Attachment 2

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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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.[1] 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."[2] 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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[1] *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*").

[2] *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),[3] to adolescence (nearly four million subscribers at the time of the 1996 Act),[4] to robust maturity (26 million subscribers in last year's report).[5] 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.[6]

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.[7] But, even as the number of network

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3 *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*").

4 *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).

5 *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*").

6 *Id*.

7 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. . . ."[8] A recent Wall Street analyst report explained that the video distribution marketplace is "*intensely competitive*."[9] *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."[10] 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

(…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).

8 Seth Sutel, *Media Giants Struggle for Digital Growth*, Seattle Post-Intelligencer, Dec. 26, 2006, *available at* http://seattlepi.nwsource.com/business/297196_yemedia26.html.

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

10 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*.[11]

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.[12] 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."[13] 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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[11] 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).

[12] 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.

[13] 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.[14]

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.[15]

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[14] 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/.

[15] Bryce Meyerson, *Cable, Telecoms Ready To Rumble*, Seattle Times, Dec. 25, 2006, *available at* http://seattletimes.nwsource.com/html/businesstechnology/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."[16]

- "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."[17]

- "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."[18]

Spurred by the rapid development of networking cites where anyone can upload video content, this year's Time Magazine "Person of the Year" was declared to be "You."[19] 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.[20]

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16 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.

17 Evie Haskell, *Yearning for Ys*, The Bridge, Dec. 1, 2006, at 1.

18 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.

19 *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.

20 *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 <u>what</u> to watch, <u>when</u> to watch it, <u>where</u> to watch it, and <u>who</u> to obtain it from.

Comcast and NCTA both provided abundant and detailed evidence of the robust competition in the video marketplace,[21] 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.[22] 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."[23] EchoStar agreed, explaining that DBS providers have continued to invest to increase capacity, create high-speed Internet options, and expand programming offerings.[24]

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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[21] *See* Comcast Comments at 7-59; Nat'l Cable Telecommunications Ass'n ("NCTA") Comments at 8-26.

[22] DIRECTV Comments at 11-13.

[23] *Id.* at 21.

[24] *See* EchoStar Comments at 3.

distribution market."[25] 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."[26] 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.[27] 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."[28]

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."[29] 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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[25] 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.

[26] *Id.* at 6 (emphasis added).

[27] *Id.*

[28] SureWest Comments at 2.

[29] Verizon Comments at 1-2.

nation and to deliver widespread video competition."[30] 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.[31] BellSouth noted that it has 20 franchises and provides video service in 14 different markets.[32] BellSouth also highlighted its "strategic marketing alliance" with DIRECTV, through which "approximately 756,000 BellSouth customers have added DIRECTV service to their communications package."[33] 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."[34]

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."[35] 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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[30] *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.

[31] *See id.* at 7.

[32] *See* BellSouth Comments at 2.

[33] *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.

[34] FTTH Council Comments at 2.

[35] NAB Comments at 6.

digital channels for multicast services," which can deliver increased numbers of broadcast channels directly to the homes of consumers.[36] 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.[37] 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.[38]

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,[39] expanded its international programming lineup,[40] and added local HD channels in additional markets.[41]

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36 *Id.* at 7.

37 *See* APTS Comments at 4-8.

38 *See id*. at 6-8.

39 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=.

40 *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 Centroamerica 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.[42]

- **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.[43] EchoStar also began marketing a deal that gives customers a 7% discount when they opt for the bundled "DISH DVR Advantage" package.[44] In late December, EchoStar announced that it had reached the 13 million subscriber mark.[45]

- **Dominion Video Satellite**, the owner and operator of the Christian Sky Angel DBS service, will offer bundled HughesNet broadband Internet service to its subscribers.[46]

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

(…footnote continued)

41 *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=.

42 *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.

43 *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.

