon Wireless subscribers will have access to an unspecified number of videos selected and approved by Verizon and YouTube); see also Amol Sharma & Kevin J. Delaney, *Verizon, YouTube Aim To Bring Web Videos to Cellphones, TV*, Wall St. J., Nov. 7, 2006, at A1 (noting that Verizon is "in advanced talks with YouTube Inc. to bring the popular Web site's videos to cellphones and television sets").

<sup>110</sup> See Todd Spangler, *AT&T Adds WB Flicks to U-verse VOD*, Multichannel News, Oct. 26, 2006, available at <http://www.multichannel.com/article/CA6385468.html>; Carol Wilson, *AT&T Inks First Cable Content Deal*, Telephony, Sept. 14, 2006, available at [http://telephonyonline.com/iptv/marketing/att\\_comcast\\_iptv\\_091406/](http://telephonyonline.com/iptv/marketing/att_comcast_iptv_091406/).

<sup>111</sup> Press Release, AT&T Inc., *AT&T U-verse TV to Include Comcast Networks' Content* (Sept. 14, 2006), available at <http://att.sbc.com/gen/press-room?pid=4800&cdvn=news&newsarticleid=22705>.

<sup>112</sup> See AT&T Inc., *U-verse -- Compare Offers*, at [http://www.sbc.com/Uverse/files/compare\\_offers.html](http://www.sbc.com/Uverse/files/compare_offers.html) (last visited Nov. 17, 2006).

currently testing HDTV in Houston and expects to launch HDTV in San Antonio before the end of the year.<sup>113</sup> Qwest announced in September that it was adding extra premium offerings, including HBO HD and other movie channels.<sup>114</sup> Presumably, if BellSouth was actively seeking to expand its cable offerings, it, too, would face few difficulties in obtaining the programming that its customers would want.

**C. Internet Video Is Commanding the Attention of Consumers and Increasing “Video Mania.”**

At the beginning of this year, the Commission noted that “[t]he amount of web-based video provided over the Internet continues to increase significantly each year.”<sup>115</sup> And, of course, the amount of video on the Internet and the amount of video viewed over the Internet has increased significantly since that statement was made. And this growth is certain to continue as more and more Americans obtain broadband access, and as more and more content providers use the Internet to make their video programming available to hundreds of millions of people all over the world.<sup>116</sup> Video consumption is no longer “linear.” With the Internet, consumers can

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<sup>113</sup> See Press Release, AT&T Inc., *AT&T Posts Strong Third-Quarter Earnings Growth* (Oct. 23, 2006) (announcing that AT&T “expects to launch HDTV in San Antonio in late November” and “expects to launch its U-verse services in approximately 15 markets . . . across its traditional 13-state wireline area by the end of 2006, all including HDTV”), available at <http://att.sbc.com/gen/press-room?pid=4800&cdvn=news&newsarticleid=22969>.

<sup>114</sup> See *Qwest Fine Tunes, Adds HD Programming to TV Service*, Telco Media News, Sept. 11, 2006, available at <http://www.telcomedianews.com/view.cfm?ReleaseID=14>.

<sup>115</sup> 12<sup>th</sup> Annual Report ¶ 135.

<sup>116</sup> See *Data: Consumers Downloading More Often*, Telco Media News, Oct. 12, 2006 (emphasizing the positive relationship between broadband access and Internet video viewing), available at <http://www.telcomedianews.com/view.cfm?ReleaseID=34#Story3>; Valerie Milano, *NATPE Giddy About Future of Multiplatform IPTV*, Communications Daily, Jan. 27, 2006, at 11 (“[T]hrough IP, we’re entering a new golden age of media, interactivity and consumer empowerment. . . . Four years ago, we envisioned the possibility of IP delivery and services such as IPVoD. The difference now is, this is a reality. And new platforms are driving the need for new content.”).

increasingly watch what they want, when they want it. And those who want to distribute their own content for viewing by others can now easily do so, using any one of a growing number of websites, and without any need to obtain a “distribution” agreement with anyone.

Today, nearly 70% of U.S. households subscribe to Internet service, and high-speed connections now constitute 60% of online subscriptions.<sup>117</sup> With these lightning-fast connections to the Internet, Americans are viewing a diverse array of video provided by traditional video content providers, major web portals, and new Internet entrants. In July 2006 alone, 107 million Americans, or three out of every five Internet users, viewed video online.<sup>118</sup> According to the *Wall Street Journal*, “video Web sites now draw users in numbers that rival those of cable and satellite companies.”<sup>119</sup>

Established media companies, including traditional broadcast and cable networks, have been racing to place their video content online.<sup>120</sup> Many networks have jumped head-first into

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<sup>117</sup> See Matthew Colella, *Everything’s Coming Up Broadband*, The Bridge, Oct. 20, 2006, at 4 (citing a study finding that cable and DSL providers “added about 10 million net new subscribers in the past year alone, making broadband one of the fastest adopted products or services of all time”).

<sup>118</sup> See *Study: 107 Million People Viewed Online Video in July*, USA Today, Sept. 28, 2006 (noting that “107 million people streamed or downloaded nearly 7.2 billion video clips -- an average of 67 apiece”), available at [http://www.usatoday.com/tech/news/2006-09-28-online-video-study\\_x.htm](http://www.usatoday.com/tech/news/2006-09-28-online-video-study_x.htm); see also Kimberly S. Johnson, *Web TV Network Makes New Waves*, Denv. Post, Nov. 2, 2006 (“Internet-based videos and television shows are soaring in popularity among viewers, investors, and advertisers.”), available at [http://www.denverpost.com/business/ci\\_4588024](http://www.denverpost.com/business/ci_4588024).

<sup>119</sup> Ellen Sheng, *As Internet TV Gains Popularity, Cable Firms Bulk Up Offerings*, Wall St. J., Sept. 27, 2006, at B4 (“YouTube, the country’s No. 1 online-video site, had more than 34 million unique visitors in August, according to Nielsen.Net Ratings. MySpace was second with 17.9 million unique visitors. In comparison, Comcast, the country’s largest cable company, has 24 million subscribers and DIRECTV, the largest satellite-TV provider[ ], has 15.5 million U.S. subscribers.”).

<sup>120</sup> See Daisy Whitney, *Google to Push MTV Networks Videos Across Web*, Television Wk., Aug. 7, 2006 (“The volume of video on the Web has exploded since last October, when ABC agreed to sell TV show episodes on Apple’s iTunes service. Television studios and networks are loading their Web sites with clips and making programs available for download, and Web companies are trying to lure more users with video features.”), at <http://www.tvweek.com/news.cms?newsId=10485>.

Internet video, providing consumers with an interactive alternative to traditional TV-set viewing.<sup>121</sup> For example:

- CSTV Networks, a division of CBS that airs college sports programming, provides more than 100 broadband channels to consumers, with each channel offering “a seamless Internet experience of more than 10,000 live events including audio, video and live data feeds of press conferences, news, features, archived games,” and ticketing and e-commerce.<sup>122</sup>
- Nickelodeon recently upgraded its broadband video platform, “TurboNick,” which allows users to create their own cartoons, create and trade playlists, and send videos through e-mail links.<sup>123</sup>
- Comedy Central is developing twenty series especially for broadband, with another 40 under consideration.<sup>124</sup>
- MTV’s broadband site, “Overdrive,” continues to garner significant attention, especially as the network continues to experiment with providing programming that complements the programs being aired on MTV’s linear channel.<sup>125</sup>
- TV Land recently launched the TV Land video player that features full-length episodes of choice hit shows, including *Star Trek*, as well as sneak peeks of originals.<sup>126</sup>

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<sup>121</sup> See Anne Becker, *TV’s New Greenhouse*, *Broad. & Cable*, Aug. 21, 2006, at 14; David Goetzl, *Cracking the Market*, *Broad. & Cable*, Sept. 18, 2006 (“[A]s people increasingly connect computers to TV screens, networks like TheSailingChannel.com, JumpTV and Heavy.com may eventually challenge linear channels.”), available at <http://www.broadcastingcable.com/article/CA6372778.html>. As stated by OMD Digital’s Jeff Minsky, “What’s going to drive the most excitement on the Web is the content you’re not going to see elsewhere. . . . It’s the peek behind the curtains. If I’m a fan of a particular show or artist, I want as much content as I can possibly get. On television, I was limited to what they were pushing out to me.” David Goetzl, *Go Where the Audience Is*, *Broad. & Cable*, Aug. 13, 2006, at 16.

<sup>122</sup> Colella, *supra* note 117, at 6 (quoting CSTV president Brian Bedol as noting that “CSTV has made it possible for every university to have its own broadband channel”).

<sup>123</sup> See *id.* at 7.

<sup>124</sup> See Becker, *supra* note 121, at 14.

<sup>125</sup> See Goetzl, *supra* note 121 (describing how, as MTV aired a show featuring Jessica Simpson live on its network station, MTV simultaneously provided a behind-the-scenes look at the program on its Overdrive broadband player). MTV’s David Sirulnick explained, “The idea is to give the viewer as much control and access to all things about the particular guest or show.” *Id.*

<sup>126</sup> See *Online*, *CableFAX Daily*, July 14, 2006, at 2.

- The Food Network is providing its second Internet series, “Dave Does,” after its first Internet offering, “Eat This,” logged one million page views in its first two weeks.<sup>127</sup>
- CMT launched “CMT Loaded,” an online portal offering more than 500 clips of performances, interviews, and original video. The CMT video library is projected to total 300 clips per month.<sup>128</sup>
- Discovery Communications added a Webcast feature to its online-news service that offers news clips about developments ranging from scientific discoveries to health information.<sup>129</sup>
- The Weather Channel is introducing a new broadband site, One Degree, that will feature videos dedicated to the subject of global warming.<sup>130</sup>

Television programming networks have begun to develop broadband video channels that feature original web content.<sup>131</sup> For example, NBC Universal built an entire digital studio dedicated to producing original web content; Bravo partnered with PlanetOut, Inc. to launch a new broadband video channel targeted to a gay audience, which joins Bravo’s triotv.com and brilliantbutcancelled.com broadband video channels that also feature exclusive web content; and MTV has launched a variety of exclusive Internet video programs through its broadband portals Overdrive, Uber, TurboNick, Vspot, and Loaded.<sup>132</sup>

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<sup>127</sup> See *In the States*, CableFAX Daily, June 6, 2006, at 2.

<sup>128</sup> See Karen Brown, *CMT Enters Broadband-Video Country*, Multichannel News, July 24, 2006 available at <http://www.multichannel.com/article/CA6355683.html>.

<sup>129</sup> See *Discovery Launches Video Webcast Service*, B&C/MCN Telco-IP Video Update, July 25, 2006.

<sup>130</sup> See Anne Becker, *Niche TV Goes Digital -- and Deeper*, Broad. & Cable, Oct. 9, 2006 available at <http://www.broadcastingcable.com/article/CA6378845.html>.

<sup>131</sup> “At a time when broadband penetration has never been higher and advertisers are demanding content on digital platforms, TV networks are rapidly launching broadband channels, and they are desperate for fresh voices to fill them.” Becker, *supra* note 121, at 14 (explaining that the increased affordability of video-editing software allows independent producers to post original content online).

<sup>132</sup> See *id.* (noting that the studio is staffed with “twentysomethings who churn out cheeky short-form programs” for online viewing); Lia Miller, *Bravo Goes More Broadband*, Feb. 6, 2006, N.Y. Times, available at <http://www.nytimes.com/2006/02/06/business/media/06bravo.html?ex=1296882000&en=952a41c7ebfcb160&ei=5090&partner=rssuserland&emc=rss>; Shirley Brady & Seth Arenstein, *Broadbanding Together*, CableFAX Daily, Apr. 21, 2006, at 4.

Moreover, new programming networks, including Voy TV, The Fix, and BlueHighwaysTV, have turned to Internet video to grow audiences.<sup>133</sup> With “shrinking gear costs and a growing audience,” new providers are continuing to unveil networks that provide content exclusively on the Internet.<sup>134</sup> As discussed in more detail below, Comcast has launched “virtual networks” like FearNet using the Internet and VOD.<sup>135</sup>

Major web portals also are jumping into the Internet video space. Google, Yahoo!, AOL, and others are increasingly cutting deals to provide both pre-existing and original content through their own Internet video distribution services. For example:

- Google launched Google Video, a service that allows users to search, view, and purchase video content, and allows users to share opinions about video clips.<sup>136</sup> In May 2006 alone, Google Video attracted almost 7 million users.<sup>137</sup>
- AOL’s video portal, which features an electronic programming guide, provides a range of free and paid video programming, including a broad library of television shows and movies from several major movie studios.<sup>138</sup> AOL Video “aims to be the

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<sup>133</sup> See Janet Stilson, *Voy TV Launches Online*, Mediaweek.com, Oct. 10, 2006 (reporting that Voy TV, a network actively seeking carriage from MVPDs, showcases video content online), available at [http://www.mediaweek.com/mw/news/recent\\_display.jsp?vnu\\_content\\_id=1003223996](http://www.mediaweek.com/mw/news/recent_display.jsp?vnu_content_id=1003223996); *New Technologies, Communications Daily*, Jan. 19, 2006, at 15 (noting that “The Fix” was the first online network to provide 100% original programming); Press Release, Network Creative Group LLC, *BlueHighwaysTV Now Available On Google Video* (Jan. 26, 2006), available at <http://www.bluehighwaystv.com/BH020206-1.HTML>.

<sup>134</sup> See *Let the Show Begin: A Bevy of Broadband Networks Set to Launch*, CableFAX Daily, Apr. 9, 2006, at 1 (listing networks including SoapNet, G4, Sportskool, and Mag Rack); John Eggerton, *Sundance Makes Web-Only Buy*, *Broad. & Cable*, Oct. 24, 2006, available at <http://www.broadcastingcable.com/article/CA6384385.html>; see also Josh Wein, *Network For \$1 Million*, *Communications Daily*, Sept. 27, 2006, at 9 (“For under \$1 million, you can have your own TV network.”).

<sup>135</sup> See *infra* text accompanying notes 255 - 256.

<sup>136</sup> See *Who Needs Cable? Industry Takes Back Seat in Vegas*, CableFAX Daily, Jan. 9, 2006, at 1 (describing the launch of Google Video); Whitney, *supra* note 120 (explaining that the partnership may give Google a lead over other Internet companies in the Internet video business); Daisy Whitney, *Google Video to Let Users Rate Clips*, *Television Wk.*, June 29, 2006, available at <http://www.tvweek.com/news.cms?newsId=10288>.

<sup>137</sup> See Whitney, *supra* note 120.

<sup>138</sup> See Carol Wilson, *Web-based Video Offers More Choice*, *Telephony*, Sept. 25, 2006, at 18 (listing programming including *Welcome Back Kotter* and *Chappelle’s Show*); Steve Donohue, *AOL Video to Launch Aug.*

(footnote continued...)

one-stop shop for online videos and will let users . . . buy or watch for free thousands of TV shows from any of 45 video-on-demand channels on nearly any device.”<sup>139</sup>

- Yahoo! continues to be one of the most popular providers of video on the Internet, attracting 16.6 million unique visitors in June 2006 alone.<sup>140</sup> The Yahoo portal includes local news clips from sixteen local CBS broadcast stations, national and international news from CBS, ABC, and CNN, and much more.<sup>141</sup>

Recognizing the profitability of providing video programming on the Internet, many new entrants have joined the Internet video distribution business over the past year. Through YouTube, which was officially launched in December 2005, “consumers view short videos *more than 70 million times a day*, ranging from clips of unicycling jugglers and aspiring musicians to vintage Bugs Bunny cartoons and World Cup soccer highlights recorded from TV.”<sup>142</sup> In addition to YouTube’s original content, some broadcast networks have struck deals to provide

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(...footnote continued)

4, Multichannel News, July 31, 2006 (exclaiming that AOL’s Video portal is “its most ambitious video venture yet,” and noting that the service contains “content from MTV Networks, A&E Television Networks and other cable programmers, in addition to free, ad-supported content”), *available at* <http://www.multichannel.com/article/CA6357470.html>; Anne Becker, *AOL Adds Paramount Movie Downloads*, *Broad. & Cable*, Oct. 23, 2006 (explaining that these movies are available for download from between \$9.99 and \$19.99 per movie), *available at* <http://www.broadcastingcable.com/article/CA6383816.html>.

<sup>139</sup> Shaveta Bansal, *AOL To Test-Launch Video Search Service*, Reuters, July 31, 2006, *available at* <http://www.eloops.com/news-article/AOL-To-Test-Launch-Online-Video-Search-Service.html>. In the near future, AOL also plans to launch “a new ‘10-foot experience’ with Intel, which will allow PC owners to view AOL and other video content on large-screen TVs and other devices.” Donohue, *supra* note 138.

<sup>140</sup> See Julia Angwin, *MSN Gets Strong Start In Race to Win Web Video Ads*, *Wall St. J.*, Aug. 2, 2006, at B1.

<sup>141</sup> See *AP, Yahoo To Offer Local News Clips From CBS*, *L.A. Times*, Oct. 16, 2006, *available at* <http://www.latimes.com/technology/la-fi-yahoo16oct16.1.5416514.story?coll=la-headlines-technology>.

<sup>142</sup> Kevin J. Delaney, *With NBC Pact, YouTube Site Tries to Build a Lasting Business*, *Wall St. J.*, June 27, 2006, at A1 (noting that users post more than 60,000 videos daily and YouTube “attracted more than 20 million users in May, compared with 11.1 million for Microsoft’s MSN Video and around seven million for MySpace’s video site and Google Video”) (emphasis added). According to a more recent article, YouTube viewers now are watching *more than 100 million video clips per day* and YouTube is receiving more than 65,000 video uploads per day. See *What’s Everybody Watching? YouTube*, *CNN.com*, Aug. 22, 2006 (“‘As more people capture special moments on video,’ its Web site declares, ‘YouTube is empowering them to become broadcasters of tomorrow.’ . . . YouTube is an escalating archive. A colossal clearinghouse. A proving ground. It’s a virtual commons for anyone anywhere with a camcorder in reach.”), *available at* <http://www.first-rate.com/ontarget/0609/07-whats-everybody-watching-youtube.html>.

Internet streaming of their programming through YouTube, and with the recent Google acquisition of YouTube, broadcasters' network programming available on the Internet is likely to expand even further.<sup>143</sup> Moreover, in August, YouTube announced "it will introduce video brand advertising on its site, a key step toward making the free service pay its way."<sup>144</sup>

In addition to YouTube, other new entrants have had a successful year in the online video industry. For instance,

**MySpace's** video services provided "1.4 billion streams or 20.1 percent of all Web-based streamed video in August 2006."<sup>145</sup> MySpace cut a notable deal with Fox to add ad-supported episodes of Fox's prime-time shows to its service.<sup>146</sup>

**Wi-Fi TV** offers hundreds of classic movies online for 99 cents apiece, in addition to over 200 live TV channels and interactive chat.<sup>147</sup>

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<sup>143</sup> See Anne Becker et al., *How the Google-YouTube Deal Shakes Up TV*, Broad. & Cable, Oct. 16, 2006 (describing the enthusiasm shared by broadcasters about the Google-YouTube merger and quoting NBC's George Kliavkoff's belief that the merger will result "in more folks watching the TV shows and therefore higher ad revenues in television" ), available at <http://www.broadcastingcable.com/article/CA6381202.html>; *YouTube Strikes Content Deals*, Assoc. Press, Oct. 9, 2006 (explaining that CBS' new "brand channel" on YouTube will include news, sports, Showtime, and prime-time programming, including short clips from hit shows such as "Survivor," and mini-previews for new fall shows ), available at [http://www.usatoday.com/tech/news/2006-10-09-youtube-deals\\_x.htm](http://www.usatoday.com/tech/news/2006-10-09-youtube-deals_x.htm); Delaney, *supra* note 142, at A1 (reporting NBC's recent announcement that it will make video clips available on YouTube for some of its popular shows, including *The Office*, *Saturday Night Live*, and *The Tonight Show with Jay Leno*; that "NBC plans to market its new fall lineup using clips on YouTube and is holding a contest for consumers to submit their own promotional videos for *The Office*;" and that it will "buy ads on the site and promote YouTube with mentions on television.").

<sup>144</sup> Yinka Adegoke, *YouTube Introduces Video Advertising*, Reuters, Aug. 22, 2006 (noting that "[a]dvertisers will be allowed to customize the channels and create subscriptions so viewers are alerted whenever a new video is added to the channel"), available at [http://www.usatoday.com/money/advertising/2006-08-22-youtube\\_x.htm?csp=34](http://www.usatoday.com/money/advertising/2006-08-22-youtube_x.htm?csp=34). Another advertising option will be the Participatory Video Ad, "a user-initiated video advertisement which allows consumers to rate, share, comment and embed advertising comment that they find interesting on their own pages." *Id.*

<sup>145</sup> *MySpace Trouncing YouTube in Web Video Streaming*, PC Mag., Oct. 19, 2006 (noting that this data puts MySpace ahead of all other Internet video providers in terms of total streams), available at <http://www.pcmag.com/article2/0,1895,2034068,00.asp>.

<sup>146</sup> See Daisy Whitney, *Fox On Demand Adds Streaming Shows to MySpace*, Oct. 3, 2006, available at <http://www.tvweek.com/news.cms?newsId=10840>.

<sup>147</sup> See *New Technologies*, Communications Daily, Jan. 10, 2006, at 8.

**BrightCove**, a broadband video provider that distributes videos from cable channels including Bravo, Discovery, AMC, Oxygen, and TV Land, recently unveiled a suite of services to help consumers find programming of interest.<sup>148</sup>

**Virtual Digital Cable** (“VDC”), an Internet-TV company, currently offers video programming from channels including ShopNBC, the Soundtrack Channel, the World Championship Sports Network, and some local television channels.<sup>149</sup>

**Microsoft’s “Soapbox on MSN Video,”** which is in its beta-testing phase, will allow Internet users to watch and post videos, rate and comment videos, and share favorite videos with friends through e-mail.<sup>150</sup>

**Akimbo**, an Internet video-on-demand service that continues to attract investment, delivers more than 8,000 on-demand programs -- including travel shows, documentaries, music videos, full-length films, sporting events, television series, and now HD content -- from the Internet to a set-top box connected to its subscribers’ televisions.<sup>151</sup>

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<sup>148</sup> See David Liberman, *BrightCove to Take Web Video to Next Level*, USA Today, Oct. 30, 2006 (quoting BrightCove CEO Jeremy Allaire as saying, “It’s going to open the floodgates of really interesting programming and a depth of media like what people have experiences in the text-Web world”), available at [http://www.usatoday.com/tech/products/2006-10-29-brightcove\\_x.htm](http://www.usatoday.com/tech/products/2006-10-29-brightcove_x.htm).

<sup>149</sup> See Press Release, VDC Corp., *VDC Corporation Adds Soundtrack Channel to Its Lineup of Networks* (May 23, 2006), available at [http://blog.vdc.com/vdc/press\\_releases/index.html](http://blog.vdc.com/vdc/press_releases/index.html); *World Championship Sports Network (WCSN) Partners with VDC*, The Official VDC Blog: News and Happenings, Sept. 12, 2006, at [http://blog.vdc.com/vdc/vdc\\_news\\_and\\_happenings/index.html](http://blog.vdc.com/vdc/vdc_news_and_happenings/index.html) (last visited Nov. 10, 2006); *VDC to Begin Offering Local Chicago Television Channels*, The Official VDC Blog: News and Happenings, July 18, 2006, at [http://blog.vdc.com/vdc/vdc\\_news\\_and\\_happenings/index.html](http://blog.vdc.com/vdc/vdc_news_and_happenings/index.html) (last visited Nov. 10, 2006).

<sup>150</sup> See Elizabeth M. Gillespie, *Microsoft to Launch Online-Video Service*, Associated Press, Sept. 19, 2006, available at <http://sify.com/news/fullstory.php?id=14293825>. Microsoft hopes to compete with the many video players already in existence by using slightly larger windows, giving users the ability to expand videos to the full screen, and by grouping videos in various categories for easier searching. See *id.*

<sup>151</sup> See Daisy Whitney, *Akimbo Announces \$15.5 Million in Funding*, Television Wk., June 26, 2006 (noting that Akimbo recently raised an additional \$15.5 million from investors Cisco, AT&T, and Blueprint ventures), available at <http://www.tvweek.com/news.cms?newsId=10266>; Press Release, Akimbo, *Akimbo and HDNet Team To Deliver High Definition Programming Via the Internet* (Mar. 27, 2006), available at [http://www.akimbo.com/press\\_rel\\_032706-hdnet.html](http://www.akimbo.com/press_rel_032706-hdnet.html). Akimbo recently unveiled its new iTV box player that “allows users to draw content downloaded from the Internet to their PCs -- including major motion pictures supplied by online content partner Movielink -- and transfer it to their TV sets for viewing.” Karen Brown, *Akimbo Unveils Box Linking PC to TV*, Multichannel News, Sept. 27, 2006 (“The unsurpassed collections of Movielink and Akimbo provide a tremendous variety of high-quality programming that can be watched at your convenience,” Akimbo CEO Joshua Goldman said. “To put it simply, this is a completely new way to be entertained in the comfort of the living room.”) available at <http://www.multichannel.com/article/CA6375757.html>.

What is most astounding about the foregoing is that it is by no means an exhaustive listing of the developments in this area. It is unlikely that anyone could have imagined that, when YouTube launched last December it would be bought less than a year later for \$1.65 billion. Nor was it foreseeable a year or two ago that most of the major broadcast and cable networks would be offering some of their most popular shows over the Internet. Where this segment of the video marketplace goes from here is anyone's guess, as the biggest developments of 2007 may not even have been conceived yet. But, if the events of the past year are any indication of what is to come, it is clear that video delivered over the Internet is here to stay.

**D. Broadcasters Remain an Important Source of Video Programming.**

In addition to obtaining their video programming from more traditional MVPDs and the thousands of distributors on the Internet, millions of households continue to rely on free, over-the-air broadcast television -- and broadcast stations and networks serve tens of millions more through delivery over other platforms. Consumers have relied on broadcast stations for video programming since long before the deployment of cable, DBS, or the Internet, and broadcast stations continue to exert an important competitive influence on the marketplace. As Jeff Zucker, CEO of the NBC-Universal Television Group, recently said, "Broadcast television is still the best way to reach the largest group of consumers, and people are watching more television than ever."<sup>152</sup>

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<sup>152</sup> Charlie McCollum, *McCollum: TV Industry Latching on to Evolving Technologies*, Mercury News, Oct. 16, 2006, available at <http://www.mercurynews.com/mld/mercurynews/entertainment/television/15757000.htm>.

As of June 30, 2005, there were 1,747 broadcast television stations nationwide that collectively provided video programming to nearly all of the nation's 111 million TV households.<sup>153</sup> Although many households receive their broadcast television through a cable operator, DBS provider, or other MVPD, broadcast services continue to be available over-the-air free of charge. Earlier this year, the Commission reported that, "as of July 2005, 15.43 million households, or 14% of the 109.6 [million] total U.S. television households, rely *exclusively* on over-the-air television for video programming."<sup>154</sup> The Commission also noted that many households that subscribe to a multichannel service also rely on over-the-air signals to receive broadcast programming on some of their television sets.<sup>155</sup>

Broadcasters continue to be an important source of video programming. And, new technologies are creating even more opportunities for broadcast distribution. For example, as NAB recently reported, the conversion to digital "is revolutionizing the broadcast television service by enabling stations to offer consumers new program choices, high-quality video and audio, and advanced features at no cost to the public."<sup>156</sup> As of November 2006, according to NAB, 1584 stations in 211 markets nationwide were broadcasting in digital.<sup>157</sup> By October

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<sup>153</sup> See *12<sup>th</sup> Annual Report* ¶¶ 8, 94; Kagan Research, *supra* note 18, at 5.

<sup>154</sup> *12<sup>th</sup> Annual Report* ¶ 97 (emphasis added). Kagan recently reported that, as of September 29, 2006, 15.1 million (or 13.6%) of the 111.3 million television households did not subscribe to a multichannel service. See Kagan Research, *supra* note 18, at 5.

<sup>155</sup> *12<sup>th</sup> Annual Report* ¶ 97.

<sup>156</sup> Press Release, NAB, *Consumer Electronics and Broadcast Industries Present Consensus Position on Digital TV Transition to U.S. Commerce Department's NTIA* (Sept. 25, 2006), available at [http://www.nab.org/AM/Template.cfm?Section=News\\_room&CONTENTID=6843&TEMPLATE=/CM/ContentDisplay.cfm](http://www.nab.org/AM/Template.cfm?Section=News_room&CONTENTID=6843&TEMPLATE=/CM/ContentDisplay.cfm).

<sup>157</sup> See NAB, *DTV Stations in Operation*, at <http://www.nab.org/AM/ASPCode/DTVStations/DTVStations.asp> (last visited Nov. 10, 2006).

2005, all 119 stations affiliated with the top-four networks in the top 30 television markets were broadcasting in digital.<sup>158</sup>

Digital technology has enabled broadcasters to multicast their own multichannel programming. Multicasting has allowed networks to use their digital spectrum to offer consumers more channels and to generate more ad revenue from these new channels.<sup>159</sup>

According to the Commission, the 13 largest broadcast networks and their affiliates broadcast more than 937,000 hours of multicast programming during the month of October 2005.<sup>160</sup>

Thanks to cooperation between broadcasters and cable operators, under mutually beneficial agreements negotiated without government coercion, much of this multicast programming is available on cable systems as well as over-the-air.<sup>161</sup>

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<sup>158</sup> See 12<sup>th</sup> Annual Report ¶ 95.

<sup>159</sup> See *id.* ¶ 101 (“This multicast programming includes news, weather, sports, religious material, music videos and coverage of local musicians and concerts, as well as foreign language programming (especially, but not limited to, Spanish programming).”); Steve Donohue, *Multicast Madness*, Multichannel News, June 26, 2006 (explaining that the major broadcast networks are multicasting additional news and weather), available at <http://www.multichannel.com/article/CA6346618.html>.

<sup>160</sup> See 12<sup>th</sup> Annual Report ¶ 101. In addition to using their digital spectrum for free over-the-air multicasting, broadcasters continue to explore “pooling the spare digital spectrum of three or four broadcast stations in a market to air a package of ‘cable’ networks to compete with cable and satellite-TV operators.” John M. Higgins, *USDTV: Up From the Ashes*, Broad. & Cable, Aug. 21, 2006, available at <http://www.broadcastingcable.com/article/CA6364195.html>. USDTV’s assets have just been sold out of bankruptcy to a company that “plans to make another go at offering a no-frills, over-the-air digital TV service to penny-conscious consumers.” Linda Moss, *USDTV Emerges for Another Try*, Multichannel News, Nov. 27, 2006, available at <http://www.multichannel.com/article/CA6394529.html>.

<sup>161</sup> See Ted Hearn, *PBS DTV Deal OK’ed*, Multichannel News, Feb. 4, 2005, available at <http://www.multichannel.com/article/CA501517.html>; *In re Applications for Consent to the Assignment and/or Transfer of Control of Licenses of Adelphia Communications Corporation to Time Warner Cable Inc. & Comcast Corporation*, Reply of Adelphia Communications Corp., Comcast Corp., and Time Warner, Inc., MB Dkt. No. 05-192, at 93-94 n.317 (filed Aug. 5, 2005) (“*Adelphia Reply*”); Letter from James L. Casserly, Counsel to Comcast Corp., to Marlene H. Dortch, Secretary, FCC, filed in MB Dkt. No. 98-120 (Feb. 3, 2005). It appears that some broadcasters have more distribution capacity than they have programming worth distributing. For the week of Tuesday, November 14, through Tuesday, November 21, the programming schedule for the *main* channel of a broadcast network that noisily insists it should be granted guaranteed cable carriage of each of *multiple* streams of programming encompassed 112 hours (two-thirds of the 168 total hours in a week) of “paid programming -- that is, (footnote continued...)”

Broadcasters are also exploiting many nontraditional platforms to distribute their content. First, in addition to the Internet outlets described above in section II.C., broadcasters have begun to directly offer significant amounts of their hit programming online (via their own websites and online broadband players often containing advertising).<sup>162</sup> For example:

- After an extremely successful online video streaming experiment last Spring, ABC relaunched its video streaming service in September 2006, offering seven of its most popular shows.<sup>163</sup>
- CBS offers three web-exclusive series, news programming, and full episodes of many of its hit primetime shows on Innertube, its free ad-supported broadband channel.<sup>164</sup>
- NBC partnered with Intel to provide “VIP Access,” an online service that will stream NBC primetime programming on-demand for free, and at a higher resolution than other Internet video players.<sup>165</sup>

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(...footnote continued)

infomercials. Of the 56 remaining hours of traditional ad-supported programming, 25 hours (45%) were reruns of TV shows of no particular note.

<sup>162</sup> See *Yahoo To Offer Local News Clips from CBS*, *supra* note 141 (describing CBS’s use of advertising to support free online programming); *Now Streaming*, *Broad. & Cable*, Sept. 18, 2006 (same for NBC), available at <http://www.broadcastingcable.com/article/CA6372781.html>; Wayne Friedman & David Goetzl, *The Broadband Upfront*, *Broad. & Cable*, May 8, 2006 (same for ABC), available at <http://www.broadcastingcable.com/article/CA6332375.html>; see also Allison Romano, *Bring It On-line*, *Broad. & Cable*, Dec. 12, 2005, at 8 (describing how local TV stations, as well as national networks, are making content available online and are generating interest from local advertisers who do not currently buy TV advertising).

<sup>163</sup> See Frank Ahrens, *ABC Encouraged by Internet TV Trial*, *Wash. Post*, June 21, 2006, at D2 (noting that more than 11 million viewers tuned in to ABC’s programs offered online during ABC’s trial in May 2006); Daisy Whitney, *ABC.com to Offer Seven Shows for Free Viewing*, *Television Wk.*, Sept. 13, 2006 (noting that ABC’s launch of these online shows marks the network’s widest distribution of its marquee shows online, and includes *Lost*, *Ugly Betty*, *Desperate Housewives*, *Grey’s Anatomy*, and others), available at <http://www.tvweek.com/news.cms?newsId=10738/>.

<sup>164</sup> See *CBS’ Innertube Gets Survivor, Race*, *Multichannel News*, Sept. 26, 2006 (listing *CSI*, *Survivor*, and *Amazing Race* as included on Innertube), available at <http://www.multichannel.com/article/CA6375473.html>; Allison Romano, *Katie Heats Up Online*, *Broad. & Cable*, Sept. 14, 2006 (noting that consumers have viewed over 100,000 streams of *CBS News First Look with Katie Couric* on Innertube), available at <http://broadcastingcable.com/article/CA6372360.html>; see also *Innertube Is Put on Wheels*, *Broad. & Cable*, Oct. 23, 2006 (noting that CBS has launched a promotional campaign for Innertube that “costs up to a half million dollars, includes outdoor, print, online and radio ads and is the most prominent effort so far aimed at raising awareness of a network’s broadband product”), available at <http://www.broadcastingcable.com/article/CA6383676.html>.

<sup>165</sup> See Glen Dickson, *NBC, Intel Team for Hi-Res Online Shows*, *Broad. & Cable*, Sept. 28, 2006 (noting that twenty different NBC shows will be available through download-to-view access), available at  
(footnote continued...)

- Fox debuted the fourth season premiere of its hit series *The O.C.* on its owned-and-operated stations' websites and on Myspace.com a week before premiering the episode on television.<sup>166</sup>
- PBS now offers many episodes of *Frontline*, *NOVA*, and segments of *The NewsHour* for free online.<sup>167</sup> In addition, PBS's *Nature* is available for free in podcast format.<sup>168</sup>

Network officials believe that online viewing will not cut into television viewing; instead, it will bolster viewing by keeping people involved in shows.<sup>169</sup>

The major broadcast networks are also offering some of their most popular programming, including primetime programming and local news programming, on the VOD platforms of established cable operators and new ones for free or for a nominal charge.<sup>170</sup> In addition, ABC is

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(...footnote continued)

<http://www.broadcastingcable.com/article/CA6375928.html>; *NBC To Offer New Shows on Web to Build Audiences*, Reuters, Sept. 14, 2006 (explaining that streamed episodes include *Kidnapped*, *Heroes*, and *Studio 60 on the Sunset Strip*, and that each will be available on the NBC site for a week after it airs on NBC), available at <http://www.topix.net/content/reuters/1704737081279918034141822295231014478388>.

<sup>166</sup> See Anne Becker, *Fox Streams O.C. Before Premiere*, *Broad. & Cable*, Oct. 24, 2006 (noting that Fox will also debut the second episode of the season of *The O.C.* online a week before it airs, and both episodes will remain free for streaming for a week after they air on TV), available at <http://www.broadcastingcable.com/article/CA6384165.html>.

<sup>167</sup> See PBS, *Frontline: Watch Frontline Online*, at <http://www.pbs.org/wgbh/pages/frontline/view/> (last visited Nov. 10, 2006); PBS, *Watch NOVA Programs Online*, at <http://www.pbs.org/wgbh/nova/programs/index.html> (last visited Nov. 10, 2006); PBS, *The Online NewsHour: Video*, at <http://www.pbs.org/newshour/video/index.html> (last visited Nov. 10, 2006).

<sup>168</sup> See PBS, *Nature: Podcasting*, at <http://www.pbs.org/wnet/nature/podcasting.html> (last visited Nov. 10, 2006).

<sup>169</sup> See David Bauder, *Networks Say Millions of TV Show Episodes are Being Streamed Online*, *SignOnSanDiego.com*, Oct. 18, 2006 (quoting Larry Kramer, CBS's digital chief: "It's very early, but we think we're keeping people involved in shows . . . It's not unusual for even good fans to miss one quarter or one half of (a show's) episodes. The idea here is that you can catch up on things very quickly."), available at <http://www.signonsandiego.com/news/business/20061018-1326-tv-streamingshows.html>; Anne Becker, *CBS: Downloads Spur Sampling*, *Broad. & Cable*, Nov. 16, 2006, available at <http://www.broadcastingcable.com/article/CA6392429.html>.

