

APPENDIX A

EVIDENCE OF COMPETITION IN THE VIDEO DISTRIBUTION MARKET

Competition from DBS Providers. DBS competition has flourished in recent years.

Subscribership and Market Share. Nationally, the number of DBS subscribers jumped 53% between June 2002 and June 2006.^{1/} As of June 2006, DBS served approximately 28 million subscribers.^{2/} DirecTV's most recent annual report shows that as of December 2006, DirecTV served 16 million subscribers and reported that its "large subscriber base provides [it] with the opportunity to obtain programming on favorable terms and secure unique and exclusive programming."^{3/} As of December 2006, EchoStar had 13.1 million subscribers.^{4/} Both DirecTV and EchoStar have at least double the number of subscribers of every cable MSO in the country, with the exception of Comcast and Time Warner.^{5/}

These increased subscriber figures have resulted in an increase in DBS providers' share

^{1/} See Satellite Broadcasting and Communications Association of America, Satellite Subscribers History, available at <http://www.sbca.com/index.asp> (last visited March 30, 2007) (In June 2002, DBS had approximately 18.3 million subscribers compared to approximately 27.9 million subscribers in June 2006.); see also, *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, Twelfth Annual Report*, 21 FCC Rcd 2503 ¶ 13 (2006) ("Twelfth Annual Report") (DBS had approximately 26.1 million subscribers as of June 2005). See also *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, Notice of Inquiry*, MB Docket No. 06-189, Comments of the National Cable & Telecommunications Association (filed Nov. 29, 2006) at 9 (DBS had 28.9 million subs, or 30% of MVPD households, as of September 2006).

^{2/} DBS subscribership data compiled by the Satellite Broadcasting and Communications Association, available at <http://www.sbca.com/index.asp> (last visited Mar. 23, 2007).

^{3/} DirecTV Holdings LLC., Annual Report (Form 10-K) (Mar. 01, 2007) at 2 ("DirecTV Annual Report").

^{4/} See EchoStar Communications Corp., Annual Report (Form 10-K Amended) (Mar. 6, 2007) at 1 ("EchoStar Annual Report").

^{5/} Compare Top 25 MSOs as of September 2006, <http://www.ncta.com/ContentView.aspx?contentId=73>, with NCTA Video Competition Comments at 10 (showing DirecTV with 15.678 million subscribers and EchoStar with 12.755 million subscribers).

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of multichannel video programming distributor (“MVPD”) subscribers of 53% between June 2002 and June 2006.^{6/} Significantly, DBS’ market share is divided among only three providers, DirecTV, EchoStar, and Dominion, while cable’s market share which is divided among many cable operators.^{7/} DirecTV and EchoStar are the second and fourth largest MVPDs, serving 15.72% and 12.27% of MVPD subscribers respectively.^{8/} In contrast, Cablevision, which serves 3.22% of MVPD subscribers, is ranked eighth.^{9/}

DBS has been in head-to-head competition with Cablevision throughout its service territories for many years. In New Jersey, the Commission found that Cablevision faces effective competition from DBS in 52 localities between 2002 and 2004.^{10/} In New York, the Commission found that Cablevision faces effective competition from DBS in 9 communities.^{11/} Since January 2005, Cablevision has filed effective competition petitions for 16 additional New Jersey communities based on DBS competition.^{12/} DBS penetration for the significant majority

^{6/} See *supra* n. 1.

^{7/} *Twelfth Annual Report* ¶ 70.

^{8/} *Twelfth Annual Report* tbl. B-3.

^{9/} *Id.*

^{10/} *Cablevision of Raritan Valley, Inc.; Cablevision of New Jersey; Cablevision of Monmouth; Petitions for Determination of Effective Competition*, 19 FCC Rcd. 6966 (2004), *app. for review pending*; *Cablevision of Paterson d/b/a Cablevision of Allamuchy; Petition for Determination of Effective Competition in Allamuchy, New Jersey (NJ0027); Cablevision of Warwick, LLC; Petition for Determination of Effective Competition in Montague (NJ0190) and Portions of Sandyston (NJ0628)*, *New Jersey*, 17 FCC Rcd. 17239 (2002). A grant of effective competition is predicated upon a finding that at least fifteen percent (15%) of the households in a cable provider’s franchise area subscribe to programming services offered by an alternative MVPD, such as DBS. See 47 U.S.C. § 543(l)(1)(B)(ii); 47 C.F.R. § 76.905(b)(2).

^{11/} *CSC Holdings, Inc. Petition for Determination of Effective Competition*, 19 FCC Rcd. 6891 (2004).

