Filings at the Commission

CHAMBER OF COMMERCE
OF THE
UNITED STATES OF AMERICA

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November 20, 2007

The Honorable Kevin J. Martin
Chairman
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, MB Docket No. 06-189

Dear Chairman Martin:

The U.S. Chamber of Commerce is troubled that as part of the *13th Annual Report on Video Competition,*[1] the Federal Communications Commission (Commission) may find that the so-called "70/70" test in Section 612(g) of the Communications Act of 1934,[2] has been met and then may exploit that finding to justify increased regulation of the cable industry. The Chamber is the world's largest business federation representing more than three million businesses and organizations of every size, sector, and region.

I. The Subscribership Percentage Prong of the "70/70" Test Has Not Been Met

Under the "70/70" test, if cable systems with 36 or more activated channels are available to 70% of U.S. households and are subscribed to by 70% of those households, then the "Commission may promulgate any additional rules necessary to provide diversity of information sources."[3] This provision relates to leased access[4] and to no other aspect of cable regulation. While the first prong of the test has been met, the second prong of test—involving the rate of subscribership—does not appear to be satisfied. However, even if the second prong were

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[1] *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming,* MB Docket No. 06-189, FCC 06-154, Notice of Inquiry (rel. October 20, 2006).

[2] 47 U.S.C. §151 et seq.

[3] 47 U.S.C. §532(g).

[4] In an attempt to enhance the diversity of program choices available to cable subscribers, Section 612 requires cable operators to provide channels for lease to third parties unaffiliated with the cable operator. The provision is known as "leased access."

satisfied, there is no justification to regulate the cable industry at a time when there is more competition than ever in the sector.

Nielsen Media Research data shows that 61.1% of U.S. households, as of October 31, 2007, subscribed to cable where the service was available. SNL Kagan estimates a subscription rate of 58.1% by the end of 2007. Therefore, based on the data from these sources, the 70% threshold required by Section 612(g) has not been met.

Press reports, however, indicate that the Commission may be relying solely on data from Warren Communications News showing a subscription rate of 71.4% to find that the second prong of the "70/70" test has been satisfied. Yet, Warren Communications News has acknowledged that it only provided the Commission with the raw number of homes-passed and subscribers for those cable system owners and operators who replied to the publisher's survey. Thus, because the number provided by Warren Communications News of homes-passed by cable is low, the subscribership percentage is overly high.

Moreover, cable subscribership has slightly fallen in the last year. For example, during the third quarter of 2007, subscribers to major cable systems declined by 203,000, according to Wachovia analyst Jeff Wlodarczak. Thus, given that last year's FCC Video Competition Report[5] cites data from Warren Communications News indicating that 67.8% of homes-passed subscribe to cable, it is more likely that this year's subscribership percentage using the publisher's data would be lower, not higher.

In accordance with its own Information Quality Guidelines and Office of Management and Budget requirements, the Commission is required to ensure and maximize the quality, objectivity, utility, and integrity of the information it disseminates. With the majority of sources indicating that the 70% subscription rate has not been met, and with Warren Communications News acknowledging that the data it provided the Commission is incomplete, the Commission has a duty to further examine its misplaced reliance on such data.

II. Congress Did Not Intend Section 612(g) to Authorize the Broad Regulation of Cable

Even if cable subscribership were to cross the 70% threshold, the Commission's ability to regulate cable under Section 612(g) is solely limited to the rates, terms, and conditions associated with leased access. The legislative history of the provision supports this conclusion: "The FCC is granted authority to promulgate any additional rules necessary to ensure that leased access channels provide as wide as possible a diversity of information sources to the public. Along these lines, the Commission may develop additional procedures for the resolution of disputes between cable operators and unaffiliated programmers, and may provide rules or new standards for the establishment of rates, terms and conditions of access for such programmers."[6]

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[5] *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, MB Docket No. 05-255, FCC 06-11, Twelfth Annual Report (rel. March 3, 2006), ¶34.

[6] Report of the Committee on Energy and Commerce, H.R. Rep. 98-934, 98th Cong., 2d Sess. 54 (1984).

Using the provision to justify regulating any other aspect of cable, such as cable ownership or channel bundling, would violate congressional intent. Moreover, imposing broad new regulation on the cable industry would create regulatory uncertainty, which would, in turn, hinder infrastructure investment, harm innovation, reduce consumer choice, and slow the deployment of new technologies.

III. Vibrant Competition Exists in the Multichannel Video Market

When Section 612 was enacted in 1984, cable competition did not exist and cable customers only had access to a limited number of channels. Leased access and the "70/70" test were intended by Congress to ensure the diversity of program choices available to cable subscribers. However, today, consumers can choose among hundreds of channels and can receive their service from cable, DBS, or new entrants, such as their local phone company.

In 2005, the Commission identified 531 satellite-delivered national programming networks, an increase from 388 networks in 2004.[7] Moreover, of the 531 networks, only 116 networks (21.8%) were owned by a cable operator.[8] Therefore, concerns about vertical integration do not justify regulation.

The Internet is changing how people view video. Streaming video from established sites, like CNN, and user-generated content available on sites, such as YouTube, are creating new distribution channels for content. According to a recent In-Stat survey, 30% of respondents said they would drop their pay TV service and rely on the Internet for TV entertainment.

The marketplace is working. There is no market failure that justifies placing new, burdensome regulations on the cable industry. Therefore, the Chamber strongly urges the Commission to reexamine the data that it is using to determine if the second prong of the "70/70" test has been met and strongly opposes using the "70/70" finding to rationalize the imposition of additional regulations on the industry.

Sincerely,

William L. Kovacs

William L. Kovacs

cc: Commissioner Michael J. Copps
Commissioner Jonathan S. Adelstein
Commissioner Deborah Taylor Tate
Commissioner Robert M. McDowell

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[7] Twelfth Annual Report, ¶21.

[8] *Id.*

November 20, 2007

Chairman Kevin Martin
Commissioner Jonathan Adelstein
Commissioner Michael Copps
Commissioner Robert McDowell
Commissioner Deborah Tate
Federal Communications Commission
445 12th Street SW
Washington, DC 20554

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

MB Docket Number 07-42, In the Matter of Leased Commercial Access, Development of Competition and Diversity in Video Programming Distribution and Carriage.

Dear Chairman Martin and Commissioners:

We write as Executives of American companies that produce media content. We are alarmed at recent press accounts and public statements by FCC officials purporting to find undue concentrations of market power that would justify a wide range of government interventions into the media marketplace. These statements stand in stark contrast to the reality of the marketplace in which we compete every day.

To be sure, there was a time when American consumers who wished to enjoy subscription TV had few, if any, alternatives to their local cable system. Thanks to successful public policy initiatives by the Congress and the FCC, this is simply no longer the case for the vast majority of U.S. consumers. Today consumers may choose between multiple subscription TV providers including cable systems, 2 national satellite systems and, increasingly, local phone companies. Consumer options range from rate regulated "lifeline" tiers, to low cost packages such as DISH Network's 40 channel package for $19.00 a month, to larger and more expensive packages.

The reality is that consumers today enjoy a wider range of media choices than at any time in history. In addition to the cable, satellite and telco choices and options described above, the Internet has emerged as a new and rapidly growing source of video media services. Through various new and heavily promoted web sites, consumers now have the option of having specific episodes of their favorite TV shows streamed to them when they want them, for free. Or, consumers who wish to own their own copy of a TV show or movie, with no commercials, may go to other sites and download a copy for as little as $1.99. The range and diversity of media options available to consumers is almost overwhelming, and all of these options are increasing virtually every single day.

Because of the vibrant competition in both programming and distribution, and because of the myriad options and alternatives available to consumers, there is no conceivable justification for government intervention into this marketplace. Media content is one of the few industry sectors in which the United States is still preeminent on the world stage. Ill-considered and unjustified government interventions cannot be permitted to undermine this vibrant American industry.

Respectfully submitted,

/s/ Peter Chernin

Peter Chernin
President and Chief Operating Officer
News Corporation

/s/Robert Iger

Robert Iger
President and Chief Executive Officer
The Walt Disney Company

/s/ Philippe Dauman

Philippe Dauman
Chief Executive Officer
Viacom

/s/ Jeff Zucker

Jeff Zucker
President and Chief Executive Officer
NBC Universal

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of	)	
	)	
Leased Commercial Access	)	MB Docket No. 07-42
	)	
Development of Competition and Diversity in Video Programming Distribution and Carriage	)	
	)	

REPLY COMMENTS OF COMCAST CORPORATION

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October 12, 2007

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WASHINGTON, D.C. 20554

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REPLY COMMENTS OF COMCAST CORPORATION

Comcast Corporation ("Comcast") hereby replies to the comments filed in response to the above-captioned Notice of Proposed Rulemaking ("*Notice*").[1] Predictably, a varied assortment of entities seized the opportunity to pursue their individual business agendas. Although their comments differ in substance and in style, there are certain commonalities among those who seek greater burdens on cable operators: many of their allegations are vague, unsubstantiated, or outright deceptive, and most call for vastly greater regulatory burdens on cable operators and other multichannel video programming distributors ("MVPDs") without taking account of the competitive and technological advances of the past 15 years that have obviated any conceivable justifications for regulatory interference with cable operators' business and editorial judgments. Although these efforts to obtain regulatory advantages are perhaps understandable, they are factually and legally without merit.

The record does not support materially revising the current leased access rules or practices or program carriage complaint procedures. In fact, marketplace realities and

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1 *In re Leased Commercial Access, Development of Competition and Diversity in Video Programming Distribution and Carriage*, Notice of Proposed Rulemaking, 22 FCC Rcd. 11222 (2007) ("*Notice*").

constitutional considerations strongly support reducing rather than expanding the Commission's role in overseeing the marketplace behavior of cable operators and other MVPDs. The record makes clear that leased access is not a viable business model except in rare circumstances (e.g., home shopping programming and infomercials) because it turns the economics of programming upside down -- no amount of tweaking will change that fundamental fact. Similarly, the record reflects that the program carriage rules have worked and that there is no rational reason to convert the rules into a litigator's dream. The Commission should reject commenters' calls for it to intervene further in a marketplace that is working well.

I. INTRODUCTION & SUMMARY.

Today's video marketplace is dramatically different from the marketplace Congress faced when it enacted the leased access and program carriage provisions of the Communications Act. As Time Warner explained, the "current leased access and program carriage rules were adopted at a time when the competitive environment for video programming distribution was far different than it is today."[2] Even Media Access Project recognized that "[i]n the ten years since the Commission last visited the rules governing the leased access and program carriage rules, much has changed in the cable industry."[3] By any measure, those changes have dramatically increased the number and availability of diverse unaffiliated programming services.

Despite the ludicrous claims of some parties here that diversity, competition, and choice are wanting (or even declining!), the facts are inescapable. The number of independent networks has skyrocketed, and the range and depth of programming choices available to consumers has

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2 Time Warner Comments at 7. For purposes herein, unless otherwise designated, all citations to comments are to filings made in MB Docket No. 07-42.

3 National Alliance for Media Arts and Culture, et. al ("MAP") Comments at 1.

increased markedly; in the past 15 years, over 400 national programming networks have been launched and are currently being distributed; the number of national programming networks has grown from around 100 in 1992 to around 500 today.[4] Contemporaneously, vertical integration between cable operators and programmers has *decreased* from over 50% in 1992 to less than 20% today.[5] At the same time, competition among distributors is fierce and growing; fully 30% of MVPD homes are served by satellite, not cable, and the giant regional Bell companies are investing enormous sums to bring consumers another cable alternative. As broadband connections proliferate, consumers are increasingly watching video over the Internet such as *Heroes* at NBC.com, *Dancing with the Stars* at ABC.com, *Prison Break* at Fox.com, *Survivor* at CBS.com, and anything and everything conceivable at sites like YouTube, Google Video, Digg.com, or VideoSift.com. Although the proponents of increased regulation choose to blindly ignore these facts, the Commission is not free to do so.

In this new environment, where consumers have such abundant choices among technologies, services, and products, programmers have significant leverage in negotiating distribution arrangements; this imposes powerful marketplace discipline on distributors that reduces the need for regulation. The marketplace has evolved so that programmers now have more opportunities than ever for how, where, and with whom they launch their networks and distribute their programming. Today, as opposed to looking solely to cable operators for distribution, programmers can launch networks (or just a few hours of programming if they

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4 *Compare 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 ¶ 21 (1994), *with 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 ¶ 21 (2006) ("*Twelfth Annual Report*").

5 Comcast Comments at 4.

cannot fill an entire linear network) on numerous platforms including on satellite, broadcast, the Internet, video on demand ("VOD"), and on mobile devices -- to name just a few of the ever-growing list of possibilities. As innovative digital technologies and platforms proliferate, programmers with compelling content will have even more chances to reach audiences.

Numerous programmers, including traditional programmers, have used the new opportunities created by competition and technological innovation to distribute their programming, alleviating the need for regulatory measures to function as safety valves. Programming networks are harnessing these developments to build their viewing audiences, and many find that it allows them to better serve the needs of their viewers. For example,

- *BlueHighways TV*. BlueHighways TV is an independent programmer that began the process of developing its network in 2004 by producing programming, raising financing, meeting with distributors, and offering test signals of its programming via satellite. The network then began offering its programming via an established programmer, RFD-TV. Soon thereafter, it gained VOD carriage on several cable systems. And earlier this year, BlueHighways TV launched its linear 24/7 network on Bresnan Communications' cable systems.[6] BlueHighways TV programming samples are also available via its website.[7]
- *Veria*. Some networks opt to launch on DBS systems. Earlier this month, EchoStar announced that it would be the first MVPD to launch Veria, an independent programming linear network, as part of Dish Network's America's Top 250 package.[8]

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6 *See* Letter from Stanley E. Hitchcock, Chairman and CEO, BlueHighways TV, to Marlene H. Dortch, Secretary, FCC, Dkt. No. CSR-7108 (Mar. 9, 2007); Press Release, Network Creative Group, LLC, *BlueHighways TV Makes its Official Network Debut* (July 12, 2004), *available at* http://www.bluehighwaystv.com/ncg/R071204.PDF; Press Release, Network Creative Group, LLC, *BlueHighways TV Now on RFDTV* (Oct. 1, 2004), *available at* http://www.bluehighwaystv.com/BH100104-2.HTML; Press Release, Network Creative Group, LLC, *BlueHighways TV To Launch VOD in August* (July 28, 2005), *available at* http://www.bluehighwaystv.com/BH072805-1.html; Press Release, Network Creative Group, LLC, *Head Out and Explore America Full Time - BlueHighways TV Launches 24/7 Network* (Mar. 6, 2007), *available at* http://www.bluehighwaystv.com/BH070305.HTML.

7 *See* Network Creative Group, LLC, BlueHighwaysTV, *at* http://www.bluehighwaystv.com/videos/ (last visited Oct. 4, 2007).

8 *See* Press Release, EchoStar Communications Corp., *DISH Network® First to Carry Veria TV Natural Wellness Channel* (Oct. 3, 2007), *available at* http://dish.client.shareholder.com/releasedetail.cfm?ReleaseID=267405.

- *Anime*. Anime, another independent programmer, launched in late 2002 as a free VOD service on Comcast and Time Warner systems. Next, it launched a subscription VOD ("SVOD") service on Cablevision and Cox systems, and an SVOD launch with Charter is planned for this Fall. Anime also provides programming to Sprint Mobile. Based on the popularity of its VOD offerings, Anime has gained carriage of its linear network on a number of cable systems.[9]
- *Exercisetv*. MVPD-affiliated programmers also have turned to alternative media for distribution. For example, in January 2006, Comcast launched Exercisetv exclusively on VOD. According to Steve Burke, President of Comcast Cable and COO of Comcast Corporation, "Exercisetv represents the next generation of television networks we are developing that are created for time-shifted, on-demand viewing."[10] As explained in the press release accompanying launch of Exercisetv: "Exercisetv is a network developed exclusively for VOD and emerging media formats, such as wireless and online video, which represents a significant shift from the traditional television programming and advertising model."[11]

The Congress of 1992 would be amazed -- and the Congress of 1984 would be stupefied -- at the progress made in furtherance of their goals of competition and diversity. These developments cannot be ignored. The competition that Congress hoped to foster is here and effectively disciplines MVPD behavior while creating substantially more attractive distribution options than leased access provides. If a service that consumers demand is not carried by one MVPD, consumers will simply switch to another MVPD (or other source of video programming) that has it.[12] Similarly, if a programmer cannot gain initial carriage on one MVPD, it can turn to numerous other MVPDs and other ever-expanding outlets to distribute its programming.

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9 Catherine Applefeld Olson, *Anime Network Pounds the Pavement with Its SVOD Business Model, and Looks to HD VOD*, Cable World, Aug. 27, 2007, *available at* http://www.cable360.net/cableworld/departments/hallmarks/.

10 Press Release, Comcast Corp., *Comcast and Jake 'Body by Jake' Steinfeld Launch Exercisetv* (Jan. 18, 2006), *available at* http://www.comcast.com/About/PressRelease/PressReleaseDetail.ashx?PRID=95.

11 *Id.*

12 *See* Time Warner Comments at 9-10 ("[T]he competition provided on a national level by two national DBS providers and, increasingly, consumers' access to a competing wireline MVPD operated by a well-financed local telephone company, like Verizon or AT&T, help ensure that a cable operator cannot afford to refuse to carry desirable (and desired) programming.").

Not surprisingly, the open-ended questions in the *Notice* elicited spirited and opportunistic responses. Comments included an expansive array of criticisms, concerns, allegations of misconduct, and proposals for how leased access and program carriage rules could be changed in ways that suit the financial interests of individual parties. Proponents of change focused their comments on what steps the Commission could take to make it easier for them to launch or grow their businesses no matter how flawed their business model or programming concept might be. These parties, however, conveniently ignore the revolutionary developments in the programming marketplace over the past 15 years and continue to fixate on having the Commission tweak a leased access business model that can never live up to their unrealistic expectations and second-guess MVPD carriage decisions regarding programming networks (both real and hypothetical). There is no reasonable basis for the Commission to adopt commenters' proposals. Any changes would be out of touch with marketplace realities and cannot be supported by the record.

II. THERE IS NO BASIS FOR OVERHAULING THE LEASED ACCESS RULES.

A. Congressional Objectives Have Been Met Despite Deficiencies Inherent in the Leased Access Business Model.

Congress adopted leased access requirements in 1984 in order to advance "competition in the delivery of diverse sources of video programming" and the availability of the "widest possible diversity of information sources."[13] Congress did not envision or intend, however, that leased access would be the sole mechanism for achieving its objectives. Instead, leased access was merely one component of the wide-reaching statutory schemes of the Cable Communications Policy Act of 1984 ("1984 Cable Act") and the Cable Television Consumer

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[13] 47 U.S.C. § 532(a).

Protection and Competition Act of 1992 ("1992 Cable Act"), both of which sought to bolster competition in the video programming marketplace.[14] (This, of course, was at a time when the first DBS satellite had yet to be launched and the telephone companies were statutorily prohibited from providing video programming.) In fact, leased access was intended to be a "safety valve" to the extent the marketplace did not adequately foster diverse unaffiliated programming services as a result of anticompetitive practices.[15] That leased access was not necessarily expected to serve a prominent role in promoting Congress's goals is demonstrated by express observations in the legislative history that the leased access business model might never be viable; as the Senate Report conceded, there is a "sound argument in claiming that the economics of leased access are not conducive to its use."[16] And as the D.C. Circuit found, "Congress never intended to ensure financial success for leased access programmers."[17]

The Senate Report had it right. Almost every commenter acknowledges that leased access is not a way to build a real programming business. For instance, The America Channel ("TAC") said that leased access is not "an effective means of growing a for-profit business."[18] And NFL Enterprises ("NFL") acknowledged that "independent national programmers . . . cannot rely on leased access to support a vibrant programming service that does not independently generate revenue directly from consumers."[19]

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14 *See* Cable Communications Policy Act of 1984, Pub. L. No. 98-549, § 2, 98 Stat. 2779, 2782 (1984) ("1984 Cable Act") (codified at 47 U.S.C. § 532); Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, § 9, 106 Stat. 1460, 1484-86 (1992) ("1992 Cable Act").

15 S. Rep. No. 102-92, at 31-32 (1991), *reprinted in* 1992 U.S.C.C.A.N. 1133, 1164-65.

16 *Id.* at 31.

17 *ValueVision Int'l v. FCC*, 149 F.3d 1204, 1209 (D.C. Cir. 1998).

18 The America Channel ("TAC") Comments at 12.

19 NFL Enterprises ("NFL") Comments at 7 n.26.

The real-world experience of leased access programmers confirms the limitations of the leased access business model. For example, even in the case of home shopping programming, ValueVision, a once-prominent leased access proponent now named ShopNBC, appears to have turned predominantly to traditional carriage arrangements to distribute its programming. A principal complainant when the Commission last reviewed these rules, ShopNBC was distributed to approximately 11.0 million "full-time equivalent cable homes" at the end of 1996 (just prior to the Commission's last revision of the rules); with the revised rules in place and the evolution of the marketplace, ShopNBC now reports that, during the second quarter of 2007, its "television home shopping programming was available to approximately 68.9 million average full time equivalent" households, an increase of more than 500%.[20] "The increase was driven by continued strong growth in satellite distribution of [ShopNBC's] programming and increased distribution of [its] programming on digital cable."[21] Similarly, "The Jewelry Channel, [a leased access programmer in Washington, DC], has reached a programming agreement with EchoStar. .

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[20] *Compare* ValueVision International, Inc., SEC Form 10-Q, Quarterly Report for the quarterly period ended Oct. 31, 1996, at 11-12 (Dec. 17, 1996) (stating that the number of "full-time equivalent cable homes able to receive the Company's . . . programming . . . increased . . . to 11.0 million at October 31, 1996"), *available at* http://www.sec.gov/Archives/edgar/data/870826/0000897101-96-001081.txt, *with* ValueVision Media, Inc., SEC Form 10-Q, Quarterly Report for the quarterly period ended Aug. 4, 2007, at 19 (Sept. 13, 2007) (stating that the network was available to "approximately 68.9 million average full time equivalent . . . households for the second quarter of fiscal 2007") ("*ValueVision 2Q07*"), *available at* http://www.sec.gov/Archives/edgar/data/870826/000095013707014123/c18586e10vq.htm.

[21] *ValueVision 2Q07* at 19. ShopNBC reports that "[a]s of February 3, 2007, the Company had entered into three- to twelve-year affiliation agreements with approximately 130 cable system operators along with the satellite companies DIRECTV and EchoStar . . . that require each to offer the Company's television home shopping programming on a full-time basis over their systems." ValueVision Media, Inc., SEC Form 10-K For the Fiscal Year Ended Feb. 3, 2007, at 69 (Apr. 17, 2007), *available at* http://www.sec.gov/Archives/edgar/data/870826/000095013707005617/0000950137-07-005617.txt.

. . This agreement brings the Jewelry Channel to more than 33 million viewers, doubling the Jewelry Channel's broadcast customer base."[22]

The comments show why leased access only works in rare cases -- it turns the normal programmer-cable operator relationship on its head. Rather than paying a programmer for its content, the cable operator is paid by the programmer for the channel capacity that the cable operator would have used for a more valuable programmer. This impedes the leased access programmer's ability to generate revenues. As the NFL explained, "Subscription fees are critical to the ongoing viability of independent programming services because advertising revenue alone is insufficient to support the costs of operating a program network and of developing innovative original programming that is attractive to consumers."[23] This is why leased access is so often used for infomercials and home shopping programs; for other programmers, it is senseless to invest valuable resources in a business model that simply will not work. That is why such a disproportionate share of new programming successes outside of leased access are being achieved by those who focus their energies on creating compelling programming and exploiting the abundant opportunities created by intense MVPD competition and new distribution modalities, instead of regulatory gamesmanship.

One need only look at the current video marketplace to see that the weaknesses inherent in the leased access model did not preclude the Congressional goals of competition and diversity

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22 *See* Press Release, The Jewelry Channel, *The Jewelry Channel Added to Dish Network(R) Line-Up* (Sept. 18, 2007), *available at* http://www.streetinsider.com/Basic+Content/The+Jewelry+Channel+Added+to+Dish+Network(R)+Line-Up/2960369.html.

23 NFL Comments at 7 n.26.

from being achieved.[24] As even the cursory examination of the video marketplace above demonstrates, "competition in the delivery of diverse sources of video programming" is flourishing. As the Commission found even *before* the advent of YouTube and its progeny, "the vast majority of Americans enjoy more choice, more programming and more services than any time in history."[25] Given the myriad ways in which those who create something worth watching can reach those who wish to watch it, it is not surprising that numerous successful *unaffiliated* programmers have chosen more economical or attractive ways to distribute their programming to audiences than leased access.

B. Proposals To Upend the Commission's Rules Will Not Fix Leased Access's Deficiencies and Would "Adversely Affect the Operation, Financial Condition, [and] Market Development" of Cable Operators.

Although some commenters acknowledge the deficiencies inherent in the leased access business model, they and other commenters erroneously continue to blame the Commission's existing regulatory regime (or level shrill and baseless allegations at cable operators) for the failure of leased access to become a premiere distribution method.[26] And while they praise the success of "low-power television (LPTV) licensees and others . . . to use leased access to provide community-based programming,"[27] these commenters go on to posit a lengthy laundry list of

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24 *See supra* Section I.

25 *In re Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Tenth Annual Report, 19 FCC Rcd. 1606 ¶ 4 (2004).

26 For example, MAP belligerently asserts that cable operators "have continued to thwart the intent of Congress . . . through stonewalling, rate gouging, and other means both permissible and prohibited to undermine and discourage the use of leased access programming." MAP Comments at 1-2. MAP, however, provides no concrete examples of any such alleged abuses. Those actual programmers who believe the rules have been violated are free to file complaints, but will have to rely on factual evidence, not ominous generalities. The miniscule number of leased access complaints in relation to the number of leased access programmers, particularly in recent years (as certain once-unsettled issues have been resolved), directly undermines the credibility of MAP's allegations.

27 MAP Comments at 3-4.

burdensome -- and somewhat inconsistent -- proposals intended to make leased access more popular. Frozen in time, these parties are solely interested in "sweetening" leased access.

None of the proposals to "fix" alleged deficiencies in the Commission's rules can be implemented in a way that is consistent with the statute. No amount of regulatory overhaul or reverse engineering can change the fact that leased access transposes the roles in the typical programmer-cable operator relationship. Implementation of the proposals would only have one guaranteed result -- contravention of Congress's express directive that leased access rules not "adversely affect the operation, financial condition, or market development" of cable systems.[28] Contrary to the apparent beliefs of some commenters, this standard is not merely optional,[29] nor can it be properly transmuted into a standard that allows any injury to cable operators short of bankruptcy.[30]

1. The Current Leased Access Rate Formula Already Produces Substantially Below-Market Rates.

Commenters propose a number of ways for altering the Commission's rate formula, the vast majority of which ignore the express directive in the *Notice* to "provide specific methodologies that the Commission should consider and how such methodologies would better

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28 *See* 47 U.S.C. § 532(c)(1).

29 *See, e.g.*, Community Broad. Ass'n ("CBA") Comments at 3, n.7 (stating that "*ValueVision* only recognized that the Commission could lawfully take into account the economic impact of leasing on cable operators and deferred to the Commission's judgment in balancing statutory goals given the limited information available at the time"). In reality, the D.C. Circuit found that "the public's interest in diversity does not outweigh the statute's mandate that leased access rates 'not adversely affect' cable operators." *ValueVision Int'l*, 149 F.3d at 1209.

30 CBA Comments at 5 (construes statute to permit any leased access rates that would not "threaten[] the overall business viability of any cable television system"); MAP Comments at 6 (arguing that, "as long as the rates and terms were not so ruinous as to endanger the financial viability of a cable operator, the Commission could impose terms that required cable operators to offer terms and observe conditions that did not fully recoup even actual costs").

serve Congress' statutory objectives in a legally sustainable way."[31] Commenters offer a veritable grab-bag of new regulatory proposals: establishing a uniform flat, per-subscriber charge,[32] awarding discounts (or even free carriage) to certain leased access programmers,[33] basing rates on leased access programmers' advertising revenues,[34] auctioning off leased access channel capacity,[35] Commission-granted tax credits to replace payments by leased access users,[36] and on and on. Not one of the advocates of any of these proposals provides a clear, coherent explanation of how they would work, how cable systems would be adversely affected, or how the proposals could be factually or legally justified.[37]

Claims that leased access rates are too high are specious, and ignore the economic realities of the video marketplace. As Comcast demonstrated in its comments, the average implicit fee formula produces rates that are a tiny fraction of those charged for time on broadcast television or a single day's worth of ad space in a newspaper -- and leased access programmers benefit from an exponentially longer time slot or period of exposure.[38] Based on this evidence,

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[31] *Notice* ¶ 8. Of course, asking commenters to submit proposals is not the same as the Commission actually providing notice of the types of specific changes that it intends to consider making to the leased access rules and is procedurally deficient under the Administrative Procedure Act. *See infra* Section V.

[32] *See, e.g.,* MAP Comments at 13; Shop NBC Comments at 9-10.

[33] *See, e.g.,* Reynolds Media Comments at 12; Engle Broadcasting Comments at 2.

[34] *See* TAC Comments at 13-14.

[35] *See* Bruno Goodworth Network Comments at 2-3.

[36] *See* Ideal Living Media Comments at 3-4.

[37] It is difficult to imagine how the Commission could establish a particular per-subscriber rate for a given channel on a given cable system at a given hour -- or more difficult still to imagine how the Commission would justify applying that rate to different hours of the day, or to different cable systems that have widely disparate cost structures. Moreover, the Commission's auction authority does not encompass bandwidth on cable systems, and the Commission has not been empowered to rewrite the Internal Revenue Code.

[38] *See* Comcast Comments at 18-19.

were the Commission to make "maximum rates . . . more in tune with the marketplace,"[39] it would have to *raise* the price of leased access (a position that Comcast does not advocate here).

Any doubt that leased access rates are a bargain is fully dispelled by leased access programmers who tout the rock-bottom prices for purchasing time on a cable system.[40] For instance, one website offers a book entitled *How to Get Your Own National TV Show for Less than $400 a Month* that explains "[w]hy leased access rates are so cheap" and "why that means you can have your own TV show for just a few dollars a month."[41] Another website proclaims "You won't believe how inexpensive it can be to run a half-hour show in front of 100,000 people or more . . . sometimes as low as $15.00 for a half hour."[42] Clearly the pricing formula is not an impediment to use of leased access.

Despite claims to the contrary, there remain substantial costs associated with the actual transmission of leased access programming. And many of the proposals made by those who clamor for lower leased access prices would, anomalously, *increase* those costs (and therefore prices) of leased access. For example, although Media Access Project wants even lower leased access rates, it urges the Commission to adopt proposals -- e.g., mandating the inclusion of leased access programs on electronic programming guides ("EPGs") and DVR search programs, allowing programmers to target audiences by zip code, and requiring cable operators to accept programming in any format the leased access programmer selects -- that will increase cable

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39 *See* CBA Comments at 5.

40 *See* Comcast Comments at 19-20; NCTA Comments at 5 & n.12.

41 *See* The Publicity Hound, *How to Get Your Own National TV Show for Less than $400 a Month, at* http://www.publicityhound.com/publicity-products/marketing-tapes/nationaltvshow.htm (last visited Oct. 3, 2007).

42 *See How to Make a Fortune Using Video . . . Even if You Are Don't Have a Computer, at* http://www.antion.com/onlinevideo.htm (last visited Oct. 3, 2007).

operators' actual costs and adversely affect cable operators' businesses in violation of the statute.[43]

In addition, there are very real practical costs for consumers. Specifically, more leased access programming will displace established programming networks that worked hard to gain carriage based on the quality of their programming rather than by government intervention. Commenters' allegations that cable operators no longer face possible subscriber defections from having to displace high-value programming with leased access because of increases in system capacity from digital technology are foolish.[44] Capacity continues to be a finite asset and compelled carriage of one programmer necessarily displaces another programmer. In an environment in which cable's most powerful competitors, DBS operators, have no leased access obligations, potential loss of subscribers from the compulsory carriage of less desirable programming remains a very real possibility.[45]

The best approach to leased access rates remains the average implicit fee formula, which was adopted only after the Commission released a detailed NPRM that actually proposed a rate methodology as well as the rationales for considering that approach -- something the Commission has not done here.[46] Significantly, after carefully considering the *entire* record and taking into account detailed analyses submitted by commenters, the Commission modified the

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43 *See* MAP Comments at 15-16.

44 *See id.* at 11; Shop NBC Comments at 3, 8.

45 Costs for lost opportunities are not the only liabilities cable operators face from leased access. Leased access also increases the possibilities that cable operators, who have little editorial control over leased access content, will be subjected to a barrage of consumer complaints or will become embroiled in litigation.

46 *See In re Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, Order on Reconsideration and FNPRM, 11 FCC Rcd. 16933 (1996).

fee formula it had initially proposed and adopted the average implicit fee formula.[47] That formula was and is fair and reasonable. It is easy to calculate and is supported by a body of Commission precedent that makes its usage predictable for both cable operators and programmers. New changes to the rate formula would only engender confusion and create added expense to the detriment of cable operators and consumers.

2. The Commission Should Reject Commenters' Wish List of Regulatory Favors.

As noted above, commenters' proposals for change are broad and varied, in large part because of the lack of guidance provided by the *Notice* and the differing relative interests of the commenting parties. However, none of these proposals are justified by the record, let alone marketplace realities. Accordingly, the Commission should refrain from interfering further in a marketplace that has already proven its mettle.

- *Current Tier and Channel Placement Rules Should Be Retained.*[48] As the Commission itself has recognized, Congress never required cable operators to place leased access programming on a specific tier.[49] The Commission required that cable operators "place leased access programmers . . . on any tier that has a subscriber penetration of more than 50 percent," which easily satisfies the statute.[50] Curtailing cable operators' flexibility to place leased access programming on highly penetrated digital tiers would harm both

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47 *See In re Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Leased Commercial Access*, Second Report & Order and Second Order on Reconsideration, 12 FCC Rcd. 5267 ¶ 25 (1997) ("After reviewing the record in this proceeding and after considering and analyzing all of the options presented, we now conclude that the cost/market rate formula does not adequately account for certain factors which, if excluded, would make the maximum leased access rates resulting from the formula unworkable in today's programming marketplace.").

48 *See, e.g.*, Charles Stogner, President, LAPA ("LAPA") Comments at 4-5; MAP Comments at 15; iNFO Channel Group ("iNFO Channel") Comments at 3; ShopNBC Comments at 3, 16.

49 *See Internet Ventures, Inc.; Internet On-Ramp, Inc.; Petition for Declaratory Ruling That Internet Service Providers Are Entitled to Leased Access to Cable Facilities Under Section 612 of the Communications Act*, Memorandum Opinion & Order, 15 FCC Rcd. 3247 ¶¶ 12-13 (2000) ("*Internet Ventures Order*") (noting that "Congress did not mandate specific tier location for leased access and did not require that leased access be carried on basic service").

50 47 C.F.R. § 76.971(a)(1).

into creation of EPG entries for broadcasters and cable networks. For example, broadcasters and cable networks that sell excess time usually have that time listed in EPGs as "paid programming." The record provides no basis for mandating that leased access programmers be provided anything more.

- *Rules Regarding Distribution of Leased Access Programming Are Being Followed.* Although several commenters complain that cable operators "require" carriage on an entire system when the programmer really wants to reach only a specific geographic area,[56] the leased access rules do not mandate that cable operators restructure their cable systems to provide such a service, nor could they. Congress envisioned that these rules would be applied to "cable systems," not to individual components thereof, and the Commission's rules require that cable operators provide leased access programmers with information about availability on a system-by-system basis, and explicitly direct cable operators to calculate leased access rates at the system level.[57] A requirement that cable operators in effect restructure entire cable systems to tailor leased access rates and distribution to the request of each interested programmer would violate the statute because it would "adversely affect the operation . . . of cable systems."[58] Moreover, any penalization of cable operators for consolidating headends would be passing strange given the numerous times that the Commission has expressly recognized the affirmative

(...footnote continued)

the EPG cannot be programmed to show coverage in discrete areas of the system, and because iNFO Channel's service is not being viewed throughout the entire market (per a mutual agreement between Comcast and iNFO Channel), Comcast customers that do not reside in Park City where iNFO Channel is available would become confused if the service were listed on the guide and they were not able to view it. Comcast's Salt Lake City cable system has been working on providing a solution to this problem since last July, and iNFO Channel is now listed on the EPG in most of the Park City area as a separate offering and Comcast soon hopes to provide the listing to all Park City customers.

56 *See, e.g.*, MAP Comments at 10, 15; iNFO Channel Comments at 3; Combonate Media Group ("Combonate") Comments at 3-4; LAPA Comments at 5; CaribeVision Comments at 12-13. Despite the existence of a confidentiality agreement, iNFO Channel is particularly critical of Comcast in describing its negotiations for a leased access programming service targeting Park City, UT. iNFO Channel's comments do not accurately reflect its use of leased access time on Comcast's system serving Park City and the greater Salt Lake City market. Aside from iNFO Channel being in violation of its confidentiality agreement, which it executed in a settlement with Comcast, iNFO Channel's reporting of the facts is faulty. iNFO Channel first approached Comcast's predecessor, AT&T Broadband, about leasing space on a particular system. iNFO Channel then disappeared for approximately 18 months. By the time that iNFO Channel returned, Comcast had acquired AT&T's systems in the Salt Lake City area, and it had consolidated several systems to maximize efficiencies and enable roll-out of new services to consumers, such as high-speed Internet. The new system configuration did not permit iNFO Channel's programming to be limited to only that portion of the system that served Park City. iNFO Channel and Comcast agreed to enter a settlement whereby iNFO Channel provided the equipment necessary for Comcast to be able to make the iNFO Channel service available solely in Park City.

57 *See* 47 U.S.C. § 532(c)(1); 47 C.F.R. §§ 76.970-.971.

58 47 U.S.C. § 532(c)(1). Compliance with such a requirement also would be difficult or impossible for many cable operators to effectuate given their systems' existing architecture.

public interest benefits -- including high-speed Internet and telephony -- that come about only through headend consolidation.[59]

Commenters' attempts to compare the ability to localize programming to Comcast Spotlight's -- Comcast's advertising subsidiary -- ability to localize advertising insertions is misplaced. Comcast Spotlight merely provides advertisers with the opportunity to purchase a limited number of 30- to 60-second-long advertising availabilities targeted to certain geographic sections of certain Comcast systems during regularly-scheduled cable programming. The fact that systems are equipped to distribute advertising on a zoned or subsystem basis does not mean that whole channels or individual programs can be distributed in the same manner without additional equipment, additional costs, and wasted bandwidth (a "dark" or "stranded channel" would be created during periods when programming appearing on a channel in one area of the system does not appear in other areas).[60]

- *Leased Access Programmers Have Adequate Choices For Delivering Programming to Cable Operators.* Leased access programmers urge the Commission to allow them to deliver their programming to cable operators by any means they choose, including "tape, DVD, [I]nternet, coax, fiber, an unlicensed frequency wireless microwave, IPTV, or any current or new technology."[61] This proposal not only is unrealistic, but also would increase cable operators' technical costs -- which would be added to leased access rates that commenters claim are already too high. Cable operators do not possess equipment or software that would enable them to accept programming in any format the programmer

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59 *See, e.g., 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 Corp.*, Memorandum Opinion & Order, 21 FCC Rcd. 8203 ¶ 110 (2006) ("*Adelphia Order*") (finding that the "transactions would result in significant public interest benefits, in particular the accelerated deployment of competitive, facilities-based local telephone service to Adelphia's subscribers . . . "); *In re Applications for Consent to the Transfer of Control of Licenses from Comcast Corporation and AT&T Corp., Transferors, to AT&T Comcast Corporation, Transferee*, Memorandum Opinion & Order, 17 FCC Rcd. 23246 ¶ 9 (2002) (holding that the "merger is likely to result in some public interest benefits associated with accelerated deployment of broadband services"); *Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from MediaOne Group, Inc., Transferor, To AT&T Corp., Transferee*, Memorandum Opinion & Order, 15 FCC Rcd. 9816 ¶ 7 (2000) (ruling that the "merger is likely to benefit consumers by enhancing the merged entity's ability to compete more effectively with incumbent local exchange companies . . . in providing facilities-based local telephony and other new services to residential customers").

60 Duane J. Polich of Combonate Media Group raises questions about using the Comcast Spotlight service to deliver a targeted leased access channel to a subsection of Comcast's Seattle, WA system. *See* Combonate Comments at 3-4. As noted, Comcast Spotlight only offers 30- and 60-second advertising insertions in regularly-scheduled cable programming, not insertions of full-length programs. Comcast's Seattle system has a uniform channel line-up (aside from PEG channels) and is not technically configured to provide different programming to different sections of the market. Mr. Polich's allegations that "[i]t has been difficult to get information from Comcast" regarding Spotlight are false; these facts were relayed to Mr. Polich by a senior officer at Comcast Spotlight during a lengthy conversation in September 2007. *See* Combonate Comments at 4.

61 *See* Reynolds Media Comments at 14; *see also* Charles Stogner, StogMedia ("StogMedia") Comments at 1-2; LAPA Comments at 8-9; MAP Comments at 16.

chooses. Numerous pieces of new equipment and types of software would need to be installed at enormous expense. Cable system personnel would need to be trained. As occurs with the introduction of any new equipment or technology into the cable system, allowing programmers to use any delivery method also raises the risk of "adversely affecting" how the system operates.[62]

- *Cable Operators Are Timely Responding to Requests for Leased Access Information.* Several commenters allege that cable operators are not responsive to requests for leased access information, but provide no proof for their assertions.[63] Several other commenters, however, refute these allegations, demonstrating that cable operators are complying with even the most burdensome leased access requests.[64] Indeed, TAC observes that both Comcast and Time Warner promptly responded to TAC's request for leased access information *for each and every one of their cable systems in the United States*.[65] These sentiments are echoed by CaribeVision, which states, "[w]hen programmers submit written *bona fide* requests that comply" with the rules, "cable operators generally timely comply with supplying the limited information required."[66] Given that cable operators are fulfilling their obligations, the Commission should not impose any additional requirements regarding requests for leased access information.

- *The Commission Should Not Adopt a Standardized Contract.* Commenters raise contradicting proposals regarding leased access contracts. Some argue for more contractual freedoms with cable operators, citing their desire to be treated like non-leased access programming networks.[67] Others urge the Commission to interfere with negotiations by imposing a standardized leased access contract on cable operators.[68] These conflicting viewpoints undermine any basis by which the Commission can or should change its existing leased access rules.[69] Although there is no basis for the

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62 Commenters' proposals to limit cable operators' rights to require that leased access programmers have insurance coverage would force cable operators to shoulder the damages such programmers could cause without proper opportunity for restitution. *See, e.g.*, CBA Comments at 4 n.8; Reynolds Media Comments at 11; LAPA Comments at 3-4; Engle Broadcasting Comments at 3; MAP Comments at 12.

63 *See, e.g.*, Pope Broadcasting Comments at 1; Reynolds Media Comments at 3; CBA Comments at 3; Positive Media Comments at 2.

64 *See* TAC Comments at 13; CaribeVision Comments at 2.

65 *See* TAC Comments at 13. TAC reported that "both Comcast and Time Warner generally replied" to TAC's onerous request "within 15 days" as required by the Commission's rules. *Id.*

66 CaribeVision Comments at 2.

67 *See, e.g.*, CaribeVision Comments at 5 (complaining that contracts "contain many similar terms from agreement to agreement" that are not conducive to the business model CaribeVision has adopted).

68 *See, e.g.*, iNFO Channel Comments at 2-3; Positive Media Comments at 3-4; LAPA Comments at 6.

69 Some commenters claim that they have encountered delays and difficulties with cable operators during the process of purchasing leased access time. Typically, such issues occur only when a programmer seeks carriage on unique terms and conditions that are often outside the terms of a standard leased access contract.

Commission to adopt a standardized leased access contract, Comcast would not oppose discussions on "best practices" that may simplify and reduce the burdens on both cable operators and leased access programmers.

3. Existing Enforcement and Complaint Procedures Adequately Protect Both Programmers' and Cable Operators' Rights.

Very few leased access complaints have ever been filed, and the numbers have decreased in recent years. The low number of complaints does not serve as an indication that something is going wrong, but as an affirmation that cable operators are properly fulfilling their obligations.

A few commenters criticize the Commission's handling of complaints. These commenters malign the Commission's staff, arguing that they have disregarded their obligations to enforce the leased access rules, in some cases simply because the staff dismissed complaints for noncompliance with the Commission's rules.[70] Meanwhile, they give no reason why complainants should not comply with the Commission's rules. These comments should be disregarded.

The Commission should similarly disregard comments that urge the Commission to punish the entire cable industry for the misstep of any particular operator.[71] Congress directed that the "price, terms, and conditions for use of channel capacity" by a cable operator are considered "reasonable and in good faith unless shown by clear and convincing evidence to the contrary."[72] Any other approach would violate cable operators' due process rights.

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70 *See, e.g.*, MAP Comments at 3 ("When programmers sought redress at the Commission, they have received the clear and unambiguous message that staff has no interest in enforcing even existing rules . . . [S]taff are quick to dismiss complaints by programmers on technicalities."); Stog Media Comments at 9 ("[T]here is a strong appearance the FCC staff simply has no desire to see the will of Congress fulfilled . . .").

71 *See* MAP Comments at 14.

72 47 U.S.C. § 532(f).

A few commenters raise concerns about the complaint process and, more specifically, about the burdens and expenses of hiring independent auditors to verify leased access rates.[73] The record in this proceeding provides no basis to change the existing requirements. This is on its face an extremely efficient process, and commenters do not provide any actual evidence that hiring an independent auditor is prohibitively expensive. It cannot reasonably be assumed that replacing accountants with lawyers and arbitrators would reduce the cost or improve the speed or quality of the process. Moreover, the independent auditor rule serves vital purposes -- protecting the confidentiality of sensitive business information and deterring the filing of frivolous complaints. And an independent auditor is needed to meet the statutory requirement that a cable operator's leased access rates be presumed lawful except where proved otherwise by "clear and convincing evidence."[74]

III. CHANGES TO THE PROGRAM CARRIAGE PROCEDURES ARE NOT SUPPORTED BY THE RECORD.

The initial comments provide no basis for concluding that program carriage complaint procedures need to be changed. Today's market realities diminish the justification for any government second-guessing of distributors' behavior.

As described above, in the 15 years since Congress enacted the 1992 Cable Act, the video programming marketplace has exploded with the launch of more than 400 programming networks, the vast majority of which are not affiliated with an MVPD. It is undisputed that, *of all those unaffiliated programming networks, only two have filed program carriage complaints.* Meanwhile, each and every one of those programming networks has actually launched its service

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73 *See, e.g.*, StogMedia Comments at 6; CaribeVision Comments at 11.

74 47 U.S.C. § 532(f).

and obtained carriage on an MVPD. And that does not even count the huge number of video programmers that have chosen to distribute their content via VOD, mobile devices, or the Internet.

Given these marketplace facts, it is clear that any Commission proposal to modify the program carriage rules is a solution in search of a problem. The only commenters that urge the Commission to revise its program carriage rules in this proceeding either (1) obtained carriage agreements and now wish to complain about the deal they agreed to,[75] (2) want the Commission to compel carriage because they have been unable to convince any major MVPD that their programming has any value to consumers,[76] or (3) do not own a programming network and have never sought carriage of anything, as best one can tell from their comments.[77] Notably, not one of these parties has ever used the existing program carriage complaint process and, therefore, none have any practical experience with whether it works adequately or needs to be revised. It is not that the system is broken; these parties simply do not like the system and have chosen not to use it.

A. The Dearth (and Identities) of Parties Urging Revisions to the Program Carriage Rules Undermines Any Reason for Such Revisions.

The record proves that the current program carriage rules are functioning properly. As a preliminary matter, it is telling (albeit not surprising) that so few networks and/or planned networks participated in this proceeding. Only one entity with a launched network, the NFL, and

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75 *See generally* NFL Comments.

76 *See generally* TAC Comments; Black Television News Channel ("BTNC") Comments.

77 *See generally* MAP Comments. Although MAP notes that it is representing "a broad range of independent programmers" and that "The National Alliance for Media Arts and Culture (NAMAC) represents thousands of individuals and organizations that produce video content seeking broader distribution," MAP provides no evidence in its comments regarding any particular networks or their experience in pursuing carriage agreements with particular distributors.

two planned services, TAC and Black Television News Channel ("BTNC"), criticize the Commission's program carriage rules.[78] Neither of the two networks that have previously filed program carriage complaints opted to participate.[79]

As noted above, the Commission reported that, as of June 2005, there were over 531 national programming networks (by Comcast's count the number is closer to 480) and 96 regional networks in operation, with at least 79 additional planned networks in development.[80] Yet only three (actual or would-be) networks accepted the Commission's invitation to address program carriage, and only two program carriage complaints have *ever* been filed at the Commission. This provides compelling evidence that the current rules are functioning properly.[81]

TAC, Media Access Project, and BTNC all assert that the scant participation of programming networks in this proceeding is due to a "fear of retaliation."[82] Such allegations are baseless, and these commenters have not offered a shred of evidence that a programming network has ever been a victim of retaliation. These vague and unsubstantiated allegations should be summarily dismissed.

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78 *See* NFL Comments; TAC Comments; BTNC Comments. Only one other commenter addressed the program carriage rules. *See* MAP Comments at 18-19 (briefly addressing the program carriage rules).

79 Specifically, neither TCR Sports Broadcasting Holding nor Classic Sports (now ESPN Classic) filed comments.

80 *Twelfth Annual Report* ¶¶ 157, 166, 167 (reporting numbers as of June 30, 2005); *see also* Comcast Comments at 9 & n.19.

81 *See In re TCR Sports Broad. Holding, L.L.P. v. Comcast Corp.*, Memorandum Opinion & Hearing Designation Order, 21 FCC Rcd. 8989 ¶¶ 9, 11 (2006); *In re Classic Sports Network, Inc. v. Cablevision Sys. Corp.*, Memorandum Opinion & Hearing Designation Order, 12 FCC Rcd. 10288 ¶ 6 (Cable Servs. Bureau 1997).

82 TAC Comments at 20; MAP Comments at 5, 18-19; BTNC Comments at 4.

In reality, once a programmer files a complaint, the MVPD is then under a Commission microscope. Certainly an MVPD would be foolish to "retaliate" when it is already subject to additional Commission scrutiny. Allegations to the contrary defy common sense.

On the other hand, it is not "retaliation" for an MVPD to continue to decline to carry a network that it for good reason chose not to carry. As Time Warner explained, the truth of the matter is that:

> [T]he dearth of complaints invoking the leased access and program carriage rules is evidence not of a regulatory failure, but of a marketplace success: the concerns that the rules are designed to address as a "safety valve" are being dealt with directly through the development of competition and through technological innovation, and without the need for intrusive regulatory intervention.[83]

Marketplace evidence supports this conclusion. The fact that there are hundreds of unaffiliated programming networks being carried, with new ones being added each year to MVPDs' channel lineups, proves that the overwhelming majority of viable programming networks are reaching carriage agreements with MVPDs and have no reason to file program carriage complaints.

B. Commenters Provide No Justifications for Revising the Program Carriage Rules.

As Comcast and others explained in the comment round, and as the record proves, there is no basis for changing the program carriage rules.[84] A handful of parties submitted comments riddled with self-interested demands and proposed new regulations that are not legally sound.

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[83] Time Warner Comments at 9; *see also* Comcast Comments at 33 ("Based on the Commission's scant experience adjudicating program carriage complaints, there is no evidence that the program carriage complaint process is not working."); NCTA Comments at 14 ("Given that the agency has issued orders relating to only a handful of program carriage complaints over the 15 years since the 1992 Act, no problem needs to be fixed.").

[84] *See* Comcast Comments at 24-34; Time Warner Comments at 27 ("[T]here is no factual (or policy) basis for the assertion that changes to the existing rules and procedures are needed to promote distribution of independent programming."); NCTA Comments at 14 ("The *Notice* contains no evidence that the existing procedures are flawed. Given that the agency has issued orders relating to only a handful of program carriage complaints over the 15 years since the 1992 Act, no problem needs to be fixed.").

NFL Network. The NFL deserves a trophy for chutzpah in seeking regulatory favors from the Commission in this rulemaking. The NFL already enjoys an exemption from the antitrust laws in negotiating national TV rights deals on behalf of its member teams,[85] and has parlayed that special status into the most lucrative sports TV contracts in history. The league has long-term deals with ESPN, CBS, Fox, and NBC totaling more than $20 billion.[86] That figure is more than the rights fees collected by the National Basketball Association, National Hockey League, Major League Baseball, and NASCAR *combined*,[87] and does not even include the NFL's *exclusive* multi-billion dollar NFL SUNDAY TICKET deal with DIRECTV, its lucrative radio agreements with SIRIUS and Westwood One, or its numerous sponsorship deals.[88] The notion that the NFL needs help from the Commission -- or anyone else -- in negotiating its carriage deals is ludicrous.

The simple fact is that the NFL voluntarily agreed to a carriage contract that gave Comcast the right to put the NFL Network on Comcast's digital sports tier. The NFL sued Comcast in state court in New York, claiming that it was entitled to different carriage terms under the contract. The court disagreed and ruled for Comcast.[89] Now, the NFL has come to the Commission insisting that the program carriage rules be rewritten so that programmers -- like

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85 *See* 15 U.S.C. § 1291.

86 *See* Ted Hearn, *Specter Vows To Lift NFL TV Exemption*, Multichannel News (Dec. 7, 2006), *available at* http://www.multichannel.com/article/CA6398153.html. These various carriage deals demonstrate that the NFL is working hard to generate substantial revenues for its owners, not "promote diversity in programming services." NFL Comments at 2. They also demonstrate that the NFL is having *no* difficulty obtaining broad distribution for its games, contrary to the suggestion in its comments.

87 *See* Peter Grant & Adam Thompson, *Gridiron Clash*, Wall St. J., Aug. 20, 2007, at A1.

88 *See 2006 Sports Business Resource Guide and Factbook* at E-116 (noting that DIRECTV will pay $3.5 billion for the SUNDAY TICKET package, Westwood One will pay $120 million for national terrestrial radio rights to NFL games, and Sirius will pay $220 million for satellite radio rights to NFL games).

89 *See NFL Enters. LLC v. Comcast Cable Communications, LLC*, 841 N.Y.S.2d 220 (N.Y. Sup. Ct. 2007).

NFL Network -- can pursue binding arbitration.[90] As Comcast noted in its comments and explains again below, the Commission has no authority to impose such a requirement.[91] More fundamentally, Congress never intended that the program carriage rules act as a contract reformation service for programmers with enormous resources -- and market power -- like the NFL Network.[92]

The NFL's suggestion that the Commission should intervene even in the absence of a distributor's misconduct is bewildering.[93] The NFL does not explain, nor could it, what business the Commission has in second-guessing a distributor's carriage decisions absent an evidentiary showing that meets the statutory standard. Comcast agrees with the NFL that program carriage rules should "protect consumers' interest,"[94] but today's marketplace does a better job of that than the Commission can. Plus, the NFL does not explain, nor could it, how that goal would be advanced by requiring Comcast and other MVPDs to carry the NFL Network 24x7x52 on highly penetrated tiers of service when that network offers a slate of just eight out-of-market football games per year. For programming with this limited appeal, there is no basis for saddling MVPD customers with hundreds of millions of dollars in increased costs.[95] If there is a role for a

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90 *See* NFL Comments at 7.

91 *See* Comcast Comments at 35-37.

92 The NFL is simply wrong in asserting that Comcast discriminates against unaffiliated programming networks. *See* NFL Comments at 4. As Comcast has explained repeatedly, the overwhelming majority of programming networks carried by Comcast are unaffiliated, including the majority of programming services carried on its basic tiers. *See* Comcast Comments at 9; Comcast Comments, MB Dkt. No. 06-189, at 61 (Nov. 29, 2006).

93 *See* NFL Comments at 7 (asserting "the Commission should reorient its approach to program carriage to focus less on an MVPD's misconduct and more on ensuring that the negotiation process and its resulting carriage terms protect consumers' interests").

94 *Id.*

95 *See* Miriam Hill, *NFL Network Sues Comcast, Demands Scheduling Change*, Phil. Inquirer, Nov. 14, 2006, at C1 ("The NFL reportedly wants cable companies to pay 70 cents per subscriber per month for the additional games, which would put the price of a game at about $100 million."). Comcast has publicly noted that sports

(footnote continued...)

government agency in exploring market power associated with competitive abuse, the better inquiry -- as Senator Specter has indicated -- would be to ask whether the NFL has been able to abuse its antitrust exemption in ways inimical to television sports viewers.[96]

TAC and BTNC. Commenters TAC and BTNC propose that the Commission commit significant resources to almost *completely* rewrite its present (and carefully considered) program carriage rules. TAC and BTNC essentially argue that they need new rules because they cannot make a business case for carriage to MVPDs. Among other things, they demand that the Commission declare (out of the context of a specific case) that certain behaviors are categorically discriminatory, use a content-based scorecard (which they admit is "highly subjective") to evaluate whether certain programmers deserve carriage more than other programmers, and unnecessarily and irrationally adopt a definition of what constitutes an "independent programmer."[97] At bottom, these commenters want the Commission to make it easier for them to obtain carriage so they do not have to follow the same path toward carriage that every other successful programming network -- whether affiliated or unaffiliated with an MVPD -- has followed.

(...footnote continued)

programming costs consume a large and growing share of its programming budget, particularly with the proliferation of new team-owned and league-owned networks. *See, e.g.*, Hearing Before the U.S. Senate Comm. on the Judiciary, *Vertically Integrated Sports Programming: Are Cable Companies Excluding Competition?*, 109th Cong. 20-21 (2006) (testimony of David L. Cohen, Executive Vice President, Comcast Corporation) (explaining that the "biggest cost incurred by MVPDs is for access to programming, and as the Government Accountability Office found a few years ago . . . , programming costs are rising faster than cable prices. By far the biggest programming cost increases are those for sports programming . . . [S]ports programming can be exceptionally expensive."), *available at* http://judiciary.senate.gov/testimony.cfm?id=2454&wit_id=5417.

96 *See* Letter from Arlen Specter, Senator, United States Congress, to Deborah Platt Majoras, Chairman, Federal Trade Commission at 1 (Mar. 21, 2007) ("In that vein, I write to express concern that the member teams of the NFL . . . may be abusing their market power to the detriment of consumers."); *Specter Wants to Revisit NFL's Antitrust Status*, Wash. Post., Dec. 8, 2006, at E5, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2006/12/07/AR2006120701608.html.