<sup>170</sup> See Glen Dickson, *Comcast to Offer Free CBS On-Demand*, *Broad. & Cable*, Sept. 14, 2006, available at <http://www.broadcastingcable.com/article/CA6372365.html> (noting that CBS is providing certain primetime shows for free on Comcast ON DEMAND); John Eggerton, *Verizon, CBS Sign Retrans Deal*, *Broad. & Cable*, Mar. 20, 2006 (noting that CBS is providing certain primetime shows for free on Verizon FiOS VOD), available at <http://www.broadcastingcable.com/article/CA6317143.html>; John M. Higgins, *Comcast Secures NBC U Demand*

(footnote continued...)

airing half-hour promotional specials of some of its most popular primetime shows on EchoStar's VOD service.<sup>171</sup> And, broadcasters such as ABC and NBC are selling their most popular shows for download on Apple's iTunes.<sup>172</sup> Other broadcasters, including local CBS stations, are experimenting with offering content on mobile phones.<sup>173</sup>

Although broadcasters initially feared that new technologies such as the Internet and DVRs would adversely impact their ad-supported programming, broadcasters are successfully adapting to them in innovative ways. For example, with respect to DVRs, broadcasters have developed interactive advertising, logo exposure, coupons, and targeted advertising that are designed to minimize the impact of ad skipping.<sup>174</sup> Because DVR technology allows consumers

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(...footnote continued)

*Deal*, Broad. & Cable, Mar. 30, 2006 (noting that NBC is offering hit shows on demand, including *The Office*, for \$0.99 per episode on Comcast ON DEMAND), available at <http://www.broadcastingcable.com/article/CA6320373.html>; *PBS Stations Seek Deals with Cable for Prime-Time VOD Offering*, Communications Daily, Apr. 4, 2006, at 9; Press Release, NBC24, *NBC 24 News With Video on Demand on Buckeye Cable* (Feb. 3, 2005) (telling consumers that NBC's local Toledo station can be viewed on demand at any time for no additional cost), available at <http://www.nbc24.com/global/story.asp?s=2895076>.

<sup>171</sup> See *Dish On Demand Sets ABC Specials*, Multichannel News, Sept. 21, 2006, available at <http://www.multichannel.com/article/CA6374188.html>.

<sup>172</sup> See Saul Hansell, *NBC to Sell TV Shows for Viewing on Apple Software*, N.Y. Times, Dec. 7, 2005, at C2 (listing the shows available for download on iTunes and describing the success of this venture); *Cable Technologists Fear Bell IPTV, Web Video, Peer-to-Peer*, Communications Daily, Jan. 17, 2006, at 6 (reporting that "3 million consumers downloaded episodes of ABC's popular 'Lost' and 'Desperate Housewives' in the first 2 months that Disney made them available to Apple's video iPod customers").

<sup>173</sup> See Keith Reed, *Local TV News When You Want It*, Boston Globe, May 31, 2006 (describing the CBS4 Mobile subscription service, designed to give Sprint and Verizon Wireless customers access to news, traffic, and weather videos from the local Boston CBS station), available at [http://www.boston.com/business/globe/articles/2006/05/31/local\\_tv\\_news\\_when\\_you\\_want\\_it/](http://www.boston.com/business/globe/articles/2006/05/31/local_tv_news_when_you_want_it/).

<sup>174</sup> See Candace Lombardi, *TV Advertising's DVR Challenge*, CNET News.com, May 23, 2006, available at [http://news.com.com/2102-1024\\_3-6075233.html](http://news.com.com/2102-1024_3-6075233.html) (describing ABC's fictitious ads run during commercial breaks of the hit series *Lost*, where viewers who stay tuned in are given phone numbers and website addresses containing clues about the show); Friedman & Goetzl, *supra* note 162 (noting that, even when an ad is fast-forwarded, if a logo is prominently displayed, there is considerable audience recognition of the logo); Lombardi, *supra* (describing a recent successful KFC commercial that provided a coupon to those who continued viewing without fast-forwarding); Karen Brown, *New TiVo Content Ads Up*, Multichannel News, May 8, 2006 (explaining how "TiVo's  
(footnote continued...)

to pause programming to engage in interactive advertising experiences without missing their favorite shows, DVR technology has the potential to be a lucrative advertising tool.<sup>175</sup> Similarly, as discussed above, broadcasters have embraced Internet distribution of video programming as a means to further involve audiences in television shows.

Since television was first invented, broadcast stations have figured prominently as distributors of video programming. Broadcasters have consistently overcome what they claimed to be insurmountable hurdles (*e.g.*, converting from black and white to color, cable distribution, the digital transition, etc.) to their business models. The events of the past year provide even more evidence that broadcasters continue to be an important source of video programming and that broadcasters are capable of adapting to new market conditions.

**E. Broadband Service Providers/Overbuilders Provide Important Competition in Markets of All Sizes.**

Broadband Service Providers (“BSPs”) (commonly referred to as “overbuilders”) offer many consumers an additional source for video programming. Despite early concern about overbuilders’ long-term viability, they have showed remarkable resiliency and an ability to

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(...footnote continued)

Product Watch” allows viewers to find more information on products they are interested in, and allows viewers to opt to receive video content directly from those brands’ companies on an ongoing basis), *available at* <http://www.multichannel.com/article/CA6332669.html>.

<sup>175</sup> See *TiVo Inks Interpublic Media Pact*, Multichannel News, May 15, 2006, *available at* <http://www.multichannel.com/article/CA6334993.html>. TiVo and other DVR providers are committed to working with advertising companies to develop creative advertising formats for DVR. See *WPP Agencies Buy TiVo Space*, Multichannel News, Sept. 14, 2006 (quoting TiVo CEO Tom Rogers as announcing that “TiVo is committed to helping advertisers to further connect with their target audience . . . by designing solutions for unique and exciting advertisements”), *available at* <http://www.multichannel.com/article/CA6372237.html>. Moreover, TiVo recently launched a feature that provides advertisers with information related to consumer DVR advertising viewing. See *Some Insights from TiVo*, IRI, Multichannel News, Sept. 20, 2006, *available at* <http://www.multichannel.com/article/CA6373907.html>.

capture and retain significant portions of the markets they serve. They continue to expand their service offerings to better attract new customers.

Although some overbuilders experienced financial difficulties in the past, they have emerged stronger than ever. For example, Knology, which successfully refinanced much of its debt and now serves 177,400 subscribers,<sup>176</sup> continues to deploy new video services and features to attract both business and residential customers, in addition to offering over 200 channels of digital cable TV, digital telephone service, and high-speed Internet access.<sup>177</sup> Likewise RCN, which also successfully emerged from bankruptcy, is obtaining new franchises, adding to its programming options, and providing RCN-branded mobile phone service in the Boston area.<sup>178</sup> RCN currently serves 369,000 customers.<sup>179</sup>

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<sup>176</sup> See NCTA, *Industry Overview*, at [http://www.ncta.com/industry\\_overview/top50mso.cfm](http://www.ncta.com/industry_overview/top50mso.cfm) (last visited Nov. 10, 2006).

<sup>177</sup> See Press Release, Knology Inc., *Knology Launches State-of-the-Art Matrix Over Cable Modem Service* (Nov. 7, 2006) (announcing the launch of Matrix Over Cable Modem service, a highly sophisticated suite of voice and data services appropriate for small businesses), available at <http://www.knology.com/content/aboutus/pressroom.details.cfm?pkey=384>; Press Release, Knology Inc., *Knology Introduces Caller ID TV in Lanett, AL* (Mar. 28, 2006) (announcing the launch of a service that allows customers to monitor incoming phone calls visually on their television screen), available at <http://www.knology.com/content/aboutus/pressroom.details.cfm?pkey=329>.

<sup>178</sup> See Press Release, RCN Corp., *RCN Reports Third Quarter 2006 Results* (Nov. 9, 2006) (during the third quarter of 2006, “RCN accelerated subscriber gains, and additional cost savings offset investments in customer acquisition and retention, enabling EBITDA to grow by nearly 40% from last year and leading us to increase our financial outlook”), available at <http://investor.rcn.com/ReleaseDetail.cfm?ReleaseID=217950>; *RCN Receives Additional Cable Franchise in Lehigh Valley, PA*, Bus. Wire, July 20, 2006 (reporting that RCN obtained a cable franchise in the Philadelphia area that will allow it to target more than 5,000 homes starting in early 2007), available at [http://www.shareholder.com/visitors/print\\_release.cfm?releaseid=204504](http://www.shareholder.com/visitors/print_release.cfm?releaseid=204504); *RCN Debuts MiVision Hispanic Tier*, Multichannel News, Sept. 5, 2006 (noting the debut of the MiVision Hispanic Tier of more than 30 networks on RCN systems), available at <http://www.multichannel.com/article/CA6368879.html>; Bruce Mohl, *RCN To Market Wireless Service*, Boston Globe, Aug. 29, 2006 (noting that RCN officials stated that the company hopes to offer the capability to view video content over mobile phones and to remotely control DVRs), available at [http://www.boston.com/business/technology/articles/2006/08/29/rcn\\_to\\_market\\_wireless\\_service?mode=PF](http://www.boston.com/business/technology/articles/2006/08/29/rcn_to_market_wireless_service?mode=PF).

<sup>179</sup> See NCTA, *supra* note 176.

Overbuilders benefit from their ability to offer customers the “triple play” of services, including phone, Internet, and video. For example, in the third quarter of 2006, Grande Communications, a Texas company, experienced a \$2.6 million increase in revenue (for a total of \$36.6 million) from its provision of bundled services.<sup>180</sup> Everest Communications, an overbuilder that offers bundled packages starting at \$80 per month, credits the bundle for allowing it to capture half or more of the customers in the communities it serves.<sup>181</sup> Ninety-five percent of Everest’s customers use digital cable boxes and 82% have high-speed Internet.<sup>182</sup> WideOpenWest (“WOW”), another “triple play” overbuilder, serves 357,000 customers in western states, up from 292,500 last year.<sup>183</sup>

Municipally-owned overbuilders also continue to update and expand their services. For example, Braintree Electric Light Department (“BELD”), has launched VOD, added channels to its Digital Plus tier, and lowered Internet service installation rates.<sup>184</sup> Likewise, Tacoma, Washington’s Click! Network, the nation’s largest municipally owned overbuilder, recently upgraded its services to offer its ISP customers Internet speeds up to 8 megabytes per second.<sup>185</sup>

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<sup>180</sup> Press Release, Grande Communications, *Grande Communications Holdings, Inc. Announces Results for Third Quarter Ending September 2006* (Nov. 9, 2006), available at [http://www.grandecom.com/pdf/Grande\\_Q3\\_2006.pdf](http://www.grandecom.com/pdf/Grande_Q3_2006.pdf).

<sup>181</sup> See Aaron Barnhad, *Everest: Plugging Away*, Kansas City Star, Oct. 28, 2006, available at <http://www.kansascity.com/mld/kansascity/entertainment/15866023.htm>.

<sup>182</sup> *Id.* This year, Everest hooked up its 30,000<sup>th</sup> connection and attracted an infusion of cash from a private equity firm. *Id.*

<sup>183</sup> Compare NCTA, *supra* note 176, with 12<sup>th</sup> Annual Report ¶ 89.

<sup>184</sup> See Press Release, Braintree Electric Light Department, *VOD is Here* (Mar. 16, 2006), available at <http://www.beld.com/News/News.asp?NewsID=109&subsection=recent>.

<sup>185</sup> See Press Release, Click! Network, *Click! Increases Internet Speeds to its ISPs* (Feb. 21, 2006), available at <http://www.click-network.com/AboutUs/PressReleases/PressReleases.htm>.

**F. Home Video Sales and Rentals Are Popular Options for Consumers, and the Availability of New Delivery Methods Will Facilitate Consumers' Continued Reliance on These Options as a Significant Source for Video Programming.**

Consumers' home media options are ever-expanding. As the Commission has recognized year after year, the sales and rentals of home video provide another distribution outlet for video programming in part because they provide services similar to the premium and pay-per-view offerings of MVPDs.<sup>186</sup>

VCRs and DVD players, the more traditional home video technologies, continue to have a significant impact on consumers' home viewing habits. According to the Commission's most recent video competition report, approximately nine out of ten TV households have at least one VCR, and 75% have a DVD player.<sup>187</sup> Sales and rentals of DVDs have accounted for 60% of entertainment companies' profits over the past eight years.<sup>188</sup> Total video resale industry revenues, including renting and selling, totaled \$24.1 billion in 2005.<sup>189</sup> Continuing a growth trend, total revenue is expected to rise to \$24.4 billion in 2008 and \$33.5 billion in 2012.<sup>190</sup>

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<sup>186</sup> See *In re Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, First Annual Report, 9 FCC Rcd. 7442, ¶¶ 134-135 (1994) (“*First Report*”); see *In re Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Eleventh Annual Report, 20 FCC Rcd. 2755, ¶ 120 (2005) (“*11<sup>th</sup> Annual Report*”); *12<sup>th</sup> Annual Report* ¶ 140.

<sup>187</sup> See *12<sup>th</sup> Annual Report* ¶ 141.

<sup>188</sup> See *id.* ¶ 142.

<sup>189</sup> See Kagan Research LLC, *Video Retail in for a Few More Hurdles*, Kagan Media Money, June 6, 2006, at 2.

<sup>190</sup> See *id.*; see also Marcy Magiera, *Home Video Poised for the Future*, Video Bus. Online, July 11, 2006, available at <http://www.videobusiness.com/index.asp?layout=articlePrint&articleID=CA6351514>. The primary factor accounting for the increase in DVD sales is the availability of television programs on DVD. In that category, sales gained 25% in 2006. See Press Release, NPD Group, Inc., *The NPD Group: TV-DVDs Soften Video Sales Decline* (Oct. 24, 2006) (reporting that sales of one-hour dramas such as “Desperate Housewives” and “Lost” increased 48%), available at [http://www.npd.com/press/releases/press\\_061024.html](http://www.npd.com/press/releases/press_061024.html).

As more companies enter the marketplace for sale and rental of home videos, consumers are finding it is easier than ever before to buy and rent these products. Consumers have numerous outlets to purchase DVDs and videocassettes, including the big retail chains, such as Target and Wal-Mart, or from online retailers, such as Amazon.<sup>191</sup> Non-traditional media retailers such as Bed Bath & Beyond, Starbucks, and various supermarket chains also sell DVDs and videocassettes to consumers.<sup>192</sup> Moreover, rental options continue to expand. For example, Redbox installs automated rental kiosks inside various grocery chains and McDonalds restaurants, and it has expanded its service from 12 locations in 2003 to 1400 locations by Fall 2006.<sup>193</sup> Also, consumers can rent movies and other programming from services that distribute DVDs via mail, such as Netflix, a service that currently boasts 5.7 million subscribers and

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<sup>191</sup> Amazon and other retailers have become increasingly important avenues for selling DVDs. Amazon's revenue from home media in North America for the third quarter of 2006 grew 15% to \$785 million, compared with the same period last year. See Paul Sweeting, *Sales Surge, Profits Drop at Amazon*, Video Bus., Oct. 24, 2006, available at <http://www.videobusiness.com/index.asp?layout=articlePrint&articleID=CA6384452>.

<sup>192</sup> See Susanne Ault, *Supplier Sells in Non-Traditional Stores*, Video Bus. Online, Sept. 22, 2006, available at <http://www.videobusiness.com/index.asp?layout=articlePrint&articleID=CA6374446>; Susanne Ault, *Magnolia Pours Into Starbucks*, Video Bus. Online Sept. 27, 2006, available at <http://www.videobusiness.com/index.asp?layout=articlePrint&articleID=CA6375750>; Cindy Spielvogel, *Grocers Gab About DVD*, Video Bus. Online, May 1, 2006, available at <http://www.videobusiness.com/index.asp?layout=articlePrint&articleID=CA6331431>; Susanne Ault, *HEB's Appetite for DVD Growing*, Video Bus. Online, Oct. 5, 2006 ("H-E-B recently began working with a major video wholesaler to handle its growing DVD purchasing, and studios are anticipating a boost in H-E-B business with the new format push."), available at <http://www.videobusiness.com/article/CA6378669.html?industryid=43291&industry=Retail>.

<sup>193</sup> See Press Release, Redbox Automated Retail, LLC, *Redbox Launches Online Movie Rentals* (Sept. 19, 2006), available at [http://www.redbox.com/Press/PressReleases/Online\\_Rental\\_Release\\_FINAL.pdf](http://www.redbox.com/Press/PressReleases/Online_Rental_Release_FINAL.pdf).

revenues that are up 48% from last year.<sup>194</sup> Finally, a peer-to-peer DVD trading market has developed wherein club members display lists of their DVDs online and offer them for trade.<sup>195</sup>

As broadband penetration continues to grow, downloadable movie service options are gaining popularity.<sup>196</sup> In fact, downloadable movie sales are expected to account for approximately \$12 million in film studio revenue in 2006.<sup>197</sup> Several Internet-based movie download services have already launched, including Movielink, CinemaNow,<sup>198</sup> Vongo (an application-based subscription service from Starz),<sup>199</sup> UnBox (launched by Amazon), Apple's

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<sup>194</sup> See Press Release, Netflix, Inc., *Netflix Announces Q3 2006 Financial Results* (Oct. 23, 2006) (estimating that Netflix will have 6.3 million subscribers by the end of the year), available at [http://cdn.nflximg.com/us/pdf/3Q06\\_earnings\\_release.pdf](http://cdn.nflximg.com/us/pdf/3Q06_earnings_release.pdf).

<sup>195</sup> Peerflix launched in September 2005 and facilitates transactions on its website for 99 cents per trade. See Press Release, Peerflix, *DVD Exchange Network Peerflix Reaches Landmark 100,000<sup>th</sup> Trade* (Jan. 6, 2006) available at <http://www.peerflix.com/Default.aspx?tabid=139#news16>. Peerflix announced that it reached 100,000 trades in January 2006. *Id.* MyDVDTrader.com, launched in April 2006, provides a similar service for a monthly subscription fee. See Jennifer Netherby, *DVD Trading Site Launches*, Video Bus. Online, Apr. 7, 2006, available at <http://www.videobusiness.com/index.asp?layout=articlePrint&articleID=CA6323749>.

<sup>196</sup> In addition to movie downloads, downloading television programs from the web is gaining popularity. See NPD Group, Inc., *supra* note 190 (reporting a 255% increase in television title downloads between August 2005 and August 2006).

<sup>197</sup> See Jon Healey, *What's Holding Up Movie Downloads*, L.A. Times, Oct. 1, 2006, available at <http://www.latimes.com/news/opinion/commentary/la-op-healey1oct01.0.7470357.story?coll=la-news-comment-opinions>.

<sup>198</sup> See Kagan Research LLC, *CinemaNow, Movielink Offer Download-To-Own*, Kagan Media Money, Apr. 4, 2006, at 1. CinemaNow also launched a service that allows users to burn purchased films onto a DVD. See Daisy Whitney, *CinemaNow Offers DVD Burn Option*, Television Wk., July 19, 2006, available at <http://www.tvweek.com/news.cms?newsId=10390>.

<sup>199</sup> See Press Release, Starz Entertainment Group, *Starz Entertainment Group Ignites Portable Internet Video Market With the Launch of Vongo(SM)* (Jan. 3, 2006), available at [http://starz.mediaroom.com/index.php?s=press\\_releases&item=141](http://starz.mediaroom.com/index.php?s=press_releases&item=141). Vongo subscribers have unlimited access to all of Vongo's movies and a live, streaming Starz TV channel, for a monthly subscription fee of \$9.99. Members are given the option to download movies to three devices of their choice. See *id.* Starz plans to expand Vongo next year through promotional deals with consumer electronics manufacturers and by seeking bundling agreements with satellite and cable operators. See Mark Seavy, *Starz Eyes 2007 Vongo Expansion, Vows Satellite, Cable Bundles*, Communications Daily, Nov. 20, 2006, at 7-8.

iTV, and AOL Video.<sup>200</sup> In addition, Netflix and Wal-Mart have announced plans to launch their own Internet movie download services.<sup>201</sup> Taking a slightly different approach, Microsoft now offers movie downloads for viewing on television sets through its Xbox gaming system.<sup>202</sup> Finally, another video download service, MovieBeam, delivers movies via broadcast signals directly to a receiver at the customer's home, without the need for Internet access or a computer.<sup>203</sup>

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<sup>200</sup> See Jennifer Netherby, *Amazon Queues Up Downloads*, Video Bus. Online, Sept. 7, 2006 (Unbox is an application-based download service that includes movie and TV downloads from program suppliers including Warner Home Video, Paramount Home Entertainment, 20th Century Fox Home Entertainment, MGM Home Entertainment, Sony Pictures Home Entertainment, Universal Studios Home Entertainment and Lionsgate), available at <http://www.videobusiness.com/index.asp?layout=articlePrint&articleID=CA6368898>; Nino Marchetti, *Apple Adds New iPods, iTunes Movie Downloads*, About: Portable Elecs., Sept. 12, 2006 (iTunes debuted with a limited availability of Disney and Pixar programming), available at <http://portables.about.com/od/mp3players/a/newipodssept06.htm>; Ritsuko Ando, *AOL to Offer Movie Downloads from Four Studios*, Reuters, Aug. 24, 2006, available at [http://www.boston.com/business/technology/articles/2006/08/24/aol\\_to\\_offer\\_movie\\_downloads\\_from\\_four\\_studios/](http://www.boston.com/business/technology/articles/2006/08/24/aol_to_offer_movie_downloads_from_four_studios/).

<sup>201</sup> See Jennifer Netherby, *Netflix Adds Details to Download Plan*, Video Bus. Online, June 16, 2006, available at <http://www.videobusiness.com/index.asp?layout=articlePrint&articleID=CA6344815>; Parija Bhatnagar, *Wal-Mart Moves on Digital Movie Downloads*, CNNMoney.com, Sept. 15, 2006 (noting that Wal-Mart currently accounts for about 40% of all DVD sales in the U.S.), available at [http://money.cnn.com/2006/09/15/news/companies/walmart\\_DVD/index.htm](http://money.cnn.com/2006/09/15/news/companies/walmart_DVD/index.htm).

<sup>202</sup> See Press Release, Microsoft Corp., *Watch Movies and TV on Your Xbox* (Nov. 6, 2006) (describing Microsoft's recent deal with CBS, MTV, Paramount, TBS, UFC, and Warner Bros. to bring an initial lineup of more than 1,000 hours of hit television shows and movies to Xbox 360 consoles by the end of the year, making Xbox the first video console "to provide HD TV shows and movies directly to gamers in their own living rooms"), available at <http://www.xbox.com/en-US/community/news/2006/20061106-moviestv.htm>. Xbox users will be able to rent movies via download from the Xbox Live network. See *id.*

<sup>203</sup> MovieBeam movies are encoded in the broadcast signals of PBS stations, allowing any consumer in a market that receives PBS signals to subscribe to the service. See David Pogue, *Renting Movies With a Box and a Beam*, N.Y. Times, June 1, 2006 (noting also that the movies are from all genres and come from almost every major movie studio), available at <http://www.nytimes.com/2006/06/01/technology/01pogue.html?ex=1306814400&en=ffe9ee52db44a76&ei=5090>.

### **III. NEW PLAYERS IN THE VIDEO MARKETPLACE PROVIDE MORE CHOICES FOR PROGRAMMERS AND CONSUMERS.**

In addition to these well-established video programming distributors, new sources of video programming continue to emerge and grow. Technological innovation in mobile video is empowering consumers to watch their favorite shows whenever and wherever they want. Similarly, innovation in new broadband network technology, such as broadband over powerline (“BPL”), holds the potential to bring an additional multichannel alternative that could be available to almost every home in America. And these are only two of the emerging technologies that may provide consumers with still more sources of video programming.

#### **A. The Mobile Telephone “Third Screen” Has Picked Up Momentum This Year, and Continues To Increase in Popularity.**

Over the past year, video delivered via wireless networks to mobile handsets has become an increasingly popular source of video programming for consumers. In the *12th Annual Report*, the Commission recognized the substantial investments that wireless operators have made to “enable the transmission of live video to cellphones,” as well as the fact that “cell phone makers are selling video-ready telephones for as little as \$99 when bought with a subscription to a video service.”<sup>204</sup> Today, nearly 8 million U.S. consumers are using their handsets to view video programming,<sup>205</sup> and it is estimated that by 2010 that number will reach 24 million, with

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<sup>204</sup> *12<sup>th</sup> Annual Report* ¶ 133 (citing reports that these services provide unlimited viewing for costs of \$15 to \$20 a month).

<sup>205</sup> See *Mobile Video Hot Overseas, Heating Up at Home*, Telco Media News, Oct. 16, 2006, available at <http://www.telcomedianews.com/view.cfm?ReleaseID=35#Story2>; see also *Study: Mobile TV Market Poised for Consolidation*, RCR Wireless News, Aug. 14, 2006, at 26 (predicting the likely success of mobile TV and quoting an IMS Research analyst’s finding that, “if providers effectively supply compelling content, quality receptions, and affordable, attractive phones, then every new mobile TV subscriber can become a mobile TV evangelist”).

revenues “exceed[ing] \$1.5 billion.”<sup>206</sup> On a global level, industry analysts predict that mobile video could be worth as much as \$27 billion by 2010.<sup>207</sup> And, although video on a mobile phone may not be a perfect substitute for a home television set, it is certainly growing into a reliable alternative for consumers who want to access video programming whenever and wherever they want.

Mobile video delivery technology has come a long way in a short period of time, and it continues to improve. When Sprint first launched MobiTV in 2003, video content was provided at only one or two frames per second.<sup>208</sup> Today, most wireless operators stream mobile video over their 3G networks using wireless broadband protocols like EV-DO, which allow them to provide superior video quality at approximately fifteen to twenty frames per second.<sup>209</sup> In

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<sup>206</sup> Edward C. Baig, *Will Consumers Tune in to a Tiny TV in their Hand?*, USA Today, Aug. 17, 2006, available at [http://www.usatoday.com/tech/wireless/2006-08-17-mobile-tv\\_x.htm](http://www.usatoday.com/tech/wireless/2006-08-17-mobile-tv_x.htm).

<sup>207</sup> See Claire Atkinson, *Disney Exec: Mobile TV is Going to be Huge*, RCR Wireless News, Oct. 12, 2006, available at <http://www.rcrnews.com/news.cms?newsId=27512>. The wide adoption of mobile video technology in other countries demonstrates the technology’s potential in the United States. For instance, it is estimated that there will be about 25 million mobile TV users in the Asia Pacific region by the end of 2008. See *25 Million Asian Mobile TV Users by 2008*, 3G.co.uk, Nov. 10, 2006, at <http://www.3g.co.uk/PR/Nov2006/3899.htm>. Moreover, “nearly 14% of all mobile handsets in South Korea support digital mobile broadcast television.” *ABI: Japanese, S. Korean Mobile Handsets Lead World in Mobile Imaging, Display Innovation*, IHS, Oct. 31, 2006, available at <http://electronics.ihs.com/news/abi-mobile-handsets.htm>; see also Peter Feuilherade, *Mobile TV Scores in Asia*, BBC News, June 22, 2006 (reporting that due to demand for World Cup mobile broadcasts, mobile TV sales in South Korea were as high as 10,000 per day in June), available at <http://news.bbc.co.uk/2/hi/technology/5105400.stm>. In Europe, Vodafone currently provides over 25 channels of mobile TV and Virgin Mobile provides a variety of popular TV channels free of charge to subscribers with plans starting at £25 per month. See Ian Youngs, *Will Mobile Make Moving Viewing?*, BBC News, Sept. 29, 2006, available at <http://news.bbc.co.uk/2/hi/entertainment/5389114.stm>. In a mobile TV trial in Oxford, England, O2 and BT Movio found that nearly 80% of people would subscribe to a mobile TV service. See *Brits Show Appetite for Mobile TV*, BBC News, Jan. 17, 2006 (finding that people were viewing an average of three hours per week, with demand highest during morning and evening commutes to work), available at <http://news.bbc.co.uk/2/hi/technology/4620792.stm>.

<sup>208</sup> See Baig, *supra* note 206.

<sup>209</sup> See Greg Sandoval, *Mobile TV Gets On a Roll*, CNET News.com, Jan. 27, 2006 (explaining that “companies like MobiTV, which provides the mobile TV service for cell phone operators Sprint and Cingular, are  
(footnote continued...)

addition, wireless operators are pursuing the possibility of providing wireless multicast video using one of two competing technologies: Forward Link Only (“FLO”) and Digital Video Broadcasting-Handheld (“DVB-H”).<sup>210</sup> Qualcomm, the inventor of FLO technology, has acquired spectrum licenses in the 700 MHz band that will allow it to deploy a nationwide network to deliver its MediaFLO service.<sup>211</sup> Both Sprint Nextel and Verizon Wireless have announced plans to use Qualcomm’s MediaFLO to deliver a wireless multicast video service to their subscribers.<sup>212</sup> Modeo, L.L.C., a subsidiary of Crown Castle International Corp., and Hiwire, a subsidiary of Aloha Partners LP, have acquired spectrum licenses in the 1.6 GHz and 700 MHz bands, respectively, and plan to invest \$500 million each to build networks using DVB-H to compete with MediaFLO.<sup>213</sup>

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(...footnote continued)

now transmitting data at about 15 to 20 frames per second”), at [http://news.com.com/Mobile+TV+gets+on+a+roll/2100-1039\\_3-6031768.html](http://news.com.com/Mobile+TV+gets+on+a+roll/2100-1039_3-6031768.html).

<sup>210</sup> For more information, see FLO Technology Overview, available at [http://www.qualcomm.com/mediaflo/news/pdf/flo\\_tech\\_overview.pdf](http://www.qualcomm.com/mediaflo/news/pdf/flo_tech_overview.pdf); Press Release, Nokia, *Motorola and Nokia to Cooperate on Mobile TV Interoperability*, Sept. 11, 2006 (explaining how with DVB-H, consumers can receive live broadcasts while simultaneously using the telephone and Internet functions on their phones), available at <http://www.mobiletv.nokia.com/news/showPressReleases/?id=82>.

<sup>211</sup> See Joni Morse, *MediaFLO Trials Under Way, but Company Not Telling Much More*, RCR Wireless News, Oct. 9, 2006, at 1. Qualcomm plans to invest \$800 million in this network build-out. See *id.*

<sup>212</sup> See *id.* The Commission has allowed Qualcomm to operate MediaFLO in markets where broadcasters are still using the 700 MHz spectrum, suggesting that wireless provider adoption of MediaFLO is likely to increase across the board. See Heather Forsgren Weaver, *With Some Restrictions, FCC Allows Qualcomm’s MediaFLO to Move Forward*, RCR Wireless News, Oct. 12, 2006, available at <http://www.rcrnews.com/printwindow.cms?newsId=27521&pageType=news>.

<sup>213</sup> See *Study: 4 Million Users to Sign Up for Mobile TV in the U.S. Next Year*, RCR Wireless News, Sept. 22, 2006, at 26; Mike Dano, *DVB-H Players Refine Launch Plans, Service Strategies*, RCR Wireless News, Oct. 6, 2006, at 1. There is some indication that T-Mobile may be teaming up with one or both companies to trial DVB-H video. See *id.* Despite the fact that no U.S. carrier has officially started using DVB-H technology, Intel, Microsoft, Motorola, Nokia, and Texas Instruments have all indicated strong support of the new technology. See Baig, *supra* note 206.

Wireless operators are providing subscribers with the top-rated content they demand. As the Commission has noted, “[m]obile telephone providers are increasingly offering video that includes content from traditional cable networks, as well as pre-recorded content from a host of other producers.”<sup>214</sup> Today, carriers provide an array of news, information, and entertainment video to their subscribers. For instance:

- Sprint Nextel’s MobiTV provides linear network programming featuring sports and entertainment news, more than fifty video and audio channels of live and on-demand programming, and a variety of full-length pay-per-view films.<sup>215</sup> Sprint Nextel also exclusively provides Power View, a made-for-mobile sports network, with live highlights from sports venues around the country, at no additional cost to its customers.<sup>216</sup>
- Cingular’s mobile TV service provides consumers with clips of TV shows, sports, news, weather, and other entertainment programming.<sup>217</sup> Recently, Cingular teamed up with HBO Mobile to provide subscribers with full-length episodes from the first

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<sup>214</sup> *12<sup>th</sup> Annual Report* ¶ 133 (citing as examples live and recorded programming from the Discovery Channel, ESPN, Weather Channel, Fox News, and Nickelodeon); *see also supra* Section II.D (describing how broadcasters are increasingly providing their content for download on mobile phones).

<sup>215</sup> *See* Joni Morse, *Sprint Nextel Trials Qualcomm’s MediaFLO as “Vue,”* RCR Wireless News, Oct. 10, 2006, available at <http://www.rcrnews.com/printwindow.cms?newsId=27492&pageType=news>; Karen Brown, *Mobile Gets Into the Hollywood Picture*, Multichannel News, Sept. 18, 2006 (explaining that, as part of its Movies service, Sprint Nextel offers 45 movie titles from Buena Vista, Lionsgate, Sony Pictures, and Universal Pictures priced at \$4 to \$6 per view), available at <http://www.multichannel.com/article/CA6372719.html>. Live video programming available on Sprint mobile phones includes over 20 live video channels including programming from FOX News, ABC News Now, FOX Sports, Discovery, and TLC. *See* MobiTV, Inc., Sprint, USA (Sprint TV Live) Channels, at [http://www.mobitv.com/channels/channelstv.php?i=sprint\\_tv\\_live](http://www.mobitv.com/channels/channelstv.php?i=sprint_tv_live) (last visited Nov. 28, 2006).

<sup>216</sup> *See* Press Release, Mobile Tracker, *Sprint Launches Sports Video Network* (Sept. 12, 2006), available at <http://www.mobiletracker.net/archives/2006/09/12/sprint-power-view>. Sprint Nextel is also working closely with advertisers to develop creative advertising techniques to generate increased revenue. *See* Brown, *supra* note 215 (citing as examples Toyota’s sponsorship of mobisodes of Fox Network’s “Prison Break,” and CNN’s advertising trials on Sprint’s PowerVision).

<sup>217</sup> *See* Press Release, Cingular, *Watch This! Cingular Video Now Available* (Mar. 7, 2006) (highlighting the wide variety of TV programming available from Cingular, and emphasizing that Cingular Video delivers the most comprehensive coverage of sports material than any other wireless carrier), available at [http://cingular.mediaroom.com/index.php?s=press\\_releases&item=1464](http://cingular.mediaroom.com/index.php?s=press_releases&item=1464).

season of hit show *Entourage*, plus segmented episodes of *Sex and the City*, and *Curb Your Enthusiasm*.<sup>218</sup>

- Verizon's V-CAST -- which offers music videos, TV-show highlights, movie trailers, news, sports, and entertainment programming -- is now providing consumers with a subscription option offering one day of viewing for only \$3.<sup>219</sup> Moreover, Verizon recently teamed up with AtomFilms to provide V-CAST subscribers short films from top directors of independent films.<sup>220</sup>

In addition to these examples, recent agreements between content producers and alternative distribution channels, such as last year's deal between Apple and Disney to provide episodes from Disney-owned ABC and Disney Channel content via Apple's video iPod, suggest that content producers are more open than ever to alternative ways to provide video content to consumers, including through mobile telephones.<sup>221</sup> As mobile video becomes even more widely adopted, and the networks demonstrate that they can handle the increased supply of video content and demand from consumers, the Commission can expect that more and more content will find its way into consumers' lives via their mobile handsets.

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<sup>218</sup> See Press Release, Cingular, *HBO Mobile and Cingular Wireless Extend "Entourage" to Wireless Phones* (July 12, 2006), available at <http://www.prnewswire.com/mnr/cingular/24946/>. Cingular's video services are available for a monthly fee providing unlimited access to video content, text messaging, e-mailing, and picture sharing. See Marguerite Reardon, *Cingular Launches Mobile-TV Service*, CNET News.com, Mar. 6, 2006 (noting that this unlimited access package, which costs \$19.99 per month, allows consumers to view short clips from 18 different channels, including the Cartoon Network, NBC, and ESPN), at [http://news.com.com/2100-1039\\_3-6046551.html](http://news.com.com/2100-1039_3-6046551.html).

<sup>219</sup> See Todd Spangler, *Verizon Offers One-Day V Cast "Snacking" Option*, Multichannel News, Oct. 19, 2006, available at <http://www.multichannel.com/article/CA6383029.html>. Twenty million Verizon Wireless subscribers now have video-capable phones, a significant number of whom pay \$15 a month to access V Cast. Noguchi, *supra* note 109.

<sup>220</sup> See Press Release, Atom Entertainment, Inc., *AtomFilms and Verizon Wireless Premiere Original Short Films From Top Indie Filmmakers ON V CAST Phones and on the Web* (May 24, 2006), available at [http://atomentertainment.com/asw\\_pressrelease\\_052406.htm](http://atomentertainment.com/asw_pressrelease_052406.htm).

<sup>221</sup> See Charlie McCollum, *TV Industry Latching on to Evolving Technologies*, San Jose Mercury News, Oct. 16, 2006 (quoting television historian Tim Brooks' reaction to the race to provide alternative viewing formats to consumers: "this is the first time I can remember that the industry has tried to get ahead of a change rather than follow it. The industry has fallen all over itself to find a way to make a business model, monetize and adjust to a new technology"), available at <http://www.mercurynews.com/mld/mercurynews/entertainment/television/15757000.htm>.

## **B. Broadband over Power Line Technology Is Another Potential Video Distributor.**

In the last two Video Competition Reports, the Commission recognized the increasing viability of delivering video via BPL and other utilities.<sup>222</sup> In just two years, BPL technology has become a potential capital- and customer-attracting MVPD competitor.<sup>223</sup>

In August 2006, the Commission adopted an order recognizing the significant benefits that BPL technology offers by extending broadband Internet access to homes and businesses and introducing additional competition to existing broadband services.<sup>224</sup> Chairman Martin declared that the Commission's order "will allow BPL systems to flourish."<sup>225</sup> To that end, the order denied requests by the amateur radio community and the television industry to exclude BPL from certain frequencies.<sup>226</sup>

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<sup>222</sup> See *11<sup>th</sup> Annual Report* ¶ 133; *12<sup>th</sup> Annual Report* ¶ 126.

<sup>223</sup> See Ken Silverstein, *Broadband's Evolution*, EnergyBiz Insider, Oct. 4, 2006, available at [http://www.energycentral.com/centers/energybiz/ebi\\_printer\\_friendly.cfm?id=216](http://www.energycentral.com/centers/energybiz/ebi_printer_friendly.cfm?id=216). BPL revenues are expected to grow from \$57 million in 2004 to \$4.4 billion in 2011. See *id.*

<sup>224</sup> See *In re Amendment of Part 15 Regarding New Requirements and Measurement Guidelines for Access Broadband over Power Line Systems, Carrier Current Systems, Including Broadband Over Power Line Systems*, Memorandum Opinion & Order, 21 FCC Rcd. 9308, ¶ 4 (2006) ("*BPL Order*").

<sup>225</sup> *Id.* (Statement of Chairman Kevin J. Martin). State utility commissions are also working to advance BPL. For example, California's Public Utility Commission recently approved a proposal that would allow state power utilities to form separate companies to develop and sell BPL to consumers. The proposal also authorizes a utility to grant the new entities free access to their networks. See Al Senia, *New Life for Broadband over Power Lines?*, America's Network (online ed.), June 1, 2006, available at <http://www.americasnetwork.com/americasnetwork/article/articleDetail.jsp?id=330558>.