^{12/} For 5 of those New Jersey communities, effective competition also was present due to competition from telephone companies providing video services. See *Petition of Cablevision of Rockland/Ramapo Inc. for a Determination of Effective Competition in Montvale, NJ; Petition of CSC*

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of those 16 communities was well above the 15% threshold.^{13/} Competition from DBS, moreover, is not unique to Cablevision. The Commission has found cable operators across the country are subject to effective competition from DBS.^{14/}

Moreover, there is nothing to impede the continued growth of DBS. Although DBS providers have asserted in the past that line of sight limitations impede their ability to offer services to certain multiple dwelling units (“MDUs”), technological advances in DBS distribution have eliminated these problems.^{15/} A new multi-satellite distribution system developed by DirecTV, and first installed in an apartment complex in New York City, is now available to the MDU market nationwide.^{16/} EchoStar also actively markets its services to

TKR, Inc. d/b/a Cablevision of Elizabeth for a Determination of Effective Competition in Elizabeth, NJ; Petition of Cablevision of Warwick LLC for a Determination of Effective Competition in West Milford, NJ, CSR Nos. 6537-E, 6670-E, 6671-E, Petition for Determination of Effective Competition (filed Jan. 31, 2005); Petition of CSC TKR, Inc. d/b/a Cablevision of Raritan Valley for a Determination of Effective Competition in Bernards, NJ, Bridgewater, NJ, Dunellen, NJ, Edison, NJ, Keansburg, NJ, Keyport, NJ, Matawan, NJ, Middlesex, NJ, Milltown, NJ, New Brunswick, NJ, North Brunswick, NJ, Piscataway, NJ, Somerville, NJ, South Amboy, NJ, CSR No. 7118-E (filed Jan. 31, 2007).

^{13/} *Id.* at 7.

^{14/} *See, e.g., Mediacom Wisconsin LLC Two Petitions for Determination of Effective Competition in Seven Local Franchise Areas, 21 FCC Rcd 3368 (2006); Charter Communications Petitions for Determination of Effective Competition in Mount Vernon, Okawville, Salem and Richmond, Illinois, 21 FCC Rcd 3400 (2006); Charter Communications Petition for Determination of Effective Competition in Various Nevada Communities, 21 FCC Rcd 11268 (2006); Mediacom Southeast, LLC Four Petitions for Determination of Effective Competition in Twenty-One Local Franchise Areas, 21 FCC Rcd 3506 (2006); Time Warner Entertainment - Advance/Newhouse Partnership d/b/a Time Warner Cable Petition for Determination of Effective Competition in Nineteen California Franchise Areas, 20 FCC Rcd 15709, (2005); Jones Intercable, Inc., Petition for Determination of Effective Competition, 15 FCC Rcd 7257 (2000); Liberty Cablevision of Puerto Rico, Ltd. Petition for Determination of Effective Competition in Seven Local Franchise Areas in the Commonwealth of Puerto Rico, 21 FCC Rcd 11995 (2006); Time Warner Entertainment-Advance Newhouse Partnership d/b/a Time Warner Communications, 15 FCC Rcd 8852 (2000); Media One of Georgia, 12 FCC Rcd 19406 (1997); Mountain Cable Company d/b/a Adelphia Cable Commc’n., 14 FCC Rcd 13994 (1999).*

^{15/} *Twelfth Annual Report* ¶ 207 (describing DirecTV’s single wire solution for access to MDUs).

^{16/} *MDU Communications Installs First in Nation Innovative Single Wire Solution From DIRECTV into New Apartment Complex in NYC, Businesswire (Aug. 18, 2005).*

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MDUs throughout its service territory.^{17/} DirecTV also has partnered with other providers to offer bundled service in MDUs. For example, it has announced a partnership with Hicks Holdings, LLC to provide bundled DirecTV programming, broadband voice, and data services to MDUs across the United States.^{18/} Both ILECs and DBS providers actively compete for the MDU market throughout the United States.^{19/}

Investment. DBS providers have invested billions of dollars in developing and deploying their respective video distribution networks and customer care infrastructures.^{20/} DirecTV has launched nine geosynchronous satellites for delivery of its programming and other services, and is scheduled to launch two more in 2007.^{21/} Moreover, DBS investment in customer acquisition is significant. In the last year alone, EchoStar spent approximately \$1.6 billion for subscriber acquisition^{22/} and DirecTV reported approximately \$1.8 billion in subscriber acquisition costs.^{23/}

Programming. The number of national programming networks that are affiliated with cable compared to the number of those affiliated with DBS is almost identical. In 2005, 21.8% of all satellite-delivered national networks were affiliated with a cable operator while 20.2%

^{17/} See, e.g., http://commercial.dishnetwork.com/content/multi_dwelling/mdu_association/index.shtml (last visited March 18, 2007) (marketing EchoStar's Dish Network to MDUs).

^{18/} Investor Relations New Release, DirecTV, *Hicks Holdings Forms New Venture, DIRECPATH, to Provide DirecTV, Broadband, Other Services to Multiple Dwelling Unit Market* (May 2, 2006).

^{19/} News Release, Verizon, *Verizon and DIRECTV to Offer Competitive Service Bundle to Beat Cable 'Triple Play' in Multidwelling-Unit Market* (Sept. 14, 2006).

^{20/} See *infra* nn. 21-23.

^{21/} See *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, Notice of Inquiry*, MB Docket No. 06-189, Comments of DirecTV (Nov. 29, 2006) at 6-7.