97 BTNC Comments at 5-13; TAC Comments at 9-11.

TAC alleges that cable operators, particularly Comcast, discriminate against unaffiliated proposed programming networks when they ask logical questions about when the proposed network intends to launch, how it intends to finance program production and network operations, and whether it has obtained carriage from other MVPDs.[98] TAC urges the Commission to categorically declare that such requests are discriminatory because TAC (mistakenly) believes that Comcast and other MVPDs do not require their own affiliated programming networks to supply the same information.[99] BTNC jumps on the TAC bandwagon and makes similar baseless allegations.[100] It is astonishing (and not credible) that TAC and BTNC can be so naïve as to how the programming business works. It takes more than a few ideas, good intentions, and some publicity to create, develop, launch, and operate a successful programming network, as hundreds of unaffiliated programmers have done -- which explains TAC's and BTNC's failures.

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98 *See* TAC Comments at 1-8.

99 TAC Comments at 1-2 ("Comcast routinely agrees to carry its own affiliated channels, prior to those channels securing funding, prior to securing carriage elsewhere, and prior to launch."). TAC goes so far as to state that an MVPD engages in discrimination when it denies an unaffiliated programming network carriage even where the MVPD does not own a channel similar to the one it is denying carriage. *See id.* at 10 ("The Commission should clarify that discrimination does not only occur when an MVPD owns a 24-hour channel with the exact same genre, demographics, programming, etc., as an independent channel.").

100 For example, BTNC claims that Comcast and Time Warner, who they refer to as "gatekeepers," "censor independent voices from America's television households to protect their own programming investments," but meanwhile reports that "BTNC has been well received by satellite television distributors, telecom, and other less dominant MSOs." BTNC Comments at 3, 11. BTNC also asserts that it "has successfully obtained satellite distribution for its launch in 2008." *Id.* at 2. The MVPD marketplace is characterized by competition that allows programmers to reach a viewing audience without carriage by a cable operator. BTNC recognizes this. Even as BTNC accuses Comcast and Time Warner of being "gatekeepers" in this proceeding, in a recent waiver request filed at the Commission, BTNC touts a satellite carriage deal as "[t]he critical opportunity for its birth." *In re BTNC, Inc. Request for Temporary Waiver*, MB Dkt. No. 07-231, at 2 (Sept. 26, 2007).

It is impossible for Comcast or Time Warner to single-handedly censor independent voices. If a consumer wants to receive programming that is not offered by his or her cable operator, the consumer can, and will, take his or her business to a competing provider that carries the service or access the programming in other ways, including on the Internet. *See* NCTA Comments at 13 ("Unaffiliated programmers can gain distribution on DBS and telephone company competitors to traditional cable systems. The Internet has arisen as another outlet for widespread distribution of video programming."). In the rare case where a particular consumer does not have a choice, enough consumers do have choices to make for market discipline.

Carriage decisions necessarily entail judgments regarding a wide variety of business and editorial considerations. Because there are many more programming services available for carriage than there are channels on which to distribute them, MVPDs must choose between many disparate types of services with different types of qualifications for carriage. The same complex judgments must be made regardless of whether a network is affiliated with an MVPD or any other entity.

This is fundamentally a decision that is to be made by MVPDs and not the government. In making such determinations, MVPDs necessarily must take into account both the present and future costs involved in carrying a particular programming network as well as the editorial contribution the network would make to the total package of services offered.[101] Moreover, the forces of an ever-increasingly competitive marketplace ensure that these decisions must always account for the interests of subscribers. These judgments cannot easily or appropriately be overseen by government regulators in light of intense competition and the First Amendment.

Although the criteria for carriage vary greatly from MVPD to MVPD, cable system to cable system, and city to city, it is reasonable for an MVPD to look for at least certain basic qualifications in a network:

- a compelling programming concept that is likely to attract consumers;
- actual programming or rights to programming that is likely to attract viewers;
- funding, or at least a reliable source for such funding, to produce its programming, launch its network, and be able to operate at least long enough to establish a revenue stream to support its ongoing operations; and

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101 A compelling program concept may be outweighed by a low expectation of success or by limited channel capacity. It may also be opted against for another service with an even more compelling concept.

- experienced management that understands how to launch and operate a programming network, and that is willing to put in the hard work necessary to get the network up and running.

Comcast applies these and other criteria to all programming networks, whether affiliated or not. As Jeff Shell, President of Comcast's Programming Group, explained long before TAC raised its arguments,

> People outside the company would be surprised at how I have to go through the same process with Matt Bond [Comcast's executive vice president of content acquisitions] that everybody else on the outside has to[.] I have the benefit of being able to walk down the hall as opposed to getting on a plane to see him. But it's just as difficult.[102]

Significantly, even affiliated networks often receive only limited distribution until they can prove their value to customers.[103] And once they prove their value to Comcast and its customers, if they want broader distribution, they must prove it to all the other MVPDs whether or not affiliated.

Moreover, for all practical purposes, in the current competitive environment it is simply impossible for an MVPD to compete if it discriminates against unaffiliated programmers. As Comcast has explained, more than 90% of the programming networks it carries in a typical system are unaffiliated, including the majority of programming services carried on its basic tiers.[104] It would be impossible for Comcast to remain competitive if it did not carry vast numbers of unaffiliated networks. This is true throughout the MVPD industry. As Time Warner submits,

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102 Linda Moss, *From Versus to Horror: Expanding a Network Portfolio*, Multichannel News, Sept. 25, 2006, *available at* http://www.multichannel.com/article/CA6374498.html.

103 For example, TV One launched with distribution to only 2.2 million Comcast homes, even with its strong potential for success evidenced by its great management, available capital, and quality programming. *See* Press Release, *Comcast Corp., TV ONE Announces Carriage Plans in Several Key Comcast Markets* (Nov. 19, 2003), *available at* http://www.comcast.com/About/PressRelease/PressReleaseDetail.ashx?PRID=275.

104 *See* Comcast Comments at 9; Comcast Comments, MB Dkt. No. 06-189, at 61 (Nov. 29, 2006).

> [O]n TWC's cable systems, the vast majority of the channels are used to provide programming in which TWC has no ownership interest. This is hardly surprising since, in making programming decisions, TWC relies on its business and editorial judgment as to whether a particular channel meets the needs and interests of its subscribers and considers such factors as input from local management, the system's overall product mix and capacity, and the financial terms being offered by the programmer. All of TWC's negotiations with programming networks -- regardless of ownership affiliation -- are conducted at arm's length and with the goal of maximizing the value offered to subscribers.[105]

The Commission must not ignore the realities of the competitive marketplace and bend to the demands of these few self-serving commenters. These programming network selection practices are not discriminatory, rather they are part of the "legitimate business practices common to a competitive marketplace" that Congress sought to preserve.[106]

Adoption of these commenters' proposals becomes even more inappropriate since the proposals advanced involve requests for the Commission to make what the commenters admit are "*highly subjective*" content-based judgments.[107] For example, to assist the Commission in comparing affiliated and unaffiliated programming services, BTNC offers the government a

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105 Time Warner Comments at 27-28; NCTA Comments at 13 ("Hundreds of program networks unaffiliated with the operator are carried on cable systems nationwide.").

106 *See In re Implementation of Sections 12 and 19 of the Cable Television Consumer Protection & Competition Act of 1992, Development of Competition and Diversity in Video Programming Distribution and Carriage*, Second Report & Order, 9 FCC Rcd. 2642 ¶ 15 (1993) ("*Program Carriage Order*") ("We emphasize that this approach remains consistent with our objective of serving the congressional intent to prohibit unfair and anticompetitive actions without restraining the amount of multichannel programming available by precluding legitimate business practices common to a competitive marketplace.") (internal citations omitted). The Commission has explained that what constitutes "coercion" and "discrimination" pursuant to the statute should be identified as it resolved particular complaints, "because the practices at issue will necessarily involve behavior that must be evaluated within the context of specific facts pertaining to each negotiation." *Id.* ¶ 14. Despite the urgings of a *total of two* commenters, it would be wholly inappropriate for the Commission to determine, out of context, whether categories of generalized behaviors constitute discrimination. Similarly, the Commission ruled that remedies should be determined "on a case-by-case basis." *Id.* ¶ 26.

107 *See* BTNC Comments at 7 ("While it is understood that such comparisons are *highly subjective* . . .") (emphasis added). TAC also supports this approach. *See* TAC Comments at 10 (BTNC "provided a thoughtful and well-reasoned 'Scorecard' which the Commission could establish as a guide for evaluating complaints. We support BTNC's approach.").

content-based "Cable Television Network Evaluation Score Card."[108] Similarly, TAC wants the Commission to establish content-based minimum requirements that an independent programmer would have to meet, including that it offers programming with "redeeming social value" and "cultural significance."[109] Happily, the Constitution stands as an absolute bar to TAC's invitation to the government to dictate content-based judgments.

These proposals would unconstitutionally inject government into the core of the editorial decision making process. Moreover, such content-based regulation was never contemplated by the statute and is impractical to implement on any consistent basis, being admittedly "subjective" in nature. Under the statute, the only relevant inquiries for the Commission to analyze in a claim of program carriage discrimination are: (1) whether an MVPD discriminated "in video programming distribution on the basis of affiliation or nonaffiliation" of a programmer; and (2) if so, whether such discrimination "unreasonably restrain[ed] the ability of [the programmer] to compete fairly."[110] It is not possible for the Commission, or an arbitrator, to intuit that a decision was improper by "reverse engineering" the operator's decision through a regulatory "beauty contest" in which the economic and programming qualities of different services are compared.[111]

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108 *See* BTNC Comments at 7-10. According to BTNC, this device would assist the Commission in evaluating whether an unaffiliated network receives carriage terms equally as favorable as an affiliated network, by judging (on a scale of one to ten), the "entertainment value," "educational value," "family viewing," "inspirational value," and "social value" of the programming networks. *Id.* at 7, 9. BTNC also offers content-based sample factors that it believes an arbitrator should consider when evaluating a program carriage complaint. *See id.* at 5-6.

109 TAC Comments at 9-10. It is unclear why TAC wants to establish a definition of "independent programmer." The Commission's rules already include a standard to distinguish between "affiliated" and "nonaffiliated" programmers -- an aspect of the rules that the Commission did not tee up for consideration in the *Notice*. *See* 47 C.F.R. § 76.1300(a); *see also Program Carriage Order* ¶ 19.

110 47 U.S.C. § 536(a)(3); *see* 47 C.F.R. § 76.1301(c); *see also id.* § 76.1302(c)(3) (requiring any complainant alleging discrimination to include in its complaint "evidence that supports complainant's claim that the effect of the conduct complained of is to unreasonably restrain the ability of the complainant to compete fairly").

111 Such a beauty contest cannot be used either to mandate carriage or to establish *prima facie* evidence sufficient for a case to proceed.

The decisions involved are decisions that editors are entitled to make and cannot be required to explain and defend if constitutional protections are to be respected.[112] The Commission should affirmatively dismiss these content-based proposals as irrelevant to the issue of discrimination in program carriage.

With respect to program carriage complaint remedies, BTNC asserts that the Commission "can, and in fact has the statutory obligation to, mandate carriage of non-affiliated networks that have been denied market access on the basis of affiliation or non-affiliation."[113] Although the statute allows the Commission to mandate carriage as a remedy for a program carriage violation, the statute also specifies that the remedy must be "appropriate" to the specific circumstances.[114] As the Commission explained in the *Program Carriage Order*, "Given the wide range of behavior that may potentially give rise to a violation of the [program carriage rules], we believe that a case-by-case determination of the appropriate remedies based on the specific behavior involved in a particular violation provides the only reasonable and meaningful method" to enforce the rules.[115] Mandatory carriage has never been granted as a remedy by the Commission. This is unsurprising because compelling carriage would directly interfere with a

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112 *See Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 636 (1994) ("Through 'original programming or by exercising editorial discretion over which stations or programs to include in its repertoire,' cable programmers and operators 'see[k] to communicate messages on a wide variety of topics and in a wide variety of formats.'" (quoting *Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488, 494 (1986)); *Time Warner Entm't Co. v. FCC*, 240 F.3d 1126, 1129 (D.C. Cir. 2001) ("[C]able operators . . . exercise[] editorial discretion in selecting the programming [they] will make available to [their] subscribers, and are entitled to the protection of the speech and press provisions of the First Amendment." (internal citations and quotations omitted)).

113 BTNC Comments at 12. BTNC misstates the pertinent standard for finding a violation; as noted above, not only must a complainant show that it has been discriminated against based on affiliation or non-affiliation, it must show that "the effect of the conduct complained of is to unreasonably restrain the ability of the complainant to compete fairly." 47 C.F.R. § 76.1302(c)(3).

114 47 U.S.C. § 536(a)(5).

115 *Program Carriage Order* ¶ 27.

cable operator's editorial discretion and raise serious First Amendment concerns, concerns that the Commission is obligated to avoid if possible.[116] It is also likely that Commission-compelled carriage of one programming service would mean the compelled dropping of another programmer. The Commission is aware that compulsory carriage, if ever appropriate, would face steep constitutional hurdles and that the Commission must construe its remedial authority in a manner so as to avoid constitutional conflicts.[117]

BTNC states: "Freedom of Speech and the right for all people to be heard have been at the center of our democracy since the framing of our government."[118] That is correct, and that right extends to cable operators as well; it is firmly established that cable operators engage in speech that is protected by the First Amendment.[119] As Time Warner noted, applying either strict or intermediate scrutiny to the program carriage rules, the content-based preferences already contained in the current program carriage rules are on precarious legal grounds.[120]

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116 A mandatory carriage remedy also raises many practical concerns, such as how could the Commission decide that compulsory carriage is a more appropriate remedy than damages? Also, how could the Commission decide which systems operated by a particular cable operator should be required to carry a given network? A cable operator -- particularly a large one -- does not simply make a binary carry/no-carry decision. Once it decides that a network is worthy of carriage, it still must assess a number of factors to determine which systems will carry the network, and when. Decisions about expanding the roll-out can be made later, as additional information is obtained about the network's performance, audience response, new programming alternatives, and so on.

117 *See U.S. West, Inc. v. FCC*, 182 F.3d 1224, 1231 (10th Cir. 1999) ("[D]eference to an agency interpretation is inappropriate not only when it is conclusively unconstitutional, but also when it raises serious constitutional questions."); *Texas Office of Pub. Util. Counsel v. FCC*, 183 F.3d 393, 443 n.95 (5th Cir. 1999) (explaining that "a court will reject an agency interpretation of a statute that would ordinarily receive deference under *Chevron* step-two if it believes the agency's reading raises serious constitutional doubts"); *see also Immigration and Naturalization Serv. v. Enrico ST. CYR.*, 533 U.S. 289, 299-300 (2001) (internal citations omitted) ("[I]f an otherwise acceptable construction of a statute would raise serious constitutional problems, and where an alternative interpretation of the statute is 'fairly possible,' we are obligated to construe the statute to avoid such problems.").

118 BTNC Comments at 13.

119 *See* Comcast Comments at 2 & n.5; Time Warner Comments at 11-12.

120 *See* Time Warner Comments at 11-13.

BTNC's and TAC's proposals are even more extreme and undoubtedly would fail judicial scrutiny.[121]

C. The Commission Should Resolve Program Carriage Complaints in a More Expeditious Manner and Punish Those Who File Frivolous Claims.

Although, as in the program access context, there is no basis to alter the established pleading cycle or to establish additional deadlines to govern the process, Comcast agrees with commenters who generally support a more expeditious resolution of program carriage complaints.[122] As NCTA points out, the Commission could commit to "speed up the FCC's internal processes."[123] This would not require a change in the rules since delays are typically the result of management processes and priorities internal to the Commission. Comcast would welcome efforts by Commission staff to process complaints -- and all the other pending business of the Commission -- as expeditiously as possible, consistent with due process and fair, informed, and reasoned decisionmaking.[124]

With respect to frivolous claims, TAC offers that, "to discourage frivolous claims, the Commission could require an independent programmer to pay the cable operator's costs if the

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[121] To the extent that BTNC and TAC ask the Commission to clarify the elements of a *prima facie* case, there is no need for such clarification. *See* BTNC Comments at 11; TAC Comments at 10. As Comcast explained in its comments, clarification beyond that provided by the Commission's *Program Carriage Order* and its two subsequent adjudications is unnecessary. *See* Comcast Comments at 27. However, Comcast does not oppose Time Warner's proposal that the Commission reaffirm the exacting nature of the burden imposed on program carriage complainants and the consequences of a complainant's failure to meet the burden. *See* Time Warner Comments at 31. Beyond that, the record does not demonstrate that the elements of a *prima facie* case require revision or clarification.

[122] TAC seeks hearing and resolution of program carriage complaints within 60-90 days. TAC Comments at 9. MAP more generally seeks "a time limit for making decisions." MAP Comments at 18.

[123] NCTA Comments at 15.

[124] *See* Comcast Comments at 28-33.

claim is deemed frivolous, or even if the programmer loses."[125] While Comcast agrees with the "loser pays" concept in principle, since complainants who file frivolous complaints should be sanctioned monetarily, the Commission's program carriage rules already provide for such redress.[126]

IV. THERE IS NO FACTUAL OR LEGAL BASIS FOR IMPOSING AN ARBITRATION REQUIREMENT.

Several commenters urge the Commission to allow leased access and/or program carriage disputes to be submitted to arbitration.[127] These parties say that such a requirement would lower costs and expedite resolution of complaints. That belief is not supported by evidence in the record. The Commission cannot outsource its statutorily-mandated duties and must inevitably

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[125] TAC Comments at 9; *see also* BTNC Comments at 4 ("it is also BTNC's position that frivolous complaint filings by non-affiliated programmers should be penalized economically"). BTNC also suggests that *if a violation is found* "the cable carrier should be burdened with the entire legal cost of both parties." BTNC Comments at 5. To the extent BTNC's proposal reflects a general concern regarding the cost of the regulatory process, the cable industry already pays almost $50,000,000 annually in Commission regulatory fees that go toward those costs. Programmers do not bear any part of these costs. *See In re Assessment and Collection of Regulatory Fees for Fiscal Year 2007*, Report & Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd. 15712, att. C (2007).

[126] *See* 47 C.F.R. § 76.6(c) ("It shall be unlawful for any party to file a frivolous pleading with the Commission. Any violation of this paragraph shall constitute an abuse of process subject to appropriate sanctions."). In an environment where over 500 channels are seeking carriage on limited capacity (digital cable systems typically have space for approximately 200 channels; analog systems can offer much less), there will inevitably be many disappointed programming networks. It should not be possible for each of these to file (or threaten to file) a cost-free complaint or unjustified discovery requests with the Commission in an effort to obtain leverage against the cable operator. The Commission must not make the process so complainant-friendly that it increases the number of frivolous complaints filed. A "loser pays" scenario could give the Commission a means to provide a disincentive for the filing of frivolous complaints and discovery requests that would otherwise present an enormous strain on Commission resources. *See In re Implementation of the Cable Television Consumer Protection and Competition Act of 1992; Development of Competition and Diversity in Video Programming Distribution: Section 628(c)(5) of the Communications Act: Sunset of Exclusive Contract Prohibition; Review of the Commission's Program Access Rules and Examination of Programming Tying Arrangements*, Report & Order and Notice of Proposed Rulemaking, FCC 07-169, at 140 (Oct. 1, 2007) (Statement of Commissioner Michael J. Copps, Approving in Part, and Concurring in Part) ("*Program Access Order*") (explaining his disapproval of the discovery aspects of the new program access rules: "[t]hey go too far in establishing a bare 'relevance and control' standard for discovery requests with no apparent limits on requests that are duplicative or unduly burdensome. I fear that these rules will embroil the Commission in an endless stream of discovery disputes as the parties vie for competitive advantage."). Considering the large number of programmers and virtually infinite number of would-be programmers, Commissioner Copps's concerns are even more acute in the instant proceeding.

[127] *See, e.g.*, MAP Comments at 17; LAPA Comments at 2-3; TAC Comments at 11; BTNC Comments at 4.

allow for *de novo* review of any arbitration decisions.[128] Therefore, arbitration would add an additional step to a process that critics gripe is already too long. Moreover, arbitration, even on an expedited timetable, can be enormously expensive; highly specialized arbitrators command fees in the hundreds of thousands of dollars. As Comcast explained in its comments, compulsory arbitration is simply not the solution to any alleged problems with the leased access or program carriage complaint processes.[129]

The Commission has no authority to impose mandatory arbitration.[130] As the Supreme Court has repeatedly held, "[a] party cannot be required to submit to arbitration any dispute which he has not agreed so to submit."[131] ADRA also prohibits an agency from using arbitration where the matter involves significant government policy questions, requires consistent policies

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[128] There is no way to get around the fact that Congress expressly stated that leased access complaints must be reviewed by "Federal district court[s] or the Commission," *see* 47 U.S.C. § 532(f), and that program carriage complaints must be reviewed by "the Commission," *see id.* § 536(a). And no proponent of arbitration has satisfactorily explained how this process could be applied to either leased access (where the statute permits the price, terms, and conditions for use of channel capacity to be found unreasonable only on the basis of "clear and convincing" evidence, the standard articulated by Congress in the Communications Act), *id.* § 532(f), or program carriage (which entail enormously difficult threshold inquiries about whether permissible hard bargaining has crossed the line into narrowly circumscribed areas of impermissibility).

[129] *See* Comcast Comments at 35-37; *see also* NCTA Comments at 16-17; Time Warner Comments at 34-36.

[130] The Alternative Dispute Resolution Act ("ADRA"), from which the Commission claims to derive its authority to impose arbitration, does not contemplate mandatory arbitration. 5 U.S.C. §§ 572(a) (agency may use a dispute resolution proceeding "if the parties agree to such proceeding"), 575(a)(1) (arbitration to be used only "when all parties consent"); *see In re Use of Alternative Dispute Resolution Procedures in Commission Proceedings and Proceedings in which the Commission is a Party*, Initial Policy Statement & Order, 6 FCC Rcd. 5669 ¶ 12 (1991) (resort to ADR is "purely voluntary"); *In re Mediacom Communications Corp. v. Sinclair Broad. Group, Inc., Emergency Retransmission Consent Complaint for Enforcement for Failure To Negotiate Retransmission Consent Rights in Good Faith*, Memorandum Opinion & Order, 22 FCC Rcd. 35 ¶ 25 (2007) ("The Commission does not have the authority to require the parties to submit to binding arbitration."); *In re Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, Report & Order and Further Notice of Proposed Rulemaking, 8 FCC Rcd. 5631 ¶ 537 (1993) ("*1993 Leased Access Order*") ("ADR is voluntary [and] parties may elect it at any time"). Moreover, it remains unclear whether the Commission ever properly implemented ADRA. *See* Comcast Reply to The America Channel's Opposition to Comcast's Petition for Declaratory Ruling, CSR-7108, at 30 n.102 (Mar. 9, 2007); Time Warner Comments at 36, n.126.

[131] *AT&T Techs., Inc. v. Communications Workers of Am.*, 475 U.S. 643, 648 (1986) (quoting *Steelworkers v. Warrior & Gulf Nav. Co.*, 363 U.S. 574, 582 (1960)); *see also First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 942 (1995).

that should not be subject to individual decisions, may significantly affect third parties, or where a full public record of the proceeding is important.[132] Every program carriage or leased access complaint proceeding has the potential to raise serious questions under the First and Fifth Amendments; displace carriage of other programmers; and establish significant precedent. Under these circumstances, mandatory arbitration is not appropriate.[133]

In addition, the effectiveness of mandatory arbitration is untested for the types of disputes in question here. This lack of experience caused the Commission to reject mandatory arbitration for program access cases in an order released earlier this month:

> We would like to see how arbitration of program access disputes, either through a merger condition or through voluntary arbitration, is working over time, to determine if modifications to the arbitration process are necessary prior to imposing a mandatory requirement on all parties to all program access complaints.[134]

If there is a paucity of information on the effectiveness of arbitrating program access disputes, there is an even greater dearth concerning arbitration of program carriage and leased access cases. Unlike program access cases, some of which have been subject to compelled arbitration

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132 *See* 5 U.S.C. § 572(b).

133 In the *TAC Order*, the Commission asserts that the arbitration condition in the *Adelphia Order* does not violate ADRA or the APA because the arbitration is "non-binding." *In re Comcast Corp. Petition for Declaratory Ruling that The America Channel is not a Regional Sports Network*, Order, FCC No. 07-172 ¶ 4 n.13 (Sept. 25, 2007) ("*TAC Order*"). The language of Section 575(a)(3) of ADRA is not limited to "binding" arbitration. *See* 5 U.S.C. § 575(a)(3). Thus, the Commission's citations in the *TAC Order* do not support the argument that "arbitration," as used in Section 575(a)(3) of ADRA, means "binding arbitration." Indeed, Section 575(a)(3) uses the term "arbitration" while another subsection in the same statute, Section 575(c), expressly refers to "binding arbitration." *Compare* 5 U.S.C § 575(a)(3), *with* 5 U.S.C. § 575(c). If "arbitration" refers to "binding arbitration," then the use of the term "binding" in Section 575(c) would be superfluous. The Commission's interpretation contradicts canons of statutory construction. *See, e.g.*, 2A Norman J. Singer & J.D. Shambie Singer, Sutherland Statutory Construction § 46:6 (7th ed. 2007) ("No clause, sentence or word shall be construed as superfluous, void or insignificant if a construction can be found which will give force to and preserve all the words of the statute . . . [W]here the legislature has employed a term in one place and excluded it in another, it should not be implied where excluded."). In any event, whatever the Commission's ability to extract "consent" to arbitration using the leverage of a merger order, that does not work in the context of a rulemaking.

134 *Program Access Order* ¶ 112.

since the adoption of the *News Corp./Hughes* merger conditions in 2002,[135] no leased access dispute has ever been arbitrated and only two program carriage disputes have resulted in arbitration, both of which are currently underway. Only after an arbitration "track record" is established will the Commission -- by its own words of 11 days ago -- be able to "determine which types of disputes lend themselves more readily to resolution by arbitration and which may be more judiciously resolved by the Commission in the first instance."[136]

In sum, there is simply no need for the Commission to impose an arbitration requirement in this proceeding. There is no record proof that the leased access and program carriage complaint processes are not working as intended. Both types of complaints are extremely rare, both already are subject to "streamlined" complaint processes, and both properly encourage negotiation and settlement of differences in the marketplace, rather than through government intervention.[137] Moreover, even if the Commission properly declines to adopt an arbitration requirement, this does not foreclose parties from voluntarily participating in alternative dispute resolution.[138]

V. THE *NOTICE* FAILED TO "FAIRLY APPRISE THE PUBLIC" OF CHANGES TO THE LEASED ACCESS AND PROGRAM CARRIAGE RULES.

Commenters in this proceeding have made numerous far-flung proposals about how to change the Commission's leased access and program carriage rules. This is a direct result of the *Notice*'s failure to provide any specificity with regard to the particular rule changes that the

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135 *See In re General Motors Corp. and Hughes Electronics Corp., Transferors, and The News Corp. Ltd., Transferee, for Authority To Transfer Control,* Memorandum Opinion & Order, 19 FCC Rcd. 473 ¶¶ 169-179 (2004) (establishing an arbitration condition for qualifying program access disputes).

136 *Program Access Order* ¶ 112.

137 *See 1993 Leased Access Order* ¶¶ 534-536; *Program Carriage Order* ¶¶ 20-34.

138 *See* Comcast Comments at 36.

Commission is contemplating.[139] Under these circumstances, were the Commission, despite the absence of authority or support, to consider adopting any of the proposals that have been submitted in this docket, the Commission would need to issue another notice with detailed proposals sufficient to provide interested parties a meaningful opportunity to comment.

As the Supreme Court explained in *Long Island Care at Home, Ltd. v. Coke*, "The Administrative Procedure Act requires an agency conducting notice-and-comment rulemaking to publish in its notice of proposed rulemaking 'either the terms or substance of the proposed rule or a description of the subjects and issues involved.' . . . The object, in short, is one of fair notice."[140] Failure to provide this type of information prevents the final rule from being considered a "logical outgrowth" of the *Notice*. As the D.C. Circuit explained in *Shell Oil Co. v. EPA*, the logical growth doctrine does not apply where interested parties have to "divine the [agency's] unspoken thoughts."[141] As Commissioner Adelstein explained in a comment that applies with full force to the current proceeding, "Publishing notices with sufficient specificity for meaningful comment is not just the right thing to do, it may very well be what the law requires. . . [A]ffording the public the right to comment on mere general questions is not a substitute for a hearty public debate on specific, interrelated proposals."[142]

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[139] *See id.* at 14 n.34.

[140] *Long Island Care at Home, Ltd. v. Coke*, 127 S. Ct. 2339, 2351 (2007) (citing to 5 U.S.C. § 553(b)(3)).

[141] *Shell Oil Co. v. EPA*, 950 F.2d 741, 751 (D.C. Cir. 1991).

[142] *In re 2002 Biennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996 et al.*, Report & Order and Notice of Proposed Rulemaking, 18 FCC Rcd. 13620, 14009 (2003) (Statement of Commissioner Jonathan S. Adelstein, Dissenting).

In *Prometheus Radio Project v. FCC*, the Third Circuit agreed that the Commission had only provided "questionable notice" when it failed to "provide notice of its underlying methodology" and the "reasoning from which it derived the proposed rule."[143] And, less than three months ago, the Commission issued a *Second Further Notice of Proposed Rulemaking* in its media ownership proceeding to "set forth in greater detail" its proposals and to "clarify the record" in response to concerns analogous to those being raised here.[144] It bears emphasis that one of the most active commenters in this proceeding is one of the most vociferous proponents of using "further notices" to spell out particular proposals toward which the Commission is gravitating.[145] The potential harms that could be caused to cable operators in this proceeding require that the Commission take the same action here, if it continues to believe (contrary to the record) that any changes are needed. Failure to do so would risk wholesale invalidation of any proposals that the Commission would adopt.

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143 *Prometheus Radio Project v. FCC*, 373 F.3d 372, 411 (3d Cir. 2004). In *Prometheus*, MAP represented Prometheus Radio Project, Center for Digital Democracy, and Fairness & Accuracy in Reporting, three of the "Citizen Petitioners" who argued that an "NPRM [which] indicated the FCC was looking for a 'new metric' [for measuring diversity] and asked only 'what other measures of diversity, quantitative or qualitative, should we consider'" did not provide "any notice, let alone notice sufficient to fairly apprise interested parties about the central analytical measure adopted in the Order." *See, e.g.*, Amended Brief for Citizen Petitioners and Intervenors at 39-40, *Prometheus Radio Project v. FCC*, No. 03-3388 et al. (3d Cir. Nov. 13, 2003).

144 *In re 2006 Quadrennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996 et al.*, Second Further Notice of Proposed Rulemaking, 22 FCC Rcd. 14215 ¶ 2 (2007).

145 *See, e.g.*, Prometheus Radio Project Comments, MB Dkt. No. 06-121, at 10 (Oct. 23, 2006) (in which MAP called for the issuance of a revised FNPRM and argued that the Commission "must provide new and procedurally sufficient notice of various proposals"); Letter from Andrew Jay Schwartzman, President and CEO, MAP, to Marlene H. Dortch, Secretary, FCC, MB Dkt. No. 06-121, at 1 (Oct. 27, 2006) (raising "questions about the adequacy of the Commission's public notice . . . and argu[ing] that the Commission must provide additional guidance as to its proposed action"); *see also In re 2006 Quadrennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996 et al.*, Further Notice of Proposed Rulemaking, 21 FCC Rcd. 8834, 8863 (2006) (Statement of Commissioner Michael J. Copps, Concurring in Part, Dissenting in Part) ("I am deeply disappointed that this Notice does not contain a specific, up-front commitment to share proposed media concentration rules with the American people in advance of a final vote. I do not see how we can be transparent and comply with the dictates of the Third Circuit without letting the American people know about and comment on any new standards of measurement that we adopt in developing our ultimate decision.").

VI. CONCLUSION.

The record established by the initial comments makes clear that there is no rational basis for the Commission to revise its leased access or program carriage rules. The marketplace is not only working but flourishing. Commenters' proposals for revisions to the Commission's rules do not reflect what is in the public interest and adopting many of these proposals would adversely implicate both the First and the Fifth Amendment rights of cable operators and programmers. The Commission should reject calls for more government intervention in a marketplace that is working precisely as Congress intended. If the Commission deems that further action in this proceeding is necessary and authorized by the Communications Act, consistent with the Administrative Procedure Act, it must issue a Further Notice of Proposed Rulemaking to adequately notice and seek meaningful comment about the specific proposals it is considering.

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October 12, 2007

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of	)	
	)	
Leased Commercial Access	)	MB Docket No. 07-42
	)	
Development of Competition and Diversity in Video Programming Distribution and Carriage	)	
	)	

COMMENTS OF COMCAST CORPORATION

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September 11, 2007

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BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of	)	
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Leased Commercial Access	)	MB Docket No. 07-42
	)	
Development of Competition and Diversity in Video Programming Distribution and Carriage	)	
	)	

COMMENTS OF COMCAST CORPORATION

Comcast Corporation ("Comcast") hereby responds to the above-captioned Notice of Proposed Rulemaking ("*Notice*"),[1] which seeks comments regarding leased commercial access and program carriage issues. There is no apparent reason why the rules pertinent to either leased commercial access or program carriage require revision. In both areas, the Commission's rules have been carefully crafted and, in the case of leased access, refined in light of experience. In both areas, complaints have been infrequent, and such complaints as there have been generally have been resolved effectively and efficiently under the Commission's current rules. In neither area is there any reason for the Commission to adopt any new rules relating to arbitration, which the Commission has no authority to impose and which, in any event, any two disputants are free to agree to at any time.

I. INTRODUCTION & SUMMARY

There were dramatic differences between the Cable Communications Policy Act of 1984 ("1984 Cable Act"), the Cable Television Consumer Protection and Competition Act of 1992

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[1] *In re Leased Commercial Access, Development of Competition and Diversity in Video Programming Distribution and Carriage*, Notice of Proposed Rulemaking, 22 FCC Rcd. 11222 (2007) ("*Notice*").

("1992 Cable Act"), and the Telecommunications Act of 1996, but one central premise of all three of those statutes was the same: competition is preferable to regulation.[2] FCC Chairmen and Commissioners have reaffirmed this premise on innumerable occasions and pledged their commitment to let regulation diminish as competition increased.[3] In today's video marketplace, where consumers enjoy choices beyond what anyone imagined even a decade ago,[4] the Commission surely has better things to do than to explore creating new and unnecessary regulatory burdens, particularly ones that would intrude further on the editorial discretion of speakers protected by the First Amendment.[5]

In the case of commercial leased access, an obligation that applies to cable operators like Comcast and AT&T but not to direct broadcast satellite ("DBS") providers like DIRECTV and

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[2] *Compare* Cable Communications Policy Act of 1984, Pub. L. No. 98-549, § 2, 98 Stat. 2779, 2780 ("1984 Cable Act") (codified at 47 U.S.C. § 521(6)) ("The purposes of this title [Title VI of the Communications Act] are to . . . promote competition in cable communications and minimize unnecessary regulation that would impose an undue economic burden on cable systems."), *with* Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, § 2(b), 106 Stat. 1460, 1463 ("1992 Cable Act") ("It is the policy of the Congress in this Act to-- (1) promote the availability to the public of a diversity of views and information through cable television and other video distribution media; [and] (2) *rely on the marketplace, to the maximum extent feasible, to achieve that availability*[.]") (emphasis added), *and with* Telecommunications Act of 1996, Pub. L. No. 104-104, preamble, 110 Stat. 56, 56 ("1996 Telecom Act") ("An Act to promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies.").

[3] *See, e.g., Nominations Hearing Before the S. Comm. on Commerce, Science & Transp.*, 109th Cong. (Sept. 12, 2006) (Statement of Kevin J. Martin, Chairman, FCC) ("If reconfirmed, I would continue to make decisions based on a fundamental belief that a robust, competitive marketplace, not regulation, is ultimately the greatest protector of the public interest.").

[4] In 2004, the Commission stated that "the vast majority of Americans enjoy more choice, more programming and more services than any time in history." *In re Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Tenth Annual Report, 19 FCC Rcd. 1606 ¶ 4 (2004). In the three short years since the Commission made this statement, consumers' choices only have continued to increase exponentially.

[5] As no fewer than eight Justices of the Supreme Court have declared, "There can be no disagreement on an initial premise: Cable programmers and cable operators engage in and transmit speech, and they are entitled to the protection of the speech and press provisions of the First Amendment. . . . [T]he rationale for applying a less rigorous standard of First Amendment scrutiny to broadcast regulation, whatever its validity in the cases elaborating it, does not apply in the context of cable regulation." *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 636-37 (1994) ("*Turner I*").

EchoStar, the *Notice* reopens a subject that the Commission already has examined carefully on multiple occasions. Rulemakings in 1992-1993 and 1996-1997 spelled out in abundant detail the obligations that apply to cable operators -- in terms of the capacity that must be made available, the procedures and timetables for handling requests, and the careful balance of statutory interests that governs the establishment of appropriate maximum rates. Since that time, cable operators have, in the open marketplace and wholly apart from commercial leased access, chosen to carry such huge quantities of unaffiliated programming that the underlying policy basis for leased access essentially has disappeared.[6]

As a result, leased access is now used in large measure to ensure the delivery of a surfeit of infomercial, home shopping, and other limited-appeal programming. Any further subsidization of leased access users likely will produce more of the same, with a corresponding loss of system capacity that is needed for programming and broadband services that cable customers truly want. Idealistic visions of more beneficial uses of leased access must be adjusted for two critical realities: the inherent infirmities of the typical leased access business model (which Congress acknowledged and accepted) and the growing number of alternative means by which entities can deliver their video content to viewers.

In the case of program carriage, the *Notice* asks only about the complaint process. This is a curious expenditure of Commission resources given that, in the 15 years since the program carriage provisions were enacted, *a grand total of two complaints have been filed.* Clear rules and the imperatives of a competitive marketplace make violations of the program carriage rules

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[6] For this reason, data on leased access channel usage cannot be a meaningful measure of the success of the rules. This is well illustrated by the fact that some significant leased access proponents when this matter was last before the Commission are now receiving widespread carriage on regular channels. Thus, any data reflecting instances of limited leasing may actually reflect increased access rather than any defect in the rules.

highly improbable. In the unlikely event that a meritorious complaint should arise, the existing complaint process already provides a vehicle for redress. There is no need to change the program carriage complaint process.

For both leased access and program carriage complaints, the *Notice* seeks to explore the use of arbitration. But parties that wish to resolve disputes through arbitration are already free to do so, and the Commission lacks authority to force parties to resolve their disputes in this manner.

II. THERE IS NO BASIS FOR CHANGING THE LEASED ACCESS RULES.

Congress established a variety of mechanisms, of which commercial leased access is one, in the hope of promoting "competition in the delivery of diverse sources of video programming" and the availability of the "widest possible diversity of information sources."[7] That objective has been achieved -- beyond Congress's wildest dreams.

In the more than two decades since the leased access rules were mandated by Congress, the video programming marketplace has changed dramatically and irreversibly. As shown below, the number of independent networks has skyrocketed, the range and depth of programming choices available to consumers have increased markedly, and vertical integration between cable operators and programmers has decreased substantially. Competition among multichannel video programming distributors ("MVPDs") is more intense than ever, and video downloads, streaming video, wireless broadband, and a host of other new technologies, services, and products are further expanding consumer choice. Congress's goals of competition and

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[7] 47 U.S.C. § 532(a).

diversity are being realized in ways no one could have imagined in 1984 (when leased access was first enacted) or 1992 (when the leased access statute was substantially revised).

Despite these successes, it is likely that a handful of parties will express disappointment that leased access has "not worked" -- at least in their view. If past is prologue, some will argue that flaws in the current rules -- and not the availability of numerous more efficient ways for programmers to reach audiences -- are what prevents more extensive and productive use of leased access. They will assert that the cost to purchase leased access time -- already set at bargain-basement prices, *as leased access users acknowledge* -- is too high, and that the Commission should make whatever adjustments are needed to ensure that leased access is used by an even greater number of potential programmers. Such claims are not based in economic reality, and the Commission should refrain from wasting time on developing new regulations that run counter to Congressional intent.

Since the adoption of the 1992 Cable Act, the Commission has painstakingly and comprehensively analyzed potential iterations of leased access regulatory regimes -- *twice*.[8] During both of these proceedings, the Commission carefully balanced promotion of diversity

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8 *See In re Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, Notice of Proposed Rulemaking, 8 FCC Rcd. 510 (1992) ("*1992 Leased Access NPRM*"); *In re Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, Report & Order and Further Notice of Proposed Rulemaking, 8 FCC Rcd. 5631 ¶¶ 485-541 (1993) ("*1993 Leased Access Order*"); *In re Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, Order on Reconsideration of the First Report & Order and FNPRM, 11 FCC Rcd. 16933 (1996) ("*1996 Reconsideration Order and FNPRM*"); *In re Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Leased Commercial Access*, Second Report & Order and Second Order on Reconsideration of the First Report & Order, 12 FCC Rcd. 5267 (1997) ("*1997 Leased Access Order*").

with a second explicit Congressional directive: that leased access must not adversely affect the operation, financial condition, or market development of cable systems.[9]

Since the Commission's last extensive order revising its rules in 1997, thousands of programmers have used leased access to transmit their programming. Hundreds of them use leased access channels on Comcast systems every day. To the extent programmers have chosen to use leased access to distribute their programming, the rules have worked exactly as the statute provides. Many programmers, however, have opted to reach audiences in ways that are ultimately more efficient than any version of leased access could ever be. Given today's hotly competitive and dynamic media environment, leased access is working as well as can be expected, especially given the inherent limitations of the leased access business model and Congress's guidance on the subject.

For these reasons, there is no rational basis for tinkering with -- much less overhauling -- the Commission's leased access regime. In particular, the Commission should resist calls to interfere with its current rate formula, which already provides programmers with the ability to purchase carriage on cable systems at well below marketplace prices. The Commission also must be careful not to take actions that would displace other programming or valuable new services that consumers desire in favor of more leased access channels laden with infomercials, home shopping presentations, and the like.

A. The Marketplace Is Fulfilling the Congressional Objectives Underlying Leased Access.

Congress first mandated that operators set aside channel capacity for commercial use by programmers in the 1984 Cable Act.[10] Leased access mandates were broadened in the 1992

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9 *See* 47 U.S.C. § 532(c)(1).

Cable Act, in which Congress explicitly directed the Commission to establish rules for determining maximum rates and terms and conditions for use of the service.[11] Congress hoped that expanded leased access requirements would help to "promote competition in the delivery of diverse sources of video programming" and "assure that the widest possible diversity of information sources are made available to the public."[12] In particular, Congress was responding to concerns that "cable operators might deny access to programmers if the operators disapproved the programmer's social or political viewpoint, or if the programmers' offerings competed with those the operators were providing."[13]

The updated leased access provisions were but one component of a comprehensive statutory regime intended to set conditions to spur competition in the video marketplace. Although Congress thought that leased access might be used as a tool by programmers to increase competition and diversity, it did not believe that leased access would necessarily be an integral means by which to achieve that result. The legislative history of the 1992 Cable Act shows that Congress did not intend to guarantee the success of leased access programmers and even knew that leased access might not be economically viable. As the Senate Report conceded, the "cable industry has a sound argument in claiming that the economics of leased access are not conducive to its use."[14]

(...footnote continued)

10 *See* 1984 Cable Act § 2, 98 Stat. at 2782.

11 *See* 1992 Cable Act § 9, 106 Stat. at 1484-85 (codified at 47 U.S.C. § 532(c)(4)(A)-(B)).

12 47 U.S.C. § 532(a).

13 *See ValueVision Int'l v. FCC*, 149 F.3d 1204, 1206 (D.C. Cir. 1998).

14 S. Rep. No. 102-92, at 31 (1991), *reprinted in* 1992 U.S.C.C.A.N. 1133, 1164.

Even the highly regulatory 1992 Cable Act established a strong policy preference for competition over regulation.[15] And that competition has arrived. DBS, which had zero customers in 1992, quickly attracted first five, then ten, then 15 million customers; today, DIRECTV and EchoStar serve almost 30 million customers, and are the second and third largest MVPDs in the country.[16] Cable responded to this competition with more than $110 billion of investment to upgrade plant, expand capacity, and introduce new services. A typical cable customer in 1992 was lucky to have 50 analog channels; today, a typical cable operator offers closer to 200 channels, and literally thousands of video-on-demand programs as well, pursuant to voluntary, market-driven, mutually beneficial agreements. Any risk that a cable operator could exercise bottleneck power over programming distribution has long since been eliminated. In this richly competitive environment, in which Congressional objectives clearly are being met, there is no reason for the Commission to adopt more detailed or intrusive leased access regulations.

Concerns about "diversity" of programming -- or excessive vertical integration between cable operators and cable networks -- are dramatically attenuated as compared to 1984 or 1992. Independent networks have increased enormously -- both in raw numbers and as a percentage of all cable programming -- over the 23 years since leased access obligations were first adopted. In 1992, there were only "68 nationally delivered cable networks," and 57% of those networks were

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15 *See, e.g.*, 1992 Cable Act, § 2(b), 106 Stat. at 1463 ("It is the policy of the Congress in this Act to . . . (2) rely on the marketplace, to the maximum extent feasible, to achieve th[e] availability [of diversity of views and information.]").

16 *See* Press Release, DIRECTV Group, Inc., *The DIRECTV Group Announces Second Quarter 2007 Results* 2 (Aug. 9, 2007) (reporting that DIRECTV had 16.32 million subscribers as of June 30, 2007), *available at* http://phx.corporate-ir.net/phoenix.zhtml?c=127160&p=irol-earnings; Press Release, EchoStar Communications Corp., *EchoStar Reports Second Quarter 2007 Financial Results* (Aug. 10, 2007) (reporting that EchoStar's DISH Network had 13.58 million subscribers as of June 30, 2007), *available at* http://dish.client.shareholder.com/releasedetail.cfm?ReleaseID=259236.

vertically-integrated with a cable operator.[17] Last year, the Commission reported that there were 531 national cable programming networks and that cable operators were vertically integrated with only about 20% of them.[18] And, assuming a pay-per-view network is counted on equal footing as a 24/7 linear network, that number is closer to 13.5%.[19]

The reduction in vertical integration is particularly stark when one examines the low percentage of cable system capacity being used by operators to carry networks that they themselves own. For instance, Comcast has attributable interests in less than 10% of the programming networks carried on its systems.[20] The growth in the number of diverse programming networks, both in terms of content and source, has been spurred both by the growth in the capacity of cable systems, as well as the development of a business model based on selling attractive packages of programming networks to consumers.[21]

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17 H.R. Rep. No. 102-628, at 41 (1992).

18 *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 ¶ 157 (2006) ("*Twelfth Annual Video Competition Report*") (reporting numbers as of June 30, 2005).

19 In the *Twelfth Annual Video Competition Report*, based on data as of June 30, 2005, the Commission found that 21.8% of national programming networks were vertically integrated with cable operators, but this finding was based on a computation that counted iN DEMAND as if it was 60 separate networks. *See id.* ¶ 157 & n.568. The Commission noted that, "[i]f we count iN DEMAND as one network, 57 satellite-delivered national programming networks are vertically integrated with one or more . . . cable operator[]," *id.* ¶ 159, which would mean 57 out of the total 472 (or approximately 12.1%) national programming networks are vertically integrated with a cable operator. In February 2007, iN DEMAND reported that it now operates one HD network and eight multiplexed PPV channels. *See* Letter from Michael S. Berman, Senior Vice President, Business Affairs & General Counsel, iN DEMAND Networks, to Marlene Dortch, Secretary, FCC, MB Dkt. No. 06-189, at 2 (Feb. 2, 2007). Factored into the Commission's analysis, this would bring the total of national programming networks to 480 and the number of cable-affiliated national programming networks to 65, or 13.5%.

20 Comments of Comcast Corporation, MB Dkt. No. 06-189, at 61 (Nov. 29, 2006).

21 The Commission's first a la carte report emphasized the importance of cable's bundling business model to both the viability of diverse networks and consumer choice. According to the Commission, bundling "enhance[s] consumer sovereignty by creating a mechanism for consumers to have access to a wide variety of viewing choices serving many diverse, niche viewer interests[,]" while "lower[ing] transaction costs, help[ing] programmers reach economies of scale and enhanc[ing] the attractiveness or convenience of the product to consumers." FCC, Media Bureau, *Report on the Packaging and Sale of Video Programming Services to the Public* 5 (Nov. 18, 2004).

In the past fifteen years, alternative distribution platforms also have flourished. Programmers have been able to achieve widespread distribution to millions of potential viewers in a growing number of ways. For instance, programmers can instantly access more than 13 million subscribers in every part of the continental United States by reaching a carriage agreement with the *smaller* of the two DBS operators. Programmers also can reach substantial and increasing numbers of viewers through any number of telcos and other overbuilders that provide cable service in competition with more traditional cable operators.

Programmers, including those that do not have enough content to fill an entire network, also have turned to the Internet, which provides an easy and inexpensive distribution option. According to research firm Broadband Directions, "While starting a new cable channel today takes an initial investment of $100 million to $200 million, a broadband channel needs just $5 million to $10 million to get going."[22] Programmers also can post individual programs on sites like YouTube for little or no cost to reach a large and growing audience. As of January 2007, 42% of adults online in the United States said that they had watched a video at YouTube and 14% said that they visit the site frequently.[23] Almost one in three (32%) of these frequent YouTube users say they are watching less television as a result of the time they spend there.[24] Because the Internet offers *worldwide* distribution at extremely low cost, even established media companies increasingly are launching new programming and entire programming networks

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[22] Bobby White, *TV Channels Move to Web, Think Outside the Cable Box*, Wall St. J., Aug. 10, 2007, at B1.

[23] *See* Press Release, Harris Interactive, *One-Third of Frequent YouTube Users Are Watching Less TV To Watch Videos Online* (Jan. 29, 2007) ("Harris Interactive Press Release"), *available at* http://www.harrisinteractive.com/news/allnewsbydate.asp?NewsID=1168.

[24] *See id.*

online and are meeting with success.[25] As of October 2006, 74 out of the top 75 cable networks were offering broadband video on their websites.[26] Almost 41% of adults on the Internet say they have watched a video at a TV network website.[27] In addition to the Internet, program producers also have been able to secure carriage by reaching agreements with any of the hundreds of broadcast and cable networks that already enjoy wide distribution or by distributing their content via other new platforms like video-on-demand.

Although the 1992 Cable Act may have helped to set the stage, it was the marketplace that created the remarkable competitive developments in the video programming industry. By all indications, Congress's wishes for a fiercely competitive environment characterized by vast consumer choice of programming have been realized. Instead of needing to rely on agreements with government-dictated terms entered into pursuant to regulatory fiat, a competitive landscape emerged, as Congress intended, through the superior method of voluntary, market-driven deals.

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25 NBC Universal and News Corp. will begin beta testing their online video venture named Hulu.com in October 2007. The site will offer programming including episodes of "Late Night with Conan O'Brien" and full-length films on AOL, Comcast, MSN, MySpace and Yahoo. *See Mass Media Notes*, Communications Daily, Aug. 30, 2007, at 9; David Goetzl, *"Conan" To Stream on Hulu*, MediaDaily News, Aug. 31, 2007, *available at* http://publications.mediapost.com/index.cfm?fuseaction=Articles.showArticleHomePage&art_aid=66678. For the past year, Cartoon Network has offered Toonami Jetstream, an online extension of its Toonami action-adventure TV franchise that provides full-length episodes of action and animé programs online. According to Cartoon Network, the Toonami Jetstream site "has streamed more than 115 million video segments in just its first year and attracted an average of 1.7 million unique visitors each month." Press Release, Cartoon Network, *Cartoon Network and VIZ Media Celebrate First Anniversary of Toonami Jetstream with a Power-Packed Expanded Show Lineup* (Aug. 7, 2007), *available at* http://www.viz.com/news/newsroom/2007/08_jetstream.php. The Independent Film Channel also has turned to the Internet, to "stream[] 22 short films called 'Trapped in the Closet' by the R&B recording artist R. Kelly." Michel Marriott, *Nothing To Watch on TV? Streaming Video Appeals to Niche Audiences*, N.Y. Times, Aug. 6, 2007. And the Jewish Television Network is "streaming music videos by Jewish performers, cooking shows and Israeli news programs. *Id.*

26 *See* Press Release, Broadband Directions LLC, *New Market Intelligence Report Finds Broadband-Delivered Video Is Now #1 New Business Priority for Many Top Cable TV Networks* (Oct. 23, 2006), *available at* http://www.broadbanddirections.com/press_061023.html.

27 Harris Interactive Press Release, *supra* note 23.

The fact that Congressional goals have been achieved without imposition of further regulation and without heavy reliance on leased access rules is something to be celebrated, not "rectified."

B. Reverse-Engineering the Commission's Carefully-Crafted Leased Access Rules Would Harm Cable Operators and Consumers.

Some critics doubtless are disappointed that leased access has not become a more popular means by which independent producers choose to distribute their programming. It is likely that these parties will urge the Commission to adopt dramatic changes to its leased access regime -- in particular, changes to the method by which rates for leased access time are calculated -- in order to increase the attractiveness of leased access. However, the Commission's duty is to implement the statute, which it has carefully and methodically done; it is not charged with formulating rules that guarantee widespread use of leased access. In fact, attempting to reverse-engineer the leased access regulatory regime in the hopes of making leased access a more attractive distribution alternative would risk upsetting the careful balance of statutory interests reflected in the current rules -- a balance that the U.S. Court of Appeals for the D.C. Circuit expressly recognized and approved.[28] It also would be unavailing. The fundamental impediment to growth of the leased access business model lies on the revenue side, not the expense side. The inherent flaws in the leased access business model cannot be cured in a manner that is consistent with the statute, and the most likely result of further tinkering with the leased access rules would be harm to cable operators and consumers in clear contravention of the Communications Act and Congressional intent.

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28 *See ValueVision Int'l*, 149 F.3d 1204.

1. The Current Rules Are the Result of Careful Consideration by the Commission.

Since the passage of the 1992 Cable Act, the Commission twice has initiated rulemaking proceedings to consider various proposals for modifying leased access regulations.[29] In each proceeding, the Commission carefully considered comments from hundreds of interested parties about these proposals. The current rules are the product of that painstaking process.

The Commission's first comprehensive analysis was released in May 1993.[30] In the *1993 Leased Access Order*, the Commission revised its leased access rules to address a number of issues, perhaps the most important of which was to set a uniform formula by which cable operators were to calculate leased access rates -- the "highest implicit fee" formula.[31] In the *1997 Leased Access Order*, the Commission once again revisited leased access and completely overhauled its rules. Of particular note, the *1997 Leased Access Order* directly addressed the issue of rates and discarded the highest implicit fee formula in favor of an average implicit fee calculation.[32]

In both the 1993 and 1997 orders, the Commission correctly balanced Congress's interest in promoting distribution of programming via leased access -- thousands of programmers have

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29 *See generally 1992 Leased Access NPRM*; *1996 Reconsideration Order and FNPRM*.

30 *1993 Leased Access Order* ¶¶ 485-541.

31 *See id.* ¶ 519.

32 *See 1997 Leased Access Order* ¶ 31 (explaining that "[b]ased on [its] review of the comments," the Commission "no longer believe[d] that the proposed cost/market rate formula" was a "reasonable formula for determining maximum leased access rates" and "that the maximum reasonable rate for leased access programming . . . should be the 'average implicit fee'"). In making this determination, the Commission rejected the alternate cost-based fee formula that it had proposed in the *1996 Reconsideration Order and FNPRM* because of the specific drawbacks of that approach identified in the record. *See id.* ¶ 25 ("After reviewing the record in this proceeding and after considering and analyzing all of the options presented, we now conclude that the cost/market rate formula does not adequately account for certain factors which, if excluded, would make the maximum leased access rates resulting from the formula unworkable in today's programming marketplace.").

used these leased access rules to transmit their programming -- and protecting cable operators. As the D.C. Circuit acknowledged in affirming the Commission's adoption of the average implicit fee in the *1997 Leased Access Order*:

> The Act instructs the Commission to set rates sufficient to "*assure* that [leased access] will not *adversely affect* the operation, financial condition, or market development of the cable system." 47 U.S.C. § 532(c)(1) (emphasis added). The provision serves as more than a mere "caveat" to the ultimate goals of promoting leased access. The rates, terms and conditions of leased access must be set within its limits.[33]

Thus, the Commission's current leased access rules -- which are the result of the careful consideration of hundreds of comments on a wide variety of proposals -- appropriately implement Congress's intent in a manner consistent with the statute.

2. The Communications Act Constrains the Commission from Adopting Any Leased Access Proposals That Would Harm Cable Operators.

In sharp contrast to its notices of proposed rulemaking in 1992 and 1996, the *Notice* provides little indication of what the Commission hopes to achieve in the instant proceeding. Rather than delineating detailed proposals for revising the leased access rules, the *Notice* asks vague questions about the current usage of leased access and extends an open-ended invitation for proposals for changing the rules.[34]

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33 *ValueVision Int'l*, 149 F.3d at 1209.

34 A significant change in the rules can only be lawfully adopted as a "logical outgrowth" of a *Notice* that gives an indication of what the Commission proposes. Whether the "logical outgrowth" test is satisfied depends on whether the affected party "should have anticipated" the agency's final course of action based upon the initial notice. *See Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 549 (D.C. Cir. 1983). The "logical outgrowth" doctrine does not extend to a final rule that finds no roots in the agency's proposal because "[s]omething is not a logical outgrowth of nothing," *Kooritzky v. Reich*, 17 F.3d 1509, 1513 (D.C. Cir. 1994), nor does it apply where interested parties would have had to "divine [the agency's] unspoken thoughts," *Arizona Pub. Serv. Co. v. EPA*, 211 F.3d 1280, 1299 (D.C. Cir. 2000) (quoting *Shell Oil Co. v. EPA*, 950 F.2d 740, 751 (D.C. Cir. 1991)). The agency must provide sufficient facts in the record for its proposal to allow for meaningful comment. *See, e.g.*, *Chamber of Commerce of the U.S. v. S.E.C.*, 2006 WL 890669, at *8 (D.C. Cir. 2006) ("In essence, the question is whether 'at least the most critical factual material that is used to support the agency's position on review . . . [has] been made public in the proceeding and exposed to refutation.'"). By requiring the "most critical factual material"

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There is no evidence that the current leased access rules are not working exactly as Congress intended. Cable operators are meeting their obligations under the rules, and programmers appear to be encountering few instances in which operators are not properly fulfilling their duties.[35] In fact, within the past seven years, only 20 leased access complaints have been filed with the Commission -- an average of fewer than three per year.[36] And the number of leased access decisions from the courts is even lower; leased access has yielded only eight or nine decisions since passage of the leased access provisions in 1984. It is instructive that nearly all of those cases dealt with issues related to carriage of indecent or obscene programming via the leased access rules.[37]

(...footnote continued)

used by the agency to be subjected to informed comment, the Administrative Procedure Act provides a procedural device to ensure that agency regulations are tested through exposure to public comment, to afford affected parties an opportunity to present comment and evidence to support their positions, and thereby to enhance the quality of judicial review. *See Int'l Union, United Mine Workers of Am. v. Mine Safety & Health Admin.*, 407 F.3d 1250, 1259 (D.C. Cir. 2005).