<sup>226</sup> *BPL Order* ¶¶ 35, 69; see also News Release, FCC, *FCC Classifies Broadband Over Power Line-Enabled Internet Access As Information Service* (Nov. 3, 2006) (announcing an order that places BPL-enabled Internet access service on an equal regulatory footing with other broadband services, such as cable modem service and DSL Internet access service), available at [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-268331A1.doc](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-268331A1.doc).

The widespread deployment of BPL could provide consumers with yet another way to access video via high-speed Internet service and potentially new BPL multichannel services.<sup>227</sup>

- Google is supporting efforts to roll out BPL video distribution services to two million homes and businesses in Texas. The bundled high-speed internet, voice, and video service will likely be marketed for about \$45 per month, and the video service is expected to include many traditional programming networks.<sup>228</sup>
- Current Communications began offering BPL in Cincinnati 2 years ago. The service, which is capable of transmitting high quality video signals, is available to approximately 60,000 households.<sup>229</sup> Current Communications is partnering with TXU Electric Delivery and others to deploy a multi-purpose high-speed data network in Texas that is expected to allow customers to “better access videos” according to EarthLink President Gary Betty.<sup>230</sup>
- ANEW Broadband, which already provides high-speed Internet over power lines in parts of Florida, is developing plans to launch an on-demand video service that can be deployed in hotels and other niche markets.<sup>231</sup>

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<sup>227</sup> BPL deployment in test markets continues to progress. In 2005, it was reported that BPL technology was being tested in Manassas, VA, San Diego, CA, Houston, TX, and as many as 18 states. See Tim Kridel, *Pipe Dream*, Telephony, June 8, 2005, available at [http://supercommnews.com/daily/wed/telecom\\_pipe\\_dream/](http://supercommnews.com/daily/wed/telecom_pipe_dream/); Akweli Parker, *Broadband's New Outlet*, Philadelphia Inquirer, Sept. 11, 2005, at C1; Louis Trager, *FCC Tech Official Says Agency's in Good Company Pushing BPL*, Communications Daily, Mar. 7, 2005, at 6. In 2006, Telkonet, Inc. and EarthLink deployed a BPL test in nine apartment complexes in Washington, D.C. using Telkonet's powerline backbone. See Press Release, Earthlink, Inc., *Telkonet and EarthLink to Deliver Broadband Over Power Lines to D.C. Apartment Dwellers* (Oct. 17, 2006), available at [http://www.earthlink.net/about/press/pr\\_broadband\\_powerlines/](http://www.earthlink.net/about/press/pr_broadband_powerlines/). In New York City, Ambient Corp., Earthlink, and Con Edison tested BPL in a high rise on Manhattan's Upper West Side and reported that it took just a few days to install the technology in the 16-story, 213-unit condominium building. See K.C. Jones, *Big Apple Eyes Broadband Over Power Lines*, TechWeb Technology News, Oct. 17, 2006, available at <http://www.techweb.com/wire/networking/193303493>. Also in 2006, it was reported that there are six commercial deployments of BPL, including by a rural electric cooperative in Virginia and one in south central Indiana. See Silverstein, *supra* note 223.

<sup>228</sup> See Christy Rickard, *BPL Prepares for Entry into Video*, Kagan Media Money, Jan. 18, 2006, at 1 (noting that the service is expected to include programmers such as QVC, Encore, STARZ!, Discovery, A&E, and Lifetime).

<sup>229</sup> Will Astor, *BPL Technology Gives Users Another Route to the Internet*, Rochester Bus. J., June 2006.

<sup>230</sup> *CURRENT Communications Announces \$130 Million in Investments in Broadband Over Power Line Networks*, VoIP Mag., May 4, 2006, available at <http://www.voip-magazine.com/content/view/3048/20060504005413/>; John Powers, *The Digital Revolution, the Smart Grid and Why the Utility Industry Isn't Like Your Grandmother's Oldsmobile Anymore*, Electric Light & Power (Mar. 1, 2006), available at [http://uaelp.pennnet.com/Articles/Article\\_Display.cfm?Section=ARTCL&ARTICLE\\_ID=251833&VERSION\\_NUM=2&p=34](http://uaelp.pennnet.com/Articles/Article_Display.cfm?Section=ARTCL&ARTICLE_ID=251833&VERSION_NUM=2&p=34).

<sup>231</sup> See Jim Wyss, *Miami Firm Offers New Path To Internet*, Miami Herald, Feb. 6, 2006, at G21.

- KlikVU, Inc. announced plans to stream VOD programming, including movies, television, sports, and foreign language films through the BPL network run by Gridline Communications Holdings, a Texas-based BPL company providing Internet access, VoIP telephony, streaming video, telemedicine, and long distance learning.<sup>232</sup>

Further, BPL is attracting significant investment capital. For example, in the first half of 2006, BPL company Current Communications Group Ltd garnered secured \$130 million in funding from TXU Corp, Earthlink, General Electric, Google Inc, Goldman Sachs & Co., and The Hearst Corp.<sup>233</sup> Further, about 20% of the nation's utilities are considering investments in BPL.<sup>234</sup> Strong support for BPL technology continues to come from a variety of market sectors through membership in the HomePlug Powerline Alliance ("HPPA") standards group.<sup>235</sup>

### **C. The Evolution of the Video Marketplace Is Generating Entirely New Distribution Alternatives, with Massive Competitive Impact.**

In addition to the sources of video described above, other innovative ways to access video are emerging, creating still more competition for the time and attention of consumers. For example,

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<sup>232</sup> See Press Release, *KlikVU, Inc., KlikVU Announces Streaming Video Deal With Gridline Communications; KlikVU Movies to Become Available via Electric Outlets* (Dec. 1, 2005), available at <http://www.klikvu.com/gridlinepressrelease.html>.

<sup>233</sup> See Press Release, *Tekrati Inc., Venture Capital Investments in IT Sector Up \$1 Billion in First Half 2006, Says Datamonitor* (Oct. 27, 2006), available at <http://www.tekrati.com/research/News.asp?id=8007>.

<sup>234</sup> See Silverstein, *supra* note 223.

<sup>235</sup> See generally HomePlug Powerline Alliance, *Home Page*, at <http://www.homeplug.org/en/index.asp>. Intel, Cisco Systems/Linksys, Motorola, Comcast, GE Security, and EarthLink are sponsor members of HPPA, and major consumer electronic players such as Samsung, Sony, and Sharp are also members. See HomePlug Powerline Alliance, *Alliance Members*, at <http://www.homeplug.org/en/about/members.asp> (last visited Nov, 13, 2006). In addition to BPL, natural gas lines may provide broadband access in the near future. Nethercomm. Corp. has patented a low-power, ultrawideband, high-frequency transmission system that send radio signals through existing natural gas lines. See *State Regulators at NARUC's Summer Meeting Learned of a New Radio Based Technology*, *Communications Daily*, Aug. 3, 2006, at 4. Nethercomm, in cooperation with San Diego, California's gas utility, plans to conduct a field test of the technology later this year. See *id.*

- Downloading video from iTunes to portable video players, especially the Apple video iPod, has gained popularity in the past year and demonstrates consumer demand for the ability to watch video content with the flexibility of a portable device.<sup>236</sup> iTunes is generating serious revenue. During the first week of its offering on iTunes, Disney sold 125,000 movie downloads on iTunes worth \$1 million, and expects to generate \$50 million in added revenue from iTunes this year.<sup>237</sup>
- Newspapers are increasingly adding video and other multimedia content to their websites, especially to cover major news events.<sup>238</sup> In response, the National Academy of Television Arts & Sciences has decided to offer its first-ever Emmy to honor “original news and documentary programming created specifically for ‘non-traditional’ viewing platforms.”<sup>239</sup>
- TiVo now offers TiVoCast, a free service that allows TiVo subscribers to watch Internet video clips through a broadband-connected TiVo device connected directly to their televisions.<sup>240</sup>

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<sup>236</sup> Many industry analysts agree that Apple’s offering of ABC shows for download from iTunes started the trend in the video industry “to mimic music in making its works available for people to enjoy as they want.” See Louis Trager, *VoIP Insurgents Vow They’ll Upend TV Next*, Communications Daily, Mar. 17, 2006, at 6 (quoting VoIP pioneer Jeff Pulver who estimates that by “‘2016, only 1/3 of TV viewing will adhere to traditional schedules,’ and the change opens the door for program creators ‘perhaps bypassing traditional channels’”); Linda Moss, *Download Deals All the Rage for Networks*, Multichannel News, Nov. 14, 2005, available at <http://www.multichannel.com/article/CA6283421.html>.

<sup>237</sup> See Keith Regan, *Disney, iTunes Partnership Off to Rousing Start*, MacNewsWorld, Sept. 20, 2006, at <http://www.macnewsworld.com/story/53134.html>.

<sup>238</sup> See Josh Wein, *TV Stations Should Develop Web-Only Content, NBC Says*, Communications Daily, Apr. 21, 2006, at 6 (quoting Roger Ogden, President, Gannett Broadcasting, who warns: “Don’t overlook how the ease of entry into this world has changed. Newspapers have developed video capabilities very quickly, and their ability to produce and distribute content is really quite interesting and sometimes quite frightening”); see also Gary Gannaway, *If You Stream it, They Will Vote*, Broad. & Cable, Nov. 6, 2006 (noting that newspapers are providing video content including political advertising and candidate debates), available at <http://www.broadcastingcable.com/article/CA6388443.html>. Since the New York Times launched a video page in December 2005, staffers have produced more than 700 video reports, and the site counts 4-5 million video streams per month. See Allison Romano, *The Paper Chase*, Broad. & Cable, Aug. 14, 2006, available at <http://www.broadcastingcable.com/article/CA6361915.html>.

<sup>239</sup> P.J. Bednarski, *NATAS Gives First Nods to ‘Net Newsters*, Broad. & Cable, July 5, 2006 (discussing the nominated documentaries from Washingtonpost.com, MTVNews.com, and NationalGeographic.com), available at <http://www.broadcastingcable.com/article/CA6349755.html>.

<sup>240</sup> See *New Technologies*, Communications Daily, June 8, 2006, at 15; Peter Grant, *Plugging the Web Into the TV*, Wall St. J., Aug. 4, 2006, at A11 (stating that, while viewing programming using the TiVo device, you “can’t even tell whether it came from the TV or off the Internet.”). TiVoCast provides video clips from many websites, including The New York Times, CNet, H2O, iVillage, Heavy.com, and Rocketboom. See David Lieberman, *TiVo Diversifies its Lineup with Web Video*, USA Today, June 6, 2006, available at [http://www.usatoday.com/tech/products/services/2006-06-06-tivo-web-video\\_x.htm](http://www.usatoday.com/tech/products/services/2006-06-06-tivo-web-video_x.htm); see also David Lieberman, *TiVo Rolls Out a New Menu of High-Tech Services*, USA Today, Nov. 14, 2006 (noting that TiVo has added video  
(footnote continued...))

- Several FM radio broadcasters have started experimenting with broadband digital radio to include video signals along with their digital audio broadcasts.<sup>241</sup> Also, digital satellite radio provider Sirius plans to use a portion of its satellite radio capability to create video channels available for backseat viewing in automobiles.<sup>242</sup>

And that is not all. The next generation of consumers is constantly engaged with all kinds of other technologies -- some with video and some without -- like MP3 players, instant messaging, gaming, social networking sites, satellite radio, and texting. All of these modalities of communications are important to younger consumers, all are part of the paradigm shift to a “what-you-want-when-you-want-it” world, and all of them compete with traditional and not-so-traditional video distribution technologies for time, attention, and dollars.

#### **IV. COMCAST CONTINUES TO INVEST AND INNOVATE TO OFFER CONSUMERS THE HIGHEST QUALITY, AND MOST DIVERSE AND ATTRACTIVE, OPTIONS IN VIDEO, BROADBAND, AND TELEPHONY.**

Comcast welcomes the challenges presented by intense and growing competition. To continue to attract and satisfy customers, Comcast and other cable operators constantly work to develop new and innovative programming and services, to upgrade existing services, and to increase the value proposition to consumers by offering cutting-edge broadband and telephone services. This commitment to innovation and delivering value and choice to its consumers is evident in everything Comcast does, from its core video business, where Comcast has spent the

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(...footnote continued)

clips from CBS Interactive, Reuters, and Forbes to TiVoCast, and has also added several new services for subscribers, including a home movie service that allows subscribers to transmit movies via the Internet to other people’s TiVos), available at [http://www.usatoday.com/money/media/2006-11-14-tivo-usat\\_x.htm](http://www.usatoday.com/money/media/2006-11-14-tivo-usat_x.htm).

<sup>241</sup> See *Video Over Digital*, NAB Weekly Newsletter for Radio Broadcast Engineers, Oct. 16, 2006 (describing video tests being conducted by FM broadcasters).

<sup>242</sup> See *id.* (noting that Sirius intends to provide two to three channels of children’s programming for backseat viewing); Michael Kwan, *Sirius Satellite Video Due Before End of Year?*, Mobile Mag., Aug. 1, 2006 (“[W]e are close to signing deals to offer the best video programming for kids as part of our OEM offering in the second half of the year.”), at <http://www.mobilemag.com/content/100/337/C8927/> (last visited Nov. 9, 2006).

past year enhancing the programming options available to its subscribers, to its broadband and telephony businesses, where Comcast has invested significant time, energy, and resources to bring these services -- and attractive bundles of services -- to as many households as possible.

**A. Comcast Brings Its Video Subscribers Greater Choice and Greater Value.**

Comcast takes great pride in offering its subscribers a vast array of video programming options and services. As Comcast continues to enhance its traditional cable offerings, however, it is also looking for ways to combine existing assets with innovative new technologies to deliver even more content to consumers. This approach allows Comcast to deliver greater choice and maximize value for subscribers.

**Program Offerings.** Over the past year, Comcast has continued to enhance its traditional cable offerings. Most recently, Comcast announced an agreement to carry a new business news channel being developed by News Corp.<sup>243</sup> In addition, Comcast announced that the college-sports network CSTV will be added to the digital-cable lineup in several Comcast markets throughout the Southeast.<sup>244</sup> In the past four years, Comcast has entered into carriage agreements with well over 50 independent programming channels, many of which (*e.g.*, Oxygen, CSTV, Tennis Channel, NFL Network, Starz!, Encore, and 38 Hispanic and other ethnic programmers) have no common ownership with major broadcasters, other cable programmers, or

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<sup>243</sup> See Mike Reynolds, *Fox News In Business with Comcast*, Nov. 7, 2006, available at <http://www.multichannel.com/article/CA6389133.html>.

<sup>244</sup> The markets are: Memphis, TN; Jackson, Meridian, Laurel, and Hattiesburg, MS; Huntington, WV; Lake County, FL; and Monroe, LA. These markets are home to schools that play in Conference USA, one of CSTV's "most valued conference partners." *Comcast Adds CSTV to Several Systems*, Multichannel News, Nov. 6, 2006 (quoting CSTV CEO Brian Bedol), available at <http://www.multichannel.com/article/CA6388751.html>.

cable MSOs.<sup>245</sup> In fact, over 90% of the networks carried by Comcast are not affiliated with Comcast.<sup>246</sup>

Subscribers to Comcast's traditional cable service have numerous programming options to fit their budgets. As the attached channel lineup from Arlington, Virginia shows, subscribers in a typical Comcast system can choose among a wide array of options:

- A basic tier that provides local broadcast stations, PEG channels, leased access channels, and several basic cable networks.
- An expanded basic tier offering the basic tier channels plus popular programming networks such as ESPN, BET, CNN, Discovery, Nickelodeon, and the Disney Channel.
- Several levels of digital service that include access to an interactive programming guide, ON DEMAND, advanced parental controls, digital music channels, broadcast multicast programming, and featuring up to 250 digital cable networks.<sup>247</sup>
- Themed tier options that cater to the programming interests of particular customers or that contain programming that require unique cost structures (*e.g.*, high-cost programming with potentially limited appeal). For example, Comcast subscribers can purchase a Family Tier that contains an average of 35-40 channels, including networks such as PBS Kids Sprout, Disney Channel, Toon Disney, Nickelodeon, and Discovery Kids.<sup>248</sup> Customers in Arlington can also purchase a Sports Tier that includes networks such as Fox Soccer Channel, GolTV, NBA TV, College Sports TV, and others.
- Over 50 multicultural cable networks, including Spanish-language networks like Discovery en Español, CNN en Español, and Toon Disney en Español.<sup>249</sup>

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<sup>245</sup> See *Adelphia Reply* at 83.

<sup>246</sup> See, *e.g.*, Comcast's Arlington, VA channel lineup (attached hereto as Exhibit 2).

<sup>247</sup> For more information about Comcast's digital cable offerings, see Comcast's Video Services Fact Sheet, at [http://media.corporate-ir.net/media\\_files/irol/14/147565/video.pdf](http://media.corporate-ir.net/media_files/irol/14/147565/video.pdf). Comcast currently offers over 185 multicast streams nationwide from commercial broadcasters in 81 markets. See also *supra* note 161.

<sup>248</sup> See Press Release, Comcast Corp., *Comcast Announces Family Tier* (Dec. 22, 2005), available at <http://www.cmcsk.com/phoenix.zhtml?c=147565&p=irol-newsArticle&ID=798663&highlight>.

<sup>249</sup> Comcast recently launched a Spanish-language film channel called "VeneMovies" that will be included in its "CableLatino Hispanic" programming package. *Carriage*, CableFAX Daily, Sept. 7, 2006, at 2. Comcast strives to be sensitive to the needs of each community it serves by providing service offerings that are often tailored to address the unique cultural needs of individual communities.

- HDTV options, including an expanding universe of networks like ESPN HD and Discovery HD Theater.
- A wide selection of premium content, including HBO, Showtime, Cinemax, and STARZ.

As the Commission has recognized previously, Comcast offers a wide variety of program and price combinations that allow consumers to find the right mix of services to meet their content interests and financial constraints.<sup>250</sup>

**VOD.** Comcast continually seeks new ways to use non-traditional video distribution channels to increase the programming available to its subscribers. VOD is a key element of this strategy. According to Jeff Shell, President of Comcast Programming: “If you want to launch new concepts, you must do it in a non-linear way. . . . This is the model of the future, and we’re putting our money where our mouth is.”<sup>251</sup>

Comcast offers almost 8000 VOD titles in the course of a single month on Comcast ON DEMAND, 6000 of which are available at any one time, and 95% of which are available free of charge to digital subscribers.<sup>252</sup> In the last two years, Comcast subscribers have viewed *over three billion* ON DEMAND titles.<sup>253</sup> In 2005, Comcast customers watched more than 1.4 billion ON DEMAND programs, and on average, customers with ON DEMAND used the service more than 20 times per month.<sup>254</sup> The most popular ON DEMAND categories are music videos and

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<sup>250</sup> See FCC, Media Bureau, *Report on the Packaging and Sale of Video Programming Services to the Public* 65 & n.319 (Nov. 18, 2004), available at [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-254432A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-254432A1.pdf).

<sup>251</sup> Simon Applebaum, *Upfront On Demand*, CableFAX Daily, Apr. 24, 2006, at 2.

<sup>252</sup> See Peter Grant, *Cable TV Haves and Have-Nots*, Wall St. J., May 6, 2006, at P5.

<sup>253</sup> See Miriam Hill, *End of TV (As We Know It)*, Phil. Inquirer, Oct. 15, 2006, at A1.

<sup>254</sup> See Comcast Corp., *Fact Sheet, ON DEMAND*, at [http://media.corporate-ir.net/media\\_files/irol/14/147565/On\\_Demand.pdf](http://media.corporate-ir.net/media_files/irol/14/147565/On_Demand.pdf) (last visited Nov. 29, 2006).

programs, with more than 620 million views; children's shows, with over 382 million views; free movies, with over 207 million views; and sports and fitness programming, with 82.7 million views.

Comcast is continually augmenting its ON DEMAND offerings. One of Comcast's most recent additions, undertaken in conjunction with Sony and Lionsgate, is a horror movie network called FearNet, which launched, not as a linear network, but via Comcast ON DEMAND and over the Internet.<sup>255</sup> Diana Robina, Comcast's President of Emerging Networks, explained that FearNet represents "a new model."<sup>256</sup> In addition, Comcast has worked with existing networks to take advantage of VOD to premiere new shows and provide other content via ON DEMAND. For example, Comcast has worked with VH1 (*Hogan Knows Best*), TBS (*Return to Gilligan's Island*), and Noggin (*Franklin's Magic Christmas Movie*) to build a following for these shows on VOD before they were aired on the networks themselves.<sup>257</sup> Discovery Channel, which already offers about 75 hours of VOD content on a monthly basis to various cable operators, including Comcast, worked with Comcast to develop a multiplatform campaign to promote Discovery's 19<sup>th</sup> annual "Shark Week."<sup>258</sup> Comcast viewers can also use ON DEMAND to view various broadcast network dramas, including popular hits from CBS and NBC, for up to four weeks after

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<sup>255</sup> See Daisy Whitney, *Screaming to be Heard: FearNet, Others Find Their Way With Unusual Launches*, Television Wk., Oct. 30, 2006, available at <http://www.tvweek.com/article.cms?articleId=30779>. The FearNet website also allows users to rent or buy movies and download them onto their computers, to buy ring tones and wallpapers for mobile phones, and to participate in a user community offering the ability to chat in open forums, create web pages, and post pictures. See Reardon, *supra* note 11.

<sup>256</sup> Phil Rosenthal, *FearNet May Put Scare into Comcast's Rivals*, Chi. Trib., Oct. 29, 2006, at 3.

<sup>257</sup> See Mike Reynolds, *VOD Bites for Discovery, Comcast*, Multichannel News, July 17, 2006, available at <http://www.multichannel.com/article/CA6353578.html>.

<sup>258</sup> *Id.* As part of this effort, Discovery made *Shark Rebellion* available via ON DEMAND ten days before the show debuted on Discovery. The campaign also included "a Shark Week microsite" on Comcast's Internet portal.

the shows originally air.<sup>259</sup> Most recently, Comcast and Disney executed an agreement whereby some of ABC's most popular primetime television shows will be available for free on Comcast ON DEMAND and Disney movies will become available on Comcast ON DEMAND in a 15-45 day window following the DVD release.<sup>260</sup>

Comcast is also using its VOD platform to connect with the communities it serves and bring important news and information to these communities. Comcast counts approximately 7 million views of local VOD content per year. Examples of the rich array of local VOD content available in the Washington, DC metropolitan area includes:

- *Live Right: Topics on Substance Abuse*, a five-episode series that explores topics such as drug and alcohol use as they relate to teenagers, the Columbian drug culture, young people's experiences with substance abuse rehabilitation, and college students' thoughts on the use and effects of drugs and alcohol;
- *In Their Own Words*, a documentary about the events of D-Day as told by World War II veterans from Maryland; and
- *E-Stories*, a collection of live-action, multicultural storyteller performances targeted at children and teenagers available in the Baltimore market.

In the Denver area, Comcast has collaborated with 26 municipal access television stations (Channel 8s) to explore new potential uses of cable technologies that would meet the unique needs of local communities beyond the current existing models and increase the value of community programming to television viewers. The resulting product, *MetroBeat TV*, is a new step forward in viewer-designed programming; viewers throughout the metro Denver area

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<sup>259</sup> See Press Release, Comcast Corp., *Comcast and CBS Introduce Free ON DEMAND Episodes of Primetime CBS Shows For Comcast Digital Cable Customers* (Sept. 14, 2006), available at [http://www.cmcsk.com/phoenix.zhtml?c=147565&p=irol-newsarticle\\_pf&ID=905571](http://www.cmcsk.com/phoenix.zhtml?c=147565&p=irol-newsarticle_pf&ID=905571); Press Release, Comcast Corp., *Comcast and NBC Universal to Offer Hit Shows From NBC, USA Network, Bravo and SCI FI Channel On Demand* (Mar. 30, 2006), available at [http://www.cmcsk.com/phoenix.zhtml?c=147565&p=irol-newsarticle\\_pf&ID=836855](http://www.cmcsk.com/phoenix.zhtml?c=147565&p=irol-newsarticle_pf&ID=836855).

<sup>260</sup> See Glen Dickson, *Comcast, Disney Ink Carriage, On-Demand Pact*, *Broad. & Cable*, Nov. 21, 2006, available at <http://www.broadcastingcable.com/article/CA6394054.html>.

submit story ideas and topics for future shows through a website. After less than a year in operation, and competing against programming from major broadcasting outlets in Colorado, Oklahoma, Kansas, and Nebraska. MetroBeat TV won four Heartland Emmy Awards: for *People to Watch* (best interview-discussion program), *MetroBeat Magazine* (magazine program), MetroBeat Promotions (program promotional campaign) and *Student Voices* (best children's/youth program).<sup>261</sup>

Further, during the most recent election cycle, Comcast offered two VOD services to promote a more engaged and informed electorate. The first, "Candidates ON DEMAND," provided Comcast subscribers with access to "CN8, The Comcast Network interviews with more than 500 political candidates for more than 350 gubernatorial, senate, house, mayoral and other local political races free-of-charge and full-time."<sup>262</sup> The second, "Election 2006," offered candidates advertising time on VOD "to expand their campaign messaging beyond the 30-second spot."<sup>263</sup> Using this service, candidates in some 70 of Comcast's markets had the opportunity to "educate and influence viewers with video as short as two minutes or as long as 30 minutes."<sup>264</sup> Andrea Silbert, a candidate for Massachusetts lieutenant governor, and the first candidate in Massachusetts to take advantage of Comcast's offer, explained that "[g]etting a complete

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<sup>261</sup> See Dusty Saunders, *Saunders: Emmy-Winning MetroBeat Keeps its Focus Local*, Rocky Mtn. News, Oct. 28, 2006, available at [http://www.rockymountainnews.com/drmn/spotlight\\_columnists/article/0,2777,DRMN\\_23962\\_5098835,00.html](http://www.rockymountainnews.com/drmn/spotlight_columnists/article/0,2777,DRMN_23962_5098835,00.html).

<sup>262</sup> *Comcast, CN8 Offer Candidates On Demand*, Multichannel News, Oct. 19, 2006, available at <http://www.multichannel.com/article/CA6383076.html>.

<sup>263</sup> Anthony Crupi, *Comcast Offers Pols Digital Platform*, MediaWeek, Oct. 3, 2006, available at [http://www.mediaweek.com/mw/news/recent\\_display.jsp?vnu\\_content\\_id=1003190433](http://www.mediaweek.com/mw/news/recent_display.jsp?vnu_content_id=1003190433).

<sup>264</sup> *Comcast Spotlight Wants Your Vote*, Multichannel News, Oct. 3, 2006, available at <http://www.multichannel.com/article/CA6377339.html>.

message to voters is critical in a political campaign. The on-demand platform allows us to provide greater detail in an unfiltered presentation not available through traditional media.”<sup>265</sup>

**HDTV & DVR.** HDTV and DVR are two advanced services that continue to generate positive consumer responses. As of the end of the third quarter, Comcast had 4.1 million customers that subscribe to HDTV or DVR service, or both.<sup>266</sup> These advanced services are increasingly integral components of the digital cable package that Comcast offers to consumers, and they are helping to drive increased penetration for digital cable.

HDTV offerings are crucial to Comcast’s future growth.<sup>267</sup> Comcast carries about 20 national and local HD channels in a given market today and plans to offer up to 35 HD channels per market by the third quarter of 2007.<sup>268</sup> Comcast offers many of the most popular channels in HD, including affiliates of all major broadcast networks; Discovery HD, Universal HD, TNT HD, and other national HD programming networks; comprehensive sports coverage with ESPN HD, ESPN2 HD, and regional sports networks across the country; and every available premium HD network, including HD networks from HBO, Cinemax, Starz, and Showtime.<sup>269</sup> In addition,

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<sup>265</sup> *Id.*

<sup>266</sup> Press Release, Comcast Corp., *Comcast Reports Third Quarter 2006 Results*, at 2 (Oct. 26, 2006) (“*Comcast 3Q06 Earnings Release*”), available at [http://media.corporate-ir.net/media\\_files/irol/11/118591/Earnings\\_3Q06/3q06release.pdf](http://media.corporate-ir.net/media_files/irol/11/118591/Earnings_3Q06/3q06release.pdf).

<sup>267</sup> See Joseph Whip, *Comcast’s Steve Burke on HDTV*, TV Predictions.com, Sept. 13, 2006 (“HD is a very important part of our business model. We were one of the first cable operators to offer HD and in most of our markets we offer more highly rated HD programming, than anyone. We also offer more HD VOD (Video on Demand) than any other provider and many places (markets) are up to 100 hours of HD VOD.”), at <http://www.tvpredictions.com/burke091306.htm>.

<sup>268</sup> *See id.*

<sup>269</sup> See Press Release, Comcast Corp., *The Force Is With Comcast Customers: The Complete Star Wars Saga in High Definition Coming to Cinemax On Demand* (Nov. 7, 2006), available at [http://www.cmcsk.com/phoenix.zhtml?c=147565&p=irol-newsarticle\\_pf&ID=928028](http://www.cmcsk.com/phoenix.zhtml?c=147565&p=irol-newsarticle_pf&ID=928028).

Comcast-owned programming network Versus is launching a new HD channel early next year that will offer programming from the Golf Channel and Versus, including NHL games carried by Versus.<sup>270</sup>

Comcast is also expanding its HD VOD library. For example, Comcast announced that it will offer 100 hours of HD VOD programming, including at least 20 HD movies from Starz, and all six Star Wars films will be available on Cinemax HD ON DEMAND nine days before airing on Cinemax HD.<sup>271</sup> Furthermore, Comcast is now offering HD copies of famous works of art directly to televisions via VOD, giving subscribers the ability to create virtual HD art galleries in their homes.<sup>272</sup>

Comcast's DVR service allows customers to record up to 80 hours of standard-definition programming, and up to 15 hours of HD programming.<sup>273</sup> Comcast is undertaking various efforts to improve its DVR service, including working with TiVo to develop TiVo software for set-top boxes used by Comcast DVR service subscribers. Once this project is complete, Comcast's DVR service subscribers will be able to enjoy many highly-touted TiVo features, such as the ability to record programs based on user preferences and TiVo's "famously easy-to-

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<sup>270</sup> See John Consoli, *Versus to Offer High-Def Channel*, MediaWeek, Nov. 15, 2006, available at [http://www.mediaweek.com/mw/news/cabletv/article\\_display.jsp?vnu\\_content\\_id=1003408626](http://www.mediaweek.com/mw/news/cabletv/article_display.jsp?vnu_content_id=1003408626).

<sup>271</sup> See Starz to Help Comcast Boost HD VOD, Multichannel News, Sept. 13, 2006, available at <http://www.multichannel.com/article/CA6371861.html>; Comcast Corp., *supra* note 269 (quoting Page Thompson, Comcast's Senior Vice President and General Manager of Video Services as saying, "[o]nly Comcast customers can watch the movies in HD any time, in any order, and as often as they want").

<sup>272</sup> See Glen Dickson, *Comcast's High-Def Art Gallery*, Broad. & Cable, Nov. 13, 2006 (explaining that Comcast subscribers can access Gallery Player's images for free through VOD that "turns an HD set into a picture frame"), available at <http://www.broadcastingcable.com/article/CA6390361.html>.

<sup>273</sup> For more information about Comcast's DVR service, see Comcast's DVR Fact Sheet, at [http://media.corporate-ir.net/media\\_files/irol/14/147565/DVR.pdf](http://media.corporate-ir.net/media_files/irol/14/147565/DVR.pdf).

use interface.”<sup>274</sup> Comcast is also working on a service that will allow users to program their DVRs from any computer via their high-speed Internet account.

**Adelphia.** On July 31, 2006, Comcast, Time Warner, and Adelphia consummated a transaction wherein Comcast acquired several additional systems and unwound its Texas Cable Partners joint venture.<sup>275</sup> After four years of bankruptcy proceedings, many of the consumers living in communities served by these systems had yet to enjoy the same services available to consumers in the rest of Comcast’s markets.<sup>276</sup> For example, Comcast co-CFO John Alchin recently noted that many of the Adelphia systems are incapable of providing phone service.<sup>277</sup> In its Order approving the Adelphia transactions, the Commission recognized that one of the public interest benefits of the transactions was that customers would benefit from upgrades and improved services that Comcast would provide.<sup>278</sup> Comcast is delivering these benefits by

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<sup>274</sup> Erica Ogg, *TiVo Readies for Prime Time with Comcast*, CNET News.com, Oct. 31, 2006, at [http://news.com.com/TiVo+readies+for+prime+time+with+Comcast/2100-1041\\_3-6130862.html](http://news.com.com/TiVo+readies+for+prime+time+with+Comcast/2100-1041_3-6130862.html).

<sup>275</sup> See Letter from Martha E. Heller to Marlene Dortch, Secretary, FCC, filed in MB Dkt. No. 05-192 (Aug. 3, 2006); see also Mike Farrell, *Comcast Exceeds Expectations - Even the Company’s Own, From Wall Street to Main Street, Cable Giant Delivers on All Fronts*, Multichannel News, Sept. 25, 2006 (quoting analyst Craig Moffett: “Comcast’s vision still starts with video and reinventing the way people watch TV . . . they don’t get the recognition they deserve for blazing the trail for video. They were miles ahead on video on demand. They are the standard bearer in creating a user experience built around what you want to watch, whenever you want to watch it.”), available at <http://www.multichannel.com/article/CA6374506.html>.

<sup>276</sup> See Grant, *supra* note 252, at P5.

<sup>277</sup> Transcript, *Q3 2006 Comcast Corporation Earnings Conference Call* (Oct. 26, 2006) (“*Q3 Conference Call*”) (noting that 50% of subscribers signing up for the “triple play” bundle are new to Comcast), available at <http://media.seekingalpha.com/article/19329>. Mr. Alchin told investors to expect capital investment in those systems over the next 12 to 18 months as Comcast works to make them more “Comcast-like.” *Id.*

<sup>278</sup> See *Applications for Consent to the Assignment and/or Transfer of Control of Licenses, Adelphia Communications Corp., Assignors, to Time Warner Cable Inc., Assignees; Adelphia Communications Corp., Assignors and Transferors, to Comcast Corp., Assignees and Transferees; Comcast Corp., Transferor, to Time Warner Inc., Transferee; Time Warner Inc., Transferor, to Comcast Corp., Transferee*, Memorandum Opinion & Order, 21 FCC Rcd. 8203 ¶ 257 (2006).

rapidly bringing the products and services enjoyed by legacy Comcast systems to the systems that it acquired in the Adelphia transaction, while making the transition as smooth as possible.<sup>279</sup>

**B. Comcast Brings New Broadband Technologies and Innovative Services to More Consumers Than Ever Before.**

Convergence in the communications marketplace is a reality. As a result, Comcast has continued to focus on expanding and improving its broadband and phone services in addition to its video offerings. Comcast is constantly working to offer faster download speeds and more content to its high-speed Internet subscribers. Comcast is also expanding its phone service and is particularly pleased by the success of its triple-play bundle. And, Comcast continues to explore the potential integration of wireless offerings to complement the services that it already offers. Combined, these efforts demonstrate Comcast's commitment to maximizing the value it delivers to consumers.

**Broadband.** Comcast is always seeking ways to innovate and improve its broadband service. To that end, Comcast now markets a service called PowerBoost, which doubles the speed of a subscriber's broadband connection when downloading a large file by passing unused capacity to those users who need extra capacity at a specific point in time (*e.g.*, to download a movie or other video file).<sup>280</sup> Also, in a move to help Comcast enhance its online video

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<sup>279</sup> For example, in the towns of Sandwich, Bourne, and Falmouth, MA, Comcast is trying to make the transition from Adelphia e-mail addresses to Comcast.net e-mail addresses as smooth as possible by offering subscribers use of a tool that will distribute a "change of address" e-mail to everybody in that person's address book, or through a service called "Easy Change," where senders and recipients of e-mail messages are automatically notified of the impending e-mail address change. See Silene Gordon, *Adelphia Picture Will Soon Fade Out*, The Upper Cape Codder, Nov. 2, 2006.

<sup>280</sup> See Dionne Searcey & Sarmad Ali, *Comcast to Speed Downloads of Some Movie, Music Files*, Wall St. J., June 1, 2006, at D3 (reporting that PowerBoost allows customers to download three typical MP3 songs in 6.6 seconds, eight times faster than it would take to download the same three songs using typical DSL speeds); Keith Reed, *Comcast Upgrade Speeds Up Downloads*, Boston Globe, June 2, 2006, at E1 (explaining that the download (footnote continued...))

capabilities, Comcast bought thePlatform, a Seattle-area company specializing in the delivery of video content over the Internet.<sup>281</sup>

Comcast is also improving its service by adding access to content on its portal. For example, Comcast entered into an agreement with JumpTV to allow Comcast's Internet subscribers to view 225 TV channels from around the world, including Sony Entertainment Television Asia (from India), Canal 9 (from Argentina), and TV Chile.<sup>282</sup> Moving forward, Comcast is developing technologies to allow subscribers to stream or download Web-based content from Comcast.net and other web sites straight to their television sets.<sup>283</sup> Combining all of Comcast's assets and multiple distribution channels in this manner will further expand the amount of content that Comcast's subscribers will be able to access.

Comcast takes great pride in the success and development of its Internet portal, Comcast.net, which gets "1.5 billion page views per month and is the No. 3 site in terms of repeat visits."<sup>284</sup> Comcast's broadband video player, The Fan, provides Comcast subscribers

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(...footnote continued)

time for a typical episode of ABC's *Lost* would be cut in half, from about 4.5 minutes using regular cable modem service to about 2 minutes and 15 seconds using PowerBoost).

<sup>281</sup> See John Cook, *Comcast Buys Seattle's thePlatform*, Seattle Post-Intelligencer, June 28, 2006, at C1. Comcast also recently invested in Revver, an online video distribution technology supplier, that "focuses on viral-video distribution, providing tools to link content owners with advertisers and track videos when they are shared between users." Karen Brown, *Comcast, Turner Back Viral-Video Outfit*, Multichannel News, July 31, 2006, available at <http://www.multichannel.com/article/CA6357827.html>.

<sup>282</sup> See *JumpTV to Jump Onto Comcast.net*, Multichannel News, Oct. 16, 2006, available at <http://www.multichannel.com/article/CA6381160.html>.

<sup>283</sup> See Peter Grant, *Cable Takes On Web Video*, Wall St. J., June 29, 2006, at B1.