^{22/} EchoStar Annual Report at 47.

^{23/} DirecTV Annual Report at 25-26 (Consolidated Financial Statements).

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were affiliated with a DBS provider.^{24/} Even smaller DBS providers such as Dominion offer their own original programming.^{25/}

DirecTV has been directly affiliated with at least 20 national programming networks and 16 regional Fox sports networks.^{26/} Further, it stands to benefit from its transfer to Liberty Media, a company with extensive experience in content development and distribution, which has interests in at least 34 national programming networks,^{27/} and three of the top regional Fox sports networks.^{28/} Through Liberty Media, DirecTV also will be affiliated with two of the top 20 programming services, including the Discovery Channel, which has the largest subscriber base at over 90 million subscribers, and TLC, which has 88.9 million subscribers.^{29/} Three of the top 10 networks ranked most valuable to viewers in 2006 will be affiliated with DirecTV through Liberty Media -- Discovery Channel (ranked number one), TLC and Animal Planet.^{30/}

The nation's leading distributor of regional sports programming, Fox - which holds interest in 43.2% of all regional sports programming - is affiliated with a single DBS provider, DirecTV.^{31/} In contrast, the remaining 45.9% of all regional sports networks affiliated with cable

^{24/} *Twelfth Annual Report* ¶ 21.

^{25/} *Id.* tbl. 10 (Dominion is affiliated with at least three networks).

^{26/} *Id.* tbls. C-1, C-2, & C-3.

^{27/} *Twelfth Annual Report* ¶ 161.

^{28/} News Release, Liberty Media, *Liberty Media to Acquire Largest Stake in DIRECTV* (Dec. 22, 2006), available at <http://ir.libertymedia.com/phoenix.zhtml?c=61138&p=irol-newsArticle&ID=944564&highlight>.

^{29/} *Twelfth Annual Report* ¶ 161.

^{30/} Press Release, Discovery Channel, *Discovery Channel Leads Major Networks in High Quality for the Sixth Consecutive Year in the 2006 BETA Research Brand Identity of Basic Cable/Broadcast Networks Study* (Mar. 27, 2007).

^{31/} *Twelfth Annual Report* ¶ 183.

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is distributed among several cable MSOs.^{32/} DirecTV is the exclusive distributor of the NFL “Sunday Ticket,” a sports programming package that is not available to cable competitors.^{33/}

DirecTV also has attempted to negotiate a similar exclusive distribution arrangement with Major League Baseball (“MLB”).^{34/} If DirecTV’s competitors do not match its commitment to MLB by the end of March 2007, DirecTV will have the exclusive distribution rights to carry MLB,^{35/} and this appears likely given that MLB appears to be rejecting competitive offers.^{36/}

Cablevision’s competition from DBS is even more pronounced. Cablevision has ownership interests in 13.6% of all regional networks compared to DirecTV’s 16.7%.^{37/} Of the top 20 networks with the greatest distribution, only six are considered to be affiliated with cable companies and of those, two also will be affiliated with DirecTV through Liberty Media.^{38/} Cablevision does not have an attributable interest in any of those networks.^{39/}

Competition from Telcos. Telecommunications carriers have vigorously entered the video distribution market. Five years ago, there were no significant efforts by incumbent local

^{32/} *Id.*

^{33/} Investor Relations News Release, DirecTV, *DIRECTV Extends and Expands Exclusive NFL SUNDAY TICKET Agreement With NFL Through 2010 Season* (Nov. 8, 2004), available at <http://phx.corporate-ir.net/phoenix.zhtml?c=127160&p=irol-newsArticle&ID=641794&highlight=>.

^{34/} Chris Isidore, *Root, root, root - and pay - for the road team: Baseball could get more money if it drops plan to let DirecTV have exclusive deal to sell out-of-market games to hard-core fans*, CNNMoney.com (Feb. 27, 2007), available at <http://money.cnn.com/2007/02/26/commentary/sportsbiz/index.htm?postversion=2007022706>.

^{35/} Steve Donahue, *Baseball Pitches Network to Operators*, *EchoStar*, Multichannel Newswire, Mar. 8, 2007.

^{36/} Larry Stewart, *MLB Rejects Offer From Cable Group*, *Los Angeles Times*, Mar. 22, 2007 (“Any hope of Major League Baseball’s Extra Innings out-of-market package staying on cable may have disappeared Wednesday with baseball’s rejection of the latest offer from In Demand.”).

^{37/} *Twelfth Annual Report* ¶ 166.

^{38/} *Id.* tbl. C-5.

^{39/} *Id.* tbl. C-5.