35 Comcast, for instance, responds to even the most onerous (and sometimes spurious) requests for leased access rate information. For example, in September 2006, The America Channel ("TAC") requested rate information for a 24-hour, 7-day per week programming network for "every available Comcast system in the U.S., in a tier actually used by most subscribers." *See* Letter from Kathleen Wallman, Counsel for The America Channel, to Arthur Block, Senior Vice President, General Counsel and Secretary, Comcast Corporation (Sept. 11, 2006). Every Comcast system produced the information, which Comcast then organized and provided to TAC. Predictably, TAC never bought so much as a second of leased access time, opting instead to simply toss the binders full of collated information on a scale and attempt to impress the Commission with their weight. *See* Letter from Doron Gorshein, President and CEO of The America Channel, to Marlene H. Dortch, Secretary, FCC, MB Dkt. No. 06-189, at 10 (Nov. 29, 2006) (informing the Commission that the box containing Comcast's leased access information weighed 29 pounds). After dutifully providing the requested information, Comcast is still awaiting TAC's order for leased access time on "every available Comcast system in the U.S. in a tier actually used by most subscribers."

36 *See generally* Public Notices of Special Relief and Show Cause Petitions providing information regarding leased access complaints filed since January 1, 2001.

37 *See e.g., Life Without Shame v. Time Warner Entm't Advance/Newhouse P'ship*, 97-CV-6082T, 1997 U.S. Dist. LEXIS 16021 (W.D.N.Y. Sept. 11, 1997), *aff'd* 191 F.3d 256 (2d Cir. 1999); *Daniel A. Beck d/b/a Leased Access Productions v. Cablevision Sys. Corp.*, Memorandum and Order, 01-CV-804 (E.D.N.Y. 2001); *Goldstein v. Time Warner New York City Cable Group*, 3 F. Supp. 2d 423 (S.D.N.Y. 1998); *Altmann v. Television Signal Corp.*, 849 F. Supp. 1335 (N.D. Cal. 1994); *Goldstein v. Manhattan Cable Television, Inc.*, 90-CV-4750, 1992 U.S. Dist. LEXIS 7628 (S.D.N.Y. May 22, 1992); *Media Ranch, Inc. v. Manhattan Cable Television, Inc.*, 757 F. Supp. 310 (S.D.N.Y. 1991); *Urban v. Manhattan Cable Television, Inc.*, 86 Civ. 1821, 1987 U.S. Dist. LEXIS 9174 (S.D.N.Y. Oct 13, 1987). As discussed in more detail below, *see infra* note 41 and accompanying text, leased access is most

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The Commission's responsibility, which it already has ably performed, is to implement the leased access provisions of the Communications Act. And, although certain commenters in this proceeding likely will argue that the Commission has a duty to do something more -- to guarantee the widespread use and success of leased access -- the Commission does not have the authority to mandate whatever regulations it may conclude would make leased access an attractive business model for a larger number of programmers (although one would not know it based on the expansive language of the *Notice*). As the D.C. Circuit explained, "Congress never intended to ensure financial success for leased access programmers. In fact, the Senate Report frankly acknowledged that leased access might not be economically viable."[38]

The Commission's ability to revise the leased access rules is constrained by Congress's injunction that it refrain from "adversely affect[ing] the operation, financial condition, or market development" of cable systems in implementing any leased access regulations.[39] Moreover, with respect to the rates for leased access, "there shall be a presumption that the price, terms, and conditions for use of channel capacity . . . are reasonable and in good faith unless shown by clear and convincing evidence to the contrary."[40] Increasing further the subsidy that leased access users already enjoy would directly conflict with Congress's express directives to the Commission. In particular, the Commission should take care not to overhaul its rate formula in an effort to engage in "results-oriented" rulemaking. "Reverse-engineering" the formula would

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often used for infomercials and home shopping programming -- programming that generates sufficient advertising revenues or other revenues paid directly by viewer to compensate for paying for carriage -- or for programming that is ill-suited for the basic or expanded basic tiers.

38 *ValueVision Int'l,* 149 F.3d at 1209.

39 47 U.S.C. § 532(c)(1).

40 *Id.* § 532(f).

not guarantee increased leased access usage, but it would impede the achievement of other important and explicit Commission and Congressional goals.

3. Leased Access Is Already Available at Discounted Rates and Further Discounts Will Not Remedy the Deficiencies Inherent in the Leased Access Business Model.

The main reason that most non-infomercial programmers pursue alternative methods to distribute their programming instead of using leased access likely has nothing to do with deficiencies in the Commission's rules in general or the leased access pricing formula in particular. Rather, programmers' efforts to find an audience elsewhere are the result of the limitations inherent in the leased access business model.

At the outset, it is important to understand that leased access is an anomaly in that it runs counter to how the typical relationship operates between a programmer and a cable operator (or, for that matter, with any MVPD). Most cable networks are dependent on two revenue streams: license fees from cable operators and revenues from the sale of advertising during their programming. Leased access programmers, however, *pay* cable systems to show their programs. Therefore, to generate sufficient funds to survive, a leased access programmer that pays anything for carriage inevitably will need to find a way to extract more revenues than do other programmers from advertising or other revenues paid directly by viewers. That is why leased access is frequently used for infomercials or home shopping, hardly high-quality or high-value programming; in fact, approximately half of the leased access time purchased on Comcast's systems is used for this type of programming.[41]

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[41] Leased access also has been used to distribute programming that is ill-suited for carriage on basic or expanded basic tiers of service. For example, in Philadelphia, a leased access channel was used to distribute "The Strip-Tease Show," which featured exotic dancers in order to promote a 1-900 adult chatline. Additionally, in Detroit, leased access programming has included a "Falcomm Production" that featured advertisements for a

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The number of individuals or organizations that can afford to pay to create and acquire programming is inherently limited. The number that can do so *and* also pay for distribution is vastly smaller. Given these realities, it is not surprising that leased access usage is not as widespread as some critics may like, and there is very little that the Commission can do to change that fact because the law of economics will always prevail.

Leased access time is already priced at discounted rates. One need only compare the price of 30 minutes of leased access time on a cable system with the price of purchasing a 30-second advertising spot on a cable or broadcast network, or a one-page advertisement in a newspaper in the same market, to understand that leased access pricing is well below what that time would bear on the open market. For example, in Washington, D.C., each of the four network broadcast stations (WUSA, WRC, WTTG, and WJLA) currently charges approximately $7,500 for *thirty seconds* of advertising during primetime. The Washington Post currently charges approximately $15,800 for a one-time, quarter-page advertisement. In contrast, *thirty minutes* of leased access time during primetime on all of Comcast's systems in the D.C. metropolitan area would cost approximately $375 (or $6.25 per thirty seconds). Similarly, in San Francisco, California, three television stations (KGO, KPIX, and KTVU) each charges approximately $12,000 for *thirty seconds* of primetime advertising, and the San Francisco Chronicle currently charges approximately $19,800 for a one-time, quarter-page advertisement.

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gentleman's club and an adult website. Because cable operators are restricted from exercising editorial discretion over leased access programming unless the content is obscene or indecent -- both of which are vague legal standards that even the Commission has difficulty applying -- there is little that cable operators can do to prevent this type of programming from being shown. Attempts to use leased access channels for carriage of indecent or obscene programming have generated significant litigation. *See supra* note 37.

By comparison, *thirty minutes* of leased access time during primetime on all of Comcast's systems in the San Francisco area would total approximately $875 (or $14.59 per 30 seconds).

The Commission should not make the mistake of assuming that the limited use of leased access means that leased access rates are too high. As demonstrated above, the current leased access formula allows users to buy access to cable viewers at discounted wholesale prices, representing a fraction of the fair market value for that airtime or the cost needed to reach those consumers in other ways. Not even direct mail is cheaper. *These sentiments are not just those of Comcast; they are those of leased access users.*

For example, a number of websites and consultants tout "price" as the "primary factor" that differentiates commercial leased access "from regular commercial advertising."[42] As a website geared toward promoting leased access as a platform for chiropractic infomercials explains, "If you were to broadcast your chiropractic infomercials at the normal retail rate it would cost you a small fortune. . . . On the other hand, you can usually broadcast your chiropractic infomercials as 'leased access programs' for less than 10% of the normal retail advertising rates."[43] This same chiropractic infomercial website provides the following examples of leased access rates:

> As an example, on a large cable system in Cincinnati, Ohio (330,000 subscribers) you can air a 30-minute infomercial for $22.68*. In Anaheim, California, you can air an infomercial on a cable system of 40,000 subscribers for $9.92*. Some cable systems have leased access rates that are even lower than these. In Texas, a

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42 Gerry Cunningham, *Leased Access Overview* 2 (2001) ("*Leased Access Overview*"), *available for purchase at* http://www.geocities.com/leasedaccessinfo/pubs.htm. Mr. Cunningham's company offers information to programmers on how to purchase leased access time on local cable systems, provides consulting services, and does leased access placements for programmers. *See Leased Access Info.com - Frequently Asked Questions, at* http://www.geocities.com/leasedaccessinfo/frequent.htm (last visited Aug. 8, 2007).

43 JMS Videos, *How To Put Your Chiropractic Infomercials on TV Cheaply, at* http://www.jmsvideos.com/cheapadvertisingmarketing.html (last visited Aug. 22, 2007).

cable system of 80,000 subscribers has rates as low as $2.65 per 30-minute broadcast. In Ohio, a cable company has rates as low as $1.70.[44]

Another website that promotes leased access for insurance policy infomercials points out that leased access is even cheap during hours when television viewership is at its highest: "The average cost for prime time viewing (7:00 PM thru 11:00 PM) on leased access cable channels in most markets is *an unbelievably low $150 to $200 per half-hour program*. This is less cost-per-thousand exposure than you spend annoying people with junk mail or telemarketing."[45]

Another leased access consultant explains that the reason that leased access is so cheap is because *"price is determined by a government-controlled formula; the regular method is determined by supply and demand.*"[46] Therefore, leased access is a "means to buy half-hour minimum blocks of airtime at wholesale prices. The difference between [leased access] and regular pricing usually ranges between 100% and 500%."[47] Within this system, leased access programmers "have the satisfaction of knowing [their] program is on the air at *pennies on the dollar* of what other advertisers pay for their time."[48]

4. Lowering Leased Access Rates Any Further Would Harm Cable Operators and Consumers.

It is hard to imagine how leased access prices could be reduced any further without creating extraordinary burdens on cable operators, in violation of the law. As noted above, the

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44 JMS Videos, *Everything You Wanted To Know About Leased Access Programming - The Cheapest Way To Broadcast Your Chiropractic Infomercials*, *at* http://www.jmsvideos.com/leased.html (last visited Aug. 22, 2007).

45 Free-Insurance-Leads.com, *Your Own 30-Minute TV Show Insurance Selling System Can Change Your Career from Chasing Clients To Attracting Them*, *at* http://www.free-insurance-leads.com/insurance-selling-system.html (last visited Aug. 24, 2007) (emphasis added).

46 *Leased Access Overview*, *supra* note 42, at 2 (emphasis added).

47 *Id.*

48 Gerry Cunningham, *Beginning Tutorial* 1 (2001) (emphasis in original), *available for purchase at* http://www.geocities.com/leasedaccessinfo/pubs.htm.

Communications Act states (and the D.C. Circuit expressly acknowledged) that the Commission, in designing leased access rules, must not "adversely affect the operation, financial condition, or market development" of cable systems.[49] This directive is underscored by Congress's creation of a presumption that the "price, terms, and conditions" offered by cable operators are "reasonable and in good faith unless shown by clear and convincing evidence to the contrary."[50] Thus, the Commission must abide by an almost Hippocratic obligation when creating leased access rate formulas; any steps to promote programming diversity through leased access must avoid harming the operations of cable systems in the process.

The Commission already has pushed the outer limits of its authority on this. In the *1997 Leased Access Order*, the Commission took action to correct alleged overcompensation of cable operators for leased access time, instantly dropping leased access rates precipitously -- by 15-20%.[51] The Commission, however, did not make this decision in a vacuum, but carefully took into account improving market conditions for independent programming networks. The Commission acknowledged that the "number of non-vertically integrated national programming services" was steadily growing, but "believe[d] that a shift . . . to an average implicit fee formula [could] provide additional opportunities for diverse, unaffiliated programmers to enter the marketplace, without creating a maximum rate that is artificially low and putting the cable operator's operation, financial development or market development at risk."[52]

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49 47 U.S.C. § 532(c)(1).

50 *Id.* § 532(f).

51 2 Charles D. Ferris & Frank Lloyd, *Telecommunications Regulation: Cable, Broadcasting, Satellite & the Internet* ¶ 15A.06[7][a] (2007).

52 *1997 Leased Access Order* ¶ 35.

Given the dramatic increase in the number of independent programming services since 1997, as well as the accompanying decrease in the percentage of channels dedicated to programming services affiliated with cable operators, the Commission would be hard-pressed to justify any additional reductions in leased access rates. Lowering leased access rates any further would clearly harm cable operators. As noted above, the "average implicit fee" formula already produces below-market prices; it allows programmers to obtain distribution to large numbers of households at rates far below those charged by other media -- including cable's direct competitors -- for comparable space and time.

In addition, lowering leased access rates will harm consumers. Any increase in the use of leased access will necessarily come at the expense of other programming and services that consumers value. Cable bandwidth is, as always, constrained. Except as compelled by must-carry, PEG, and leased access requirements, every channel is being put to its highest and best use. In this environment, it is a constant struggle to find the bandwidth needed for new and innovative programming networks, additional high-definition channels, higher Internet speeds, competitive voice services, and other technological improvements highly sought by consumers. Any action to lower leased access rates would impinge on the availability of this bandwidth for video or any other services and therefore would "adversely affect the . . . market development" of cable systems, in direct contravention of the statute.[53]

A large influx of leased access programming would displace these new and improved services and impede achievement of longstanding Commission goals. For instance, it would be passing strange for the Commission to make it less expensive for home shopping programmers

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[53] 47 U.S.C. § 532(c)(1).

(or those marketing chiropractic services or insurance) to take up large chunks of bandwidth on leased access channels when doing so would lower capacity available for carriage of the high-definition and other innovative digital programming that Congress and the Commission have worked so hard to champion, and that consumers are now so eagerly consuming. Similarly, reducing leased access rates also would force cable operators to make difficult choices about whether they have sufficient space to carry new high-quality programming such as The Africa Channel or VeneMovies, or whether they have to drop existing programming, as they try to make room for more leased access home shopping programming and infomercials.[54]

Finally, purchases by programmers of leased access time at fire-sale prices also would take up space on cable systems that is dedicated to the provision of high-speed Internet services and facilities-based voice competition for more consumers. This would conflict with the Commission's stated goals of promoting the widespread deployment of these services. For instance, just last year in the *Adelphia Order*, the Commission cited the "accelerated deployment of competitive, facilities-based local telephone service to Adelphia's subscribers" as one of the "significant public interest benefits" that formed the basis for its approval of the Adelphia transactions.[55] And, in Congressional testimony earlier this summer, Chairman Martin highlighted Commission actions that "boosted competition in the delivery of voice" services and

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[54] Programming networks likely to be deleted would be those that attract smaller niche audiences, which would result in a loss of diverse programming in order to accommodate additional leased access home shopping and infomercial programming.

[55] *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 Corp.*, Memorandum Opinion & Order, 21 FCC Rcd. 8203 ¶ 110 (2006).

confirmed the Commission's "commitment to ensure that all consumers, regardless of where they live, benefit from competition in the voice" market.[56]

Lowering rates would not only impede distribution by cable systems of programming and services consumers demand, but also would reduce cable operators' ability to compete with alternative providers of video service, such as DBS operators, that are not forced to sell any of their capacity, let alone at the bargain-basement prices mandated by the leased access rules.[57] For all these reasons, changes in leased access rules cannot be justified.

III. THERE IS NO BASIS FOR CHANGING THE PROGRAM CARRIAGE RULES.

Robust competition and technology changes ensure that programmers have plenty of distribution outlets. With all the marketplace changes described above, and in particular with two DBS providers (both with nationwide footprints) each of which serves in excess of 13 million multichannel customers, programming networks today have significant leverage in negotiating carriage. This provides powerful marketplace discipline that reduces the need for regulation. An MVPD that fails to provide consumers with the programming they demand will quickly be left behind for MVPDs that do.

This does not guarantee that every programming network -- or would-be network -- will obtain carriage on every MVPD in every market. Capacity of cable and satellite systems remains constrained, and business and editorial judgments must be made. But there is far less reason than

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56 *Oversight of the Federal Communications Commission – Part 2*, 110th Cong. 2 (July 24, 2007) (testimony of Kevin J. Martin, Chairman, FCC), *available at* http://energycommerce.house.gov/cmte_mtgs/110-ti-hrg.072407.FCCoversightPart2.shtml. Additionally, Chairman Martin stressed that "[p]romoting broadband access and affordability remains one of our top priorities" and said that "competition among broadband platforms" was "[o]ne important factor spurring both increased broadband availability and reduced prices." *Id.* at 3-4.

57 DBS operators, while subject to some public interest obligations, are not required to provide programmers with opportunities to purchase time on their systems at below-market rates. *See* 47 U.S.C. § 335(b) (outlining DBS operators' carriage obligations for noncommercial, educational, and informational programming).

ever before for the government to be second-guessing those decisions, through program carriage complaints or otherwise.

The *Notice* seeks comment on "whether and how [the Commission's] processes for resolving carriage disputes should be modified."[58] More specifically, the *Notice* asks whether the Commission should: (1) clarify the "elements of a *prima facie* case" for a program carriage complaint; (2) specify new time limits on parties and adjudicating complaints; (3) revise its rules governing retaliation and frivolous complaints; and (4) adopt rules to allow programming networks to seek nationwide distribution.[59] The *Notice*, however, provides no rationales for why such modifications are needed, and a review of the Commission's experience with program carriage complaints clearly demonstrates that such modifications are *not* needed.

A. There Is No Need To Clarify or Revise the Rules for Making a Prima Facie Case.

The *Notice* asks "whether the elements of a *prima facie* case should be clarified."[60] Clarifying the prima facie elements is not necessary or feasible.

In the order implementing the Commission's program carriage rules (the "*Program Carriage Order*"), the Commission concluded that "the resolution of Section 616 complaints will necessarily focus on specific facts pertaining to each negotiation, and the manner in which certain rights were obtained."[61] The Commission "emphasiz[ed] that the statute does not

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58 *Notice* ¶ 14.

59 *See id.* ¶¶ 14-17.

60 *Id.* ¶ 14 (emphasis in original).

61 *In re Implementation of Sections 12 and 19 of the Cable Television Consumer Protection & Competition Act of 1992, Development of Competition and Diversity in Video Programming Distribution and Carriage*, Second Report & Order, 9 FCC Rcd. 2642 ¶ 14 (1993) ("*Program Carriage Order*"); *see id.*¶ 24 (noting that the Commission needs to "evaluate contested facts related to the parties' *specific* negotiation") (emphasis added). As for remedies, "a *case-by-case determination* of the appropriate remedies based on the specific behavior involved in a

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explicitly prohibit multichannel distributors from acquiring a financial interest or exclusive rights that are otherwise permissible,"[62] and recognized that any rules must "strike a balance that not only prescribes behavior prohibited by the specific language of the statute but also preserves the ability of affected parties to engage in legitimate, aggressive negotiations."[63] Accordingly, the Commission "adopt[ed] general rules that are consistent with the statute's specific prohibitions regarding actions between distributors and program vendors [and determined that it would] identify specific behavior that constitutes 'coercion' and 'discrimination' as [it] resolve[d] particular Section 616 complaints."[64]

The Commission noted, however, "that ultimatums, intimidation, conduct that amounts to the exertion of pressure beyond good faith negotiations, or behavior that is tantamount to an unreasonable refusal to deal with a vendor who refuses to grant financial interests or exclusivity rights in exchange for carriage, should be considered examples of behavior that violates the prohibitions set forth in Section 616."[65] The Commission also noted that, "while [it] believe[d] that it is unnecessary to provide further illustrative guidelines, . . . behavior such as that suggested by commenters, as described [in the *Program Carriage Order*], can provide useful guidelines for case-by-case inquiry."[66] The Commission expressly noted that "[s]uch examples

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particular violation provides the only reasonable and meaningful method of enforcing Section 616." *See id.* ¶ 27 (emphasis added).

62 *Id.* ¶ 17. "Thus, in the context of good faith, arms-length discussions, multichannel distributors may negotiate for, but may not insist upon, such benefit in exchange for carriage on their systems." *Id.*

63 *Id.* ¶ 14; *see id.* ¶ 15 (noting that the rules must "preserve[] the legitimate aspects of negotiations" and not "preclud[e] legitimate business practices common to a competitive marketplace").

64 *Id.* ¶ 14.

65 *Id.* ¶ 17.

66 *Id.* Commenters described "several criteria for a prima facie showing" of discrimination, including, among other things, "a refusal to carry an unaffiliated service without reasonable business justification," disparate treatment

(footnote continued...)

may be used by complainants to develop facts to support their complaints, thus serving as models for specific allegations pertaining to unfair program carriage agreements."[67]

In the 14 years since the Commission adopted its program carriage rules, *only two complaints have been filed*, and in both cases, determinations were made that the programmers established a prima facie case but that a number of factual issues remained in dispute.[68] Neither programmer in those cases had any apparent difficulty determining the facts it needed to allege and support in order to establish a prima facie case (although, at least with respect to the *TCR* case, there was little evidence that supported the facts alleged, while there was substantial evidence that refuted those allegations). Moreover, any subsequent complainant can look to these precedents for insights about the kind of showing needed to establish a prima facie case.

Further clarification beyond that provided by the Commission's *Program Carriage Order* and its two subsequent adjudication orders is unnecessary. Demands for additional clarification are based purely on speculation. There is simply no evidence that potential program carriage complainants are not fully aware of the types of conduct that are proscribed by the Commission's rules and that can serve as the basis for a complaint.

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in marketing and promotion of competing unaffiliated services, "requiring that unaffiliated services waive rights not waived by any comparable affiliated or unaffiliated service," and "imposing more onerous technical quality standards or requirements on an unaffiliated service." *Id.* ¶ 13.

67 *Id.* ¶ 17.

68 *See In re TCR Sports Broad. Holding, L.L.P. v. Comcast Corp.*, Memorandum Opinion & Hearing Designation Order, 21 FCC Rcd. 8989 ¶¶ 9, 11 (2006) ("*TCR Order*"); *In re Classic Sports Network, Inc. v. Cablevision Sys. Corp.*, Memorandum Opinion & Hearing Designation Order, 12 FCC Rcd. 10288 ¶ 6 (Cable Servs. Bureau 1997) ("*Classic Sports*").

B. There Is No Need To Adopt Additional Deadlines To Expedite Carriage Complaint Procedures.

The *Notice* seeks comment on whether the Commission should adopt timelines for the resolution of program carriage complaints, including "whether specific time limits on the Commission, cable operators, or others would promote a speedy and just resolution of these disputes."[69] Although Comcast agrees that more expeditious resolution of program carriage complaint proceedings would benefit all parties involved, the Commission should not alter the established pleading cycle (which is already quite abbreviated) nor should it establish any other deadlines to govern the process. After the initial pleading cycle, any further proceedings should be governed by the professional assessments of the Media Bureau and, as appropriate, an administrative law judge of the particular circumstances of a given case.

The pleading cycle for a program carriage complaint allows a complainant up to a year to prepare its complaint, but then requires an MVPD defendant to file an answer within thirty days after being served with the complaint. After the filing of the MVPD defendant's answer, a complainant is afforded twenty days to file its reply to the answer. Thus, in all, the original pleading cycle takes no longer than fifty days.[70]

Shortening the pleading cycle is not practicable and would raise significant due process concerns. Moreover, it is wholly unnecessary. To the extent there have been delays in the resolution of program carriage complaints, they were not caused by the length of the pleading cycle.[71] Delays in the resolution of program carriage complaints are not unique to these kinds of

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[69] *Notice* ¶ 15.

[70] *See generally Program Carriage Order* ¶¶ 29-30.

[71] In the two program carriage complaint proceedings, the parties followed the Commission's expedited pleading cycle.

disputes and are the consequence of management processes and priorities internal to the Commission rather than any defect in the rules.

In its *Program Carriage Order*, the Commission noted that the decision-making process it adopted "will provide the most flexible and expeditious means of enforcing the carriage agreement provisions of Section 616" and "promotes resolution of as many cases as possible on the basis of a complaint, answer and reply."[72] "As a practical matter, however, given that alleged violations of Section 616, especially those involving potentially 'coercive' practices, will require an evaluation of contested facts and behavior related to program carriage negotiations, we believe that the staff will be unable to resolve most program carriage complaints on the sole basis of a written record[.]"[73] Accordingly, in those cases in which additional fact-finding is necessary, the Commission adopted a procedure whereby, "after reviewing the complaint, answer and reply, the staff will inform the parties of its determination that resolution of the complaint will require a hearing before an administrative law judge."[74]

The Commission has had only two occasions to address program carriage complaints. In the first, *Classic Sports*, it took the Cable Services Bureau less than four months from the date the complaint was filed (March 17, 1997), and a little over two months from the date the pleading cycle ended (May 12, 1997), to determine whether a prima facie case was made and issue an order (July 16, 1997). The parties settled the case before a hearing before an ALJ ever was scheduled, and the case was dismissed officially on December 23, 1997. Thus the

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72 *Program Carriage Order* ¶ 23. The Commission stated that "additional pleadings will not be accepted or entertained unless specifically requested by the reviewing staff," and "[d]iscovery will not necessarily be permitted as a matter of right . . . but only as needed on a case-by-case basis, as determined by the staff." *Id.*

73 *Id.* ¶ 24.

74 *Id.*

Commission's decision-making process worked exactly as the Commission intended: expeditiously and through a private settlement.

In the second case, *TCR,* it took nearly a year from the end of the pleading cycle for the Media Bureau to determine -- contrary to the substantial evidence Comcast submitted -- that TCR had made a prima facie case and to refer the case to an ALJ.[75] TCR filed its complaint on June 14, 2005; Comcast filed its answer on July 14, 2005; and the pleading cycle ended on August 3, 2005 when TCR filed its reply to Comcast's answer. Although Comcast believes that the complaint, answer, and reply provided more than enough bases for the Bureau to conclude that a prima facie case had not been made, there were at least two unusual complications. First, Comcast and TCR's owners were engaged in contentious litigation in Maryland state court regarding contractual claims that directly impacted issues relevant to carriage of MASN. Second, at the same time the Media Bureau was reviewing the complaint pleadings, it was also conducting its review of Comcast's and Time Warner's proposed acquisition of Adelphia, and TCR and other parties opportunistically attempted to incorporate the issues TCR raised into the merger review proceeding, which only served to complicate both proceedings. Under these peculiar circumstances, it is perhaps not surprising that it took almost a year to review all the pleadings and determine the next step.

In both cases, after reviewing the pleadings and supporting evidence, it was determined that additional fact-finding was necessary to resolve the complaints. In both cases, decisions were made to refer the cases to an ALJ. And in both cases, the parties were able to settle their

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[75] In the *TCR* case, TCR filed more than 1,000 pages of pleadings and attachments, to which Comcast timely responded, refuting each and every one of TCR's allegations.

disputes shortly after those referrals. Therefore, neither case provides a reason why new procedures need to be established.

In the *program access* context, when the Commission previously examined the question of imposing deadlines on its decision-making process, it recognized "that any time limits imposed must reflect the myriad circumstances and complexity inherent in the program access provisions."[76] The Commission also noted that "any time limits imposed by the Commission must afford a meaningful opportunity to pursue settlement negotiations."[77] For program access proceedings, the Commission decided that five months was a reasonable amount of time to resolve easier cases (e.g., unreasonable refusals to sell programming, petitions for exclusivity, etc.) and nine months was a reasonable amount of time to resolve more complex "program access complaints, including price discrimination cases."[78]

Taking those *program access* timelines into account, it is clear that adjudicating *program carriage* complaints would require more than nine months. In fact, establishing any deadline that the Bureau or an ALJ could meet while providing the parties due process would be difficult. The complexity of a typical program access case pales in comparison to the complexity of either of the two program carriage cases filed at the Commission.

Under the program carriage rules, the Bureau or ALJ must carefully scrutinize negotiations to determine whether permissible hard bargaining has crossed the line to an impermissible demand for equity or discrimination based on non-affiliation "the effect of which

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76 *In re Implementation of the Cable Television Consumer Protection and Competition Act of 1992; Petition for Rulemaking of Ameritech New Media, Inc. Regarding Development of Competition and Diversity in Video Programming Distribution and Carriage*, Report & Order, 13 FCC Rcd. 15822 ¶ 38 (1998).

77 *Id.* ¶ 42.

78 *Id.* ¶ 41.

is to unreasonably restrain the ability of an unaffiliated video programming vendor to compete fairly."[79] As the Commission noted in the *Program Carriage Order*, "resolution of Section 616 complaints will necessarily focus on the specific facts pertaining to each negotiation, and the manner in which certain rights were obtained, in order to determine whether a violation has, in fact, occurred."[80] Plus, even if a violation were to be found, the Commission then would face the difficult task of fashioning an appropriate remedy. One possible remedy would be for the Commission to require carriage of the complaining network, but this would break entirely new ground and necessarily would require decisions about the systems on which the programming would be carried (many networks are carried on only a subset of any given operator's systems) and on which tier it would be carried (Comcast has many different tiers and specialty packages); a much more complex decision than simply setting a price for the sale of programming that is subject to the program access rules.

The complexity of program carriage cases counsels against the Commission adopting hard deadlines for either the Bureau or an ALJ to resolve program carriage complaints. Each program carriage complaint will have its own unique set of facts, and it simply is impossible for the Commission to project how long any particular case should take to resolve. Imposing generalized deadlines on an ALJ is particularly troublesome given that the ALJ is charged with conducting an investigation to resolve facts that are in dispute and then resolving the entire case and issuing a recommended order. In the *TCR* case, the Bureau "direct[ed] that an [ALJ] resolve the factual disputes . . . and return a recommended decision and a recommended remedy, if

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79 47 C.F.R. § 76.1301(c); *see* 47 U.S.C. § 536(a)(3). In today's video marketplace, it would be extremely difficult, if not impossible, for any complainant to show how any single MVPD's discrimination prevented an unaffiliated programming network from competing fairly.

80 *Program Carriage Order* ¶ 14.

necessary, to the Commission within 45 days" of the stay of the *TCR Order* being lifted.[81] Even the "Rocket Docket," more properly known as the U.S. District Court for the Eastern District of Virginia, does not adjudicate cases that fast.

Based on the Commission's scant experience adjudicating program carriage complaints, there is no evidence that the program carriage complaint process is not working. The Commission should not attempt to adopt arbitrary deadlines for resolving program carriage complaints but should rely, instead, on the intelligence, experience, and professionalism of its staff to process such complaints as expeditiously as possible. If there is a need to do more, then the Bureau can use the ALJ process to reliably determine facts and impartially administer the law without political or personal agendas factoring into the equation.

C. There Is No Need To Revise the Rules Governing Retaliation or Frivolous Complaints.

The Commission asks whether it "should adopt additional rules to protect programmers from potential retaliation if they file a complaint" and "whether the existing penalties for frivolous program carriage complaints are appropriate."[82] History demonstrates no need for such measures. Of the two parties that filed the only program carriage complaints in Commission history, neither Classic Sports nor TCR ever alleged that it was retaliated against for filing its complaint.

Not a single complaint has been filed that the Commission has deemed frivolous, although in Comcast's view the TCR complaint should have been deemed so. The fact that only two complaints have been filed in the 14 years since the program carriage rules were adopted

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81 *TCR Order* ¶ 13.

82 *Notice* ¶ 16.

provides strong evidence that networks recognize that they should file a complaint only when they really believe the rules are being violated, not just because they are frustrated with their negotiations. This is precisely how the rules were intended to work, and -- again -- there is no evidence that the rules need to be changed.

D. There Is No Need for the Commission To Adopt Rules "To Allow Independent Programmers To Seek Nationwide" Distribution.

The *Notice* seeks comment on "whether the Commission should adopt rules that expressly allow independent programmers to seek nationwide access directly from multiple system operators and, if so, how such a process would operate."[83] The answer to the first question renders the second one moot.

There is nothing that prevents programmers from seeking broad distribution on an MVPD's platform, and many do so. Carriage agreements vary widely based on, among other things, the nature of the programming offered, consumers' demands, and the decision-making processes of each distributor. For example, TCR sought carriage across what it considered its MLB territory, from Harrisburg, PA to Charlotte, NC. The voluntary settlement that was reached between Comcast and TCR specified the geographic scope and timing of MASN's carriage on Comcast's systems.

Practically speaking, only DBS providers can actually distribute networks nationwide and launch them to all of their customers at the same time. Even they, however, have to make decisions about the tier in which to place a particular network. For cable operators, the process is more complicated, and carriage agreements often provide for distribution across a subset of an operator's systems, especially in the case of a network for which there is no proven demand or

83 *Id.* ¶ 17.

track record of performance.[84] Technological capabilities differ from one system to another, as do channel line-ups and carriage obligations. So, too, consumers' demands for particular programming often vary from market to market due to demographic and other factors.

IV. THE COMMISSION SHOULD NOT ADOPT ARBITRATION PROCEDURES FOR LEASED ACCESS OR PROGRAM CARRIAGE DISPUTES.

The *Notice* inquires about "the application of arbitration procedures to resolve leased access and program carriage disputes."[85] More specifically, it asks whether the Commission should establish arbitration procedures and, if so, what types of procedures should be enacted, whether arbitration should be mandatory or elective, who should bear the costs, and what standard of review the Commission should employ in reviewing arbitration decisions.[86] The answer to the first question renders the others moot. There is no reason why the Commission needs to concern itself with the use of arbitration to address these issues.

For one thing, there is no demonstrated deficiency in the complaint process. Complaints alleging violations of the leased access rules are rare,[87] and complaints alleging violations of the program carriage rules are rarer still. For both types of complaints, Congress previously directed the agency to establish procedures for "expedited" review,[88] and in implementing this directive the Commission has already adopted "streamlined" complaint processes.[89]

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[84] Even many of the longest established, best financed, best managed, and most popular cable networks do not have agreements for ubiquitous distribution.

[85] *Notice* ¶ 19.

[86] *Id.*

[87] By the Commission's own count, a mere 70 leased access complaints have been filed in the past decade. *Notice* ¶ 1 n.1. It appears that the pace has further slowed in recent years, with only 18 leased access complaints filed in the past four years -- and most of those were duplicative complaints filed on the same day by the same complainant, but against different systems.

[88] 47 U.S.C. §§ 532(c)(4)(iii) (leased access), 536(a)(4) (program carriage).

[89] *See 1993 Leased Access Order* ¶¶ 534-536; *Program Carriage Order* ¶¶ 20-34.

For another, there is nothing the Commission needs to do to enable parties who wish to pursue arbitration to do so. If two parties who have a leased access or program carriage dispute believe that arbitration would be a useful way to resolve their differences, they are free to do so, and the American Arbitration Association stands ready to provide arbitration services under its well-established procedures.[90] But that is a decision to be made voluntarily, by the commercial entities involved.[91]

There are numerous additional reasons why arbitration is not the panacea that some think it is. For example, an important function of administrative adjudication is to provide guidance for future conduct and future adjudications, a result that is hamstrung by using arbitration.[92] Further, an agency is directed not to use means of alternative dispute resolution where "the matter significantly affects persons or organizations who are not parties to the proceeding."[93] Suffice it to say that arbitration cannot relieve the Commission of its responsibility to adjudicate a properly filed complaint, and, if either party to such a complaint insists on its right to a decision

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90 *See* American Arbitration Association, *Commercial Arbitration Rules and Mediation* (amended and effective Sept. 1, 2007), *available at* http://www.adr.org/sp.asp?id=22440.

91 5 U.S.C. §§ 572(a) (agency may use a dispute resolution proceeding "if the parties agree to such proceeding"), 575(a)(1) (arbitration to be used only "when all parties consent"); *see Use of Alternative Dispute Resolution Procedures in Commission Proceedings and Proceedings in Which the Commission Is a Party*, Initial Policy Statement & Order, 6 FCC Rcd. 5669 ¶ 12 (1991) (resort to ADR is "purely voluntary"); *In re Mediacom Communications Corp. v. Sinclair Broad. Group, Inc., Emergency Retransmission Consent Complaint for Enforcement for Failure To Negotiate Retransmission Consent Rights in Good Faith*, Memorandum Opinion & Order, 22 FCC Rcd. 47 ¶ 25 (2007) ("The Commission does not have the authority to require the parties to submit to binding arbitration."); *1993 Leased Access Order* ¶ 537 ("ADR is voluntary [and] parties may elect it at any time").

92 As 5 U.S.C. § 572(b)(1) instructs, "An agency shall consider not using a dispute resolution proceeding if . . . a definitive or authoritative resolution of the matter is required for precedential value, and such a proceeding is not likely to be accepted generally as an authoritative precedent."

93 *Id.* § 572(b)(4). An arbitrator's decision that would require carriage of a particular channel could result in other channels being dropped, adversely affecting third parties in contravention of the directives of the statute.

by the Commission, a detour to the arbitration process will not accelerate that result.[94] Moreover, using arbitration in the program carriage context would severely implicate the First Amendment rights of cable operators who could be compelled to carry certain speech as well as the rights of other programmers that might be deleted from a cable system. And, in the leased access context, arbitration could not extinguish the presumption, explicitly set forth in the statute, "that the price, terms, and conditions for use of channel capacity designated [by the cable operator for leased access] are reasonable and in good faith unless shown by clear and convincing evidence to the contrary."[95]

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[94] In recent comments and reply comments filed in MB Docket No. 07-29, Comcast explained why arbitration is not appropriate in program access proceedings; Comcast incorporates those pleadings here by reference. *See, e.g.*, Comments of Comcast Corporation, MB Dkt. No. 07-29, at 28-20 (Apr. 2, 2007); Reply Comments of Comcast Corporation, MB Dkt No. 07-29, at 39-41 (Apr. 16, 2007).

[95] 47 U.S.C. § 532(f).

V. CONCLUSION

There is no apparent reason why the Commission should revise either its commercial leased access or program carriage rules. The Commission's regulations governing both areas have been carefully crafted and honed through years of experience. Leased access and program carriage complaints have been infrequent and resolved effectively and efficiently. Moreover, given the success of the current rules, there is no reason for the Commission to adopt any new regulations relating to arbitration of either leased access or program carriage disputes, and the Commission lacks legal authority to do so.

Respectfully submitted,

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September 11, 2007

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Leased Commercial Access	)	
	)	MB Docket No. 07-42
Development of Competition and Diversity in Video Programming Distribution and Carriage	)	
	)	
	)	

COMMENTS OF TIME WARNER CABLE INC.

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SUMMARY

The Commission initiated this proceeding to explore the effectiveness of the leased access and program carriage rules and to consider whether any substantive or procedural modifications are needed in order for the rules to achieve their intended purpose. Generally speaking, these rules were designed to act as a safety valve to ensure that the public had access to diverse sources of programming and Congress expressly recognized that such restrictions should be necessary only insofar as competitive forces were not achieving this same goal. An examination of the historical record and current competitive conditions demonstrates that the constitutional underpinnings of these rules is suspect and that there is neither any need nor any justification for the Commission to adopt changes in these rules that would increase the burdens that these rules already impose on cable operators' speech and property rights.

In the years since the leased access and program carriage rules were adopted, the MVPD competitive landscape has undergone a radical transformation such that the underlying purpose of the rules (*i.e.*, availability of independent sources of programming) is indeed being met through competition. In the face of substantial growth in horizontal competition from DBS operators (and now wireline video providers), cable system channel capacity and the number of available programming services have increased dramatically. At the same time, the level of vertical integration of programming networks has significantly decreased. All of these factors, coupled with the explosion of video content on the Web and via other distribution platforms (*e.g.*, local video-on-demand, wireless video, and other emerging technologies), mean that the goal of programming diversity is being met in ways that Congress never imagined. As the Commission itself has recognized, Americans enjoy more choice, more programming, and more services than at any time in history.

Given these marketplace developments, no major modifications to the leased access and program carriage rules are needed, and certainly none that would make the rules any more constitutionally suspect than they already are. The fact that the demand for leased access capacity appears to be relatively modest and that the Commission is not overwhelmed with a deluge of leased access or program carriage complaints are not indications that the rules are failing; rather, they are signs that the intensely competitive video distribution environment is successfully fostering the development of diverse, independent, competitive sources of programming.

Thus, the Commission should eschew suggestions that it modify substantive elements of the leased access rules, such as the rate formula and tier placement provisions. The current rate formula is predictable and easily applied, while alternative approaches such as a cost-of-service model, would be cumbersome and complex. Capping rates at a lower level than that produced by the current formula would effectively create a subsidy and would violate Congress' injunction that leased access rates "not adversely affect the operation, financial condition, or market development" of cable systems. Changes in the current tier placement rules also are unnecessary and run the risk of increasing the disruption that leased access can create for a cable system's operations.

If any changes are to be made to the leased access rules, those changes should seek to encourage negotiation over litigation. For example, the Commission might consider clarifying the information that a cable operator must provide in response to a leased access request and modifying the response timetable applicable to leased access complaint proceedings. In addition, the Commission could elect to refrain from regulating leased access rates in communities that are subject to "effective competition."

Similarly, there is no need to "fix" the program carriage rules. Cable operators devote the vast majority of their channels to carriage of programming in which they do not have any ownership stake. This is hardly surprising since in today's competitive environment, a cable operator's success requires it to make programming decisions based on business and editorial judgments as to whether particular channels meet the needs and interests of the operator's subscribers and to attempt to maximize consumer value by making the best deal possible in arm's length negotiations. Any attempt by the Commission to impose additional obligations on cable operators under the program carriage rules would run afoul not just of the Constitution, but of the Commission's own recognition that Congress did not intend the program carriage rules to interfere with "legitimate business practices common to a competitive marketplace" including the ability of distributors and programmers to engage in "legitimate, aggressive negotiations."

Insofar as the Commission is inclined to make any changes to the program carriage rules, it should focus on reaffirming and clarifying the exacting burden imposed on a complainant to establish a *prima facie* case through documentary evidence or face immediate dismissal of its complaint. The program carriage rules were not intended to be a vehicle for anti-competitive fishing expeditions by programming vendors and, as the Commission has held, complaints under those rules "may not merely reflect conjecture or allegations based only on information and belief." Rather, to satisfy the *prima facie* case threshold, a complainant must set forth a plausible case for relief based on specific factual allegations.

For example, a complaint alleging unlawful discrimination must establish more than the mere fact that the respondent is carrying an affiliated service on different terms and conditions than those offered the complainant. The complaint also must establish that the respondent has an attributable interest in a programming service that directly competes with the complainant's service, both in terms of content and targeted audience. The complaint also must allege facts to demonstrate that there is no justification for the extension of different carriage terms other than an intent to cause the complainant competitive harm on account of its lack of affiliation with the respondent. And, as the Commission has recognized, the complaint must set forth documentary support for the assertion that the respondent's conduct unreasonably restrains the complainant's ability to compete by threatening its viability. The Commission also should restate its prior determination that in order to make out a *prima facie* case under the provisions barring unlawful coercion, retaliation, or demands for equity ownership, a complainant must provide evidence of ultimatums, intimidation, or other bad faith negotiating tactics that are "tantamount to an unreasonable refusal to deal."

Finally, the Commission should reject suggestions that it impose mandatory arbitration procedures on parties to leased access and program carriage disputes. *Voluntary* alternative dispute resolution is already an element of both the leased access and program carriage complaint processes, and has been highly successful in facilitating private resolution of such matters. Furthermore, Supreme Court precedent, federal law, and the Commission's own policies make clear that the Commission cannot mandate alternative dispute resolution procedures absent the consent of the parties.

Before the

Federal Communications Commission

Washington, D.C. 20554

In the Matter of	)	
	)	
Leased Commercial Access	)	
	)	MB Docket No. 07-42
Development of Competition and Diversity in Video Programming Distribution and Carriage	)	
	)	
	)	

COMMENTS OF TIME WARNER CABLE INC.

Time Warner Cable Inc. ("TWC"), by its attorneys, hereby submits the following comments in response to the Commission's Notice of Proposed Rulemaking ("NPRM") in the above-captioned proceeding.[1] TWC is the nation's second largest cable operator and third largest multichannel video programming distributor ("MVPD").[2]

I. INTRODUCTION AND BACKGROUND.

The instant proceeding has its genesis in the Commission's order approving various transactions involving Comcast Corporation, TWC, and Adelphia Communications Corporation ("Adelphia") relating to the disposition of cable systems formerly owned by Adelphia. Based on certain comments received during that proceeding, the Commission decided to undertake a review of the leased access (47 C.F.R. §§ 76.970-977) and program carriage (47 C.F.R. §§ 76.1300-1302) rules to determine how well they are working and whether any changes are

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[1] *Implementation of Section 612 of the Cable Communications Policy Act of 1984 as Amended by the Cable Television Consumer Protection and Competition Act of 1992 and Section 616 of the Cable Television Consumer Protection and Competition Act of 1992*, Notice of Proposed Rulemaking, 72 Fed. Reg. 39370 (July 18, 2007) ("NPRM").

[2] TWC owns or manages cable systems serving more than 14 million subscribers in more than 4,500 communities in 33 states.

needed to ensure that the rules achieve their intended purpose.[3] As will be discussed below in greater detail, an examination of the historical record and current competitive environment demonstrates that there is neither any need from a factual standpoint nor any justification from a legal or policy perspective for the Commission to change these rules — rules that likely could not withstand constitutional scrutiny as it is — to make them any more intrusive than they already are. In particular, the mechanisms in place for enforcing the rules — which already include alternative dispute resolution procedures — should not be modified in ways that would encourage the filing of complaints in lieu of the negotiated resolution of disputes.

A. <u>Commercial Leased Access.</u>

The designation of channel capacity for third party commercial leased access has been a part of the cable television landscape for more than thirty years. Early debates over whether cable television systems should be operated as common carriers led to the Commission's 1972 adoption of rules requiring cable operators in the top 100 television markets to dedicate at least one channel to commercial leased access.[4] This obligation, as modified in subsequent proceedings, was struck down by the Supreme Court on jurisdictional grounds in *Midwest Video*

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[3] *Applications for Consent to the Assignment and/or Transfer of Control of Licenses, Adelphia Communications Corporation (and Subsidiaries, Debtors-In-Possession), Assignors, to Time Warner Cable Inc. (Subsidiaries), Assignees; Adelphia Communications Corporation (and Subsidiaries, Debtors-In-Possession), Assignors and Transferors, to Comcast Corporation (Subsidiaries), Assignees and Transferees; Comcast Corporation, Transferor, to Time Warner Inc., Transferee; Time Warner Inc., Transferor, to Comcast Corporation, Transferee*, Memorandum Opinion and Order, 21 FCC Rcd 8203 (2006) (Separate Statement of Commissioner Adelstein).

[4] *Amendment of Part 74, Subpart K, of the Commission's Rules and Regulations Relative to Community Antenna Television Systems and Inquiry into the Development of Communications Technology and Services to Formulate Regulatory Policy and Rulemaking and/or Legislative Proposals; Amendment of Section 74.1107 of the Commission's Rules and Regulations to Avoid Filing of Repetitious Requests; Amendment of Section 74.1031(c) and 74.1105(a) and (b) of the Commission's Rules and Regulations as They Relate to Addition of New Television Signals; Amendment of Part 74, Subpart K, of the Commission's Rules and Regulations Relative to Federal-State or Local Relationships in the Community Antenna Television System Field and/or Formulation of Legislative Proposals in This Respect; Amendment of Subpart K of Part 74 of the Commission's Rules and Regulations with Respect to Technical Standards for Community Antenna Television Systems,* Cable Television Report and Order, 36 F.C.C. 2d 143 (1972).

II.[5] In 1984, Congress resolved the jurisdictional issue presented in *Midwest Video II* by establishing an express statutory framework requiring cable operators to designate a portion of their channels for use by unaffiliated third parties, codified in Section 612 of the Communications Act, as amended by the Cable Communications Policy Act of 1984 (the "1984 Cable Act").[6] The legislative history of Section 612 indicates that Congress adopted federal leased access requirements in order to address its concern that, given the competitive environment at that time, a cable operator might not necessarily have the incentive to provide the public with access to diverse programming sources.[7]

However, Congress also made clear that its goal was for leased access to produce increased diversity "in a manner which is not inconsistent with the growth and development of cable systems" and that the operation of the leased access rules should not "adversely affect the cable operator's economic position since it is not the exercise of any economic power, but his exercise of editorial control which is of concern."[8] Thus, Section 612 as enacted in 1984 expressly stated that the rates, terms and conditions established by a cable operator for commercial leased access should be "at least sufficient to assure that such use will not adversely affect the operation, financial condition, or market development of the cable system."[9]

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[5] *Midwest Video Corp. v. FCC*, 440 U.S. 689 (1979) ("*Midwest Video II*").

[6] Cable Communications Policy Act of 1984, Pub. L. No. 98-549, 98 Stat. 2779 (1984), § 612. The formula for calculating a cable operator's leased access "set-aside" exempts cable systems with fewer than 36 activated channels from having to designate capacity for leased access (but grandfathers existing franchise-imposed leased access requirements for such systems). Systems with between 36 and 54 activated channels are required to designate 10 percent of those channels that federal law does not require to be used for other purposes (such as must carry channels) or prohibits from being used (such as channels on certain aeronautical frequencies). The percentage factor applicable to systems with between 55 and 100 channels is 15 percent. Thus, for example, a system with 70 activated channels and 10 must carry channels would be required to designate nine channels for leased access (70 – 10 = 60 x 15% = 9). Systems with more than 100 activated channels also are required to designate 15 percent for leased access use, but without first subtracting reserved or prohibited channels.

[7] H. R. Rep. No. 98-934, 98th Cong., 2d Sess. 48 (1984) ("*1984 Act House Report*").

[8] *Id.* at 48, 50.

[9] 47 U.S.C. § 532(c)(1).

Moreover, the fact that Congress understood from the beginning that leased access channels might be used only sporadically was expressly acknowledged by the principal author of the 1984 Cable Act, Rep. Wirth, who declared that "an operator cannot be found to have acted in bad faith or to have established unreasonable rates simply because parties seeking access choose not to meet the offered rate."[10]

Congress revisited Section 612 eight years later when it enacted the Cable Television Consumer Protection and Competition Act of 1992 (the "1992 Cable Act").[11] Specifically, Congress modified the stated statutory purpose of Section 612 to link the promotion of the diversity of information sources with the enhancement of competition in the delivery of such programming.[12] Congress also directed the Commission to establish maximum reasonable rates for the use of leased access channels.[13] In making these changes to Section 612, Congress acknowledged that "the cable industry has a sound argument in claiming that the economics of leased access are not conducive to its use,"[14] and that mandated leased access was merely intended to serve as a "safety valve."[15] These revisions to the leased access regime also have to be viewed in the broader context of the overarching statutory policies of the 1992 Cable Act, *e.g.*, to "rely on the marketplace, to the maximum extent feasible" to achieve programming diversity, and to limit intrusive regulation to communities "where cable television systems are not subject to effective competition."[16]

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[10] Cong. Rec., Oct. 1, 1984, at H10411.

[11] Pub. L. No. 102-385, 106 Stat. 1460 (1992) ("1992 Cable Act").

[12] 47 U.S.C. § 532(a). Congress did not change the 1984 Cable Act's formula for determining how many channels a system is required to designate for leased access use. *See* note 6 *supra*.

[13] 47 U.S.C. § 532(c)(4)(A)(i).

[14] S. Rep. No. 92, 102d Cong., 1st Sess. 30 (1991).

[15] *Id.* at 31-32.

[16] 1992 Cable Act, § 2(b).

Implementing the 1992 Cable Act's amendments to Section 612, the Commission in 1993 adopted a "highest implicit fee" formula as the methodology for setting the maximum reasonable leased access rate.[17] The agency also promulgated procedures for the expedited resolution of leased access disputes.[18] However, the Commission acknowledged that these rules likely would be subject to "refinement" through case-by-case adjudication and additional rulemaking proceedings.[19] And, in fact, in 1996, the Commission initiated a further rulemaking that led to the adoption in 1997 of a revised maximum rate formula based on the "average implicit fee" that the operator charges other programmers for carriage on programming tiers.[20] In addition to revising the rate formula, the Commission adopted certain other rule modifications, such as allowing the resale of leased access time, reaffirming the requirement that operators lease capacity on a "part-time" basis, and streamlining the complaint process.[21]

B. <u>Program Carriage.</u>

The Commission's rules governing program carriage agreements between unaffiliated programmers and cable operators are of somewhat more recent vintage than the leased access requirements.[22] The source of the Commission's statutory authority to regulate program carriage

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[17] 47 C.F.R. § 76.970(g).

[18] 47 U.S.C. §§ 532(c)(4)(A)(i), (ii), (iii).

[19] *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, Report and Order and Further Notice of Proposed Rulemaking, 8 FCC Rcd 5631, ¶ 491 (1993) ("*1993 Leased Access Order*").

[20] *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, Order on Reconsideration of the First Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd 16933 (1996) (*"1996 Leased Access Order"*); *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, Second Report and Order and Second Order on Reconsiderations of the First Report and Order, 12 FCC Rcd 5269, ¶¶ 31-36, 43-45 (1997) ("*1997 Leased Access Order*").

[21] *1997 Leased Access Order*, 12 FCC Rcd at ¶¶ 62-69, 77-82, 103-107.

[22] Furthermore, unlike the leased access rules, the program carriage rules apply on their face to all MVPDs, not just to cable operators.

agreements is Section 616 of the Communications Act, as amended by the 1992 Cable Act.[23] In Section 616, Congress specifically directed the Commission to adopt and enforce rules barring MVPDs from (i) requiring a financial interest in a program service as a condition of carriage, (ii) coercing a grant of exclusive carriage rights from an unaffiliated programmer or retaliating against an unaffiliated programmer for refusing to grant exclusive carriage rights, and (iii) engaging in conduct which unreasonably restrains the ability of an unaffiliated programmer to compete fairly by discriminating on the basis of affiliation in the selection, terms, or conditions for carriage.[24]

In its rulemaking orders implementing Section 616, the Commission took note of the provision's legislative history and other indicia of congressional intent, pointing out in particular that the 1992 Cable Act expressly stated that it was Congress' policy to "rely on the marketplace to the maximum extent feasible" to achieve the Act's goals.[25] Consistent with this statutory directive, the Commission concluded that the implementation of Section 616 should "not preclud[e] legitimate business practices common to a competitive marketplace" and "must strike a balance that not only prescribes behavior prohibited by the specific language of the statute, but also preserves the ability of affected parties to engage in legitimate, aggressive negotiations."[26] To this end, the Commission essentially codified the statutory descriptions of the practices prohibited by Section 616 and, as directed by Congress, established an expedited procedural framework for resolving program carriage complaints and specified the remedies available where

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[23] 47 U.S.C. § 536.

[24] *Id.*

[25] *Implementation of the Cable Television Consumer Protection and Competition Act of 1992: Development of Competition and Diversity in Video Programming Distribution and Carriage*, Second Report and Order, 9 FCC Rcd 2642, ¶ 15 (1993) ("*Program Carriage Order*"), *citing* 1992 Cable Act, § 2(b)(2).

[26] *Program Carriage Order* at ¶¶ 14-15.

a violation is found to have occurred.[27] At the same time, however, the Commission made clear that a complaining party bears the burden of making out a *prima facie* case based on "documentary evidence or testimony" and that frivolous complaints would not be tolerated.[28]

C. Marketplace Developments.

The current leased access and program carriage rules were adopted at a time when the competitive environment for video programming distribution was far different than it is today. Channel capacity, the number of services available, the level of vertical integration, and the cable industry's share of the multichannel video subscriber universe have all undergone a radical transformation in the years since Congress adopted and the Commission implemented the leased access and program carriage rules.[29]

For example, when Section 612 was adopted in 1984, fewer than five percent of all cable systems offered 54 or more channels and 65 percent of all systems offered fewer than 30 channels.[30] By 1992, the number of systems with more than 54 channels had increased, but was still under 12 percent of the total. Even by 1997, when the Commission revised the leased access rate formula and procedural rules, the number of systems with more than 54 channels represented only around 19 percent of all systems.[31] In contrast, today more than 85 percent of

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[27] 47 C.F.R. §§ 76.1301-1302.

[28] *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Development of Competition and Diversity in Video Programming Distribution and Carriage,* Memorandum Opinion and Order, 9 FCC Rcd 4415, ¶ 33 (1994) ("*Program Carriage Reconsideration Order*").

[29] *See, e.g.*, *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Twelfth Annual Report, 21 FCC Rcd 2503, ¶ 5 (2006) (*"Twelfth Annual Report"*) ("[A]lmost all consumers have the choice between over-the-air broadcast television, a cable service, and at least two DBS providers... [and] consumers may also have access to video programming delivered by emerging technologies..."); *id.* at ¶ 6 ("The second and third largest MVPDs now are DBS operators... [and] LECs, such as [AT&T] and Verizon... have spent the past year preparing to offer video in their operating areas and are building out their facilities to add video offerings.").

[30] TV & Cable Factbook No. 52 (1984), page 1726.

[31] TV & Cable Factbook, 1992 edition, G-65; *Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming*, Fifth Annual Report, 13 FCC Rcd 24284, ¶ 20 (1998).

all systems have a capacity of at least 750 MHz and the average system offers more than 70 analog channels and approximately 150 digital channels.[32]

Going hand in hand with this astounding increase in cable system channel capacity, the number of cable program networks available to subscribers also has grown dramatically since 1992. According to the Commission's annual competition reports, there were around 100 national non-broadcast programming networks in service fifteen years ago.[33] By 2005, the number of such networks had more than quintupled to 531 and there were approximately 100 additional regional networks.[34]

The increases that have occurred in channel capacity and program network availability clearly have implications for the diversity and competition concerns that spurred the adoption of the leased access and program carriage rules. Just as importantly, there also have been dramatic changes in the level of vertical integration and in horizontal competition. The Commission's first annual video competition report indicated that more than 50 percent of the national cable networks then available were vertically-integrated with a cable operator.[35] The most recent such report shows that vertically-integrated networks now represent less than 22 percent of the total.[36] And the number of vertically-integrated networks among the top 15 services in terms of viewership has declined from 12 at the time of the first report to only three in the latest report.[37]

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[32] *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Eleventh Annual Report, 20 FCC Rcd 2755, ¶ 24 (2005).