<sup>284</sup> Abbey Klaassen, *Comcast's Online Goal? Become Another Yahoo*, Advertising Age, Aug. 14, 2006 ("Comcast's broadband player, The Fan, is tracking at more than 60 million views a month. . . . The cable operator has bulked up its online-sales team and plans to open its Comcast.net portal to all its customers -- increasing its potential audience from its 10 million high-speed-data subscribers to its 23 million video subscribers."), available at [http://adage.com/article.php?article\\_id=111104](http://adage.com/article.php?article_id=111104).

with video from a variety of sources, including E!, ABC News Now, and the Associated Press, and has experienced phenomenal growth.<sup>285</sup> The Fan’s users expressed their satisfaction with the service this past September, when The Fan bested 60 other Internet sites and applications to win the “People’s Choice Award” at the 16th Flashforward Conference and Film Festival.<sup>286</sup> Today, The Fan averages over 2 million downloads per day.<sup>287</sup>

Comcast recently announced the launch of Ziddio, an ad-supported Internet site that allows users to post homemade video content on-line.<sup>288</sup> Once the site is officially up-and-running, the clips that have the most potential for life on a bigger screen will be culled from Ziddio and offered via Comcast’s VOD service.<sup>289</sup>

**Phone/Bundles.** Comcast has enjoyed tremendous success with its phone offerings, particularly with its “triple-play” bundle of phone, high-speed cable Internet, and video services.<sup>290</sup> In most markets offering Comcast Digital Voice (“CDV”), consumers can purchase the triple play bundle for only \$99 per month.<sup>291</sup> Comcast reported a total of 2.1 million phone

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<sup>285</sup> *See id.*

<sup>286</sup> *See* Press Release, Comcast Corp., *Comcast Wins People’s Choice Award for The Fan(TM) Media Player*, Sept. 15, 2006, available at <http://news.corporate.findlaw.com/prnewswire/20060915/15sep20061457.html>. The Fan competed against 60 other Internet sites and applications for the award. *See id.*

<sup>287</sup> *See id.*

<sup>288</sup> *See* Anthony Crupi, *Comcast To Test Site for User-Gen Video*, MediaWeek, Nov. 6, 2006, available at [http://www.mediaweek.com/mw/news/recent\\_display.jsp?vnu\\_content\\_id=1003352853](http://www.mediaweek.com/mw/news/recent_display.jsp?vnu_content_id=1003352853).

<sup>289</sup> *See id.*

<sup>290</sup> As explained by Brian L. Roberts, Chairman and CEO of Comcast, “Cable’s outstanding results reflect both great execution and growing demand for our Triple Play offering. Our strategy of bringing value to consumers through a set of superior services is driving the business to new levels of performance.” *Comcast 3Q06 Earnings Release* at 1.

<sup>291</sup> *See id.*; *see also* Carol Wilson, *Comcast Offers Triple Play for \$99*, Telephony, July 10, 2006, available at [http://telephonyonline.com/independent/marketing/comcast\\_triple\\_play\\_071006/](http://telephonyonline.com/independent/marketing/comcast_triple_play_071006/); *Q3 Conference Call* (noting that (footnote continued...))

customers at the end of the third quarter of 2006.<sup>292</sup> At the end of the third quarter, CDV service reached (and is marketed to) over 30 million homes, or about 65% of the homes within the Comcast footprint.<sup>293</sup> Comcast expects CDV will be available to pass approximately about 80% of the homes in Comcast's footprint by the end of 2006, and 90% of those homes by the end of 2007.<sup>294</sup>

**Wireless.** Comcast is also pursuing various wireless strategies. Last year, Comcast and other cable operators announced a joint venture with Sprint Nextel. Through this project, Comcast and the other cable operators are investigating ways to integrate wireless offerings, using Sprint Nextel's nationwide wireless network, with their existing offerings. In fact, Comcast just introduced wireless telephone service through its partnership with Sprint Nextel in Boston, Massachusetts and Portland, Oregon.<sup>295</sup>

Comcast also partnered with other cable operators in a joint venture named SpectrumCo to participate in the FCC's recent Advanced Wireless Services ("AWS") Auction. SpectrumCo

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(...footnote continued)

50% of subscribers signing up for the "triple play" bundle are new to Comcast). Comcast is also pursuing alternative distribution channels to reach potential subscribers, such as its partnership with Wal-Mart to sell Comcast's triple-play bundle to retail customers at over 500 Wal-Mart locations in Comcast's service area. *See Comcast Will Partner with Wal-Mart to Sell the MSO's Triple-Play Bundle*, Communications Daily, Apr. 11, 2006, at 9.

<sup>292</sup> *See Comcast 3Q06 Earnings Release* at 2-3.

<sup>293</sup> *See id*; *see also* Kimberly, S. Johnson, *The Deal for Phone, Cable, and Internet is the Latest Salvo in the War Between Phone and Cable Firms*, *Denv. Post*, June 29, 2006, available at [http://www.denverpost.com/business/ci\\_3984025](http://www.denverpost.com/business/ci_3984025)

<sup>294</sup> *Q3 Conference Call*.

<sup>295</sup> *See Kelly Hill, Comcast Sells Wireless Service Bundle in Boston, Portland*, RCR Wireless News, Nov 28, 2006 (noting that customers will be able to "watch mobile TV channels, check your e-mail and make unlimited calls from your wireless phone to your Comcast Digital Voice home phone"), available at <http://rcrnews.com/news.cms?newsId=27839>.

successfully bid \$2.4 billion to acquire licenses that give the cable operators a nationwide footprint. Although SpectrumCo has yet to decide precisely how it will use the spectrum,<sup>296</sup> Comcast Chairman and CEO Brian Roberts said that the purchase gives Comcast “great flexibility and optionality on a nationwide basis” and noted that the licenses acquired in the Auction “cover about 99% of [Comcast’s] cable territories.”<sup>297</sup>

**C. Comcast Actively Maintains and Honors Its Commitments As a Good Corporate Citizen.**

Comcast is deeply engaged in the local communities it serves. Many Comcast initiatives demonstrate that this commitment is deeply engrained in Comcast’s corporate credo. As CEO Brian Roberts explains, “[c]ommunity service is more than writing checks. It’s about sharing actively and passionately and being personally involved in local communities.”<sup>298</sup> In pursuit of this goal, Comcast and its thousands of employees actively participate in numerous local events and activities. Comcast dedicates millions of dollars and hundreds of thousands of man-hours to improving the quality of life in the communities it serves.

Comcast’s commitment to its customers and their local communities is demonstrated and reinforced every day in numerous ways. Among its many programs, Comcast supports high school and college scholarships, minority outreach and business development, and provides

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<sup>296</sup> See Mike Farrell, *Alchin: Comcast Won’t Be a Cellular Competitor*, Multichannel News, Sept. 12, 2006, available at <http://www.multichannel.com/article/CA6371166.html> (reporting that Comcast co-CFO John Alchin has emphasized that Comcast has “no interest in being the fifth cellular operator”).

<sup>297</sup> *Q3 Conference Call*.

<sup>298</sup> *Following a Father’s Example*, Multichannel News, Oct. 9, 2006, available at <http://www.multichannel.com/article/CA6378811.html>.

grants to scores of worthy charities. Comcast's many community-based initiatives over the past year include:

- As of the end of 2005, Comcast had provided free cable television services to approximately 17,000 schools as part of the Cable in the Classroom Initiative. In addition, Comcast provided free high-speed Internet service to almost 7,250 schools and 1,500 libraries and youth and community centers.
- On October 7, 2006, in the sixth annual "Comcast Cares" Day, 30,000 Comcast volunteers donated more than 180,000 hours and participated in over 300 programs in which they worked on "projects ranging from beautifying schools, parks and community centers to delivering meals; and from renovating an apartment complex to sprucing up a neighborhood zoo."<sup>299</sup> The Comcast Foundation also gave over \$1.2 million in grants to organizations with which its employees volunteered.<sup>300</sup>
- Between January and the end of October 2006, the Comcast Foundation provided a total of over \$3.8 million to community organizations and initiatives nationwide.<sup>301</sup>
- In October 2006, Comcast announced that the Comcast Foundation would provide \$50,000 to fund a grant for LULAC National Educational Service Centers to focus on literacy efforts.<sup>302</sup>
- In 2006, Comcast provided over \$1.7 million in scholarships in three different programs: (1) the Leaders and Achievers program recognizes high school seniors for outstanding leadership, academic, and community achievement; (2) the Gustave G. Amsterdam Leadership Awards are given each year to two Philadelphia public high school students attending a Philadelphia college or university; and (3) the Emma L.

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<sup>299</sup> Press Release, Comcast Corp., *Thousands of Comcast Volunteers Provide More Than 180,000 Hours of Community Service Nationwide* (Oct. 10, 2006), available at [http://www.cmcsk.com/phoenix.zhtml?c=147565&p=irol-newsArticle\\_print&ID=914358&highlight](http://www.cmcsk.com/phoenix.zhtml?c=147565&p=irol-newsArticle_print&ID=914358&highlight).

<sup>300</sup> *See id.*

<sup>301</sup> *See* Comcast Corp., *Our Programs*, at <http://www.comcast.com/corporate/about/inthecommunity/foundation/programsfunded.ashx?Year=2006> (last visited Nov. 17, 2006).

<sup>302</sup> *See Comcast Backs Literacy*, Multichannel News, Oct. 5, 2006 (explaining that LULAC is a national nonprofit organization formed by the League of United Latin American Citizens that focuses on educating and preparing the U.S. work force through educational programming and leadership development training), available at <http://www.multichannel.com/article/CA6378660.html>. Comcast has pledged to build awareness of LULAC's public service programs and identify employment and education opportunities for its membership. Brent Wilkes, Executive Director of LULAC stated: "Comcast's commitment to working with LULAC further demonstrates their commitment to the Hispanic community." Press Release, Comcast Corp., *LULAC and Comcast Announce Comprehensive Partnership* (Mar. 22, 2006), available at <http://www.cmcsk.com/phoenix.zhtml?c=147565&p=irol-newsArticle&ID=834499&highlight=>.

- Bowen Foundation provides internships for minority high school and college students in media and communications.<sup>303</sup>
- In September 2006, Comcast, in partnership with the Congressional Hispanic Caucus Institute (“CHCI”), the nation’s premier Hispanic youth leadership development and educational organization, launched the first-ever bilingual PSA campaign featuring 17 Hispanic members of Congress. The campaign reached more than 23 million homes and featured a streaming-video component available on Comcast Latino, Comcast’s Hispanic video portal.<sup>304</sup>
  - In September 2006, the Comcast Foundation announced that it would provide \$50,000 to sponsor three exceptional university students to participate in CHCI’s Congressional Internship Program. CHCI President Esther Aguilera remarked: “With this support of Comcast and the Comcast Foundation, our nationally recognized Congressional Internship Program will help provide these exceptional undergraduate students with unmatched public policy experience and mentorship opportunities both with corporate and elected officials.”<sup>305</sup>
  - In 2006, Comcast plans to expand upon the \$1.3 million in cash and in-kind contributions focusing on youth development and learning in Oregon and southwest Washington provided in 2005. Zeke Smith, Director of Community Engagement for the Portland Schools Foundation noted that Comcast has “gone well beyond what you would typically expect of a sponsor.”<sup>306</sup>
  - In July 2006, Comcast announced a \$30.35 million credit facility with the United Bank of Philadelphia, the city’s only African-American controlled commercial bank. Since its founding in 1992, the Bank’s primary mission has been to provide banking services to underserved clients in the greater Philadelphia area.<sup>307</sup>

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<sup>303</sup> See Comcast Corp., *Comcast Scholarships*, at <http://www.comcast.com/corporate/about/inthecommunity/scholarships/scholarships.html> (last visited Nov. 17, 2006).

<sup>304</sup> See Press Release, Comcast Corp., *PSA Campaign Speaks to “Our Youth, Our Future, Our Legacy” Featuring 17 Hispanic Members of Congress* (Sept. 14, 2006), available at [http://www.cmcsk.com/phoenix.zhtml?c=147565&p=irol-newsArticle\\_Print&ID=905221&highlight=](http://www.cmcsk.com/phoenix.zhtml?c=147565&p=irol-newsArticle_Print&ID=905221&highlight=).

<sup>305</sup> Press Release, Comcast Corp., *Comcast and Congressional Hispanic Caucus Institute (CHCI) Partner to Help Hispanic Students Succeed* (June 12, 2006), available at <http://www.cmcsk.com/phoenix.zhtml?c=147565&p=irol-newsArticle&ID=871307&highlight=>.

<sup>306</sup> Jeane Senior, *Comcast Proves Willing to Support Community Causes*, *Portland Bus. J.*, Sept. 8, 2006, available at <http://sanjose.bizjournals.com/portland/stories/2006/09/11/focus5.html?t=printable>.

<sup>307</sup> See Press Release, Comcast Corp., *Comcast Announces Multi-Million Dollar Credit Facility with United Bank of Philadelphia* (July 25, 2006), available at <http://phx.corporate-ir.net/phoenix.zhtml?c=147565&p=irol-newsArticle&ID=886142&highlight=>.

- In April 2006, Comcast was the official conference sponsor of the United State Hispanic Chamber of Commerce annual legislative conference. The conference brings together the nation's top business owners and governmental officials to share insights on policies that affect the nation's Latino community.<sup>308</sup>
- In 2006, Comcast provided \$25,000 for five Scholarships to students attending the four historically black colleges in Maryland. The scholars participate in the Washington Center's Congressional Leadership Program to provide students with an experience and understanding of the workings of government.<sup>309</sup>
- In 2006 in the Washington and Baltimore Metropolitan areas alone, Comcast provided grants to the Dyslexia Tutoring Program, the Kennedy Krieger High School Career and Technology Center, the Loyola College Saturday and Sunday Scholars Program, the United Way Chapters of Cecil County and Baltimore Maryland, and the Washington Performing Arts Society Concerts in Schools Program.<sup>310</sup>

Comcast continues to finance and support the Comcast Literacy Fund. This fund is dedicated to increasing both literacy levels and reading skills through grants and programs nationwide.<sup>311</sup> Comcast also continues to be a member, along with other cable companies, of the Cable in the Classroom initiative, helping to provide schools, teachers, and families with a variety of resources, including cable video and high-speed Internet service as well as

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<sup>308</sup> See Press Release, Comcast Corp., *Comcast to Serve as Presenting Sponsor For U.S. Hispanic Chamber of Commerce 16<sup>th</sup> Annual Legislative Conference* (Mar. 20, 2006), available at <http://www.cmcsk.com/phoenix.zhtml?c=147565&p=irol-newsArticle&ID=834064&highlight=>.

<sup>309</sup> See Press Release, The Washington Center, *Comcast Funds Maryland Students for Internships in Congress* (June 19, 2006), available at <http://www.twc.edu/Comcast.shtml>.

<sup>310</sup> See Comcast Corp., *Our Programs*, at [http://www.comcast.com/corporate/about/in\\_the\\_community/foundation/programsfunded.ashx?Year=2006](http://www.comcast.com/corporate/about/in_the_community/foundation/programsfunded.ashx?Year=2006) (last visited Nov. 17, 2006).

<sup>311</sup> See Comcast Corp., *The Comcast Literacy Fund*, at <http://www.comcast.com/corporate/about/inthecommunity/literacy/literacyfund.html> (last visited Nov. 17, 2006). For example, in August 2006, Comcast provided a \$20,000 grant from its literacy fund to the Sarasota Reading Festival. See Press Release, Sarasota Reading Festival, *Comcast Foundation Awards \$20,000 Grant to Sarasota Reading Festival* (Aug. 11, 2006), available at [http://www.sarasotareadingfestival.com/pr\\_08\\_11\\_2006.html](http://www.sarasotareadingfestival.com/pr_08_11_2006.html).

programming and online content. Cable in the Classroom also sponsors the “Leaders in Learning Program” to spotlight and reward the best teachers in America.<sup>312</sup>

Comcast implemented a nationally recognized and comprehensive program to promote diversity both inside the company, through its third-party suppliers, and in the communities it serves. As of 2005, of Comcast’s 68,000 employees, 39% were minorities and 37% were women.<sup>313</sup> Recently, more than 40% of promoted employees were minorities and 40% were women.<sup>314</sup> Most impressively, as of 2005, 13% of Comcast’s senior management were minorities.<sup>315</sup> Comcast encourages its employees to be involved with, and funds their participation in, programs such as Women in Cable and Telecommunications (“WICT”) and the National Association for Multi-Ethnicity in Communications (“NAMIC”).<sup>316</sup>

In 2005, Comcast spent “10 percent of its total spend with diverse suppliers.”<sup>317</sup> In 2006, Comcast was named one of the 25 noteworthy companies for diversity by Diversity Inc. in large part because of its supplier diversity program.<sup>318</sup> For the second year in a row, Comcast was

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<sup>312</sup> See Comcast Corp., *Cable in the Classroom*, at <http://www.comcast.com/corporate/about/inthecommunity/literacy/cableintheclassroom.html> (last visited Nov. 17, 2006); Cable in the Classroom, *Cable’s Leader in Learning Awards*, available at <http://www.ciconline.org/LeadersInLearningAwards/default.htm> (last visited Nov. 17, 2006).

<sup>313</sup> See *Comcast Hires Diversity Locally*, Diversity/Careers (Feb/Mar. 2005) available at [http://www.diversitycareers.com/articles/pro/05-febmar/dia\\_comcast.htm](http://www.diversitycareers.com/articles/pro/05-febmar/dia_comcast.htm).

<sup>314</sup> See *id.*

<sup>315</sup> See *id.*

<sup>316</sup> See *id.*

<sup>317</sup> Press Release, Comcast Corp., *Comcast Named One of America’s Top 50 Corporations for Multicultural Business Opportunities* (Jan. 4, 2006), available at <http://www.cmcsk.com/phoenix.zhtml?c=147565&p=irol-newsArticle&ID=800326&highlight>.

<sup>318</sup> See *The 25 Noteworthy Companies*, Diversityinc.com, June 19, 2006, available at <http://www.diversityinc.com/public/213.cfm>. Diversity Inc. found that “Supplier diversity is the cable company’s strongest diversity area, with minority- or women-owned companies representing 12.25 percent of its vendors.” *Id.*

named one of America's top 50 corporations for multicultural business opportunities by DiversityBusiness.com.<sup>319</sup> Also for the second year in a row, Comcast was named one of the 2006 Top Companies for Hispanics by Hispanic Business Magazine, basing the ranking on more than 30 metrics including commitment to hiring Hispanics, promotion, marketing, and supplier relationships.<sup>320</sup>

Throughout Comcast's 40 years, and along with its growth, Comcast has been (and continues to be) an active corporate citizen in each community it serves. Comcast's service is experienced by customers as a local service, tailored to the needs of the community. Comcast welcomes its duty to act as a good corporate citizen and be active in local civic activities, while investing resources in strengthening and improving each community in its footprint. Comcast also recognizes that, when competing in the marketplace, its commitments on a local level distinguish it from its more nationally-focused MVPD competitors. Comcast is proud to be characterized by its commitments to community involvement and good corporate citizenship on the local level.

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<sup>319</sup> See Comcast Corp., *supra* note 317; Diversity Business, *America's Top Organizations for Multicultural Business Opportunities - 2005*, DiversityBusiness.com, available at <http://www.diversitybusiness.com/Resources/DivLists/2005/DivTop50/2005Div50C.htm>. The Div50 list represents "a listing of the top 50 corporate and organizational buyers of diversity products and services throughout the country. It represents the voices of over 500,000 diversity-owned (women, Blacks, Hispanics, Asians, Native Indian and other minority groups) businesses in the U.S., in sectors such as technology, manufacturing, food service and professional services." Diversity Business, *The Power of Choice: Diversity Businesses Vote on Top Corporations*, DiversityBusiness.com, Dec. 15, 2005, available at <http://www.diversitybusiness.com/resources/news/2005/December/toporganizationlist.htm>.

<sup>320</sup> See Press Release, Comcast Corp., *Hispanic Business Magazine Names Comcast One of the Top 50 Companies for Hispanics* (Sept. 12, 2006), available at <http://www.cmcsk.com/phoenix.zhtml?c=147565&p=irol-newsArticle&ID=904223&highlight>.

**V. DYNAMIC CHANGE IN THE VIDEO MARKETPLACE IS OUTPACING LAW AND REGULATION, WITH TROUBLING RESULTS.**

In its first Annual Report on the status of video competition over a decade ago, the Commission recognized that “the 1992 Cable Act’s regulatory scheme serves as a *transitional* mechanism until competition develops and consumers have adequate multichannel video programming alternatives.”<sup>321</sup> The foregoing evidence of competition in the video marketplace overwhelmingly supports a conclusion that the transition to competition is complete.

With technology bringing massive and unpredictable changes to video competition, power is shifting decisively from programmers and distributors to consumers -- who increasingly are insisting on watching what they want, when they want, and how they want. In this new environment, the traditional format and content of the Commission’s video competition reports have become increasingly anachronistic. Many of the questions posed in this year’s *Notice* reflect a ever-more-microscopic examination of conventional MVPD distribution services; meanwhile, marketplace participants and consumers are riding a tsunami of change.

Law and regulation need to be suited to current marketplace facts. But cable regulation remains rooted in historical, and largely irrelevant, circumstances of the past. Many of the cable regulations that were prescribed under the 1992 Cable Act simply do not make sense in today’s video marketplace. As evidenced in great detail in these comments, the current video marketplace is characterized by a multitude of choices for consumers, delivered by broadcast station, satellite, cable system, telephone line, Internet, wireless network, and other means. In contrast to 1992 -- when DBS and the Internet did not yet exist, telephone companies were

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<sup>321</sup> *First Report* ¶ 6.

prohibited from offering video services, cable operators were the predominant source for nonbroadcast video programming, DVDs were still being invented, and mobile video was limited to small TVs capable of receiving over-the-air broadcast signals -- cable operators now compete with all kinds of video delivery modalities, but nevertheless remain on an unequal regulatory footing. As the attached chart demonstrates, cable operators are subject to many regulations that other players in the video marketplace are not.<sup>322</sup>

Two years ago, the Commission sought comment “on whether there are any statutes or regulations that should be modified in light of changes in the video industry and competition over the past decade.”<sup>323</sup> In its comments that year, Comcast detailed a number of regulations that have become outmoded.<sup>324</sup> The attached chart shows even more areas in which certain video providers are subject to more burdensome regulations than other providers offering the same service.<sup>325</sup> In fact, the chart shows that the bulk of the burdensome and unwarranted regulations fall exclusively on cable operators. What is especially noteworthy about many of the most discriminatory regulations is that those regulations are not statutorily required; rather, those regulations were promulgated by the Commission, which is free to change them but has neglected to do so to date.

It is past time for the Commission to review and revise its regulations in the context of the modern video marketplace. Specifically, the Commission should review its rules regarding:

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<sup>322</sup> See *Anomalies of Video Regulation: Treating Like Services Differently* (attached hereto as Exhibit 3).

<sup>323</sup> *In re Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Notice of Inquiry, 19 FCC Rcd. 10909, ¶ 10 (2004).

<sup>324</sup> See Comments of Comcast Corp., filed in MB Dkt. No. 04-227, at 39-43 (filed July 23, 2004).

<sup>325</sup> See Exhibit 3.

**Effective Competition:** DBS providers now serve nearly 30% of all customers of multichannel video programming distributors. Given that Congress has deemed that effective competition exists when 15% of the multichannel customers in an area subscribe to a competing provider, there is no rational basis for the Commission to continue its presumption that cable systems are not subject to effective competition. The Commission should presume that effective competition exists statewide in any state where DBS penetration is over 15%. Moreover, in order to expedite petitions for effective competition, which have been known to languish at the Commission, any petition that is unopposed by a local franchising authority should be deemed granted automatically.

**Integration Ban:** Operating under a statute that applies equally to *all* MVPDs, the Commission decided to prohibit cable operators -- but not their satellite competitors -- from continuing to offer their customers set-top boxes that combine security and other functions in a single integrated device. Now, cable customers are on the verge of being subjected to a \$600 million tax so that consumer electronics retailers can have a new revenue stream. Meanwhile, the Commission has exempted DBS providers from similar requirements, creating disparate regulation of like services. The Commission should repeal the integration ban and permit cable operators to offer consumers the full range of set-top boxes. At a minimum, the Commission should permit cable operators to offer their customers low-cost, limited-capability integrated set-top boxes.

**Program Access:** Fourteen years ago, Congress enacted a *transitional* rule to ensure that cable's competitors have access to cable-affiliated networks. When Congress first enacted the program access rules, it had two primary rationales for its concern that competitors to cable may not have access to programming affiliated with cable operators: (1) over 50% of cable program networks at that time were vertically integrated with a cable operator; and (2) cable operators served almost all multichannel video customers, so cable program networks could refuse to deal with other MVPDs and still reach the vast majority of all multichannel subscribers. These two rationales are no longer applicable: (1) fewer than 15% of cable program networks are now affiliated with cable operators; and (2) competing MVPDs now serve over 30% of all multichannel subscribers. Moreover, competing MVPDs are successfully utilizing exclusive programming as a means to differentiate their products. Next year, the Commission will once again review whether it is necessary to continue to ban exclusive contracts between cable operators and cable program networks. In 2002 when the Commission last reviewed the need for the ban, the Commission largely ignored the significant developments of the prior decade. Now, almost five years later, the Commission must not ignore the incredibly vibrant competition in the marketplace that clearly makes the continuation of the exclusivity ban unnecessary.

The Commission should be working to eliminate unnecessary regulations. Too many remnants of an antiquated statutory regime crafted for the marketplace of 1992 remain. At a minimum, the Commission should practice regulatory restraint and refrain from adopting new

regulations that further disadvantage cable operators and inhibit investment. In particular, any effort to change established cable industry business models through regulatory fiat, or to regulate based on conjecture about what might be the business models of the future, must be avoided.<sup>326</sup> In a robustly competitive and rapidly evolving marketplace, such regulations simply do not make sense. In addition, such action would be inconsistent with Congress's goal of promoting competition through deregulation, enumerated in the 1996 Act.

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<sup>326</sup> In particular, the Commission should refrain from interfering with business models related to program packaging. As Comcast and others have explained previously, such action would not comport with the Communications Act, which gives the Commission no power to concern itself with cable packaging or content, nor the First Amendment, which protects free speech and free press rights to cable operators. *See, e.g.*, Comments of Comcast Corp., filed in MB Dkt. No. 04-207 (filed July 15, 2004).

## VI. CONCLUSION.

The video competition reports of the past serve as a valuable resource in showing how the video marketplace has changed markedly over the years since Congress first directed the Commission to engage in this annual exercise. But the legislative and regulatory decisions of the future should not be based on only those developments that can be seen through a rear-view mirror. The chief characteristics of today's marketplace are its dynamism, uncertainty, and empowerment of users. An honest appraisal of the proliferation of video distribution modalities and changing patterns of video consumption can only conclude that the marketplace of today is so different from that which existed just a few years ago that all pre-existing regulatory rules and policies ought to be called into question.

Respectfully submitted,

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November 29, 2006

**EXHIBIT 1**

# Verizon FiOS TV — Washington Metro Channel Lineup

Local	
3	CW — WDCW-TV 50
4	NBC — WRC-TV 4
5	FOX — WTTG-TV 5
6	My WDCA-TV 20
7	ABC — WJLA-TV 7
8	News Channel 8
9	CBS — WUSA-TV 9
13	i:WPXW-TV
14	Telefuturo — WFDC-TV 14
17	Univision — WMDO-TV
20	Telemundo — WZDC-TV
22	PBS — WMPT-TV 22
26	PBS — WETA-TV 26
29	Superstation — WGN-TV
32	PBS — WHUT-TV 32
33	MHz 2 — WNVN-TV
34	MHz — WNVN-TV
48	TV Guide
49	Weatherscan Local
Entertainment	
50	USA Network
51	TNT
52	TBS
53	FX
54	Spike TV
Sports	
60	ESPN
61	ESPN Classic Sports
62	ESPNews
63	ESPNU
64	ESPN 2
65	Comcast Sports Net Mid-Atlantic
66	MASN
68	Speed Channel
69	NFL Network
News	
70	CNN
71	CNN Headline News
72	Fox News
73	CNBC
74	MSNBC
75	Bloomberg TV
76	CNN International
77	CNBC World
78	ABC News Now
79	C-SPAN
80	C-SPAN 2
81	C-SPAN 3
89	The Weather Channel
Information	
90	Discovery Channel
91	National Geographic Channel
92	Science Channel
93	Discovery Times
94	Pentagon Channel
95	Military Channel
96	Military History Channel
97	History Channel International
98	History Channel
99	Biography Channel
100	Animal Planet
101	TLC (The Learning Channel)

Women	
110	Lifetime
111	Lifetime Movie Network
112	Lifetime Real Women
113	SoapNet
114	Oxygen
Shopping	
120	QVC
121	HSN
123	America's Store
125	Jewelry
127	Shop NBC
Home & Leisure	
130	Style
131	Discovery Health
132	LIME
133	Fit TV
134	Food Network
135	HGTV (Home & Garden Television)
136	Fine Living
137	DIY (Do It Yourself)
138	Discovery Home
139	Wealth TV
140	Travel Channel
Pop Culture	
150	Sci-Fi Channel
151	A&E
152	Crime & Investigation Network
153	Court TV
154	GSN
155	Bravo
156	Sleuth
157	Logo
158	Ovation
159	BBC America
160	Comedy Central
161	E! Entertainment Television
162	Fox Reality
163	Fuel
164	ABC Family
Music	
170	MTV
171	MTV2
173	MTV Jams
174	MTV Hits
175	VH1
176	VH1 Classic
177	VH1 Soul
178	IMF
179	BET Jazz
180	CMT
181	CMT Pure Country
182	Great American Country
183	Gospel Music Channel
184	BET Gospel
185	Soundtrack Channel
Movies	
190	Turner Classic Movies
192	Fox Movie Channel
Family	
200	Hallmark Channel
202	Family Net
203	AmericanLife TV
204	TV Land
Children	
210	Disney
211	Toon Disney

212	Nickelodeon
213	Nick Too
214	The Nicktoons Network
215	GAS
216	Noggin
217	Cartoon Network (ESP)*
218	Boomerang (ESP)*
219	Discovery Kids
220	Varsity TV
221	FUNimation
People & Culture	
230	BET
231	TV One
232	Black Family Channel
233	MTV Español
234	Galavisión
235	Mun2
236	Sí TV
237	AZN Television
Religion	
240	EWTN
241	INSP
242	I-Life
243	Church
244	JCTV
245	BYU
246	Three Angels
248	Daystar
249	Smile of a Child
250	TBN
Sports**	
300	Fox College Sports — Atlantic
301	Fox College Sports — Central
302	Fox College Sports — Pacific
303	Tennis Channel
305	Golf Channel
306	VERSUS
307	Outdoor Channel
308	The Sportsman Channel
311	Fox Sports en Español
312	Fox Soccer Channel
313	GoTV
315	TVG (Horse Racing)
316	Horse Racing TV
318	Mav TV
319	Blackbelt TV
320	G4
Movies**	
340	Starz
341	Starz West
342	Starz Edge
343	Starz Edge West
344	Starz in Black
345	Starz Kids & Family
346	Starz Cinema
347	Starz Comedy
348	Encore
349	Encore West
350	Encore Love
351	Encore Love West
352	Encore Westerns
353	Encore Westerns West
354	Encore Mystery
355	Encore Mystery West
356	Encore Drama

357	Encore Drama West
358	Encore Action
359	Encore Action West
360	Encore WAM!
361	Showtime
362	Showtime West
363	Showtime Showcase
364	Showtime Showcase West
365	Showtime Too
366	Showtime Too West
367	Showtime Beyond
368	Showtime Beyond West
369	Showtime Extreme
370	Showtime Extreme West
371	Showtime Women
372	Showtime Women West
373	Showtime Next
374	Showtime Next West
375	Showtime Family Zone
376	Showtime Family Zone West
377	The Movie Channel
378	The Movie Channel West
379	The Movie Channel Xtra
380	The Movie Channel Xtra West
381	Flix
382	Flix West
384	Sundance
HBO**	
400	HBO
401	HBO West
402	HBO 2
403	HBO 2 West
404	HBO Signature
405	HBO Signature West
406	HBO Family
407	HBO Family West
408	HBO Comedy
409	HBO Comedy West
410	HBO Zone
412	HBO Zone West
413	HBO Latino
414	HBO Latino West
Cinemax**	
415	Cinemax
416	Cinemax West
417	More Max
418	More Max West
419	Action Max
420	Action Max West
421	Thriller Max
422	Thriller Max West
423	Women's Max
424	At Max
425	Five Star Max
426	OuterMax
Other Premiums**	
430	Playboy TV
431	Playboy TV en Español
435	Here!

\*A Spanish-language Secondary Audio Program (SAP) is available for selection.

\*\*Subscription to corresponding premium channels and packages required.

FiOS TV is frequently changing its channel offerings. Please call 1-800-293-9139 for our latest published channel lineup.

# Verizon FiOS TV – Washington Metro Channel Lineup

En Español**	
440	Galavisión
442	ESPN Deportes
443	Fox Sports en Español
444	Go!TV
446	CNN en Español
447	Canal SUR
448	TVE Internacional
452	History Español
453	Discovery en Español
454	Viajar y Vivir
456	Infinito
457	MTV Tr3s
458	VH Uno
459	Telehit
462	De Película
463	De Película Clásico
464	Cine Latino
465	Cine Mexicano
468	La Familia
469	TV Chile
470	TV Colombia
472	Sorpresa
473	Toon Disney Español
474	Boomerang (ESP)*
475	Discovery Kids en Español
477	TBN Enlace
478	EWTN Español
International Premiums**	
480	SBTN (Vietnamese)
481	CCTV-4 (Mandarin Chinese)
482	CTI — Zhong Tian Channel (Chinese)
483	TV Japan
484	MBC (Korean)
485	The Filipino Channel
486	TV Asia
487	ART (Arabic)
488	RAI (Italian)
489	TV 5 (French)
490	TV Polonia
491	Rang A Rang (Farsi)
492	RTN Russian
493	Channel 1 Russian
496	Bridges TV
497	MTV K
498	MTV Chi
499	MTV Desi
Entertainment	
500	USA Network
501	TNT
502	TBS
503	Galavisión
504	FX
505	Spike TV
Sports	
508	ESPN Deportes
510	Comcast Sports Net — Mid-Atlantic
511	MASN
513	Fox Sports en Español
514	Fox Soccer Channel
516	Go!TV
News	
518	CNN en Español
519	CNN

La Conexión	
520	CNN Headline News
521	Fox News
522	CNBC
523	MSNBC
524	C-SPAN
525	Canal SUR
Information	
529	TVE Internacional
530	History Español
531	Discovery Channel
532	Discovery en Español
534	Animal Planet
535	TLC (The Learning Channel)
Women	
537	Lifetime
538	Lifetime Movie Network
Shopping	
540	QVC
541	HSN
543	Shop NBC
Home & Leisure	
545	Discovery Health
546	Viajar y Vivir
549	Infinito
550	Food Network
551	HGTV (Home & Garden Television)
552	Travel Channel
Pop Culture	
555	El Entertainment Television
556	A&E
557	Si TV
558	Mun2
559	Comedy Central
560	Sci-Fi Channel
Music	
562	MTV Tr3s
563	MTV2
564	Telehit
565	VH Uno
566	CMT
Movies	
569	De Película
570	De Película Clásico
571	Cine Mexicano
572	Cine Latino
Family	
574	ABC Family
575	La Familia
576	TV Chile
577	TV Colombia
578	TV Land
Children	
580	Nickelodeon
581	Disney en Español
582	Toon Disney Español
583	Boomerang (ESP)*
584	Cartoon Network (ESP)*
585	Sorpresa
586	Discovery Kids en Español
Religion	
588	TBN Enlace
589	EWTN Español

Music Choice	
600	Showcase
601	Today's Country
602	Classic Country
603	Bluegrass
604	R&B and Hip-Hop
605	Classic R&B
606	Smooth R&B
607	R&B Hits
608	Rap
609	Metal
610	Rock
611	Arena Rock
612	Classic Rock
613	Alternative
614	Retro-Active
615	Electronica
616	Dance
617	Adult Alternative
618	Soft Rock
619	Hit List
620	Party Favorites
621	90s
622	80s
623	70s
624	Solid Gold Oldies
625	Singers & Standards
626	Big Band & Swing
627	Easy Listening
628	Smooth Jazz
629	Jazz
630	Blues
631	Reggae
632	Soundscapes
633	Classical Masterpieces
634	Opera
635	Light Classical
636	Show Tunes
637	Contemporary Christian
638	Gospel
639	Radio Disney
640	Sounds of the Seasons
641	Música Urbana
642	Salsa y Merengue
643	Rock en Español
644	Pop Latino
645	Mexicana
646	Americana
Pay Per View	
701	TVN Events
HD Broadcast	
801	FOX — WTTG HD
802	CBS — WUSA HD
803	ABC — WJLA HD
804	PBS — WETA HD
805	My WDCA HD
806	PBS — WMPT HD
807	NBC — WRC HD
808	CW — WDCW HD
HD National**	
810	TNT HD
811	ESPN HD
812	ESPN 2 HD
814	NFL Network HD
817	HD Net
818	HD Net Movies

819	Universal HD
820	Discovery HD
821	Wealth TV HD
822	National Geographic Channel HD
823	MTV HD
HD Premium**	
830	HBO HD
831	Cinemax HD
832	Showtime HD
833	TMC HD
834	Starz HD
Local Plus	
850	NBC Weather Plus
851	WUSA Weather Radar
852	WJLA Weather Now
853	Tube Music Network
861	WETA 26
862	WETA FAMIL
863	WETA WRLD
864	WETA CRTE
870	WMPT 2
871	MPT Kids
872	MPT SLCT
873	MPT LERN
FIOS ON DEMAND**	
900	On Demand Access & Menu
Kids FREE	
ALL FREE	
	Home & Leisure
	Info & Education
	Kids
	Music
	News
	Pop Culture
	Shopping
	Sports
Movies	
	New Movies
	New by Category
	All Movies
	All Movies by Category
	In Theaters
	En Español
Subscriptions	
	Cinemax
	HBO
	Showtime
	Starz
	Sundance
	The Movie Channel
	WWE
	Karaoke
	Playboy
Adult	
	Events
	Hustler
	Spice
	TEN
	Playboy Subscribers
873	FIOS TV Help

\*A Spanish-language Secondary Audio Program (SAP) is available for selection.  
 \*\*Subscription to corresponding premium channels and packages required.  
 Programming services offered within each package are subject to change, and not all programming services will be available at all times. Blackout restrictions also apply.

- Lifestyle
- Premiums
- Arts & Entertainment
- Sports
- Local Plus
- News & Information
- Music Choice
- PPV
- HD
- FIOS On Demand



We never stop working for you.