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exchange carriers (“ILECs”) to provide video programming to consumers. To the extent the ILECs mentioned video, it was only to reassure investors that they had no intention of getting into the business. Five years later, AT&T and Verizon are offering service to what is expected to be nearly 14 million households by the end of this year.^{40/}

Verizon is actively competing across Cablevision’s service territory. In New York, the Commission already has found that Cablevision faces effective competition from Verizon’s video offering in 3 communities.^{41/} Since 2006, Cablevision has filed additional effective competition petitions for 18 communities in New York and New Jersey based solely on competition from local exchange carriers such as Verizon.^{42/}

^{40/} See Ernie Carey, Vice President-Advanced Network Technologies, *AT&T Inc., Presentation to Bear Sterns 20th Annual Media Conference* (Mar. 6, 2007) at 10 (AT&T projects passing 8 million homes with its U-Verse product by the end of 2007, in addition to growing its 1.5 million existing Homezone customers by 100,000 subscribers per quarter.); Press Release, Verizon, *Verizon’s 4Q 2006 Results Cap Strong Year of Organic Growth in Wireless, Broadband, and Business Markets* (Jan. 29, 2007), available at <http://investor.verizon.com/news/view.aspx?NewsID=813> (Verizon passed 2.4 million homes at the end of 2006).

^{41/} *Cablevision of Rockland/Ramapo, LLC Petition for Determination of Effective Competition in the Villages of Nyack, New York (NY0870) and South Nyack, New York (NY0872)*, 22 FCC Rcd 745 (2007); *Cablevision Systems Long Island Corporation Petition for Determination of Effective Competition in the Town of Hempstead, New York (NY0454)*, 22 FCC Rcd. 742 (2007). A cable operator is deemed subject to effective competition if a LEC or its affiliate offers comparable video programming services directly to subscribers by any means (other than direct-to-home satellite services) in the unaffiliated cable operator’s franchise area. See 47 U.S.C. § 543(1)(1)(D); see also 47 C.F.R. § 76.905(b)(4).

^{42/} *Petition of Cablevision of Rockland-Ramapo, LLC for a Determination of Effective Competition in Mahwah, NJ*, CSR No. 7119-E (filed Jan. 31, 2007); *Petition of CSC TKR, Inc. d/b/a Cablevision of Raritan Valley for a Determination of Effective Competition in Bernards, NJ, Bridgewater, NJ, Dunellen, NJ, Edison, NJ, Keansburg, NJ, Keyport, NJ, Matawan, NJ, Middlesex, NJ, Milltown, NJ, New Brunswick, NJ, North Brunswick, NJ, Piscataway, NJ, Somerville, NJ, South Amboy, NJ*, CSR No. 7118-E (filed Jan. 31, 2007); *Petition of Cablevision Systems Long Island Corporation for a Determination of Effective Competition in Massapequa Park, NY*, CSR No. 7011-E (filed Apr. 11, 2006); *Petition of Cablevision of Rockland/Ramapo, LLC for a Determination of Effective Competition in Nyack, NY, South Nyack, NY*, CSR No. 7031-E (filed May 19, 2006); *Petition of Cablevision Systems Long Island Corporation for a Determination of Effective Competition in Hempstead, NY*, CSR No. 7040-E (filed Jul. 18, 2006); *Petition of Cablevision Systems Long Island Corporation for a Determination of Effective Competition in Oyster Bay, NY*, CSR No. 7048-E (filed Aug. 9, 2006); *Petition of Cablevision of*

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Investment. AT&T is aggressively pursuing the video distribution business by spending \$4.6 billion to upgrade its network in order to provide video to an expected 19 million homes by mid-2008, obtaining distribution rights to more than 300 channels of video programming, and negotiating or consummating statewide franchise agreements in Texas, California, and elsewhere with terms of seven years or more.^{43/} As of the end of Q3 06, AT&T had passed 1.3 million homes with its U-Verse option, and AT&T plans to push the U-Verse option past 2.4 million homes by the end of Q4 06.^{44/} Verizon has stated that it plans to invest \$18 billion in its FiOS network by the year 2010.^{45/}

Distribution. Verizon has been granted cable franchises and is offering its FiOS TV service in more than 60 communities in New York^{46/} in direct competition with Cablevision

Rockland/Ramapo, Inc. for a Determination of Effective Competition in Upper Nyack, NY, Grandview-On-Hudson, NY, Clarkstown, NY, CSR No. 7079-E (filed Dec. 8, 2006); Petition of Cablevision Systems Long Island Corporation for a Determination of Effective Competition in Laurel Hollow, NY, Lynbrook, NY, Cedarhurst, NY, CSR No. 7080-E (filed Dec. 8, 2006); Petition of Cablevision of Southern Westchester, Inc. for a Determination of Effective Competition in Greenburgh, NY, Irvington, NY, CSR not yet assigned (filed Mar. 19, 2007); Petition of Cablevision Systems Long Island Corporation for a Determination of Effective Competition in Mineola, NY, East Rockaway, NY, Farmingdale, NY, Valley Stream, NY, CSR not yet assigned (filed Mar. 19, 2007).