[33] *Implementation of Section 19 of the Cable Television Consumer Protection and Competition Act of 1992, Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, First Report, 9 FCC Rcd 7442, ¶ 21 (1994) ("*First Annual Report*").

[34] *Twelfth Annual Report* at ¶ 21 (2006).

[35] *First Annual Report* at ¶ 161.

[36] *Twelfth Annual Report* at ¶ 21.

[37] *Id.*

The changes that have taken place within the cable industry are themselves the results of developments occurring in the larger MVPD competitive landscape. In 1992, DBS was more of a promise than a reality. Today, DirecTV and EchoStar are two of the four largest MVPDs in the country and together have more than 30 million subscribers.[38] The percentage of the nation's multichannel subscribers served by cable, which was 95 percent fifteen years ago, has dropped to 69 percent.[39] And these figures do not take into account the development of the Internet and other new platforms for distribution of video programming, such as wireless devices. As the Commission recognized nearly four years ago, "the vast majority of Americans enjoy more choice, more programming and more services than any time in history."[40]

The reason for dwelling on the evolutionary – and indeed revolutionary – changes that have occurred in the video marketplace in recent years is that an appreciation for the realities of the current and constantly intensifying competitive environment is critical to any reassessment of the program carriage and leased access rules. The parties attempting to make an issue of these rules during the Commission's review of the Adelphia transactions suggested that the fact that the rules are not frequently invoked is evidence of some regulatory failure. In fact, however, the dearth of complaints invoking the leased access and program carriage rules is evidence not of a regulatory failure, but of a marketplace success: the concerns that the rules are designed to address as a "safety valve" are being dealt with directly through the development of competition and through technological innovation, and without the need for intrusive regulatory intervention.

In particular, the competition provided on a national level by two national DBS providers and, increasingly, consumers' access to a competing wireline MVPD operated by a well-financed

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[38] *Id.* at ¶ 73.

[39] *Id.* at ¶ 8.

[40] *In re Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Tenth Annual Report, 19 FCC Rcd 1606, ¶ 4 (2004).

local telephone company, like Verizon or AT&T, help ensure that a cable operator cannot afford to refuse to carry desirable (and desired) programming.[41] Furthermore, the deployment of digital technology in general, and of video-on-demand ("VOD") in particular, is creating an effective incubator for niche services of the kind that Congress once thought might need a regulatory bootstrap to obtain carriage. And with the arrival on the scene of Internet-based services such as video blogs, YouTube, MySpace, Facebook, etc., the "electronic soapbox" goals of the leased access rules are being met in ways that neither Congress nor the Commission ever imagined.[42]

II. THE COMMISSION MUST CONSIDER THE SERIOUS CONSTITUTIONAL ISSUES RAISED BY THE LEASED ACCESS AND PROGRAM CARRIAGE RULES

In the discussion that follows, TWC will review specific elements of the current leased access and program carriage rules, rebutting claims that the rules are somehow ineffective and in need of significant modification. Before doing so, however, it is necessary to address a threshold concern that the leased access and program carriage rules are unlikely to survive constitutional scrutiny. The constitutionality of the program carriage rules under the First and Fifth

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[41] The intent of Verizon and AT&T to actively deploy video services is unquestionable. Verizon, which has been the most aggressive with its video rollout, plans to spend an estimated $23 billion building a fiber-to-the-home network that will pass more than 18 million homes by 2010. *See* George Winslow, "Placing Bets in the Bandwidth Battle," *Multichannel News*, June 18, 2007, *available at*: http://www.multichannel.com/article/CA6452622.html?q=%22placing+bets+in+the+bandwidth%22 (last visited: Aug. 28, 2007). Similarly, AT&T, which has committed $6.5 billion to deploying IPTV services, anticipates that its video product will be available to about 13 million homes by 2008. *See id.*

[42] *See, e.g., Midwest Video Corporation v. FCC, et al.*, 571 F.2d 1025, 1045 (8th Cir. 1978) (*quoting in re Amendment of Part 76 of the Commission's Rules and Regulations Concerning the Cable Television Channel Capacity and Access Channel Requirements of Section 76.251*, Report and Order, 59 FCC 2d 294, ¶ 8 (1976)); *see also id.* at 1046:

> The Commission founded its access rules on its belief that the "public interest can be significantly advanced by opening of cable channels for use by the public and other specified users who would otherwise not likely have access to television audiences," (citation omitted), and refused to be deterred by evidence indicating little likelihood of anyone ever watching access programs.
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> [T]he mere belief that the public interest lies in forcing cable operators to build and deliver to each citizen an electronic soapbox would appear to be entirely conclusory.

Amendments has never been tested and, while the United States Court of Appeals for the District of Columbia Circuit rejected a facial First Amendment challenge to the constitutionality of Section 612 in 1996,[43] TWC submits that changes in marketplace conditions call into question the continued validity of that decision. Indeed, members of the Supreme Court, both before and after that decision, have expressed serious doubts as to the constitutionality of leased access.

For example, Justice White noted in *Midwest Video II* that "compelling cable operators indiscriminately to accept access programming will interfere with their determinations regarding the total service offering to be extended to subscribers."[44] Not surprisingly, Justice White's opinion goes on to describe the constitutional questions raised by mandatory leased access as "not frivolous."[45] More recently, Justice Thomas, joined by then-Chief Justice Rehnquist and Justice Scalia, concluded that "[t]here is no getting around the fact that leased access...[is] a type of forced speech" and that the Supreme Court's decision in the *Turner* case "ineluctably leads to the conclusion that the federal access requirements are subject to some form of heightened scrutiny."[46]

The constitutional infirmities of the program carriage rules are equally clear. By creating its own programming and exercising editorial discretion in making decisions regarding the carriage of programming created by others, an MVPD engages in speech that is protected by the

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[43] *Daniels Cablevision, Inc. v. United States,* 835 F. Supp. 1 (D.D.C. 1993), *aff'd sub nom Time Warner Entm't Co., L.P. v. FCC*, 93 F.3d 957 (D.C. Cir. 1996).

[44] *Midwest Video II* at 708, note 17. Justice White's opinion also noted that enforcement of access rules will "significantly compromise the editorial discretion actually exercised by cable operators" and will "occasion[] the displacement of alternative programming." *Id.*

[45] *Id.* at 709, note 19.

[46] *Denver Area Educ. Telecomm. Consortium, Inc. v. FCC*, 518 U.S. 727, 820-21 (1996), *citing Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622 (1994) ("*Turner I*") (opinion of Justice Thomas concurring in part and dissenting in part). Justice Thomas also intimated that Congress' imposition of common-carrier-like obligations on cable operators may raise Takings Clause questions. *Id.*

First Amendment.[47] Rules that force an MVPD to carry services that it would not otherwise have carried, or to carry them on different terms than it chooses, require a constitutionally sufficient justification. Whether or not such a justification may have existed at one time, it clearly does not exist any longer.

In particular, to the extent that the underlying goal of the program carriage (and leased access) rules is to promote the diversity of speech available on cable, the rules are content-based and thus presumptively unlawful.[48] The government may no more promote speech diversity on a cable system by prohibiting the cable system operator from discriminating against unaffiliated video programming services than it may promote speech diversity in newspapers by requiring the New York Times to print columns of unaffiliated journalists. Strict scrutiny demands a "compelling" government interest and "narrow tailoring."[49] Assuming that "improving" private speech is even a permissible government interest, it plainly is not a compelling interest. As discussed in detail herein, speech on cable is already widely diverse and the availability of video content on new platforms such as the Internet has added to that diversity exponentially.

Even if program carriage and leased access regulation only merited intermediate scrutiny, the rules would still fail. Under intermediate scrutiny, rules prohibiting a cable operator from preferring affiliated speech (or requiring the operator to designate capacity for speech by others) can survive constitutional scrutiny only if the rules can be shown to be necessary to solve a real

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[47] *See, e.g., Turner I, supra*, 512 U.S. at 636 ("There can be no disagreement on an initial premise: Cable programmers and cable operators engage in and transmit speech, and they are entitled to the protection of the speech and press provisions of the First Amendment.").

[48] *See Davenport v. Washington Educ. Ass'n*, 127 S.Ct 2372, 2381 (2007) ("content-based regulations of speech are presumptively invalid"). *See also Turner I, supra*, 512 U.S. at 641 ("At the heart of the First Amendment lies the principle that each person should decide for himself or herself the ideas and beliefs deserving of expression, consideration and adherence."); *Pacific Gas & Elec. Co. v. Public Utils. Comm'n of California*, 475 U.S. 1, 20 (1986) (plurality) ("the State cannot advance some points of view by burdening the expression of others").

[49] *Turner I, supra*, 512 U.S. at 663.

problem in a way that is not unduly harmful to free speech.[50] Assuming that there ever was a risk that cable operators might attempt to limit programming desired by subscribers, it is clear that they can no longer do so today. Vigorous competition from two large national DBS operators as well as from telephone companies and new video distribution platforms such as the Internet ensures that if cable operators are not delivering desirable programming, consumers will migrate to other providers.

The program carriage and leased access rules intrude substantially on a cable operator's constitutionally protected rights. Under the circumstances, the Commission should be weighing not whether mechanisms for enforcing the rules need to be "fixed," but rather whether the rules should be enforced at all. Even if the current rules could be sustained against facial challenge, the Commission should avoid taking action that could further exacerbate the burdens that those rules already impose on cable operators' speech and property rights.[51]

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[50] *Id.* at 664; *see also id.* at 662 (a rule subject to intermediate scrutiny can survive only if "it furthers an important or substantial government interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on First Amendment freedoms is no greater than essential to the furtherance of that interest.").

[51] While the discussion above centered on the infirmities of the leased access and program carriage rules under the First Amendment, those rules also infringe cable operators' rights under the Takings Clause of the Fifth Amendment in depriving cable operators of the value of their property (*i.e.*, channel capacity) without just compensation. Although both the leased access and program carriage rules contemplate payment for the use of such capacity (through the "average implicit fee" formula under the leased access rules, and through privately negotiated payment terms under the program carriage rules), such recompense is not sufficient to overcome Takings Clause issues. To constitute a permissible regulatory taking, there must be an "essential nexus" between a legitimate state interest and the condition imposed by the Government to advance that interest. *Dolan v. City of Tigard*, 512 U.S. 374, 386 (1994). Furthermore, the extent of the taking must bear some rough proportion to the magnitude of the objective sought to be achieved. *Id.* Given the existence of a fiercely competitive landscape fostering the development of diverse programming sources, there is no "essential nexus" or "rough proportionality" that would justify the taking that occurs under the leased access and program carriage rules, rendering both regimes unconstitutional from a Fifth Amendment standpoint, as well.

III. THERE IS NO NEED FOR THE COMMISSION TO MAKE CHANGES IN ITS RULES TO ARTIFICIALLY PROMOTE THE USE OF LEASED ACCESS CAPACITY.

There is no justification as either a factual or policy matter for the Commission to impose additional regulatory burdens on cable operators in an effort to artificially foster greater use of leased access capacity by potential lessees. Substantively, the goals of the leased access provision are being met through technological innovation and increased competition and the need for a leased access "safety valve" to ensure that the public is not denied access to a diverse array of competitive programming has, if anything, diminished to the point where the continued need for the rules is questionable. Procedurally, the current leased access complaint process is effective in minimizing disputes and allowing the few complaints that do arise under the rules to be resolved on a reasonable and timely basis.

A. The Substantive Goals Of Leased Access Are Being Met.

Commissioner Adelstein's separate statement accompanying the NPRM poses the question of whether the leased access regime is working or needs "improvement."[52] TWC's real-world experience with leased access indicates that programmers can and do obtain leased access carriage. While the level of leased access usage varies from system to system, the vast majority (typically 90% or more) of leased access programming is locally produced. Leased access programming on TWC systems falls primarily into three general categories: religious (often over 40%), infomercials promoting real estate sales, automobile dealers, and tourism, among other things (about one-third of total leased access programming), and international/ foreign language programs (typically accounting for 10-15%). The remaining leased access programming usually consists of community programs featuring local news and sporting events,

[52] NPRM (Separate Statement of Commissioner Adelstein).

segments devoted to hobbies such as fishing and cooking, as well as educational, home shopping and entertainment programs.

In any event, given Congress' clear mandate favoring reliance on the marketplace over regulation whenever possible, TWC submits that the Commission's focus should not be on the degree to which programmers are utilizing leased access capacity, but rather should be on whether the substantive goals of the leased access provision are being achieved without regulatory intervention.

Concerns that leased access capacity is not being used in many systems to the maximum extent provided in the rules does not mean that the rules are failing; rather, it is an indication of the extent to which content that might otherwise be carried pursuant to leased access is finding its way to the public through other means and through economic models that are better suited to nationwide distribution than leased access. As noted above, Congress intended for the leased access rules to serve as a "safety valve" to ensure that the public has access to a diverse and competitive array of programming services. The need for that safety valve clearly has been usurped as technology and competition have provided programmers of all kinds with a variety of new outlets for their content.

1. Technological Innovation And Competition Are Ensuring That The Public Has Access To A Diverse Array Of Programming.

New outlets and models have developed that provide an opportunity for all types of programmers to reach the public. Many of these new outlets can be found on the Internet, which has proved to be an extraordinarily fertile test bed for new programming concepts, delivered over an ever-expanding array of streaming video sites. Although "[f]or many people, public access TV is still symbolized by 'Wayne's World,' the 'Saturday Night Live' sketch that portrayed two slackers [producing a cable access program from a basement recreational room,] today, the

Waynes of the world have a whole new stage on the Web."[53] On video-sharing sites like YouTube and MySpace, "[h]omemade videos are viewed by millions each day, giving anyone with a video camera and a fast Internet connection their own 'show.'"[54] Indeed, some have argued that traditional cable access channels are outdated and should be replaced by a Web-based model.[55]

Feeding the creative frenzy is the increasing availability of cheap tools for recording and editing that enable anyone to play video mogul.[56] Further contributing to the "crowdsourcing" or "social media" phenomenon is Americans' voracious appetite for user-generated content. According to market research, 132 million Americans (or 75 percent of U.S. Internet users) viewed more than eight billion Internet video streams in May of this year alone.[57] With the 2008 election on the horizon, political candidates also have recognized that video-sharing sites are "a way of getting national exposure on a completely free distribution system."[58] Some of the signature campaign moments so far have occurred on YouTube, and many users view this site as "a digital democracy of sorts."[59] As "a testament to the increasing role of online video in politics," CNN and YouTube recently co-sponsored a debate between Democratic presidential

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[53] Adrian McCoy, "Who Needs Public Access TV?" *Pittsburgh Post-Gazette*, Aug. 5, 2007, p. F1.

[54] *Id.*

[55] *Id.* (advocating a transition period during which public access broadcasting on cable systems is phased out in favor of a Web model).

[56] *See* Kevin Coughlin, "The Revolution Will Be Webcast: Are These Low-Budget Producers Changing How We're Entertained?" *The Star-Ledger* (Newark, NJ), Aug. 5, 2007, p. 1.

[57] *Id.*; "Mass Media Notes," *Communications Daily*, July 18, 2007, p. 19.

[58] Sam Gustin, "E-Lection Day Hits Internet - Pols Run Onto Web," *New York Post*, Nov. 2, 2006, p. 44.

[59] Jose Antonio Vargas, "The Debate's New Face," *Washington Post*, July 19, 2007, p. A01. Election news coverage crossed over to popular culture with YouTube clips of John Edwards combing his hair to "I feel Pretty," Bill and Hillary Clinton's spoof of "The Sopranos," and BarelyPolitical.com's "I Got a Crush on Obama." *Id.*

candidates that featured video questions uploaded from users to YouTube.[60] A similar debate for Republican candidates is slated to air later this fall.

The success of YouTube and similar sites (*e.g.*, MySpace, Facebook, AOL Video, Grouper, Blip.tv, etc.) has sparked the creation of online services with interactive features allowing people to broadcast live videos of themselves to the Internet while simultaneously receiving feedback via a live chat room beneath the video image. Stickam.com, for example, "has hundreds of young faces broadcasting themselves at any given moment."[61] A recent Facebook enhancement even allows users to create a personalized "My Channel" lineup so that others may "tune" to the member's favorite online and personal video clips.[62]

Proving that videos truly are "viral," this obsession with sharing popular clips has now spread to wireless phones. Verizon Wireless' V-Cast service provides content from the video-sharing site Revver.[63] A similar offering available from Mobango allows wireless subscribers "to publish, convert, and share with friends all kinds of user generated content - via the web and mobile devices."[64] Members of the mywaves mobile video service, which recently became available in North America on the Alltel Wireless network, may browse more than 100,000 channels of private and user-generated video. In fact, since launching in December 2006, mywaves has surpassed more than one million users globally, making it "the fastest growing, carrier independent mobile video company delivering Web videos to cell phones around the

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[60] *Id.*

[61] Ivor Tossell, "We're Looking at Each Other, And It's Not a Pretty Sight," *Globe and Mail*, May 18, 2007, p. R24.

[62] John Eggerton, "Facebook Adds Video Channel Lineup," *Broadcasting & Cable*, Aug. 28, 2007, *available at*: http://www.broadcastingcable.com/article/CA6472323.html (last visited: Sept. 4, 2007).

[63] "Verizon Wireless Revs Up Mobile Video," CNET News.Com, *available at*: http://news.com.com/Verizon+Wireless+revs+up+mobile+video/2100-1039_3-6139156.html (last visited: Sept. 4, 2007).

[64] "About Us," *available at*: http://www.mobango.com/aboutus/ (last visited: Aug. 29, 2007).

world."[65] Due to the increasing popularity of mobile video, some companies view it as a powerful forum for self expression in its own right. Treemo, for instance, a "mobile community dedicated to sharing digital media… and transforming creativity into action… inspires visitors to create their own digital expressions, and to share those creations with the world - on the web and on mobile phones."[66] The astonishing growth of both online and mobile video-sharing through the Internet and wireless devices clearly provides a multitude of outlets for expression of diverse viewpoints, rendering the continued utility of leased access channels little more than a quaint anachronism.

The growth of MVPD competition, increases in cable capacity, and the deployment of new services such as VOD are providing additional outlets for programmers who might otherwise have sought carriage through leased access. For example, TWC currently is offering "local video-on-demand" ("LVOD") service in virtually all of its divisions. LVOD programming consists primarily of locally-created content that is digitally stored on servers at the cable system headend and is made available to digital cable customers at any time of their choosing, 24 hours a day, 7 days a week. The programming offered on TWC's LVOD channels includes high school and college sports coverage, tourism information, restaurant reviews, school plays and concerts, community arts programs, and other local events. LVOD also provides a vehicle for political and public service programming and interactive participation by subscribers in program-related competitions and surveys. In short, LVOD gives cable consumers access on

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[65] "mywaves Hits One Million Mobile Users Worldwide," *available at*: http://www.mywaves.com/site/news/news_onemillion.html (last visited: Aug. 29, 2007).

[66] "About Treemo," *available at*: http://www.treemo.com/static/about/ (last visited: Aug. 29, 2007).

a 24/7, on-demand basis to precisely the type of diverse content that the leased access rules were designed to promote.[67]

2. Changes To The Substantive Provisions Of The Leased Access Rules Would Create Uncertainty And Would Further Distort The Programming Marketplace.

Looking specifically at the substantive elements of the leased access rules, such as the rate formula and the tier placement provisions, there are several additional reasons why the Commission should not disturb the current regulations. The average implicit rate formula is predictable and fairly simple to calculate.[68] By contrast, other approaches, such as a rate-of-return methodology, would be cumbersome and complex, would likely produce many errors and inconsistencies, and in any event would violate the statutory ban on imposing common carrier regulations on cable operators.[69] Moreover, by capping the rate that a cable operator may charge a programmer for leased access capacity at an amount designed to recoup nothing more than the forgone value of the used channel, the average implicit fee formula prevents any cable operator from overcharging a leased access programmer or realizing an excess return from such carriage. Indeed, on many cable systems, the rate formula produces a rate of less than $10 per hour.

Any downward adjustment to leased access rates would effectively create a subsidy flowing from the cable operator to the leased access programmer. Establishing a rate-setting methodology that produces rates that are lower than those produced by the Commission's current

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[67] TWC's LVOD offerings in Wisconsin and other areas were described more fully in *ex parte* submissions filed in connection with the Commission's review of the Adelphia transactions. *See, e.g.*, letter from Seth A. Davidson, Counsel for Time Warner Inc., to Marlene H. Dortch, Secretary, FCC (Nov. 17, 2005); letter from Seth A. Davidson, Counsel for Time Warner Inc., to Marlene H. Dortch, Secretary, FCC (Dec. 5, 2005), both filed in MB Docket No. 95-192.

[68] *1997 Leased Access Order* at ¶ 33 (The maximum rate allowed "represents the average amount of subscriber revenue that full-time programmers cede to the operator to permit the operation to cover its costs and earn a profit."). The average implicit rate is calculated using commonly kept and easily accessible data that is readily available to local cable operator personnel. *See* 47 C.F.R. §§ 76.970(d)-(h) (describing the precise methodology used by each cable system to calculate its maximum leased access channel rates).

[69] 47 U.S.C. § 541(c).

approach (which reflects the financial per-hour value of a particular channel to the cable operator) would clearly under-compensate the cable operator for the value of the foregone channel use, and cannot be squared with Congress' injunction that lease rates ". . . not adversely affect the operation, financial condition, or market development of the cable system."[70] The current "average implicit fee" formula for calculating leased access rates was upheld on review as a reasonable balancing of "the interests of leased access programmers and those of cable operators," where the court expressly affirmed the Commission's determination that, to the extent leased access is to be used as a tool to encourage diversity of programming sources, it must be accomplished "in ways that do not impose adverse financial effects on cable operators."[71]

The Commission's existing rules regarding tier placement of leased access channels also are appropriate and should not be modified.[72] These rules provide cable operators with the necessary flexibility to accommodate the demand for leased access and to minimize the disruption that leased access requirements can create for a cable system's operations, while also ensuring that leased access programmers have access to a genuine, audience-rich outlet for their programming. Indeed, it cannot be argued that there is any right to basic tier carriage for leased access programming. Unlike certain broadcast signals and PEG programming, "Congress did

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[70] 47 U.S.C. § 532(c)(1). As the Commission has recognized, Congress did not intend that "[c]able operators subsidize programmers who seek access to the system through the provision of Section 612." *1996 Leased Access Order* at ¶ 27. Rather, Congress instructed in the legislative history that "[w]hile the overall intent of [Section 612] is to diversify the sources of programming available to the public, this is to be accomplished in a manner consistent with the financial viability of individual cable systems." H.R. Rep. No. 628, 102d Cong., 2d Sess. 50 (1992) ("*1992 Act House Report*").

[71] *Valuevision Int'l, Inc. v. FCC*, 149 F.3d 1204, 1209 (D.C. Cir. 1998).

[72] Under these rules, the channels a cable operator designates for full- and part-time leasing can be on either the basic service tier or a higher tier, or on both. However, any tier above the basic service tier on which the cable operator chooses to locate leased channels must have a subscriber penetration in excess of 50%. 47 C.F.R. § 76.971(a). Tier placement and channel number on the tier are decisions within the discretion of the cable operator. 47 C.F.R. § 76.971(a)(2).

not mandate specific tier location for leased access and did not require that leased access be carried on basic service."[73]

There also is neither the need nor the requisite statutory authority for the Commission to expand the scope of leased access to interactive on-demand services such as VOD. As discussed above, LVOD is already serving the purposes underlying the leased access requirements by enabling distribution of content that might otherwise not have found a slot on the cable system line-up. Moreover, from a purely legal perspective, Section 612 requires cable operators to designate channel capacity for "commercial use,"[74] a term defined as the "provision of video programming."[75] The Commission has found that "video programming" is limited to "programming provided by, or generally considered comparable to programming provided by, a television broadcast station" in 1984.[76] No television broadcast station in 1984 was offering an on-demand type service, but rather television broadcasts were (and remain) entirely linear in that the broadcast time of each program is selected by the station, not by the viewer. Thus, Section 612 cannot be legally stretched to require cable operators to devote VOD capacity for leased access.

B. The Current Leased Access Procedures Should Be Changed, If At All, Only In Ways That Encourage Negotiation Over Litigation.

The procedural elements of the leased access rules also are not in need of any major revision. The complaint process by which disputes over leased access rates or terms and

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[73] *1993 Leased Access Order* at ¶ 498.

[74] 47 U.S.C. § 532.

[75] 47 U.S.C. § 522(b)(5).

[76] 47 U.S.C. § 522(20). *See also, Internet Ventures, Inc.; Internet On-Ramp, Inc.; Petition for Declaratory Ruling that Internet Service Providers are Entitled to Leased Access to Cable Facilities Under Section 612 of the Communications Act*, Memorandum Opinion and Order, 15 FCC Rcd 3247, ¶¶ 12-13 (2000).

conditions are resolved is spelled out in Section 76.975 of the Commission's rules.[77] Under these rules, complaints must be filed with the Commission within 60 days of any alleged violation, must state concisely the facts constituting a violation of the leased access rules and cite the specific rule or regulation allegedly violated.[78] An operator then has 30 days from the date of the complaint to submit a response.[79] In order for relief to be granted, the complainant must ultimately show, by clear and convincing evidence, that the cable operator violated the leased access rules or otherwise acted unreasonably or in bad faith.[80]

Where the dispute centers on leased access rates, the complainant must take certain procedural steps prior to presenting the matter to the Commission for resolution.[81] These procedures, which involve the review of any contested rates by a certified accountant, as well as a voluntary arbitration mechanism for the preliminary and reasoned resolution of the dispute, not only have preserved Commission resources by reducing frivolous allegations of pricing abuses, but also have contributed to the efforts of cable operators and potential channel lessees to settle their differences privately. A significant element of these procedures that helps promote compliance with the leased access rules is the requirement that the cable operator pay all the costs of an arbitration where it is found to have demanded a price in excess of the allowable maximum.[82]

The fact that the current leased access procedural rules encourage negotiation over litigation has contributed to the steep decline in the number of leased access complaints in recent

[77] 47 C.F.R. § 76.975.

[78] 47 C.F.R. § 76.975(d).

[79] 47 C.F.R. § 76.975(e).

[80] 47 C.F.R. § 76.975(g).

[81] 47 C.F.R. § 76.975(b).

[82] 47 C.F.R. § 76.975(b)(4).

years. The decrease in leased access disputes also reflects the development of a balanced and well-understood body of precedent that provides clear guidance to both cable operators and leased access programmers with respect to their rights and obligations under the rules. In TWC's experience, most of the areas of substantive contention, including insurance requirements, bonding, channel and tier placement, technical assistance and part-time carriage, can readily be resolved informally by the parties by simple reference to the Commission's prior decisions.[83] The successful negotiation of leased access agreements is clearly preferable to the resolution of such matters through complaint proceedings and the Commission must be wary of proposals to "fix" the rules that would, in fact, create uncertainty and increase the number of leased access

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[83] *See, e.g.*, Insurance Requirements: *Lorilei Communications, Inc. d/b/a The Firm v. Heritage Cablevision of California, Inc. d/b/a TCI of California*, Memorandum Opinion and Order, 14 FCC Rcd 12073, ¶ 8 (CSB 1999), *aff'd* 15 FCC Rcd 2917 (2000) (a cable operator may require a clause in an insurance certificate assuring notice of policy cancellation); *Church of New Bedford v. MediaOne*, Order on Reconsideration, 14 FCC Rcd 2863, ¶ 8 (CSB 1999) (a $1,000,000 liability limit insurance coverage requirement and a $1,500 premium payment are not unreasonable); Bonding: *United Multimedia Productions, Inc. and Hamptons Video Guide, Inc. v. CSC Acquisition-New York, Inc.*, Memorandum Opinion and Order, 16 FCC Rcd 5234, ¶ 11 (CSB 2001) (finding that petitioners had not presented any evidence to show that requiring prepayment of 50% of programming costs is unreasonable); *Lorelei Communications v. Cablevision of Monmouth*, Memorandum Opinion and Order, 13 FCC Rcd 13919, ¶ 14, fn. 25 (CSB 1998) (requiring prepayment of half of the cost of a twelve week arrangement is consistent with §76.971(d), however this determination should be made on a case by case basis and may not be appropriate in all circumstances, especially in cases of a long contract); Channel and Tier Placement: *A1A TV, Inc. v. Palm Coast Cablevision, Ltd.*, Memorandum Opinion and Order, 15 FCC Rcd 13382, ¶ 5 (CSB 2000) (placement of leased access programming on two different channels is not consistent with the requirement for reasonable channel selection or the goal of promoting competition); *Intervision Productions, Inc. v. TCI Cablevision of Pasco County Florida*, Memorandum Opinion and Order, 12 FCC Rcd 13287, ¶ 9 (CSB 1997) (a cable operator may place leased access programming on any reasonable channel so long as the tier that the channel is carried on receives more than 50% subscribership); Technical Assistance: *United Multimedia Productions, Inc. and Hamptons Video Guide, Inc. v. CSC Acquisition-New York, Inc.*, Memorandum Opinion and Order, 16 FCC Rcd 5234, ¶ 7 (CSB 2001) (a $25 tape insertion fee based on the cable operator's demonstrated costs is not unreasonable); *Engle Broadcasting v. Comcast*, Memorandum Opinion and Order, 16 FCC Rcd 17650, ¶ 5 (CSB 2001) (a cable operator is not required to transport leased access programming from one cable system to another); Part-Time Carriage: *Fal-Comm Communications v. Continental Cablevision of Michigan*, Memorandum Opinion and Order, 12 FCC Rcd 13319, ¶ 9 (CSB 1997) (a cable operator does not need to open an additional channel for part-time leased access until the existing part-time channels are "substantially filled," i.e. the leased access programming occupies 75% or more of the channel); *Matthews Media Productions vs. Coaxial Communications*, Memorandum Opinion and Order, 12 FCC Rcd 6835, ¶ 16 (CSB 1997) (it is not reasonable to require a leased access programmer to commit to an initial programming run of 13 weeks in order to secure a part-time lease); Timeframe for Response: *Frank J. Vitale, d/b/a Fal-Comm Communications vs. MediaOne of Metropolitan Detroit, Inc.*, Memorandum Opinion and Order, 14 FCC Rcd 9572, ¶ 5 (CSB 1999) (cable operators are not required to provide potential leased access programmers with a copy of their policies regarding the allocation of leased access time slots); *Smith v. TCI Cablevision of Texas, Inc.*, Memorandum Opinion and Order, 13 FCC Rcd 3121, ¶ 7 (CSB 1998) (requests for leased access information do not have to be in writing to begin the 15-day period before which the cable operator must respond).

disputes. With this caveat in mind, TWC submits that there are a few minor adjustments that merit the Commission's consideration.

First, Section 76.970(i)(1)(i) currently requires a cable operator to respond to a request for leased access information within 15 days by detailing how much of a cable operator's total leased access set-aside capacity is currently available.[84] As the channel capacity of the average cable system has expanded, the requirement that a cable operator precisely calculate and detail the entirety of its leased access set-aside each time it receives a leased access information request has become both unnecessary for the potential leased access user and unduly burdensome for the cable operator, particularly in the context of a "blanket" leased access request covering multiple systems.[85] As cable systems increasingly employ dynamic bandwidth management techniques, *e.g.*, to offer advanced services such as high-speed data and digital voice as efficiently as possible and to accommodate fluctuating capacity requirements of programmers that offer HD programming on a part-time basis, the determination of "available" video channels has become a moving target subject to constant change.

In order to minimize the disruption and waste of resources occasioned by such requests, the Commission should clarify that a cable operator's response does not have to precisely quantify the exact number of leased access channels available. Instead, where the target cable system has multiple channels of open set-aside capacity, it should be sufficient for the cable operator to simply confirm that adequate capacity is currently available to meet a prospective

[84] 47 C.F.R. § 76.970(i)(1)(i).

[85] Over the past few years, TWC has received blanket requests from purported leased access programmers asking the cable operator to precisely detail the exact amount of full-time capacity available on each cable system TWC operates. TWC has expended great energy and resources to accurately respond to such requests on a timely basis, even in cases where actual leased access use is light or non-existent, and available set-aside capacity is more than adequate. What has made these requests particularly vexing is that in virtually every case, after TWC personnel have expended countless hours to compile the information, there has been no follow-up purchase of leased access space by the requesting programmer. TWC can only speculate whether many of these requests are more about harassment than legitimate business interests.

programmer's request.[86] Precise quantification of occupied leased access capacity should be required only where a leased access request is denied on that basis.

Second, TWC submits that the leased access process could benefit from a minor revision to the response timetable specified in Section 76.975(e).[87] Specifically, the timetable applicable to filings in leased access complaint proceedings should be integrated with the generally applicable complaint timetable outlined in Section 76.7(b)(1).[88] Such a change would reduce the amount of time for a cable operator to respond to a leased access complaint from thirty days to twenty days, but would measure the deadline from the date on which the Media Bureau publishes a public notice regarding the filing of the complaint rather than from the date on which the complaint was received by the operator. The suggested change will benefit all parties by creating more certainty and allowing for participation by other interested parties, while preserving a reasonable time for the cable operator to respond.[89]

Third, the Commission should refrain from regulating leased access rates in any community that has been found to be subject to effective competition. The Commission's jurisdiction to regulate cable programming and leased access rates is delineated in Section 623(a)(1) of the Communications Act.[90] The statutory limitations on Commission authority

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[86] In the alternative, the cable operator's timeframe to respond to requests involving multiple systems should be extended to thirty days from the current fifteen.

[87] 47 C.F.R. § 76.975(e).

[88] 47 C.F.R. § 76.9(b)(1).

[89] Leased access programmers often do not have the resources or experience to engage in all of the formalities of Commission pleading and, as a result, occasionally reach out to the Commission not with formal complaints, but rather with informal letters that seek some ill-defined form of regulatory intervention. Given the informal and frankly rambling nature of such correspondence, confusion can and does arise as to whether or not the Commission will treat such a letter as a formal complaint triggering the thirty-day deadline for the cable operator's response under Section 76.975(e). Filing a response to informal correspondence that the Commission may decide does not warrant treatment as a formal complaint not only is a waste of resources, but also could very well escalate the conflict with the programmer or limit the operator's response options should an actual formal complaint be eventually filed.

[90] 47 U.S.C. § 543(a)(1).

expressly recite a preference for competition over regulation.[91] While the ban on rate regulation in Section 623(a)(2) for cable systems that face effective competition does not expressly apply to leased access rates, nothing prevents the Commission from exercising regulatory restraint in such situations. Indeed, allowing leased access rates to be established through the competitive interplay of supply and demand would be entirely consistent with the overriding policy goals of the 1992 Cable Act to rely on marketplace forces to the maximum extent feasible, as well as the recognition by Congress in the 1984 Cable Act that "[m]arketplace negotiations over use of leased access channels should result in the establishment of fair rates."[92]

IV. THE COMMISSION SHOULD NOT MAKE ANY CHANGES IN THE PROGRAM CARRIAGE RULES THAT WOULD ENCOURAGE THE FILING OF BASELESS COMPLAINTS.

The disciplining effect of an intensely competitive video distribution marketplace is successfully achieving the goals that Congress sought to foster when it enacted Section 616 — the development of diverse, independent, competitive sources of programming — without the need for Commission involvement in dictating the terms by which programmers and MVPDs reach agreement on carriage.[93] As the Commission wisely concluded when it first implemented Section 616, it is important that the program carriage rules "strik[e] a balance" between the interests of unaffiliated programmers and the legitimate business practices of cable operators and

[91] *See, e.g.*, 47 U.S.C. § 543(a) ("competition preference"); § 543(a)(2) ("preference for competition").

[92] *1984 Act House Report* at 50 (1984).

[93] *See, e.g.*, *Applications for Consent to the Assignment and/or Transfer of Control of Licenses, Adelphia Communications Corp., Assignors, to Time Warner Inc., Assignees; Adelphia Communications Corp., Assignors and Transferors, to Comcast Corporation, Assignees and Transferees; Comcast Corporation, Transferor, to Time Warner Inc., Transferee; Time Warner Inc., Transferor, to Comcast Corporation, Transferee*, Reply of Adelphia Communications Corporation, Comcast Corporation, and Time Warner Inc., MB Docket No. 05-192 (filed Aug. 5, 2005), at 78-83.

other MVPDs.[94] There is simply no evidence to suggest that the current rules, to the extent they are needed at all, are no longer striking the proper balance.

A. **<u>There Is No Evidence That Changes To The Program Carriage Rules Are Needed To Protect The Public's Interest In Program Diversity And Competition</u>.**

In his separate statement accompanying the NPRM in this proceeding, Commissioner Copps noted that over the years only a small number of program carriage complaints have been filed and asked whether this is because "independent programmers are not facing unfair or discriminatory practices" or because the rules "fail to provide timely and adequate relief and thus discourage the filing of otherwise legitimate claims?"[95] TWC respectfully submits that the answer to Commissioner Copps' question can be found in the Commission's own annual reports which describe the transformation that has occurred in the video marketplace over the past decade-and-a-half. In particular, as described above, since 1992 the number of national cable programming networks has increased five-fold (to well over 500) and the percentage of networks that are vertically-integrated with a cable operator has dropped dramatically.

Notwithstanding the robust competition and broad array of diverse choices available in today's video marketplace, the argument was made during the Commission's consideration of the Adelphia transactions that the current program carriage rules are insufficient to protect independent programmers and that there is a need for the government to intrude even more deeply into the exercise of business and editorial judgments by cable operators and other MVPDs. As TWC and others pointed out in response to such arguments, there is no factual (or policy) basis for the assertion that changes to the existing rules and procedures are needed to promote distribution of independent programming. For example, on TWC's cable systems, the

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[94] *Program Carriage Order* at ¶ 14.

[95] NPRM (Statement of Commissioner Copps).

vast majority of the channels are used to provide programming in which TWC has no ownership interest. This is hardly surprising since, in making programming decisions, TWC relies on its business and editorial judgment as to whether a particular channel meets the needs and interests of its subscribers and considers such factors as input from local management, the system's overall product mix and capacity, and the financial terms being offered by the programmer. All of TWC's negotiations with programming networks — regardless of ownership affiliation — are conducted at arm's length and with the goal of maximizing the value offered to subscribers.

As previously discussed, the Commission has properly recognized that Congress did not intend for the program carriage rules to interfere with "legitimate business practices common to a competitive marketplace," including the ability of distributors and programmers to engage in "legitimate, aggressive negotiations."[96] This is significant, not only in assessing claims that the current rules are somehow deficient, but also in weighing specific proposals for changing the rules, such as the suggestion that the Commission should impose on cable operators a substantive obligation to negotiate with unaffiliated programmers for national carriage rather than for system-by-system carriage.[97] Both the system-by-system "hunting license" approach to negotiating carriage and the national carriage agreement approach represent "legitimate business practices common to a competitive marketplace" and, thus, given the congressional admonition that the Commission should "rely on the marketplace, to the maximum extent feasible, to achieve greater availability" of diverse programming sources, it would be wholly inappropriate for the Commission to adopt rules dictating the outcome of this particular element of carriage negotiations between operators and a class of programmers.

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[96] *Program Carriage Order* at ¶¶ 14-15.

[97] NPRM at ¶ 17.

Similarly, there is no need for the Commission to make any changes in the procedural elements of the program carriage complaint process. Indeed, a review of the only two program carriage complaints to have been considered on their merits establishes that the existing procedures can and do further the objective of encouraging the establishment of programming arrangements through marketplace negotiations rather than by administrative litigation and government fiat.

Briefly stated, the current rules provide for the filing of a complaint, followed by an answer (due 30 days after the complaint) and a reply (due 20 days after the answer).[98] Once the pleadings are submitted, the staff is required to make a determination as to whether the complainant has made out a *prima facie* case of a violation of the rules and, if so, whether relief can be granted on the existing record.[99] If a *prima facie* case has been established, but the record is not sufficient to resolve the complaint and grant relief, the staff can either order discovery or refer the case to an administrative law judge ("ALJ") for an administrative hearing.[100] However, as provided in Section 76.7(g)(2) of the Commission's rules, before referring a case to an ALJ, the staff is required to give the parties ten days to decide whether to proceed with the administrative hearing or to voluntarily elect to submit the matter to alternative dispute resolution procedures.[101]

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[98] 47 C.F.R. § 76.1302. A programmer must provide the potential defendant with at least ten days written notice of its intent to file a complaint.

[99] *Program Carriage Order* at ¶ 31.

[100] *Id. See also* 47 C.F.R. §§ 76.7(f), (g).

[101] The Commission's rules and orders contain numerous other safeguards designed to ensure that the program carriage complaint process is conducted expeditiously. For example, the Commission has established time limits for the submission of post-discovery findings of fact and conclusions of law and replies thereto. *See Program Carriage Order* at ¶ 33. The Commission also has directed that an ALJ to whom a program carriage dispute is referred should hold an immediate status conference to establish timetables for discovery, hearing and submission of briefs, findings of facts, and conclusions of law and has restricted the filing of interlocutory appeals. *Id.* at ¶ 34.

Turning to the two program carriage complaints that have been reviewed on the merits over the past fifteen years, it appears that in *Classic Sports*, the staff completed its review of the pleadings and issued a hearing designation order within 120 days of the filing of the complaint (and within 60 days of the filing of the reply).[102] The matter was thereafter settled by the parties and dismissed at their request.[103] The more recent program carriage dispute between Comcast and TCR over carriage of the Mid-Atlantic Sports Network admittedly took longer to resolve as measured from the date the complaint was filed (roughly a year). However, that case was delayed by factors unrelated to the Commission's procedural rules — *i.e.*, ancillary litigation, high-level political involvement, and the linking of the complaint to the review of the Adelphia transactions. Once the full Commission referred the matter to an ALJ (something that could have been ordered by the staff much sooner but for the above-described extraneous factors), the case, like the *Classic Sports* case, was promptly resolved by the parties through private negotiations.[104]

B. <u>At Most, The Commission Should Reaffirm And Clarify The Requirement That Program Carriage Complaints Must Establish A *Prima Facie* Case Based On Documentary Evidence, Not Conjecture</u>.

Upon receipt of a complaint under the program carriage rules, the Media Bureau is required to make an initial determination as to whether the complainant has established a *prima facie* case of a violation and to immediately dismiss complaints that fail to meet this test.[105] The

[102] *Classic Sports Network, Inc. v. Cablevision Systems Corporation*, Memorandum Opinion and Hearing Designation Order, 12 FCC Rcd 10288 (rel. July 16, 1997).

[103] *Classic Sports Network, Inc. v. Cablevision Systems Corporation; Joint Stipulation of Dismissal*, Order, 12 FCC Rcd 22100 (rel. Dec. 24, 1997).

[104] Mike Reynolds, "Comcast, MASN Ink Carriage Deal," *Multichannel News*, Aug. 7, 2006, *available at*: http://www.multichannel.com/article/CA6360260.html (last visited: Sept. 11, 2007).

[105] Successfully making out a *prima facie* case does not end the matter in the complainant's favor. Rather, it simply means that the case can proceed to discovery (to the extent deemed necessary) and a full consideration of both sides' arguments. The Commission has recognized that in most instances where a complainant overcomes the *prima facie*

NPRM asks whether the elements of a *prima facie* program carriage complaint should be clarified.[106] Any such clarification (which only would be necessary if, notwithstanding the constitutional infirmities identified above, the Commission intends to continue to enforce the program carriage rules) should reaffirm the exacting nature of the burden imposed on program carriage complainants to put forward a *prima facie* case and the consequences of a complainant's failure to meet this burden.

For example, the program carriage rules were not intended to be a vehicle for anti-competitive fishing expeditions by programming vendors. Thus, the Commission should remind programmers of its previous determination that, in order to make out a *prima facie* case, a complaint must be supported by "documentary" evidence or testimony and "may not merely reflect conjecture or allegations based only on information and belief."[107] The Commission also should reaffirm that complainants who fail to make out a *prima facie* case may be subject to sanctions for filing a frivolous complaint.

With respect to the *prima facie* standard itself, the Commission indicated in its orders implementing Section 616 that the boundaries of what constitutes prohibited conduct would emerge through the development of a body of precedent on a case-by-case basis.[108] TWC submits that this continues to be the right approach. If, however, the Commission does decide to elaborate on the *prima facie* standard, it should take a page from the Supreme Court's recent *Twombly* decision and clarify that in order to establish a *prima facie* case under Section 616, a complaint must set forth a plausible case for relief based on specific factual allegations rather

case threshold, resolution of the matter will require an administrative hearing to evaluate contested facts. *Program Carriage Order* at ¶ 24.

[106] NPRM at ¶ 14.

[107] *Program Carriage Reconsideration Order* at ¶ 33.

[108] *Program Carriage Order* at ¶¶ 17, 29.

than speculation, legal conclusions, or the formulaic recitation of the elements of a violation of the rules.[109]

For example, a complaint alleging a violation of Section 616(a)(3) must on its face allege more than the mere fact that the respondent MVPD is carrying a vertically-integrated programming service on different terms and conditions than those offered to the complainant. Rather, the complaint must be accompanied by documentary evidence establishing that the MVPD has an attributable interest in a programming service that is substantially similar to the complainant's service in terms of content and that directly competes with complainant's service in terms of the targeted audience.[110] Moreover, the complaint must allege facts affirmatively demonstrating that the MVPD's extension of different carriage terms to the complainant is motivated by an intent to cause the complainant competitive harm due to its lack of affiliation with the MVPD. And, as the Commission has recognized, in order to avoid immediate dismissal, a program carriage complaint must set forth factual allegations, backed up by documentary evidence, supporting the conclusion that the conduct prompting the complaint is unreasonably restraining the ability of the complainant to compete by threatening the complainant's viability.[111]

Put another way, it simply is not enough for a complainant to assert that an MVPD has the incentive and ability to discriminate against an unaffiliated programmer.[112] Rather, the

[109] *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955, 1964-65 (2007). The *Twombly* case addressed the standard for avoiding a Rule 12(b)(6) motion to dismiss in an action brought under Section 1 of the Sherman Act; however, the underlying principles articulated in the case are equally applicable to the question of what is necessary to make out a *prima facie* case under Section 616.

[110] For instance, allegations that a complainant's sports-themed network is being discriminated against by an MVPD with an attributable interest in a general interest network that happens to offer some sports programming are insufficient to make out a *prima facie* case.

[111] *Program Carriage Order* at ¶ 14.

[112] While the adoption of the program carriage rules reflects an assumption on the part of Congress that MVPDs may have the ability and incentive to favor affiliated programmers, the Commission properly has recognized that

Commission's initial review of a program carriage complaint must always take into consideration the competitive realities of today's video programming marketplace and the fact there are valid business and technical reasons why a cable operator might conclude that carrying a particular service on the terms demanded would not on the whole make for a better, more competitive video package.[113] Thus, for instance, in assessing a complaint based on an MVPD's rejection of an unaffiliated programmer's demand for analog carriage, the Commission must keep in mind that analog basic tiers are largely channel locked and, as a result of the Commission-encouraged migration of cable systems to digital technology, are shrinking in size. Moreover, carriage on a digital tier, which increasingly have penetration levels in excess of fifty percent (and are growing rapidly), cannot plausibly be viewed as inherently damaging to a service's prospects for survival.[114]

Finally, making out a *prima facie* case under Sections 616(a)(1) and (a)(2), which prohibit MVPDs from requiring a financial stake in a programmer as a condition of carriage or from engaging in coercion or retaliation with respect to the grant of exclusive rights, also requires the complainant to show more than the mere fact that the MVPD requested or obtained a

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Congress did not intend to treat cable operators as common carriers and that "discrimination" can result from legitimate business practices. *Id.* at note 6, *citing 1992 Act House Report* at 110.

[113] In particular, where a cable operator is willing to carry a programmer, but refuses to meet the programmer's demands for carriage on a particular tier or pursuant to particular terms, the question is not whether that decision is the "best" decision – it is whether it is a plausibly legitimate exercise of the operator's business judgment. *Cf. Program Carriage Order* at ¶¶ 13-17 (noting that one commenter suggested that a *prima facie* case might be established where an MVPD's refusal to carry an unaffiliated service is "without reasonable business justification" as a factor that might support *a prima facie* complaint of a violation of Section 616(a)(3)). Thus, even where a complainant can point to evidence of demand for its service or of carriage of its service by other MVPDs, the complaint must be accompanied by evidence supporting the conclusion that the reasons given by the operator for its decisions cannot be anything other than pretextual.

[114] In light of the diminishing availability of analog capacity, complaints based on allegations that an MVPD providing analog carriage to an affiliated service is refusing to provide comparable carriage to an unaffiliated programmer should at minimum be required to show that the respondent only recently started carrying the affiliated service on analog. *Cf. Program Carriage Order* at ¶¶ 13-17 (noting that one commenter suggested that a *prima facie* case might be established by pointing to the "assignment of significantly inferior channel positioning, or other type of inaccessibility to subscribers, as compared to competing affiliated *services added to the system during the same time period*") (emphasis supplied).

financial stake or exclusivity. Rather, consistent with prior Commission findings on this issue, there must be documentary evidence of "ultimatums, intimidation, conduct that amounts to the exertion of pressure beyond good faith negotiations, or behavior that is tantamount to an unreasonable refusal to deal."[115]

V. THE COMMISSION SHOULD NOT ADOPT NEW ARBITRATION MANDATES FOR RESOLVING LEASED ACCESS OR PROGRAM CARRIAGE DISPUTES.

The NPRM seeks comment on the application of arbitration procedures to resolve leased access and program carriage disputes.[116] As described above, voluntary alternative dispute resolution is already an element of both the leased access and program carriage complaint processes. The leased access rules, which require review of rate disputes by an independent accountant prior to the filing of any complaint with the Commission, allow the parties to voluntarily initiate alternative dispute resolution processes in an attempt to reach an accord prior to further Commission consideration of the matter.[117] With respect to program carriage complaint proceedings that the Commission designates for a hearing before an ALJ, the rules permit the parties to elect to resolve their dispute through alternative dispute resolution procedures in lieu of an adjudicatory hearing.[118]

These voluntary dispute resolution procedures, along with competitive and technological developments, have contributed to the current environment in which leased access and program carriage disputes rarely arise and are typically resolved with little expenditure of Commission resources. Moreover, even if the existing procedures were somehow lacking, the Commission is constrained by federal law from imposing mandatory alternative dispute resolution procedures in

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[115] *Program Carriage Order* at ¶ 17.

[116] NPRM at ¶ 19.

[117] 47 C.F.R. §§ 76.975(b)(1), (b)(5).

[118] 47 C.F.R. § 76.7(g).

an attempt to rectify any perceived deficiencies. Specifically, pursuant to Supreme Court precedent, "a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit."[119] The Alternative Dispute Resolution Act ("ADRA") likewise seeks to ensure "that the use of arbitration is *truly voluntary* on all sides" by prohibiting federal agencies, including the Commission, from requiring parties to submit to mandatory alternative dispute resolution procedures.[120] The ADRA clearly states that alternative dispute resolution is only permissible if "the parties agree to such proceeding," and that alternative dispute resolution mechanisms are "voluntary procedures which supplement rather than limit other available agency dispute resolution techniques."[121]

Because Congress has not expressly prescribed mandatory alternative dispute resolution as a mechanism for resolving leased access or program carriage,[122] the Commission has no authority to delegate to third parties the resolution of leased access and program carriage complaints via mandatory arbitration.[123] The Commission's own policy statement concerning the use of alternative dispute resolution procedures recognizes this limitation, expressly stating

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[119] *AT&T Techs., Inc. v. Communications Workers of Am.*, 475 U.S. 643, 648 (1986), *citing United Steelworkers of Am. v. Warrior & Gulf Nav. Co.*, 363 U.S. 574, 582 (1960); *see also Air Line Pilots Ass'n v. Miller*, 523, U.S. 866, 869 (1998) (holding that "employees need not submit fee disputes to arbitration when they have never agreed to do so.").

[120] S. Rep. No. 101-543, at 13, *as reprinted in* 1990 U.S.C.C.A.N. 3931, 3943 (emphasis added); *accord id.* at 3932 (stating that "[p]articipation in the ADR techniques authorized by the Act is predicated on the voluntary, informed agreement of all parties to a dispute."); *see also id.* at 3933 (explaining that Congress passed ADRA "to promote more efficient, effective administrative procedures through the use of voluntary, informal procedures"); *id.* at 3936 (providing that mandatory ADR is only constitutional if the "decision to arbitrate" is truly "voluntary on the part of all parties and is subject to... [ADRA] guidelines"); *id.* at 3937 (indicating that "[v]oluntary binding arbitration" is only "authorized when all parties consent"); *id.* at 3939 (explaining that ADRA permits alternative dispute resolution only "when all the parties to the dispute voluntarily agree to its use").

[121] 5 U.S.C. §§ 572(a), 572(c).

[122] *See, e.g.*, 47 U.S.C. § 252(b) (mandatory arbitration before the state PUC relating to interconnection and related disputes between telecommunications carriers).

[123] As noted by the United States Court of Appeals for the D.C. Circuit, "the case law strongly suggests that subdelegations to outside parties are assumed to be improper absent an affirmative showing of Congressional authorization." *USTA v. FCC*, 359 F.3d 554, 565 (D.C. Cir. 2004); *see also Michigan Bell v. Lark*, 373 F. Supp. 2d (E.D. Mich. 2005).

that such "techniques are purely voluntary."[124] Moreover, even if the Commission were to preserve the right to review such proceedings, *de novo* consideration would not make the imposition of mandatory arbitration lawful because it would not negate the fact that parties would be compelled to submit to such process without their consent.

Finally, leased access and program carriage proceedings often involve policy implications that the Commission is uniquely qualified to consider.[125] The ADRA prohibits mandatory alternative dispute resolution in such circumstances.[126] Thus, although the existing voluntary alternative dispute resolution mechanisms available under the leased access and program carriage rules have been largely successful, the Commission plainly lacks authority to adopt any modifications that would require mandatory and involuntary applicability of such procedures.

VI. CONCLUSION

Today's video programming marketplace bears little resemblance to the competitive landscape that existed at the time Congress was considering, and the Commission was implementing, the 1992 Cable Act. In particular, today's video marketplace is characterized by levels of competition and program diversity unimaginable fifteen years ago. Under the

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[124] *Use of Alternative Dispute Resolution Procedures in Commission Proceedings and Proceedings in which the Commission is a Party*, Initial Policy Statement and Order, 6 FCC Rcd 5669, ¶ 12 (1991) ("*Initial ADR Policy Statement*").

[125] *See, e.g.*, note 83 *supra*.

[126] An agency is prohibited from requiring parties to submit to alternative dispute resolution if, among other things, the matter involves significant questions of Government policy, agency resolution of the dispute would ensure consistent results among decisions, the matter significantly affects persons or organizations who are not parties to the proceeding, or a full public record of the proceeding is important. *See* 5 U.S.C. § 572(b). Furthermore, the ADRA requires the head of each agency to consult with the Attorney General and issue guidance concerning circumstances where mandatory arbitration is appropriate. 5 U.S.C. § 575(c). Although the FCC issued its initial policy statement and solicited public comment concerning mandatory arbitration several years ago, it did not release a final order that would establish the formal guidance required under the ADRA. *See Initial ADR Policy Statement* (establishing the Commission's preliminary policies concerning the use of ADR and expressly providing for issuance of a final policy statement that would be subject to review by the Administrative Conference of the United States and the Federal Mediation and Conciliation Service).

circumstances, the Commission should steer clear of making changes to the program carriage and leased access rules that not only are unnecessary, but also would further inject government into the editorial and business decisions made by multichannel video programming distributors in contravention of Congress' express policy of preferring marketplace solutions over regulation to the maximum extent feasible.

Respectfully submitted,

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September 10, 2007

FILED ELECTRONICALLY

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: MB Docket No. 07-29
Notice of *Ex Parte* Presentation

Dear Ms. Dortch:

On September 7, 2007, on behalf of Cablevision Systems Corporation ("Cablevision"), Lee Schroeder of Cablevision spoke by telephone with Michelle Carey, Senior Legal Advisor to Chairman Martin, regarding the above-captioned proceeding. The substance of their discussion is reflected in the attached papers, which were also provided to Ms. Carey.

Pursuant to section 1.1206(b) of the Commission's rules, an electronic copy of this letter and the attachments is being filed electronically with the Office of the Secretary and served electronically on the Commission participants in the meetings.

Should there be any questions regarding this matter, please contact the undersigned.

Sincerely,

Howard J. Symons

Howard J. Symons

Attachments
cc: Michelle Carey

THE FCC SHOULD TRANSITION AWAY FROM THE PROGRAM ACCESS EXCLUSIVITY BAN

THE EMERGENCE OF DURABLE COMPETITION WARRANTS A SHORTENED EXTENSION OF THE EXCLUSIVITY BAN

- Since enactment of the program access provisions, the share of MVPD customers served by cable's competitors has increased more than ten-fold
- DBS providers' share of MVPD subscribers jumped 53% between June 2002 and June 2006, while cable's share of MVPD customers fell another 16% during the same period.
- Five years ago, there were no significant efforts by incumbent local exchange carriers (ILECs) to provide video programming to consumers. Today, AT&T and Verizon are offering service to what is expected to be nearly 14 million households by the end of this year, and that number is expected to nearly double by the end of 2008.
- Given the strength and accelerating pace of competition for MVPD subscribers, and the dynamic changes taking place in the overall video marketplace, it makes little sense to retain legacy regulations like the exclusivity ban for a lengthy period time. The Commission should therefore adopt retain the ban for no more than 3 years.

THE COMMISSION SHOULD ESTABLISH A MECHANISM FOR FASTER REMOVAL OF THE EXCLUSIVITY BAN SHOULD IN MARKETS WHERE COMPETITION FROM DBS AND THE TELCOS HAS TAKEN FIRM ROOT

- In many local markets around the country, incumbent cable operators face competition from three powerful competitors: DirecTV (the 2nd largest MVPD in the country), EchoStar (the 4th largest MVPD) and either Verizon or AT&T (companies with market caps and network footprints far larger than any cable operator).
- In its current form, however, the exclusivity ban effectively presumes that a cable operator facing local market competition from DBS and the telcos could nonetheless use exclusivity to drive DirecTV, EchoStar, and either Verizon or AT&T from the marketplace. There is no empirical basis for blanket retention of such a presumption in markets where both DBS and a telco are competing with cable. Eighty percent of all programming networks are unaffiliated with cable operators, fewer than 1 in 3 of the top 40 networks are vertically integrated with cable and all four of cable's chief competitors have the wherewithal to develop their own programming and enter into exclusive arrangements themselves.
- In the UNE context, the Commission has recognized that government-imposed asset-sharing arrangements among competitors are justifiable only when found to be a competitive necessity based upon a "granular analysis" of local market conditions. *See, e.g., Triennial Review Order*, 18 FCC Rcd 16978, ¶ 118 (the FCC must undertake a granular analysis "considering 'market-specific variations in competitive impairment'" without access to UNEs) (quoting *United States Telecom Ass'n v. FCC*, 290 F.3d 415, 422 (D.C. Cir. 2002) (*USTA I*)) (subsequent history omitted); *Triennial Review Remand Order*, 20 FCC Rcd 2533, ¶ 8 (2005) (noting *USTA I* rejected national sharing obligations because they "did not account for differences in particular markets and particular customer classes"), *aff'd Covad Comm. Co. v. FCC*, 440 F.3d. 528 (D.C. Cir. 2006) (noting that that "*USTA I* and *USTA II* require a nuanced application of a "granular" impairment standard, which incorporates competitive variations within and across markets").