**EXHIBIT 2**

# Rates

Effective 10/1/06

## BASIC CABLE SERVICES (MONTHLY)

Service	Monthly Charges
Limited Basic . . . . .	\$ 14.85
Expanded Basic†† . . . . .	\$ 38.35
Full Basic (Limited & Expanded) . . . . .	\$ 53.20
Pay-Per-View Movies* . . . . .	\$ 4.99
Pay-Per-View Adult Movies* . . . . .	\$ 12.99
Monthly Cable Guide . . . . .	\$ 2.75

\*PPV billed per use

## PREMIUM SERVICES\*

Service	Monthly Charges
HBO . . . . .	\$ 16.95
Starz . . . . .	\$ 13.95
Cinemax . . . . .	\$ 13.95
Showtime . . . . .	\$ 13.95
The Movie Channel . . . . .	\$ 13.95
Playboy . . . . .	\$ 18.95
WWE 24/7 . . . . .	\$ 7.99
Howard Stern . . . . .	\$ 9.99
ART . . . . .	\$ 14.95
Zee TV . . . . .	\$ 14.95
TV Asia . . . . .	\$ 14.95
ZeeTV & TV Asia Combo . . . . .	\$ 24.95
Bollywood (with either Zee TV or TV Asia \$9.99) . . . . .	\$ 12.99
Cable Latino . . . . .	\$ 11.95
Family Tier (Must have Limited Basic Service)†† . . . . .	\$ 14.95
Sports Tier . . . . .	\$ 5.00

## COMCAST DIGITAL SERVICES\*

Service	Monthly Charges
Comcast Digital Classic . . . . .	\$ 9.95
Comcast Digital Plus (Included Digital Classic) . . . . .	\$ 14.95
DVR (Digital Video Recorder) Service . . . . .	\$ 9.95
Digital Additional Outlet . . . . .	\$ 9.95

## DIGITAL PACKAGES\*†

Service	Monthly Charges
Comcast Digital Basic Package . . . . .	\$ 71.65
Silver HBO (HBO Premium Only) . . . . .	\$ 86.95
Silver non-HBO (1 Premium) . . . . .	\$ 84.95
2 Pay (HBO/STZ or HBO/SHO) . . . . .	\$ 91.95
Gold (HBO/STZ/SHO or HBO/MAX/SHO) . . . . .	\$ 96.95
Platinum (HBO/SHO/STZ/MAX/TMC) . . . . .	\$101.95

## COMCAST HIGH-SPEED INTERNET (MONTHLY)

Service	Monthly Charges
IP Addresses (for networked computers only) . . . . .	\$ 6.95
<b>Non-Cable Customers:</b>	
6Mbps/768Kbps . . . . .	\$ 57.95
16Mbps/1Mbps . . . . .	\$ 67.95
<b>Cable Customers:</b>	
6Mbps/768Kbps . . . . .	\$ 42.95
16Mbps/1Mbps . . . . .	\$ 52.95

## EQUIPMENT (MONTHLY)

Service	Monthly Charges
Remote (Any Type) . . . . .	\$ 0.15
Basic Only Converter . . . . .	\$ 0.07
Addressable or Digital Converter . . . . .	\$ 3.50
HDTV Converter* . . . . .	\$ 5.00
Modem Rental . . . . .	\$ 3.00
Comcast Cert. Home Network Device Rental . . . . .	\$ 5.00

# Rate & Service Charges

Effective 10/1/06

## SPECIAL (NON-MONTHLY) CHARGES

Service	Charges
Returned Check Fee . . . . .	\$ 30.00
Late Fee: % of past due balance . . . . .	5%
Unreturned Analog Converter . . . . .	\$100.00
Unreturned Digital Converter . . . . .	\$225.00
Unreturned Internet Modem . . . . .	\$ 50.00
Unreturned EMTA . . . . .	\$ 50.00
Unreturned HDTV Converter . . . . .	\$325.00
Unreturned DVR . . . . .	\$525.00
Unreturned Comcast Cert. Home Net Device . . . . .	\$125.00
Unreturned Remote (Any Type) . . . . .	\$ 7.50

## STANDARD INSTALLATION

Service	Charges
Unwired Home . . . . .	\$ 41.95
Pre-wired Home . . . . .	\$ 24.95
Reconnection of Service . . . . .	\$ 24.95
Additional Outlet (Same Trip) . . . . .	\$ 12.45
Additional Outlet (Separate Trip) . . . . .	\$ 20.95
Hourly Service Charge . . . . .	\$ 30.95
Relocate Outlet . . . . .	\$ 16.95
Other Install Upgrade (non-addressable) . . . . .	\$ 14.95
Other Install Downgrade (non-addressable) . . . . .	\$ 11.95
VCR/DVD Hookup (Same Trip) . . . . .	\$ 5.95
VCR/DVD Hookup (Separate Trip) . . . . .	\$ 13.95
Addressable Change of Service (no-trip) . . . . .	\$ 1.99
Customer Trouble Call . . . . .	\$ 19.95
Comcast High Speed Internet Installation . . . . .	\$ 99.00
Comcast Home Networking Install (2 PC's) . . . . .	\$199.99
Comcast Home Networking Install (3rd & 4th PC's) . . . . .	\$ 50.00
Comcast Home Networking Install (5th PC) . . . . .	FREE
Comcast Home Networking (Same Trip) . . . . .	\$ 75.99

Rates exclude Franchise and FCC fees and taxes. Additional cost may be incurred for custom installs.  
 \* Viewing digital signals requires compatible equipment. ON DEMAND requires a digital converter and ON DEMAND selections subject to charge indicated at the time of purchase. ON DEMAND available to residential customers in Comcast Digital Cable wired and serviceable areas only. ON DEMAND programs are limited. To receive HD features and benefits, an HD television (not provided), converter, remote control, and other equipment are required. A monthly HDTV equipment charge may apply. HD programming is limited to the programming provided to Comcast by the programming provider. To receive premium channels in HD, you must subscribe to that premium channel. HDTV programming and programming charges subject to change. ON DEMAND programs cannot be recorded with DVR. DVR recording time is limited. Up to 15 hours of HDTV programming can be recorded. Equipment is required and equipment fees may be additional. HDTV programs can be paused up to 15 minutes. ON DEMAND programs cannot be recorded with DVR. Certain services are available separately or as a part of other levels of service. Prior to obtaining a DVR from Comcast, additional documentation and credit verification may be necessary. Call 1-800-COMCAST for pricing, service and equipment details. ©2006 Comcast Cable Communications, Inc. All rights reserved.  
 \*\*HDTV operates with HDTV television set only. Requires a converter. Must subscribe to digital premium services to receive HDTV premium service. One time HDTV premium charge applies.  
 † Comcast digital packages are valid through December 2006 and include the benefits of Comcast digital cable on the first outlet only. Pricing and number of channels vary by package and are subject to change. Package prices do not include applicable fees, taxes, or box.  
 †† Cannot be sold separately. Subscription to basic service is required to receive any other level of service.

## REPAIR

Please call our office at 703-841-7700 24 hours.

## BILLING INQUIRIES

Monday-Friday 8am-8pm and Saturday 8am-5pm

## FULL SERVICE LOBBY LOCATION

2707 Wilson Blvd  
 Arlington, VA 22201

Mon-Fri 8:00AM-9:00PM Sat 9:00 AM-6:00PM Sun-Closed

# (703) 841-7700

### OUR CREDO – TURN TO US FIRST

We will be the company to look to first for the communications products and services that connect people to what's important in their lives.

## Comcast Digital Cable with ON DEMAND

- No dish— You'll get a clear picture rain or shine.
- Interactive Program Guide - Quickly find something to watch, set reminders for shows, and enable parental controls.
- Great TV - Enjoy channels featuring something for everyone in the family, including The History Channel, Discovery Channel, MTV, HGTV, PBS Kids Sprout, Comcast SportsNet and much more!
- Comcast's Digital network delivers 100% digital quality picture & sound.
- Music - Get up to 47 commercial-free music channels! Choose from country, Latin, pop and more!
- ON DEMAND - Choose from a library of thousands of movies and shows that are ready when you are, most are FREE!
- Premium Networks ON DEMAND: HBO®, Showtime®, Starz®, Cinemax®, and The Movie Channel® ON DEMAND - When you add one of our premium channels to your digital cable subscription, you not only get the great movies and shows that premiere each month, you also get access, at no additional charge, to the best programming of each channel ON DEMAND! You don't get that with satellite - only with Comcast.

### HDTV

- No Expensive equipment to buy\*
- More HD Programming options than Direct TV or Dish Network
- Dolby® Digital 5.1 sound
- Up to 17 channels in HD and more channels coming soon

### DVR

- Pause live TV and create instant replays
- Record all of your favorite shows
- Watch what you want - when you want
- Watch a pre-recorded show while recording live programming
- Connects to your HDTV and records HD programming\*

## Comcast High-Speed Internet

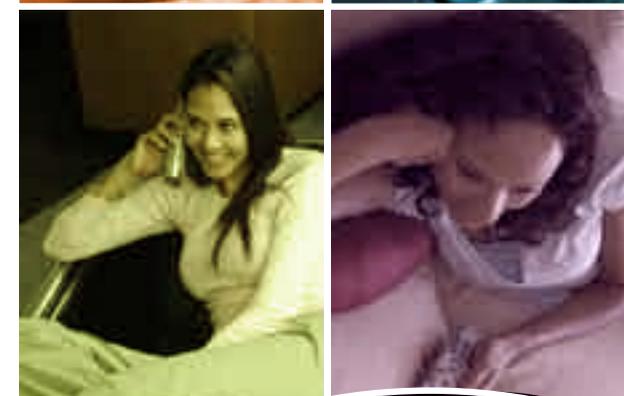
- With 6 Mbps, it's up to 7x faster than 768K DSL and 100x faster than dial up! Plus, get \$300 in Broadband features.\*\*
- Comcast Security Powered by McAfee® - Protect your family and your computer with VirusScan, Privacy Service and Personal Firewall Plus.
- Comcast Rhapsody Radio Plus™ - Listen to 100 commercial-free radio stations or create your own from 30,000 artists.
- The Fan™ - Only on Comcast.net - Stay in the know with click and play videos. From the latest news clips to sports highlights, entertainment features, movie trailers, and more.
- Comcast PhotoShow Deluxe™ - Customize, animate and share photos albums in an online digital scrapbook.
- Video Mail - Create your own three-minute video messages, and send to anyone with an email address.\*\*

## Comcast Digital Voice®

- One bill for all of your Comcast services.
- 12 popular calling features, plus Voice Mail - Get caller ID, Call Waiting, 3-Way Calling, Call Forwarding, Call Blocking, Call Return and more.
- Unlimited local and long-distance calling - Call anyone, anytime, anywhere in the country, including Puerto Rico - all for one low price. Now includes calls to Canada!\*\*\*
- Keep your current phone number - You can switch to Comcast Digital Voice without switching your number.\*\*\*
- Web access to Voice Mail - Receive and check your home Voice Mail from anywhere there is web access - click, drag & listen!
- Digital Voice Center - Check voice mails, review your calling history and easily manage everything else related to your account without picking up your phone. Comcast's Digital Voice Center allows you to do it all online.

\*\*Speeds stated for downloads only and compare Comcast 6.0 Mbps to 768 Kbps DSL. Web cam required to create video mail is not included. A cable modem is required for Comcast High-Speed Internet and equipment fees are additional. Speeds stated for downloads only and compare Comcast 6.0Mbps (maximum upstream limited to 384Kbps) to 768K DSL. Many factors affect speed and actual speeds will vary. Not all applications and features are compatible with Macintosh systems. Standard Rhapsody burn charges apply. Comcast Home Networking is only available to Comcast High-Speed customers and requires additional equipment and installation charges. Comcast's standard charges apply for professional installation and vary by service area. Prices shown do not include taxes and franchise fees. Please call 1-800-Comcast or go to Comcast.com for restrictions and complete details about service, prices and equipment. Comcast ©2006. All rights reserved. All other trademarks are the property of their respective owners.

\*\*\*The ability to keep your current number may not be available in limited areas. Unlimited Package pricing applies to direct-dialed domestic calls from home. Pricing shown does not include federal, state or local taxes and fees; our Regulatory Recovery Fee, which is not a tax or government-required; or other applicable charges (e.g. per-call charges or international calling). Comcast Digital Voice service (including 911/emergency services) may not function during an extended power outage. Certain customer premises equipment may not be compatible with Comcast Digital Voice services. Please note that additional fees, charges and surcharges apply to your service. For a complete listing of fees, charges and surcharges, including charges for installation, activation or modification of service, please visit our website or call 1-888-COMCAST.



# Comcast

DIGITAL CABLE WITH ON DEMAND  
 COMCAST HIGH-SPEED INTERNET  
 COMCAST DIGITAL VOICE®  
 HIGH DEFINITION TELEVISION  
 DIGITAL VIDEO RECORDER

Arlington

Effective 10/1/06

# Arlington channel line-up

Effective 10/1/06

2	TV Guide Channel	L	42	TV Land	E
3	WDCW-50 (CW)	L	43	Nickelodeon†	E
4	WRC-4 (NBC)	L	44	Disney†	E
5	WTTG-5 (FOX)	L	45	Cartoon Network	E
6	QVC	L	46	Animal Planet	E
7	WJLA-7 (ABC)	L	47	TLC	E
8	News Channel 8	L	48	Discovery	E
9	WUSA-9 (CBS)	L	49	Discovery Health	E
10	Comcast SportsNet	E	50	Lifetime	E
11	ESPN	E	51	Sci-Fi Channel	E
12	ESPN2	E	52	HGTV†	E
13	USA	E	53	TV One	E
14	WFDC-14 (Univision)	L	54	Food Network†	E
15	WMDO-47 (Telefutura)	L	55	GSN	E
16	WZDC-64 (Telemundo)	L	56	E!	E
17	WPXW-66 (Independent Television)	L	57	VH-1	E
18	ABC Family	L	59	MTV	E
19	WHUT-32 (PBS)	L	60	BET	E
20	WDCA-20 My Network	L	61	Comedy Central	E
21	CN8	L	62	MASN	E
22	MPT-22 (PBS Annapolis)	L	63	Speed Channel	E
23	HSN	L	64	Versus (formerly OLN)	E
24	WGN	L	65	Golf Channel	E
26	WETA-26 (PBS)	L	66	Court TV	E
27	Weather Channel†	E	67	Travel Channel	E
28	Headline News†	E	68	Hallmark	E
29	CNN	E	69	AIM	L
30	MSNBC	E	70	Arlington Public Schools 1	L
31	CNBC	E	71	Arlington Virginia Network	L
32	FOX News	E	72	Arlington Public Schools 2	L
33	FX	E	73	Arlington Public Schools 3	L
34	Spike TV	E	74	Arlington Virginia Network	L
35	TBS	E	76	C-SPAN	L
36	TNT	E	77	C-SPAN2	L
37	History Channel	E	95	Leased Access	L
38	A&E	E	96	G4	E
39	Bravo	E			
41	TCM	E			

101	Weatherscan Local	DC
102	ESPNews	DC
105	C-SPAN 3	DC
107	Current	DC
109	National Geographic†	DC
110	The Science Channel†	DC
111	Discovery Times	DP
112	Military Channel	DP
113	Discovery Home & Leisure	DP
114	BBC America	DP
115	Biography Channel	DP
116	History International	DP
118	style.	DC
119	Lifetime Movie Network	DP
120	SOAPnet	DP
121	Do-It-Yourself Network†	DP
122	Fine Living	DP
128	Sprout†	DC
129	Nicktoons	DC
130	Discovery Kids†	DC
131	Noggin	DC
132	Nick 2	DP
133	Nick Games & Sport†	DC
134	Encore WAM	DP
135	Toon Disney†	DC
138	AMC	DC
139	MTV Hits	DP
140	MTV2	DC
141	MTV Español	DP
142	MTV Jams	DP
143	VH-1 Classic	DC
144	VH-1 Soul	DC
145	CMT Pure Country	DP
146	CMT	DC
147	Great American Country	DC
149	MoviePlex	DC
150	Encore	DP
152	Encore Action	DP
154	Encore Mystery	DP
156	Encore Love Stories	DP
158	Encore Drama	DP
160	Encore Westerns	DP
163	LOGO	DP
165	Sundance	DP
167	IndiePlex	DC
168	RetroPlex	DC
170	Flix	DC
180	NFL Network	DP
186	WNVN Link TV	L
191	AZN TV	DC
199	Comcast On Demand (VOD)	VOD
200	WETA Create	L
201	WETA Family	L
202	WETA World	L
204	Doug Hill's Weather Now	L
205	WNVN MHz Worldview	L
207	WDCW The Tube	L
208	NBC Weather Plus	L

210	WJLA-HD (ABC)	L-HD
211	WRC-HD (NBC)	L-HD
212	WUSA-HD (CBS)	L-HD
213	WTTG-HD (Fox)	L-HD
214	WDCW-HD (CW)	L-HD
220	WETA-HD (PBS)	L-HD
225	Discovery HD	E-HD
226	iNHD 1	E-HD
227	iNHD 2	E-HD
228	HBO HD	DPR-HD
233	Cinemax HD	DPR-HD
238	Showtime HD	DPR-HD
248	Starz HD	DPR-HD
249	TNT HD	E-HD
250	Universal HD	E-HD
251	Comcast SportsNet HD	E-HD
252	ESPN HD	E-HD
253	ESPN2 HD	E-HD
259	HorseRacing TV	DSP
260	TV Games	DP
262	Fox College Sports - Atlantic	DSP
263	Fox College Sports - Central	DSP
264	Fox College Sports - Pacific	DSP
265	ESPN Classic	DP
267	Fox Soccer Channel	DSP
268	Gol TV	DSP
273	NBA TV	DSP
274	College Sports TV	DSP
275	NFL Network	DSP
277	The Tennis Channel	DSP
281	Home Preview Channel	DC
282	Jewelry TV	DC
283	WNVT MHz2	L
290	Trinity Broadcast Network†	DC
291	EWTN	DC
294	The Word	DC
295	Inspirational Network	DC
298	Bollywood	DPR
299	HBO ON DEMAND	DPR
300	HBO HD	DPR-HD
301	HBO E	DPR
302	HBO Plus	DPR
303	HBO Signature	DPR
304	HBO Family	DPR
305	HBO Comedy	DPR
306	HBO W	DPR
310	HBO Zone	DPR
311	HBO Latino	DPR
318	Cinemax ON DEMAND	DPR
319	Cinemax HD	DPR-HD
320	Cinemax E	DPR
321	MoreMax	DPR
322	Cinemax W	DPR
324	ActionMax	DPR
325	ThrillerMax	DPR
327	Wmax	DPR
328	@Max	DPR
329	5 StarMax	DPR

330	Outermix	DPR
338	Showtime ON DEMAND	DPR
339	Showtime HD	DPR-HD
340	Showtime	DPR
341	Showtime Too	DPR
342	Showtime Showcase	DPR
346	Showtime Beyond	DPR
347	Showtime Extreme	DPR
350	The Movie Channel	DPR
352	The Movie Channel Xtra	DPR
354	The Movie Channel ON DEMAND	DPR
367	Encore ON DEMAND	DP
368	Starz ON DEMAND	DPR
369	Starz HD	DPR-HD
370	Starz	DPR
371	Starz Edge	DPR
372	Starz InBlack	DPR
373	Starz Kids & Family	DPR
374	Starz Cinema	DPR
375	Starz Comedy	DPR
401	Showcase	DM
402	Today's Country	DM
403	Classic Country	DM
404	Bluegrass	DM
405	R&B and Hip-Hop	DM
406	Classic R&B	DM
407	Smooth R&B	DM
408	R&B Hits	DM
409	Rap	DM
410	Metal	DM
411	Rock	DM
412	Arena Rock	DM
413	Classic Rock	DM
414	Alternative	DM
415	Retro-Active	DM
416	Electronica	DM
417	Dance	DM
418	Adult Alternative	DM
419	Soft Rock	DM
420	Hit List	DM
421	Party Favorites	DM
422	90's	DM
423	80's	DM
424	70's	DM
425	Solid Gold Oldies	DM
426	Singers and Standards	DM
427	Big Band & Swing	DM
428	Easy Listening	DM
429	Smooth Jazz	DM
430	Jazz	DM
431	Blues	DM
432	Reggae	DM
433	Soundscapes	DM
434	Classical Masterpieces	DM
435	Opera	DM
436	Light Classical	DM
437	Showtunes	DM
438	Contemporary Christian	DM
439	Gospel	DM

440	Radio Disney	DM
441	Sounds of the Season	DM
442	Musica Urbana	DM
443	Salsa y Merengue	DM
444	Rock en Español	DM
445	Pop Latino	DM
446	Mexicana	DM
447	Americana	DM
450	DMX Latin Contemporary	HT
451	DMX Rock en Español	HT
452	DMX Salsa	HT
453	DMX Tejano	HT
454	DMX Latin Jazz	HT
455	DMX Regional Mexican	HT
456	DMX Musica of the Americas	HT
457	DMX Latin Dance	HT
495	Howard Stern ON DEMAND	DPR
496	WWE 24/7 ON DEMAND	DPR
501	Comcast iN Demand1	DPPV
502	Comcast iN Demand 2	DPPV
542	Playboy ON DEMAND	DPR
544	Playboy	DPR-DPPV
547	Spice Hot	DPPV
549	TEN	DPPV
601	Discovery Español	HT
602	CNN Español	HT
603	Fox Sports Español	HT
604	Toon Disney Español	HT
605	MTV Español	HT
606	History Channel en Español	HT
608	CineLatino	HT
609	VeneMovies	HT
610	Cine Mexicano	HT
619	Grandes Documentales	HT
621	Canal 24-Horas	HT
622	Gol TV	HT
628	Canal Sur	HT
637	EWTN (En Español)	HT
652	Canal 52	DC-HT
657	WNVN Russian World TV	L
665	TV Asia	DPR
666	Zee TV	DPR
677	WNVN Nigerian TV Authority	L
684	ART	DPR
701-706	ESPN Game Plan/Full Court	SPPV
748	NBA ON DEMAND	SPPV
749	NBA TV	DSP
750	League Pass Preview Channel	DC
751-761	NBA/MLS	SPPV
771-780	NHL Center Ice/MLB Extra Innings	SPPV
921	Buzztime	DC

## CHANNEL KEY

- L = Limited Basic
- † = Family Tier
- E = Expanded Service
- DC = Digital Classic
- DP = Digital Plus
- DM = Digital Music
- HD = High Definition Television
- HT = Hispanic Tier
- DPR = Digital Premium
- DSP = Digital Sports Pak
- DPPV = Demand Pay-Per-View
- SPPV = Sports Pay-Per-View
- VOD = Video ON DEMAND



**EXHIBIT 3**

## ANOMALIES OF VIDEO REGULATION: TREATING LIKE SERVICES DIFFERENTLY

Regulations/Restrictions	Broadcast	Cable	DBS	Internet	Mobile Video
<b>Content Requirements</b>					
<b>Public Interest Programming</b>	<p>47 U.S.C. § 307(b) 47 C.F.R. § 73.3526</p> <p>Broadcasters are required to operate in the public interest in order to maintain their licenses. The public interest standard has been interpreted in different ways over the years; currently, responsibilities are somewhat unsettled, especially with respect to broadcasting of digital television.</p> <p>At the very least, broadcasters are required to maintain a public inspection file containing an "issues/program list" that lists the programs aired by the broadcaster that significantly address community issues. Stations must update these lists quarterly.</p>	<p>47 U.S.C. §543(b)(7) 47 C.F.R. § 76.901(a)</p> <p>As part of the franchise agreement, local franchise authorities ("LFAs") are permitted to demand that cable operators provide channel capacity for the carriage of public, educational, or governmental ("PEG") programming as well as financial support for the production of such programming.</p>	<p>47 U.S.C. § 335(b) 47 C.F.R. § 25.701(f)</p> <p>Four percent of a DBS provider's channel capacity must be reserved for educational or informational programming (the statute permits the FCC to set the reserved amount at between 4%-7%). This channel capacity must be made available to non-commercial programmers at rates that do not exceed costs that are directly related to making the capacity available.</p>	No similar requirement applies.	No similar requirement applies.
<b>Children's Programming</b>	<p>47 U.S.C. §§ 303a, 303b, 609 note. 47 C.F.R. §§ 73.671, 73.4050</p> <p>Broadcasters have an affirmative duty to provide educational and informational programming for children. Although no strict threshold is prescribed, the FCC notes that a broadcaster that provides 3 hours of such programming per week will be considered in compliance. Broadcasters also have an obligation to inform viewers as to the availability of children's educational programming.</p> <p>47 C.F.R. §§ 73.670, 73.4050</p> <p>Broadcasters must limit the amount of commercial time during children's programming: 10.5 minutes per hour on the weekends and 12 minutes per hour on weekdays. Additionally, broadcasters must separate commercials and program content by use of special measures such as "bumpers." Moreover, there are strict limits on airing commercials for a product in conjunction with a program that features the product.</p> <p>The FCC also limits the display of website addresses during children's programming.</p>	<p>47 U.S.C. §§ 303a, 303b, 609 note. 47 C.F.R. § 76.225</p> <p>Cable operators must limit the amount of commercial time during children's programming as follows: 10.5 minutes per hour on the weekends and 12 minutes per hour on weekdays. Additionally, cable operators must separate commercials and program content by use of special measures such as "bumpers." Moreover, there are strict limits on airing commercials for a product in conjunction with a program that features the product. Cable operators also must limit the display of website addresses during children's programming.</p> <p>Cable operators, however, are not responsible for ensuring compliance with the rules for programs aired on broadcast channels or leased access or PEG channels over which the cable operator may not exercise editorial control. Cable operators are responsible for ensuring the compliance of cable network programming.</p>	<p>47 U.S.C. § 335(b) 47 C.F.R. § 25.701(e)</p> <p>Identical limits as cable. However, this requirement does not apply to programs aired on a broadcast channel carried by the DBS provider or over any channel noncommercial, educational and informational programming it is required to carry and over which it does not have editorial control. DBS providers are responsible for ensuring the compliance of any satellite network programming.</p>	15 U.S.C. §§ 6501-03 Operators of websites or online services directed to children may not collect personal information from a minor under the age of thirteen without express consent from the child's parent. Any operator that chooses to obtain parental consent must abide by strict disclosure rules and allow a parent to discontinue his or her consent for the operator's continued collection or use of the child's personal information.	No similar requirement applies.

Regulations/Restrictions	Broadcast	Cable	DBS	Internet	Mobile Video
<b>Political Broadcasting</b>	<p>47 U.S.C. §§ 312(a)(7), 315 47 C.F.R. §§ 73.1941, 73.1940-44, 73.4185 Broadcasters must permit a legally qualified candidate for federal public office to use their broadcast facilities. Broadcasters must allow equal opportunities for other candidates for the same office to use the facilities. A broadcaster may not charge candidates more than it charges its most favored commercial advertisers for the same classes and amount of time for the same period.</p> <p>47 U.S.C. § 317 47 C.F.R. §§ 73.1212, 73.4190, 73.4195 <i>Joint agency guidelines for broadcast licensees re political broadcasting</i>, Public Notice (rel. Jun. 19, 1978). Broadcasters are also required to ensure that advertising by candidates for federal office contains clear identification of the sponsors of the advertisement.</p> <p>47 U.S.C. § 315(e) Broadcasters (broadly defined to include cable operators) are required to maintain a public inspection file of all requests to purchase air time made by a legally qualified candidate or that communicates a message relating to any political matter of national importance, including messages related to a legally qualified candidate, any Federal election, or a national legislative issue of public importance.</p>	<p>47 U.S.C. §§ 315 47 C.F.R. §§ 76.205-09 Cable operators are not required to permit legally qualified candidate for public office to use their cablecast facilities.<sup>1</sup> But, if they do so, all other candidates for the same office must be given equal opportunities to use the facilities. Cable operators may not censor any content a candidate chooses to air. A cable operator may not charge candidates more than it charges its most favored commercial advertisers for the same classes and amount of time for the same period.</p> <p>47 C.F.R. §§ 76.1611, 73.1615 If a candidate uses a cable operator's cablecast facilities, the cable operator must disclose to all candidates the information about its rates, terms, conditions, and all value-enhancing discount privileges offered to other advertisers.</p> <p>In the event that a cable operator receives film, record, transcription, talent, script, or other material service for a political cablecast, the cable operator must announce the true identity of the sponsor at both the beginning and the end of the cablecast material.</p> <p>47 U.S.C. § 315(e) Cable operators have the same public file requirement as broadcasters with respect to requests for time for political messages.</p>	<p>47 U.S.C. §§ 312(a)(7), 315, 335 47 C.F.R. § 25.701(b)-(c) DBS providers must permit a legally qualified candidate for federal public office to use their facilities.<sup>2</sup> DBS providers must allow equal opportunities for other candidates for the same office to use the facilities. DBS providers may not edit or alter such use by a candidate.</p> <p>Rates for use of the facilities and ad times must be set pursuant to the FCC rules. A DBS provider may not charge candidates more than it charges its most favored commercial advertisers for the same classes and amount of time for the same period.</p>	<p>2 U.S.C. §§ 431(9)(B)(iii), 431(17), 441d(a) 11 C.F.R. §§ 100.26, 100.29(c), 110.11 Certain disclosure obligations are imposed on candidates, campaigns, and other organizations supporting a candidate, but not on the Internet provider. For example, electronic communications must contain clear and conspicuous disclaimers identifying the person paying for the communication, and whether authorized by the candidate or paid for by another entity.</p>	<p>2 U.S.C. §§ 431(9)(B)(iii), 431(17), 441d(a) 11 C.F.R. §§ 100.26, 100.29(c), 110.11 Certain disclosure obligations are imposed on candidates, campaigns, and other organizations supporting a candidate, but not on the communications provider.</p>
<b>Personal Attack and Political Editorial Rules</b>	No similar requirement applies.	In 2000, the Commission was ordered by the D.C. Circuit to repeal its personal attack and political editorial rules as to both broadcasters and cable operators. Although the FCC repealed the personal attack and political editorial rules contained in 47 C.F.R. §§ 76.209(b), (c), and (d), it appears to have neglected to delete the similar provisions in 47	No similar requirement applies.	No similar requirement applies.	No similar requirement applies.

<sup>1</sup> Cablecasting is defined as "programming (exclusive of broadcast signals) carried on a cable television system." 47 C.F.R. § 76.5(o).

<sup>2</sup> *In re Implementation of Section 25 of the Cable Television Consumer Protection and Competition Act of 1992, Direct Broadcast Satellite Public Interest Obligations*, Memorandum Opinion & Order on the Reconsideration of the First Report & Order, 19 FCC Rcd. 5854 ¶ 26 (2004).

<b>Regulations/Restrictions</b>	<b>Broadcast</b>	<b>Cable</b>	<b>DBS</b>	<b>Internet</b>	<b>Mobile Video</b>
		<p>C.F.R. §§ 76.1612-13.</p> <p>47 C.F.R. § 76.1612 requires a cable operator to permit persons who are subject to a personal attack transmitted over its cablecast facilities an opportunity to respond. 47 C.F.R. § 76.1613 states that, if a cable operator transmits its own endorsement of or opposition to a candidate, the cable operator must notify the other candidates for the same office and offer a reasonable opportunity to respond.</p>			
<b>Sponsorship Identification (Payola)</b>	<p>47 U.S.C. § 317 47 C.F.R. § 73.1212</p> <p>Whenever a broadcaster airs material for which it receives money, service, or other valuable consideration, it must fully and fairly disclose the true identity of the sponsor.</p>	<p>47 C.F.R. § 76.1615</p> <p>When a cable operator originates a cablecast presenting any material for which it receives money, service, or other valuable consideration, the cable operator must disclose the true identity of the sponsor.</p>	No similar requirement applies.	No similar requirement applies.	No similar requirement applies.
<b>Closed Captioning</b>	<p>47 U.S.C. § 613 47 C.F.R. §§ 79.1-79.2</p> <p>Broadcasters are required to provide closed captioning for the hearing impaired on a phased-in basis -- as of 1/1/06, all new nonexempt video programming, including emergency programming such as hazardous weather and dangerous community situations, must be captioned; for programming that was originally aired prior to 1/1/98, currently, 30% of such programming must be captioned and after 1/1/08, 75% must be captioned.</p>	<p>47 U.S.C. § 613 47 C.F.R. §§ 76.606, 79.1-79.2</p> <p>With certain exceptions, cable operators have the same captioning requirements with respect to cable programming as broadcasters do with respect to broadcast programming. They also are required to ensure that their equipment can transmit closed-captioning data without alteration. They are not required to provide closed captioning for programming that, by law, is not subject to their editorial control, such as the signals of television broadcast stations, programming involving candidates for public office, or commercial leased access and PEG programming. Cable operators are responsible for ensuring the compliance of cable network programming.</p>	<p>47 U.S.C. § 613 47 C.F.R. § 79.1-79.2</p> <p>Identical to cable.</p>	No similar requirement applies.	No similar requirement applies.
<b>Obscenity/Indecency</b>	<p>18 U.S.C. § 1464 47 U.S.C. §§ 73.3999, 73.4165, 73.4179</p> <p>Broadcasters may not air obscene material. Nor may they air indecent or profane material between 6:00 AM and 10:00 PM.</p>	<p>18 U.S.C. § 1468 47 U.S.C. § 559</p> <p>Cable operators may not distribute obscene material.</p> <p>47 U.S.C. § 560</p> <p>Cable operators must scramble or block any channel that a customer does not subscribe to</p>	<p>18 U.S.C. § 1468</p> <p>DBS providers may not distribute obscene material.</p>	18 U.S.C. § 1462	Identical to Internet.

Regulations/Restrictions	Broadcast	Cable	DBS	Internet	Mobile Video
		<p>and that the customer requests to have blocked.</p> <p>47 U.S.C. § 544(c)(2) Cable operators must provide subscribers with a device by which the subscriber can prohibit viewing of a particular cable service during times selected by the subscriber.</p> <p>47 U.S.C. § 544(c)(3)(A) Cable operators must provide subscribers advance notice of free promotions of premium programming and block these channels upon a customer's request.</p>		with pornography on the Internet. <sup>3</sup>	
<b>Tobacco Advertising</b>	<p>15 U.S.C. §§ 1335, 1338-39, 4402 47 C.F.R. § 73.4055 Cigarettes, "little cigars," and smokeless tobacco may not be advertised on any medium of electronic communication subject to the jurisdiction of the FCC. The provision is enforced by the DOJ. Although the statutory language arguably prohibits tobacco advertising on the Internet, the statute was enacted in the 1970s, well before the development of the Internet, and it does not appear that the issue of whether the statute applies to the Internet has ever been addressed by the courts.</p>				
<b>Lotteries</b>	<p>18 U.S.C. §§ 1304, 1307 47 C.F.R. § 73.1211 Except in limited circumstances, broadcasters are prohibited from transmitting any advertisement or information concerning lotteries, gifts, etc. that are dependent in whole or in part on lot or chance.</p> <p>As of 1999, the rule and statute is interpreted to permit advertisements for lawful casino gambling, regardless of whether the broadcaster that transmits the advertisement is located in a state which permits casino gambling or a state which prohibits it.<sup>4</sup></p>	<p>18 U.S.C. §§ 1304, 1307 47 C.F.R. § 76.213 Identical to broadcast restrictions.</p>	<p>It is uncertain as to whether the same prohibitions apply to DBS. No regulation specifically prohibits the transmission of lottery information or gambling information via satellite. However, 18 U.S.C. § 1304 applies more broadly to "Whoever broadcasts by means of any radio or television station for which a license is required by any law of the United States." Thus, it is sufficiently broad to include DBS.</p>	<p>There is significant uncertainty as to the application of federal gambling law to the Internet. Although Congress recently passed a bill that would prohibit credit card companies from processing payments to online gambling companies, regulations have yet to be adopted and it is not entirely clear how the law will be implemented.</p>	<p>The state of law is uncertain.</p>
<b>Promotions and Contests</b>	<p>47 C.F.R. § 73.1216 If a broadcaster airs information about a contest that it conducts, it must fully and accurately disclose the material terms of the</p>	No similar requirement applies.	No similar requirement applies.	No similar requirement applies.	No similar requirement applies.

<sup>3</sup> See *Ashcroft v. ACLU*, 542 U.S. 656 (2004) (striking down the Child Online Protection Act of 1998); *Reno v. ACLU*, 521 U.S. 844 (1997) (striking down the Internet provisions of the Communications Decency Act of 1996).

<sup>4</sup> See *Casino Advertising Enforcement Pending Disposition of Players International Case*, Public Notice, 14 FCC Rcd. 6203 (1999). The FCC has indicated that it would reevaluate this matter, but, to date, it has not. See *id.*; see also *Greater New Orleans Broad. Ass'n v. United States*, 527 U.S. 173, 195-96 (1999). The holding in that case triggered the Commission's reinterpretation in 1999.

<b>Regulations/Restrictions</b>	<b>Broadcast</b>	<b>Cable</b>	<b>DBS</b>	<b>Internet</b>	<b>Mobile Video</b>
	contest. Also, the contest must be conducted as advertised.				
<b>Telephone Conversations</b>	47 C.F.R. § 73.1206 If a broadcaster records a telephone conversation for broadcast, it must inform the calling party that it is the broadcaster's intention to air the conversation, unless the party is aware or may be presumed to be aware that its call is likely to be broadcast (e.g., a call-in program).	No similar requirement applies.	No similar requirement applies.	No similar requirement applies.	No similar requirement applies.
<b>False Information and Taped Material</b>	47 C.F.R. § 73.1217 Broadcasters may not broadcast false information concerning a crime or catastrophe if the licensee knows that the information is false or if the broadcast of such information will cause substantial public harm.  47 C.F.R. § 73.1208 Broadcasters may not air previously recorded material without identifying it as such.	No similar requirement applies.	No similar requirement applies.	No similar requirement applies.	No similar requirement applies.
<b>Emergency Alert System ("EAS") Public Service Announcements</b>	47 U.S.C. § 606. 47 C.F.R. §§ 11.41, 11.44 All broadcasters must transmit Presidential-level EAS messages. State and local-level messages are typically carried by broadcasters, but are not required by regulations or law.  Broadcasters must reserve their facilities for distribution of Presidential Messages during a national emergency.  47 C.F.R. § 79.2 All video programming distributors (including broadcasters, cable operators, and DBS providers) are obligated to provide emergency information to people with hearing or seeing disabilities in a manner that does not interfere with the emergency broadcast itself.	47 U.S.C. §§ 544(g), 606. 47 C.F.R. §§ 11.41, 11.44, 79.2 Identical to broadcaster requirements.	No similar requirements apply currently, except that requirements that closed captioning for emergency information be provided and passed through to viewers do apply. On May 31, 2007, DBS will be subject to the same rules as cable operators and broadcasters.	No similar requirement applies.	No similar requirement applies.
<b>Access, Transmission, Channel, and Tiering Requirements</b>					
<b>Program Carriage</b>	No similar requirement applies.	47 U.S.C. § 536 47 C.F.R. §§ 76.1301 Cable operators and other MVPDs may not	47 U.S.C. § 536 47 C.F.R. § 76.1301 Identical to cable.	No similar requirement applies.	No similar requirement applies.