^{43/} See AT&T, Inc., Annual Report (Form 10-K), at 2 (Feb. 26, 2007) (“We expect to have the capability to offer service to approximately 19 million living units by the end of 2008, as part of our initial deployment, and expect to spend approximately [\$4.6 billion] in network-related deployment costs and capital expenditures from 2006 through 2008, as well as additional customer activation capital expenditures. We remain on budget for this overall target and expect to spend approximately [\$3.1 billion] during 2007 and 2008. These expenditures may increase slightly if the programming and features of the video offering expand or if additional network conditioning is required.”). See also *Twelfth Annual Report* ¶ 123.

^{44/} See Cynthia Brumfield, *AT&T Claims 10% Penetration for U-Verse IPTV Service*, IPMedia Monitor (Mar. 19, 2007).

^{45/} R. Scott Raynovich, *Verizon to Pump \$18B Into FiOS by 2010*, Light Reading (Sept. 27, 2006).

^{46/} News Release, Verizon, *Verizon Expands FiOS TV Service to More New York Consumers, Providing Choice and Greater Value* (Feb. 22, 2007), available at <http://newscenter.verizon.com/press-releases/verizon/2007/verizon-expands-fios-tv-4.html>.

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throughout its service area.^{47/} The Connecticut Department of Public Utility Control has paved the way for AT&T and other ILECs to offer Internet protocol-based television (“IPTV”) service without obtaining franchises and with no regulatory oversight.^{48/} In areas where it does not offer landline IPTV-driven bundles, AT&T offers satellite provided video service to its broadband Internet users throughout Connecticut.^{49/} In New Jersey, Verizon has been granted a statewide video franchise.^{50/} Verizon announced that following approval of its statewide franchise it will begin marketing its FiOS TV service to about 100 New Jersey communities.^{51/} As of December 31, 2006, Verizon’s FiOS network passed six million premises, doubling the number passed at year-end 2005.^{52/} By the end of 2006, Verizon had obtained over 600 video franchises covering 7.3 million households with service available for sale to 2.4 million premises and had 207,000 FiOS TV customers by the end of 2006.^{53/} Verizon has recently received approval to offer FiOS TV in 45 communities in Southern California pursuant to a state-wide franchise in addition to the 18 communities where the service is already available under locally approved franchises.^{54/}

^{47/} *Cablevision of Rockland/Ramapo, LLC Petition for Determination of Effective Competition in the Villages of Nyack, New York and South Nyack, New York*, Memorandum Opinion and Order, DA 07-184 (2007).

^{48/} See Final Decision, Docket No. 05-06-12, DPUC Investigation of the terms and Conditions Under which Video Products may be Offered by Connecticut’s Incumbent Local Exchange Companies (June 7, 2006), stay denied (Jul. 19, 2006).

^{49/} See *AT&T Offers Homezone in Connecticut*, Xchange Online (Feb. 01, 2007), available at: <http://www.xchangemag.com/articles/539/72h111504037744.html>.

^{50/} See I/M/O Application by Verizon of New Jersey, Inc. for a Systemwide Cable Television Franchise, Docket No. CE0611076 (Dec. 18, 2006).

^{51/} Steve Donahue, *Verizon Wins N.J. Franchise*, Multichannel Newswire (Dec. 15, 2006).

^{52/} Verizon, Annual Report (Form 10-K), Overview (Mar. 1, 2007).

^{53/} *Id.*

^{54/} Investor Relations News Release, Verizon, *First State-Issued Video Franchise Granted to Verizon* (Mar. 8, 2007).

Ultimately, Verizon's goal is for FiOS TV to have a market penetration rate that ranges from 20% to 25%, or from 3 to 4 million FiOS TV customers, based on its estimate that about 15 million households will be video-ready by 2010.^{55/}

Competition from Broadband Service Overbuilders, Municipal Providers, and SMATV.

Broadband Service Providers. Broadband service providers ("BSPs"), including overbuilders, offer video services as part of their bundled video, voice, and data offerings. There are several large BSPs, including RCN, Wide Open West ("WOW"), Knology, and Grande. RCN's network passes 1.6 million homes and serves approximately 406,000 subscribers in New York, eastern Pennsylvania, Boston, Chicago, and Washington, D.C and RCN.^{56/} RCN reports that in 2006 alone, its subscriber base increased by 6,000 and new product additions increased by 26,000.^{57/} Knology's network passes 759,000 homes in its service area and through its pending acquisition of PrairieWave Holdings, Inc. in 2007, Knology is poised to increase its customer base by another 157,000 subscribers.^{58/}

Municipal Systems. In addition, municipally-owned cable systems also continue to compete with cable systems. There are currently well over 100 municipal utility broadband systems providing video services in every region of the country.^{59/} A recent American Public

^{55/} Jim Duffy, *Verizon provides FiOS update*, Network World (Sept. 27, 2006).

^{56/} RCN Corp., Annual Report (Form 10-K) (Mar. 16, 2007) at 4.

^{57/} *Id* at 23.

^{58/} Knology, Inc., Annual Report (Form 10-K) (Mar. 15, 2007) at 1-2.