- The Commission should establish a mechanism to permit a cable operator to obtain relief from the exclusivity ban in any local market where a granular analysis of marketplace conditions demonstrates that the ban is no longer "necessary to preserve and protect competition and diversity in the distribution of video programming" in that market.

THE FCC SHOULD TRANSITION AWAY FROM THE PROGRAM ACCESS EXCLUSIVITY BAN

Three Year Extension. The continued emergence of durable competition from DBS and the incumbent local exchange carriers (ILECs) warrants a shortened extension period for the exclusivity ban. Since enactment of the program access provisions, the share of MVPD customers served by cable's competitors has increased more than ten-fold. DBS providers' share of MVPD subscribers jumped 53% between June 2002 and June 2006, while cable's share of MVPD customers fell another 16% during the same period.

Five years ago, there were no significant efforts by incumbent local exchange carriers (ILECs) to provide video programming to consumers. Today, AT&T and Verizon are offering service to what is expected to be nearly 14 million households by the end of this year, and that number is expected to nearly double by the end of 2008. [1/] While the telephone companies are relatively nascent video competitors, it is clear that they have the intention and capacity to be durable competitors.

Given the strength and accelerating pace of competition for MVPD subscribers, and the dynamic changes taking place in the overall video marketplace, legacy regulations such as the exclusivity ban should not be retained for a lengthy period time. The Commission should therefore extend the ban for no more than 3 years.

Faster Removal of Exclusivity Ban in Local Markets Where Competition from DBS and the ILECs. In some local markets around the country, incumbent cable operators face competition from three powerful competitors: DirecTV (the 2nd largest MVPD in the country), EchoStar (the 4th largest MVPD) and either Verizon or AT&T. In a growing number of local markets around the country, MVPD subscribers now have a choice of four different video programming distributors, thereby calling into question the continued need for government intervention -- in the form of the exclusivity ban -- to ensure competition in such areas.[2/]

Competition in today's video market is highly dynamic and variable. A national, monolithic assessment of whether there is "video competition" may no longer be sufficient to properly meet the statutory requirement that the exclusivity ban be imposed only where "necessary to preserve and protect competition." In its current form, the exclusivity ban effectively presumes that a cable operator facing local market competition from DBS and the telcos could nonetheless use exclusivity to drive DirecTV, EchoStar, and either Verizon or AT&T from the marketplace. There is a substantial basis for questioning whether that presumption should continue to apply in markets where both DBS and a telco are competing with cable. Eighty percent of all programming networks are unaffiliated with cable operators, fewer than 1 in 3 of the top 40 networks are vertically integrated with cable and all four of cable's chief competitors have the financial strength and resources to develop their own programming and enter into exclusive arrangements themselves.[3/]

In connection with the application of other government-imposed asset-sharing arrangements, courts and the Commission have emphasized the importance of imposing such requirements only in circumstances in which they are found to be a competitive necessity based

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1/ *See* Cablevision Comments at 2.

2/ *See* Cablevision Comments at 15-16, 31-32.

3/ *See* Cablevision Comments at 2-3, 17-20 .

upon a "granular analysis" of local market conditions. *See, e.g., Triennial Review Order*, 18 FCC Rcd 16978, ¶ 118 (the FCC must undertake a granular analysis "considering 'market-specific variations in competitive impairment'" without access to UNEs) (quoting *United States Telecom Ass'n v. FCC,* 290 F.3d 415, 422 (D.C. Cir. 2002) (*USTA I*)) (subsequent history omitted); *Triennial Review Remand Order,* 20 FCC Rcd 2533, ¶ 8 (2005) (noting *USTA I* rejected national sharing obligations because they "did not account for differences in particular markets and particular customer classes"), *aff'd Covad Comm. Co. v. FCC*, 440 F.3d. 528 (D.C. Cir. 2006) (noting that that "*USTA I* and *USTA II* require a nuanced application of a "granular" impairment standard, which incorporates competitive variations within and across markets").

In light of the dynamism and variability of competition in local markets around the country, and the Commission's legal obligation to limit the imposition of sharing arrangements only to markets where a granular analysis of local market conditions compels a conclusion that such arrangements are a competitive necessity, cable operators facing competition from DBS and the telcos should be afforded the opportunity to show that the ban is no longer necessary to protect competition. Accordingly, the Commission should establish, for the remaining three years of the exclusivity ban, a petition mechanism that will permit any MSO to demonstrate that the markets served by one or more of its systems face durable competition from multiple providers of video programming and that, therefore, continuation of the exclusivity ban in that market is no longer "necessary to preserve and protect competition." The Commission should address and resolve such petitions on an expedited timeframe -- i.e., no greater than 90 days from the date of filing.

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September 5, 2007

FILED ELECTRONICALLY

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: MB Docket No. 07-29
Notice of *Ex Parte* Presentation

Dear Ms. Dortch:

On September 4, 2007, on behalf of Cablevision Systems Corporation ("Cablevision"), Michael Olsen of Cablevision, Justin Lilley of TeleMedia Policy Corp., and the undersigned met with Rudy Brioché, Legal Advisor to Commissioner Adelstein, and Amy Blankenship, Legal Advisor to Commissioner Tate, regarding the above-captioned proceeding.

In the meetings, we reiterated the argument in our filings in this proceeding that extending the exclusivity ban in section 628(c)(2)(D) would be inconsistent with the state of technology and the marketplace and that retention of the ban therefore cannot be justified under the standard of section 628(c)(5). We also proffered the proposal described in the attachment hereto and provided copies of the attached materials to the Commission participants in the meetings.

Pursuant to section 1.1206(b) of the Commission's rules, an electronic copy of this letter and the attachments is being filed electronically with the Office of the Secretary and served electronically on the Commission participants in the meetings.

Should there be any questions regarding this matter, please contact the undersigned.

Sincerely,

Howard J. Symons

Howard J. Symons

Attachments
cc: Rudy Brioché
Amy Blankenship

CURRENT CONDITIONS COMPEL A NARROWING OF THE PROGRAM ACCESS EXCLUSIVITY BAN

THE MARKETPLACE IS MORE COMPETITIVE THAN IN 1992 AND 2002.

- DBS providers' share of MVPD subscribers jumped 53% between June 2002 and June 2006.
- Five years ago, there were no significant efforts by the ILECs to provide video programming to consumers. Today, AT&T and Verizon are offering service to what is expected to be nearly 14 million households by the end of this year.

OPERATORS FACING WELL-FUNDED COMPETITORS SHOULD HAVE ALL COMPETITIVE TOOLS AVAILABLE TO THEM.

- Both DirecTV and EchoStar have at least double the number of subscribers of every cable MSO in the country, with the exception of Comcast and Time Warner.
- DirecTV and EchoStar are the second and fourth largest MVPDs, serving 15.72% and 12.27% of MVPD subscribers respectively, while Cablevision, which serves 3.22% of MVPD subscribers, is ranked eighth.
- AT&T is spending $4.6 billion to upgrade its network in order to provide video to an expected 19 million homes by mid-2008. Verizon has stated that it plans to invest $18 billion in its FiOS network by the year 2010.

THE WIDE AVAILABILITY OF PROGRAMMING FROM MULTIPLE SOURCES MEANS THAT THE ABERRATIONAL FORCED SHARING POLICY MUST BE NARROWLY TAILORED.

In addition to DBS and Telcos, consumers can receive programming from:

- **Broadband service overbuilders**, including RCN, Wide Open West ("WOW"), Knology, and Grande. RCN's network passes 1.6 million homes and serves approximately 406,000 subscribers. In 2006 alone, RCN's subscriber base increased by 6,000 and new product additions increased by 26,000. Knology's network passes 759,000 homes in its service area and through its pending acquisition of PrairieWave Holdings, Inc. in 2007, Knology is poised to increase its customer base by another 157,000 subscribers.
- **Municipal providers.** There are currently well over 100 municipal utility broadband systems providing video services in every region of the country.
- **SMATV.** There are at least 150 SMATV providers offering services throughout the United States. SMATV providers are particularly strong in Cablevision's service area: at least six SMATV operators compete with Cablevision in New York and New Jersey and at least four compete with Cablevision in Connecticut
- **Internet Video.** In July 2006 alone, 107 million Americans, three out of every five Internet users, viewed video online. According to the *Wall Street Journal*, "video Web sites now draw users in numbers that rival those of cable and satellite companies."
- **Mobile Video.** By 2010, more than 250 million people worldwide will be watching mobile video, generating $27 billion in revenue.
- **Competition from Electric and Gas Utilities**. Electric and gas utilities are well positioned for entry into the MVPD market, through their existing access to public rights-of-way and established customer relationships.

PROPOSED PROGRAM ACCESS COMPETITION TEST

The exclusivity restriction shall not apply to non-sports programming owned by a cable operator in any Designated Market Area (DMA) not served by that cable operator. The exclusivity restriction shall not apply to such programming in any DMA served by that cable operator if a wireline incumbent local exchange carrier (ILEC) offers multichannel video programming service to at least 20% of the households passed by the operator in that DMA.

- A cable operator has little if any incentive to unlawfully withhold programming from non-cable MVPD in markets where the operator does not provide cable service.

- The Commission has implicitly acknowledged that the likelihood of foreclosure declines as the size of a cable operator's footprint falls. *2002 Extension Order at ¶ 38* ("The larger the number of subscribers controlled by the vertically integrated cable programmer the larger the benefits of withholding that accrue to that programmer. Other things being equal then, as the number of subscribers rises, so does the likelihood that withholding could be profitable."). A cable operator that passes only 5 percent of the nation's television households and faces competition from EchoStar, DirecTV (each of which serves more than 10 million subscribers and passes virtually every home in the country) and either AT&T or Verizon has no ability to foreclose competition through exclusivity with an affiliated national programming service.

- Even within an operator's footprint, the Commission recently determined that an MVPD's lack of access to regional non-sports programming could not harm competition or consumers. *See Adelphia Transfer Order* at ¶ 169. DBS providers carry few, if any, of the 59 non-sports regional programming services available on the marketplace, *See Twelfth Annual Report*, at ¶ 166 (identifying 96 regional networks) and ¶ 183 (identifying 37 regional sports networks), even though, as the Commission notes, "many, but not all, regional networks are satellite-delivered." *Id.* at ¶ 166. The fact that DirecTV and EchoStar have ascended to be the second and fourth largest MVPDs in the country without carrying regional non-sports networks provided by cable operators offers strong evidence that such networks are not "essential" to their competitive viability.

- Verizon provides wireline service to over 40 million homes while AT&T serves over 30 million homes. Verizon and AT&T enjoy a combined market capitalization of approximately $350 billion, roughly 40 times larger than Cablevision. In its most recent quarter, Verizon earned $22 billion in revenues while AT&T reaped $29 billion -- 15 to 20 times larger than Cablevision's $1.5 billion in revenues in its most recent quarter.

- The LEC test for cable rate deregulation requires only that a LEC "offer video programming . . . in the franchise area." Unlike the other effective competition tests, Congress expressly did not require the LEC to meet a minimum penetration or passby test as a predicate for rate deregulation of the incumbent cable operator.

- Explicitly requiring an ILEC to pass at least 20% of households as a condition of sunsetting the exclusivity ban would go further than the effective competition test by adding a specific metric and would ensure that the ILEC, already well-positioned to compete, has obtained a solid footing in the market prior to the sunset.

- Adopting this standard will not eliminate ability of competing MVPDs to challenge exclusive arrangements between cable operators and vertically-integrated programmers. Instead, it simply shifts the burden of proof by eliminating the *per se* ban on such arrangements in section 628(c)(D). These agreements could still be challenged under the "unfair competition" prong of the program access rules, 47 U.S.C. § 548(b), but the complainant would be required to show that the challenged arrangement causes competitive harm.

WILLKIE FARR & GALLAGHER LLP

1875 K Street, NW
Washington, DC 20006

Tel: 202 303 1000
Fax: 202 303 2000

August 16, 2007

VIA ECFS

Marlene Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: Implementation of the Cable Television Consumer Protection and Competition Act of 1992; Development of Competition and Diversity in Video Programming Distribution: Section 628(c)(5) of the Communications Act; Sunset of Exclusive Contract Provision; MB Docket No. 07-29

Dear Ms. Dortch:

On August 15, 2007, Jim Coltharp of Comcast Corporation met with Rick Chessen, Senior Legal Advisor to Commissioner Michael Copps; Rudy Brioche, Legal Advisor to Commissioner Jonathan Adelstein; and Amy Blankenship, Legal Advisor to Commissioner Deborah Taylor Tate, to discuss the above-captioned proceeding. Mr. Coltharp was accompanied by Jim Casserly and, for the meeting with Ms. Blankenship, the undersigned, of Willkie Farr & Gallagher LLP. The meetings focused on the arguments contained in Comcast's written comments and reply comments. The attached document provides a summary of the discussions.

Kindly direct any questions regarding this matter to my attention.

Respectfully submitted,

/s/ Ryan G. Wallach
Ryan G. Wallach
Counsel for Comcast Corporation

Attachment

cc: Rick Chessen
Rudy Brioche
Amy Blankenship

THE EXCLUSIVITY PROHIBITION SHOULD BE PERMITTED TO SUNSET, AS CONGRESS INTENDED. PROPOSALS TO EXPAND PROGRAM ACCESS RULES OR TO MAKE THEM MORE BURDENSOME SHOULD BE REJECTED OUT OF HAND.

I. COMPETITION IN THE VIDEO MARKETPLACE IS VIBRANT AND GROWING.

- Congress intended for the exclusivity prohibition to last 10 years, and, in those 10 years, the video marketplace evolved to a point where competitors to incumbent cable companies grew larger than most cable companies and had access to all the programming they needed to compete, justifying a sunset of the rules. Nevertheless, in 2002, a divided Commission extended the prohibition for an additional 5 years; then-Commissioner Martin said the decision for whether the ban was still "necessary" to be a "very close call." With the continued acceleration of video, it is no longer a close call -- the rule should sunset.

- ***Video Choice.*** As the attached document details, competition in the distribution of video programming is intense and getting more so each day. In every community, virtually every consumer can choose from *a minimum of three MVPDs*, and in many a fourth or fifth MVPD is available or will be soon, to say nothing of the many other ways by which consumers can access video content (broadcasting, DVDs, Internet downloads, video streaming, mobile video devices).

- ***Vertical Integration.*** Vertical integration between programming networks and cable operators -- a key concern when Congress adopted the program access rules -- has plummeted. In 1992, 57% of all national programming networks were vertically-integrated with a cable operator. Since then the Commission has documented the steady decrease in vertical integration and last year reported that, as of June 30, 2005, cable operators had interests in only about 20% of the 531 national programming networks. And, in fact, that number is closer to 13.5%. Assuming a pay-per-view network is counted on equal footing as a 24/7 linear network, Comcast has a financial interest in only 18 national networks. Of the 100 or so regional networks identified by the Commission, Comcast has a financial interest in only twelve.

II. EXCLUSIVITY AND VERTICAL INTEGRATION ARE THE NORM IN COMPETITIVE MARKETS AND ARE RECOGNIZED TO BE PRO-CONSUMER.

- The benefits of exclusivity have been recognized in America since its inception, and Congress specifically acknowledged the benefits of program exclusivity when it deliberately incorporated the sunset provision into Section 628(c)(5).

- The Commission also has recognized the benefits of exclusivity in the programming context. For example, the network nonduplication rule was not statutorily mandated but "arose from the Commission's recognition in the 1970s and 1980s that protection of exclusive contractual rights is necessary . . . to provide appropriate protections and incentives to program producers and distributors to provide the programming desired by viewers."

- Exclusive contracts can foster investment, innovation, and increased competition based on product differentiation. There are myriad examples of exclusive contracts working this way.
    - We see this when Yahoo! cuts exclusive deals with newspapers so that it can better compete against Google, or when XM Radio builds exclusive content around Bob Dylan and certain major sports leagues, and Sirius counters with Howard Stern and other major sports leagues.
    - We see this in the video marketplace when DIRECTV enters into exclusive agreements with the NFL, NASCAR, and the NCAA, while EchoStar licenses a substantial amount of international fare on an exclusive basis, in order to differentiate their services. In the words of DIRECTV's CEO Chase Carey: "[U]nique content is what will separate the company from its pay-TV brethren over the course of the next few years."

III. IF THERE WAS A JUSTIFICATION FOR THE EXCLUSIVITY PROHIBITION IN 1992, THAT JUSTIFICATION IS NOW LONG GONE.

- In light of the intense competition in the marketplace, it is clear that the exclusivity prohibition does not "continue[] to be necessary to preserve and protect competition and diversity in the distribution of video programming."
- As Chairman Martin previously noted, "'necessary' should mean something closer to 'indispensable' or essential . . . . Thus, I believe that a finding that the exclusivity ban is 'beneficial' to or 'promotes' competition and diversity would not be sufficient."
- The exclusivity prohibition in today's competitive marketplace is clearly not "necessary" to preserve and protect competition and diversity. The percentage of vertically integrated programming networks has declined dramatically. The overall number of programming networks has increased just as dramatically. There is an abundance of programming available to fill every MVPD's channel lineup and tailored to every possible niche interest. In fact, there is now so much programming that no single MVPD does or can carry it all.
- It is also important to recognize that, were the exclusivity prohibition allowed to sunset, the other program access rules would remain in place. Thus, a cable-affiliated programming network would still be constrained in its ability to engage in certain conduct that could harm an MVPD competitor. Moreover, the antitrust laws are also well-suited for addressing any anticompetitive conduct.
- Independent of the foregoing, the exclusivity prohibition as currently applied is anomalous in the extreme and the Commission must not perpetuate these anomalies. The prohibition is both too broad and too narrow to address its stated objectives. It is too broad in that it applies to any cable-affiliated programming, whether it is "must-have" or not. It is too narrow in that it does not apply to a lot of programming that the Commission and many consumers consider to be "must-have," including some for which DBS providers have obtained exclusive distribution rights.
- In deciding whether it is "necessary" to further extend the prohibition more than five years beyond the time that Congress originally anticipated it would sunset, it would be arbitrary and capricious for the Commission to perpetuate a rule that operates in such an illogical and discriminatory fashion.

IV. PROPOSALS TO EXPAND THE SCOPE OF THE EXCLUSIVITY PROHIBITION ARE BEYOND THE COMMISSION'S AUTHORITY.

- The Commission repeatedly has concluded that its statutory authority under the program access rules applies only to "satellite cable programming and satellite broadcast programming," and that terrestrially delivered programming is "outside the direct coverage of Section 628(c)." Nothing has changed to alter that conclusion.

V. CHANGES TO THE COMMISSION'S PROGRAM ACCESS COMPLAINT PROCEDURES ARE UNNECESSARY AND WOULD BE COUNTERPRODUCTIVE.

- The existing program access procedures were the product of careful consideration and have worked just as Congress intended -- to spur the marketplace to ensure that distributors have access to the programming their subscribers demand. Proposals to change the rules would impose additional costs and delays in processing complaints. They would also encourage unnecessary litigation.
- Requiring arbitration of program access disputes is unnecessary and would be unlawful. The statute specifically assigns the Commission with responsibility for adjudicating program access disputes, and the law does not empower the Commission to outsource this responsibility. Requiring parties to engage in arbitration would be inconsistent with both the Commission's Alternative Dispute Resolution Policy Statement and with federal law under the Alternative Dispute Resolution Act. Moreover, arbitration would further delay proceedings and burden Commission resources.

WILLKIE FARR & GALLAGHER LLP

1875 K Street, NW
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Tel: 202 303 1000
Fax: 202 303 2000

June 13, 2007

VIA ECFS

Marlene Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming; MB Docket No. 06-189;

Implementation of the Cable Television Consumer Protection and Competition Act of 1992; Development of Competition and Diversity in Video Programming Distribution: Section 628(c)(5) of the Communications Act; Sunset of Exclusive Contract Provision; MB Docket No. 07-29

Dear Ms. Dortch:

On June 12, 2007, Jim Coltharp and Mary McManus of Comcast, and Jim Casserly, Ryan Wallach, and the undersigned, of Willkie Farr & Gallagher LLP, met with Elizabeth Andrion, Dan Bring, Steve Broeckaert, Brian Extein, Marcia Glauberman, Rosemary Harold, David Konczal, Karen Kosar, Anne Levine, and Mary Beth Murphy of the Media Bureau, to discuss developments in the video marketplace and, in particular, to summarize the factual, legal, and policy reasons why the Commission should allow the program access exclusivity prohibition to sunset. The attached handouts were distributed to all meeting participants.

Kindly direct any questions regarding this matter to my attention.

Respectfully submitted,

/s/ Stephanie L. Podey
Stephanie L. Podey
Counsel for Comcast Corporation

Attachments

cc: Elizabeth Andrion
Dan Bring
Steve Broeckaert
Brian Extein
Marcia Glauberman
Rosemary Harold
David Konczal
Karen Kosar
Anne Levine
Mary Beth Murphy

THE EXCLUSIVITY PROHIBITION SHOULD BE PERMITTED TO SUNSET, AS CONGRESS INTENDED. PROPOSALS TO EXPAND PROGRAM ACCESS RULES OR TO MAKE THEM MORE BURDENSOME SHOULD BE REJECTED OUT OF HAND.

I. COMPETITION IN THE VIDEO MARKETPLACE IS VIBRANT AND GROWING.

- Congress intended for the exclusivity prohibition to last 10 years, and, in those 10 years, the video marketplace evolved to a point where competitors to incumbent cable companies grew larger than most cable companies and had access to all the programming they needed to compete, justifying a sunset of the rules. Nevertheless, in 2002, a divided Commission extended the prohibition for an additional 5 years; then-Commissioner Martin said the decision for whether the ban was still "necessary" to be a "very close call." With the continued acceleration of video, it is no longer a close call -- the rule should sunset.
- *Video Choice.* As the attached document details, competition in the distribution of video programming is intense and getting more so each day. In every community, virtually every consumer can choose from *a minimum of three MVPDs*, and in many a fourth or fifth MVPD is available or will be soon, to say nothing of the many other ways by which consumers can access video content (broadcasting, DVDs, Internet downloads, video streaming, mobile video devices).
- *Vertical Integration.* Vertical integration between programming networks and cable operators -- a key concern when Congress adopted the program access rules -- has plummeted. In 1992, 57% of all national programming networks were vertically-integrated with a cable operator. Since then the Commission has documented the steady decrease in vertical integration and last year reported that, as of June 30, 2005, cable operators had interests in only about 20% of the 531 national programming networks. And, in fact, that number is closer to 13.5%. Assuming a pay-per-view network is counted on equal footing as a 24/7 linear network, Comcast has a financial interest in only 18 national networks. Of the 100 or so regional networks identified by the Commission, Comcast has a financial interest in only twelve.

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- The exclusivity prohibition in today's competitive marketplace is clearly not "necessary" to preserve and protect competition and diversity. The percentage of vertically integrated programming networks has declined dramatically. The overall number of programming networks has increased just as dramatically. There is an abundance of programming available to fill every MVPD's channel lineup and tailored to every possible niche interest. In fact, there is now so much programming that no single MVPD does or can carry it all.
- It is also important to recognize that, were the exclusivity prohibition allowed to sunset, the other program access rules would remain in place. Thus, a cable-affiliated programming network would still be constrained in its ability to engage in certain conduct that could harm an MVPD competitor. Moreover, the antitrust laws are also well-suited for addressing any anticompetitive conduct.
- Independent of the foregoing, the exclusivity prohibition as currently applied is anomalous in the extreme and the Commission must not perpetuate these anomalies. The prohibition is both too broad and too narrow to address its stated objectives. It is too broad in that it applies to any cable-affiliated programming, whether it is "must-have" or not. It is too narrow in that it does not apply to a lot of programming that the Commission and many consumers consider to be "must-have," including some for which DBS providers have obtained exclusive distribution rights.
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- Requiring arbitration of program access disputes is unnecessary and would be unlawful. The statute specifically assigns the Commission with responsibility for adjudicating program access disputes, and the law does not empower the Commission to outsource this responsibility. Requiring parties to engage in arbitration would be inconsistent with both the Commission's Alternative Dispute Resolution Policy Statement and with federal law under the Alternative Dispute Resolution Act. Moreover, arbitration would further delay proceedings and burden Commission resources.

"[T]HE MEDIA MARKETPLACE HAS CHANGED DRASTICALLY.... COMPETITION IN THIS SPACE HAS NEVER BEEN SO FIERCE AND CHAOTIC."

I. AMERICAN CONSUMERS TODAY ENJOY ABUNDANT CHOICES IN VIDEO PROGRAMMING DISTRIBUTION.

DBS. DIRECTV and EchoStar offer service to virtually every household in the United States and have continued to strengthen their competitive position in the marketplace.

- As of March 31, 2007, DIRECTV and EchoStar served almost 30 million customers (or *over 30%* of the 96.8 million U.S. MVPD subscribers). DIRECTV added almost 1 million gross subscribers (235,000 net) in the first quarter of 2007 and now serves 16.19 million, while EchoStar added almost 900,000 gross subscribers (310,000 net) and now serves 13.42 million. DIRECTV and EchoStar are now the second and third largest MVPDs in the United States.
- DBS providers continue to offer new services while enhancing existing services. In the past year, they have rolled out more HD programming, innovative DVRs, and unique "interactive" TV enhancements. Earlier this year, DIRECTV announced that it intends to carry 100 HD channels in 2007, and that it will eventually deliver more than 1,500 local HD and digital channels and 150 national HD channels. Over the past year, DIRECTV also entered into new exclusive programming deals, for example, NASCAR's programming package. EchoStar too has been beefing up its service by expanding the local and national HD services it offers and offering exclusive services such as DishGAMES.
- Competition between DBS and cable is so fierce that these MVPD competitors are spending millions of dollars on ad campaigns and related litigation disputing who has the better service and quality.

LECs. LECs continue to rapidly deploy their video services to more areas and consumers.

- Verizon is now the 13th largest cable operator in the nation, provides video service to over 348,000 customers, and is adding nearly 2,200 new video customers each day. It offered its service to over 2.4 million households by the end of 2006 and expects its cable service to pass 9 million homes by the end of 2008 and 18 million homes by 2010.
- AT&T has expanded its cable service to over 21 markets and now serves over 30,000 subscribers, an increase of 900% from the 3,000 subscribers it had at the beginning of 2007. As of March 31, 2007, AT&T's U-verse installations had ramped up to approximately 500 per day. AT&T plans to make U-verse available to 19 million homes by the end of 2008. Meanwhile, Qwest continues to offer its ChoiceTV cable service in certain markets and is reportedly upgrading to a fiber-optic infrastructure to provide additional video services.
- LECs continue to roll out HD offerings: Verizon's cable service offers 24-34 HD channels, and AT&T offers 25 HD channels. Verizon also recently introduced to its video customers the latest in advanced interactive programming guide technology.
- The LECs' DBS partnerships also continue to attract significant numbers of subscribers: as of March 31, 2007, Verizon had signed up 618,000 DBS customers for its bundled package of services, AT&T had signed up approximately 1.7 million, and Qwest had signed up over 506,000.

Internet. Technological advances and widespread broadband adoption have made the Internet a significant alternative source for video programming.

- Recent surveys found that over 40% of Americans aged 12-64 watch online videos at least once a week, and one-quarter of online Americans over age 12 (45 million people) have streamed TV shows.
- CBS SportsLine announced that more than 800,000 people registered for its 2007 March Madness on Demand via the Internet and more than 189,000 users waited to view the tip-off of the first game.
- YouTube and other online video businesses, such as Wi-Fi TV, Brightcove, Virtual Digital Cable, Microsoft's "Soapbox on MSN Video," and Akimbo, continue to attract millions of viewers. The

founders of Skype have begun rolling out Joost, an Internet TV service that uses peer-to-peer networking to deliver multichannel content. A similar service, Babelgum, launched its beta offering in May 2007 and already serves content from Reuters and AP.

Broadcasters. The conversion to digital broadcasting is making even more programming available free over-the-air, and broadcasters are finding other innovative ways to distribute their programming.

- As of May 24, 2007, 1,600 stations in 211 markets were broadcasting in digital, all of which are capable of transmitting HD and multicast signals to any consumer in their service area.
- Consumers are turning to the Internet to watch broadcasters' programming. During February 2007 alone, ABC.com attracted 9 million viewers, NBC.com attracted 8 million, CBS.com attracted 5.6 million, and Fox.com attracted 2.9 million. Fox offers full episodes of ten different shows including *24*, *Bones*, *Are You Smarter Than a Fifth Grader?*, and *Prison Break* on MySpace. News Corp. and NBC Universal have agreed to create an online video site, which will launch this summer.
- Broadcasters are rolling out wireless video offerings. For example, CBS recently announced a new division, CBS Mobile, to expand its wireless offerings and plans to start a dedicated network feed by 2008. NBC Universal partnered with MobiTV to offer VOD full-length episodes of prime-time shows from its top networks and to launch original mobile channels.

BSPs/Overbuilders. BSPs such as Everest, Grande Communications, Knology, WideOpenWest, Optical Entertainment Network (OEN), SureWest, and RCN continue to offer another MVPD option in a growing number of areas. While some of these companies went through difficult financial times, overbuilders such as RCN have fought back to financial stability and are continuing to expand their service areas. For example, just a few weeks ago, RCN announced new financing and said it will expand its service footprint in the Boston area.

Emerging Services. Wireless service providers are becoming an increasingly popular source for video programming. In the past year, Verizon Wireless launched its mobile video service, V-CAST, in 20 markets. It offers made-for-mobile channels from programmers like CBS, NBC, Fox, MTV, Comedy Central, and Nickelodeon. AT&T is rolling out wireless video and has signed an exclusive deal with Apple to deploy the iPhone. The iPhone synthesizes communications, video, music, and computing in one device; Apple predicts that it will sell 10 million video-capable phones by 2008. Telephia Research estimates that there were 6.2 million mobile video subscribers in the United States at the beginning of 2007 (an annual growth rate of 188%) and IMS Research estimates that there will be 30 million mobile TV subscribers by 2011. Broadband over Power Lines (BPL) also continues to develop. For example, Google is supporting efforts to roll out BPL video distribution services to two million homes and businesses in Texas.

II. COMCAST CONTINUES TO INVEST AND INNOVATE TO BE THE FIRST COMPANY CONSUMERS TURN TO FOR AN INCREASING ARRAY OF SERVICES.

Competition has compelled cable operators to differentiate themselves from their competitors.

Cable Services. Comcast continues to improve its video services and increase the availability of HDTV and other advanced video services.

- In the first quarter of 2007, Comcast added 644,000 digital cable customers; approximately 55% of its video customers currently subscribe to digital cable.
- By the third quarter of 2007, Comcast plans to offer up to 35 HD channels per market, up from 20 today.
- Comcast's VOD service has enjoyed exponential growth -- Comcast offers almost 8000 VOD titles in the course of a single month, 95% of which are available free of charge to digital subscribers. In

addition, Comcast launched an unprecedented initiative to offer 100 hours of HD programming on VOD. In the last two years, Comcast subscribers have viewed *over three billion* VOD titles.

Video Programming. Comcast continues to invest in new programming networks.

- In 2006, Comcast partnered with CSTV to launch The mtn., a national network dedicated to sports programming from the Mountain West Conference. Comcast also recently announced that it will help launch a new regional sports network in Portland, Oregon that will feature Portland Trailblazers' games. In addition, Comcast will acquire and manage Fox Sports Net New England and Bay Area, which will allow Comcast to improve those regional sports networks as it did the Comcast SportsNets, adding more HD programming and innovative sports shows.
- Despite these new investments, vertical integration continues to decline. The Commission reported in 2006 that only approximately 20% of the 531 national programming networks were affiliated with a cable operator; the current figure is now actually closer to 13.5%.

Triple- and Quadruple- Play Bundle. Comcast customers have the convenience of obtaining bundles of services such as video, high-speed Internet access, and digital phone at discounted prices. Comcast offers its triple-play bundle in many markets for only $99 per month.

- In 2006, Comcast added almost a million new subscribers for its high-speed Internet service. As of March 31, 2007, Comcast offered its high-speed Internet service to over 47.2 million homes and provided service to over 12 million of those households.
- Comcast began offering Comcast Digital Voice (CDV) service in 2005 and by March 2007 had surpassed two million customers, well ahead of projections. Comcast's voice services are now available to over 40 million homes, and almost 3 million customers have chosen Comcast's service. According to a recent study, residential cable phone customers could save on average $135 or more each year on their phone bills, and residential customers and small businesses combined could save a total of $101.5 billion over the next five years.
- At the end of 2006, Comcast introduced a bundle of four services in limited markets. For an introductory price of $132 per month, Comcast offers consumers video, data, and voice plus Pivot, a new mobile telephone service that allows customers to watch live TV, access TV listings, check home e-mail, and make unlimited calls between their cable VoIP home service and mobile phones. AT&T has responded to Comcast's quad-play bundle by offering its own bundle for $135 per month.

Good Corporate Citizenship. Comcast knows that cable service is a local service, tailored to the individual needs of each community, and addressing the demands of the citizens of those communities. Accordingly, Comcast is deeply engaged in the local communities it serves.

- Comcast provides educational programming and Internet access to thousands of schools and libraries.
- Comcast actively supports programs such as Partnership for a Drug Free America, Emma L. Bowen Foundation Diversity Internship Program, United Way, United States Hispanic Chamber of Commerce Foundation, National Urban League, Comcast Leaders and Achievers scholarship program, numerous local Boys and Girls Clubs, and many others. Each year, tens of thousands of Comcast volunteers donate their time to working on projects to better their communities.
- Comcast has established a comprehensive program to promote diversity and has been recognized as one of the Top 25 Notable Companies for Diversity, one of America's top 50 corporations for multicultural business opportunities, and one of the Top Companies for Hispanics.

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

In the Matter of	)	
	)	
Implementation of the Cable Television Consumer Protection and Competition Act of 1992	)	
	)	MB Docket No. 07-29
Development of Competition and Diversity in Video Programming Distribution: Section 628(c)(5) of the Communications Act	)	
	)	
Sunset of Exclusive Contract Prohibition	)	

REPLY COMMENTS OF CABLEVISION SYSTEMS CORP.

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April 16, 2007

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REPLY COMMENTS OF CABLEVISION SYSTEMS CORP.

INTRODUCTION AND SUMMARY

Proponents of extending the exclusivity ban fail to meet the heavy burden established by law to justify such a result. The statute mandates expiration of the ban unless the Commission determines, based upon a thorough analysis of the marketplace today, that "such prohibition continues to be necessary to preserve and protect competition and diversity in the distribution of video programming." Such a determination requires empirical findings that lifting the ban would result in the withdrawal of specific cable-affiliated programming networks *and* that such withdrawal would harm consumer welfare.

No commenter has proffered the empirical evidence necessary to meet this standard. With strong and well-financed companies such as DIRECTV, EchoStar, Verizon, AT&T, and others offering hundreds of programming networks and a wealth of video content accessible via the Internet, no one can deny that competition has taken hold in the video programming distribution market and the objective of the exclusivity ban has been met. The ban was expressly designed to be a temporary mechanism and must now be allowed to sunset.

Supporters of extending the ban improperly confuse harm to competitors with harm to competition. The demanding statutory standard for extension of the ban cannot be satisfied by unsupported allegations that cable programmers have "incentives" to favor their cable affiliates,[1/] that lifting the ban could "hamper" competition,[2/] or that a particular MVPD's competitive prospects "could be severely compromised."[3/]

Likewise, the ban cannot be extended based on unsupported claims that various cable-owned programming networks are "must-have" services that would be unavailable absent the ban. Such claims are devoid of any empirical evidence and do not satisfy the required showing that the withdrawal of any particular cable-owned programming service would harm competition in video programming distribution. Commenters' inconsistent and self-serving definitions of "must-have" programming further undermine their argument, which also ignores the Commission's own finding that withholding would "not make economic sense" for many cable-owned networks.

Finally, proponents of the ban disregard the level and strength of competition in today's video distribution marketplace, thereby distorting the analysis of the likelihood and impact of any program withdrawal that might occur as a result of lifting the ban. EchoStar argues that "the key threshold issues were resolved in 2002,"[4/] effectively urging the Commission to ignore the 50 percent growth in market share gained by cable's competitors since 2002, the entry into the

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1/ AT&T Comments at 3; DIRECTV Comments at 5.

2/ EchoStar Comments at 7.

3/ Qwest Comments at 5.

4/ EchoStar Comments at 2.

video market by Verizon and AT&T, and the explosion of video content available via the Internet.

As Cablevision demonstrated in its opening comments, the exclusivity ban is no longer necessary. Retaining it in today's marketplace would thwart creativity and innovation and inhibit competition and diversity in video programming distribution. The Commission should allow the ban to sunset.

I. PROPONENTS OF RETAINING THE BAN MISSTATE THE LEGAL STANDARD TO BE APPLIED IN THIS PROCEEDING

Proponents of reimposing the exclusivity ban seek to rewrite the statutory standard established by Congress. Rather than examine whether the ban is necessary to preserve and protect *competition* in the distribution of video programming, they complain that allowing the ban to expire would make it harder for *them* in the marketplace. Verizon, for instance, asserts that renewal of "its programming deals could be more difficult" if the exclusivity ban is lifted.[5/] In a similar vein, Qwest states that if the exclusivity ban sunsets "its ability to compete in the multichannel video market could be severely compromised."[6/]

Congress, however, did not intend the ban to remain in place for the convenience of particular competitors.[7/] The incumbent local exchange carriers' demands that cable operators remain subject to this compelled asset sharing requirement ring particularly hollow in light of

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5/ Verizon Comments at 7.

6/ Qwest Comments at 5.

7/ *See* 47 U.S.C. § 548(c)(5) (authorizing the Commission to reenact the ban only if "necessary to preserve and protect *competition*") (emphasis added); Applications of Pacific Telesis Group, Transferor and SBC Communications, Inc., Transferee, *Memorandum Opinion and Order*, 12 FCC Rcd. 2624, 2646-47 ¶ 48 (1997) (The Commission's "priority is to promote efficient competition, not to protect competitors") (*citing SBC v. FCC* and cases cited therein); *SBC Comm., Inc. et al. v. FCC et al.*, 56 F.3d 1484, 1491 (D.C. Cir. 1995) ("The Commission is not at liberty . . . to subordinate the public interest to the interest of "equalizing competition among competitors").

their unequivocal condemnation of such requirements in their core voice telephony business.[8]

Notably, the ILECs argued that asset-sharing mandates were unnecessary because their residential voice competitors held 15 percent of the market. By contrast, non-cable MVPDs today serve almost twice that proportion of multichannel households. There is, if anything, greater justification to end the asset sharing obligations of cable operators.[9]

Various commenters urge the Commission to examine whether cable has an "incentive" to use exclusivity to compete,[10] but this claim misses the point. Such an incentive is common in the competitive marketplace,[11] but the mere existence, if any, of an "incentive to withhold" is

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8/ *See, e.g.*, Petition for Writ of Certiorari of Verizon Communications in *Verizon Communications v. Trinko*, 540 U.S. 398 (2004) (No. 02-682), 2002 WL 32354607, at *15 ("Forced access reduced the incentives that antitrust law centrally encourages - to invest in rival facilities to lower cost and thus raise output. Incumbents will invest less if they must share, and new entrants will invest less where sharing is easier and less risky."); *id.*, Brief for Verizon Communications, 2003 WL 21244083 at *11 ("Forced sharing dampens incentives for incumbents who have to share the rewards of often risky investments, and for competitors whose independent investments in new facilities become riskier (and perhaps costlier) than sharing"); *Unbundled Access of Network Elements, Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, WC Docket No. 04-313, CC Docket No. 01-338, Comments of Verizon, at 86 (filed Oct. 4, 2004) ("[I]ntermodal forms of competition offer consumers much greater benefits than forms of competition that merely duplicate the incumbent's offerings"); *Unbundled Access of Network Elements, Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, WC Docket No. 04-313, CC Docket No. 01-338, Comments of SBC Communications, Inc. at 11 (Oct. 4, 2004) ("Where alternative providers are already competing successfully without forced UNE access, unbundling creates no competitive benefit, but rather merely inflicts on consumers and the economy the significant social costs that this Commission and the D.C. Circuit have rightly associated with forced sharing requirements").

9/ *See, e.g.*, News Release, Federal Communications Commission Releases Data on Local Telephone Competition, at 1 (Dec. 22, 2004).

10/ *See, e.g.*, DIRECTV Comments at 5; Verizon Comments at 7, 11; USTA Comments at 6. That such an inquiry cannot serve as a standard for decision is illustrated by RCN, which claims that both an increase in cable subscribership and a decrease in cable subscribership raises cable's "incentive" to withhold programming. *Compare* RCN Comments at 3 ("The incentive of incumbent operators to use their control over programming to stymie the development of competition has not changed since Congress enacted Section 628 -- if anything this incentive has increased . . . the larger the number of subscribers controlled by a provider, the larger the benefits of withholding programming from competitors, and the incumbents have steadily increased the number of subscribers they serve") and *id.* at 6 ("any erosion of their total number of subscribers provides additional, not less, incentive to act anti-competitively").

11/ Indeed, a firm's ability to differentiate itself in the market through exclusivity is generally regarded as an appropriate means of promoting investment, innovation, lower prices and enhanced consumer welfare. DIRECTV, in fact, characterizes offering "differentiated and exclusive content" as a not enough under the statute to justify continued compelled sharing of programming.[12/]

Congress did not authorize the Commission to reenact the exclusivity ban to blunt cable's "incentives" to use exclusivity to gain or retain market share, nor did it authorize an extension of the ban to protect any particular competitor. Rather, Congress established that the Commission's decision on whether to reimpose the ban should hinge solely upon whether it is indispensable to the preservation of competition in the video distribution marketplace as a whole. The Commission should reject alternative formulations of the applicable legal standard.[13/]

II. SUPPORTERS OF THE BAN HAVE FAILED TO PROFFER SUFFICIENT EVIDENCE TO SHOW THAT ITS RETENTION IS NECESSARY TO PRESERVE COMPETITION

The Commission has recognized that Section 628(c)(5) creates a presumption that the exclusivity ban should sunset and that therefore the ban's supporters bear the burden of demonstrating that its retention is necessary to preserve and protect competition in video programming distribution.[14/] Proponents of the ban must demonstrate with specific evidence that a sunset would result in the withdrawal of a significant quantum of cable programming from rival MVPDs *and* that this withdrawal would derail competition and harm consumer welfare. Not a single commenter supporting extension of the ban, however, mentions or references this

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top business strategy. The DIRECTV Group, Inc., SEC Form 10-K, at 5 (March 1, 2007), *available at* http://phx.corporate-ir.net/phoenix.zhtml?c=127160&p=irol-sec&control_selectgroup=Annual%20Filings.

12/ *Cf. AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 390 (1999) ("If Congress had wanted to give blanket access to incumbents' networks on a basis as unrestricted as the scheme the Commission has come up with, it would not have included [any statutory standard] in the statute at all. It would simply have said (as the Commission in effect has) that whatever requested element can be provided must be provided").

13/ Adoption of AT&T's view that the *2002 Extension Order* properly focused on assisting DBS providers, and the instant proceeding should focus on aiding telco new entrants, *see* AT&T Comments at 9, would likewise result in a significant misapplication of the statutory standard.

evidentiary burden. To the contrary, some commenters seem to believe that the ban can be reimposed based on the Commission's assessment of the marketplace *five years ago*.[15] Because supporters of the ban have failed to offer convincing empirical proof that either -- let alone both -- of these contingencies would occur following a sunset, they have failed to meet their burden to justify a further extension of the ban.

A. There Is No Evidence That A Sunset Would Result In The Withdrawal Of A Significant Volume Of Programming Available To Non-Cable MVPDs.

When Congress enacted the exclusivity ban, cable operators owned 57 percent of the programming networks available for distribution.[16] Since then, that number has declined over 60 percent, with cable now in control of just over 20 percent of the programming networks available to MVPDs.[17] A few proponents of the exclusivity ban suggest that cable can still be said to dominate the video programming marketplace, but those efforts are half-hearted at best. Qwest complains that 70 percent of the top 20 programming networks are owned by just 4 companies -- but two of those companies are not cable operators and those two own the lion's share of that top 20.[18] Telco commenters argue that guaranteed access to cable programming was essential to facilitating their entry into the video market,[19] even though, for example, less

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14/ Implementation of the Cable Television Consumer Protection and Competition Act of 1992 - Sunset of Exclusive Contract Prohibition, *Report and Order*, 17 FCC Rcd. 12124, 12130-31 ¶ 16 (2002) ("*2002 Extension Order*").

15/ *See, e.g.*, EchoStar Comments at 2 ("the key threshold issues were resolved in 2002 and need not be revisited").

16/ H. Rep. No. 102-628, at 41 (1992).

17/ *See* Cablevision Comments at 19.

18/ Qwest Comments at 3. Of the 14 programming networks cited by Qwest, eight are controlled by Disney and Viacom.

19/ *See, e.g.*, Verizon Comments at 3; AT&T Comments at 2-3.

than 20 percent of the more than 180 channels in Verizon's FiOS TV Premier package are owned by cable companies.[20]

The actual facts refute any claim that cable operators hold sway over the programming market: 80 percent of the programming networks available to MVPDs lack any cable affiliation, cable's ownership of networks in the "top 20" or "top 40" has steadily declined in the past five years, the number of new programming networks created during that time has nearly doubled, and entry barriers into the video content supply market have crumbled -- as evidenced by the explosion of video offerings available via the Internet.[21]

Unable to perpetuate the myth of cable control of the programming marketplace, supporters of the ban instead posit a category of "must-have" cable programming services.[22] Most commenters make little, if any, effort to actually describe how and why a program network should be classified as "must-have," although RCN hazards a definition: "must have" programming is "programming that has no close substitutes and cannot be duplicated no matter how much time and money are committed."[23] Under RCN's self-servingly narrow notion of substitutability, all "sports programming," "much kids programming" (such as PBS Kids), and any motion picture in a film library constitutes "must-have" programming.[24]

While the comments reflect a substantial range of opinion regarding what programming networks are "must have," the category appears to encompass any cable-owned programming a

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20/ *See, e.g.*, Verizon FiOS Washington Metro Channel Lineup , http://www22.verizon.com/NROneRetail/NR/rdonlyres/7D3CAA14-02A3-4BCD-830C-6C3F630FBDD1/0/VA_WashingtonMetro.pdf (February 2007).

21/ *See generally* Cablevision Comments at Section III.

22/ *See, e.g.*, DIRECTV Comments at 6; Qwest Comments at 4-5; RCN Comments at 4; EchoStar Comments at 9; USTA Comments at 14; CA2C Comments at 9-10.

23/ RCN Comments at 4.

24/ *See id.*

distributor would like to carry. Proponents have made no effort to empirically demonstrate the existence of a category of "must have" programming by, for example, examining whether the cross-elasticities of demand for various video programming packages and offerings yield evidence of a core of "must-have" services. To the contrary, they offer little more than broadly divergent opinions about cable-owned programming networks they consider important. USTA lists, *inter alia*, E!, The Learning Channel and the Golf Channel, none of which are among the Top 20 most widely viewed networks.[25/] BSPA lists WE, the Travel Channel, Versus and Animal Planet, none of which are mentioned by any other commenter and each of which fall outside the top 20 most widely carried networks.[26/]

Asserting the existence of "must have" networks, however, is not the same as demonstrating that such networks exist. Nonetheless, EchoStar baldly claims that withdrawal of even a single "must have" network "could hamper, if not foreclose competition."[27/] With more than 500 programming networks available on the market (more than 80 percent of which are unaffiliated with cable), such an argument is unsustainable. Consumer demand for video programming is fragmented among hundreds of different networks and the vast array of content available over the Internet. There is no evidence to support the contention that the withdrawal of any single cable-affiliated programming network -- no matter how popular -- would harm competition and consumer welfare.[28/] Further, notwithstanding assertions by proponents of the ban that a broad swath of vertically integrated networks are "must have" programming, only

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25/ USTA Comments at 14.

26/ BSPA Comments at 6.

27/ EchoStar Comments at 7.

28/ *See* Cablevision Comments at Section III.

three cable-owned programming networks (none of which are owned by Cablevision) achieve an average prime-time rating above 1.0.[29/]

The Commission itself has acknowledged that not all cable-affiliated programming can be considered must-have, observing that "there clearly are services that either lack sufficient subscriber appeal to make them critical to the competitive success of DBS or for which reasonable substitutes are either available or could be created."[30/] Even assuming *arguendo* that some cable programming could be classified as "must have," proponents of the ban have made no attempt to empirically demonstrate that a withdrawal of a significant level of such programming would be the probable consequence of a sunset. While the Commission itself has stated that "in many instances, the economic incentive of vertically integrated programmers will be to make their programming available to as many MVPD outlets as possible,"[31/] proponents assume that cable will withhold its programming as soon as it is afforded the chance to do so.

No commenter in support of the ban attempts to explain why it would make economic sense for AMC or WE -- networks owned by Cablevision -- to forego the opportunity to obtain revenue from 32 million non-cable subscribers in order to capture monopoly rents from a cable system with a network footprint of only five million households, which faces competition in each of its markets from three larger and better-financed rivals. Similarly, no proponent of the ban attempts to make the business case for a decision by CNN -- a programming network that generates nearly half a billion dollars per year in advertising revenues[32/] -- to imperil that revenue stream (and forego substantial license fees as well) by repudiating more than one-third of its 90

29/ *See* Kagan Research, Economics of Basic Cable Networks 50 (2006) ("Kagan 2006 Cable Economics").

30/ *2002 Extension Order*, 17 FCC Rcd. at 12150 ¶ 57.

31/ *Id.* at 12i47-48 ¶ 53.

32/ *See* Kagan 2006 Cable Economics at 167.

million subscribers. In the absence of any empirical analysis, the Commission has no basis for finding that the ban continues to be necessary to preserve and protect competition.

B. There Is No Evidence That, In Today's Video Distribution Market, Cable Exclusivity Could Harm Competition.

Proponents of extending the exclusivity ban ask the Commission to believe that rival MVPDs' position in the marketplace is so fragile that the withdrawal of even a single cable-owned programming service would harm competition in video programming distribution. Such a view has no basis in fact. Whatever ability cable may have possessed to use exclusivity to harm competition in 1992 (when it served over 95 percent of MVPD subscribers and controlled 57 percent of all cable programming)[33/] is no longer present today, when more than one-third of all MVPD subscribers and four-fifths of all programming networks are controlled by non-cable companies. EchoStar purports to show that vertically-integrated cable operators have a heightened ability to foreclose competition through program withholding, but only by completely ignoring the existence and rapid growth of both DIRECTV and EchoStar[34/] and the impact of their status as the second and fourth largest MVPDs respectively on the viability of any attempt to use exclusivity to endanger competition.[35/] In any case, the putative "increase" in cable's foreclosure capability cited by EchoStar is attributable solely to a statistical anomaly, the timing of AT&T's spin-off of Liberty Media. Using either 2001 or 2003 as the starting date shows little or no change in the market share held by the major vertically-integrated cable companies.[36/] On

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33/ *See* Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, *Second Annual Report*, 11 FCC Rcd. 2060, 2180-81 (1995) (Appendix G, Table 1); H. Rep. No. 102-628, at 41 (1992).

34/ *See* EchoStar Comments at 4-5, Table 1.

35/ *See* Cablevision Comments at 20.

36/ According to the *Seventh Annual Report* released at the end of 2001, the top vertically-integrated cable companies controlled 54 percent of MVPD subscribers. *See* Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, *Seventh Annual Report*, 16 FCC Rcd.

the other hand, during the 2002 - 2006 time period cited by EchoStar, non-cable providers increased their share of MVPD subscribers by 50 percent, and the Commission has implicitly acknowledged that the likelihood of successful foreclosure through exclusivity declines as non-cable MVPDs market share rises.[37/] Proponents of the ban simply ignore the significant increase in the "costs" of a foreclosure strategy that have occurred in the last five years.[38/]

Commenters supporting the ban also ignore the vast resources of DIRECTV, EchoStar, Verizon and AT&T and the sunk costs they have invested in their distribution platforms. It is irrational to assume that, confronted with the withdrawal of a handful of cable-owned programming services, each of these entities would simply exit the video distribution market.[39/] It is far more probable that these companies would respond to any cable exclusivity arrangements that might arise following a sunset in a manner similar to the responses shown in other segments of the content business where exclusive arrangements occur -- by entering into exclusive arrangements of their own, investing in new content, offering packaging and service

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6005, 6113 (2001) (Table C-3). Two years later, the *Ninth Annual Report* showed vertically-integrated cable companies in control of 49 percent of MVPD subscribers. *See* Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, *Ninth Annual Report*, 17 FCC Rcd. 26901, 26978 (2002). The market share figures of the four vertically integrated cable companies shown in EchoStar's Table 1 should be revised to reflect the increase in the total number of MVPD households (from the 92.1 million figure used in the *Adelphia Order* to the current 96.4 million figure) and Comcast's net loss of approximately 600,000 attributable subscribers arising from its recent Patriot Media and Insight Communications transaction announcements. *See* Mike Farrell, *Comcast Buys a Patriot*, Multichannel News, April 9, 2007, at 7; Mike Farrell, *Insight Facing Decisions*, Multichannel News, April 9, 2007, at 7; *Cable*, Communications Daily, April 3, 2007, at 8 ("the deal with Insight will make Comcast 639,000 customers smaller in the FCC's eyes."). With these revisions, the aggregate market share figure in EchoStar's Table 1 should be 54 percent, or unchanged since 2001.

37/ *See 2002 Extension Order*, 17 FCC Rcd. at 12140 ¶ 37 (noting that costs of foreclosure strategy "tend to be low when the initial loss in programming revenue is low (because, for example, the excluded platforms serve relatively fewer customers)").

38/ *See generally* Cablevision Comments at 15-18; *see also id.* at Appendix B, Dr. Scott Wallsten, The Effects of the FCC's Program Exclusivity Ban at 2, 12 ("Wallsten Report").

39/ *See* Cablevision Comments at 11-13, 15.

innovations, or utilizing any of a wide array of other countermeasures employed by companies in competition with one another -- all results that would promote consumer welfare.[40/]

Proponents raise particular concerns about the continued availability of regional sports networks ("RSNs"), but here, too, they offer no evidence that the availability of such programming is necessary to preserve and protect competition in video distribution.[41/] Referring to what it calls the "well-worn example" of lack of access to the RSN in Philadelphia, EchoStar claims that the unavailability of Comcast SportsNet has "inhibited" DBS' competitiveness there.[42/] EchoStar does not mention that DBS market share in Philadelphia has tripled since the issue of access to Comcast SportsNet was first raised, and that DBS penetration in Philadelphia is comparable to that in at least a half-dozen similar metropolitan markets where DBS providers have raised no issues regarding RSN access. Nor does EchoStar explain why, given its assertions concerning the importance of RSN programming, it declined to carry an RSN in Washington, D.C. (MASN) for two years, and still declines to carry one of the RSNs serving New York City (YES), even though YES is the most popular RSN in the country.[43/]

Several proponents of the ban believe that the economic analysis performed in the *Adelphia* transfer proceeding buttresses their view that RSN withholding by cable operators

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40/ Cablevision Comments at 8, 17; Wallsten Report at 4.

41/ RCN recycles polling data gathered for the 2002 sunset proceeding purporting to "show that some 40-58 percent of cable subscribers would be less likely to subscribe to cable service if it lacked local sports programming." RCN Comments at 9-10 & n.27. Apart from the fact that they are at least five years old, these data are of little value since, due to the ready availability of sports programming in New York from a wide variety of outlets, there is virtually no chance that RCN's subscribers would ever "lack[] local sports programming." Further, RCN provides no information on the methodology of this survey and fails to explain what "less likely" means. Even on their face, the data show that up to 60 percent of subscribers may be completely indifferent about the availability of any local sports programming.

42/ EchoStar Comments at 9.

could harm competition.[44/] As demonstrated in the economic report submitted with Cablevision's comments, however, the "findings" regarding DBS penetration in Philadelphia are based upon a fatally flawed regression analysis[45/] that does not provide the empirical proof required to justify extending the ban.[46/] No proponent of the exclusivity ban has ever explained how DBS penetration in Philadelphia could be considered "low" due to the unavailability of the RSN there even though it is comparable to the penetration levels achieved in other similar markets where RSN access is not an issue.[47/]

Supporters of the ban have offered no empirical analysis or specific evidence showing that even if lifting the ban deprived them of access to some cable-owned programming, such withholding would result in harm to competition and consumer welfare.[48/] Accordingly, the ban must be allowed to sunset.

43/ *See* Cablevision Comments at 25-26. On April 6, 2007, EchoStar announced that it was launching MASN on its system, after declining to carry the service during the 2005 and 2006 baseball seasons.

44/ *See, e.g.*, EchoStar Comments at 9-10; AT&T Comments at 16. DIRECTV's suggestion that an analysis of the likelihood and impact of a "uniform price increase" strategy should be considered "interchangeable" with an analysis of the likelihood and impact of the withdrawal of a program service due to exclusivity is unavailing. *See* DIRECTV Comments at 9 & n.25. The costs associated with exclusivity are akin to the costs of permanent foreclosure, which the Commission has acknowledged to be higher than the costs of temporary withholding designed to effectuate a uniform price increase. *See* General Motors Corporation and Hughes Electronics Corporation, Transferors and The News Corporation Limited, Transferee, *Memorandum Opinion and Order*, 19 FCC Rcd. 473, 511 ¶ 79 (2004). In any event, a sunset of the exclusivity ban would not increase the likelihood or incidence of uniform price increase strategies, since the restriction does not deter that conduct. *See id.* at 510 ¶ 77. Thus, the Commission's analysis of that issue in its *News Corp./DIRECTV* and *Adelphia* transfer proceedings has no bearing upon the issues implicated here.

45/ *See* Wallsten Report at 24-25.

46/ *See* Wallsten Report at 25 ("[T]he analysis does not specifically test the effect of RSN exclusivity. Instead, it tests whether DBS penetration in Philadelphia, San Diego and Charlotte are different than one would expect given the control variables and attributes those findings solely to RSNs").

47/ *See id.* (noting lack of controls that could help address the question of why "several major cities that do not have exclusive RSNs have lower DBS penetration than Philadelphia").