44 *See Ergenomics: 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.*

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

46 *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!.[47] Verizon also significantly expanded its FiOS TV footprint in Massachusetts, Virginia, and Pennsylvania,[48] and announced that it will soon launch FiOS TV in parts of Delaware, New Jersey, Maryland, and Rhode Island.[49] 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.[50] Verizon has also opened two retail stores, dubbed the "Verizon Experience," to introduce consumers to its products, particularly FiOS TV.[51]

- **AT&T** signed carriage agreements with HDNet, NBC Universal, and TotalVid VOD and announced it will offer 27 channels of HDTV.[52] AT&T has launched its U-verse service in Houston, TX, and communities in California, Connecticut, and Indiana.[53]

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[47] *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.").

[48] *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/.

[49] *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).

[50] *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).

[51] 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.

[52] *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."[54]

Internet video options also continue to flourish and expand, fueled by increasing broadband penetration.[55] 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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(…footnote continued)

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.*

53 *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; 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.

54 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.*

55 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. 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.

doubled and the number of services has expanded."[56] 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.[57] Meanwhile Yahoo! and News Corp. introduced Fox Business Now, a collection of original Fox News reports distributed on Yahoo Finance.[58]

- Viacom will introduce at least twenty online niche channels early next year "to capitalize on rising online media consumption."[59]

- 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.[60]

- 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.[61]

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[56] Wade Holden, *Internet Movie Services Make Major Strides in 2006*, Kagan Media Money, Nov. 7, 2006, at 2-3.

[57] *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. 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.

[58] *See* Mass Media Notes, *News Corp. and Yahoo Introduced Fox Business Now*, Communications Daily, Dec. 5, 2006, at 9.

[59] *Viacom Will Introduce 20-Plus Online Channels Early in 2007*, Communications Daily, Nov. 28, 2006, at 9.

[60] *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.

[61] *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.[62]

- 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."[63]

- 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.[64]

- The Sundance Channel announced the launch of an online virtual screening room featuring films, original series, and interactive events with filmmakers.[65] AOL also launched a new website, AOL True Stories, that will distribute documentaries.[66]

- 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.[67]

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62 *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.

63 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.

64 *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.

65 *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.

66 *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.[68]

- 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.[69]

- 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.[70]

- 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.[71]

- 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.[72]

(…footnote continued)

67 *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.

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

69 *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.

70 *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.

71 *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. 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.[73] YouTube has become a "cultural phenomenon."[74] After its official launch only one year ago,[75] 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.[76] Today, YouTube serves more than 100 million video views per day, and receives more than 65,000 video uploads per day.[77] In response, major media companies, including Fox, CBS, and NBC Universal are reportedly in talks to develop a rival to YouTube.[78]

(…footnote continued)

[72] *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.

[73] 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.").

[74] Sutel, *supra* note 8.

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

[76] *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.

[77] *See* YouTube, Inc., *supra* note 75.

[78] *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.

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.[79] 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.[80] 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."[81] 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.[82] 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.[83]

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.[84] And

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[79] *RESEARCH: Online Video a Billion-Dollar Biz in 2007, CTAM Kudos*, The Morning Bridge, Dec. 14, 2006.

[80] *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/e3i05eccb01aebe60a7de548d939b3fc83f.

[81] Musgrove, *supra* note 18.

[82] *See id.*

[83] *Id.*

[84] *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.[85] Mobile video shows so much promise that MTV Networks has created a new unit, MTVN Mobile Media, dedicated to growing its mobile video business.[86] 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.[87]

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,[88] negotiating earlier release dates for films on VOD, adding new

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

86 *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.

87 *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.

88 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.[89] 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.[90] Moreover, Comcast announced the availability of new VOD content centering on the issues and experiences of immigrant and ethnic communities.[91] In another VOD move, Comcast is testing the release of films on demand simultaneously with their release on DVDs.[92] Comcast also announced the launch of The Sportsman Channel on its Digital Sports Package in certain markets.[93] 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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89 *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.*

90 *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.

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

92 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").