^{59/} *See Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, Notice of Inquiry*, MB Docket No. 06-189, Reply Comments of American Public Power Association at 3 (filed Dec. 29, 2006) ("municipal utility broadband systems continue to thrive, building newer and more robust networks, offering additional services, and achieving higher customer penetration rates.").

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Power Association survey of utility broadband service providers indicated an average subscriber penetration rate of over 50 percent of the homes passed.^{60/} At least 102 state-owned, not-for-profit, community electric utilities provided video services between 2005-2006.^{61/}

SMATV. SMATV providers continue to be a significant competitive presence in most major metropolitan markets, thereby offering residents of many urban areas an unprecedented “fifth” choice of multichannel providers -- along with cable, the telcos, EchoStar and DirecTV. There are at least 150 SMATV providers offering services throughout the United States.^{62/} SMATV providers are particularly strong in Cablevision’s service area: at least six SMATV operators compete with Cablevision in New York and New Jersey and at least four compete with Cablevision in Connecticut.^{63/} MDU Communications, for example, which competes with Cablevision in New York, New Jersey and Connecticut and solely serves the MDU market, reported a 26% increase in its subscriber base as of September 2006 from the previous year.^{64/}

Competition from Internet Video. The availability of prime time network programming on the Internet has exploded in recent years.^{65/} Almost 70% of U.S. households subscribe to Internet service, and high-speed connections now constitute 60% of online

^{60/} *Id.*

^{61/} *Twelfth Annual Report* ¶ 128.

^{62/} *Twelfth Annual Report* ¶ 130.

^{63/} See Independent Multi-Family Communications Council (“IMCC”) membership list available at <http://www.imcc-online.org/2004%20SERVICE%20PRO%20DIRECTORY/STATES-SERprovider.htm#ny> (last visited Mar. 19, 2007).

^{64/} MDU Communications International, Inc., Annual Report (Form 10-K) (Dec. 29, 2006).

^{65/} See *Twelfth Annual Report* ¶ 135.

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subscriptions.^{66/} In July 2006 alone, 107 million Americans, three out of every five Internet users, viewed video online.^{67/} According to the *Wall Street Journal*, “video Web sites now draw users in numbers that rival those of cable and satellite companies.”^{68/}

Video clips from popular shows such as *The Daily Show With John Stewart* and *The Colbert Report* are available at Comedycentral.com, and each week ABC.com rebroadcasts the most recent episode of its hit prime time dramas *LOST*, *Desperate Housewives*, and *Grey’s Anatomy*.^{69/} Likewise, NBC.com now makes every episode of popular shows such as *Heroes*, *Scrubs*, *The Apprentice*, and *the Office* available for free online, as CBS.com does with its own popular shows *Survivor*, *CSI*, and *Jericho*.^{70/} [TV Land](http://TVLand.com) has a video player that features full length episodes of popular hit shows such as *The Munsters* and *M*A*S*H*.^{71/} [CSTV Networks](http://CSTV.com), a division of CBS that airs college sports programming, has over 100 broadband channels showing live events and data feeds of press conferences, news, features, and archived games available on its website, CSTV.com.^{72/} Viewers can access full-length music videos for free on MTV.com

^{66/} See Matthew Colella, *Everything’s Coming Up Broadband*, *The Bridge*, Oct. 20, 2006, at 4 (citing a study that found that cable modem and DSL providers “added about 10 million net new subscribers in the past year alone”).

^{67/} See *Study: 107 Million People Viewed Online Video in July*, *USA TODAY*, Sept. 28, 2006, available at 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.

^{68/} Ellen Sheng, *As Internet TV Gains Popularity, Cable Firms Bulk Up Offerings*, *WALL ST. J.*, Sept. 27, 2006, at B4.

^{69/} See generally <http://www.comedycentral.com/>.

^{70/} See generally <http://www.nbc.com/>.

^{71/} See generally <http://www.tvland.com/tvlhome.jhtml>.

^{72/} See generally <http://www.cstv.com/>.

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and watch every out-of-market baseball game in America on MLB.com for \$19.95 per month.^{73/}

Not only do programming networks provide already-aired content online, but they also have started developing broadband video channels that feature original Web content. NBC Universal has a digital studio solely dedicated to producing original Web content; Bravo and PlanetOut, Inc. have partnered to launch a new broadband video channel targeted to a gay audience in addition to Bravo's already existing broadband video channels that feature exclusive Web content; and MTV has several exclusive Internet video programs through its broadband portals Overdrive, Uber, TurBoNick, Loaded, and Vspot.^{74/}

Furthermore, the explosive popularity and growing strength of YouTube, Google Video, Akimbo, and other Internet-based sources of video content are having a major impact on the diversity and dynamism of the video programming marketplace -- representing a seismic shift in the marketplace from five years ago, when Internet-based video was viewed mostly as grainy images and choppy packet streams. Google Video attracted almost 7 million users in May 2006,^{75/} and Yahoo! had 16.6 million unique visitors in June 2006 alone.^{76/} Companies such as Microsoft are involved in initiatives designed to facilitate viewing of Internet-based video on

^{73/} See generally <http://www.mtv.com>.