48/ Conversely, the Federal Trade Commission specifically examined the competitive impact of a withdrawal of RSN programming from competing MVPDs and found no evidence to indicate that "a loss

III. THE COMMISSION SHOULD DISREGARD ISSUES UNRELATED TO THE CORE QUESTION OF WHETHER TO EXTEND THE BAN

The Commission should disregard the extraneous issues raised by various commenters in this proceeding. RCN, for instance, resurrects a seven year old program access complaint that was dismissed by the Commission as somehow illustrative of "problems" with access to sports programming in New York, even though it currently has full access to all four regional sports networks distributed in the New York DMA. Verizon invokes a program access complaint it filed against Rainbow that was settled without Commission intervention. In a similar vein, Verizon complains that it has been unable to secure access to certain terrestrially-delivered HD offerings, but terrestrially-delivered content is not even subject to the program access law. These recitations have no relevance or probative value in the Commission's examination of whether to extend the exclusivity ban.

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of competition" would be likely. Statement of Chairman Majoras, Commissioner Kovacic, and Commissioner Rosch, Concerning the Closing of the Investigation Into Transactions Involving Comcast, Time Warner Cable, and Adelphia Communications (Jan. 31, 2006), at 2, *available at* http://www.ftc.gov/os/closings/ftc/0510151twadelphiamajoraskovacic_rosch.pdf.

CONCLUSION

For the reasons set forth here and in Cablevision's initial comments, section 628(c)'s ban on exclusive contracts should be allowed to sunset, or at a minimum, substantially restricted.

Respectfully submitted,

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April 16, 2007

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

In the Matter of	)	
	)	
Implementation of the Cable Television	)	
Consumer Protection and Competition	)	
Act of 1992	)	
	)	MB Docket No. 07-29
Development of Competition and	)	
Diversity in Video Programming	)	
Distribution: Section 628(c)(5) of the	)	
Communications Act	)	
	)	
Sunset of Exclusive Contract Prohibition	)	

COMMENTS OF CABLEVISION SYSTEMS CORP.

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April 2, 2007

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	)	
Sunset of Exclusive Contract Prohibition	)	

COMMENTS OF CABLEVISION SYSTEMS CORP.

INTRODUCTION AND SUMMARY

The 1992 exclusivity prohibition was imposed by Congress in an era before widespread competition existed in the market for video distribution. It was intended to nurture new video distributors in their infancy by guaranteeing them access to programming thought essential to their survival and to prevent cable operators from using exclusivity to foreclose competition and harm consumer welfare. The forced sharing required by the exclusivity ban marked a radical departure from the norms of both copyright and antitrust law. Content providers typically have free rein to determine who should and should not distribute their creative works and intellectual property, service providers routinely use exclusivity arrangements to differentiate their products in the marketplace in order to attract customers, and the antitrust law recognizes their right to do so. Accordingly, Congress provided that the exclusivity ban would expire when it was no longer necessary to jump-start competition among content distributors.

The ban's sunset is overdue. In today's market, retention of the ban cannot be justified as "necessary to preserve and protect competition and diversity in the distribution of video programming."[1/]

First, competition in video programming distribution is no longer in its infancy; it is mature, robust, and expanding:

- Since 2002, the portion of multichannel video programming distributor ("MVPD") subscribers served by cable operators has declined another 16%, from 78% to less than 67%; meanwhile, the percentage of MVPD subscribers served by rival MVPDs has risen by another 50%, from 22% to 33%.[2/]

- Five years ago, there were virtually no households in the country that could obtain multichannel video programming service over telephone company facilities. This year, telephone companies will be offering video over their own facilities to over 14 million homes, and that number is expected to nearly double by the end of 2008.[3/]

- DirecTV and Echostar are the second and fourth-largest MVPDs, respectively, and each has a subscriber base at least four times larger than Cablevision, while Verizon and AT&T each pass tens of millions of homes and enjoy a combined market capitalization of approximately $350 billion, roughly 40 times larger than Cablevision. All four of these companies have invested billions of dollars to deploy a video programming distribution infrastructure and launch video service.

Second, the breadth and competitiveness of the content market render implausible claims that cable could use exclusivity to foreclose competition from rival distributors. The sheer volume of program and content alternatives available today means that no cable network can any longer be considered "must-have" programming: fewer than one in three of the 40 most popular

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1/ 47 U.S.C. § 548(c)(5).

2/ *Compare Implementation of the Cable Television Consumer Protection and Competition Act of 1992; Development of Competition and Diversity in Video Programming Distribution: Section 628(c)(5) of the Communications Act; Sunset of Exclusive Contract Prohibition,* Report and Order, 17 FCC Rcd 12124, ¶ 20 (2002) ("*2002 Extension Order*") *with Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, Notice of Inquiry,* MB Docket No. 06-189, Comments of the National Cable & Telecommunications Association (filed Nov. 29, 2006) ("NCTA Video Competition Comments") at 9.

3/ *See* Ernie Carey, Vice President-Advanced Network Technologies, *AT&T Inc., Presentation to Bear Sterns 20th Annual Media Conference* (Mar. 6, 2007) at 10; Press Release, Verizon, *Verizon's 4Q 2006 Results Cap Strong Year of Organic Growth in Wireless, Broadband, and Business Markets* (Jan. 29, 2007); AT&T, Inc., Annual Report (Form 10-K), at 2 (Feb. 26, 2007) ("AT&T Annual Report").

national programming networks is vertically-integrated, and there is a viable competitive substitute for each of those networks.[4/]

- Since 2002, the percentage of programming networks owned by cable operators has declined by another 38%, while the total number of programming networks unaffiliated with a cable operator has increased 118%, from 190 to 415.[5/]

Third, the rapid growth and enormous popularity of new video distribution platforms that are not subject to the exclusivity ban show that the restriction is not necessary to nurture new sources of video competition:

- Five years ago, there was little high-quality video available over the Internet or mobile devices. Today, these are the fastest growing segments of the market. High-quality video is available over the Internet from every major motion picture studio, television network, programming network, professional sports league and a wealth of other content sources.

As the Commission acknowledged in 2002, the Cable Act creates a presumption against extending the exclusivity ban.[6/] The exacting legal standard for extending the ban requires the Commission to assess not whether the sharing requirement for cable-owned programming is "helpful" or "useful" for cable's competitors, but whether it is "essential" or "indispensable" to preserving and protecting *competition* in video distribution.[7/] The burden of proof lies with those who would extend the restriction to show that its sunset would impair competition significantly enough to harm consumer welfare.[8/] It is a burden that they cannot carry in today's marketplace. Cable's video distribution competitors are potent, plentiful, and in the marketplace to stay.

4/ *See Economics of Basic Cable Networks*, Kagan Research (2006), at 50 (ranking average prime-time rating of cable networks).

5/ *Compare 2002 Extension Order* ¶ 18 *with Annual Assessment of the Status of Competition in the Market for Delivery of Video Programming*, Twelfth Annual Report, 21 FCC Rcd 2503, ¶ 21 (2006) ("*Twelfth Annual Report*").

6/ *2002 Extension Order* ¶ 16.

7/ *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 388-90 (1999); *GTE Serv. Corp. v. FCC*, 205 F.3d 416, 422 (D.C. Cir. 2000).

8/ *See generally* Section I, *infra*.

Competition in video programming distribution is simply too strong and too well-entrenched to be disabled by any attempt by cable to use exclusivity anti-competitively, and the antitrust laws can provide redress for any such attempt.

As underscored by the attached economic submission of Dr. Scott Wallsten[9/] and as the Commission itself acknowledged in 2002,[10/] elimination of the ban is unlikely to precipitate the withdrawal of a substantial amount of cable-owned programming from rival MVPDs. Carriage on the platforms of DBS providers and other rival MVPDs is an important and steadily growing source of revenue for all programmers. The proliferation of video offerings and sources is growing exponentially, from the scores of new networks created each year, to the rapid growth in on-demand offerings available to multichannel consumers, to the wealth of video news, sports and entertainment offerings available to anyone with a broadband connection. Further, DBS operators and telcos have the means and muscle to invest in programming themselves -- and they are doing so, as evidenced by Verizon's recent launch of its FiOS1 local program channel.[11/]

No program service is indispensable to the preservation of competition. Even the sports programming market -- singled out by the Commission as the principal form of "must-have" programming -- has undergone dramatic changes over the last five years. The percentage of regional sports networks affiliated with cable has declined by 45%.[12/] Video distributors in the New York area can offer thousands of professional and college sporting events, including hundreds of games played by local teams, over more than a dozen networks -- most of which are unaffiliated with local cable operators. Professional sports leagues are asserting increased

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9/ *See* Appendix B, "The Effects of the FCC's Program Exclusivity Ban" ("Wallsten Report").

10/ *2002 Extension Order* ¶¶ 53, 57.

11/ "FiOS1, Verizon's First Local TV Channel, Debuts in Washington, D.C. Metro Area," Verizon Press Release, Mar. 29, 2007.

12/ *Compare 2002 Extension Order* ¶ 19 *with Twelfth Annual Report* ¶ 183.

control over their content, as evidenced by the growth of league-owned programming networks, out-of-market packages, and Internet video offerings. In some major markets, including New York, New Orleans and Washington, D.C., MVPDs decline to distribute local RSNs yet continue to compete effectively.

In markets served by Cablevision -- a company whose size and scale is far smaller than either the DBS providers or the telephone companies -- the ban is not necessary to preserve and protect competition. Cablevision faces competition from two DBS providers, each of which has a subscriber base at least four times larger than its own, and from Verizon and AT&T, whose market capitalizations are 10 and 25 times larger, respectively, than Cablevision's. Each of those entities has the ability to invest in its own programming, just as Cablevision did. There is no justification for continuing a regulatory policy that forces Cablevision to be a content incubator for its competitors, absorbing the costs of program investments that fail to pan out, while forced to share the fruits of successful program investments with its larger and better-funded rivals, for little, if any, competitive gain.

Extending the exclusivity ban is inconsistent with the state of technology and the marketplace. As such, its retention cannot be justified.

I. "NECESSARY TO PRESERVE AND PROTECT COMPETITION AND DIVERSITY" MUST BE RIGOROUSLY CONSTRUED

The FCC may only extend the exclusivity ban if it determines that doing so is "*necessary* to preserve and protect *competition* and diversity in the distribution of video programming."[13]

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[13] 47 U.S.C. § 548(c)(5) (emphasis added). Section 628(c)(5) only grants the Commission authority to conduct one proceeding "conducted during the last year of such 10-year period [following enactment]" to determine if the ban continues to be necessary. That proceeding occurred as directed. The Commission used its opportunity to postpone the ban's sunset for five years; it has no authority to extend the ban's sunset any further. Nowhere did Congress grant to the Commission any authority to extend the exclusivity ban a second time. The plain meaning of the statutory language must be given its full effect

The temporary nature of the ban reflects Congress's recognition that limiting the rights of content owners by barring exclusive arrangements is compelled asset sharing, a policy generally disfavored by policymakers because it thwarts investment incentives and competition.[14] Accordingly, Section 628 "creates a presumption that the rule will sunset. . .".[15]

The language of Section 628(c)(5) imposes a high standard, precluding the Commission from extending the exclusivity ban unless it concludes that retention is "indispensable" or "absolutely required" to prevent harm to competition and the associated consumer welfare benefits that flow from competition, *i.e.*, increases in output, quality, innovation and price discipline.[16] That allowing the ban to expire might harm individual competitors does not suffice to show the requisite injury to competition or consumer welfare;[17] all competitive activity by

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and the proceeding terminated. *See, e.g., Lamie v. United States Tr.*, 540 U.S. 526, 534 (2004); *Pub. Employees Ret. Sys. v. Betts*, 499 U.S. 158, 171 (1989).

14/ *See, e.g., Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 124 S. Ct. 872, 879 (2004) ("Compelling . . . firms to share the source of their advantage is in some tension with the underlying purpose of antitrust law, since it may lessen the incentive for the monopolist, the rival, or both to invest in those economically beneficial facilities."); *AT&T Corp.*, 525 U.S. at 428-29 (Breyer, J., concurring in part and dissenting in part) ("a sharing requirement may diminish the original owner's incentive to keep up or to improve the property by depriving the owner of the fruits of value-creating investment, research, or labor"); *id.* at 429 ("Nor can one guarantee that firms will undertake the investment necessary to produce complex technological innovations knowing that any competitive advantage deriving from those innovations will be dissipated by the sharing requirement."); *Orson, Inc. v. Miramax Film Corp.*, 79 F.3d 1358 (3d Cir. 1996) (allowing exclusivity has procompetitive benefits, including preventing free-riding).

15/ *2002 Extension Order* ¶ 16.

16/ *See AT&T Corp.*, 525 U.S. at 388-90; *GTE Serv. Corp.*, 205 F.3d at 422 (rejecting the FCC's attempt to interpret "necessary" broadly in Section 251(c)(6) of the Act to mean "used or useful" as "overly broad and disconnected from the statutory purpose"); *Morris Commc'ns Corp. v. PGA Tour, Inc.*, 364 F.3d 1288, 1294 (11th Cir. 2004) ("In order for a practice to be exclusionary, it must harm the competitive process and thereby harm consumers. ") (internal quotation marks, brackets and citations omitted). These cases construe use of the term "necessary" in section 251 of the act, but there is a "natural presumption that identical words used in different parts of the same act are intended to have the same meaning." *Atl. Cleaners & Dyers v. U.S.*, 286 U.S. 427 (1932); *Sullivan v. Stroop*, 496 U.S. 478, 484 (1990); *Gen. Dynamics Land Sys. v. Cline*, 540 U.S. 581, 582 (2004).

17/ It is well established that harm to competitors does not equal harm to competition. *See, e.g., Spanish Broad. Sys. of Fla., Inc. v. Clear Channel Commc'ns, Inc.*, 376 F.3d 1065, 1071 (11th Cir. 2005) ("To have an anticompetitive effect, conduct must harm the competitive process and thereby harm rival market participants hurts individual competitors. Rather, the Commission must consider not only the utility of the ban for its beneficiaries, but also the costs and burdens imposed by the restriction. Sharing requirements such as the exclusivity ban "require balance," and rules that "do not sufficiently reflect or explore [the] other side of the . . . coin" are unlawful.[18/] A standard that turns on harm to competitors offers no balance or limiting principle, because exclusive agreements can be said to inflict some harm on almost "any new entrant into virtually any new business."[19/]

Focusing on whether more sharing would be better for any individual competitor or whether the absence of the ban "would impose a competitive risk" for a rival MVPD misconstrues the standard to be applied.[20/] The statute directs that the ban must be allowed to sunset unless the Commission determines that its expiration would derail competition and injure consumer welfare.[21/] This determination must be made on the basis of specific evidence of what would happen in the absence of the ban; it cannot be based on speculation or conjecture about what might happen if the ban were lifted. To support retention, the statute requires the Commission to make an empirical determination of (i) the quantum and type of programming that would be withheld, (ii) the markets where such withholding would occur, and (iii) the manner in which the withdrawal of such program networks from rival MVPDs would imperil

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consumers. Harm to one or many competitors will not suffice.") (internal quotation marks and brackets omitted); *Applications of Pacific Telesis Group, Transferor and SBC Communications, Transferee*, 12 FCC Rcd 2624, ¶ 48 (1997) (Commission's "priority is to promote efficient competition, not to protect competitors").

18/ *AT&T Corp.*, 525 U.S. at 429-30 (Breyer, J., concurring in part and dissenting in part); *see also United States Telecomms. Ass'n v. FCC*, 290 F.3d 415, 427 (D.C. Cir. 2002) (noting "the balance called for explicitly by Justice Breyer or implicitly by the Court").

19/ *Id.*

20/ *2002 Extension Order* ¶ 63.

21/ *See* nn. 16-18, *supra*.

competition and harm consumer welfare.[22/]

The Commission also must demonstrate why rivals would not respond to competition based upon exclusivity with competitive activity of their own. For example, it must explain why, in the face of such withholding, competitors would exit the market rather than simply lower their prices (to reflect their reduction in costs), invest in new content, or take other steps such as packaging their services differently or bundling their video offering with another product -- all steps that would increase consumer welfare. It must show further why, notwithstanding the potential impact of such countermeasures, the withdrawn programming would enable cable to wield monopoly control over video programming distribution as a whole.[23/]

A standard that requires the Commission to analyze the likely effect on competition and consumer welfare of lifting the ban also harmonizes with the general principles of antitrust and copyright law. Both these disciplines permit exclusive arrangements that promote competition and consumer welfare while deterring such arrangements in circumstances where their harmful effects outweigh their competitive benefits.[24/] Regardless of whether the crude tool of a *per se*

22/ *Cf. AT&T Corp.*, 525 U.S. 366 at 388-91 (the statute "requires the Commission to determine on a rational basis [how much sharing will be required], taking into account the objectives of the Act and giving some substance to the [statutory] requiremen[t].").

23/ As discussed below, the Commission's decisionmaking process must not only satisfy its duty under the arbitrary and capricious standard, but must meet the higher standard required by the First Amendment. *See Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027, 1041 (D.C. Cir. 2002) ("first amendment 'intermediate scrutiny' . . . is more demanding than the arbitrary and capricious standard of the APA"); *Time Warner Ent'm't Co. v. FCC*, 240 F.3d 1126, 1137 (D.C. Cir. 2002) ("*Time Warner II*") ("[T]o pass even the arbitrary and capricious standard, the agency must at least reveal a rational connection between the facts found and the choice made. . . . Here the FCC must also meet First Amendment intermediate scrutiny.") (internal quotation marks omitted).

24/ *See, e.g., Tampa Elec. Co. v. Nashville Coal Co.*, 365 U.S. 320, 329, 334 (1961) (declining to prohibit exclusive dealing arrangement that, on balance, benefited both the buyer and the seller and did not eliminate competition in a substantial portion of the market); Antitrust Guidelines for the Licensing of Intellectual Property Issued by the United States Department of Justice and the Federal Trade Commission (1995) at 5; *Independent Serv. Orgs. Antitrust Litig. CSU, LLC v. Xerox*, 203 F.3d 1322, 1325 (Fed. Cir. 2000), *cert. denied sub nom. CSU, LLC v. Xerox Corp.*, 531 U.S. 1143 (2001); *id.* at 1328 ("[T]he owner of a copyright, if it pleases, may refrain from vending or licensing and content [itself] with simply exercising the right to exclude others from using its property"); *Data Gen. Corp. v. Grumman Sys.*

ban on exclusivity was ever needed to jump-start competition in video programming distribution,[25] in today's competitive market, it makes far more sense to evaluate exclusive programming arrangements in light of the balancing tests long-employed under both antitrust and copyright law.[26] To deviate from this approach requires a showing that competition in the target market is so fragile that an extraordinary departure from normal business practices is essential to its preservation.[27]

Support Corp., 36 F.3d 1147, 1187 (1st Cir. 1994) ("an author's desire to exclude others from use of its copyrighted work is a presumptively valid business justification for any immediate harm to consumers").

[25] The Commission has noted the benefits of exclusivity in connection with the production of video programming. *See Amendment of Parts 73 and 76 of the Commission's Rules Relating to Program Exclusivity in the Cable and Broadcast Industries*, Report and Order, 3 FCC Rcd 5299, ¶¶ 49-89 (1988) (subsequent history omitted) ("*Syndicated Exclusivity Order*"); *Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992; Development of Competition and Diversity in Video Programming Distribution and Carriage*, First Report and Order, 8 FCC Rcd 3359, ¶ 63 (1993) ("As a general matter, the public interest in exclusivity in the sale of entertainment programming is widely recognized."). Many of the Commission's rules protect exclusive rights. *See* 47 C.F.R. § 76.101 (syndicated exclusivity); § 76.92 (network non-duplication rights). Other segments of the communications industry regularly use exclusive content as a means of competing against other distributors. *See* Investor Relations News Release, DirecTV, *DIRECTV Extends and Expands Exclusive NFL SUNDAY TICKET Agreement With NFL Through 2010 Season* (Nov. 8, 2004), *available at* http://phx.corporate-ir.net/phoenix.zhtml?c=127160&p=irol-newsArticle&ID=641794&highlight (discussing DirecTV's exclusive arrangement with the NFL); "Carriers Locked in Content Land Grab," Brandweek (Mar. 12, 2007) (discussing wireless deals for exclusive content).

[26] *See, e.g., Tampa Elec. Co.*, 365 U.S. at 329 ("it is necessary to weigh the probable effect of the contract on the relevant area of effective competition, taking into account the relative strength of the parties, the proportionate volume of commerce involved in relation to the total volume of commerce in the relevant market area, and the probable immediate and future effects which pre-emption of that share of the market might have on effective competition therein."); *Harper & Row v. Nation Enter.*, 471 U.S. 539, 580 (1985) ("The challenge of copyright is to strike the difficult balance between the interests of authors and inventors in the control and exploitation of their writings and discoveries on the one hand, and society's competing interest in the free flow of ideas, information, and commerce on the other hand.").

[27] Interpreting the standard in section 628(c)(5) in a manner consistent with antitrust law more appropriately reflects Congress's desire to minimize unnecessary regulation by permitting pro-competitive exclusive arrangements. Determining whether an exclusive dealing contract is an "unreasonable" restraint of trade requires a case by case analysis. *See, e.g., Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 29-30 (1984). The Supreme Court has specifically cautioned lower courts not to summarily condemn exclusive deals because of the potential for such arrangements to be procompetitive in a large number of circumstances. *See, e.g., Continental TV, Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 54-59 (1977).

Sharing obligations are particularly troublesome when, as here, they burden constitutionally protected speech.[28/] Cable programmers and cable operators "engage in and transmit speech, and they are entitled to the protection of speech and press provisions of the First Amendment."[29/] A prohibition on exclusive contracts reduces economic incentives to invest in the development of new programming, resulting in "reduced programming -- that is, less speech."[30/] Such a prohibition is permissible only if it addresses harms that are "real, not merely conjectural," and it "alleviate[s] these harms in a direct and material way."[31/] Under these principles, the statutory standard must be read narrowly.[32/] The First Amendment implications of the exclusivity ban require the Commission's decision in this proceeding to satisfy more than the normal "arbitrary and capricious" standard and to base its factual findings on specific evidence.[33/] In particular, to meet this standard, the FCC must "build a record that convincingly shows a problem to exist,"[34/] and, to the extent predictions are "susceptible of empirical proof," they must be so proven.[35/]

28/ *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Const. Trades Council*, 485 U.S. 568, 575 (1988) (court must construe statutes to avoid constitutional problems unless such construction is plainly contrary to the intent of Congress.") (citations omitted); *Jones v. U.S.*, 529 U.S. 848, 849 (2000).

29/ *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 636 (1994) ("*Turner I*"), *citing Leathers v. Medlock*, 499 U.S. 439, 444 (1991).

30/ *Time Warner Entertainment Co., L.P. v. FCC*, 93 F.3d 957, 979 (D.C. Cir. 1996).

31/ *Turner I*, 512 U.S. at 664. *See also Time Warner II*, 240 F.3d at 1137.

32/ The First Amendment requires that any restriction on speech must be "narrowly tailored" to advance the goal of competition without unnecessarily sweeping within its purview arrangements and program networks that pose no likelihood of imperiling that goal. *See Turner I*, 512 U.S. at 664.

33/ *See Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027, 1041 (D.C. Cir. 2002) ("first amendment 'intermediate scrutiny' . . . is more demanding than the arbitrary and capricious standard of the APA"); *Time Warner II*, 240 F.3d at 1137 ("[T]o pass even the arbitrary and capricious standard, the agency must at least reveal a rational connection between the facts found and the choice made. . . . Here the FCC must also meet First Amendment intermediate scrutiny.") (internal quotation marks omitted).

34/ *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 50 (D.C. Cir. 1977) (per curiam); moreover, its findings of fact are not entitled to deference. *See Century Communications Corp. v. FCC*, 835 F.2d 292,

II. THE EXCLUSIVITY BAN IS NOT NECESSARY TO PRESERVE AND PROTECT COMPETITION IN THE DISTRIBUTION OF VIDEO PROGRAMMING

The exclusivity ban can no longer be deemed "necessary" to preserve and protect competitive and diverse video distribution. Incumbent cable operators in 2007 face numerous strong, well-funded competitors. Retiring the exclusivity ban would neither force those providers from the market nor harm consumer welfare. This is so for two reasons: first, vertically-integrated programmers would not find it profitable in most cases to attempt to withhold programming from entrenched distributors of that size, especially given the broad availability of alternative content sources and offerings; second, the impact of the withdrawal of a handful of programming services from such powerful distributors would be minimal, and could not adversely affect competition and consumer welfare. Competition from DBS, the telcos, and others makes it too costly and too difficult for cable to successfully foreclose competition via exclusivity.

A. The Video Distribution Market Is Competitive.

The goal of competition and diversity in video distribution, which animated enactment of the exclusivity ban in 1992, has been met. A full discussion of the competitiveness of the video distribution market is set forth in Appendix A, attached hereto, but the state of competition is clear from even a brief overview of the video distribution market.

DBS. DBS competition is increasing annually. Both DirecTV and EchoStar have each invested billions of dollars in developing and deploying their networks,[36/] and each now has at

304 (D.C. Cir. 1987); *Turner II*, 117 S. Ct. at 1189; *Turner I*, 512 U.S. at 665-66 (plurality); *id.* at 671 n.2 (Stevens, J., concurring in part and concurring in the judgment).

[35/] *Quincy Cable TV, Inc. v. FCC*, 768 F.2d 1434, 1457-58 (D.C Cir. 1985).

[36/] DirecTV has launched nine geosynchronous satellites for delivery of its programming and other services, and is scheduled to launch two more in 2007. *Annual Assessment of the Status of Competition in* least double the number of subscribers of nearly every cable MSO in the country.[37] The number of DBS subscribers nationally jumped over 50% between 2002 and 2006 and in 2005 alone DBS subscribership grew an additional 12.8%.[38] DBS providers' share of MVPD subscribers increased 53% between 2002 and 2006.[39] EchoStar now has 13.1 million subscribers while DirecTV serves 16 million customers.[40] DirecTV is on the verge of being transferred to Liberty Media, a company with extensive experience in content development and distribution.

Telephone Companies. Telecommunications carriers have vigorously entered the video distribution market. AT&T and Verizon are expected to offer video service to over 14 million households by the end of this year, and AT&T has announced its intention to provide video to 19 million homes by mid-2008.[41] AT&T and Verizon also have expended billions of dollars to upgrade their network;[42] indeed, video is regarded as the "key driver for new fiber deployment

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the Market for the Delivery of Video Programming, Notice of Inquiry, MB Docket No. 06-189, Comments of DirecTV (filed Nov. 29, 2006) at 6-7; EchoStar Communications Corp., Annual Report (Form 10-K Amended) (Mar. 6, 2007) at 47 ("EchoStar Annual Report").

37/ *See Twelfth Annual Report* ¶ 13.

38/ *See* Satellite Broadcasting and Communications Association of America, Satellite Subscribers History, *available at* http://www.sbca.com/index.asp (last visited Mar. 30, 2007) (In June 2002, DBS had approximately 18.3 million subscribers compared to approximately 27.9 million subscribers in June 2006.); *see also* Top 25 MSOs as of Sept. 2006, http://www.ncta.com/ContentView.aspx? contentId=73, *with* NCTA Video Competition Comments at 10 (DirecTV has 15.678 million subscribers and EchoStar has 12.755 million subscribers).

39/ *Twelfth Annual Report* ¶ 13 (DBS accounts for approximately 26.1 million subscribers as of June 2005); Comments of the National Cable & Telecommunications Association, MB Docket No. 06-189 (Nov. 29, 2006) at 9 (28.9 million subs/30% of MVPD households).

40/ DirecTV Holdings LLC., Annual Report (Form 10-K) (Mar. 1, 2007) at 2; EchoStar Annual Report at 1.

41/ *See* Ernie Carey, Vice President-Advanced Network Technologies, AT&T Inc., Presentation to Bear Sterns 20th Annual Media Conference, March 6, 2007, at 10; Press Release, "Verizon's 4Q 2006 Results Cap Strong Year of Organic Growth in Wireless, Broadband, and Business Markets," Jan. 29, 2007, available at http://investor.verizon.com/news/view.aspx?NewsID=813; AT&T Annual Report at 2.

42/ Verizon is expected to invest nearly $18 billion deploying its fiber network in 2007, in order to position the company "to be very aggressive in FiOS, particularly on the video side." "Verizon expects bigger fiber diet in '07," *Marketwatch*, Jan. 29, 2007 (quoting CEO Ivan Seidenberg). AT&T is spending $4.6 billion to upgrade its network. *See* AT&T Annual Report at 2 ("We expect to have the capability to in the residential market."[43] Verizon has made clear it is fully committed to the video business,[44] entering into hundreds of cable franchise agreements across the country that typically have terms of at least ten years,[45] and securing distribution rights to over 400 channels of programming and 8000 on-demand titles in a relatively short time frame.[46] AT&T is moving aggressively to be able to provide video to an expected 19 million homes by mid-2008, obtaining distribution rights to more than 300 channels of video programming, and negotiating or consummating statewide franchise agreements in Texas, California, and elsewhere with terms of seven years or more.[47]

SMATV, Broadband Service Overbuilders, Municipal Providers. There are at least 150 SMATV providers offering video in the United States.[48] SMATV providers continue to be a significant competitive presence in most major metropolitan markets, including those served by

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offer service to approximately 19 million living units by the end of 2008, as part of our initial deployment, and expect to spend approximately $4,600 in network-related deployment costs and capital expenditures from 2006 through 2008, as well as additional customer activation capital expenditures. We remain on budget for this overall target and expect to spend approximately $3,100 during 2007 and 2008. These expenditures may increase slightly if the programming and features of the video offering expand or if additional network conditioning is required.") (reporting figures in millions).

43/ Statement of Chairman Kevin J. Martin, *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,* MB Docket No. 05-311, *Report and Order and Further Notice of Proposed Rulemaking*, FCC 06-180 (rel. March 5, 2007).

44/ *See* R. Scott Raynovich, *Verizon to Pump $18B Into FiOS by 2010*, Light Reading (Sept. 27, 2006); "New round begins in fight over choice," *Bergen County Record*, Jan. 15, 2007 (noting Verizon statements that it "will sell TV in approximately 300 New Jersey communities" in 2007 and quoting Verizon official: "In two months we'll be serving more towns in New Jersey than Cablevision has in 35 years.").

45/ *See* Verizon, Annual Report (Form 10-K), Overview (Mar. 1, 2007).

46/ *See* "Choice and Competition for TV Service on the Way to More Rhode Island Consumers," Verizon Press Release, Mar. 8, 2007 (FiOS TV offers more than 400 channels and 8600 on-demand titles); "Crash Course to Success: Verizon's O'Connell Defies FiOS Odds," *Multichannel News*, Jan. 29, 2007 (FiOS TV "managed to get 300 channels under contract in a year"); "A new player in TV; can Verizon flip the switch?" *Crain's New York Business*, Nov. 27, 2006 ("A typical deal for multichannel distribution takes 12 to 18 months to close," says Mr. Denson, vice president of content strategy and acquisition for FiOS TV. "We were asked to do over 100 deals in half that time.").

47/ *See* AT&T Annual Report at 2 ("We expect to have the capability to offer service to approximately 19 million living units by the end of 2008.").

48/ *Twelfth Annual Report* ¶ 130.

Cablevision, offering residents an unprecedented "fifth" choice in multichannel providers. Broadband overbuilders such as RCN and WOW are among the largest MVPDs, and there are also well over 100 municipal utility broadband systems offering video around the country.[49/]

Internet Video. The availability of prime time network programming on the Internet has exploded in recent years: almost 70% of U.S. households subscribe to Internet service, and high-speed connections now constitute 60% of online subscriptions.[50/] In July 2006 alone, 107 million Americans, three out of every five Internet users, viewed video online.[51/] According to the *Wall Street Journal*, "video Web sites now draw users in numbers that rival those of cable and satellite companies."[52/] The explosive popularity and growing strength of YouTube, Google Video, Akimbo, and other Internet-based sources of video content are having a major impact on the diversity and dynamism of video programming regardless of whether they can be considered perfect substitutes for video programming from more traditional distributors, representing a seismic shift in the market from five years ago.

49/ *See* MB Docket No. 06-189, APPA Reply Comments, at 3 (filed Dec. 29, 2006) ("municipal utility broadband systems continue to thrive, building newer and more robust networks, offering additional services, and achieving higher customer penetration rates. A recent APPA survey of municipal utility broadband service providers indicated an average subscriber penetration rate of over 50 percent of the homes passed.").

50/ *See* Matthew Colella, *Everything's Coming Up Broadband*, The Bridge, Oct. 20, 2006, at 4 (citing a study that found that cable and DSL providers "added about 10 million net new subscribers in the past year alone"); *Twelfth Annual Report* ¶ 135.

51/ *See Study: 107 Million People Viewed Online Video in July*, USA TODAY, Sept. 28, 2006, *available at* http://www.usatoday.com/tech/news/2006-09-28-online-video-study_x.htm; *see also* Kimberly S. Johnson, *Web TV Network Makes New Waves*, DENV. POST, Nov. 2, 2006 ("Internet-based videos and television shows are soaring in popularity among viewers, investors, and advertisers."), *available at* http://www.denverpost.com/business/ci_4588024.

52/ Ellen Sheng, "As Internet TV Gains Popularity, Cable Firms Bulk Up Offerings," WALL ST. J., Sept. 27, 2006, at B4.

Mobile Video. By 2010, it is estimated that more than 250 million people worldwide will be watching mobile video, generating $27 billion in revenue.[53] The wireless industry is rapidly rolling out and developing mobile video offerings to attempt to capitalize on this demand, and providers are seeking new ways to provide a wireless mass media experience similar to that available over the wired broadband Internet. Mobile devices such as iPod and wireless phones represent another fast-growing, new source of video content for consumers.

Other Competition. Video distributors also face competition from broadcast television, theatrical movie releases, DVD sales and rentals, and a great many other video distribution channels that do not necessarily seek to distribute cable network programming. The video distribution market is expanding both horizontally -- in terms of the number and type of video content providers -- and vertically, in terms of the depth and diversity of offerings for consumers. The scope of the exclusivity restriction thus covers only a small portion of the video content distribution market.

B. The Exclusivity Ban Is Not Indispensable To The Preservation Of Competition In Video Programming Distribution.

There is no meaningful prospect that program exclusivity would foreclose competition in video distribution and harm consumer welfare. *First*, given the size and strength of the DBS and telephone companies and the extent of their sunk investment in video distribution business, there is no basis for concluding that their inability to secure access to one or more cable-owned programming networks would preclude competition in video programming distribution. The billions of dollars in sunk costs incurred by DBS and the telcos represent a significant investment for them, and they will continue to offer video service irrespective of whether a handful of cable-

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[53] Olga Kharif, "*Online Video: Next Stop, NASDAQ?*," Business Week Online, Sept. 27, 2006, *available at* www.businessweek.com/technology/content/sep2006/tc20060927_385661.htm?chan=search.

owned programming services are unavailable to them.

Second, a cable-owned programmer that attempted to use exclusivity to benefit its affiliated distributor would risk being unable to recoup the significant license fees and advertising revenues lost when not distributed over competing platforms.[54/] In order to make an exclusivity strategy profitable, a vertically-integrated distributor must recover a substantial portion of its lost revenues through increased distribution revenues. This becomes more difficult -- and expensive -- as the number of subscribers to the competing distributor rises.[55/] In Cablevision's case, the likelihood it could profit from an exclusivity arrangement is particularly remote because its subscriber base is relatively small and its geographic footprint highly concentrated, such that it would have to recover a higher amount of foreclosure costs over a smaller base of subscribers.

The Commission five years ago recognized that lifting the exclusivity ban would not affect the ability of rival video content distributors to carry a significant portion of cable-owned programming, because "it may not make economic sense for [a vertically integrated] entity to withdraw an existing service or collection of services from DBS subscribers."[56/] The 50% increase in the number of customers now served by rival MVPDs since 2002 means that the costs of pursuing an anti-competitive foreclosure strategy through exclusivity also have risen substantially, making it even less likely that lifting the ban would result in widespread use of

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54/ A vertically integrated programmer that attempts to use exclusivity to facilitate foreclosure of competition from rival distributors sacrifices the potential profits from the sale of its programming to those competitors. While those foregone revenues may have been of less consequence in 1992 when competing MVPDs had far fewer subscribers, the lost profits from foreclosure grow larger as the size of the competing program buyer increases. Wallsten Report at 12.

55/ Wallsten Report at 2, 12; *see also 2002 Extension Order* ¶ 36 ("the exclusive distribution contract can be viewed as a kind of 'investment,' in which an initial loss of profits from programming is incurred in order to achieve higher profits later from cable distribution").

56/ *2002 Extension Order* ¶ 57.

exclusivity.[57] To the extent a cable operator with popular programming attempted to withhold that network, recovering the costs of such a strategy would be particularly high, since such networks are most likely to garner the highest licensing fees and advertising revenues. A cable operator with multiple programming networks faces the additional risk that using an exclusivity strategy for its best-known network could adversely affect distribution of its other networks, compounding the costs.

Third, the size of cable's competitors means a cable operator could not attempt foreclosure through exclusivity without risking effective counter-measures from the excluded distributor. Rival distributors might cut prices, acquire other programming on an exclusive basis themselves, or might counter cable exclusivity by launching new programming services of their own.[58]

Fourth, actual marketplace experience impugns claims that cable could use exclusivity to foreclose competition. The ban has never constrained cable operators from entering into exclusive arrangements with unaffiliated cable programming networks. Despite the fact that for 15 years, cable has had the ability to enter into exclusive arrangements with a significant and ever-growing segment of the programming marketplace, DBS providers have still grown to become the 2nd and 4th largest MVPDs respectively. And even though approximately 80% of today's program networks are not subject to any restriction on cable exclusivity, the telephone companies still opted to invest billions of dollars to enter the video distribution market. The costs of attempting to effectuate anticompetitive foreclosure via exclusive agreements with unaffiliated programmers are no greater than those associated with undertaking such an effort by

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57/ Wallsten Report at 12.

58/ *Id.* at 4.

withholding vertically-integrated programming services.[59] Examining how competition has been affected by cable's ongoing authority to distribute exclusively a wide swath of cable networks is certainly probative of the impact on competition of removing the last remaining segment of programming from the constraints of the exclusivity ban.

Fifth, the antitrust laws are wholly capable of addressing and remedying any potential anticompetitive use of exclusive contracts by vertically-integrated cable programmers, should such abuses occur and threaten consumer welfare.[60]

III. THE COMPETITIVENESS AND DIVERSITY OF THE PROGRAM SUPPLY MARKET PRECLUDES CABLE FROM USING EXCLUSIVITY TO HARM COMPETITION IN VIDEO PROGRAMMING DISTRIBUTION

Competition in the content supply market is so robust that any use of exclusivity by cable could not harm competition in the distribution market. Cable operators do not own the great majority of the most popular cable programming services, and the steady growth of the video content market dilutes the significance of any single network. Given the broad array of video programming services available to today's video distributors -- nearly 80% of which lack any cable ownership -- competition does not depend on the ability of a distributor to access any particular network, whether national or regional.

59/ *Id.* at 12. In either instance, an operator would have to be able to raise its rates sufficiently on the distribution side of its business in order to recover the costs of the foreclosure (foregone license fee and advertising revenues from distribution to rival MVPDs), or, in the case of unaffiliated programmers, the price paid for exclusivity.

60/ *See, e.g., Geneva Pharm. Tech. Corp. v. Barr Lab. Inc.*, 386 F.3d 485, 508-10 (2d Cir. 2004) (striking down an exclusive dealing agreement that "had the potential to freeze competitors out of the . . . market," by reducing supply); *Reading Int'l, Inc. v. Oaktree Capital Mgmt. LLC*, 317 F. Supp. 2d 301, 320-21 (S.D.N.Y. 2003) (denying summary judgment because plaintiff's allegations that the exclusive agreements were "excessive in scope and duration" and resulted in a "blanket refusal by distributors to consider plaintiff's venue" could support a finding that the exclusive agreements were anticompetitive).

A. There Is A Vibrant Market For The Supply Of National Video Programming Services.

Today's distributors do not rely on cable-owned programming for their competitive success. In 1992, most distributors offered 36-54 channels and more than half the programming services offered over cable systems were vertically-integrated. Today, MVPDs offer hundreds of channels, most of which are unaffiliated with cable. Since 2002, the number of national program networks has grown by 80%, from 294 to 531,[61/] but the percentage of national program networks affiliated with a cable operator has fallen from 35% to 22%.[62/] At the same time, the percentage of national programming networks affiliated with one or more DBS providers has grown rapidly, and now stands at 20%.[63/]

In 2002, the Commission considered it "most significant . . . that vertically integrated content constitutes 35 percent of the most popularly rated satellite-delivered prime time programming and 45 percent of the most-subscribed-to programming."[64/] Today, the percentage of cable-owned channels in the top 20 most widely carried and highly rated cable channels has fallen to 25% and 30% respectively.[65/] The four major broadcast networks – leveraging their own integration of program production and program distribution assets -- are the dominant players in cable programming, controlling 50% of the most widely-carried and 11 of the top 15 most highly rated programming networks.[66/] A key factual predicate underlying imposition of

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61/ *See Eighth Annual Video Competition Report* ¶157; *Twelfth Annual Report* ¶ 157.

62/ *See Eighth Annual Video Competition Report* ¶157; *Twelfth Annual Report* ¶ 157.

63/ *Twelfth Annual Report* ¶ 161.

64/ *2002 Extension Order* ¶ 32. *See also id.* ¶ 18 (nine of the top-20 cable networks ranked by subscribership are vertically integrated with cable, and seven of the top-20 cable networks ranked by prime-time rating are vertically integrated).

65/ *See Eighth Annual Video Competition Report* ¶159; *Twelfth Annual Report* ¶ 163; Kagan, *Economics of Basic Cable Networks* at 41, 70-72.

66/ *Twelfth Annual Report* ¶ 21 & tbl. C-6.

the exclusivity ban -- cable's putative control of the content supply market -- is no longer tenable, further illustrating that a sunset is long overdue.

Further, as the Commission acknowledged in 2002, lifting the ban would not affect the availability of many cable-owned programming services to rival MVPDs. The more than 30 million subscribers served by rival MVPDs represent a significant potential revenue source that no programmer -- vertically-integrated or not -- can afford to shun. The substantial growth experienced by DBS and other non-cable MVPDs has eliminated the prospect that lifting the ban would result in program withdrawals that could harm competition in a manner that impacts consumer welfare.

The Commission also has acknowledged that some services "clearly . . . either lack sufficient subscriber appeal to make them critical to the competitive success of DBS" or can be exchanged for "reasonable substitutes [that] are either available or could be created."[67/] Only 50 of the current 531 programming networks are distributed to more than one-half of the nation's television households.[68/] Hardly any of these could be considered "critical" under any standard, and in any event, there are readily available substitutes for virtually every one.[69/] This is particularly true because consumers today focus more on whether a provider offers a "double" or "triple" play of video, voice and data than whether it carries any particular programming

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67/ *2002 Extension Order* ¶ 57.

68/ *Twelfth Annual Report* ¶ 157.

69/ There are multiple news channels (CNN, Fox News, MSNBC), business channels (CNBC, Bloomberg Television, Fox Business Channel), weather channels (The Weather Channel, NBC Weather Plus), children's channels (Nickelodeon, Disney, Toon Disney, Cartoon Network, Noggin), networks featuring national sports (ESPN, Fox Sports, Versus, NFL Network, NBA Network, Golf Channel, Speed, NASCAR Network, as well as the sports available on FX, TNT and TBS), and music channels (VH-1, MTV, CMT, Fuse, The Tube). There are also multiple educational services (Discovery Channel, TLC, History Channel), multiple services oriented toward women (Lifetime, WE, Oxygen) and minorities (BET, TV One), multiple premium movie channels (HBO/Cinemax, Showtime/Movie Channel, Encore/Starz), classic film channels (AMC and Turner Classic Movies) and multiple general entertainment networks (USA, TNT, FX).

network.

Moreover, the loss of any particular network today is far less likely to impact competition, let alone foreclose it and harm consumers.[70/] One of the most significant changes in the market for the distribution of video content since 2002 has been the explosion of high-quality video content available over the Internet -- from broadcasters, cable programmers, the major motion picture studios, sports leagues and other sources.[71/] In 2002, major content companies were offering little, if any, video content over the Internet;[72/] today, "[m]any traditional programmers . . . offer streaming video on their websites to increase access to and supplement their regular television programming content."[73/] If subscribers can access their favorite shows and games over the Internet,[74/] and with so many new video programming options and outlets, no single program channel can be considered a competitive necessity, the presence or absence of which is "indispensable" to a rival MVPD's competitive viability such that consumers would suffer a loss of competitive diversity.

70/ Wallsten Report at 21.

71/ In 2002, the Commission found access to broadcast-quality video over the Internet "limited," *see Eighth Annual Video Competition Report* ¶ 89; last year, it noted that broadcast quality video is possible at speeds readily available from most broadband providers. *Twelfth Annual Report* ¶ 136.

72/ *Cf. Eighth Annual Video Competition Report* ¶¶ 90-94.

73/ *Twelfth Annual Report* ¶ 138.

74/ "Online Overtime; Now the Internet Can Bring Live Sports Action to Fans 365 Days a Year," *Washington Post*, Jan. 29, 2006 ("While helping to boost sports sites' revenue, fans watching live games online could further slice up the media audience -- unwelcome news for the traditional television networks. As fanatics sit alone in front of the computer, rooting for their beloved team, they could ignore the evening programming lineup on the living room TV. If cable, satellite, vide games and iPods weren't enough trouble already, the TV networks could face yet another source of competition for viewers' attention.").

B. Exclusivity Restrictions For Regional Programming Services Are Unnecessary.

Regional programming services -- whether sports or non-sports -- are demonstrably not "essential" to the competitive viability of any MVPD and so cannot affect the diversity in the distribution of video programming.

Non-Sports Regional Programming. Non-sports, regional programming services cannot be viewed as "indispensable" to the competitive viability of rival MVPDs. DBS providers carry few, if any, of the 59 non-sports regional programming services available in the market,[75/] even though many of them are satellite-delivered and available.[76/] The Commission concluded in the *Adelphia* proceeding that "the record does not indicate that any MVPD's lack of access to [regional non-sports] programming would harm competition or consumers."[77/] Allowing the ban to continue to apply to such programming would violate the statutory standard.

Non-sports regional networks are subject to competition and substitutes that render foreclosure via exclusivity highly improbable. Further, local news is widely available on the Internet. Entry into the market for regional non-sports programming "is not hindered by a lack of content."[78/]

Regional Sports Services. While competing MVPDs frequently assert their survival depends on access to all RSNs, those claims are not substantiated by an empirical analysis of the

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75/ *See Twelfth Annual Report* ¶ 166 (identifying 96 regional networks), ¶ 183 (identifying 37 regional sports networks).

76/ *Id.* ¶ 166.

77/ *Applications for Consent to the Assignment and/or Transfer of Control of Licenses, Adelphia Communications Corporation, Time Warner Cable Inc., Comcast Corporation*, Memorandum Opinion and Order, 21 FCC Rcd 8203, ¶ 169 ("*Adelphia Transfer Order*").

78/ *Id.; see id.* at n.553 ("Even with respect to New England Cable News, which commenters cite as an example of desirable non-sports regional programming, there is no evidence establishing that an MVPD's inability to carry that network would materially diminish competition or hurt consumers").

market. Even if it were true in 2002 that the exclusivity ban was needed to guarantee competing distributors access to cable-owned, regional sports programming,[79/] the sports programming market has changed considerably in recent years.[80/]

A new trend to emerge is the proliferation of team-owned RSNs and league-owned sports networks. Team-owned RSNs unaffiliated with any cable MSO are present in several major markets, including Boston (NESN), New York (YES), Washington, D.C. (MASN), and Denver (Altitude). League-owned networks such as the NFL Network, the NBA Network, and the Baseball Network signal an interest by the professional and college sports leagues to exercise greater control over the distribution of their content.[81/]

The amount of professional sports video content available over the Internet also is growing exponentially.[82/] Both Major League Baseball and the National Basketball Association make games available over the Internet to broadband subscribers.[83/] In Cablevision's footprint, there are four different regional sports networks offering New York-centric sports programming to MVPD subscribers in addition to numerous out-of-market regional sports networks. Video programming distributors in the New York area have the ability to distribute thousands of professional and college sporting events, including hundreds of games played by local teams,

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79/ *See, e.g., 2002 Extension Order* ¶¶ 29, 54.

80/ While in 2002, "86 percent of 'must have' regional sports programming [wa]s vertically integrated," *2002 Extension Order* ¶ 47, only 17 of 38 RSNs (44.7%) are vertically integrated with a cable MSO today. *See Twelfth Annual Report* ¶ 183 (the *Twelfth Annual Report's* reference to 37 RSNs did not include MASN).

81/ "Pay up, tune in: Leagues, conferences may change how sports is watched on TV; Specialty channels like Big Ten Network could force fans to pay higher price to see their favorite teams," *Indianapolis Star*, March 10, 2007.

82/ *See supra*, Section II.A; *see also* "Online Overtime; Now the Internet Can Bring Live Sports Action to Fans 365 Days a Year," *Washington Post*, Jan. 29, 2006.

83/ *See, e.g.*, "NBA Takes It to the 'Net; 'League Pass' Subs Will Get Free Access to Game Streams," *Multichannel News*, Oct. 16, 2006.

over more than a dozen networks -- most of which are unaffiliated with cable.[84/]

The unavailability of RSNs to a distributor does not appear to harm competition. In reviewing the transfer of Adelphia's cable systems to Comcast and Time Warner, a majority of FTC Commissioners concluded that even if an RSN entered into an exclusive arrangement with a cable operator, such an arrangement would be problematic only if it would "create a likely risk of a substantial harm to competition, on balance making consumers worse off," and that they did "not have facts that indicate such a loss of competition is likely."[85/] The FTC's determination is consistent with other recent instances in which one or more MVPDs have not carried a local RSN but nonetheless have continued to function as viable competitors.

Cablevision's own experience in 2002 when it was unable to offer its subscribers Yankees games due to a dispute with YES provides concrete evidence that an MVPD can remain a strong competitor even without offering all games from all local professional sports teams in a particular market. The Commission found that Cablevision lost 2.1% of its subscribers that year.[86/] Even if that figure were wholly attributable to Cablevision's failure to carry YES (which is highly unlikely), the impact on an MVPD would not be sufficient to jeopardize competition in video distribution.

While Philadelphia has long been invoked as the prime example of the importance of

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84/ The New York market is saturated with sports programming from a range of outlets, including FSNY, MSG, YES, SportsNet New York, ESPN, ESPN2, TNT, TBS, FX, ABC, CBS, NBC, Fox Broadcasting, WNYW, WPIX, WLNY, Versus, the NFL Network.

85/ Statement of Chairman Majoras, Commissioner Kovacic and Commissioner Rosch Concerning the Closing of the Investigation Into Transactions Involving Comcast, Time Warner Cable, and Adelphia Communications (Jan.31, 2006) at 2, available at www.ftc.gov/os/closings/ftc/ 0510151twadelphiamajoraskovacic_rosch.pdf.

86/ *See General Motors Corporations and Hughes Electronics Corporation, Transferors, and The News Corporation Limited, Transferee, For Authority to Transfer Control*, Memorandum Opinion and Order, 19 FCC Rcd 473, Appendix D, ¶ 47 (2004) ("*News Corp/DirecTV Order*"); *Adelphia Transfer Order*, Appendix D, ¶ 20.

RSN programming, there is no reliable empirical data demonstrating this to be true.[87] DBS penetration in Philadelphia has more than tripled -- from 4% in 2000 to over 12% at the end of 2006 -- since DirecTV and EchoStar first began to complain that lack of access to the terrestrially-delivered Comcast SportsNet jeopardized MVPD competition in that market.[88] The Commission has cited putatively "low" DBS penetration in Philadelphia as justification for exclusivity restrictions,[89] but the DBS penetration rate in that market is higher than Hartford-New Haven, Providence, and Springfield and comparable to Boston and Baltimore, all markets where there are no public expressions of concern by competing MVPDs regarding access to RSNs.[90] Indeed, the fact that DBS penetration in Philadelphia has tripled since DirecTV and EchoStar began making claims that their competitive viability there was imperiled by lack of access to Comcast SportsNet strongly suggests that competition can survive and flourish in that market even with RSN exclusivity.

Other markets similarly fail to show harm to competition from lack of RSN access. In Charlotte, neither DirecTV nor EchoStar has televised local games played by the National Basketball Association's Charlotte Bobcats, and DBS penetration in that market is over 25%.[91]

87/ Wallsten Report at 25-26.

88/ *See Reconsidering Our Communications Laws: ensuring Competition and Innovation: Hearing Before the S. Comm. On Judiciary*, 109th Cong. (2006), *available at* http://judiciary.senate.gov/testimony.cfm?id=1937&wit_id=5417 (testimony of David L. Cohen, Comcast Corporation) ("Cohen Testimony").

89/ *See, e.g.*, *Adelphia Transfer Order* ¶ 146; *2002 Extension Order* at n.107.

90/ Cohen Testimony. Nor is cable penetration in Philadelphia appreciably higher than other DMAs where there are no reports of RSN access concerns for DBS. According to Nielsen data, Philadelphia's cable penetration is 82%, which is lower than Boston, Providence, Hartford and comparable to New York. Broadcasting & Cable Yearbook (2007), at C-14.

91/ The Commission sought to dismiss this data by suggesting the "Charlotte Bobcats are a relatively new team and do not yet have a strong enough following to induce large numbers of subscribers to switch MVPDs." *Adelphia Transfer Order* ¶ 151. The Commission did not indicate the basis for this conclusion, and apparently overlooked the fact that an NBA franchise has been in Charlotte for all but two of the last 18 years.

In New Orleans, both DirecTV and EchoStar have opted not to carry Cox Sports Television, which features games played by the New Orleans Hornets and the LSU Tigers, even though it has been offered to them for distribution.[92/] It is difficult to reconcile the DBS providers' characterization of RSNs as "must-have" programming with their voluntary decision to eschew carriage of a local RSN in a significant metropolitan market. EchoStar does not carry YES in New York or MASN in Washington, D.C., further impugning assertions about the indispensability of RSN programming.[93/] In San Diego, DirecTV was unable to show that the lack of access to local sports programming in that market had a statistically significant effect on expected DBS penetration levels.[94/]

Continuation of a policy that effectively condemns sports exclusivity for cable-affiliated programming on a *per se* basis is particularly problematic today, when DirecTV can compete with cable on the basis of sports programming exclusivity for its increasingly popular and highly lucrative out-of-market sports packages.[95/] DirecTV has exclusive distribution rights to the NFL's Sunday Ticket package of out-of-market games, the March Mega-Madness package of out-of-market NCAA college basketball tournament games, NASCAR's Hot Pass offering, and its advertising and marketing materials loudly trumpet these exclusive sports offerings.[96/]

92/ *See Adelphia Transfer Order* at n.502.

93/ *See* http://www.dishnetwork.com/content/whatson_dish/pay_per_view/sports/multi_sports_packages/packages.aspx (sports package channel line-up).

94/ *See Adelphia Transfer Order* ¶ 148.

95/ "Root, root root and pay for the road team," *CNNMoney.com*, Feb. 26, 2007 ("While local and national broadcast sports fees are showing only solid gains, if that, the leagues are seeing the rights fees for out-of-market games soar. . .More than 2 million fans had [Sunday Ticket] last year").

96/ Bob Marsocci: DirecTV's Exclusive MEGA MARCH MADNESS Package to Broadcast 30 Games in High-Definition Format, *available at* http://phx.corporate-ir.net/phoenix.zhtml?c=127160&p=irol-newsArticle&ID=683680&highlight=; "NFL Sunday Ticket Only From DirecTV", *available at* http://www.directv.com/DTVAPP/global/contentPage.jsp?assetId=900044; "Ride Shotgun with the Top

Cable operators should not have to play by rules not followed by either the sports leagues or competing MVPDs,[97] especially when the Commission recognizes and allows other forms of sports programming exclusivity.[98] At a minimum, the "necessary" standard requires the Commission to articulate an empirically-based rationale for its tolerance of sports programming exclusivity in a plethora of contexts, while continuing to ban sports programming exclusivity between cable operators and affiliated RSNs.

IV. COMPETITION AND DIVERSITY ARE BEST ADVANCED BY LIFTING THE EXCLUSIVITY BAN

Restricting exclusivity constrains investment in programming both by cable operators and competing MVPDs. Deprived of the right to control the distribution of their content, cable

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Drivers From Nascar Exclusively on DirecTV," *available at* http://www.directv.com/DTVAPP/global/contentPageNR.jsp?assetId=P4200058&CMP=ILC-Q107-banner-HotPass.

97/ Differences between local and out-of-market games do not automatically justify different treatment of sports programming exclusivity. Out-of-market games are highly popular; the 2.3 million fans subscribing to either "Extra Innings" or "Sunday Ticket" is comparable to, or larger than, several RSNs. For viewers in many states, out-of-market games feature the most popular and closely followed teams in a particular area. "Cheering for the big dogs," *CNNMoney.com*, June 11, 2004 ("When Sports Illustrated did state-by-state polls . . . it found 15 states outside California that listed the Lakers as their favorite NBA team. Another 19 states list the Lakers as its second favorite basketball team. The states where the Lakers rule stretch from Alaska to Alabama, and they include Tennessee, which has its own NBA team, the Memphis Grizzlies"); *see id* ("The SI poll found 32 states outside the New York metro area ranked the Yankees as one of the local fans' three most popular baseball teams . . . [including] Utah and Montana, where the Yanks finished first").

98/ Professional sports leagues typically grant their individual teams exclusive local territories for the sale and distribution of televised rights to member club games, such that the teams may block the importation of other games into their local market, subject to exceptions for games shown on outlets televising national, league-wide packages (*e.g.*, ESPN, TNT and the broadcast networks). Individual teams typically sell local games on exclusive telecast basis to distribution outlets (cable and broadcast channels) in their local territories. These local territory exclusivity restrictions help to create the market landscape for the out-of-market packages sold on an exclusive basis by DirecTV. *See, e.g.*, "Kasten Makes a Deposit to Bid on Team," *Washington Post*, Feb. 15, 2005 ("Baseball grants certain geographic regions around teams as 'exclusive' broadcast rights for that team only, while outer regions are often termed 'shared'"); "To see or not see: a primer on sports blackouts," *Lawyers Weekly*, June 22, 2001 (NHL blackouts are designed "to protect television rights-holders in the competing teams' home market. Teams sell local rights and control which home games are regionally televised. Local broadcasters own exclusive broadcast rights . . ."). *See also Adelphia Transfer Order* ¶ 125 ("Sports programming generally is available only to consumers located within the authorized viewing zone for a team's programming").

operators have reduced incentives to develop new programming due to the prospect that their chief competitors will be able to exploit the value of that investment while bearing none of the risk. Cable investment dollars flow away from programming, because operators cannot afford to deploy scarce capital in order to serve as "content incubators" for their competitors.[99/] Unsurprisingly, the relative level of cable investment in programming has declined precipitously since the ban was adopted.[100/]

The decrease in cable investment in programming means that consumers are not fully reaping the benefits of cable's content expertise.[101/] Cable operators' position as content distributors yields a wealth of complementary resources and expertise, and cable's investment in programming has been critical to the proliferation of program networks and service choices now available to multichannel subscribers. The television business evolved into the multichannel video programming marketplace because cable operators did more than simply retransmit the same content being offered by broadcasters. The explosion of new cable programming services in the 1980s -- HBO, Showtime, AMC, MTV, CNN, Bravo, BET, Comedy Central, Discovery, TNT -- was funded principally by cable operator investment at a time when the exclusivity ban was not in effect.[102/]

99/ Wallsten Report at 27-28.