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

high-speed Internet network in the California Bay Area.[94] 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."[95] 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.[96]

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.[97] As Comcast has explained repeatedly,[98] as the comments of DBS providers affirm, and as marketplace evidence proves,[99] the DBS providers are effective competitors to cable.

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94 *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.

95 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.

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

97 *See* BSPs Comments at ii, 8; AT&T Comments at 1-5; USTA Comments at 5.

98 *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).

99 *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.[100] 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."[101] 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.[102] 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*.[103] And, EchoStar just announced it now serves over 13 million subscribers.[104] 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."[105]

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[100] *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.").

[101] *Twelfth Annual Report* ¶ 7.

[102] *See id.* ¶ 8.

[103] *See* Comcast Comments at n.17 (citing DIRECTV and EchoStar press releases).

[104] *See* Eggerton, *supra* note 45.

[105] *Satellite Poised for Prosperity*, SKYREPORT.com, Dec. 20, 2006, *available at* http://www.skyreport.com/archives/view/?publication_id=1&release_id=88.

A 2004 article by Austan Goolsbee[106] 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."[107] 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.[108] In the case of cable, competition from DBS has manifested itself in substantial service and quality enhancements.[109]

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[106] 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.

[107] 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.

[108] *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.").

[109] *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.

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.[110] The majority of these competitive responses have taken place in areas where overbuilders and telcos are <u>not</u> offering cable service, but where DBS services <u>are</u> available.[111] As the number of competing platforms grows, Comcast will continue to respond -- in <u>all</u> of its markets -- by offering better products, better value, and better service.[112]

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110 *See* Comcast Comments at 59-78.

111 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.

112 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."[113]

(…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.*

[113] *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);[114] and that the Commission must adopt new regulations to protect them.[115] 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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[114] *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).

[115] *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.[116] Strangely, so do Verizon and AT&T, despite their apparent success entering into contracts for carriage of all cable-affiliated programming they have requested.[117] 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."[118] 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).[119]

- **Vertical Integration.** The BSP Commenters state that incumbent cable operators' vertical integration "is as significant today as it was in 1992."[120] 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.[121]

- **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."[122] Based on Verizon's press releases, however, it appears that Verizon has signed a carriage

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116 *See, e.g.*, DIRECTV Comments at 13-14; EchoStar Comments at 7-14; BSPs Comments at 11-14.

117 *See, e.g.*, AT&T Comments at 13-18; Verizon Comments at 29-30; USTA Comments at 19-22.

118 BSPs Comments at 12.

119 *See* Comcast Comments, *supra* note 103.

120 BSPs Comments at 11.

121 *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.

122 Verizon Comments at 29.

agreement with every cable-affiliated programmer from whom it has sought carriage.[123] 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.[124] 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."[125] 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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[123] *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/fiostv/channel+lineup/channel+lineup.htm (last visited Dec. 20, 2006).

[124] *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/. 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.

[125] 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.[126]

The BSP Commenters imply that the Commission somehow erred in its analysis of the statutory language.[127] And, AT&T urges the Commission to use its "ancillary authority" to expand the program access rules to terrestrially-delivered programming.[128] 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."[129] 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.[130] 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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126 *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).

127 *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.").

128 *See* AT&T Comments at 17.

129 BSPs Comments at 13.

130 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.[131] 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.[132]

- **Regional Clustering.** A number of commenters imply that regional clustering is harmful to competition.[133] The Commission, however, has previously acknowledged the benefits of clustering.[134] More recently, so has the FTC's Director of the Bureau of Economics:

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[131] *Vertically Integrated Sports Programming: Are Cable Companies Excluding Competition: Hearing Before the S. Comm. on the Judiciary*, 109th 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.

[132] *Id.*

[133] *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."

[134] *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.[135]

- **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.[136] 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)[137] 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.[138]

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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135 *FTC Testimony* at 4.