Regulations/Restrictions	Broadcast	Cable	DBS	Internet	Mobile Video
		<p>require a financial interest in a programming service as a condition of carriage for that service. MVPDs may not coerce a programmer to provide, or retaliate against such provider for failing to provide, exclusive rights to programming. Nor may MVPDs discriminate against programmers on the basis of affiliation or nonaffiliation.</p> <p>As a condition of the FCC's approval of the Adelphia transactions, regional sports networks ("RSNs") unaffiliated with Comcast or Time Warner may seek to have carriage disputes resolved through arbitration. The FCC also indicated that it will initiate a proceeding to review carriage issues.</p>			
<b>Program Access</b>	No similar requirement applies.	<p>47 U.S.C. § 548 47 C.F.R. § 76.1002 Satellite-delivered programming owned by cable operators or their affiliates must be made available to other MVPDs on non-discriminatory prices, terms, and conditions.</p> <p>Cable operators are prohibited from entering into exclusive contracts with affiliated programmers, unduly or improperly influencing an affiliated programmer's decision to sell to an unaffiliated MVPD, or unduly or improperly influencing the prices, terms, and conditions of such sale.</p> <p>As a condition of the FCC's approval of the Adelphia transactions, Comcast and Time Warner affiliated RSNs, regardless of whether they are terrestrially-delivered, are subject to the program access rules, and distributors seeking access to such RSNs may elect to have access disputes resolved through arbitration. The FCC also indicated that it would initiate a proceeding to examine program access issues.</p>	<p>There are no similar requirements in the statute or regulations.</p> <p>However, as a condition of the FCC's approval of the News Corp.-DIRECTV merger, programming networks affiliated with News Corp. and DIRECTV are subject to restrictions similar to the program access rules, and distributors seeking access to such program networks may elect to have access disputes resolved through arbitration.</p>	No similar requirement applies.	No similar requirement applies.
<b>Must-Carry/Retransmission Consent</b>	47 U.S.C. § 325(b) Broadcasters generally have the right to demand must-carry or negotiate retransmission of their signals by cable operators or DBS providers.	47 U.S.C. §§ 325(b), 534 47 C.F.R. § 76.56 Cable operators must carry all qualified local noncommercial educational broadcast stations and local commercial broadcast stations up to	47 U.S.C. § 338. 47 C.F.R. § 76.66(b) A DBS provider that has chosen to provide local-into-local service must carry the signals of all broadcast	No similar requirement applies.	No similar requirement applies.

<b>Regulations/Restrictions</b>	<b>Broadcast</b>	<b>Cable</b>	<b>DBS</b>	<b>Internet</b>	<b>Mobile Video</b>
		<p>one-third of the aggregate number of usable activated channels on a system. In certain circumstances, they must also carry low-power broadcast stations.</p> <p>47 C.F.R. § 76.60 Cable operators are prohibited from accepting or requesting compensation in exchange for carriage or channel positioning of broadcast signals carried pursuant to the must-carry rules.</p> <p>47 C.F.R. § 76.64 Commercial broadcast stations may demand that cable operators negotiate for consent to carry the stations' signals.</p>	<p>television stations in the local market upon request.</p> <p>47 C.F.R. § 76.66(l) DBS providers are prohibited from accepting or requesting compensation in exchange for carriage or channel positioning of broadcast signals carried pursuant to the must-carry rules.</p> <p>47 C.F.R. §§ 76.64, 76.66(c) Commercial broadcast stations may demand that DBS providers negotiate for consent to carry the stations' signals.</p> <p>47 U.S.C. § 339 DBS providers may provide distant network signals to subscribers outside a broadcast service area.</p>		
<b>Channel Positioning</b>	No similar requirement applies.	<p>47 C.F.R. § 76.57 At the election of broadcast stations carried pursuant to the must-carry rules, cable operators must place broadcast station signals on the cable system channel numbers that correspond to the stations' over-the-air channel numbers.</p>	<p>47 C.F.R. § 76.66(i) DBS providers must retransmit the signal of the local television broadcast stations to subscribers in the station's local market on contiguous channels.</p>	No similar requirement applies.	No similar requirement applies.
<b>Mandatory Basic Tier</b>	No similar requirement applies.	<p>47 U.S.C. § 543(b)(7) 47 C.F.R. § 76.920 Cable customers must buy a cable operator's basic tier in order to be able to purchase any other video programming from the operator. Basic tier service must include all local broadcast station signals and any public, educational, and government channels.</p>	No similar requirement applies.	No similar requirement applies.	No similar requirement applies.
<b>Tier Buy-Through</b>	No similar requirement applies.	<p>47 U.S.C. § 543(b)(8) 47 C.F.R. § 76.921 Cable operators may not require subscribers to buy intermediate tiers of service in order to obtain premium channels, and may not discriminate between subscribers who only purchase the basic tier and subscribers who purchase higher tiers with regard to the rates charged for premium channels.</p>	No similar requirement applies.	No similar requirement applies.	No similar requirement applies.
<b>Leased Access</b>	No similar requirement applies.	<p>47 U.S.C. § 532 47 C.F.R. §§ 76.970, 76.971 Cable operators must set aside channel</p>	No similar requirement applies.	No similar requirement applies.	No similar requirement applies.

<b>Regulations/Restrictions</b>	<b>Broadcast</b>	<b>Cable</b>	<b>DBS</b>	<b>Internet</b>	<b>Mobile Video</b>
		<p>capacity for commercial use by unaffiliated persons and must provide access to those channels at rates and on terms and conditions established by the FCC.</p> <p>As a condition of the FCC's approval of the Adelphia transactions, leased access programmers may seek to have carriage disputes with Comcast or Time Warner resolved through arbitration. The FCC also indicated that it will initiate a proceeding to review leased access issues.</p>			
<b>Channel Occupancy</b>	No similar requirement applies.	<p>47 C.F.R. § 76.504</p> <p>At least 60 percent of the first 75 channels of a cable system must be set aside for use by programmers unaffiliated with the cable operator.</p> <p>In 2001, the channel occupancy rule were overturned by the U.S. Court of Appeals for the D.C. Circuit.<sup>5</sup> The FCC has continued to operate as though the rule was in place, as shown most recently by requiring Comcast and Time Warner to certify their compliance with the rule as part of the Adelphia transactions.</p>	No similar requirement applies.	No similar requirement applies.	No similar requirement applies.
<b>Network Non-Duplication, Syndicated Exclusivity, and Sports Blackout</b>	No similar requirement applies.	<p>47 C.F.R. §§ 76.92, 76.111</p> <p>Upon notification by a broadcaster or a holder of the broadcast rights to sporting events, cable operators are prohibited from carrying programs that duplicate the programming of a broadcast network, syndicated programming whose exclusive rights are held by a broadcast station, and live broadcasts of sporting events against the wishes of the holder of the broadcast rights.</p>	<p>47 U.S.C. § 339(b)</p> <p>47 C.F.R. §§ 76.122-30</p> <p>Identical to cable. However, DBS providers may substitute programming from any other television broadcast station for which the provider has obtained the necessary rights and permissions.</p>	No similar requirement applies.	No similar requirement applies.
<b>Entry, Economic, and Customer Service Regulation</b>					
<b>Franchise Authority Regulations</b>	No similar requirement applies.	<p>47 U.S.C. § 521</p> <p>47 C.F.R. § 76.502</p> <p>LFAs are permitted to condition the grant of a cable franchise on cable operators agreeing to a variety of regulations and conditions. In addition, LFAs have the right to approve transfers of ownership of a cable franchise and can take up to four months to grant such</p>	No similar requirement applies.	No similar requirement applies.	No similar requirement applies.

<sup>5</sup> See *Time Warner Entm't Co. v. FCC*, 240 F.3d. 1126 (D.C. Cir. 2001).

<b>Regulations/Restrictions</b>	<b>Broadcast</b>	<b>Cable</b>	<b>DBS</b>	<b>Internet</b>	<b>Mobile Video</b>
		approval. LFAs often impose conditions on their approval and can require cable operators to undergo stringent due diligence prior to approval.			
<b>Rate Regulation</b>	No similar requirement applies.	47 U.S.C. § 623 47 C.F.R. §§ 76.901-76.990 Cable operators are restricted in the rates they can charge for their basic tier and associated equipment.	No similar requirement applies.	No similar requirement applies.	No similar requirement applies.
<b>Customer Service and Consumer Protection</b>	No similar requirements.	47 U.S.C. § 552 47 C.F.R. § 76.309 Cable operators must abide by specific FCC regulations governing, among other things, the hours their offices must be open, hours of customer service availability by phone, and bill formats. In addition, LFAs are permitted to establish and enforce even more burdensome customer service regulations on cable operators.	No similar requirement applies.	No similar requirement applies.	No similar requirement applies.
<b>Notice for Programming Changes</b>	No similar requirement applies.	47 U.S.C. § 544(h)(1) 47 C.F.R. §§ 76.1601, 76.1603 Cable operators must provide subscribers <i>and</i> broadcasters 30 days written notice of a cable system's plans to delete or reposition a broadcast channel. Cable operators must also give subscribers 30 days written notice of any plans to change programming services.	No similar requirement applies.	No similar requirement applies.	No similar requirement applies.
<b>Ownership</b>					
<b>SMATV Ownership</b>	No similar requirement applies.	47 U.S.C. § 533 47 C.F.R. § 76.501 Cable operators are prohibited from offering SMATV service in any area served by their cable systems.	No similar requirement applies.	No similar requirement applies.	No similar requirement applies.
<b>Radio Licenses</b>	No similar requirement applies.	47 C.F.R. § 21.912 Cable operators are prohibited from owning a variety of radio licenses (including MMDS, LMDS, etc.) if a portion of the licenses' protected service area is within a portion of a franchise area actually served by the cable operator's system.	No similar requirement applies.	No similar requirement applies.	No similar requirement applies.
<b>Subscriber Limits</b>	Consolidated Appropriations Act, 2004, Pub. L. No. 108-199, § 629, 118 Stat. 3, 99 Broadcaster are prohibited from owning stations that can reach more than 39% of U.S. TV households.	47 C.F.R. § 76.503 Cable operators are prohibited from owning an attributable interest in cable systems that serve more than 30% of the national total of MVPD subscribers. The order adopting this prohibition	No similar requirement applies.	No similar requirement applies.	No similar requirement applies.

<b>Regulations/Restrictions</b>	<b>Broadcast</b>	<b>Cable</b>	<b>DBS</b>	<b>Internet</b>	<b>Mobile Video</b>
		was reversed by the D.C. Circuit and a new limit (or new rationale for the 30% limit) has yet to be adopted.			
<b>Attribution Rules</b>	47 C.F.R. § 73.3555 Notes 1-2 For purposes of ownership rules, the FCC has deemed numerous partial ownership interests as “attributable.” For example, a time brokerage agreement, in which a broadcaster controls more than 20% of broadcast time is attributable.	47 C.F.R. § 76.501 Notes 1-6 For purposes of ownership rules, the FCC has deemed various partial ownership interests as “attributable.” For example, owning 5% or more of voting stock is generally deemed to be equivalent to owning 100%.  The FCC recently announced that it will initiate a rulemaking proceeding to review its attribution rules. Based on press reports, the FCC will consider expanding the scope of its rules to encompass new forms of attributable interests, e.g., options.	No similar requirement applies.	No similar requirement applies.	No similar requirement applies.
<b>Buy-Out Prohibition</b>	47 C.F.R. § 73.3555(c) The 4 major networks (ABC, CBS, Fox, and NBC) are prohibited from merging. In addition, broadcasters are prohibited from owning interests in a radio station, another television station, or a newspaper except in certain circumstances.	47 C.F.R. § 76.505 A cable operator is prohibited from acquiring more than a 10% ownership interest in a local exchange carrier that provides telephone service in the area served by the cable operator, and vice versa.	No similar requirement applies.	No similar requirement applies.	No similar requirement applies.
<b>Consumer Equipment Requirements</b>					
<b>Subscriber (Navigation) Equipment</b>	No similar requirement applies.	47 U.S.C. §§ 544a, 549 47 C.F.R. §§ 76.1200-1210 Cable operators may not restrict subscribers’ abilities to connect navigation devices to the cable system except where the devices might harm the network or are designed to steal services.  Cable operators must cooperate in enabling set-top boxes and other “navigation” devices to be available at retail. After July 1, 2007, cable operators may not place into service new navigation devices that perform both security and nonsecurity functions.	Although the FCC is charged with adopting regulations to assure that navigation devices for all MVPD services are commercially available, it has exempted DBS providers and others from requirements it has established for cable operators.	No similar requirement applies.	No similar requirement applies.

# **Attachment B**

**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 COMCAST CORPORATION**

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**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 COMCAST CORPORATION**

Comcast Corporation (“Comcast”) hereby replies to the comments submitted in response to the Commission’s Notice of Inquiry (“*Notice*”) in the above-captioned proceeding.<sup>1</sup> These reply comments also update the record with additional developments that further illustrate the rapid changes and vigorous competition in the video marketplace.

**I. INTRODUCTION AND SUMMARY.**

In each of the past 12 years, by Congressional directive, the Commission has dutifully chronicled the constant growth of “competition in the market for the delivery of video programming.”<sup>2</sup> Those reports reflect a transformation in multichannel video programming distributors (“MVPDs”). Cable has morphed from a one-way, analog medium for delivering a couple dozen linear channels to a two-way, digital, multi-service platform that offers hundreds of channels, thousands of video-on-demand (“VOD”) offerings, and broadband Internet that offers access to millions of video offerings available for streaming and downloading. During that same

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<sup>1</sup> *In re Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Notice of Inquiry, 21 FCC Rcd. 12,229 (2006) (“*Notice*”).

<sup>2</sup> *See* Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, § 19, 106 Stat. 1460, 1497 (“*1992 Cable Act*”) (codified at 47 U.S.C. § 548(g)).

period, Direct Broadcast Satellite (“DBS”) has grown from infancy (40,000 subscribers as of the time of the Commission’s first video competition report),<sup>3</sup> to adolescence (nearly four million subscribers at the time of the 1996 Act),<sup>4</sup> to robust maturity (26 million subscribers in last year’s report).<sup>5</sup> As the Commission found last year,

[c]ompetition in the delivery of video programming services has provided consumers with increased choice, better picture quality, and greater technological innovation[.] [A]lmost all consumers have the choice between over-the-air broadcast television, a cable service, and at least two DBS providers. In some areas, consumers also may have access to video programming delivered by emerging technologies, such as digital broadcast spectrum, fiber to the home, or video over the Internet.<sup>6</sup>

In short, competition was robust, and consumers enjoyed an abundance of choice.

But this was just the beginning. By any measure, 2006 was a watershed year. The magnitude and pace of technological and marketplace developments have been astonishing.

In one of the largest scale developments (though by no means the fastest moving), the country’s largest telephone companies (“telcos”) began at last to exploit the opportunity Congress gave them a decade ago to enter the cable business. The long awaited entry into wireline video of two Fortune 50 companies, each with existing ubiquitous networks, by itself would be a development of unprecedented significance.<sup>7</sup> But, even as the number of network

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<sup>3</sup> See *In re Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, First Annual Report, 9 FCC Rcd. 7442 ¶ 65 (1994) (“*First Report*”).

<sup>4</sup> See *In re Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Third Annual Report, 12 FCC Rcd. 4358 ¶ 39 (1997).

<sup>5</sup> See *In re Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Twelfth Annual Report, 21 FCC Rcd. 2503 ¶ 72 (2006) (“*Twelfth Annual Report*”).

<sup>6</sup> *Id.*

<sup>7</sup> AT&T’s revenues, *before* the Bell South deal, are *more than two times* greater than Comcast’s, and Verizon’s revenues are *more than three times* greater than Comcast’s. See generally MSN Money, *Investing, Stocks, Research, Financial Results, Highlights* (reporting total revenues as of the third quarter of 2006 for Comcast (footnote continued...))

providers was increasing, technological innovation was transforming the content consumers could access as video options on the Internet exploded, mobile devices became video players, and consumers increasingly decided what to watch, when to watch it, and where and how to watch it. Perhaps even more significantly, YouTube and others demonstrated the potential of the Internet to become an uber-network, bypassing whatever distribution bottleneck may have once existed and at the same time negating long-held notions that content must be packaged in 30- or 60-minute increments or viewed “when it’s on.”

Every objective observer sees that the changes are dramatic. As one reporter observed, “Media bigwigs watched with a mixture of fear and fascination this year as the video-sharing site YouTube became a cultural phenomenon. . . .”<sup>8</sup> A recent Wall Street analyst report explained that the video distribution marketplace is “*intensely competitive.*”<sup>9</sup> *The New York Times* reported that “consumers are benefiting from the competition, which has led to lower prices, more channels per television package, higher broadband speeds and other services.”<sup>10</sup> One of the best descriptions of these developments came from Commissioner McDowell, who aptly explained that,

the media marketplace has changed drastically. . . . [T]he broadcast industry faces enormous competitive challenges from cable TV, satellite MVPDs, satellite radio, iPods

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(...footnote continued)

Corp., AT&T Inc., and Verizon Communications Inc., as \$19 billion, \$47 billion, and \$68 billion, respectively), at <http://moneycentral.msn.com/investor/invsub/results/hilite.asp> (last visited Dec. 29, 2006).

<sup>8</sup> Seth Sutel, *Media Giants Struggle for Digital Growth*, Seattle Post-Intelligencer, Dec. 26, 2006, available at [http://seattlepi.nwsource.com/business/297196\\_yemedia26.html](http://seattlepi.nwsource.com/business/297196_yemedia26.html).

<sup>9</sup> Vijay Jayant et al., Lehman Brothers Equity Research, *Cable/DBS/Telco Data Book: 3Q 2006*, Dec. 18, 2006, at 1 (emphasis added).

<sup>10</sup> Ken Belson, *A Wiring War Among Giants*, N.Y. Times, Dec. 10, 2006, at 14NJ.

and podcasting, the Internet and blogging -- and perhaps most importantly, the rapidly changing viewing and listening habits of young people -- with more on the horizon. *Competition in this space has never been so fierce and chaotic.*<sup>11</sup>

The record in this proceeding, and the events that have taken place in the month since the initial comments were filed, provide abundant evidence of competition and innovation. This competition has brought better quality, more services, and lower prices for consumers.

The first-round comments demonstrated that cable operators continue to face fierce competition from well-established video distributors such as DBS providers, overbuilders and broadband service providers (“BSPs”), and broadcasters.<sup>12</sup> As the Fiber-To-The-Home (“FTTH”) Council concluded in its comments, the video marketplace is “in the midst of an important transformation, which is already bringing great benefits to consumers.”<sup>13</sup> The DBS providers continue to aggressively market their services and attract new subscribers. In addition, they continue to add new features and services to their offerings. The two leading DBS providers, DIRECTV and EchoStar, are the second and fourth largest MVPDs in America, and they market their services to virtually every household in competition with local cable companies. Meanwhile, overbuilders and BSPs continue to attract customers, and broadcasters are expanding their offerings of high-definition television (“HDTV”) and multicast programming.

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<sup>11</sup> Robert M. McDowell, Commissioner, FCC, Statement at the Credit Suisse Media & Telecom Week Conference, New York, NY 6 (Dec. 5, 2006) (as prepared for delivery) (emphasis added).

<sup>12</sup> Testament to the power of this competition, according to the Television Bureau of Advertising (“TVB”), cable penetration of U.S. households in November was 62.1%, a 16-year low (compared with 64.8% a year before). TVB also found that EchoStar and DIRECTV penetrate 24% of U.S. households, up from 20.2% this time last year. See Steve Donohue, *Cable Penetration Hits 16-Year Low*, Multichannel News, Dec. 13, 2006, available at <http://www.multichannel.com/article/CA6399767.html>.

<sup>13</sup> Fiber-To-The-Home (“FTTH”) Council Comments at 2. For purposes herein, unless otherwise designated, all citations to comments are to filings made in MB Docket No. 06-189.

Nor have competitive pressures been solely from traditional video distributors. In the past year, competition from the telcos, especially Verizon, has intensified. In the past month, Verizon and AT&T have both announced expanded program carriage agreements with several programming networks, including several networks affiliated with Comcast and other cable operators; Verizon and AT&T both expanded the number of households passed by their video services; and Verizon obtained 13 new cable franchises, including *statewide* franchises in Rhode Island and New Jersey. The *Boston Globe* described the marketplace as follows:

It's the battle of the bundles. The line between cable and telephone companies has blurred as Comcast Corp., Verizon Communications Inc., and RCN Corp. compete to control the pipe that delivers a dial tone, Internet, and television channels into homes. Now, the turf wars have extended into the wireless world. . . . Ultimately, the companies say that bundling will benefit consumers: Data, video, and voice will stream smoothly among devices that sit on desktops and gadgets carried in pockets.<sup>14</sup>

The past month has also seen many significant Internet video developments -- further underscoring the paradigm shift toward consumer control. As described in more detail below, original video programming channels are being launched online by traditional players and new players continue to enter the scene. As reported by the Associated Press:

As the giants of phone and cable do battle, . . . both sides will find themselves flicking away at technological termites that threaten their victories by offering new ways to communicate and deliver content, always for less and sometimes for free. Daily, it seems there's another renegade company launching some form of calling or video that bypasses the normal mode of consumption. They do it usually by exploiting IP, a network language that reduces all forms of communication into simple building blocks of data, one indistinguishable from the next.<sup>15</sup>

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<sup>14</sup> Carolyn Y. Johnson, *Phone + Cable + Internet + Cellphone = Fierce Competition*, Boston Globe.com, Dec. 10, 2006, available at [http://www.boston.com/business/technology/articles/2006/12/10/phone\\_cable\\_internet\\_cellphone\\_fierce\\_competition/](http://www.boston.com/business/technology/articles/2006/12/10/phone_cable_internet_cellphone_fierce_competition/).

<sup>15</sup> Bryce Meyerson, *Cable, Telecoms Ready To Rumble*, Seattle Times, Dec. 25, 2006, available at [http://seattletimes.nwsourc.com/html/business/technology/2003493657\\_bttelecom25.html](http://seattletimes.nwsourc.com/html/business/technology/2003493657_bttelecom25.html).

The effects of “technological termites” such as Internet video competition are increasingly recognized by informed observers:

- “If this was the year that Web video sites like YouTube encroached on TV programmers’ turf, 2007 may mark the year the Internet finally invades the living room.”<sup>16</sup>
- “Ask anyone over 40 what techno devices they’ve gotta have, and the TV wins running away. Not so for the youth groups. In fact, among Gen Y’ers [ages 18-26], the TV comes in at a relatively poor fourth place behind PCs, desktops and cells.”<sup>17</sup>
- “Is TV moving onto the Internet or is the Internet moving onto TV? As the lines between the two begin to blur, it’s getting harder to tell. . . . [T]he blurred line between traditional and online video is accommodating a growing variety of viewers: those who prefer to watch on a TV, those who gravitate more toward the Web and even those who like to watch on their mobile phones or TiVo recorders.”<sup>18</sup>

Spurred by the rapid development of networking sites where anyone can upload video content, this year’s Time Magazine “Person of the Year” was declared to be “You.”<sup>19</sup> As the magazine explained:

Who are these people? Seriously, who actually sits down after a long day at work and says, I’m not going to watch *Lost* tonight. I’m going to turn on my computer and make a movie starring my pet iguana? . . . The answer is, you do. And for seizing the reins of the global media, for founding and framing the new digital democracy, for working for nothing and beating the pros at their own game, TIME’s Person of the Year for 2006 is you.<sup>20</sup>

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<sup>16</sup> Scott Kirsner, *Couch Crashers; Internet Set Grabs a Seat in America’s Living Room*, Variety.com, Dec. 10, 2006, available at <http://www.variety.com/article/VR1117955360.html?categoryid=14&cs=1>.

<sup>17</sup> Evie Haskell, *Yearning for Ys*, The Bridge, Dec. 1, 2006, at 1.

<sup>18</sup> Mike Musgrove, *Video Visionaries Meld Traditional TV and the Web*, Wash. Post, Dec. 2, 2006, at D1; see also Frazier Moore, *In 2006, TV Programming Migrates Online*, Mercury News, Dec. 18, 2006 (“If you want to see what happened on TV this year, holster your remote and grab your mouse. Then start pointing and clicking. Television by the gigabyte awaits you on the Web. In 2006, that accounted for much of the big news about TV, as its programming migrated online - television’s new frontier.”), available at <http://www.mercurynews.com/mld/mercurynews/entertainment/gossip/16267820.htm>.

<sup>19</sup> See Lev Grossman, *Person of the Year: You*, Time.com, Dec. 13, 2006, available at <http://www.time.com/time/magazine/printout/0,8816,1569514,00.html>.

<sup>20</sup> *Id.*

In short, the video marketplace is fiercely competitive, rapidly changing, and vastly more dynamic than the *Notice* would suggest. Amidst this growing competition, Comcast continues to respond -- and to lead -- by improving quality, introducing new services and features, controlling costs, and increasing value to consumers.

One would think that this overwhelming marketplace evidence of vibrant competition would inhibit parties from using this proceeding to recount the same gratuitous arguments and bogus allegations of anticompetitive conduct they have made over the past decade, or to call for additional regulatory burdens for cable operators. Sadly, that is not the case. Even those commenters who have grown from fledgling competitors to full-fledged media giants have not refrained from predicting their impending demise absent government interference. Comcast takes this opportunity to correct the record, refute those allegations, and request that the Commission only report marketplace facts that are substantiated with evidence.

The Commission should acknowledge and celebrate the extremely competitive and dynamic state of the video marketplace. It should not succumb to a myopic view that focuses on incremental market gains (*e.g.*, DBS gained another X million customers or vertical integration of linear programming networks dropped by another Y percent) and utterly misses the seismic changes that are underway as power shifts from those who create, aggregate, and distribute programming to those who consume it. Most of all, it should heed Congress's admonition that it should pursue "pro-competitive, deregulatory" communications policies, and it should rededicate itself to eliminating asymmetric monopoly-era regulations that have long-since outlived their justification.

## **II. VIDEO COMPETITION IS ROBUST AND GROWING.**

The video marketplace is more competitive than ever. Consumers have more choices than ever before of what to watch, when to watch it, where to watch it, and who to obtain it from.

Comcast and NCTA both provided abundant and detailed evidence of the robust competition in the video marketplace,<sup>21</sup> and, as described below, other commenters also provided substantiation of the growth of competition and consumer benefits.

**A. Commenters Almost Universally Agree That the Video Marketplace Is Extremely Competitive.**

Virtually every competitor who filed in this proceeding highlighted how competitive the video marketplace is and how aggressive competition for consumers has become. For example, DIRECTV commented that it “faces substantial competition from other MVPDs” and specifically named cable, other DBS providers, telcos, video via the Internet, terrestrial wired and wireless providers, and broadcasters as competitors.<sup>22</sup> Faced with this competition, DIRECTV emphasized that it “has made significant improvements to its service in the past year, offering more programming options and attracting more subscribers than ever before” while maintaining “an extremely competitive price structure.”<sup>23</sup> EchoStar agreed, explaining that DBS providers have continued to invest to increase capacity, create high-speed Internet options, and expand programming offerings.<sup>24</sup>

The joint comments filed by a number of BSPs (“BSP Commenters”) reported that they and other BSPs “have made significant inroads in the multichannel video programming

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<sup>21</sup> See Comcast Comments at 7-59; Nat’l Cable Telecommunications Ass’n (“NCTA”) Comments at 8-26.

<sup>22</sup> DIRECTV Comments at 11-13.

<sup>23</sup> *Id.* at 21.

<sup>24</sup> See EchoStar Comments at 3.

distribution market.”<sup>25</sup> The BSP Commenters noted that “BSPs, all of whom have entered the market since the 1996 Act, have operations in nearly half the states in the country, including all major regions.”<sup>26</sup> The BSP Commenters reported that they “have over 10 million households under active franchises” operating with 42 headends, passing approximately 4.1 million homes, and counting over 1.2 million customers.<sup>27</sup> SureWest Communications separately noted that it faces competition from cable operators, DBS providers, and other video distributors, and asserted that “the quality of its service and products will allow it to succeed, and consumers will benefit from such competition.”<sup>28</sup>

Telco commenters reported major advances as video competitors. Verizon noted that it has obtained over 200 franchises to date, that it currently offers its cable service (known as “FiOS TV”) to more than one million households in seven states, and that it “hopes to have 175,000 subscribers by the end of this year.”<sup>29</sup> Verizon declared that “consumers have reaped the benefits” resulting from its entry into the video marketplace, and that it expects this trend to continue as it invests \$18 billion in net capital from 2004 through 2010 in deploying its fiber network, promising to “bring cutting-edge new broadband technologies to consumers across the

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<sup>25</sup> Broadband Service Providers (“BSPs”) Comments at 1-2. The BSP Commenters include Champion Broadband; Everest Connections; Hiawatha Broadband; Knology; Prairie Wave Communications; RCN; Sigecom; SureWest Communications; WOW! Internet, Cable & Phone; and members of the Broadband Service Providers Association.

<sup>26</sup> *Id.* at 6 (emphasis added).

<sup>27</sup> *Id.*

<sup>28</sup> SureWest Comments at 2.

<sup>29</sup> Verizon Comments at 1-2.

nation and to deliver widespread video competition.”<sup>30</sup> Verizon plans to build its fiber network past six million premises by the end of this year and 18 million by the end of 2010.<sup>31</sup> BellSouth noted that it has 20 franchises and provides video service in 14 different markets.<sup>32</sup> BellSouth also highlighted its “strategic marketing alliance” with DIRECTV, through which “approximately 756,000 BellSouth customers have added DIRECTV service to their communications package.”<sup>33</sup> All of this activity led the FTTH Council to conclude that competition in the video marketplace is benefiting consumers and “new sources of [video] delivery are burgeoning and much different product offerings are becoming the choice of consumers.”<sup>34</sup>

With respect to broadcast services, the National Association of Broadcasters (“NAB”) pointed out that “broadcasters across the country are fully engaged in developing HD and multicast programming to better serve their viewers and their communities.”<sup>35</sup> NAB cited several examples, including that the major broadcast networks are providing their most popular shows in HD, most major sporting events are broadcast in HD, 1584 stations in 211 television markets are broadcasting in digital, and that “[h]undreds of local stations are also using their

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<sup>30</sup> *Id.* at 1, 4. Verizon claims that its all-fiber network will permit it to compete more effectively with cable operators. *See id.* at 4.

<sup>31</sup> *See id.* at 7.

<sup>32</sup> *See* BellSouth Comments at 2.

<sup>33</sup> *Id.* BellSouth also explained that it is “exploring the deployment of IPTV as a competitive multimedia platform for delivering competitive video services in conjunction with the company’s voice and data services.” *Id.* at 2-3.

<sup>34</sup> FTTH Council Comments at 2.

<sup>35</sup> NAB Comments at 6.

digital channels for multicast services,” which can deliver increased numbers of broadcast channels directly to the homes of consumers.<sup>36</sup> Similarly, the Association of Public Television Stations (“APTS”) noted that local public television stations are also finding innovative and valuable ways to distribute more video programming via digital broadcasting.<sup>37</sup> In particular, APTS cited to numerous examples of the efforts of public television stations nationwide to use multicasting capabilities to deliver high-quality content regarding issues of local, state, national, and international importance.<sup>38</sup>

### **B. New Developments Reconfirm That Video Competition Is Vigorous.**

In the short period since parties filed their initial comments, news reports continue to be filled with examples of the rapidly evolving and increasingly competitive video marketplace.

For example, all three DBS providers have announced important developments in recent weeks.

- **DIRECTV** added new exclusive sports programming from NASCAR,<sup>39</sup> expanded its international programming lineup,<sup>40</sup> and added local HD channels in additional markets.<sup>41</sup>

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<sup>36</sup> *Id.* at 7.

<sup>37</sup> *See* APTS Comments at 4-8.

<sup>38</sup> *See id.* at 6-8.

<sup>39</sup> The three-year exclusive deal provides DIRECTV subscribers that subscribe to NASCAR HOTPASS access to five video channels to watch five different drivers during every NASCAR race. *See* Press Release, DIRECTV, Inc., *DIRECTV Produces A World’s First; Ushers In New Era Of NASCAR Viewing With Innovative HOTPASS Service To Debut At 2007 DAYTONA 500* (Dec. 6, 2006) (noting that each of the five dedicated channels will offer multiple camera angles, real-time statistics, in-car audio, and a dedicated announcer team), available at <http://phx.corporate-ir.net/phoenix.zhtml?c=127160&p=irol-newsArticle&ID=939701&highlight=>.

<sup>40</sup> *See, e.g.*, Press Release, DIRECTV, Inc., *DIRECTV Is ‘Home’ for Central Americans in the U.S.* (Dec. 6, 2006) (noting that DIRECTV now offers Centromerica TV, a 24-hour Spanish-language network), available at <http://phx.corporate-ir.net/phoenix.zhtml?c=127160&p=irol-newsArticle&ID=939880&highlight=>; Linda Moss, *MEGA Cosmos Is All Greek to DIRECTV*, Multichannel News, Dec. 1, 2006 (noting that DIRECTV now offers Greek-TV language service MEGA Cosmos), available at <http://www.multichannel.com/article/CA6396645.html>; Press Release, DIRECTV, Inc., *DIRECTV Expands International Programming Platform To Include Premier Polish-Language Channels* (Nov. 27, 2006), available at <http://phx.corporate-ir.net/phoenix.zhtml?c=127160&p=irol-newsArticle&ID=936075&highlight=>.

It also announced plans to offer 100 national HD channels and expand delivery of local HD channels to 100 markets by year-end 2007.<sup>42</sup>

- **EchoStar** entered into an agreement with New Line Cinema to add the studio's current and catalog titles to DISH On Demand and EchoStar's pay-per-view service, and also announced a sweepstakes promotion that will run on the DishGAMES "interactive" channel.<sup>43</sup> EchoStar also began marketing a deal that gives customers a 7% discount when they opt for the bundled "DISH DVR Advantage" package.<sup>44</sup> In late December, EchoStar announced that it had reached the 13 million subscriber mark.<sup>45</sup>
- **Dominion Video Satellite**, the owner and operator of the Christian Sky Angel DBS service, will offer bundled HughesNet broadband Internet service to its subscribers.<sup>46</sup>

Likewise, the telcos continued to add new programming to their channel lineups, while also expanding their service areas. For example,

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(...footnote continued)

<sup>41</sup> See Press Release, DIRECTV, Inc., *DIRECTV Activates HD Local Channels in Green Bay, Wisc., Greensboro, N.C., Grand Rapids, Mich., and Providence, R.I.* (Nov. 27, 2006) (noting that DIRECTV now offers local HD broadcast channels in 49 cities, representing more than 65% of U.S. TV households), available at <http://phx.corporate-ir.net/phoenix.zhtml?c=127160&p=irol-newsArticle&ID=935924&highlight=>.

<sup>42</sup> See *DIRECTV Gearing for 100 HD Channels Nationally by Late 2007*, Communications Daily, Nov. 30, 2006, at 6. Robert Gabrielli, DIRECTV senior vice president of programming and operations explained that DIRECTV's "biggest issue now is going to be getting the suppliers to provide the content [to fill the new capacity]. We're pushing our providers and we're going to be really close [to having a majority supplying HD content by late 2007]." *Id.* DIRECTV also announced that Verizon will offer DIRECTV to its small business customers, expanding the lucrative DIRECTV/Verizon partnership. See *Verizon Offers Biz Clients DIRECTV*, SKYREPORT, Dec. 7, 2006.

<sup>43</sup> See Press Release, EchoStar Communications Corp., *Video on Demand Movie Deal Signed Between DISH Network(TM) & New Line Cinema* (Dec. 12, 2006), available at <http://phx.corporate-ir.net/phoenix.zhtml?c=68854&p=irol-newsArticle&ID=941649&highlight=>; *Cellpoint, PixelPlay Bring SMS to DishGAMES*, Multichannel News, Dec. 7, 2006, available at <http://www.multichannel.com/article/CA6397944.html>.

<sup>44</sup> See *Ergonomics: EchoStar Prepares To Hike Rates in 2007*, CableFAX Daily, Dec. 28, 2006, at 1 (explaining that the bundle includes America's Top 200 (plus locals), dual tuner DVR, and installation for up to 4 TVs for \$49.99). An EchoStar representative noted: "With the savings offered by the [bundle], existing customers can offset most or all of any increases in the cost of their programming packages by converting to the package." *Id.*

<sup>45</sup> See John Eggerton, *Dish Serves 13 Million*, Broad. & Cable, Dec. 22, 2006, available at <http://www.broadcastingcable.com/article/CA6402428.html>.

<sup>46</sup> See *Sky Angel Adds Broadband from Hughes*, Multichannel News, Dec. 6, 2006, available at <http://www.multichannel.com/article/CA6397697.html>.

- **Verizon** signed carriage agreements for Comcast SportsNet Philadelphia, Versus, PBS KIDS Sprout, and here!.<sup>47</sup> Verizon also significantly expanded its FiOS TV footprint in Massachusetts, Virginia, and Pennsylvania,<sup>48</sup> and announced that it will soon launch FiOS TV in parts of Delaware, New Jersey, Maryland, and Rhode Island.<sup>49</sup> Since comments were filed in this proceeding, Verizon filed a franchise application with the state of Indiana; began negotiating local franchising agreements in parts of California; and has received 13 cable franchises covering parts of Maryland, Florida, Massachusetts, New York, and Pennsylvania, and including statewide franchises in New Jersey and Rhode Island.<sup>50</sup> Verizon has also opened two retail stores, dubbed the “Verizon Experience,” to introduce consumers to its products, particularly FiOS TV.<sup>51</sup>
- **AT&T** signed carriage agreements with HDNet, NBC Universal, and TotalVid VOD and announced it will offer 27 channels of HDTV.<sup>52</sup> AT&T has launched its U-verse service in Houston, TX, and communities in California, Connecticut, and Indiana.<sup>53</sup>

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<sup>47</sup> See Press Release, Verizon Communications, Inc., *Verizon Signs Agreements with Comcast for Comcast SportsNet-Philadelphia, PBS Kids Sprout and Versus* (Dec. 4, 2006) (noting that Verizon already carries Comcast SportsNet Mid-Atlantic and The Golf Channel), available at <http://newscenter.verizon.com/press-releases/verizon/2006/verizon-signs-agreements-with.html>; *Programming: TWC Inks MTV/BET Deals, here! on FiOS TV*, The Morning Bridge, Dec. 12, 2006 (“Gay/lesbian network here! joined the Verizon FiOS TV service as a subscription premium network.”).

<sup>48</sup> See Steve Donohue, *FiOS Grows in Massachusetts*, Multichannel News, Dec. 13, 2006 (noting that Verizon now passes 177,000 households in Massachusetts with its FiOS TV service), available at <http://www.multichannel.com/article/CA6399784.html>; Press Release, Verizon Communications, Inc., *The Future of TV Arrives as Verizon Launches FiOS TV in Greater Richmond Area* (Dec. 14, 2006); Press Release, Verizon Communications, Inc., *TV as You’ve Never Seen It Before: Verizon Launches FiOS TV in Greater Philadelphia Area* (Dec. 4, 2006). Recent Verizon press releases are available at <http://newscenter.verizon.com/>.