^{74/} See Anne Becker, *Niche TV Goes Digital -- and Deeper*, BROAD. & CABLE, Oct. 9, 2006 available at <http://www.broadcastingcable.com/article/CA6378845.html>; 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.

^{75/} See Daisy Whitney, *Google to Push MTV Networks Videos Across Web*, TELEVISION WK., Aug. 7, 2006, at <http://www.tvweek.com/news.cms?newsId=10485>.

^{76/} See Julia Angwin, *MSN Gets Strong Start In Race to Win Web Video Ads*, WALL ST. J., Aug. 2, 2006, at B1.

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television and personal computer screens.^{77/}

Recent data on the U.S. streaming video market demonstrates that nearly 123 million people in the U.S. -- 70% of the total U.S. Internet audience -- viewed 7.2 billion videos online as of January 2007.^{78/} Notably, the highest Internet viewership occurred weekdays between the hours of 5-8 p.m. and on weekends between 7-11 p.m. which are time slots that are considered adjacent to primetime television viewing.^{79/} Marketers and programmers can utilize a multi-channel strategy to capitalize on these adjacent primetime blocks to maximize their market impact.^{80/} Internet video therefore provides a source for original programming that not only competes with existing video distribution platforms but can complement these technologies to provide greater incentive for programmers to create unique content.

Competition from Mobile Video. By 2010, more than 250 million people worldwide will be watching mobile video, generating \$27 billion in revenue.^{81/} To take advantage of this potential consumer demand, wireless providers, video programmers, and manufacturers are rolling out and developing mobile video offerings. As wireless networks evolve, mobile video

^{77/} *NBC Universal, News Corp. launching free video site - MSN, AOL and Yahoo! will distribute their shows*, Seattle Times (Mar. 24m 2007) (“NBC Universal and News Corp. joined forces...with several major Internet companies including Microsoft to distribute TV shows, video clips and movies online in an effort to better control their programming and counter competition from Google's YouTube. The media giants will create a Web site, expected to launch this summer, that features full-length films and television shows.”).

^{78/} *Primetime U.S. Video Streaming Activity Occurs on Weekdays Between 5-8 P.M.*, PR Newswire, available at <http://www.prnewswire.com/cgi-bin/stories.pl?ACCT=109&STORY=/www/story/03-21-2007/0004550858&EDATE> (last visited Mar. 27, 2007).

^{79/} *Id.*

^{80/} *Id.*

^{81/} Olga Kharif, *Online Video: Next Stop, NASDAQ?*, Business Week Online, Sept. 27, 2006, available at http://www.businessweek.com/technology/content/sep2006/tc20060927_385661.htm?chan=search.

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services are becoming more advanced with providers seeking ways to provide a wireless mass media experience similar to that available over the wired broadband Internet.

Sprint Nextel offers over 50 video and audio channels of live and on-demand programming on its mobile phones with the capability to offer live television programming, broadcast live concerts, play full-length feature films, deliver a continuous streaming product up to 15 frames per second, and offer a Spanish-language live service.^{82/} In September 2006, Sprint launched Sprint Movies, the first pay-per-view service for mobile phones in the U.S. that streams full-length movies.^{83/} In addition, Sprint has entered into a joint venture with Comcast, Time Warner, Cox and Advance/Newhouse to offer customers wireless video and telephone service.^{84/} On March 26, 2007, Sprint unveiled its Pivot service that offers the mobile quad play of voice, text, data, and video services.^{85/} Pivot provides customers with the ability to, among other things, watch live and mobile TV, and access home TV listings using a programming guide like the one they use at home.^{86/} Pivot is now available in eight metropolitan areas (Raleigh, N.C.; Austin, Tex.; Boston; Portland, Ore.; San Diego; Phoenix; Cincinnati; and Dayton, Ohio) and is expected to launch in 40 metropolitan areas in 2007.^{87/}

^{82/} News Release, Sprint Nextel, Sprint is First to Offer Full-Length “Pay-Per-View” Movies on Mobile Phones (Sept. 5, 2006), *available at* http://www2.sprint.com/mr/news_dtl.do?id=13280.

^{83/} *Id.*

^{84/} Marguerite Reardon, *Cable Goes for the Quadruple Play*, CNET News.com, Nov. 7, 2005, *available at* http://news.com.com/Cable+goes+for+the+quadruple+play/2100-1034_3-5933340.html.

^{85/} News Release, Sprint, *Innovative Wireless Service Gives Customers the Power to Feel at Home* (Mar. 26, 2006), *available at* http://www2.sprint.com/mr/news_dtl.do?id=15840.