100/ When the exclusivity ban was enacted, 57% of national programming networks were vertically integrated with one or more cable operators. H. Rep. No. 102-628 at 41 (1992). Today, only 22% of all national programming networks are vertically integrated. *Twelfth Annual Report* ¶ 157.

101/ The Commission has recognized that cable exclusivity can have positive effects by promoting programming investment and output. *See New England Cable News*, 9 FCC Rcd 3231, ¶ 34 (1994) (exclusivity may "attract investment, carriage and support of [a programming] service"); *id.* ¶ 40 ("exclusivity may promote diversity in the programming market when used to provide incentives for cable operators to promote and carry a new and untested programming service").

102/ *See Competition, Rate Deregulation and the Commission's Policies Relating to the Provision of Cable Television Service*, 5 FCC Rcd 4962, ¶ 78 (1990) ("*1990 Competition Report*") (vertical integration "increased both the quality and quantity of program services available to the viewing public"); *id.* ¶¶ 82-

The exclusivity restriction also suppresses programming investment by DBS, Verizon, AT&T, and other rival MVPDs, who have the financial wherewithal to develop their own programming but have chosen not to do so. With the exclusivity restrictions in place, it is more profitable for rival MVPDs to rely on programming developed by others and proven in the marketplace than to make investments of their own.

Exclusivity also promotes diversity by enabling a distributor to take account of, and respond to, not only the aggregate preferences of a distributor's customer base, but also the intensity of those preferences. Exclusivity fuels a virtuous cycle of output production, as both content creators and distributors respond to the exclusivity strategies of their rivals by producing and distributing distinct content offerings that enable them to maintain a unique presence in the marketplace.[103/] Such product differentiation "represents a useful and desirable part of the competitive process" that "includes such clear public benefits as product diversity, genuine innovation, responsiveness to consumers, attention [and] service[.]"[104/]

Failing to lift the exclusivity ban harms Cablevision by forcing it to compete against rivals that are far larger and far better-financed without recourse to a common competitive tool. Allowing the ban to expire will intensify competition in the video distribution market, and provide consumers with more choices and a greater diversity of content offerings and options.

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85 (vertical integration has led to investment in better programming and resulted in more viewing options for consumers).

103/ Wallsten Report at 4.

104/ Phillip Areeda, *Antitrust Law: An Analysis of Antitrust Principles and Their Application* ¶ 1612c2 (1989) at 170. *See also Continental TV, Inc.*, 433 U.S. at 54-55; "Perspective on Three Recent Votes: the Closing of the Adelphia Communications Investigation, the Issuance of the Valassis Complaint & the Weyerhaeuser Amicus Brief," Speech of FTC Commissioner J. Thomas Rosch, July 6, 2006 ("exclusives can help firms differentiate themselves and compete more effectively. [Distributors] that were cut off from a RSN might compete harder with differentiated programming").

V. THERE IS NO FACTUAL OR LEGAL BASIS FOR RETAINING THE FULL BREADTH OF THE EXCLUSIVITY BAN CURRENTLY IN EFFECT

If the Commission concludes that the exclusivity ban is "necessary," a finding that is not supportable on the existing record, it must tailor the ban as narrowly as possible to constrain only the minimum number of exclusivity arrangements necessary to preserve and promote competition in the distribution of video programming in order to meet First Amendment requirements.[105/] In 2002, the Commission implicitly acknowledged that not all cable programming could be considered "must have,"[106/] but declined to narrow the exclusivity restriction due to "the difficulty of developing an objective process of general applicability to determine what programming may or may not be essential to preserve and protect competition."[107/] The Commission also noted that making "a channel-by-channel determination would place the Commission in the untenable position of designating certain programming as more essential than others and thus raise constitutional questions."[108/]

There are, however, objective metrics that easily could be used by the Commission as a content-neutral means of freeing exclusive arrangements that are not necessary to promote competition from the constraints of the ban. The Constitution requires the Commission to adopt such less restrictive alternatives to a per se ban in order for its restrictions on speech to be "no greater than essential."[109/] For example, the ban should not be applied to restrict a cable-owned programmer from entering into exclusive arrangements outside the footprint of its affiliated cable

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105/ *See* Section I, *supra*.

106/ *See 2002 Extension Order* ¶¶ 53, 57.

107/ *Id.* ¶ 69.

108/ *Id.*

109/ *See* Section I, *supra*.

operator. There is no logical or empirical basis for presuming that a vertically-integrated cable programmer has the incentive to use exclusivity in order to foreclose competition from rival MVPDs in markets outside the footprint of the programmer's distribution affiliate. Nor should the ban restrict exclusive agreements by a cable programmer affiliated with a cable operator whose network passes only a small number of households in the nation, since such an entity lacks sufficient size and scale to foreclose competition successfully via exclusivity.

Certain types of programming services cannot be considered "necessary" to protect competition. For example, new services, by their nature, are not essential to the "continued" viability of competing MVPDs, since that viability was attained without those services. It also would be considerably overbroad to apply the exclusivity restrictions to cable networks that are not deemed sufficiently important by market participants to warrant carriage to a significant number of the nation's television households. Likewise, national networks with low average prime-time ratings should not be covered by the ban, since a network that draws viewers from only a small fraction of television households in the country cannot be considered a competitive necessity for MVPDs. In addition, the Commission itself recently determined that an MVPD's lack of access to regional non-sports programming could not harm competition or consumers,[110/] so any such services owned by a cable operator should no longer be subject to the ban. The exclusivity prohibition also should not cover regional sport networks in DMAs served by more than one unaffiliated RSN. Where two or more regional sports networks are bidding for the major professional and college sports product available within a particular DMA, there is little risk that an exclusive distribution arrangement for one such network could foreclose competition.

Finally, the ban should not apply to programming networks affiliated with a cable

110/ *Adelphia Transfer Order* ¶ 169.

operator facing competition from both DBS and the telephone companies. Because there is no factual basis for concluding that a single cable operator could use exclusivity to drive EchoStar, DirecTV, and one of either AT&T or Verizon from a particular market, the exclusivity ban should not apply within the network footprint of any cable system (or group of adjacent systems) where a cable operator faces video competition from both DBS and one of the telcos.

CONCLUSION

For the foregoing reasons, section 628(c)'s ban on exclusive contracts should be allowed to sunset, or at a minimum, substantially restricted.

Respectfully submitted,

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APPENDIX A

EVIDENCE OF COMPETITION IN THE VIDEO DISTRIBUTION MARKET

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

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

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

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

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

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

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

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

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

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

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6/ *See supra* n. 1.

7/ *Twelfth Annual Report* ¶ 70.

8/ *Twelfth Annual Report* tbl. B-3.

9/ *Id.*

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

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

12/ For 5 of those New Jersey communities, effective competition also was present due to competition from telephone companies providing video services. *See Petition of Cablevision of Rockland/Ramapo Inc. for a Determination of Effective Competition in Montvale, NJ; Petition of CSC* of those 16 communities was well above the 15% threshold.[13/] Competition from DBS, moreover, is not unique to Cablevision. The Commission has found cable operators across the country are subject to effective competition from DBS.[14/]

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

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

13/ *Id.* at 7.

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

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

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

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

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

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

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

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

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

20/ *See infra* nn. 21-23.

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

22/ EchoStar Annual Report at 47.

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

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

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

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

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24/ *Twelfth Annual Report* ¶ 21.

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

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

27/ *Twelfth Annual Report* ¶ 161.

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

29/ *Twelfth Annual Report* ¶ 161.

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

31/ *Twelfth Annual Report* ¶ 183.

is distributed among several cable MSOs.[32] DirecTV is the exclusive distributor of the NFL "Sunday Ticket," a sports programming package that is not available to cable competitors.[33] DirecTV also has attempted to negotiate a similar exclusive distribution arrangement with Major League Baseball ("MLB").[34] If DirecTV's competitors do not match its commitment to MLB by the end of March 2007, DirecTV will have the exclusive distribution rights to carry MLB,[35] and this appears likely given that MLB appears to be rejecting competitive offers.[36]

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

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

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32/ *Id.*

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

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

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

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

37/ *Twelfth Annual Report* ¶ 166.

38/ *Id.* tbl. C-5.

39/ *Id.* tbl. C-5.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

49/ *See AT&T Offers Homezone in Connecticut*, Xchange Online (Feb. 01, 2007), *available at*: http://www.xchangemag.com/articles/539/72h11504037744.html.

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

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

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

53/ *Id.*

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

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

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

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

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

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

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

57/ *Id* at 23.

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

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

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

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

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

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60/ *Id.*

61/ *Twelfth Annual Report* ¶ 128.

62/ *Twelfth Annual Report* ¶ 130.

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

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

65/ *See Twelfth Annual Report* ¶ 135.

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

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

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

67/ *See Study: 107 Million People Viewed Online Video in July*, USA TODAY, Sept. 28, 2006, *available at* http://www.usatoday.com/tech/news/2006-09-28-online-video-study_x.htm; *see also* Kimberly S. Johnson, *Web TV Network Makes New Waves*, DENV. POST, Nov. 2, 2006 ("Internet-based videos and television shows are soaring in popularity among viewers, investors, and advertisers."), *available at* http://www.denverpost.com/business/ci_4588024.

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

69/ *See generally* http://www.comedycentral.com/.

70/ *See generally* http://www.nbc.com/.

71/ *See generally* http://www.tvland.com/tvlhome.jhtml.

72/ *See generally* http://www.cstv.com/.

and watch every out-of-market baseball game in America on MLB.com for $19.95 per month.[73/]

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

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

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73/ *See generally* http://www.mtv.com.

74/ *See* Anne Becker, *Niche TV Goes Digital -- and Deeper*, BROAD. & CABLE, Oct. 9, 2006 *available at* http://www.broadcastingcable.com/article/CA6378845.html; Lia Miller, *Bravo Goes More Broadband*, Feb. 6, 2006, N.Y. TIMES, *available at* http://www.nytimes.com/ 2006/02/06/business/ media/06bravo.html?ex=1296882000&en=952a41c7ebfcb160&ei=5090&partner=rssuserland&emc=rss; Shirley Brady & Seth Arenstein, *Broadbanding Together*, CableFAX Daily, Apr. 21, 2006, at 4.

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

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

television and personal computer screens.[77]

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

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

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

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

79/ *Id.*

80/ *Id.*

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

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

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

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

83/ *Id.*

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

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

86/ *Id.*

87/ *Id.*

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

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

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

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

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

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

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

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

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

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

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

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94/ *Id.*

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

96/ *See* http://www.att.com/gen/press-room?pid=7857.

97/ *See generally*, http://www.apple.com/itunes/store/tvshows.html.

98/ *Id.*

99/ *See, e.g.*, http://mobitv.com/channels/channelstv.php?i=midwest.

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

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

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

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

101/ *Twelfth Annual Report* ¶ 126.

102/ *Id.*

APPENDIX B

THE EFFECTS OF THE FCC'S PROGRAM EXCLUSIVITY BAN

Declaration of Dr. Scott Wallsten*

* I thank Harold Furchtgott-Roth for insightful comments and David Osinski, Carolina Czastkiewicz, Andrew Demers, Federico Mini, Seth Sacher, and Xuejuan Su for excellent assistance. All mistakes, however, are my own.

I. Introduction

Existing regulations generally ban vertically integrated cable operators from entering into exclusive agreements for the distribution of their programming. Any economic justification there may have been for this ban in the early 1990s -- when consumers could generally choose only among broadcast television, cable, or video rentals (or purchase) for in-home viewing -- is no longer true today due to greatly increased competition in video programming and distribution.

Today's market bears little resemblance to the market of even a few years ago. Consumers can choose from a wide range of distribution platforms—including cable, satellite, traditional broadcast, downloads and streaming video from the Internet, and new competition from the incumbent telephone companies who are investing billions of dollars in fiber distribution networks.

Despite unsubstantiated claims to the contrary, there is no such thing as "must have" programming. Hundreds of programming networks are available on the market, most of which are not owned by cable, and entry into the video programming market is not difficult. While sports programming is commonly called "must have" content, ESPN has ratings only half that of Nickelodeon. No empirical evidence suggests that lack of access by a video distributor to an RSN harms consumers. Because no programming can be considered "must have" and because the video production market is competitive, it is unrealistic to believe that a cable company could behave anticompetitively by retaining exclusive rights to some programming.

Indeed, the ability to enter into exclusive agreements is an important key to competition. DBS is a prime example of the importance of exclusive offerings. DirectTV, for example, has differentiated itself by offering exclusive content such as *NFL Sunday Ticket*, *Extra Innings*, and *NASCAR Hotpass*.

Exclusive deals are also important for encouraging innovation and investment in programming by allowing the innovator or investor to enjoy appropriate returns to the investment. Reducing the potential returns to an investment in programming by barring exclusive deals reduces incentives to invest. In this case, an exclusivity ban reduces the incentives to invest in programming.

Finally, the exclusivity ban has unintended consequences. In particular, vertically integrated cable companies are largely unable to compete by offering different programming from their competitors. Were cable companies able to offer unique programming, rivals might respond with new content of their own, or with new packaging options. Under the current regime of compelled sharing of programming, distributors have less incentive to invest in differentiated programming since regulations allow a competitor to immediately and precisely match their offerings. If cable companies had the ability to offer a greater lineup of exclusive programming, all distributors in the market might have more of an incentive to compete by offering different content rather than by mimicking the content offerings of one another.

Even without the ban, only a small amount of programming, if any, is likely to become exclusive. Indeed, most cable networks are not owned by cable companies and thus not necessarily subject to the ban, yet relatively few are offered exclusively. It makes sense to keep content exclusive only if the revenue gain from increased subscribership attributable to exclusive programming outweighs the revenue loss from diminished viewership of competing distribution networks. As the penetration of competing video distribution platforms continues to increase those losses simultaneously increase. Given this consideration, the ban becomes increasingly likely to bar only exclusive deals that would be beneficial to consumers. With today's broad video distribution market and competitive programming market, banning vertically integrated cable companies from offering exclusive content makes little economic sense.

II. Exclusive contracts are a common business practice that can be an important competitive tool

Exclusive contracts are a common feature of a well-functioning market economy. Indeed, competition frequently relies on firms' abilities to offer different products to consumers. To the extent differentiation increases competition, a given competitor may fare worse when another firm enters into an exclusive contract, but the key issue is the contract's effect on consumers, not on competitors.

Exclusive deals can be beneficial and efficient. They can help align the incentives of two firms so that, for example, a distributor has an incentive to promote content without fear of other distributors free riding on promotional efforts. They can also help ensure that a programming innovator can appropriate greater returns from her innovation. Denying an innovator the right to make an exclusive deal with a licensee reduces the innovator's potential returns and ultimately harms society by reducing incentives to innovate. Similarly, investors should be allowed to realize the returns to their investments, rather than requiring them to engage in a less preferred contracting arrangement with distributors, thereby creating inefficiency and reducing incentives to invest.[1]

Firms often rely on exclusive offerings to enter a new market or to improve their competitive position. The video distribution market is a prime example of this phenomenon. Although vertically integrated cable companies are barred from offering exclusive content, DBS providers have relied on exclusive deals to attract subscribers. DirecTV today exclusively offers programs such as *NFL Sunday Ticket* and *NASCAR Hotpass*. Had DirecTV been required to make these programs available to its competitors, it would have been less likely to offer them in the first place.

Precisely because exclusive contracts can enhance welfare, U.S. courts evaluate exclusive contracts under a rule of reason: an exclusive deal between a downstream distributor and an upstream input provider is not *per se* unlawful, even if the input in question cannot be procured elsewhere.[2] Given the intense competition in the video production market (discussed below), it is unlikely that an exclusive contract could effectively serve any anticompetitive purpose.

In a competitive marketplace competitors can respond to an exclusive arrangement in many ways. If a cable operator enters into an exclusive arrangement for a particular programming network, rivals could respond by lowering prices, entering into other exclusive arrangements, investing in new content, or innovating in other ways (*e.g.*, adding new communications services or providing subscribers more flexibility in programming packages). Indeed, the essence of

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[1] Rey, Patrick and Jean Tirole, "A Primer on Foreclosure," forthcoming in *Handbook of Industrial Organization III*, edited by Mark Armstrong and Rob Porter, North-Holland. Whinston, Michael D., *Lectures on Antitrust Economics*. MIT Press: 2006.

[2] Under certain circumstances exclusive contracts may have anticompetitive aspects, but even in those cases the welfare effects of banning exclusive contracts is ambiguous —the costs of a ban to society could outweigh any benefits (E.g., see, Bernheim, B. Douglas and Michael D. Whinston. "Exclusive Dealing," Journal of Political Economy, 1998, v106 (1,Feb), 64-103).

welfare-enhancing competition involves firms innovating to improve on services provided by their competitors.

Vertical integration is common and can be economically efficient

Firms may choose to produce their own inputs or procure them in the market. As economist and Noble laureate Ronald Coase observed, it is not obvious or pre-ordained what is more efficient for a firm to produce itself and what is more efficient to purchase in the market. A key component of the decision of whether to produce or to purchase depends on the relative transactions and other costs associated with contracting in the market versus producing goods internally.[3] Moreover, there are varying degrees of vertical integration, ranging from complete ownership of input production to joint ventures between upstream and downstream suppliers to other contractual arrangements. Thus, firms may vertically integrate in a number of ways for purely competitive reasons. Vertical integration is neither inherently nor even typically anticompetitive; indeed, vertical integration tends to be competitive and to enhance consumer welfare.[4]

Vertical integration of video content and distribution and exclusive use of that content, in particular, are common. Major broadcast networks have long created their own content for exclusive broadcast on their own stations (except for possible later syndication). Vertical integration in content and distribution extends beyond the legacy broadcast networks. Disney owns ABC, ESPN, and other cable networks; NBC owns broadcast stations and also develops content for several cable networks; and Viacom owns several cable networks and until January 2006 also owned CBS broadcasting stations.[5] News Corporation owns the Fox broadcasting network, cable networks, a share of DirecTV (which it is in the process of selling), and other content distributors such as newspapers and a publisher (Harper Collins).

New entrants into the video distribution market are concluding that developing their own content is beneficial. Just as the cable industry initially competed with broadcast television for viewers by investing in unique content, Verizon is beginning to develop its own content to distribute over its fiber "FiOS" connections, including local news shows.[6] This vertical integration is likely to yield benefits both in terms of competition (Verizon becomes more competitive by offering unique programming) and in terms of direct benefits to consumers (new programming that they would not otherwise have). In other words, new entrants try to compete by offering different video choices than their competitors. If entrants were forced to make that programming available to competitors, then they would have less incentive to invest in that programming. In this case, that would mean fewer local choices to consumers who would clearly be worse off as a result.

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[3] Coase, Ronald H., "The Problem of Social Cost," *Journal of Law & Economics*, 1960, 3: 1-44. Joskow, Paul L., "Vertical Integration," *Handbook of New Institutional Economics*, C. Menard and M. Shirley, eds, 2005.

[4] Several Federal Trade Commission economists, including the former director of the Bureau of Economics recently surveyed the economic evidence regarding various vertical restraints and concluded: "Our review of the empirical evidence – which informs our priors – suggests that vertical restraints are likely to be benign or welfare enhancing." (See Cooper, James C., Froeb, Luke M., O'Brien, Dan, and Vita, Michael G., "Vertical Antitrust Policy as a Problem of Inference," International Journal of Industrial Organization, 2005, v23, Sept, 639-664.)

[5] http://www.cbsnews.com/stories/2006/01/03/business/main1176111.shtml

[6] Searcey, Dionne. "Verizon's Network Bet Relies on Games, TV." WSJ. March 7, 2007.

III. The Marketplace for Video Distribution is Competitive

When the FCC first implemented the exclusivity ban, cable had relatively limited channel capacity and was generally the only choice for consumers who were willing to pay for more video streamed into their homes than was broadcast for free over the air.[7] Today's market for video distribution bears little resemblance to the prevailing marketplace at that time.

Consumers face a wide range of choices and are no longer constrained to cable and broadcast for video streamed into the home and to DVDs (or VHS cassettes) for movies and other recorded video. Instead, two satellite DBS providers are available across the United States; the nation's two largest telephone companies, Verizon and AT&T, are investing billions of dollars to become video distributors; and rapid technological advances are dramatically increasing the number of online and other methods of obtaining video. The next subsection reviews cable and satellite, followed by a discussion of the broader choices available for video distribution.

Cable faces substantial competition from DBS

As late as the early 1990s, consumers who wanted more video streaming choices than were available over the air had few choices. Other than free over-the-air broadcast signals, they generally had access to only a single, relatively low capacity, cable network. The entry of DBS changed that situation dramatically. Most obviously, it stopped the growth in the number of subscribers to cable companies. As seen in Figure 1, DBS companies have continued to add subscribers even as the number of cable subscribers has slowly decreased.

DBS entry had both direct and indirect effects on competition. The direct effect of DBS on competition was to provide new platforms for distributing video programming directly to consumers. The indirect effect was to induce the cable industry to upgrade its technology in order to respond to the large channel capacity offered by DBS. When DirecTV began operations in 1994 it offered over 100 channels.[8] Cable systems typically had much lower capacity—in 1992 more than 65 percent of all cable systems were limited to 53 channels or fewer.[9] With the broadcast must-carry rules and other regulatory obligations such as providing public access channels, cable companies had little spare capacity. Today, however, cable systems routinely offer 200 channels or more.[10]

In other words, the entry of DBS in the early 1990s increased competition in the video distribution marketplace by providing additional choices for video consumption and increasing the number of available channels *within* each platform.

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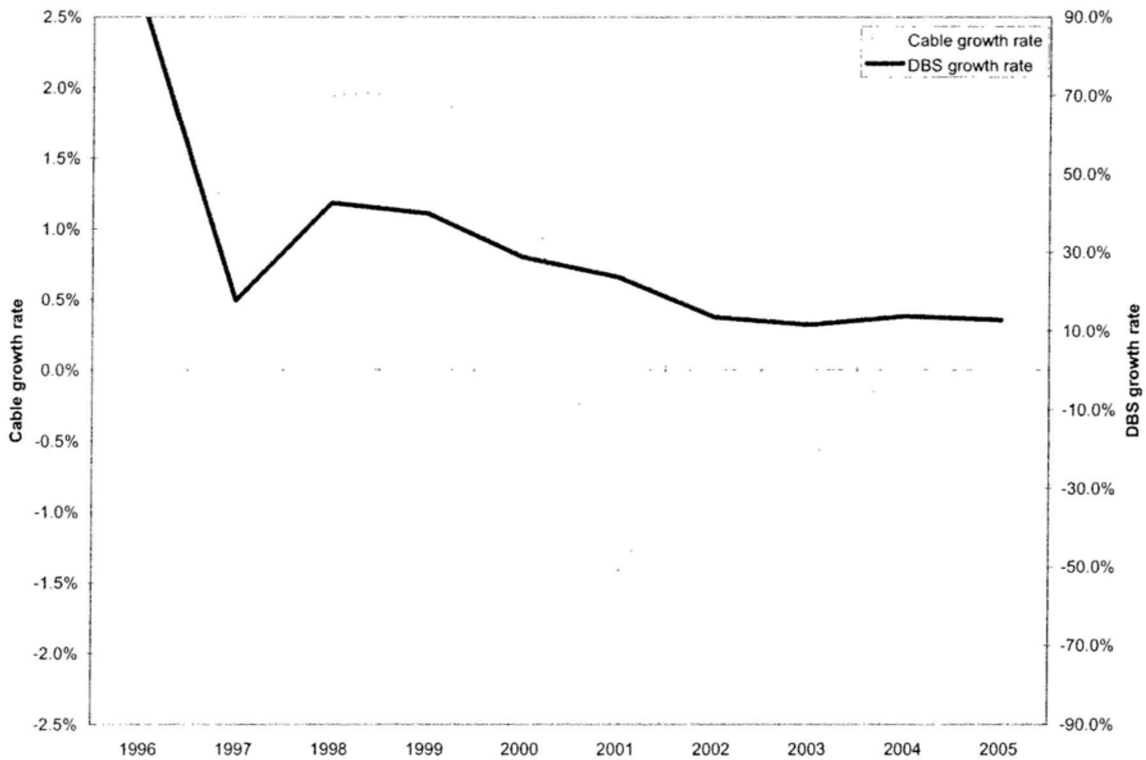
[7] Only about one-third of all households with cable subscribed to services that were capable of carrying more than 54 channels. Crandall, R. W. and Harold Furchtgott-Roth, 1996, *Cable TV: Regulation or Competition?* Washington DC: Brookings Institution.
[8] Hughes Electronics 1997 Annual Report, pg. 23.
[9] Crandall, R. W. and Harold Furchtgott-Roth, 1996, *Cable TV: Regulation or Competition?* Washington DC: Brookings Institution.
[10] For example, Comcast offers over 250 channels for premium subscribers http://stocks.us.reuters.com/stocks/fullDescription.asp?symbol=CMCSA.O

Figure 1: Growth in the Number of Cable and DBS Subscribers



Source: Annual Assessment of the Status of Competition in the Market for Delivery of Video Programming, Sixth Annual Report, Ninth Annual Report, and Twelfth Annual Report

The True Market for Video Distribution is Broad and Expanding

Cable and satellite represent only a fraction of the choices consumers face in ways to watch video at home. Since the advent of the VCR consumers have been able to rent movies of their choice rather than being limited to the movies offered on cable channels. Indeed, both cable and satellite operators increasingly offer video on demand to lure customers who would otherwise rent movies, demonstrating that movie rentals are one source of competition.[11]

Technological change has since revolutionized the market for video distribution. The maturation of IPTV, or video delivered using Internet protocols, combined with increased demand for high-speed Internet connections, is allowing firms to roll out fiber optic systems that both provide

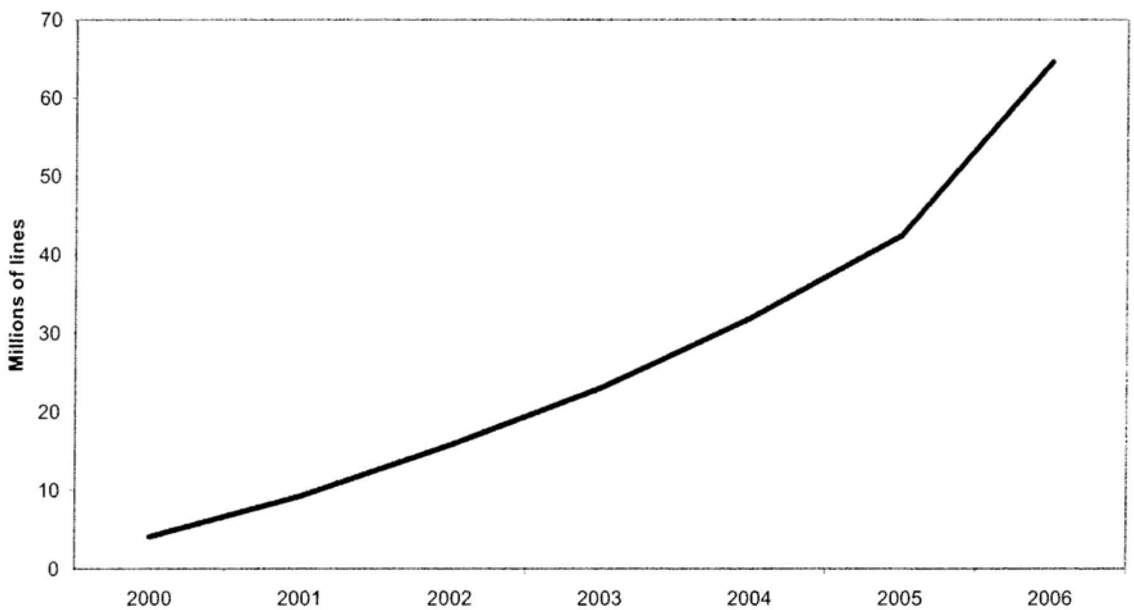
[11] Movie rentals have also become more convenient, with mail delivery from Netflix and Blockbuster, as well as Internet downloads available from a number of distributors.

high-speed broadband and video distribution. In particular, both Verizon and AT&T are investing heavily in fiber systems that will bring video services to subscribers' households.[12]

Verizon has announced plans to spend $18 billion on its fiber optic ("FiOS") buildout.[13] Consistent with this plan, in 2005 Verizon had the largest capital expenditures of any firm in the country.[14] By the end of 2006, Verizon had 207,000 FiOS TV customers, passed 2.4 million homes, and offered more than 200 video channels.[15,16] AT&T expects to reach 19 million households by the end of 2008.[17] With their large footprints, financial resources, and existing customer bases, Verizon and AT&T are poised to be major competitors in the video distribution market.

Investment in fiber is just one component of an overall surge in investment in high-speed Internet infrastructure. Figure 2 shows the increase in the number of broadband connections in the United States. In the first six months of 2006 alone (the latest data available from the FCC), the number of high-speed connections increased by 26 percent.[18]

Figure 2: Millions of High-Speed Lines in the U.S.



Source: High-Speed Services for Internet Access, FCC, January 2007

[12] Verizon and AT&T are using slightly different technologies. Verizon is building its fiber lines directly to homes, while AT&T is building its fiber to the node and using copper wire to the home. Nevertheless, both offer television video services. See http://www.igigroup.com/st/pages/fttp.html

[13] http://online.wsj.com/article_print/SB117322928784528977.html

[14] http://www.cfo.com/printable/article.cfm/5193423/c_5243641?f=options

[15] http://investor.verizon.com/financial/quarterly/VZ/4Q2006/4Q06Bulletin.pdf

[16] http://www22.verizon.com/content/FiosTV

[17] http://www.att.com/gen/press-room?pid=5838

[18] http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-270128A1.pdf

Investment and adoption of broadband Internet technology provide consumers with more choices of how to access video from their homes. As recently as a few years ago, online video consisted primarily of short clips of uneven quality. Video on the Internet is increasingly another platform for accessing a vast array of high quality, popular video from sources ranging from major producers to individuals uploading their own creations (see section 4 below on the programming market).

Investment in online video distribution has soared in the past year. The most widely known example is Google's purchase of YouTube for $1.65 billion.[19] But Google's belief in online distribution as a crucial component of video distribution is only one part of the picture. MSN, AOL, Yahoo, NBC, and Fox (including MySpace) recently announced plans to distribute video over the Internet.[20] And on March 22, 2007 AT&T announced that customers could watch 30 channels offered on its U-verse system live over any broadband connection.[21]

Table 1 shows some of the recent developments in online video distribution. Apple's iTunes, for example, offers full-length popular television shows from nearly all the major networks as well as movies and other digital content.[22] This video, moreover, is not confined to viewing on computer screens. On March 21, 2007 Apple launched a device (Apple TV) that wirelessly sends video downloaded from iTunes to a television set.[23] AppleTV has received favorable reviews for its usability.[24,25]

Apple is not alone in moving into online video distribution. Microsoft has made it possible to download both movies and television programs to its Xbox 360, which can then play the programming on the consumer's television set.[26] Likewise, Amazon is moving into video distribution (beyond selling DVDs). "AmazonUnbox" allows users to download movies and television directly to their TiVO digital video recorder for later viewing.[27] Like Apple and Microsoft, Amazon offers video from a large number of programming networks.[28]

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[19] http://www.msnbc.msn.com/id/15196982/

[20] http://www.nytimes.com/2007/03/23/business/media/23video-web.html?hp

[21] http://dallas.bizjournals.com/dallas/stories/2007/03/19/daily28.html?t=printable

[22] Networks with shows on iTunes: ABC, CBS, NBC, MTV, ESPN, Sci Fi Channel, Comedy Central, Disney, Nickelodeon, and Showtime (http://www.apple.com/itunes/store/tvshows.html)

[23] http://www.nytimes.com/2007/03/22/technology/22pogue.html?ex=1175400000&en=13d6a042abfd5538&ei=5070

[24] http://store.apple.com/1-800-MY-APPLE/WebObjects/AppleStore.woa/wa/RSLID?mco=BAE33B0&nclm=AppleTV

[25] http://online.wsj.com/article_print/SB117443716237743525.html

[26] http://www.engadget.com/2006/11/06/microsofts-xbox-live-video-hdtv-and-hd-movie-downloads-for-you/

[27] http://www.amazon.com/b/ref=gw_br_unbox/102-5708124-4969767?%5Fencoding=UTF8&node=16261631

[28] According to Amazon's website, as of March 17, 2007, AmazonUnbox offered video from the following networks: A&E, ABC, Adult Swim, Animal Planet, BBC, The Biography Channel, Cartoon Network, CBS, Comedy Central, The CW, Discovery Channel, DIY, E!, Fine Living, FOX, FOX Reality, FOX Sports, FX, Fuel TV, Hanna-Barbera, HGTV, The History Channel, Logo, MTV, MTV2, The N, National Geographic, NBC, Nick at Nite, Nickelodeon/Nick Jr., PBS, Showtime, Speed, Spike, The Travel Channel, TV Land, and VH1.

Online video is not limited to recorded content. Live video is also increasingly available online. CNN, FoxNews, ESPN, and C-Span, to name a few, all offer live video. Major League Baseball offers MLB.tv, which allows subscribers to watch every out-of-market game online.[29]

Wireless as a competitor

Broadcast television itself is a competitor in video distribution. In addition, innovation is rapidly expanding the ways in which wireless technologies can become video distribution platforms. Wireless mobile companies, for example, are investing in their own high-speed data networks (typically called "3G" networks) and offer video downloads to subscribers. Sprint and Verizon both already offer video clips from major networks for viewing on handsets.[30] These services are unlikely to be perfect substitutes for home video viewing in the short run, but highlight the substantial innovation in the market for video distribution.[31]

Other potential wireless distributors include the XM and Sirius satellite technologies, which could offer video in addition to radio. On March 29th, for example, Sirius announced that it would begin transmitting three popular video channels for new Chrysler minivans.[32] WiMax technologies, often predicted to be an efficient way to deliver high-quality wireless broadband services could also be used to deliver video.[33] The FCC's upcoming 700 Mhz spectrum auction is likely to spark competition for wide-ranging wireless broadband services.

In sum, the market for video distribution is dynamic and competitive. Cumulatively, new innovations demonstrate the rapidly evolving methods of distributing video. Consumers can choose not only among broadcast, cable, and satellite, but also among competing online video distributors, and wireless companies. Innovation is delivering a steady stream of new methods of distributing video. Some of these new platforms may choose to build viewership by producing their own programming and by entering into exclusive deals, just as DirecTV has done to build its subscribership. The ban on exclusivity could make it more difficult for firms to enter and compete in the distribution market.

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[29] http://mlb.mlb.com/mlb/subscriptions/mlbtv.jsp accessed March 17, 2007.

[30] Sprint offers video from ABC, The Discovery Channel, The Weather Channel, FOX Sports and others. See (http://www1.sprintpcs.com/explore/ueContent.jsp?scTopic=multimedia&ATR_ExtraOne=uhp_services) Verizon offers live video from CBS Mobile, Comedy Central, ESPN, Fox Mobile, MTV, NBC 2Go, NBC News 2Go and Nickelodeon. See http://www.msnbc.msn.com/id/17405350/

[31] Nobody knows if mobile television will succeed. But, by one estimate, mobile TV revenues could reach nearly $2 billion by 2011. See http://www.marketwire.com/mw/release_html_b1?release_id=142329.

[32] http://www.insidebayarea.com/business/ci_5555924

[33] http://www.itbusinessedge.com/item/?ci=17918

Opportunity Cost of Exclusive Deals Increasing with Competition

Sometimes exclusive deals make good business sense. As discussed above, they can help align the promotion incentives of the video producer and distributor. Often, however, an exclusive deal would not be in the interest of a vertically integrated firm.

Typically, retaining exclusive rights to programming would be beneficial to the vertically-integrated firm only if it expects the gains from increased subscribership to offset the foregone license fees and advertising revenues (due to larger and broader viewership) generated from distribution to other distributors.

As the number of subscribers to other platforms increases, the costs of such exclusivity to the vertically integrated firm also increase. Such costs have increased substantially since the Commission last noted retaining the exclusivity ban was a "close call." In the past five years the number of DBS subscribers has increased more than 50 percent, substantially increasing the costs of excluding rivals. Moreover, those costs will continue to rise as other distribution platforms continue to mature.

The increased competition in video distribution makes exclusives less profitable regardless of whether the exclusivity occurs through vertical integration or contract. A content provider will enter into an exclusive agreement with an unrelated distributor if its benefits from the agreement exceed its costs of lost viewership. The distributor will enter into an exclusive agreement if its benefits exceed its costs, which include paying more to the content provider to compensate it for lower viewership. Just as with the vertically integrated firm, the costs to the distributor of exclusivity increase as the number of viewers using other platforms increases.

Such exclusive agreements are currently available with non-integrated cable programmers, yet rarely occur. In other words, such exclusivity is already available for some cable programmers, and marketplace evidence demonstrates that the costs of exclusivity are high. No evidence suggests that the availability of exclusive arrangements for non-integrated programmers have hurt competition or consumers.

While the ability to promote exclusive offerings is likely to remain an important part of a successful business strategy, as DirecTV's use of exclusive sports offerings demonstrates, exclusives come with a cost, and that cost increases with the number of subscribers on other platforms. As a result, it may only rarely be in the interest of the vertically integrated firm to offer such exclusives. When it is in the interest of such a firm, it is increasingly likely to be for pro-competitive reasons, meaning that the ban is increasingly likely to bar only pro-competitive arrangements.

Table 1: Video Distribution Technologies

	Availability	Example competitors	Other information
Cable	113 million households passed[34]	Comcast Time Warner	66 million subscribers[35] About 750 hours per person per year[36]
Satellite	More than 102 million households passed (with access to local television stations)[37]	DirecTV	26 million subscribers[35] About 300 hours per person per year[36]
Broadcast	Nearly universal	Univision Broadcast networks	15 million users[35] About 800 hours per person per year (including cable subscribers watching broadcast television) [36]
Fiber	2.7 million households passed[15]	Verizon, AT&T	0.25 million subscribers[15]
Movie theater	Nearly universal[38]	AMC	Americans purchased 1.45 billion movie tickets in 2006[39]
Home video (from local store)	Nearly universal access	Blockbuster Hollywood Video	About 80 hours per person per year[40] About 100 hours per person per year are spent consuming home videos across all delivery methods[40]
Home video (mail order)	Universal	Netflix (6.3 million subscribers) Blockbuster (2.2 million subscribers)[41]	8.5 million subscribers[41] About 20 hours per person per year[40] Approximately 8% penetration of U.S. TVHHs (16% penetration in San Francisco, which is considered a leading indicator) [41]
Home video (downloaded)	At least 100 million households have access to broadband[42]	Netflix Xbox NDS set-top for DBS[43] AppleTV Amazon/TiVO	84 million households had broadband access in March 2006[44]

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[34] http://www.ncta.com/ContentView.aspx?contentId=54
[35] 2005 Figure. FCC, *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, (March 3, 2006), Table B.
[36] Veronis Suhler via Credit Suisse. FCC Annual Video Competition Report to Congress.
[37] DirecTV Investor Relations, November 10, 2004. See http://phx.corporate-ir.net/phoenix.zhtml?c=127160&p=irol-newsArticle&ID=642880&highlight=
[38] http://www.statemaster.com/red/graph/lif_cla_mov_the_and_dri-classic-movie-theaters-drive-ins&b_map=1#source
[39] http://www.usatoday.com/life/movies/news/2007-03-06-box-office-rise_N.htm
[40] Veronis Suhler via Credit Suisse. NetFlix 2006 Q4 earnings conference call.
[41] NetFlix 2006 Q4 earnings conference call.
[42] http://www.cybertelecom.org/data/broadband.htm
[43] Oppenheimer report on the media and broadcasting industry.

Gaming consoles	Universally available	Microsoft	16 million heavy gamers in the United States[45] Xbox offers video downloads.
Streaming proprietary video	At least 100 million households have access to broadband[42]	Joost[46] Brightcove YouTube MLB.com New NBC-Fox venture AT&T U-Verse ESPN360 Sirius	Viacom agreement with Joost[47] and suing Google[48] Distributor for videos on WSJ and other traditional media CBS sports highlights on YouTube[49] Offers a variety of subscription packages[50] Due for start-up in summer 2007[51] Launched March 22, 2007.[52] ESPN360 requires ISPs to pay an affiliate fee Satellite TV direct to vehicles[53]
User-generated video	At least 100 million households have access to broadband[42]	YouTube Metacafe	Over 100 million hits per day[54] YouTube hosts 60% of videos watched online[54]
Portable video		iPod video V Cast	Internet download plus player Mobile connection on compatible phone

44 http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-268845A1.pdf
45 Searcey, Dionne. "Verizon's Network Bet Relies on Games, TV." *WSJ*. March 7, 2007.
46 http://economist.com/business/displaystory.cfm?story_id=E1_RGSDNSJ
47 http://www.viacom.com/view_release.jhtml?inID=10000040&inReleaseID=227591
48 http://online.wsj.com/article_print/SB117319537794228320.html
49 http://news.com.com/CBS+teams+with+YouTube+for+NCAA+basketball/2100-1026_3-6167843.html
50 See http://mlb.mlb.com/mlb/subscriptions/index.jsp?c_id=mlb. MLB itself has an exclusive deal with DirecTV for out-of-market games.
51 http://online.wsj.com/article_print/SB117457218554245466.html
52 http://dallas.bizjournals.com/dallas/stories/2007/03/19/daily28.html?t=printable
53 http://www.insidebayarea.com/business/ci_5555924
54 http://news.bbc.co.uk/2/hi/technology/5186618.stm

IV. The Marketplace for Video Content is Competitive

The market for video content is a crucial component in evaluating the effects of the exclusivity ban. The more competition there is in video production, and the easier it is to enter that market, the less likely it is that exclusive contracts could be used to harm competition in distribution. To the contrary, the competitiveness of the content market makes it more likely that exclusive contracts would be a crucial tool for promoting competition.

The evidence demonstrates that any video distributor can choose programming from a wide range of producers and formats. This section explains the numerous ways in which the market for video content is competitive—a number of different networks offer many options in different program categories, and vice versa. The section also demonstrates that no particular channel is truly "must-have."

The key point is that with competition and low barriers to entry in the marketplace for video content and the lack of any true "must have" programming, it is unlikely that any exclusive arrangements could have anticompetitive consequences in video distribution.

No single network or provider of content has a large share

Both satellite and cable offer packages of programming services that contain hundreds of channels of video programming, most of which are unaffiliated with cable. Today's video landscape bears no resemblance to the 36 to 54 channel universe prevailing in 1992. As of 2005, the FCC identified 531 satellite-delivered national programming networks.[55]

Virtually every type of national programming network faces ample competition. There are multiple news channels (CNN, Fox News, MSNBC), children's channels (Nickelodeon, Disney, Toon Disney, Cartoon Network), sports networks (ESPN, Fox Sports, Versus, NFL Network, NBA Network, Golf Channel, as well as the sports available on broadcast networks, FX, TNT and TBS), and music channels (VH-1, MTV, CMT, Fuse). There are also multiple educational programming services (Learning Channel, Discovery Channel, History Channel), premium movie channels (HBO/Cinemax, Showtime/Movie Channel, Encore/Starz) and general entertainment networks (USA, TNT, FX).

[55] FCC, *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, (March 3, 2006), ¶157.

Table 2 lists annual Nielsen 24-hour ratings for the top stations grouped by owner from 1996-2005. The table shows that no single program or network has a clearly dominant position. The single largest station, Nickelodeon, has a 1.70 rating. This means that an average of 1.7 percent of all households with a television (or about 1.9 million households) were tuned into Nickelodeon at any one time during a given 24-hour period. The largest single owner, Disney, has a combined 6.63 rating over 15 stations, representing approximately 7.3 million households.

Viewing the same data differently shows another way in which the market is competitive. Table 3 lists 24-hour Nielsen ratings for each station, this time grouped by programming category. The table shows multiple competitors in each major group. Moreover, the top stations in almost every programming category are under different ownership. For example, five different firms own the top six "General Entertainment" stations, three different firms own the top three "Children's" stations and three different firms own the top three "News" stations. One of the areas with the fewest owners is music, where Viacom owns almost all stations, and Sports, where Disney owns the ESPN networks. Note that Viacom acquired VH-1 as part of its CBS acquisition, which was cleared by the DOJ in 2000. As discussed below, Disney does not have a corner on the market for sports, since sporting events are shown on almost all major networks.

Table 2

Station 24-Hour Nielsen Ratings, by Owner, 1996-2005

Owner [1]	Station	2005	2004	2003	2002	2001	2000	1999	1998	1997	1996
Disney	Disney Channel	1.15	1.13	1.13	0.83	0.80	0.00	0.00	0.00	0.00	0.00
	Lifetime [2]	1.00	1.00	1.14	1.22	1.23	1.11	1.02	0.94	0.83	0.84
	ESPN [3]	0.73	0.77	0.75	0.68	0.60	0.69	0.74	0.78	0.76	0.83
	ABC Family	0.59	0.57	0.46	0.51	0.53	0.52	0.49	0.64	0.61	0.66
	11 other stations	3.16	3.03	2.72	2.19	2.36	2.05	1.95	1.73	1.70	1.58
	Disney totals	6.63	6.50	6.20	5.43	5.52	4.37	4.20	4.09	3.90	3.91
Viacom	Nickelodeon/NAN	1.70	1.64	1.52	1.16	1.39	1.53	1.52	1.56	1.64	1.60
	MTV	0.64	0.58	0.56	0.52	0.50	0.57	0.60	0.50	0.45	0.48
	Spike TV	0.61	0.47	0.45	0.44	0.46	0.41	0.43	0.50	0.53	0.50
	TV Land	0.58	0.49	0.48	0.46	0.43	0.46	0.47	0.44	0.29	0.00
	9 other stations	3.25	2.74	2.40	2.06	2.13	2.11	2.21	2.25	2.03	1.62
	Viacom totals	5.59	4.96	4.48	3.74	4.02	4.21	4.33	4.31	4.12	3.70
Time Warner	TNT	1.23	1.18	1.13	0.93	0.88	0.87	0.97	0.99	1.02	1.05
	Cartoon	1.18	1.13	1.14	1.13	1.13	1.11	1.08	0.97	0.89	0.88
	TBS	0.85	0.85	0.90	0.95	1.05	1.14	1.18	1.06	1.09	1.19
	CNN	0.53	0.48	0.68	0.55	0.85	0.63	0.70	0.77	0.75	0.78
	2 other stations	0.76	0.77	0.60	0.41	0.35	0.34	0.24	0.11	0.11	0.08
	Time Warner totals	4.55	4.41	4.45	3.97	4.26	4.09	4.17	3.90	3.86	3.98
News Corp	Fox News	0.93	0.88	1.00	0.70	0.55	0.00	0.00	0.00	0.00	0.00
	FX Network	0.58	0.57	0.52	0.53	0.50	0.53	0.53	0.46	0.45	0.46
	2 other stations	0.35	0.30	0.22	0.20	0.00	0.00	0.00	0.00	0.00	0.00
	News Corp totals	1.86	1.75	1.74	1.43	1.05	0.53	0.53	0.46	0.45	0.46
Discovery/Cox/Newhouse	Discovery [4]	0.51	0.52	0.53	0.57	0.63	0.65	0.65	0.65	0.65	0.60
	TLC [4]	0.39	0.53	0.68	0.61	0.56	0.53	0.55	0.54	0.46	0.38
	Animal Planet [4]	0.35	0.35	0.37	0.33	0.35	0.30	0.26	0.22	0.16	0.00
	4 other stations	0.60	0.43	0.41	0.27	0.23	0.19	0.16	0.13	0.09	0.00
	Discovery/Cox/Newhouse totals	1.85	1.83	1.99	1.78	1.77	1.67	1.62	1.54	1.36	0.98
GE	USA [5]	0.77	0.86	0.83	0.85	0.80	0.89	0.99	0.98	0.90	0.95
	SCI FI [5]	0.42	0.46	0.46	0.43	0.39	0.44	0.40	0.39	0.33	0.38
	MSNBC[6]	0.25	0.28	0.33	0.30	0.40	0.00	0.00	0.00	0.00	0.00
	2 other stations	0.33	0.42	0.51	0.44	0.49	0.38	0.39	0.40	0.27	0.23
	GE totals	1.77	2.02	2.13	2.02	2.08	1.71	1.78	1.77	1.50	1.56
Scripps	HGTV	0.50	0.51	0.50	0.43	0.41	0.40	0.42	0.38	0.31	0.00
	Food Network [7]	0.50	0.44	0.43	0.33	0.30	0.28	0.20	0.19	0.19	0.00
	Scripps totals	1.00	0.95	0.93	0.76	0.71	0.68	0.62	0.57	0.50	0.00
Cablevision	AMC	0.50	0.45	0.43	0.40	0.45	0.00	0.00	0.00	0.00	0.00
	WE	0.18	0.18	0.12	0.18	0.00	0.00	0.00	0.00	0.00	0.00
	Fuse	0.03	0.05	0.01	0.00	0.00	0.00	0.00	0.00	0.00	0.00
	Cablevision totals	0.71	0.68	0.56	0.58	0.45	0.00	0.00	0.00	0.00	0.00
Comcast	Outdoor Life	0.10	0.10	0.07	0.00	0.00	0.00	0.00	0.00	0.00	0.00
	G4 Videogame TV	0.10	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
	Comcast totals	0.20	0.10	0.07	0.00	0.00	0.00	0.00	0.00	0.00	0.00
Crown Media	Hallmark	0.70	0.60	0.45	0.25	0.30	0.00	0.00	0.00	0.00	0.10
Landmark	Weather	0.33	0.33	0.29	0.28	0.27	0.31	0.32	0.32	0.32	0.37
Sony/Liberty	GSN [8]	0.25	0.23	0.30	0.30	0.30	0.50	0.50	0.40	0.00	0.00
TV Guide	TV Guide	0.20	0.20	0.24	0.30	0.28	0.26	0.25	0.25	0.24	0.28
BBC	BBC America	0.12	0.10	0.15	0.15	0.00	0.00	0.00	0.00	0.00	0.00

[1] When multiple companies jointly own a channel, that channel is grouped under the company that owns the largest number of channels (not necessarily the company with the majority stake in the channel).
[2] Lifetime networks are owned by Disney (50%) and Hearst (50%).
[3] ESPN networks are owned by Disney (80%) and Hearst (20%).
[4] National Geographic is owned by News Corp (67%) and the National Geographic Society (33%).
[5] Discovery, TLC, Animal Planet, and other channels are owned by Discovery Holding (50%), Cox (25%), and Advance/Newhouse (25%).
[6] USA and SCI FI are owned by GE (95%) and other minority shareholders (5%).
[7] MSNBC is owned by GE (82%) and Microsoft (18%).
[8] Food Network is owned by Scripps (64%), Tribune (29%), Media One (5%), and other minority shareholders (2%).
[9] GSN is owned by Sony (50%) and Liberty (50%).

Source: Kagan Research, LLC

Table 3

Station 24-Hour Nielsen Ratings, by Topic, 1996-2005

Content type [1]	Station	Owner [2]	2005	2004	2003	2002	2001	2000	1999	1998	1997	1996
General entertainment	TNT	Time Warner	1.23	1.18	1.13	0.93	0.88	0.87	0.97	0.99	1.02	1.05
	TBS	Time Warner	0.85	0.85	0.90	0.95	1.05	1.14	1.18	1.06	1.09	1.19
	USA [3]	GE	0.77	0.86	0.83	0.85	0.80	0.89	0.99	0.98	0.90	0.95
	ABC Family	Disney	0.59	0.57	0.46	0.51	0.53	0.52	0.49	0.64	0.61	0.66
	TV Land	Viacom	0.58	0.49	0.48	0.46	0.43	0.46	0.47	0.44	0.29	0.00
	FX Network	News Corp	0.58	0.57	0.52	0.53	0.50	0.53	0.53	0.46	0.45	0.46
	7 other stations		2.35	2.39	2.44	2.42	2.42	2.59	2.53	2.27	1.76	1.73
		General entertainment totals	6.95	6.91	6.76	6.65	6.61	7.00	7.16	6.84	6.12	6.04
Children's	Nickelodeon/NAN	Viacom	1.70	1.64	1.52	1.16	1.39	1.53	1.52	1.56	1.64	1.60
	Cartoon	Time Warner	1.18	1.13	1.14	1.13	1.13	1.11	1.08	0.97	0.89	0.88
	Disney Channel	Disney	1.15	1.13	1.13	0.83	0.80	0.00	0.00	0.00	0.00	0.00
	3 other stations		0.80	0.63	0.50	0.30	0.30	0.00	0.00	0.00	0.00	0.00
		Children's totals	4.83	4.53	4.29	3.42	3.62	2.64	2.60	2.53	2.53	2.48
Education	History Channel [4]	Disney	0.58	0.58	0.52	0.48	0.53	0.57	0.48	0.39	0.33	0.28
	Discovery [5]	Discovery/Cox/Newhouse	0.51	0.52	0.53	0.57	0.63	0.65	0.65	0.65	0.65	0.60
	7 other stations		1.48	1.40	1.36	1.15	0.91	0.83	0.81	0.76	0.62	0.38
		Education totals	2.57	2.50	2.41	2.20	2.07	2.05	1.94	1.80	1.60	1.26
Movies	Hallmark	Crown Media	0.70	0.60	0.45	0.25	0.30	0.00	0.00	0.00	0.00	0.10
	Lifetime Movie Net. [6]	Disney	0.50	0.55	0.51	0.00	0.00	0.00	0.00	0.00	0.00	0.00
	AMC	Cablevision	0.50	0.45	0.43	0.40	0.45	0.00	0.00	0.00	0.00	0.00
	Bravo	GE	0.20	0.28	0.24	0.20	0.15	0.00	0.00	0.00	0.00	0.00
		Movies totals	1.90	1.88	1.63	0.85	0.90	0.00	0.00	0.00	0.00	0.10
News	Fox News	News Corp	0.93	0.88	1.00	0.70	0.55	0.00	0.00	0.00	0.00	0.00
	CNN	Time Warner	0.53	0.48	0.68	0.55	0.85	0.63	0.70	0.77	0.75	0.78
	MSNBC [7]	GE	0.25	0.28	0.33	0.30	0.40	0.00	0.00	0.00	0.00	0.00
	CNBC	GE	0.13	0.14	0.27	0.24	0.34	0.38	0.39	0.40	0.27	0.23
		News totals	1.84	1.78	2.28	1.79	2.14	1.01	1.09	1.17	1.02	1.01
Music	MTV	Viacom	0.64	0.58	0.56	0.52	0.50	0.57	0.60	0.50	0.45	0.48
	BET	Viacom	0.40	0.38	0.40	0.40	0.39	0.33	0.32	0.40	0.40	0.40
	VH-1	Viacom	0.34	0.28	0.27	0.21	0.24	0.27	0.28	0.27	0.21	0.18
	3 other stations		0.35	0.37	0.23	0.18	0.19	0.23	0.30	0.25	0.28	0.25
		Music totals	1.73	1.61	1.46	1.31	1.32	1.40	1.50	1.42	1.34	1.31
Lifestyle	HGTV	Scripps	0.50	0.51	0.50	0.43	0.41	0.40	0.42	0.38	0.31	0.00
	Food Network [8]	Scripps	0.50	0.44	0.43	0.33	0.30	0.28	0.20	0.19	0.19	0.00
	Travel Channel [5]	Discovery/Cox/Newhouse	0.21	0.21	0.21	0.16	0.23	0.19	0.16	0.13	0.09	0.00
	3 other stations		0.30	0.20	0.07	0.00	0.00	0.00	0.00	0.00	0.00	0.00
		Lifestyle totals	1.51	1.36	1.21	0.92	0.94	0.87	0.78	0.70	0.59	0.00
Women's	Lifetime [6]	Disney	1.00	1.00	1.14	1.22	1.23	1.11	1.02	0.94	0.83	0.84
	Oxygen [9]	Time Warner	0.23	0.23	0.20	0.00	0.00	0.00	0.00	0.00	0.00	0.00
	WE	Cablevision	0.18	0.18	0.12	0.18	0.00	0.00	0.00	0.00	0.00	0.00
		Women's totals	1.41	1.41	1.46	1.40	1.23	1.11	1.02	0.94	0.83	0.84
Sports	ESPN [10]	Disney	0.73	0.77	0.75	0.68	0.60	0.69	0.74	0.78	0.76	0.83
	ESPN2 [10]	Disney	0.27	0.27	0.24	0.24	0.22	0.24	0.25	0.25	0.26	0.24
	3 other stations		0.35	0.10	0.11	0.10	0.00	0.00	0.00	0.00	0.00	0.00
		Sports totals	1.35	1.14	1.10	1.02	0.82	0.93	0.99	1.03	1.02	1.07
Men's	Spike TV	Viacom	0.61	0.47	0.45	0.44	0.46	0.41	0.43	0.50	0.53	0.50
Civics	Court TV	Time Warner	0.53	0.54	0.40	0.41	0.35	0.34	0.24	0.11	0.11	0.08
Information	Weather	Landmark	0.33	0.33	0.29	0.28	0.27	0.31	0.32	0.32	0.32	0.37
	TV Guide	TV Guide	0.20	0.20	0.24	0.30	0.28	0.26	0.25	0.25	0.24	0.28
		Information totals	0.53	0.53	0.53	0.58	0.55	0.57	0.57	0.57	0.56	0.65

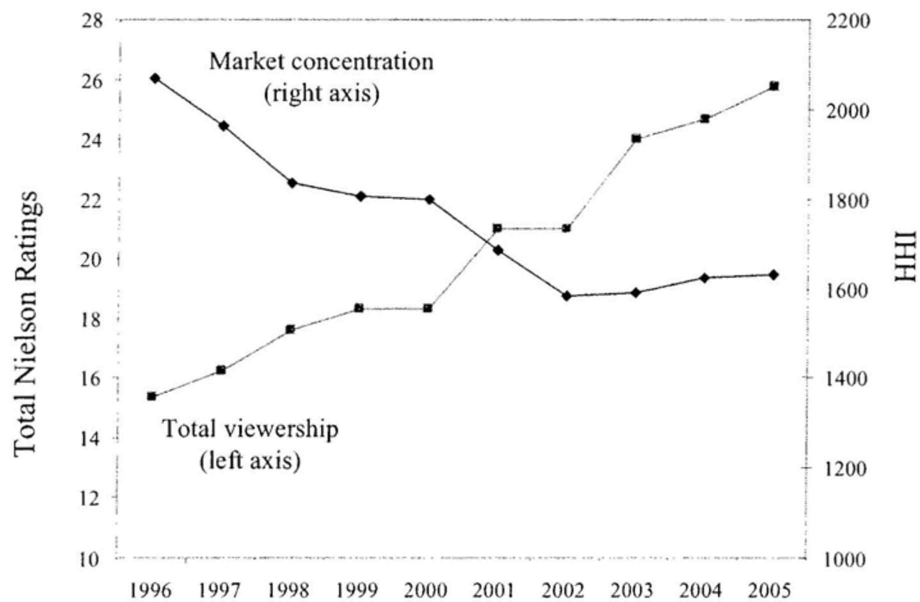
[1] Content types are obtained from the FCC's NPRM, Kagan Associates, LLC, and general knowledge.
[2] When multiple companies jointly own a channel, that channel is grouped under the company that owns the largest number of channels (not necessarily the company with the majority stake in the channel).
[3] USA and SCI FI are owned by GE (95%) and other minority shareholders (5%).
[4] History Channel, A&E, and Biography are owned by Disney (37.5%), Hearst (37.5%), and GE (25%).
[5] Discovery, TLC, Animal Planet, Travel Channel, Discovery Health, and Military Channel are owned by Discovery Holding (50%), Cox (25%), and Advance/Newhouse (2
[6] Lifetime networks are owned by Disney (50%) and Hearst (50%).
[7] MSNBC is owned by GE (82%) and Microsoft (18%).
[8] Food Network is owned by Scripps (64%), Tribune (29%), Media One (5%), and other minority shareholders (2%).
[9] Oxygen is owned by Time Warner, Carsey-Werner-MandaBach, Clarity Partners, Harpo Entertainment, and Vulcan Ventures in unspecified amounts.
[10] ESPN, ESPN2, ESPNews, and ESPN Classic are owned by Disney (80%) and Hearst (20%).