<sup>49</sup> See *TV as You’ve Never Seen It Before*, *supra* note 48; Press Release, Verizon Communications Inc., *Annapolis Approves Verizon’s Latest FiOS TV Franchise in Maryland* (Dec. 12, 2006); Press Release, Verizon Communications Inc., *Verizon Receives DPUC Approval for Compliance Order Certificate to Offer FiOS TV in Rhode Island* (Dec. 20, 2006).

<sup>50</sup> See *Verizon Drives into Indiana*, B&C/MCN Telco-IP Update, Dec. 5, 2006; *Verizon Still in Local Calif. Franchise Talks*, B&C/MCN Telco-IP Update, Nov. 21, 2006; see generally Verizon Communications Inc., *News Archive* (listing press releases announcing Verizon’s franchise agreements in the past 30 days), at <http://newscenter.verizon.com/press-releases/> (last visited Dec. 29, 2006).

<sup>51</sup> The stores are located in the Washington, DC and Dallas, TX metropolitan areas. See Kim Hart, *Verizon Store Follows Apple’s Example*, Wash. Post, Dec. 28, 2006, at D1.

<sup>52</sup> See *U-verse Gets HDNet*, The Morning Bridge, Dec. 5, 2006 (reporting that the agreement covers HDNet and HDNet Movies); *Mass Media Notes, NBC Universal Agreed To Provide Programming to AT&T’s U-verse IPTV Service*, Communications Daily, Nov. 28, 2006, at 9 (reporting that the agreement includes Universal Pictures movies delivered by VOD, programming from all Telemundo and NBC owned-and-operated broadcast stations, CNBC, USA, and others); Todd Spangler, *U-verse TV To Offer TotalVid VOD*, Multichannel News, Dec. 7, 2006 (reporting that the agreement includes hundreds of VOD titles on topics such as home improvement, martial arts and  
(footnote continued...)

In assessing video competition from the telcos, *The New York Times* reported that “[a]bout 50 technicians are graduating each week from [Verizon’s] video boot camp with skills they hope will arm them in the fight against their archrivals at Comcast and Cablevision. . . . [C]onsumers are benefiting from the competition, which has led to lower prices, more channels per television package, higher broadband speeds and other services.”<sup>54</sup>

Internet video options also continue to flourish and expand, fueled by increasing broadband penetration.<sup>55</sup> Kagan Media reports that 2006 was a “landmark year” for movies and TV shows delivered via the Internet, and that “the number of providers of legal downloads has

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self-defense instruction, music and sports instruction, and military history), *available at* <http://www.multichannel.com/article/CA6397949.html>; Peter Grant, *AT&T Raises TV Stakes With Bigger HD Lineup*, Wall St. J., Dec. 19, 2006, at B3. AT&T can only deliver one HDTV signal per household at a time but hopes to push that number to two next year. *See id.*

<sup>53</sup> *See* Marguerite Reardon, *AT&T Launches IPTV in Second Market*, C-NET News.com, Dec. 1, 2006 (reporting that the U-verse TV service in Houston includes over 25 HD channels, remote access to a DVR via the Web, and the ability to record up to four programs at once on a DVR), *available at* [http://news.com.com/2100-1034\\_3-6139668.html](http://news.com.com/2100-1034_3-6139668.html); Ellen Lee, *AT&T Battles Cable, Satellite TV Services*, S.F. Chron., Dec. 22, 2006 (noting that AT&T is offering its service in San Ramon, Danville, Cupertino, and Saratoga, CA), *available at* <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2006/12/22/MNGI6N4GNA1.DTL&feed=rss.news>; *Business Briefs: AT&T Expands U-verse to 3 Connecticut Areas*, San Antonio Express-News, Dec. 27, 2006 (noting that AT&T has launched its service in suburban areas of New Haven, Stamford, and Hartford, CT), *available at* <http://www.mysanantonio.com/business/stories/MYSA122806.02D.BIZbriefs.262ba9f.html>; Todd Spangler, *AT&T Misses U-Verse TV Target*, Multichannel News, Dec. 28, 2006, *available at* <http://www.multichannel.com/article/CA6402913.html>.

<sup>54</sup> Belson, *supra* note 10. This “turf war” has benefited consumers because “both incumbent and challenger are pushing bundles of products that often carry significant discounts and plenty of goodies.” *Id.*

<sup>55</sup> Nielsen/NetRatings reported a 78% broadband penetration rate for U.S. homes, representing a significant increase from 65% last year. *See Three Quarters of Web Users on Broadband*, Associated Press, Dec. 12, 2006, *available at* <http://www.msnbc.msn.com/id/16174787/>. Increased penetration and programming is fueling Internet ad spending, which is “poised to surpass \$16 billion this year with further growth forecast in the near term.” Brian Morrissey, *Internet Ad Spend to Surpass \$16 Bil.*, Adweek.com, Dec. 7, 2006, *at* [http://www.adweek.com/aw/national/article\\_display.jsp?vnu\\_content\\_id=1003494104](http://www.adweek.com/aw/national/article_display.jsp?vnu_content_id=1003494104). In the third-quarter of 2006 alone, the top twenty U.S.-based cable and telephone service providers, which collectively represent about 94% of the market, gained more than 2.5 million net additional broadband subscribers. *See* Jim Cooper, *Top Cable, Phone Firms Nab 2.5 Mil. Broadband Subs in 3Q*, Mediaweek.com, Dec. 21, 2006, *available at* [http://mediaweek.com/mw/news/recent\\_display.jsp?vnu\\_content\\_id=1003524324](http://mediaweek.com/mw/news/recent_display.jsp?vnu_content_id=1003524324).

doubled and the number of services has expanded.”<sup>56</sup> Some notable recent developments include:

- Video streams on Yahoo! News have increased more than tenfold during the past year, and Yahoo! News agreed to make ABC News its premiere video content partner.<sup>57</sup> Meanwhile Yahoo! and News Corp. introduced Fox Business Now, a collection of original Fox News reports distributed on Yahoo Finance.<sup>58</sup>
- Viacom will introduce at least twenty online niche channels early next year “to capitalize on rising online media consumption.”<sup>59</sup>
- ABC has increased the number of shows it provides on its online video player, including all of the season-to-date episodes of *Desperate Housewives*, *Grey’s Anatomy*, and *Ugly Betty*. So far, ABC.com has recorded 30 million episode starts on its streaming player.<sup>60</sup>
- Fox Sports will provide full-length replays of college football’s *Bowl Championship Series*, including the national title game, on several different Internet sites on a pay-per-view basis.<sup>61</sup>

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<sup>56</sup> Wade Holden, *Internet Movie Services Make Major Strides in 2006*, Kagan Media Money, Nov. 7, 2006, at 2-3.

<sup>57</sup> See Carly Mayberry, *ABC, Yahoo! Extend Video Content Agreement*, Hollywood Rep., Dec. 13, 2006 (“Yahoo! News is the most popular news site on the Internet, according to Nielsen/NetRatings data for the week ending Nov. 26, averaging 10.3 million unique visitors.”), available at [http://www.hollywoodreporter.com/hr/content\\_display/television/news/e3ia1286c83ec34a784a0a237af56020aa9](http://www.hollywoodreporter.com/hr/content_display/television/news/e3ia1286c83ec34a784a0a237af56020aa9). Going forward, ABC News will double the amount of content it contributes to Yahoo! News, including clips of breaking news stories as well as additional features and interviews like video segments from *Good Morning America* and *20/20*. See *id.* In addition, ABC News will distribute BBC News video clips on Yahoo!, including 30 BBC-produced video clips per day for the Yahoo! news service. See *ABC News Will Distribute BBC News Video Clips on Yahoo*, Communications Daily, Dec. 4, 2006, at 8.

<sup>58</sup> See Mass Media Notes, *News Corp. and Yahoo Introduced Fox Business Now*, Communications Daily, Dec. 5, 2006, at 9.

<sup>59</sup> *Viacom Will Introduce 20-Plus Online Channels Early in 2007*, Communications Daily, Nov. 28, 2006, at 9.

<sup>60</sup> See Anne Becker, *ABC Offers Online Viewers a Christmas Gift: More Shows*, Broad. & Cable, Dec. 21, 2006, available at <http://www.broadcastingcable.com/article/CA6402214.html?title=Article&spacedesc=news>.

<sup>61</sup> See Ben Grossman, *Fox To Put Bowl Championship Series Online*, Broad. & Cable, Dec. 28, 2006 (noting that this is the first time that Fox Sports has made downloadable content available on the Internet), available at <http://www.broadcastingcable.com/article/CA6402801.html>.

- CNBC relaunched its website featuring three to eight hours of live programming daily including web-specific video clips and market updates, video from news events, interviews with CEOs and other newsmakers, and an originally produced show.<sup>62</sup>
- To expand its reach and to “redefine the distribution of television,” Wi-Fi TV is offering financing to anyone who wants to buy an online channel. Wi-Fi TV plans to give “the airwaves back to the people” and to make “new TV channels available for viewing anywhere in the world with a high speed Internet connection.”<sup>63</sup>
- The founders of Skype announced plans to launch a broadband television service that will offer “near high-definition” programs supported by advertising and will allow users to personalize their channels. The service will use peer-to-peer technology, making it possible to serve “tens of millions of users” while eliminating security concerns.<sup>64</sup>
- The Sundance Channel announced the launch of an online virtual screening room featuring films, original series, and interactive events with filmmakers.<sup>65</sup> AOL also launched a new website, AOL True Stories, that will distribute documentaries.<sup>66</sup>
- HBO is working on launching a broadband video service sometime in 2007, which is expected to offer some of the same original series, specials, and sports offerings currently distributed on HBO’s VOD service.<sup>67</sup>

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<sup>62</sup> See Nidhi Sharma, *CNBC To Re-Launch Its Website, Ending Relations with MSN Money*, BizReport.com, Dec. 6, 2006, at [http://www.bizreport.com/2006/12/cnbc\\_to\\_re-launch\\_its\\_website\\_ending\\_relations\\_with\\_msn\\_money.html](http://www.bizreport.com/2006/12/cnbc_to_re-launch_its_website_ending_relations_with_msn_money.html).

<sup>63</sup> Press Release, Wi-Fi TV, Inc., *Wi-Fi TV Will Finance Anyone To Buy a Wi-Fi Channel with as Little as \$2,000 Down in Effort To Make MySpace Dead Space and YouTube What Tube* (Dec. 27, 2006), available at [http://www.pinksheets.com/quote/news.jsp?url=fis\\_story.asp%3Ftextpath%3DCOMTEX%5Ciw%5C2006%5C12%5C27%5C87362005.html%26clientid%3D168%26provider%3DInternet\\_Wire&symbol=WTVI](http://www.pinksheets.com/quote/news.jsp?url=fis_story.asp%3Ftextpath%3DCOMTEX%5Ciw%5C2006%5C12%5C27%5C87362005.html%26clientid%3D168%26provider%3DInternet_Wire&symbol=WTVI).

<sup>64</sup> See Andrew Edgecliffe-Johnson, *Skype Founders to Offer Web TV*, Financial Times, Dec. 17, 2006, available at <http://www.ft.com/cms/s/0ad7c98e-8df6-11db-ae0e-0000779e2340.html>.

<sup>65</sup> *Sundance Lives a Second Life*, Multichannel News, Dec. 12, 2006 (quoting Sundance executive Christopher Barry: “Second Life provides us with an innovative way to interact with our audience. . . . [W]e’re not only extending our programming to a new platform, but also providing a space for like-minded residents of Second Life to meet, interact and discuss high-quality programming. We’re excited to be part of such a groundbreaking online world.”), available at <http://www.multichannel.com/article/CA6399292.html>.

<sup>66</sup> See Carly Mayberry, *AOL Releasing Docus Online as True Stories*, Hollywood Rep., Dec. 7, 2006 (quoting Jordan Kurzweil, Vice President of development and production at AOL: “We’re launching this site as part of an overall strategy to create and grow niche audiences online.”). The site will offer titles before theatrical release and between the theatrical and DVD windows as part of a larger film catalog offering. Films will be available to stream, download-to-own, and buy as a DVD. In addition, the site will offer community forums where viewers can communicate through blogs, live chats, message boards, and video posting. See *id.*

- Major League Baseball will distribute MLB.com content via Interactive TV Networks's broadband TV service.<sup>68</sup>
- Turner Broadcasting will make Court TV shows *Murder by the Book*, *Body of Evidence*, *Psychic Detectives*, *Beach Patrol: Miami Beach*, and *The Investigators* available on the Internet for the first time via iTunes.<sup>69</sup>
- Showtime and A&E recently struck a deal with CinemaNow, which sells movies and other video content over the Internet, to offer many of their original series on CinemaNow on a download-to-own basis.<sup>70</sup>
- In an effort to compete with iTunes, Sony is introducing its own video download system, which will allow consumers to purchase movies online and view them on the PlayStation Portable.<sup>71</sup>
- ClickStar, a new broadband-movie-download company backed by Morgan Freeman and Intel, announced distribution agreements with Sony Pictures Home Entertainment, Universal Studios Home Entertainment, and Warner Bros. Home Entertainment.<sup>72</sup>

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<sup>67</sup> See R. Thomas Umstead, *HBO Plans Broadband Launch in '07*, Multichannel News, Dec. 11, 2006 (quoting an HBO executive: "We believe we can do with the broadband platform what we did with the on-demand product for our partners. . . . Our goal is to create a broadband product with our affiliates that would continue to increase our usage and the value of HBO to our subscribers."), available at <http://www.multichannel.com/article/CA6398584.html>.

<sup>68</sup> See New Technologies, *Major League Baseball Advanced Media Will Distribute MLB.com Content*, Communications Daily, Dec. 7, 2006, at 17.

<sup>69</sup> See John Eggerton, *Turner Lays Down Law on iTunes*, Broad. & Cable, Dec. 7, 2006 (noting that more content from Adult Swim and Cartoon Network will be added to iTunes), available at <http://www.broadcastingcable.com/article/CA6398096.html>. Likewise, the CW announced that it would make two of its signature shows, *Supernatural* and *Veronica Mars*, available on iTunes. See Josef Adalian & Ben Fritz, *CW Goes Digital with iTunes*, Variety.com, Dec. 17, 2006 ("Creation of a CW page on iTunes means all five broadcast nets now are offering their wares on Apple's site."), available at <http://www.variety.com/article/VR1117955946.html?categoryid=14&cs=1&nid=2565>. PBS has also announced that, for the first time, it will make shows available online before they are broadcast. See John Eggerton, *PBS Pre-Streams First Full Episode*, Broad. & Cable, Dec. 17, 2006 (reporting that the new programs will be streamed at pbs.org and available for free at iTunes), available at <http://www.broadcastingcable.com/article/CA6400457.html>.

<sup>70</sup> See Glen Dickson, *Showtime, A&E Peddle Content Online with CinemaNow*, Broad. & Cable, Dec. 18, 2006, available at <http://www.broadcastingcable.com/article/CA6401078.html>.

<sup>71</sup> See Kate Kelly et al., *Sony Is To Offer Video Downloads to Battle iTunes*, Wall St. J., Dec. 18, 2006, available at [http://online.wsj.com/article\\_print/SB116641794389853222.html](http://online.wsj.com/article_print/SB116641794389853222.html). Sony is also developing a video download service that will allow consumers to download content directly to their portable devices, without the need to use personal computers. See *id.*

*The Washington Post* reported that, soon after CBS launched its channel on YouTube in October, the CBS content featured on the site attracted nearly 30 million views and ratings for the associated broadcast programming have gone up.<sup>73</sup> YouTube has become a “cultural phenomenon.”<sup>74</sup> After its official launch only one year ago,<sup>75</sup> its popularity took off almost immediately -- in February 2006, a clip of a *Saturday Night Live* skit was watched 5 million times -- leading to the acquisition of YouTube by Google in October 2006, for \$1.65 billion.<sup>76</sup> Today, YouTube serves more than 100 million video views per day, and receives more than 65,000 video uploads per day.<sup>77</sup> In response, major media companies, including Fox, CBS, and NBC Universal are reportedly in talks to develop a rival to YouTube.<sup>78</sup>

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<sup>72</sup> See Todd Spangler, *ClickStar Inks Deals with Three Movie Studios*, Multichannel News, Dec. 12, 2006 (noting that prices for purchase and rental will be “competitive with industry trends”), available at <http://www.multichannel.com/article/CA6399295.html>.

<sup>73</sup> Musgrove, *supra* note 18 (“Since then, ratings for the network have gone up, and viewership of *The Late Show with David Letterman*, which got the biggest boost, was up by 200,000 over the past month.”). Newspaper companies are also increasingly seeing the Internet as key to their future business plans. Gannett has redirected its newsrooms to focus on the Web first, paper second. See Frank Ahrens, *A Newspaper Chain Sees Its Future, and It’s Online and Hyper-Local*, Wash. Post, Dec. 4, 2006, at A1 (“Gannett -- at its 90 papers, including USA Today -- is trying everything it can think of to create Web sites that will attract more readers.”).

<sup>74</sup> Sutel, *supra* note 8.

<sup>75</sup> See YouTube, Inc., *YouTube Fact Sheet*, at [http://www.youtube.com/t/fact\\_sheet](http://www.youtube.com/t/fact_sheet) (last visited Dec. 27, 2006).

<sup>76</sup> See Jake Coyle, *Year of YouTube Saw Web Site Grow in Power, Audience*, Contra Costa Times (Dec. 27, 2006), available at <http://www.contracostatimes.com/mld/cctimes/16326791.htm>; see also John Biggs, *Media Talk: A Video Clip Goes Viral, and a TV Network Wants To Control It*, N.Y. Times, Feb. 20, 2006, at C5.

<sup>77</sup> See YouTube, Inc., *supra* note 75.

<sup>78</sup> See Julia Angwin & Matthew Karnitschnig, *Media Titans Again Discuss Site To Rival YouTube*, Wall St. J., Dec. 9, 2006, at A4 (“The talks are driven by media companies’ belief that the fast-growing YouTube has built a huge business off their video content.”); see also Louis Hau, *Could a ThemTube Work?*, Forbes.com, Dec. 21, 2006, available at [http://www.forbes.com/2006/12/20/youtube-networks-portal-tech-media-cx\\_lh\\_1221youtube\\_print.html](http://www.forbes.com/2006/12/20/youtube-networks-portal-tech-media-cx_lh_1221youtube_print.html).

Research firm Strategy Analytics reports that video download sales through Apple's iTunes store and other sources will total \$298 million in 2006, and will grow to \$1.5 billion by the end of 2007.<sup>79</sup> Strategy Analytics also reports that, by 2010, global revenue from online video sales, rentals, and subscriptions will increase to \$5.9 billion and account for 8% of total home video industry revenues.<sup>80</sup> According to Josh Bernoff, a technology analyst with Forrester Research, "Now that there's all this video content on the Web, everyone is trying to figure out if there's any way to get it onto the television."<sup>81</sup> Apple Computer, just one of several companies that are working to develop a solution, is expected to announce a device early next year that will plug into a television set and retrieve video from computers connected to home networks.<sup>82</sup> For its part, TiVo is "broaden[ing] its reach beyond a DVR that stores traditional television shows" from traditional television networks to include video content from Internet sites such as Heavy.com or C-Net.<sup>83</sup>

Newer distribution alternatives such as mobile video continue to bulk up video programming options. For instance, Verizon Wireless and Revver signed a deal to distribute Revver's user-generated content over Verizon's VCast mobile telephone video platform.<sup>84</sup> And

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<sup>79</sup> RESEARCH: *Online Video a Billion-Dollar Biz in 2007*, CTAM Kudos, The Morning Bridge, Dec. 14, 2006.

<sup>80</sup> See *id.* Netflix is reportedly collaborating with Amazon.com to sell online DVD rental subscriptions. *Netflix, Amazon Discuss Collaboration*, Hollywood Rep., Dec. 1, 2006, available at [http://www.hollywoodreporter.com/hr/content\\_display/business/news/e3i05eccb01aeb60a7de548d939b3fc83f](http://www.hollywoodreporter.com/hr/content_display/business/news/e3i05eccb01aeb60a7de548d939b3fc83f).

<sup>81</sup> Musgrove, *supra* note 18.

<sup>82</sup> See *id.*

<sup>83</sup> *Id.*

<sup>84</sup> See *Wireless, Verizon Wireless and "Viral Video" Storehouse Revver Signed a Deal*, Communications Daily, Nov. 30, 2006, at 8.

Ellen On-the-Go, which features programming from *The Ellen DeGeneres Show*, recently became the latest channel available on Sprint Nextel's Power Vision service.<sup>85</sup> Mobile video shows so much promise that MTV Networks has created a new unit, MTVN Mobile Media, dedicated to growing its mobile video business.<sup>86</sup> Also, Sirius Satellite *Radio* said it expects to offer a live *television* service in cars by late 2007, and deals with content providers may be set as early as January.<sup>87</sup>

These developments are impossible to ignore. They have both business and regulatory significance. In examining the video marketplace of 2006 -- and in policymaking for 2007 and beyond -- looking through the prism of 1992 is utterly indefensible.

All this competition compels every competitor to counter with improved quality, innovative services, and new bundles of services priced to meet the needs of consumers and the demands of competition. Comcast has adapted to these fundamental changes in the video marketplace by, among other things, further expanding its VOD offerings to include content tailored to local audiences,<sup>88</sup> negotiating earlier release dates for films on VOD, adding new

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<sup>85</sup> See *Ellen On-the-Go with Sprint*, Multichannel News, Dec. 15, 2006, available at <http://www.multichannel.com/article/CA6400441.html>.

<sup>86</sup> See Mike Shields, *MTVN Goes Bananas with Sub-Based Mobile Offering*, Mediaweek.com, Dec. 20, 2006, available at [http://www.mediaweek.com/mw/news/recent\\_display.jsp?vnu\\_content\\_id=1003523830](http://www.mediaweek.com/mw/news/recent_display.jsp?vnu_content_id=1003523830).

<sup>87</sup> See *Live TV in Cars? You Must Be Sirius*, CNNMoney.com, Nov. 30, 2006 (noting that the mobile video, likely to be available in 2008 model lines, would be geared toward young viewers sitting in the back seat), at [http://money.cnn.com/2006/11/30/technology/sirius\\_tv.reut/index.htm](http://money.cnn.com/2006/11/30/technology/sirius_tv.reut/index.htm).

<sup>88</sup> Comcast recognizes that providing programming responsive to local needs and interests is integral to serving local communities and is a significant competitive advantage in its ability to attract and retain customers whose local information needs are not met by competitors who have a more national focus. As Comcast explained in greater detail in the Adelphia transactions proceeding, Comcast has committed extensive resources to producing a wide range of original local and regional programming, including VOD programming. See, e.g., Letter from James R. Coltharp, Comcast Corporation, to Marlene Dortch, Secretary, FCC, at 21-24 (Nov. 22, 2005).

programming to its services, continuing to upgrade its cable systems, utilizing innovative marketing techniques, and enhancing its service offerings.

For example, to bolster its local on-demand base, Comcast has announced that CN8 will expand its efforts in education, as well as in the entertainment realm, including restaurant-related content, theater, and music.<sup>89</sup> In its most recent example of a commitment to local VOD content, Comcast and CN8 partnered to obtain holiday greetings from hundreds of U.S. troops worldwide to distribute through Comcast ON DEMAND.<sup>90</sup> Moreover, Comcast announced the availability of new VOD content centering on the issues and experiences of immigrant and ethnic communities.<sup>91</sup> In another VOD move, Comcast is testing the release of films on demand simultaneously with their release on DVDs.<sup>92</sup> Comcast also announced the launch of The Sportsman Channel on its Digital Sports Package in certain markets.<sup>93</sup> Comcast announced that it will spend \$80 million in the next year and a half to finish upgrading its cable television and

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<sup>89</sup> See Christian Lewis, *Comcast Puts Faith in Localized VOD Content*, Multichannel News, Dec. 11, 2006 (“As Comcast continues to add to its base of national video-on-demand offerings, the cable operator’s Eastern division is reporting significant viewership increases for localized public-service content.”), available at <http://www.multichannel.com/article/CA6398565.html>. Comcast already offers a substantial amount of local VOD content, including services such as Pets ON DEMAND, Fugitives ON DEMAND, Troop Greetings ON DEMAND, and Candidates ON DEMAND. See *id.*

<sup>90</sup> See Steve Donohue, *Comcast Runs Troop Greetings On Demand*, Multichannel News, Dec. 13, 2006 (explaining that, to ensure that family members of the troops are able to access the messages, Comcast will offer free digital service upgrades through Jan. 22, the last day the troop greetings will be carried on Comcast ON DEMAND), available at <http://www.multichannel.com/article/CA6399749.html>.

<sup>91</sup> See *Comcast Adds Ethnic VOD*, Multichannel News, Dec. 15, 2006, available at <http://www.multichannel.com/article/CA6400309.html>.

<sup>92</sup> The test is being run in Denver and Pittsburgh, where customers can access movies newly available on DVD for \$4. See Geraldine Fabrikant, *Media; On Demand and DVD At the Same Time*, N.Y. Times, Dec. 18, 2006, at C5 (explaining that Comcast “has been the industry leader in offering free and paid video on demand, compiling a library of 8,000 movies and television episodes to lure subscribers and to distinguish itself from satellite TV”).

<sup>93</sup> *Comcast, Time Warner, Cox Systems Add Sportsman*, Multichannel News, Dec. 7, 2006, available at <http://www.multichannel.com/article/CA6397946.html>.

high-speed Internet network in the California Bay Area.<sup>94</sup> Comcast and Circuit City began test marketing an in-store boutique in Massachusetts “where customers can sign up for Comcast triple-play services, get product advice, and arrange in-home assistance with installing related gadgets.”<sup>95</sup> To bolster its Internet efforts, Comcast made GameInvasion.net, a video-game site previously available only to Comcast’s high-speed Internet subscribers, available to all Internet users.<sup>96</sup>

### **C. DBS Competition Is Powerful and Effective.**

Certain commenters, namely the telcos and BSPs, persist in submitting self-serving claims that DBS competition is not meaningful and that only competition from wireline-based competitors really counts.<sup>97</sup> As Comcast has explained repeatedly,<sup>98</sup> as the comments of DBS providers affirm, and as marketplace evidence proves,<sup>99</sup> the DBS providers are effective competitors to cable.

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<sup>94</sup> See Ellen Lee, *Comcast Expands System Upgrade; 2,200 Miles of Cable Part of Plan to Add Telephone Service*, S.F. Chron., Dec. 28, 2006, available at <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2006/12/28/BUGMHN7V201.DTL>.

<sup>95</sup> Cassimir Medford, *Comcast Storms Into Retail*, Red Herring, Dec. 8, 2006, available at <http://www.redherring.com/Article.aspx?a=20144&hed=Comcast+Storms+into+Retail>.

<sup>96</sup> See Todd Spangler, *Comcast Unlocks Site for Gamers*, Multichannel News, Dec. 11, 2006, available at <http://www.multichannel.com/article/CA6398558.html>.

<sup>97</sup> See BSPs Comments at ii, 8; AT&T Comments at 1-5; USTA Comments at 5.

<sup>98</sup> See Comcast Reply Comments, filed in MB Dkt. No. 05-255, at 37-41 (Oct. 11, 2005) (“*Comcast 2005 Reply*”); Comcast Reply Comments, filed in MB Docket No. 04-227, at 12-17 (Aug. 25, 2004).

<sup>99</sup> See *supra* notes 39-46 and accompanying text; Comcast Comments at 7-17; NCTA Comments at 9-13; DIRECTV Comments at 2-15. Even those who try to undervalue DBS competition admit to the presence of significant competition in the video marketplace. For example, the BSP Commenters state that in the past twelve years, “new competitors . . . have made significant inroads in the multichannel video programming distribution market.” BSPs Comments at 1-2.

The Commission has long recognized that DBS provides meaningful video competition.<sup>100</sup> In its most recent report, the Commission noted the strong competitive effect of DBS, explaining that cable operators “have responded to the growth of DBS and its competitive service offerings by, among other things, expanding their channel line ups and bundling video service with other service offerings, such as cable modem service or telephone service” and that “[t]hese competitive efforts are matched by DBS operators’ offering of local broadcast channels, additional sports and international programming, and advanced set-top boxes with digital video recorder (DVR) capabilities.”<sup>101</sup> The Commission found that DBS providers served approximately 27.7% of all MVPD subscribers as of June 2005, compared with 25.1% the year before.<sup>102</sup> Over the past year, DBS subscriber numbers continued on this trajectory of growth: as of September 30, 2006, EchoStar and DIRECTV reported over 28.43 million subscribers, or *approximately 30% of all MVPD subscribers*.<sup>103</sup> And, EchoStar just announced it now serves over 13 million subscribers.<sup>104</sup> As the trade press indicates: “During 2006 the satellite industry has shown continued positive growth marked with important events and signs of a prosperous future.”<sup>105</sup>

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<sup>100</sup> See *In re Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Fifth Annual Report, 13 FCC Rcd. 24,284 ¶ 62 (1998) (“DBS continues to represent the single largest competitor to cable operators and DBS subscribership continues to show strong growth.”).

<sup>101</sup> *Twelfth Annual Report* ¶ 7.

<sup>102</sup> See *id.* ¶ 8.

<sup>103</sup> See Comcast Comments at n.17 (citing DIRECTV and EchoStar press releases).

<sup>104</sup> See Eggerton, *supra* note 45.

<sup>105</sup> *Satellite Poised for Prosperity*, SKYREPORT.com, Dec. 20, 2006, available at [http://www.skyreport.com/archives/view/?publication\\_id=1&release\\_id=88](http://www.skyreport.com/archives/view/?publication_id=1&release_id=88).

A 2004 article by Austan Goolsbee<sup>106</sup> and Amil Petrin reinforces the conclusion that DBS operators provide meaningful competition to cable operators. Goolsbee and Petrin conducted an economic analysis of the consumer gains from DBS competition and concluded that DBS competition has constrained cable prices substantially: “without DBS entry[,] cable prices would be about 15 percent higher and cable quality would fall.”<sup>107</sup> Moreover, Goolsbee and Petrin recognized that lower prices are not the only manifestation of vibrant competition: improved quality and service also are natural competitive responses to increased competition.<sup>108</sup> In the case of cable, competition from DBS has manifested itself in substantial service and quality enhancements.<sup>109</sup>

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<sup>106</sup> It is noteworthy that Professor Goolsbee has been retained to conduct one of the Commission’s media ownership studies. See Public Notice, FCC, *FCC Names Economic Studies To Be Conducted as Part of Media Ownership Rules Review* (Nov. 22, 2006), available at [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-268606A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-268606A1.pdf).

<sup>107</sup> Austan Goolsbee & Amil Petrin, *The Consumer Gains from Direct Broadcast Satellites and the Competition with Cable TV*, 72 *Econometrica* 351, 351 (2004). Goolsbee & Petrin find that:

For cable subscribers, our results suggest that cable prices are at least \$4 per month lower than they would have been [without DBS entry]. In the aggregate, given 70 million cable subscribers, the price effect yields a total welfare gain of about \$3.3 billion for the consumers that stay with cable.

*Id.* at 377.

<sup>108</sup> See *id.* at 370 (“In most empirical work [the incumbent firm’s response to entry] is ignored, even though it can substantially impact consumer welfare. In the cases where it is recognized . . . , incumbents are assumed to respond only by changing prices. Because of the rapid rise of DBS and the fact that it [was] a higher quality alternative [in 2001] on many dimensions, we examine the response of both cable prices and cable characteristics to entry.”).

<sup>109</sup> See *id.* at 377 (“The quality improvements to cable characteristics [resulting from DBS competition] are worth approximately another \$1 per month of surplus, which adds another \$800-900 million to the welfare change.”). A natural offshoot of improved services and programming is higher prices and programming costs. This is the nature of the video business as evidenced by the price increases recently announced by Verizon, RCN, and EchoStar. See, e.g., Steve Donohue, *Verizon Sets First FiOS Rate Hike*, Multichannel News, Nov. 20, 2006 (stating that Verizon plans to raise the rates for its Verizon FiOS television service by 7.6% in January), available at <http://www.multichannel.com/article/CA6393559.html>; Mayor Menino Says RCN Rates for 2007 Are Too High, Boston Globe, Dec. 9, 2006, at A11 (noting that the cost of RCN’s “full basic” package is rising 8%); Joyzelle Davis, *EchoStar to Raise Most Bills by 3%*, Rocky Mtn. News, Dec. 22, 2006, available at [http://www.rockymountainnews.com/drmn/tech/article/0,2777,DRMN\\_23910\\_5230345,00.html](http://www.rockymountainnews.com/drmn/tech/article/0,2777,DRMN_23910_5230345,00.html).

Those who persist in calls for regulation have always provided reasons to discount DBS competition. Early on, they cited satellite's equipment costs; later they cited the lack of local channels; now they claim that DBS doesn't have as robust a bundle. The fact is, DBS providers serve over 28.43 million subscribers. DBS providers now typically provide free equipment to subscribers; they offer local channels; and they are pursuing several strategies to provide bundled services, including active partnerships with the telcos and satellite-delivered broadband options.

In its initial comments, Comcast submitted extensive evidence of its responses to competition, including its investment in its systems and programming, innovation, customer service efforts, and community involvement.<sup>110</sup> The majority of these competitive responses have taken place in areas where overbuilders and telcos are not offering cable service, but where DBS services are available.<sup>111</sup> As the number of competing platforms grows, Comcast will continue to respond -- in all of its markets -- by offering better products, better value, and better service.<sup>112</sup>

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<sup>110</sup> See Comcast Comments at 59-78.

<sup>111</sup> It is not just the 28.43 million households that already subscribe to DBS that provide market discipline; it is also the potential for millions of additional customers to switch, on a moment's notice, in response to attractive incentives and with virtually no up-front cost.

<sup>112</sup> Commenters arguing that DBS does not provide meaningful competition rely largely on a report by GAO, which purported to evaluate the effect of wireline overbuilders on the prices for cable services. See Gen. Accounting Office, *Telecommunications: Wire-Based Competition Benefited Consumers in Selected Markets*, GAO-04-241, (Feb. 2004). As Comcast explained in comments submitted last year, that report's analysis suffered from significant deficiencies that deprived the conclusions of any evidentiary value. See *Comcast 2005 Reply* at 40-41. Key deficiencies include the following. (1) The report was based on an extremely small sample; it examined only six "matched pairs" of markets that were hypothesized to be comparable in every way except for the presence of an overbuilder in one of every two paired cities. (2) The study overweighted small markets, which tend to have larger estimated competitive differentials. (3) The report may have also overweighted markets with low DBS penetration since four of the six markets with an overbuilder had DBS penetration well below the national average. (4) The report failed to calculate quality-adjusted prices but merely compares the nominal prices for packages of services, ignoring potentially significant differences in the number or nature of channels in the package. (5) No effort was made to determine whether the service prices observed in overbuilt markets are sustainable. (6) There was no indication that GAO took into account, among other things: (a) whether the overbuilder competed in the  
(footnote continued...)

### **III. PROPOSALS TO INCREASE GOVERNMENT INTERFERENCE IN THE MARKETPLACE ARE UNJUSTIFIED.**

Based solely on the time-tested adage that “practice makes perfect,” one might reasonably expect that certain commenters’ tired arguments about “problems” in the video marketplace might eventually become more persuasive or, at a minimum, be supported with evidence. But the facts refuse to cooperate. And yet, certain commenters continue to make unsubstantiated and inaccurate allegations about the marketplace, their ability to compete, and the dynamics of competition. In an environment in which competition, choice, and substitution are all increasing, a few dead-enders persist in calling for increased government regulation. And they are joined by some new special pleaders, including some of the largest and most powerful companies in the nation’s economy.

Whether the issue is access to programming, retail prices, the franchising process, or carriage of particular programming, these commenters are not timid about arguing that the Commission needs to regulate cable operators more and them less. It is time for the Commission to narrow the scope of its inquiry and more selectively distinguish (in the words of a former Chairman) between “true facts” and “fantastic fictions.”<sup>113</sup>

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(...footnote continued)

entire franchise area or only in selected neighborhoods (meaning the “benefits” of price competition were limited to the most demographically attractive neighborhoods); (b) how long the overbuilder had been in business, and whether this price differential had persisted for a lengthy period of time; (c) whether the overbuilder was a private entity or one established by local government (leading to explicit or implicit government subsidies); or (d) whether the overbuilder, the cable operator, or both have rebuilt their systems (in fact, GAO seemed to find that the presence of an overbuilder does not affect overall quality improvements). *Id.*

<sup>113</sup> See Reed E. Hundt, Chairman, FCC, Address Before the International Radio and Television Society (Oct. 19, 1994), available at <http://www.fcc.gov/Speeches/Hundt/spreh433.txt>.

**A. Video Programming Distributors Have Marketplace Access to All Programming Services They Need To Compete.**

The most familiar area where commenters advocate more regulation where none is needed involves access to programming. For the tenth year in a row, cable competitors have claimed that they have been denied access to cable-affiliated programming networks; that cable-affiliated programming networks are migrating their programming from satellite to terrestrial delivery in order to “evade” the program access rules by use of the so-called “terrestrial loophole” (allegations that the Commission has repeatedly rejected);<sup>114</sup> and that the Commission must adopt new regulations to protect them.<sup>115</sup> These allegations have been shown repeatedly to be nothing more than conjecture. Commenters have yet to submit any evidence and continue to make baseless allegations.

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<sup>114</sup> See *RCN Telecom Servs. of N.Y., Inc. v. Cablevision Sys. Corp.*, 14 FCC Rcd. 17,093 (1999), *aff'd*, 16 FCC Rcd. 12,048 (2001); *DIRECTV, Inc. v. Comcast Corp.*, 13 FCC Rcd. 21,822 (1998), *aff'd*, Memorandum Opinion & Order, 15 FCC Rcd. 22,802 (2000); *EchoStar Communications Corp.*, 14 FCC Rcd. 2089 (1999), *aff'd*, Memorandum Opinion & Order, 15 FCC Rcd. 22,802 (2000), *aff'd*, *EchoStar v. FCC*, 292 F.3d 749 (D.C. Cir. 2002).