136 *See* DIRECTV Comments at 13; AT&T Comments at 14; USTA Comments at 21; EchoStar Comments at 9 n.10; Verizon Comments at 30.

137 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.

138 *See* Eggerton, *supra* note 39 and accompanying text.

> sufficient. . . . For me, whether the exclusivity ban continues to be necessary was a very close call.[139]

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."[140]

B. There Is No Basis for Complaints About Cable Operators' Pricing Practices In Response to Competition.

Repeating unfounded claims raised in previous years,[141] the National Telecommunications Cooperative Association ("NTCA") alleges that cable operators engage in predatory pricing and illegal discounting.[142] 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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139 *Sunset Order* at 12,180-81 (Separate Statement of Commissioner Kevin Martin) (emphasis in original).

140 47 U.S.C. § 548(c)(5).

141 *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).

142 *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.[143] 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.[144] 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.[145] No one has alleged that this type of marketing is improper or illegal.[146] To the contrary, such discounts only underscore the vibrancy and competitiveness of the video distribution marketplace.

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143 *See* NTCA Comments at 16.

144 *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))).

145 *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.

146 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.[147] 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.[148] As LECs increasingly provide video service, the Commission should move quickly to declare markets subject to effective competition, as Congress expressly intended.[149]

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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[147] *See* NTCA Comments at 17.

[148] 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).

[149] 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(l)(1)(D). This is in contrast to the competing provider test that establishes specific availability and penetration thresholds. *See* 47 U.S.C. § 543(l)(1)(B).

and franchise applicants.[150] 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.[151]

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.[152] Commissioner

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[150] *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).

[151] 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.

[152] 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,"[153] and numerous legal and policy experts have noted that this is now a matter for the courts.[154]

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."[155] Regardless of what NAB calls it (multicast must-carry, either/or

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153 *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.").

154 *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.").

155 *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."[156] 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.[157] 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.[158] A significant portion of quality multicast content is currently available over cable systems under such arrangements.[159] Comcast remains committed to voluntarily providing compelling multicast content from broadcasters to its subscribers.[160]

- **Cable Consumer Electronics Compatibility.** Contrary to CEA's claims,[161] 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.[162] Grant of the waivers filed over

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156 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).

157 *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*").

158 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.

159 *See* Comcast Comments at 39; APTS Comments at i.

160 *See* Comcast Comments. n.161.

161 *See* CEA Comments at 9-12.

162 *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.[163] 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.[164] 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 McSlarrow, 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).

163 *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; *see also CEA Government and Policy Initiatives, available at* 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.

164 *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."[165] 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.[166] These parties essentially ask the Commission to overturn a prior Commission decision on this question, based solely on anecdotes of isolated incidents.[167] The Commission has recognized legitimate competitive benefits to exclusive access arrangements,[168] 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.[169] 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.[170] The parties to the transaction presented abundant facts, analysis, and economic testimony on these issues in MB Docket No. 05-192.[171] Comcast incorporates those submissions by

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165 USTA Comments at 22.

166 *See, e.g.*, Verizon Comments at 24-28; USTA Comments at 16-18; SureWest Comments at 2-7.

167 *See, e.g.*, SureWest Comments at 5-7.

168 *See In re Telecommunications Services Inside Wiring*, First Order on Reconsideration and Second Report & Order, 18 FCC Rcd. 1342 ¶ 71 (2003).

169 *See* The America Channel ("TAC") Comments at 5.

170 *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.

171 *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.[172] 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.[173] 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.[174] 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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[172] *See generally In re Applications for Consent to the Assignment and/or Transfer of Control of Licenses from Adelphia Communications Corp. to Time Warner Cable Inc. and Comcast Corporation*, Memorandum Opinion & Order, 21 FCC Rcd. 8203 (2006) ("*Adelphia Order*").

[173] *See* TAC Comments at 9-10; Black Television News Network Comments at 3.

[174] *See Adelphia 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.

Respectfully submitted,

/s/ James L. Casserly

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