^{86/} *Id.*

^{87/} *Id.*

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Verizon Wireless offers video content through its V-Cast service.^{88/} The V-Cast service is available in 20 Verizon markets and includes full-time access to CBS Mobile, Comedy Central, ESPN, Fox Mobile, MTV, NBC 2Go, NBC News 2Go and Nickelodeon.^{89/} In addition to its V-Cast service, Verizon Wireless has partnered with QUALCOMM to launch expanded mobile video services over QUALCOMM's MediaFLO network.^{90/} The MediaFLO service, which functions more like a traditional broadcast service and offers content from the same networks as V-Cast, became available on March 1, 2007 in cities such as Chicago; New Orleans; Portland, Oregon; Seattle; Las Vegas; Tucson, Arizona; Kansas City; Dallas-Forth Worth; and Salt Lake City.^{91/} QUALCOMM claims its technology offers several advantages over other mobile multicast technologies, including higher-quality video and audio, faster channel switching time, superior mobile reception, optimized power consumption and greater capacity.^{92/}

Cingular has unveiled its Cingular Video on-demand streaming service, with 19 video channels providing video clips.^{93/} Cingular Video includes a wide selection of video, including popular content, such as Fox News clips, ESPN, FOX Sports, FUEL, SPEED, and local weather

^{88/} Marguerite Reardon, *Verizon Wireless Takes the Road Less Traveled*, CNET News.com, Sept. 15, 2006, available at http://news.com.com/Verizon+Wireless+takes+the+road+less+traveled/2008-1035_3-6116181.html; Download Songs in Full, http://getitnow.vzwshop.com/index.aspx?id=music_vcast_catalog.

^{89/} Bruce Meyerson, *Verizon Wireless launches live TV on cell phones in 20 markets*, The Associated Press State & Local Wire, (Mar. 1, 2007).

^{90/} News Release, Verizon Wireless and QUALCOM Incorporated, QUALCOMM and Verizon Wireless Announce Plans for Nationwide Commercial Launch of MediaFLO's Mobile Real-Time TV Services (Dec. 1, 2005), available at <http://news.vzw.com/news/2005/12/pr2005-12-01.html>.

^{91/} Sinead Carew, *Verizon Wireless kicks off mobile phone TV*, Reuters News (Mar. 2, 2007).

^{92/} QUALCOMM, *MediaFLO Revolutionizing Multimedia FLO Technology Brief*, at 7-8 (May 6, 2005), available at http://www.qualcomm.com/mediaflo/news/pdf/flo_whitepaper.pdf.

^{93/} Cingular Video (TV) Launches, MobileTracker, March 7, 2006, available at <http://www.mobiletracker.net/archives/2006/03/07/Cingular-Video-TV-Launches>.

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forecasts for 100 cities across the country.^{94/} In addition, Cingular Video has an agreement with HBO for content from popular HBO shows, including “The Sopranos.”^{95/} AT&T now advertises that it is “delivering the digital lifestyle from three screens,”^{96/} referring to its offering of content via the Internet, via its MVPD service, and via its wireless network.

Mobile devices such as the iPod represent another fast-growing, new source of video content for consumers. Owners of a video-enabled iPod can download top-rated shows such as CSI, Lost, and The Office for commercial free viewing at any time and various other television shows from ABC, CBS, NBC, MTV, ESPN, Sci Fi Channel, Comedy Central, Disney, Nickelodeon, and Showtime, among others, from the iTunes store.^{97/} In addition to television shows, users can download movies and music videos to their personal computers which are then transferred “synched” onto their iPod.^{98/}

Companies such as MobiTV, Inc. are delivering programming across the mobile and broadband markets. MobiTV has more than one million subscribers and offers over 100 popular TV and channels from top labels, networks and cable providers, such as MSNBC, ABC News Now, CNN International, FOX News Channel, Fox Sports, ESPN 3GTV, NBC Mobile, Bravo To Go, Sci Fi Pulse Mobile, Telemundo Mobile, Discovery Channel, TLC, The Weather Channel, and others.^{99/} The MobiTV service is available in the US through Sprint, AT&T, and

^{94/} *Id.*

^{95/} *Cingular Sings Sopranos in Mobile-TV Chorus*, ZDNet News, December 16, 2005, available at http://news.zdnet.com/2100-1035_22-5998014.html.

^{96/} *See* <http://www.att.com/gen/press-room?pid=7857>.

^{97/} *See generally*, <http://www.apple.com/itunes/store/tvshows.html>.

^{98/} *Id.*

^{99/} *See, e.g.*, <http://mobitv.com/channels/channelstv.php?i=midwest>.

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Cingular, and can be used with a variety of mobile phones and PDAs.

The adoption rate for mobile video has been extremely aggressive. Although a nascent industry, about 1.3% of U.S. wireless subscribers already watch video on their phones.^{100/} The mobile video industry's growth is likely to increase exponentially as consumers upgrade to more powerful phones and carriers upgrade their networks.

Competition from Electric and Gas Utilities. Electric and gas utilities are well positioned for entry into the MVPD market, through their existing access to public rights-of-way and established customer relationships.^{101/} Although not yet widespread, these utilities continue to move forward with ventures involving video distribution.^{102/}

^{100/} Dan Frommer, *Mobile TV's Picture Improves*, Forbes.com (Feb. 28, 2007).

^{101/} *Twelfth Annual Report* ¶ 126.

^{102/} *Id.*