<sup>115</sup> See DIRECTV Comments, filed in CS Dkt. No. 97-141, at 5-6 (July 23, 1997); DIRECTV Comments, filed in CS Dkt. No. 98-102, at 6-7 (July 31, 1998); DIRECTV Comments, filed in CS Dkt. No. 99-230, at 3 (Aug. 6, 1999); DIRECTV Comments, filed in CS Dkt. No. 00-132, at 8, 15 (Sept. 8, 2000); DIRECTV Comments, filed in CS Dkt. No. 01-129, at 8-10 (Aug. 3, 2001); DIRECTV Comments, filed in MB Dkt. No. 02-145, at 9-11 (July 29, 2002); DIRECTV Comments, filed in MB Dkt. No. 03-172, at 10 (Sept. 11, 2003); DIRECTV Comments, filed in MB Dkt. No. 04-227, at 18-23 (July 23, 2004); DIRECTV Comments, filed in MB Dkt. No. 05-255, at 14-15 (Sept. 19, 2005). EchoStar raised the same arguments to the Commission in 1999, 2001, 2002, 2004, and 2005. See EchoStar Comments, filed in CS Dkt. No. 99-230, at 4-5 (Aug. 6, 1999); EchoStar Comments, filed in CS Dkt. No. 01-129, at 10-11 (Aug. 3, 2001); EchoStar Comments, filed in MB Dkt. No. 02-145, at 10-11 (July 29, 2002); EchoStar Comments, filed in MB Dkt. No. 04-227, at 11-13 (July 23, 2004); EchoStar Comments, filed in MB Dkt. No. 05-255, at 3-6 (Sept. 19, 2005). And, RCN and other BSPs have made similar allegations since 1997. See, e.g., RCN Reply Comments, filed in CS Dkt. No. 97-141, at 6 (Aug. 20, 1997); RCN Comments, filed in CS Dkt. No. 99-230, at 18-22 (Aug. 6, 1999); RCN Comments, filed in CS Dkt. No. 00-132, at 13-21 (Sept. 8, 2000); RCN Comments, filed in CS Dkt. No. 01-129, at 9-10 (Aug. 3, 2001); RCN Comments, filed in MB Dkt. No. 03-172, at 7-10 (Sept. 11, 2003); RCN Comments, filed in MB Dkt. No. 04-227, at 9-10 (July 23, 2004); RCN Comments, filed in MB Dkt. No. 05-255, at 7-11 (Sept. 19, 2005); BSPA Comments, filed in Dkt. No. 02-145, at 11-16 (July 29, 2002); BSPA Comments, filed in Dkt. No. 03-172, at 14-19 (Sept. 11, 2003); BSPA Comments, filed in Dkt. No. 04-227, at 12-14 (July 23, 2004); BSPA Comments, filed in Dkt. No. 05-255, at 12-15 (Sept. 19, 2005).

Not surprisingly, these commenters make the same claims again this year.<sup>116</sup> Strangely, so do Verizon and AT&T, despite their apparent success entering into contracts for carriage of all cable-affiliated programming they have requested.<sup>117</sup> We address here the key arguments and misstatements from proponents of program access regulation:

- **Status of Today’s Marketplace.** The BSP Commenters claim that “[t]he same basic market conditions that existed in 1992 exist today.”<sup>118</sup> That is obviously untrue, as the Commission’s video competition reports confirm. In 1992, DBS service did not exist, but today DBS providers serve over 28.43 million subscribers (close to a third of all MVPD subscribers).<sup>119</sup>
- **Vertical Integration.** The BSP Commenters state that incumbent cable operators’ vertical integration “is as significant today as it was in 1992.”<sup>120</sup> That is patently false. In the early nineties, over 50% of national programming networks were vertically integrated with a cable operator, while last year, the Commission found that cable operators had ownership interests in only 21.8% of national programming networks.<sup>121</sup>
- **Refusals To Deal.** Verizon alleges that video programmers have “refus[ed] to sell their programming to competing distributors (such as wireline competitors like Verizon or satellite carriers) or by selling that programming on discriminatory terms.”<sup>122</sup> Based on Verizon’s press releases, however, it appears that Verizon has signed a carriage

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<sup>116</sup> See, e.g., DIRECTV Comments at 13-14; EchoStar Comments at 7-14; BSPs Comments at 11-14.

<sup>117</sup> See, e.g., AT&T Comments at 13-18; Verizon Comments at 29-30; USTA Comments at 19-22.

<sup>118</sup> BSPs Comments at 12.

<sup>119</sup> See Comcast Comments, *supra* note 103.

<sup>120</sup> BSPs Comments at 11.

<sup>121</sup> Compare *First Report* ¶ 161 with *Twelfth Annual Report* ¶ 157. Even the 21.8% number is vastly overstated when considering that the Commission counted iN DEMAND as 60 different programming networks. The Commission appears to have based its attribution of 60 programming networks to iN DEMAND on a press release from Major League Soccer (“MLS”), an entity that has a partnership with iN DEMAND to transmit MLS’s premium sports package, but is not in any other way affiliated with iN DEMAND. To the extent the MLS sports package, and other professional premium sports packages, can be considered programming networks, they should not be attributed to iN DEMAND, but rather to the sports teams. Moreover, if the Commission is going to count the sports packages as programming networks, then the same logic dictates that it should count the 13 programming feeds of the NFL SUNDAY TICKET as individual networks owned by the NFL.

<sup>122</sup> Verizon Comments at 29.

agreement with every cable-affiliated programmer from whom it has sought carriage.<sup>123</sup> Like Verizon, AT&T and Qwest have successfully expanded their programming offerings to include a diverse variety of programming networks, including networks affiliated with cable operators, such as Time Warner and Comcast.<sup>124</sup> And although the negotiations for programming may not have been frictionless, that is the nature of *all* program carriage negotiations, regardless of whether the programmer is affiliated with a cable operator, a broadcaster, a DBS provider, or is independent. This is far from proof of market failure that requires government intervention.

Referring to Comcast's efforts in Philadelphia to distinguish its service from its DBS competitors, AT&T asserts that "Comcast has denied its MVPD competitors access to programming of the games of the local professional sports teams."<sup>125</sup> AT&T chooses to ignore the fact that Comcast has reached carriage agreements for this programming with its wireline competitors in Philadelphia -- RCN and Verizon -- even though it is under no legal obligation to do so.

- **The Terrestrial Exemption.** A number of parties continue to insist that there is a terrestrial "loophole." This so-called "loophole" was in fact an exemption from the usual requirements of the program access rules. As the Commission has explained repeatedly,

the language of Section 628(c) expressly applies to "satellite cable programming and satellite broadcast programming," and that terrestrially delivered programming is "outside of the direct coverage of Section 628(c)." . . . [T]he legislative history to Section 628 reinforces our conclusion. The Senate version of the legislation that became Section 628 would have applied the program access provisions to all

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<sup>123</sup> See, e.g., *TV as You've Never Seen It Before*, *supra* note 48 (announcing "the availability of Comcast SportsNet-Philadelphia for FiOS TV subscribers"); Press Release, Verizon Communications Inc., *Verizon and Rainbow Media Holdings Sign Programming Deal* (Nov. 16, 2006), available at <http://newscenter.verizon.com/press-releases/verizon/2006/verizon-and-rainbow-media.html>; Press Release, Verizon Communications Inc., *Verizon and New England Cable News Sign Agreement* (May 31, 2006), available at <http://newscenter.verizon.com/press-releases/verizon/2006/page.jsp?itemID=29670483>; *Verizon Signs First Video Deal with Time Warner*, Reuters, July 6, 2005. Verizon carries many Comcast-affiliated networks, including Comcast SportsNet Mid-Atlantic, Style, E! Entertainment Television, the Golf Channel, Versus, and others. See Verizon Communications Inc., *Channel Lineup*, at <http://www22.verizon.com/content/fiosv/channel+lineup/channel+lineup.htm> (last visited Dec. 20, 2006).

<sup>124</sup> See Todd Spangler, *AT&T Adds WB Flicks to U-verse VOD*, Multichannel News, Oct. 26, 2006, available at <http://www.multichannel.com/article/CA6385468.html>; Carol Wilson, *AT&T Inks First Cable Content Deal*, Telephony, Sept. 14, 2006, available at [http://telephonyonline.com/iptv/marketing/att\\_comcast\\_iptv\\_091406/](http://telephonyonline.com/iptv/marketing/att_comcast_iptv_091406/). AT&T has signed an agreement allowing it "to deliver Comcast networks' linear and on-demand programming" as part of its cable service programming lineup. Press Release, AT&T Inc., *AT&T U-verse TV to Include Comcast Networks' Content* (Sept. 14, 2006), available at <http://att.sbc.com/gen/press-room?pid=4800&cdvn=news&newsarticleid=22705>.

<sup>125</sup> AT&T Comments at 14; see also USTA Comments at 20.

“national and regional cable programmers who are affiliated with cable operators.” The House version, by contrast, expressly limited the provisions to “satellite cable programming vendor[s] affiliated with a cable operator.” The Conference agreement adopted the House version with amendments. Given this express decision by Congress to limit the scope of the program access provisions to satellite delivered programming, we continue to believe that the statute is specific in that it applies only to satellite delivered cable and broadcast programming.<sup>126</sup>

The BSP Commenters imply that the Commission somehow erred in its analysis of the statutory language.<sup>127</sup> And, AT&T urges the Commission to use its “ancillary authority” to expand the program access rules to terrestrially-delivered programming.<sup>128</sup> Despite the apparent belief of the BSP Commenters and AT&T that the Commission is free to disregard the express language of the statute as well as the legislative history that clearly exempts terrestrially-delivered programming from the program access rules, the Commission has not done so, and should not do so.

- **Terrestrial Migration and Regional Concentration.** The BSP Commenters claim that the Adelphia transactions resulted in regional clustering where cable operators will have “the ability to distribute [local sports and news] programming terrestrially [to] ensure that this programming is not subject to the current Section 628 rules.”<sup>129</sup> However, as explained above, there is absolutely no evidence that any programming has migrated from satellite to terrestrial delivery so that it is not subject to the program access rules.<sup>130</sup> In fact, the evidence is to the contrary: in every market where Comcast has created a regional sports network subsequent to Comcast SportsNet Philadelphia -- Baltimore/Washington, Chicago, Sacramento, and New York -- the RSN is satellite-delivered. This is so despite the fact that Comcast has regional clusters in almost all of those markets. Of note, in its own merger analysis, the Federal Trade Commission (“FTC”) asked “whether the increased clustering from the [Adelphia] transaction[s]”

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<sup>126</sup> *In re Implementation of the Cable Television Consumer Protection & Competition Act of 1992: Sunset of Exclusive Contract Prohibition*, Report & Order, 17 FCC Rcd. 12,124 ¶ 73 (2002) (“*Sunset Order*”) (internal citations omitted).

<sup>127</sup> See BSPs Comments at 12 (“Unfortunately, the existing statute has narrow application to satellite-delivered content . . . which, according to the Commission, does not apply to terrestrially delivered content.”).

<sup>128</sup> See AT&T Comments at 17.

<sup>129</sup> BSPs Comments at 13.

<sup>130</sup> Contrary to popular belief, Comcast SportsNet Philadelphia was not migrated from satellite to terrestrial delivery. The Commission has specifically concluded that the delivery of Comcast SportsNet Philadelphia complies with the FCC’s program access rules. See *DIRECTV, Inc. v. Comcast Corp.*, Memorandum Opinion & Order, 15 FCC Rcd. 22,802 ¶ 14 (2000), *aff’d*, *EchoStar v. FCC*, 292 F.3d 749 (D.C. Cir. 2002).

would affect competitors' access to RSNs, and it found no problem.<sup>131</sup> As the FTC's Director of the Bureau of Economics recently explained,

After careful consideration, the staff concluded for various reasons that the evidence did not indicate that the proposed transaction was likely to make exclusive contracts profitable for either Comcast or TWC in the geographic markets impacted by the transaction. For example, in one geographic area, the staff's economic analysis demonstrated that it would be unprofitable for TWC to obtain the exclusive distribution rights for the local sports team because an insufficient number of satellite customers were likely to switch to TWC. Historical evidence from other markets where the RSN rights are held on an exclusive basis by a cable company show that the necessary level of switching could not be expected. In other markets, the evidence showed that the local sports teams were unwilling to enter into exclusive agreements and did not believe that TWC or Comcast would be able to force them to do so.<sup>132</sup>

- **Regional Clustering.** A number of commenters imply that regional clustering is harmful to competition.<sup>133</sup> The Commission, however, has previously acknowledged the benefits of clustering.<sup>134</sup> More recently, so has the FTC's Director of the Bureau of Economics:

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<sup>131</sup> *Vertically Integrated Sports Programming: Are Cable Companies Excluding Competition: Hearing Before the S. Comm. on the Judiciary*, 109<sup>th</sup> Cong. at 5-6 (Dec. 7, 2006) ("FTC Testimony") (statement of Michael Salinger, Director, Bureau of Economics, FTC), available at [http://judiciary.senate.gov/testimony.cfm?id=2454&wit\\_id=5929](http://judiciary.senate.gov/testimony.cfm?id=2454&wit_id=5929).

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

<sup>133</sup> See, e.g., BSPs Comments at 12; DIRECTV Comments at 13. The large ILECs benefit from having larger and more contiguous "clusters" than the big cable companies. Likewise, it can be said that the DBS providers reap benefits from having a nationwide "cluster."

<sup>134</sup> See *In re Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Eighth Annual Report, 17 FCC Rcd. 1244 ¶ 140 (2002) (noting commenters' recitation of benefits of clustering); *In re Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Seventh Annual Report, 16 FCC Rcd. 6005 ¶ 166 (2001) (noting clustering "permits cable operators to . . . gain efficiencies related to economies of scale and scope resulting in lower administrative costs, enhanced deployment of new technologies, and encouraging the extension into previously unserved areas"); *In re Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Sixth Annual Report, 15 FCC Rcd. 978 ¶¶ 161-62 (2000) (noting that clustering "can create greater economies of scale and size," thereby enabling "cable operators to offer a wider variety of broadband services at lower prices to customers in geographic areas that are larger than single cable franchise areas," and thus, "make cable operators more effective competitors to LECs whose local service areas are usually much larger than a single cable franchise area"); *In re Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Fifth Annual Report, 13 FCC Rcd. 24,284 ¶¶ 144-48 (1998); see also Gen. Accounting Office, *Telecommunications: The Changing Status of Competition to Cable Television* at 28 (July 1999).

Clustering enables cable firms to realize economies of scale associated with providing cable service in contiguous areas. By acquiring contiguous systems, TWC and Comcast could lower several categories of costs, such as management, administrative and marketing costs, as well as the expense of providing system upgrades. In addition, TWC and Comcast could use clustering to position themselves better to compete with local telephone companies and other providers in the delivery of video and telephone service.<sup>135</sup>

- **Regional Sports Programming.** DIRECTV, AT&T, and USTA continue to argue that RSN programming is “must-have” programming, while EchoStar and Verizon point to access to sports programming as necessary for them to compete.<sup>136</sup> Marketplace experience disproves this theory. For example, EchoStar continues not to carry the YES Network (which carries Yankees games, the most valuable baseball franchise in the country)<sup>137</sup> and Mid-Atlantic Sports Network. Despite the lack of this programming, EchoStar has been able to compete successfully against cable operators and now has over 13 million subscribers.<sup>138</sup>

As in past years, the Commission should give little credence to these allegations. The marketplace has worked well, and all consumers have access to more programming and more options for how they receive that programming (and from whom) than ever before. In fact, the marketplace has worked so well that it is evident that continued regulation of cable operators’ vertical relationships is no longer necessary. As then-Commissioner Martin noted four years ago,

I believe the Commission must let the exclusivity ban sunset *unless* it can determine based on specific evidence – not solely the Commission’s “expert” or “predictive” judgment – that the ban is essential to preserving and protecting competition and diversity in the distribution of video programming. Thus, I believe that a finding that the exclusivity ban is “beneficial” to or “promotes” competition and diversity would not be

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<sup>135</sup> *FTC Testimony* at 4.

<sup>136</sup> See DIRECTV Comments at 13; AT&T Comments at 14; USTA Comments at 21; EchoStar Comments at 9 n.10; Verizon Comments at 30.

<sup>137</sup> See Michael Ozanian, *The Business of Baseball*, Forbes.com, Apr. 20, 2006, available at [http://www.forbes.com/2006/04/17/06mlb\\_baseball-team-valuations-cx\\_mo\\_0420sports.html](http://www.forbes.com/2006/04/17/06mlb_baseball-team-valuations-cx_mo_0420sports.html).

<sup>138</sup> See Eggerton, *supra* note 39 and accompanying text.

sufficient. . . . For me, whether the exclusivity ban continues to be necessary was a very close call.<sup>139</sup>

If the status of the competitive marketplace four years ago made it a “very close call” as to whether “the ban [was] essential to preserving and protecting competition and diversity in the distribution of video programming,” then the incredible expansion of competition since that time renders such rules obsolete. Comcast looks forward to addressing this issue and others related to the program access rules in the Commission’s upcoming review of whether the exclusivity prohibition “continues to be necessary to preserve and protect competition and diversity in the distribution of video programming.”<sup>140</sup>

**B. There Is No Basis for Complaints About Cable Operators’ Pricing Practices In Response to Competition.**

Repeating unfounded claims raised in previous years,<sup>141</sup> the National Telecommunications Cooperative Association (“NTCA”) alleges that cable operators engage in predatory pricing and illegal discounting.<sup>142</sup> Of course, if the cable operators truly were engaging in predatory pricing or other anticompetitive conduct, NTCA or its member companies could file a formal complaint with the Commission or pursue antitrust remedies. The fact of the matter is that, far from being improper, the sorts of “winback” discounting NTCA describes are legal, common, and indicative of a fully competitive video marketplace.

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<sup>139</sup> *Sunset Order* at 12,180-81 (Separate Statement of Commissioner Kevin Martin) (emphasis in original).

<sup>140</sup> 47 U.S.C. § 548(c)(5).

<sup>141</sup> *See, e.g.*, Nat’l Telecommunications Cooperative Ass’n (“NTCA”) Comments at 7-9, filed in MB Docket No. 05-255 (Sept. 19, 2005); RCN Comments at 16, filed in MB Docket No. 05-255 (Sept. 19, 2005); BSPA Comments at 15-18, filed in MB Docket No. 05-255 (Sept. 19, 2005).

<sup>142</sup> *See* NTCA Comments at 15-16.

NTCA's allegation that cable companies are engaging in predation is without foundation. The sole "evidence" provided by NTCA is reference to a single unnamed cable operator that offered a rebate check and lower-priced programming to any customer that would switch back to its service.<sup>143</sup> There is no evidence that type of behavior amounts to predation. Offering promotional discounts to retain, win-back, and recruit new customers is a normal part of competition in the video marketplace and other markets.<sup>144</sup> In fact, DBS operators have been making generous discount offers for years. DBS operators consistently offer hundreds of dollars in free equipment (set top boxes, satellite dishes and other enticements) to prospective customers. Only a few months ago, DIRECTV tried to capitalize on Time Warner Cable's dispute with the NFL Network by offering Time Warner customers in select markets over \$150 in rebates to switch to DIRECTV.<sup>145</sup> No one has alleged that this type of marketing is improper or illegal.<sup>146</sup> To the contrary, such discounts only underscore the vibrancy and competitiveness of the video distribution marketplace.

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<sup>143</sup> See NTCA Comments at 16.

<sup>144</sup> See *Orloff v. FCC*, 352 F.3d 415, 421 (D.C. Cir. 2003) (holding that "[c]onsumers...can only benefit" when service providers adopt a "competitive marketing strategy" of making individualized offers that "respond immediately to changes in the marketplace and to individual customer demand when existing plans and promotions were inadequate." (quoting *Orloff v. Vodafone AirTouch Licenses LLC*, 17 FCC Rcd. 8987, 8998-99 (2002))).

<sup>145</sup> See Mike Reynolds, *DIRECTV, NFL Network Going Deep*, Multichannel News, Oct. 16, 2006, available at <http://www.multichannel.com/article/CA6381162.html>. Providing even more evidence of competition, Sinclair is offering rebates to cable customers as an incentive to switch to DBS while Sinclair is in a retransmission dispute with the local cable company. See *Sinclair Extends DirecTV Rebate*, Multichannel News, Dec. 28, 2006, available at <http://www.multichannel.com/article/CA6402985.html>.

<sup>146</sup> Even DIRECTV's standard current offer provides to new customers, at no additional cost, a satellite dish, 4 receivers (one of which can be a DVR), and a portable DVD player. See *DIRECTV, DIRECTV-CURRENT OFFER*, at <http://www.directv.com/DTVAPP/global/contentPage.jsp?assetId=2700001> (last visited Dec. 20, 2006).

NTCA alleges that cable company pricing flexibility is facilitated by what it believes is an ill-designed test for determining when LEC video entry constitutes “effective competition.” NTCA provides no reason to reject the Commission’s test except that it disagrees with it.<sup>147</sup> There is no reason to make the Commission’s effective competition test more stringent. The real problem associated with the test is the Commission’s failure to timely grant petitions in markets where effective competition clearly exists.<sup>148</sup> As LECs increasingly provide video service, the Commission should move quickly to declare markets subject to effective competition, as Congress expressly intended.<sup>149</sup>

**C. The Local Franchising Process Is Not a Barrier to the Entry of New Video Competitors.**

Certain commenters advocate changes in the cable franchising process that would apply disparate regulation to like services. These parties reiterate claims they made in the *Franchise Proceeding* that the franchising process is a barrier to entry to the video marketplace and that the Commission has the authority to dramatically alter the relationships between local governments

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<sup>147</sup> See NTCA Comments at 17.

<sup>148</sup> Comcast has several petitions for determinations of effective competition pending at the Commission, at least 5 of which have been pending for over two years. Of these, the newest is two years and three months old. See Public Notice, FCC, *Special Relief and Show Cause Petitions* (Oct. 22, 2004) (placing on public notice Comcast’s petition for a determination of effective competition in Miami and surrounding areas of Dade County -- CSR-6406-E, CSR-6407-E, CSR-6408-E, CSR-6409-E, CSR-6410-E -- which were filed on September 20, 2004). Four others are three years and eight months old. See generally Public Notice, FCC, *Special Relief and Show Cause Petitions* (Apr. 29, 2003) (including effective competition petitions filed on April 11, 2003 for Framingham, MA, CSR-6154-E; Wakefield, MA, CSR-6153-E; Brookline, MA, CSR-6152-E; and Burlington, Natick, Waltham, and Watertown, MA CSR-6156-E).

<sup>149</sup> Congress in 1996 amended the effective competition statute to provide that, when a LEC is providing service in a local franchising area, effective competition is present. See 47 U.S.C. § 543(1)(1)(D). This is in contrast to the competing provider test that establishes specific availability and penetration thresholds. See 47 U.S.C. § 543(1)(1)(B).

and franchise applicants.<sup>150</sup> Their arguments in that proceeding were completely contradicted by both the facts and the law, and they presented no new evidence in this proceeding. In fact, the marketplace evidence in the record and the new developments described above show that new competitors are obtaining franchises much faster than they can upgrade their networks and deploy their services.<sup>151</sup>

Notwithstanding this lack of evidence, and the Commission's lack of authority, on December 20, 2006, the Commission adopted an order that, based on the discussion at the open meeting and the description in the press release, appears to substantially infringe on local governments' authority as reserved by Congress in the Cable Act, create new competitive asymmetries, and overstep the bounds of the Commission's jurisdiction.<sup>152</sup> Commissioner

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<sup>150</sup> See *In re 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*, Notice of Proposed Rulemaking, 20 FCC Rcd. 18,581 (2005).

<sup>151</sup> Verizon, the only Bell company that is actually pursuing local cable franchises, is acquiring franchises at a rapid clip, securing 13 franchises, including two statewide franchises, in the 30 days since comments were filed in this proceeding. As of early December, Verizon had acquired over 230 franchises covering approximately 5 million households. Nor has the franchise process hampered AT&T's ability to offer video services; AT&T is slowly but surely deploying its video service to communities in its footprint. Of particular note, if AT&T had started negotiating franchise agreements when it first announced its intent to enter the video marketplace several years ago, by now it could easily have obtained franchise agreements that covered its entire telephone service area. The fact of the matter is that eliminating the franchising process entirely will not speed the delivery of competitive video services because, for example, Verizon's franchise acquisitions are significantly outpacing the speed of its network deployment and AT&T's deployment of video services is far slower than the franchise process. See *supra* note 48-53 and accompanying text.

<sup>152</sup> The record in the *Franchising Proceeding* makes clear that the Commission does not have the authority to adopt the far-reaching proposals put forward by the telcos. See generally Comcast Comments, filed in MB Dkt. No. 05-311, at 26-40 (Feb. 13, 2006); Comcast Reply Comments, filed in MB Dkt. No. 05-311, at 30-37 (Mar. 28, 2006). First, Congress unambiguously gave the courts, not the Commission, reviewing authority over LFA franchising decisions. There is no ambiguity in the statute regarding the Commission's authority, or, in this case, the lack thereof. Second, the Commission lacks the authority to preempt state and local franchising laws, including "level-playing-field" statutes. The law is clear that, if Congress intends to preempt a power traditionally exercised by a state or local government, it must make its intention "unmistakably clear." There is no such statement of Congressional intent here. Finally, the legislative history of the relevant provisions reflects a clear Congressional intent to preclude the Commission from writing and rewriting the rules governing cable franchising, as the Commission had been prone to do before passage of the 1984 Act.

Adelstein summarized the action as “an arrogant case of federal power riding roughshod over local governments,”<sup>153</sup> and numerous legal and policy experts have noted that this is now a matter for the courts.<sup>154</sup>

**D. The Commission Should Address Concerns About Prior Commission Decisions and Assertions Regarding Issues Pending in Other Proceedings in the Appropriate Dockets.**

Predictably, some parties once again use the annual video competition inquiry as an opportunity to air grievances concerning a host of issues that are irrelevant to the issue of competition in the video marketplace, that are the subject of other Commission proceedings, or both. Other parties treat this inquiry as an opportunity to raise miscellaneous complaints largely irrelevant to the current status of competition and intended to justify new regulations on cable operators and programming networks. There is no merit to these attempts to have the Commission perpetuate regulations that will inure to the respective commenters’ benefit. In particular, the following allegations should be dismissed:

- **Multicast Must Carry.** In its comments, NAB tries a new justification for mandatory multicast must-carry. NAB couches its old quest for multicast must-carry as an “anti-stripping policy.”<sup>155</sup> Regardless of what NAB calls it (multicast must-carry, either/or

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<sup>153</sup> *In re 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 & Order and Further Notice of Proposed Rulemaking, MB Docket No. 05-311, Separate Statement of Commissioner Adelstein 8; *see also id.* at Separate Statement of Commissioner Copps 2 (“Under the circumstances, proceeding on such a controversial decision today does not put an end to this issue. It only invites more delay, more confusion, and more possibility of legal challenge.”).

<sup>154</sup> *See, e.g.*, Blair Levin, Stifel Nicolaus, *FCC Approves Franchise Order in Attempt to East Telco Video Entry*, Telecom, Media & Tech Regulatory, Dec. 20, 2006, at 1 (“We believe there is significant litigation risk.”); Paul Gallant, Stanford Group Company, *FCC Eases Franchise Burdens, But Legal Cloud Remains*, Institutional Research, Dec. 20, 2006, at 1 (“[T]he FCC’s legal authority to take today’s action is questionable and appellate litigation is likely to put a cloud over the legitimacy of the Commission’s order.”).

<sup>155</sup> *See* NAB Comments at 8 (“NAB again urges the Commission to adopt an anti-stripping policy that prevents cable operators from selectively choosing which content aired by local broadcast stations is carried on MVPD systems.”).

proposal, or anti-stripping), it is, as Commissioner Adelstein aptly observed, “misguided.”<sup>156</sup> The Commission has twice rejected multicast must-carry, concluding that the statutory requirement that a cable operator carry a broadcaster’s “primary video” signal only requires carriage of a single programming stream and other “program-related” material.<sup>157</sup> A cable operator should only be obligated to carry more than the primary signal where cable operators and broadcasters have successfully negotiated for the carriage of secondary signals, but that is not an issue for the Commission to regulate.<sup>158</sup> A significant portion of quality multicast content is currently available over cable systems under such arrangements.<sup>159</sup> Comcast remains committed to voluntarily providing compelling multicast content from broadcasters to its subscribers.<sup>160</sup>

- **Cable Consumer Electronics Compatibility.** Contrary to CEA’s claims,<sup>161</sup> the set-top box integration ban will result in substantial public interest harms with no countervailing public benefit. As Comcast and others have demonstrated in the navigation devices docket, the ban will impose hundreds of millions of dollars of annual costs on consumers, deny consumers popular equipment options, impede the development of downloadable security, and slow the rollout of new digital services.<sup>162</sup> Grant of the waivers filed over

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<sup>156</sup> In response to a failed multicast must-carry item, Commissioner Adelstein explained “[p]erhaps the best example of government overreach was an item that many of you know circulated on the eighth floor for some time - - multicast must-carry. The item would have imposed a requirement on cable operators to carry all of a broadcast station’s free, over-the-air programming -- which could include up to 5 or 6 channels. If it had been approved, it would’ve been misguided and unfortunate.” Jonathan S. Adelstein, Commissioner, FCC, Keynote: Progress & Freedom Foundation, 12th Aspen Summit, at 2 (Aug. 20, 2006).

<sup>157</sup> *In re Carriage of Digital Broadcast Signals et al.*, First Report & Order and Further Notice of Proposed Rulemaking, 16 FCC Rcd. 2598 ¶ 57 (2001); *In re Carriage of Digital Television Broadcast Signals: Amendments to Part 76 of the Commission’s Rules*, Second Report & Order and First Order on Reconsideration, 20 FCC Rcd. 4516 ¶ 33 (2005) (“*Recon Order*”).

<sup>158</sup> The Commission has recognized that cable companies and broadcasters are voluntarily entering into multicast agreements. *See Recon Order*. ¶ 38 (“There is evidence from the record, as well as news accounts, that cable operators are voluntarily carrying the multiple streams of programming of some broadcast stations, including public television stations, that are currently multicasting. Indeed, the Association of Public Television Stations and the NCTA recently announced an agreement that involves cable operators carrying up to four programming streams of at least one public TV station in a DMA during the transition from analog to digital technology, and every public TV station in a DMA after the transition, subject to certain nonduplication contingencies. Under these circumstances, the interests of over-the-air television viewers appear to remain protected.”); *see also* APTS Comments at 2.

<sup>159</sup> *See* Comcast Comments at 39; APTS Comments at i.

<sup>160</sup> *See* Comcast Comments. n.161.

<sup>161</sup> *See* CEA Comments at 9-12.

<sup>162</sup> *See, e.g.*, Letter from James L. Casserly, Counsel to Comcast Corp., to Marlene H. Dortch, Secretary, FCC, CS Docket No. 97-80 (Nov. 17, 2006); Letter from James L. Casserly, Counsel to Comcast Corp., to Marlene H. Dortch, Secretary, FCC, CS Docket No. 97-80 (Oct. 25, 2006); Letter from Steve B. Sharkey, Director, Spectrum (footnote continued...)

the past eight months by Comcast and nearly a dozen other cable providers, BSPs, and phone companies is fully justified in light of these clear harms.

And CEA's fondness for expensive and consumer-unfriendly technology mandates is not limited to the integration ban. As NCTA has noted in the navigation devices docket, CEA's latest proposal for two-way devices would saddle the cable industry with a highly invasive regulatory regime that is as unnecessary as it is unprecedented.<sup>163</sup> The cable industry is strongly committed to the commercial availability of two-way devices at retail and has worked tirelessly with CE manufacturers to develop the technology and licenses to enable the production of such products. CEA's proposal would undo years of marketplace-driven progress on this front in favor of industrial policy that would impose costly and innovation-chilling regulations on cable operators and their customers.

- **Downloadable Conditional Access Systems.** Verizon's discussion about "open standards" for downloadable conditional access systems reflects a serious misunderstanding of the cable industry and the video marketplace.<sup>164</sup> Specifically, Verizon seems to want to prevent cable operators from continuing their rapid progress in the development and deployment of a new and beneficial system for protecting cable system security, promoting further advances in the competitive availability of retail

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(...footnote continued)

and Standards Strategy, Motorola, Inc., to Marlene H. Dortch, Secretary, FCC, CS Docket No. 97-80 (Nov. 8, 2006); Letter from Kyle McSillarow, President and CEO, NCTA, to Secretaries Carlos M. Gutierrez and John M.R. Kneuer, Department of Commerce, and Chairman Kevin J. Martin and Commissioners Michael J. Copps, Jonathan S. Adelstein, Deborah Taylor Tate, and Robert M. McDowell, FCC, CS Docket No. 97-80 (Oct. 31, 2006).

<sup>163</sup> See Letter from Neal M. Goldberg, General Counsel, NCTA to Marlene H. Dortch, Secretary, FCC, CS Docket No. 97-80 (Nov. 29, 2006). CEA's advocacy here must be contrasted with its pro-free market advocacy in other contexts. In connection with possible legislation to protect content delivered via satellite radio, CEA has run full-page ads in Capitol Hill publications faulting the content industry for advocating government solutions to marketplace issues. See, e.g., *You've Heard This Song Before*, Roll Call, June 20, 2006, at 27. CEA faults the content providers for asking government to "step in and stop new technologies" -- *precisely what CEA is doing here*. CEA salutes Congress for having "chosen free markets over regulation" -- a choice CEA opposes with respect to low-cost, limited-capability set-top boxes. CEA concludes: "It's time to say Enough is Enough. Let Innovation Work -- Oppose Technology Mandates . . ." CEA has made similar points in its "Guiding Principles for Telecommunications Policy Reform," stating, among other things that "government should not be picking winners and losers among the emerging, competing technologies," but instead "government should let service providers and manufacturers compete in the open marketplace" and "impose only a minimal level of regulation" on new networks and services. See *CEA Guiding Principles for Telecommunications Policy Reform*, available at [http://www.ce.org/shared\\_files/initiatives\\_attachments/282Telecom%20Principles%20FINAL.pdf](http://www.ce.org/shared_files/initiatives_attachments/282Telecom%20Principles%20FINAL.pdf); see also *CEA Government and Policy Initiatives*, available at [http://www.ce.org/GovernmentAffairs/Current\\_Policy\\_Initiatives/initiatives\\_issues.asp](http://www.ce.org/GovernmentAffairs/Current_Policy_Initiatives/initiatives_issues.asp) (noting that CEA favors marketplace rather than regulatory solutions to "fair use," energy conservation, recycling, and broadband issues, among other things). It is time for CEA to sing a consistent tune -- CEA is correct when it argues *against* government technology mandates such as those it has advocated for navigation devices.

<sup>164</sup> See Verizon Comments at 31-33.

devices, and avoiding the enormous consumer costs of CableCARD technology. Instead, Verizon favors a pie-in-the-sky approach that will junk tens of millions of dollars worth of investment, delay deployment of DCAS, and involve the Commission deeply in standards-setting activities that are beyond its legal and technical competence. In contrast, the United States Telecom Association urges that the Commission “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.”<sup>165</sup> While Comcast would welcome any such legislative scrutiny of these issues, it should also be noted that the Commission has already received appropriate congressional guidance in Section 629 which, if followed, would lead to a dramatic scaling back of the Commission’s efforts to micromanage the technology choices of any and all MVPDs.

- **Exclusive MDU Agreements.** Several parties attempt to use this proceeding to question the competitive impact of exclusive access arrangements between video providers and multi-dwelling units.<sup>166</sup> These parties essentially ask the Commission to overturn a prior Commission decision on this question, based solely on anecdotes of isolated incidents.<sup>167</sup> The Commission has recognized legitimate competitive benefits to exclusive access arrangements,<sup>168</sup> and there is no evidence in this proceeding to suggest that the Commission should reconsider its findings.
- **Program Carriage.** The America Channel (“TAC”) once again alleges that independent programmers are subject to “severe discrimination” when attempting to enter the video marketplace.<sup>169</sup> To this end, TAC resubmitted 256 pages of mostly out-of-date materials, including a brief cover letter, articles, and studies that it has previously submitted to the Commission in other proceedings, particularly the Adelphia transaction proceeding.<sup>170</sup> The parties to the transaction presented abundant facts, analysis, and economic testimony on these issues in MB Docket No. 05-192.<sup>171</sup> Comcast incorporates those submissions by

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<sup>165</sup> USTA Comments at 22.

<sup>166</sup> See, e.g., Verizon Comments at 24-28; USTA Comments at 16-18; SureWest Comments at 2-7.

<sup>167</sup> See, e.g., SureWest Comments at 5-7.

<sup>168</sup> See *In re Telecommunications Services Inside Wiring*, First Order on Reconsideration and Second Report & Order, 18 FCC Rcd. 1342 ¶ 71 (2003).

<sup>169</sup> See The America Channel (“TAC”) Comments at 5.

<sup>170</sup> See generally TAC Comments. TAC admits that some of the materials are dated: “we have not reinitiated our study for the past twelve months” and/or limited to review of the alleged actions of only a few marketplace participants. *Id.* at 4.

<sup>171</sup> See, e.g., *In re Applications for Consent to the Assignment and/or Transfer of Control of Licenses from Adelphia Communications Corporation to Time Warner Cable Inc. and Comcast Corporation*, Applications and Public Interest Statement, filed in MB Docket No. 05-192 (May 18, 2005); Reply Comments of Adelphia, Time Warner, and Comcast, filed in MB Dkt. No. 05-192 (Aug. 5, 2005).

reference here. After considering the materials in the docket, including TAC's submissions, the Commission granted the transactions, finding that they would provide significant public interest benefits.<sup>172</sup> It remains the case that TAC has submitted dozens of pleadings in various proceedings over the last two years and eight months, and yet has not demonstrated that it has produced a single hour of programming.

- **Leased Access.** TAC and the Black Television News Network (“BTN”) question whether the Commission’s leased access rules can be used effectively by independent programming networks to secure carriage on cable systems.<sup>173</sup> TAC’s and BTN’s arguments are prematurely raised and inappropriate for consideration in this proceeding. The Commission should reserve judgment on leased access issues until it has amassed a complete record. Indeed, the Commission has promised to initiate a full notice-and-comment rulemaking proceeding on these issues in the near future.<sup>174</sup> In the meantime, every Comcast system will continue to offer programmers the opportunity to purchase time on local leased access channels at reasonable prices set in accordance with Commission’s rules.

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<sup>172</sup> See generally *In re Applications for Consent to the Assignment and/or Transfer of Control of Licenses from Adelfia Communications Corp. to Time Warner Cable Inc. and Comcast Corporation*, Memorandum Opinion & Order, 21 FCC Rcd. 8203 (2006) (“*Adelfia Order*”).

<sup>173</sup> See TAC Comments at 9-10; Black Television News Network Comments at 3.

<sup>174</sup> See *Adelfia Order*, Separate Statement of FCC Commissioner Jonathan S. Adelstein, at 8371 (noting that the Commission plans to launch an NPRM on leased access issues).

#### IV. CONCLUSION.

As Commissioner McDowell quite rightly has recognized, competition in the media marketplace is “fierce and chaotic.” The Commission should forcefully state its findings, and it should dismiss demands to preserve (or, worse, expand) monopoly-era regulations in a competitive environment.

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