Source: Kagan Research, LLC

In addition, the above two groupings do not exhaustively show the ways in which video services compete. At any given point in time consumers may be choosing what to watch not only within a content type (e.g., channels among general entertainment) but also across content types (e.g., general entertainment versus movies), all of which are competing for viewers.[56]

Recognizing the myriad ways in which channels compete, it is possible to construct an HHI index showing concentration in video content on cable and satellite. Figure 3 presents this index and viewership over time based on the above Nielsen ratings for channels shown on cable and satellite.[57]

Figure 3
Viewership and Concentration of Cable and Satellite Programming



Source: Kagan Research, LLC

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[56] Competitive pressure exists as long as enough "marginal" consumers view different types of programming as substitutes. The prevalence of "channel surfing" supports the idea that such substitution is sufficiently common that the number of marginal consumers is large. Thus it would be inappropriate to consider an individual category of programming as a separate relevant market. See U.S. Department of Justice and the Federal Trade Commission, Horizontal Merger Guidelines, http://www.usdoj.gov/atr/public/guidelines/horiz_book/toc.html.

[57] Nielsen 24-hour ratings are the percentage of all households with a television (there are about 110 million television households in the United States) that are tuned into a particular channel at any one time during a given 24-hour period. The HHI refers to the Herfindahl-Hirschman Index and computed by summing the square of each firm's share of ratings in each year. The HHI ranges from 10,000 (in the case of a pure monopoly) to a number approaching zero (in the case of an atomistic market). The HHI here was calculated in terms of households viewing any subscriber network stations and omitted broadcast stations.

Figure 3 shows that even as viewership has increased, programming concentration has decreased. Data on merger challenges indicate that antitrust agencies are highly unlikely to challenge mergers with concentration indices in this range.[58] Indeed, these numbers may overstate concentration since they do not include either broadcast TV stations or other forms of video distribution discussed below.

Cable's share of video content continues to decline

The program access rules prohibit discrimination by vertically integrated programming services against competing distributors and seek to prevent a cable system from "unduly or improperly" influencing an affiliated program service's price and terms of sale to unaffiliated distributors. The main goal of these "program access" rules is to prevent vertically integrated cable MSOs from denying access to popular programming by rival distributors. However, the share of cable programming networks affiliated with cable operators is low and steadily declining. As of 2005, of the 531 satellite-delivered national programming networks, only 21.8 percent were vertically integrated with at least one cable operator.[59] Kagan Research reports that in 2005 only one in three of the forty most popular national cable programming networks were vertically integrated.

Since 2002, the percentage of programming networks owned by cable operators has declined by 50%, while the total number or programming networks unaffiliated with a cable operator has nearly doubled.[60]

The number of content providers continues to grow

Each new technology and each new entrant increases competition in an already competitive market to distribute video services. The proliferation of video content from other sources and outlets—on-demand, Internet, and mobile devices—further reduces the likelihood of any hypothetical anti-competitive advantage of withholding of any particular video network.

The quality of video experiences available over the Internet and mobile devices has increased substantially and continues to increase. Thus, the explosive popularity and

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[58] Based on data for fiscal years 1999-2003 of the 1253 relevant markets in which the Federal Trade Commission or Department of Justice challenged mergers, only 57 or less than five percent involved markets where the HHI was 1,800 or below. Further, of the 214 markets in the "telecommunications industry" in which a merger was challenged, none involved an HHI of 1800 or below. (See Federal Trade Commission and U.S. Department of Justice, "Merger Challenges Data: Fiscal Years 1999-2003 (December 18, 2003), Tables 1 and 6.)

[59] 2006 Assessment, ¶157.

[60] Compare *2002 Extension Order* ¶ 18 with *Annual Assessment of the Status of Competition in the Market for Delivery of Video Programming, Twelfth Annual Report*, 21 FCC Rcd 2503 (2006) ("*Twelfth Annual Report*"), ¶ 21

growing strength of YouTube and other Internet-based sources of video content are having a major effect on the diversity and dynamic nature of the video programming marketplace. Mobile devices such as iPod and wireless phones represent another fast growing source of video content for consumers. Any hypothetical anticompetitive behavior by cable companies would be self-defeating, as it would only accelerate such trends.

Regional news services face competition from local over-the-air broadcast stations and Internet-based news services. There are many competitors within each of these subcategories, both domestically and internationally. Movie channels face competition from on-demand movie services as well as video rentals.[61]

Video subscribers also have the ability to obtain regional sports content from a wide variety of program networks and sources. Sports are shown on every broadcast network, including ABC, NBC, CBS, and FOX as well as on many entertainment cable networks such as TNT. Any sporting event faces competition from other sports events across many networks. Team-owned and league-owned sports networks and Internet offerings provide consumers with still more sources of sports content.

There are no "must have" programming services

It has been argued that cable companies could exert market power by locking up "must have" stations. As shown previously, no single programming service or owner has enough viewers to be seriously considered "must have." Indeed, all these services and networks face significant competition and rival distributors can obtain programming from a wide range of sources. Further, as noted below, entry barriers into the creation of content are low. Thus, if cable operators deny competitors existing networks, new networks will likely enter and move into any void created by such putative "foreclosure."

Petitioners before the FCC tend to cite sports as a prevailing form of "must have" programming. However, as seen in Table 3, ESPN, the prevailing cable sports network, has a share of about 0.7, less than half of Nickelodeon.[62] All sports stations combined represent a rating of 1.35. Further, ESPN is not vertically integrated into cable and not subject to the ban.

Moreover, to say that ESPN embodies all sports programming is incorrect. In fact, ESPN airs few "big games." Playoffs in just about every major sport, including the NCAA tournament, are broadcast over networks through a variety of exclusive and non-

[61] See Netflix vs. Naysayers, *Wall Street Journal*, March 27, 2007.
[62] ESPN is one among the many prominent stations not affiliated with a cable MSO.

exclusive contracts.[63] All of the top 50 sports broadcasts in the past five years were carried by broadcast networks.[64]

RSNs are not "must have" programming

Despite claims to the contrary, RSNs cannot be considered "must-have" for several reasons.

First, RSNs are not the only provider of sports programming. Nearly every major network offers such programming. Professional and collegiate teams and other sports leagues have many licensing agreements, often with multiple networks.[65] The most significant playoffs and tournaments are almost always shown on broadcast networks.[66] DirecTV has its own exclusive deals for several professional sports packages. Thus, a substantial amount of sports programming is available outside of an RSN.

Second, if RSNs constitute must-have programming, we would expect competing video providers to carry them whenever possible. In fact, DBS companies sometimes choose not to carry RSNs even when they do not have exclusive deals with other distributors. For example, Echostar chooses not to carry MASN in DC or YES in New York, and neither DBS provider chooses to carry the RSN in New Orleans.

Finally, to the extent that some aspects of sports programming are inelastic, they stem from the fact that a particular game involving a particular team or player occurs at a particular moment. In such situations the sports leagues and teams, not the video distributor, hold the scarce resource. In other words, there may be scarcities in sports markets, but the sports teams or leagues are the source of such scarcity.[67] An exclusive contract for RSN inflicts no incremental adverse effect on consumer welfare, but a ban on such contracts precludes the marketplace from reaping the pro-competitive benefits associated with exclusivity.

Moreover, sports teams are launching their own networks. The owner of two of Denver's four major sports teams (basketball and hockey) launched a network in September 2004

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[63] For example, CBS has exclusive rights to the 2007 NCAA basketball tournament (see for instance "CBS prepares for March Madne$$", CNNmoney.com, March 6th 2007).

[64] See http://www.tvb.org/rcentral/mediatrendstrack/tvbasics/18_TopSportsShowsHH.asp.

[65] The NFL has agreements worth a combined $23.9 billion with CBS, DirecTV, ESPN, Fox, and NBC in addition to showing football games on its own NFL Network. See "Cable operators balking at NFL Network". AFX International Focus. November 22, 2006. The MLB has agreements with ESPN, Fox, and TBS. See "Going Inside MLB's latest $3 billion TV agreements", July 13, 2006, http://www.sportsbusinessnews.com/_news/news_347260.php.

[66] All of the top 50 sports broadcasts in the past five years were carried by broadcast networks. See http://www.tvb.org/rcentral/mediatrendstrack/tvbasics/18_TopSportsShowsHH.asp.

[67] This observation is akin to the one-monopoly rent theorem. E.g., Dennis W. Carlton and Jeffery M. Perloff, Modern Industrial Organization, 3d ed. (Reading, MA: Addison-Wesley, 2000), 390.

called Altitude Sports. New England Sports Network (NESN) is majority-owned by the Red Sox and is the highest-rated regional sports network for baseball.[68]

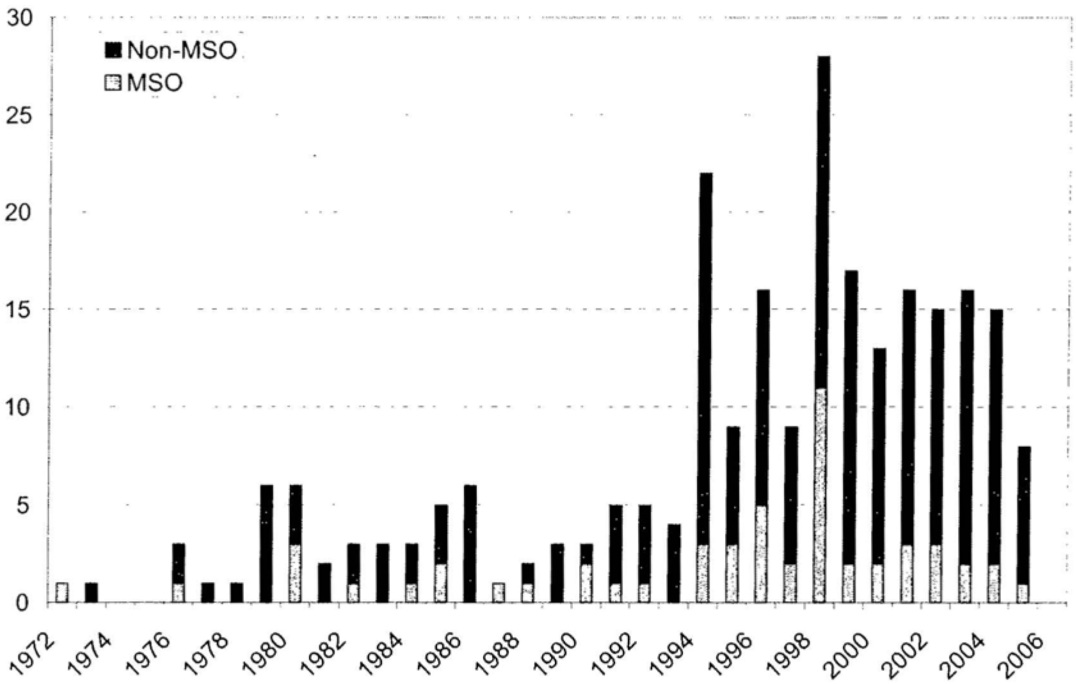
Low entry barriers into video programming

In addition to the presence of a large number of competitors, another key aspect of a competitive marketplace is low barriers to entry. Thus, even if certain networks were hypothetically important for the viability of video distributors competing with cable, with low entry barriers new content providers could enter to fill gaps created by any exclusionary strategy undertaken by video distributors. The following figure indicates that entry of new programming is common. Any concerns that competitive video distributors would suffer if vertically integrated cable companies were allowed to enter into exclusive deals are unfounded.

Figure 4 shows the number of new national programming services by year from 1972 to the present. Few new networks are affiliated with an MSO. Programming is now so diverse that channels target viewers by age group, gender, ethnicity, and sexual orientation.

[68] NESN had an average local rating of 10.6 for the 2006 baseball season. Neff, Andrew. "NESN top-rated regional sports network in nation." *Bangor Daily News*, October 27, 2006.

Figure 4: New national programming services by year



Source: FCC, Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, (March 3, 2006), Appendix C.

Entry shows no signs of slowing. As of 2005, the FCC had identified 79 new planned programming services.[69] Attempts to engage in exclusionary behavior would only further increase the incentive of content providers to enter the market. Further, eliminating the exclusivity regulations would further reduce any remaining entry barriers by increasing the incentives of cable operators to develop content.

Further, there is no basis for concluding that DirecTV, EchoStar, AT&T and Verizon—all of which are large companies with good access to capital—are less capable of developing new programming than are cable companies. If a cable company were to deny competitors access to specific content, these competitors have ample resources and incentives to remain competitive and would be likely to find replacement programming from the highly competitive programming market or even create their own.

[69]FCC, Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, (March 3, 2006), Appendix C, Table C-4.

V. No empirical evidence of harm to consumers

In its 2002 order the FCC noted complaints from DBS firms of low subscribership in Philadelphia and suggested that the cause was an exclusive RSN.[70] Simple comparisons of penetration across areas are not meaningful since so many factors affect penetration. Indeed, several major cities in which RSNs are not exclusive have lower DBS penetration than does Philadelphia.[71]

Recognizing the limitations in simple cross-city comparisons, proponents of the ban have more recently relied on an econometric analysis presented in the FCC's Adelphia Transfer Proceeding.[72] The analysis purports to show that exclusive RSN access reduces the number of DBS subscribers. As described in detail in this section, however, that analysis is flawed and reveals no information about consumer welfare or the public interest.

In its analysis presented in the Adelphia Transfer Proceeding, the FCC regressed DBS penetration in a county on several control variables plus dummy variables indicating whether the incumbent cable company is located in Philadelphia, San Diego, or Charlotte.[73] In those three regions RSNs are not offered to DBS operators. The analysis yields negative and statistically significant coefficients on the Philadelphia and San Diego dummy variables, which the FCC interprets as the effect on DBS companies of not having access to the RSN.

The FCC analysis, however, is fundamentally flawed and does not show any harm from the inability to offer an RSN.

First, the econometric specification does not actually test the effects of exclusive RSN rights on DBS penetration. The text claims that "[t]hese results are best viewed as estimates of the impact of not having access to regional sports programming on an entrant

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[70] See *2002 Extension Order, footnote 107,* " DIRECTV and EchoStar assert that their significantly lower subscribership in Philadelphia as compared to other large cities is directly attributable to their inability to access Comcast SportsNet. *Economic Assessment* at 24."

[71] For example, non-cable penetration estimates for February 2007 are 12.3% in Boston, 15.1% in Baltimore, and 16.2% in New York, all of which are lower than 16.5% in Philadelphia. http://www.tvb.org/rcentral/markettrack/Cable_and_ADS_Penetration_by_DMA.asp

[72] See *Adelphia Transfer Order* ¶ 149, "Our own regression analysis uses data from the Cable Price Survey, as well as Nielsen's data regarding the number of households that subscribe to DBS. We find that the percentage of television households that subscribe to DBS service in Philadelphia is 40% below what would otherwise be expected given the characteristics of the market and the cable operators in the DMA." ¶ 151, "We conclude that there is substantial evidence that a large number of consumers will refuse to purchase DBS service if the provider cannot offer an RSN."

[73] Control variables include monthly price for basic cable plus one additional package of channels, the number of cable channels offered by the responding cable company, whether the cable system is in a geographic market that includes a major league sports team, whether at least one DBS operators offers local broadcast channels, whether there is a competing cable company, whether the cable company offers HD service, whether the cable company offers high-speed Internet, median household income in the county, the share of households in multiple dwelling units, and the latitude of the county. All variables except the dummies are in logs.

in the MVPD market" (para 19, Appendix D), but this claim is unfounded. The analysis simply tests whether DBS penetration is different in Philadelphia, San Diego, and Charlotte than it is elsewhere, but not why it is different in those places.

Results of the FCC analysis show that the control variables do not explain all of the differences between Philadelphia, San Diego, and the rest of the nation, but provides no reason to believe that the lack of access to an RSN is the key factor. Moreover, the analysis does not specifically test the effect of RSN exclusivity. Instead, it tests whether DBS penetration in Philadelphia, San Diego, and Charlotte are different than one would expect given the control variables and attributes those findings solely to RSNs.

In order to believe that access to RSNs explains any difference, one would have to believe that the only excluded city- (or county-) specific effect that could affect DBS penetration is RSN access. This assumption, however, is not plausible. First, many variables likely to be important in explaining DBS penetration are omitted, such as the extent of local marketing of DBS, the quality of local DBS service, terrain and foliage coverage, and the extent and local marketing of cable, among others.

Second, the presence of an exclusive RSN is hardly the only relevant variable excluded from the FCC's model. Indeed, if RSNs were of such profound importance to DBS and cable penetration (for which there is no empirical evidence), the model should include some information about the number and quality of RSNs in an area. Each geographic market has different combinations of RSNs, not all of which are carried either by every cable operator or DBS operator in the region. It is not possible to capture all the relevant information related to RSNs in a dichotomous variable indicating whether there is an exclusive RSN in a region. Moreover, the analysis should *control* for city or regional fixed effects, not include a few and claim that tests the effects of RSN access. Such controls are especially important given the fact that several major cities that do not have exclusive RSNs have lower DBS penetration than Philadelphia.

Moreover, even if one believes that the model is valid, the results on the Charlotte dummy variable contradict the FCC's interpretation. DBS penetration in Charlotte does not differ statistically from elsewhere even though it is one of the areas where DBS did not have access to an RSN. In other words, if one believes the FCC's approach, then in one out of three markets, RSN exclusivity makes no statistical difference to DBS penetration. It is impossible under these circumstances to conclude that the FCC model provides any statistical support to the contention that program exclusivity affects, much less harms, DBS penetration.

Further assuming the empirics and underlying assumptions are correct, the analysis confuses harm to competitors with harm to consumers. Even if one were to stipulate that the FCC analysis and its underlying assumptions were correct and worth investigating further and one were to ignore the contradictory findings for Charlotte, the FCC model would still provide information only on the impacts of RSNs on DBS subscribership. Importantly, it tells us nothing about the effects of exclusive RSN deals on consumer welfare.

VI. Exclusivity Ban Distorts Investment and Harms Consumers and Programmers

The ban on exclusive contracts between cable companies and vertically integrated programming production was intended to "preserve and protect competition and diversity in the distribution of video programming" [47 U.S.C. § 548(c)(5)]. As discussed above, both video distribution and production are competitive. The ban, however, continues to affect both of those markets and may have other, unintended, consequences that prevent consumers from reaping further benefits from competition.

Reduces and distorts investment incentives in content and distribution

Firms compete with each other in many dimensions. In addition to price competition, they may offer differing types of services, levels of quality, and other features. Indeed, in the early days of cable television, one of the ways cable was able to compete with broadcast services was by investing in its own content. In other words, cable was able to enter and to succeed in the market precisely because it was allowed to offer its own programming to help differentiate itself from broadcast television.[74]

The current ban reduces the incentive for video distributors to develop new and innovative content in two ways. First, a vertically integrated cable company has less incentive to invest in programming because other firms can then distribute it. Second, competing (non-vertically integrated) distributors have less incentive to invest in their own programming since they know they can rely, in part, on content developed by others. With lower expected returns, some programs may never be developed at all, denying consumers new and innovative programming.

New programming, like any investment, is risky. Many programming services and offerings never make it past development. Some fail to gain sufficient distribution to justify their launch, and others fail to win enough viewers to remain viable. Guaranteed access to new programming for competitors enhances the risks and costs of content investment. In the current regulatory environment, rival video distributors can sit idly while cable operators absorb the costs associated with new programming investment and reap the benefits of the cable content investments that succeed. The result is reduced program output by all video distributors, which reduces consumer welfare and limits competition and diversity among distributors.

Programmers thus need ways of promoting their new content in order to increase its chances of succeeding. Networks, for example, heavily advertise their new programs. A vertically integrated cable company, under the exclusivity ban, has little incentive to

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[74] Crandall, R. W. and Harold Furchtgott-Roth, 1996, *Cable TV: Regulation or Competition?* Washington DC: Brookings Institution. Economists Incorporated, December 3 2001. *Competition for Video Programming: Economic Effects of Exclusive Distribution Contracts.*

advertise new programs in a competitive market since that advertising may redound to the benefit of its competitors, who have the regulatory right to the same programming.

May harm creators of video content

Copyright law, like patents, is intended to encourage innovation by giving innovators the right to earn returns on their creation. Copyright holders can realize these returns by negotiating with distributors for the right to distribute their work. Exclusive deals are the norm in these industries, in which artists such as authors, songwriters, and cartoonists routinely sign contracts with a single publishing house, record label, or news syndicate.

These types of exclusive arrangements are largely unavailable for distribution by vertically integrated cable networks, which are barred by regulations from such agreements. As a result, one possible distribution method is unavailable to the copyright holder. The inability to enter into an exclusive distribution arrangement with a vertically integrated cable company may have two negative effects.

First, by removing a large potential distributor from the set of feasible contracts available, the artist may earn less for her creation. That is, the exclusivity regulations have arbitrarily reduced the number of potential bidders for an artist's work. A smaller number of bidders may mean that the winning bid for some work is lower than it otherwise would have been and that other work may not be picked up at all.

Second, by removing the cable companies as bidders for the new programming, the exclusivity ban may result in some video being distributed in ways other than it would have been in a market not distorted by regulations. In other words, the exclusivity ban may affect whether certain video is initially distributed via the Internet, satellite, cable, or other methods (e.g., only on DVD).

Can harm consumers

All of these distortions in investment incentives can ultimately harm consumers. The investment distortions will change consumers' viewing habits and prevent firms from adequately meeting the true demand for different types of programming. At the same time, consumers may see higher prices when regulations induce firms to use more costly transmission mechanisms than they would otherwise.

VII. Conclusions

Economic regulation should focus on correcting a market failure and carefully target the cause of that market failure.[75] A proposed regulation should then be evaluated to ensure that its benefits outweigh the costs. The ban on vertically integrated cable companies and exclusive programming fails both tests. No empirical evidence clearly supports the assertion of a market failure and no analysis suggests that any purported benefits of the ban outweigh its costs.

The market for video distribution is competitive and new technologies are bringing a steady stream of new entrants into the distribution market. The marketplace for video content is also competitive, with ample programming available across a wide range of program types and from a wide range of owners.

Despite the competitive nature of video distribution and creation, the ban reduces investment incentives, harms competition, and ultimately harms consumers. Given the costs of this ban and the lack of any demonstrated benefits, the ban should be allowed to sunset as scheduled.

[75] Indeed, President Bush recently amended executive order 12866 on regulatory planning so that all regulatory agencies must identify "the specific market failure" or problem the regulation addresses. http://www.whitehouse.gov/news/releases/2007/01/20070118.html

I certify that all statements made in this document are true to the best of my knowledge.

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Employment

- Senior Fellow and Director, Communications Policy Studies, Progress & Freedom Foundation, 2006 - present.
- Resident Scholar, American Enterprise Institute, 2003 - 2006.
- AEI-Brookings Joint Center for Regulatory Studies, Fellow 2003-2005, Senior Fellow 2005-2006.
- The World Bank, Economist, 1998 - 2003.
- Stanford University, Acting Assistant Professor of Public Policy and Visiting Researcher, Stanford Institute for Economics Policy Research, 1999-2001.
- President's Council of Economic Advisers, Staff Economist, 1995-1996.

Peer-Reviewed Publications

- "The Effects of Ownership and Benchmark Competition: An Empirical Analysis of U.S. Water Systems." With Katrina Kosec. Forthcoming in *International Journal of Industrial Economics*.
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- "Executive Compensation and Firm Performance: Big Carrot, Small Stick." SIEPR Working Paper 99-17. March 2000.

Testimony, Presentations, and Panels

- Phoenix Center Annual Conference on Net Neutrality, 2006.
- Wilkinson, Barker, Knauer, LLP on Reverse Auctions, 2006.
- London Business School Global Communications Consortium, on Spectrum Policy and Competition, 2006.
- Progress and Freedom Foundation 2006 Aspen Summit, on broadband investment.

- Pew Internet and American Life Foundation, conference on broadband statistics, 2006.
- The Brookings Institution, on Telecommunications reforms in developing countries, 2006.
- AEI-Brookings Joint Center panel on network neutrality, 2006.
- McDonough School of Business, Georgetown University, on broadband policy, 2006.
- Presentation to National Defense University students on Iraq cost analysis, 2006.
- American Economic Association annual meeting, discussant and speaker in Transportation and Public Utilities Group sessions, 2006.
- AEI-Brookings Joint Center, OIRA 25th anniversary, moderator, 2005.
- NCAER-Brookings India Policy Forum, New Delhi, India, 2005.
- AEI, the economics of sports stadiums, 2005.
- AEI-Brookings Joint Center, the future of telecom deregulation, 2005.
- Stanford Institute for Economic Policy Research, telecommunications conference, co-organizer and discussant, 2005.
- CATO Institute, DC Baseball subsidies, November 2004.
- AEI-Brookings Joint Center, telecommunication and spectrum regulation, moderator, 2004.
- AEI-Brookings Joint Center, software and intellectual property rights, moderator, 2004.
- NCAER, telecommunications reform, New Delhi, India, 2004.
- AEI, globalization conference, 2004.
- Stanford University conference on Latin America, 2003.
- APEC conference on regulation, Mexico City, 2003.
- Economic History Association, St. Louis, 2002.
- FEEM Privatization Conference, Milan, 2002.
- Economic History Society, Birmingham, 2002.
- ISNIE 2002 Conference, Cambridge, 2002.
- Wharton School of Business, 2002.
- Georgetown University, 2001.
- ISNIE 2001 Conference, Berkeley, 2001.
- Ronald Coase Institute, Berkeley, 2001.
- Asia Pacific Research Center, Stanford University, Palo Alto, 2000.
- Washington University, St. Louis, 2000.
- The World Bank, 1999, 2000, 2002.
- U.S. House of Representatives, Committee on Science, Subcommittee on Technology, 1997.
- Econometrics Society Annual Meeting, Montreal, Canada 1998.
- NBER Summer Science & Tech Policy Conference, Cambridge, 1996.

Other Professional and Referee Activities

- Member, "Sufficient Evidence? Building Certifiably Dependable Systems," National Academies of Sciences Computer Science and Technology Board, 2003-present.
- Advisory board member, Center for Public Integrity Telecom project, 2006-present.

Referee for:

- American Economic Review
- Journal of Political Economy
- Journal of Industrial Economics
- RAND Journal of Economics
- Journal of Regulatory Economics
- Journal of Economic History

- Journal of Development Economics
- Journal of Comparative Economics
- Information Economics and Policy
- Telecommunications Policy
- International Journal of Industrial Organization
- Cambridge University Press
- National Science Foundation Small Business Innovation Research Program

Honors

- Alfred P. Sloan Foundation Dissertation Fellowship, 1997 - 1998.
- Phi Beta Kappa.
- Omicron Delta Epsilon, International Economics Honor Society.
- Percy Tucker Fellow, Washington University Department of Economics award for outstanding economics undergraduate.

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of	)	
	)	
Implementation of the Cable Television Consumer Protection and Competition Act of 1992	)	
	)	
Development of Competition and Diversity in Video Programming Distribution: Section 628(c)(5) of the Communications Act	)	MB Docket No. 07-29
	)	
Sunset of Exclusive Contract Prohibition	)	

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COMMENTS OF COMCAST CORPORATION

Comcast Corporation ("Comcast") hereby responds to the above-captioned Notice of Proposed Rulemaking ("*Notice*").[1] As shown below, the exclusivity prohibition of the program access rules should be permitted to sunset on October 5, 2007, and the complaint procedures applicable to the remaining program access rules are working and should not be changed.

I. INTRODUCTION AND SUMMARY.

The *temporary* rule prohibiting exclusive arrangements between cable-affiliated programmers and cable system operators, first promulgated in 1992 for a period of ten years and later extended by the Commission for an additional five years, must be allowed to sunset.

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[1] *In re Implementation of the Cable Television Consumer Protection and Competition Act of 1992; Development of Competition and Diversity in Video Programming Distribution: Section 628(c)(5) of the Communications Act; Sunset of Exclusive Contract Prohibition*, Notice of Proposed Rulemaking, 22 FCC Rcd. 4252 (2007) ("*Notice*").

First and foremost, the immense and incessant changes in the marketplace prove that the video competition that Congress intended to stimulate, and preferred to rely on rather than regulation to promote consumer choice, is here. If, in the words of then-Commissioner Martin, extending the exclusivity prohibition was a "very close call" five years ago, this year there is no need for the officials to consult the videotape -- the goal line has been crossed, competition is here, and the exclusivity prohibition is no longer necessary. The two nationwide satellite competitors to cable are firmly established, are today the nation's second and fourth largest multichannel video programming distributors ("MVPDs"), and are in an intense rivalry with cable for consumer loyalty. The aggressive entry into video by the nation's two largest telecommunications companies is taking the battle for consumer affection to new heights.

With every passing year, it can again be said that American consumers enjoy access to a greater abundance and diversity of programming, delivered in a multitude of ways, than at any previous point in history. This competition shows no signs of abating, with new players entering the video business at a rapid pace in nontraditional forms, including delivery of video over the Internet. Further, the vertical integration between cable operators and cable programming networks that was at the heart of Congress's original concern has been in steep decline -- from well over 50% in 1992 to below 20% now; meanwhile, cable's competitors are utilizing their own exclusive arrangements as competitive tools. For example, the second largest MVPD, DIRECTV, is able and committed to differentiating itself on the basis of exclusive, high-value programming.

When Congress adopted the prohibition on exclusive programming arrangements, it understood that exclusive commercial arrangements typically benefit consumers. In the U.S. economy, exclusive arrangements are commonplace, and the nation's laws typically view them as pro-consumer. Recognizing this, Congress enacted the exclusivity ban as a temporary measure and intended that exclusive arrangements would be permissible once competition took hold. Indeed, retaining the exclusivity ban in its current form may ultimately harm consumers by, among other things, reducing the incentive for competing video distributors to invest in programming.

The evidence in 2002 amply demonstrated that the exclusivity prohibition should have been allowed to sunset then, as Congress planned. Competitive developments in the past five years have eroded any remaining justification and make any further extension of the rule simply indefensible. In this hyper-competitive era, the vast majority of all video programming services, whether affiliated with a cable operator or not, are "platform agnostic" and unlikely to foreclose growth opportunities by curtailing distribution. The exclusivity prohibition is not "necessary" to preserve and protect competition and diversity in the distribution of video programming. Moreover, to the extent that any particular exclusive arrangement raises serious concerns, the antitrust laws remain available to provide any necessary redress.

In addition to the problems with the exclusivity prohibition itself, the current application of the exclusivity prohibition is fraught with inconsistencies. Of course, the Commission cannot rewrite the statute; that is a job that only Congress can perform. But, in addressing the issue of whether it is "necessary" to further extend the exclusivity prohibition, more than five years beyond the time that Congress originally planned for it to sunset, the Commission is duty-bound to confront the anomalies. It would be arbitrary and capricious for the Commission to give more life to a rule that has become so illogical in light of the realities of today's video marketplace.

Even if the exclusivity prohibition were to sunset, other program access rules will remain. The procedures to adjudicate complaints under the program access rules were established after careful consideration, they have worked well, and they should not be changed. Proposals to add binding arbitration provisions are beyond the Commission's authority and should not be adopted.

II. IF DECIDING TO DELAY THE SUNSET OF THE EXCLUSIVITY PROHIBITION WAS A "VERY CLOSE CALL" IN 2002, ELIMINATING THE BAN SHOULD BE AN EASY CALL IN TODAY'S MARKETPLACE.

In 1992, Congress prohibited exclusive arrangements between cable operators and their affiliated programming networks because of factual circumstances that have long since changed.[2] Two factors were of particular importance: (1) then, consumers had little choice among MVPDs or other video distributors, and (2) then, vertical integration of cable operators and programming services was very high -- and increasing.[3] Under those circumstances, Congress adopted the exclusivity prohibition, with the understanding that it represented a significant divergence from the general treatment of exclusivity in the marketplace. Congress indicated that it both hoped and expected that increased competition would render the prohibition unnecessary after a period of years.

Today, after a decade and a half of rapid and accelerating change, that competition is firmly established. The exclusivity prohibition is no longer "necessary" to promote competition -- it is in fact a marketplace anomaly that is hindering competition and, in the process, harming

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[2] *See* 47 U.S.C. §§ 548(c)(2)(D), 548(c)(5). The Commission later interpreted this provision to prohibit exclusive arrangements between a cable operator and any programming network affiliated with that cable operator or any other cable operator. *See* 47 C.F.R. § 76.1002(c).

[3] *See* H.R. Rep. No. 102-628, at 41, 43-44 (1992); S. Rep. No. 102-92, at 26-28 (1991), *as reprinted in* 1992 U.S.C.C.A.N. 1133, 1159-61.

consumers.[4] As such, the Commission should adhere to Congressional intent and allow the provision to sunset.[5]

A. Competition in the Video Marketplace Is Vibrant and Growing.

The exclusivity prohibition was intended to last only ten years, and, in those ten years, the video marketplace evolved in precisely the ways Congress anticipated would justify allowing the prohibition to sunset.[6] However, in 2002, a divided Commission extended the prohibition for an additional five years;[7] then-Commissioner Martin found the case for whether the ban was still

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[4] The word "necessary" is used in multiple provisions of the Communications Act and has been interpreted in different ways in different contexts. *Compare AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 374, 378 (1999), *and GTE Serv. Corp. v. FCC*, 205 F.3d 416, 424 (D.C. Cir. 2000), *with Prometheus Radio Project v. FCC*, 373 F.3d 372, 394 (3d Cir. 2004), *and Cellco P'ship v. FCC*, 357 F.3d 88, 97-98 (D.C. Cir. 2004). The Supreme Court has cautioned against excessive rigidity in applying the general presumption that the same text used in different parts of a statute should be given the same interpretation and has advised that a proper analysis must take account of each particular provision's "text, structure, purpose, and history." *General Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 595, 600, 604 (2004); *see Cellco P'ship*, 357 F.3d at 96 (finding that petitioner's position "'would give an unwarranted rigidity to the application of the word "necessary," which has always been recognized as a word to be harmonized with its context'" (quoting *Armour & Co. v. Wantock*, 323 U.S. 126, 129-30 (1944)). In the context of a provision that prescribes a sunset on a date certain "unless the Commission finds . . . that such prohibition continues to be necessary to preserve and protect competition and diversity," and enacted as part of a statute that expressed a strong policy preference for competition over regulation, *see* Cable Television Consumer Protection & Competition Act of 1992, Pub. L. No. 102-385, § 2(b)(2), 106 Stat. 1460, 1463, "necessary" here warrants an interpretation more along the lines of "indispensable" or "essential," rather than "helpful" or "useful."

[5] Congress directed that the exclusivity ban "shall cease to be effective 10 years after the date of enactment of this section, unless the Commission finds, . . . that such prohibition continues to be necessary to preserve and protect competition and diversity in the distribution of video programming." 47 U.S.C. § 548(c)(5). In the *Notice*, the Commission overstates the relevant inquiry, describing it as "'preserving and protecting diversity in the distribution of video programming -- ensuring that as many MVPDs as possible remain viable distributors of video programming.'" *Notice* ¶ 10 (internal citations omitted). The Commission's focus on maximizing the number of MVPDs, which is not the standard Congress established, mistakenly intrudes on market dynamics, and would seemingly justify perpetual retention of a prohibition that was intended to be temporary.

[6] *See* Comments of Comcast Corp., CS Dkt. No. 01-290 (Dec. 3, 2001); Reply Comments of Comcast Corp., CS Dkt. No. 01-290 (Jan. 7, 2002); *see also* Comments of Cablevision System Corp., CS Dkt. No. 01-290 (Dec. 3, 2001); Reply Comments of Cablevision System Corp., CS Dkt. No. 01-290 (Jan. 7, 2002); Comments of AT&T Corp., CS Dkt. No. 01-290 (Dec. 3, 2001); Reply Comments of AT&T Corp., CS Dkt. No. 01-290 (Jan. 7, 2002); Comments of Nat'l Cable & Telecomm. Ass'n, CS Dkt. No. 01-290 (Dec. 3, 2001); Reply Comments of Nat'l Cable & Telecomm. Ass'n, CS Dkt. No. 01-290 (Jan. 7, 2002).

[7] *See In re Implementation of the Cable Television Consumer Protection and Competition Act of 1992 – Development of Competition and Diversity in Video Programming Distribution: Section 628(c)(5) of the*

(footnote continued...)

"necessary" to be a "very close call,"[8] and Commissioner Abernathy wrote a powerful dissent.[9] The developments in the last five years make a further extension of the prohibition even less defensible than it was in 2002. Video choice has exploded, and vertical integration is vastly reduced.

Video Choice. Two years ago, the Commission concluded that "the vast majority of Americans enjoy more choice, more programming and more services than any time in history."[10] The competition that exists today far exceeds what existed two short years ago.[11] In every

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(...footnote continued)

Communications Act: Sunset of Exclusive Contract Prohibition, Report & Order, 17 FCC Rcd. 12124 (2002) ("*Sunset Order*").

[8] *Id.* at 12181 (Separate Statement of Commissioner Kevin J. Martin, Approving in Part, Concurring in Part) ("For me, whether the exclusivity ban continues to be necessary was a very close call.").

[9] Commissioner Abernathy opposed extending the prohibition, explaining that

> The record in this case demonstrates that increased competition in both the video distribution and programming markets jointly render the ban on exclusive agreements no longer necessary. I understand the majority's reluctance to trust in the market, since it is necessarily less predictable and more volatile than regulatory mandates. Nevertheless, time and again markets have been proven to deliver greater innovation and choice to consumers and this is no exception. I believe today's marketplace supports placing our trust in markets over mandates and lifting the ban. . . .
>
> I believe that eliminating this prohibition likely would foster the development of new, innovative services that allow competitors to distinguish themselves and provide additional value and services to consumers. Mandating that vertically integrated programmers share the rewards, but not the risks, of their investment reduces the willingness of those programmers to develop innovative new programming in the first place. Congress wanted to rely on market forces to the extent feasible to achieve a diversity of views and information through cable television and other video distribution media. Allowing the prohibition on exclusive contracts to sunset as envisioned by Congress would allow market forces to work to provide such diversity to the benefit of all Americans.

Id. at 12175, 12178 (Dissenting Statement of Commissioner Kathleen Q. Abernathy).

[10] *In re Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 10th Annual Report, 19 FCC Rcd. 1606 ¶ 4 (2004).

[11] *See* Comments of Comcast Corp., MB Dkt. No. 06-189 (Nov. 29, 2006) ("*Comcast Video Competition Comments*"); Reply Comments of Comcast Corp., MB Dkt. No. 06-189 (Dec. 29, 2006) ("*Comcast Video Competition Reply*"); Letter from James L. Casserly, Counsel to Comcast Corp., to Marlene Dortch, Secretary, FCC, MB Dkt. No. 06-189 (Mar. 30, 2007) ("*Supplement*") (highlighting certain significant video competition developments from December 29, 2006 through March 30, 2007); *see generally* Supplemental Comments of

(footnote continued...)

community, consumers can choose from a minimum of three MVPDs, and in many a fourth or fifth MVPD is available or will be soon.

Direct Broadcast Satellite ("DBS") providers -- already enormously successful by 2002, having gone from zero subscribers in 1992 to over 16 million ten years later -- have increased their subscribership by another 80% since the Commission's *Sunset Order*.[12] DIRECTV and EchoStar each offer their services to almost every household in the United States, and, between them, they have captured more than 29 million subscribers. Each year for the past five years, the DBS companies have added two to three million new subscribers, while the cable industry in the aggregate has added approximately zero.[13] In 2002, DBS companies served approximately 18.2% of all MVPD subscribers; now the two major DBS companies serve approximately 30% of all MVPD subscribers, and they are the second and fourth largest MVPDs in the United

(...footnote continued)

Comcast Corp., MM Dkt. No. 92-264 (Feb. 14, 2007). Under separate cover, Comcast will place in the record of this proceeding its comments, reply comments, and recent supplemental filing from this year's inquiry on video competition.

[12] At the end of 2006, DIRECTV reported 15.95 million subscribers and EchoStar reported 13.105 million subscribers, for a total of 29.055 million subscribers. *See* Press Release, DIRECTV Group, Inc., *DIRECTV Group Announces Fourth Quarter and Full Year 2006 Results* (Feb. 7, 2007), *available at* http://media.corporate-ir.net/media_files/irol/12/127160/pdf/Q42006EarningsRelease1.pdf; Press Release, EchoStar Communications Corp., *EchoStar Reports Fourth Quarter 2006 Financial Results* (Mar. 1, 2007), *available at* http://phx.corporate-ir.net/phoenix.zhtml?c=68854&p=irol-newsArticle_print&ID=968819&highlight=. In 2002, the Commission reported that DBS providers had 16.1 million subscribers as of June 2001. *See In re Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 8th Annual Report, 17 FCC Rcd. 1244, App. C, Table C-1 (2002) ("*8th Annual Report*").

[13] *Compare 8th Annual Report*, App. C, Table C-1, *with 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, App. B, Table B-1 (2006) ("*12th Annual Report*").

States.[14] By comparison, the cable industry's share of the MVPD marketplace has dropped from 78% in 2002 to 67.8% at the end of 2006.[15]

The entry of the nation's two largest telecommunications companies -- AT&T and Verizon -- and Qwest into the video marketplace is providing consumers with even more choices. Verizon, AT&T, and Qwest continue to provide telephone service to over 90% of all the households in their service areas and have resources far beyond those of any traditional cable company. They are now deploying multichannel video service in hundreds of markets throughout the country and are formidable video competitors in every market they enter.[16] For example, as of the end of 2006, Verizon offered cable service to over 2.4 million households in eight states,[17] and it predicts that number will rise to 18 million households by the end of 2010.[18]

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14 *Compare 8th Annual Report*, App. C, Table C-1, with *Comcast Video Competition Comments* at 7 & n.17.

15 *Compare 8th Annual Report* App. C, Table C-1 (as of June 2001), *with* Kagan Research LLC, Kagan Media Index, Kagan Media Money, Jan. 23, 2007, at 5 (reporting 96.8 million total multichannel subscribers nationwide, and 65.6 million basic cable subscribers). According to the Television Bureau of Advertising, cable penetration of U.S. households in February 2007 hit a 17-year low. *See* Steve Donohue, *Cable Penetration Hits 17-Year Low*, Multichannel News, Mar. 19, 2007, *available at* http://www.multichannel.com/article/CA6425963.html.

16 The Commission and several state governments have adopted special video franchising rules for the Bell companies and other local exchange carriers based on those companies' claims that such special treatment will accelerate their roll-out of video services across the country. *See, e.g.*, Kimberly S. Johnson, *FCC Order May Help Qwest's Quest*, Denv. Post, Mar. 11, 2007, *available at* http://www.denverpost.com/search/ci_5414210.

17 *See* Press Release, Verizon Communications Inc., *Verizon's 4Q 2006 Results Cap Strong Year of Organic Growth in Wireless, Broadband and Business Markets* (Jan. 29, 2007) ("*Verizon 4Q06 Press Release*"), *available at* http://newscenter.verizon.com/press-releases/verizon/2007/verizons-4q-2006-results-cap.html; Press Release, Verizon Communications Inc., *Verizon Expands FiOS TV Service to More California Consumers, Providing Choice and Greater Value* (Jan. 3, 2007), *available at* http://newscenter.verizon.com/press-releases/verizon/2007/verizon-expands-fios-tv.html. Verizon currently offers its cable services to consumers in parts of ten states, including California, Delaware, Florida, Maryland, Massachusetts, New Jersey, New York, Pennsylvania, Texas, and Virginia. *See* Press Release, Verizon Communications Inc., *Verizon Expands FiOS TV Service to More Consumers in New York's Westchester County* (Mar. 29, 2007), http://newscenter.verizon.com/press-releases/verizon/2007/verizon-expands-fios-tv-5.html.

18 *See* Todd Spangler, *Verizon Bulks Up Bundles*, Multichannel News, Feb. 5 2007, *available at* http://www.multichannel.com/article/CA6413014.html.

AT&T currently offers cable service to approximately 2.2 million households in six states, expects to reach eight million households by the end of this year,[19] and plans to pass 19 million households by the end of 2008.[20] Meanwhile, Verizon, AT&T, and Qwest continue successful partnerships with the DBS companies to provide video options to consumers in areas where they have not yet deployed their own cable services.[21]

But of course, MVPDs are not now, nor have they ever been, the only source of video choices for consumers. Despite the multiple choices of MVPDs available, anywhere from 15-20 million households still prefer to rely on over-the-air television. Tens of millions of Americans also supplement their viewing with DVD and videotape rentals and purchases, and Netflix has become a national phenomenon.[22] The increasing popularity of new video outlets including the Internet, mobile devices, and other new technologies are providing consumers with even more options and encouraging vast increases in the supply of video content.[23]

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19 *See* Sanford Nowlin, *AT&T Readies for Aggressive U-verse Expansion*, San Antonio Express-News, Feb. 27, 2007, *available at* http://www.mysanantonio.com/business/stories/MYSA022807.1E.ATTuverse.2d448ee.html. *See* Glen Dickson, *AT&T Rolls Out TV in K.C.*, Broad. & Cable, Mar. 20, 2007, *available at* http://www.broadcastingcable.com/article/CA6426156.html. AT&T offers its cable services to consumers in California, Connecticut, Indiana, Kansas, Texas, and Wisconsin. *See generally* AT&T Knowledge Ventures, L.P., *AT&T U-verse, View Channel Line-up*, *at* https://uverse1.att.com/launchAMSS.do (last visited Apr. 2, 2007).

20 Nowlin, *supra* note 19.

21 *See Verizon 4Q06 Press Release*, *supra* note 17 (reporting 540,000 Verizon/DIRECTV bundle subscribers); Jeffry Bartash, *DIRECTV or DISH? Take Your Pick*, MarketWatch, Feb. 16, 2007 (reporting approximately 1,450,000 total AT&T/DBS bundle subscribers, including 818,000 newly-acquired BellSouth/DIRECTV bundle subscribers and 632,000 AT&T/EchoStar bundle subscribers), *available at* http://www.marketwatch.com/news/story/directv-dish-both-could-buyout/story.aspx?guid=%7BBE91EDAF-8CF9-41CE-B012-E7974EE77262%7D; Press Release, Qwest Communications Int'l Inc., *Qwest Reports Strong Fourth Quarter and Full Year 2006 Results* (Feb. 8, 2007) (reporting 366,000 Qwest/DIRECTV bundle subscribers), *available at* http://media.corporate-ir.net/media_files/IROL/11/119535/020807_Final_Earnings_Press_Release_4Q06.pdf.

22 *See Comcast Video Competition Comments* at 46-49.

23 *See id.* at 29-37, 50-59; *Comcast Video Competition Reply* at 14-20; *Supplement* at 3-5.

Probably the most significant developments have taken place in video available via the Internet. In July 2006 alone, 107 million Americans, or three out of every five Internet users, viewed video online.[24] A survey conducted in January 2007 found that two-thirds of Internet users view video online on a weekly basis.[25] Last Fall, *The Wall Street Journal* reported that "video Web sites now draw users in numbers that rival those of cable and satellite companies."[26] It is unlikely that anyone would have imagined that, when YouTube launched in December 2005, it would be acquired by Google less than a year later for $1.65 billion. Nor was it foreseeable, just a year or two ago, that every major broadcast network would be offering a selection of its most popular shows over the Internet. As Chairman Martin recently explained, "Television programs are watched when and where we want them, and are increasingly on the Internet."[27] A Google executive put it even more vividly: "Once upon a time, if you had some video content that you wanted to distribute, you could do it on three television stations in the days of the

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

25 *See* Shankar Gupta, *Study: Two-Thirds of Web Users View Streaming Video Weekly*, Online Media Daily, Feb. 7, 2007, *available at* http://publications.mediapost.com/index.cfm?fuseaction=Articles.showArticleHomePage&art_aid=55157. Eighty-four percent of consumers surveyed said their consumption of online video last year either stayed the same or increased from 2005. *See id.*

26 Ellen Sheng, *As Internet TV Gains Popularity, Cable Firms Bulk Up Offerings*, Wall St. J., Sept. 27, 2006, at B4.

27 Written Statement of Kevin J. Martin, Chairman, Federal Communications Commission, Before the House Committee on Energy and Commerce 2 (Mar. 14, 2007), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-271486A1.pdf.

networks, then 100 in the days of cable. Now . . . you can do it on literally millions of channels on the Internet."[28]

In short, the video marketplace is more competitive and diverse than ever.[29] Any assessment of the state of video competition must recognize the enormous and decentralizing change that has taken place in just the last two years. The Commission cannot myopically view the video marketplace as it was viewed in 1992, or 1996, or even 2002. Even DIRECTV acknowledges that the current marketplace is "precisely what Congress envisioned":

> Cable, and now Verizon and AT&T, compete by offering the triple play. DISH Network has carved out a niche as the low-cost provider. And digital media distributed over the Internet is exploding.[30]

The video marketplace today is fundamentally and irreversibly competitive.

Vertical Integration. The explosion of video distribution capacity and outlets has launched a corresponding explosion in content -- accompanied by a *steep decline in vertical integration* between cable operators and cable programming networks. When the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act") was passed,[31] there were approximately 68 national programming networks (and only a dozen or so regional

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28 *See* Louise Story, *Google in Content Deal with Media Companies*, N.Y. Times, Feb. 26, 2007 (quoting Kim Malone, director of online sales and operations for Google AdSense), *available at* http://www.nytimes.com/2007/02/26/technology/26google.html?ex=1330146000&en=5ac917a42d06e4cc&ei=5088&partner=rssnyt&emc=rss. The popularity of paid-for content is expected to rise dramatically, with web sales of TV shows and movies expected to reach $6.3 billion by 2012. *See* Archie Thomas, *Download Revenue To Rise Tenfold by 2012*, Variety, Jan. 29, 2007, *available at* http://www.variety.com/article/VR1117958250.html?categoryid=1009&cs=1.

29 *See supra* Part II.A.

30 Letter from Chase Carey, President and Chief Executive Officer, DIRECTV, to Monica Shah Desai, Chief, Media Bureau, FCC 6 (Mar. 2, 2007).

31 Pub. L. No. 102-385, 106 Stat. 1460 (1992).

networks) in operation in the United States.[32] The majority of them -- in fact, 57% -- had "some ownership affiliation with the operating side of the cable industry,"[33] largely because independent programmers, the broadcast networks, and the Hollywood studios were not willing to invest in cable programming at the time. The average household did not have cable at all, and those that did normally had access to 36 or fewer channels of analog programming.[34]

Fast forward to 2007. Incredibly, last year, the Commission reported that cable operators have an interest in only approximately 20% of the 531 national programming networks it counts.[35] And, in fact, that number is now actually closer to 13.5%.[36] Assuming a pay-per-view network is counted on equal footing as a 24/7 linear programming network, Comcast has a financial interest in only 18 of these national networks.[37] Of the 100 or so regional networks

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32 H.R. Rep. No. 102-628, at 41 (noting that there were "68 nationally delivered cable video networks").

33 *Id.* (noting that "39 [of the 68], or 57 percent, have some ownership affiliation with the operating side of the cable industry").

34 S. Rep. No. 102-92, at 3, *as reprinted in* 1992 U.S.C.C.A.N. at 1135.

35 *See 12th Annual Report* ¶ 157.

36 In the *12th Annual Report*, based on data as of June 30, 2005, the FCC found that 21.8% of national programming networks were vertically integrated with cable operators, but this finding was based on a computation that counted iN DEMAND as if it were 60 separate networks. *See id.* ¶ 157 & n.568. The Commission noted that, "[i]f we count iN DEMAND as one network, 57 satellite-delivered national programming networks are vertically integrated with one or more . . . cable operator[]," *id.* ¶ 159, which would mean 57 out of the total 472 (or approximately 12.1%) national programming networks are vertically integrated with a cable operator. iN DEMAND recently reported that it now operates one HD network and eight multiplexed PPV channels. *See* Letter from Michael S. Berman, Senior Vice President, Business Affairs & General Counsel, iN DEMAND Networks, to Marlene Dortch, Secretary, FCC, MB Dkt. No. 06-189, at 2 (Feb. 2, 2007). Factored into the Commission's analysis, this would bring the total of national programming networks to 480 and the number of cable-affiliated national programming networks to 65, or 13.5%.

37 The national programming networks are: E!, G4, AZN, VERSUS, style, Golf Channel, iN DEMAND (INHD and 8 PPV channels), TV One, PBS KIDS Sprout, and The mtn.

identified by the Commission, Comcast has a financial interest in only twelve.[38] Focusing more specifically on sports programming, Comcast has a financial interest in only three national programming networks and eight regional programming networks that show some sports programming.[39] The decline of vertical integration is even more dramatic if one focuses on the networks with the biggest audiences; of the "Top 15 Programming Services by Prime Time Rating" catalogued by the Commission, Comcast has a financial interest in *zero*.[40]

In light of the dramatic increase in the number of programming networks, there is an abundance of programming -- affiliated and unaffiliated with any cable operator -- available to every MVPD. Despite this abundance, there is always room for additional creative and innovative programming, programming that might be created were it not for the exclusivity prohibition. As explained below, the exclusivity prohibition is one of the few exceptions where Congress and the Commission have interfered with the natural pro-competitive benefits generated by exclusivity in a free marketplace.

B. Exclusivity Is the Norm in Competitive Markets and Is Widely Recognized To Be Pro-Consumer.

The exclusivity prohibition's key points of focus -- exclusivity and vertical integration -- are not presumptively anticompetitive or harmful to consumers. Rather, these types of

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38 Comcast's regional programming networks are: CN8, Cable Sports Southeast, Comcast SportsNet Philadelphia, Comcast SportsNet Mid-Atlantic, Comcast SportsNet Chicago, Comcast SportsNet West, SportsNet New York, Fox Sports New England, New England Cable News, Pittsburgh Cable News Channel, Comcast Local (Detroit), and Comcast Entertainment TV (Denver).

39 These networks are: VERSUS, Golf Channel, The mtn., Comcast/Charter Sports Southeast, Comcast SportsNet Philadelphia, Comcast SportsNet Mid-Atlantic, Comcast SportsNet Chicago, Comcast SportsNet West, SportsNet New York, Fox Sports New England, and Comcast Local (Detroit).

40 *See 12th Annual Report*, App. C, Table C-6.

arrangements are common throughout the economy and are generally found to benefit consumers and competition.

The benefits of exclusivity have been recognized in America since its inception: the Constitution expressly recognizes that, "[t]o promote the Progress of Science and the useful Arts," it is important to "secure for limited Times, to Authors and Inventors, the exclusive Right to their respective Writings and Discoveries."[41] The Framers recognized that people will be more inclined to invest their labor, capital, and creativity -- and to take risks -- when they possess corresponding freedom to enjoy the resulting economic rewards. Congress acknowledged the benefits of exclusivity when it deliberately incorporated the sunset provision into Section 628(c)(5).[42]

The Commission also has recognized the benefits of exclusivity. For example, the Commission respects broadcast programming contracts that promote geographic exclusivity. The network nonduplication rule protects broadcast television stations that have purchased exclusive rights to network programming within a specified area.[43] That rule was not statutorily mandated, but "arose from the Commission's recognition in the 1970s and 1980s that protection of exclusive contractual rights is necessary both to protect local broadcasters from the importation of non-local stations by cable systems and to provide appropriate protections and

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41 U.S. Const. art. I, § 8, cl. 8.

42 *See* 47 U.S.C. § 548(c)(5); *see also* S. Rep. No. 102-92, at 26-28.

43 *See* 47 C.F.R. § 76.92. Similarly, the syndicated program exclusivity rule allows broadcast stations to protect exclusive distribution rights for syndicated programming in a local market. *See* 47 C.F.R. § 76.101.

incentives to program producers and distributors to provide the programming desired by viewers."[44]

Likewise, vertical integration can promote competition and consumer welfare. The classic definition of vertical integration is straightforward: "Vertical integration occurs when a firm provides for itself some input that it might otherwise have purchased on the market. As a result, the input is said to be produced within the firm rather than purchased from another firm."[45] Vertical integration is common and ubiquitous. It occurs in every industry and region and is "practically infinite in its variety."[46]

As a general matter, vertical integration is widely understood to be procompetitive or competitively neutral, and courts and experts agree that there should be no presumption against vertical integration.[47] There is a long-standing and bipartisan consensus among antitrust

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44 *In re Implementation of the Satellite Home Viewer Improvement Act of 1999: Application of Network Nonduplication, Syndicated Exclusivity, and Sports Blackout Rules to Satellite Retransmissions*, Notice of Proposed Rulemaking, 15 FCC Rcd. 434 ¶ 13 (2000).

45 3A Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 755a (2nd ed. 2002).

46 *Id.* For example, a car manufacturer produces its own glass in its own plant rather than purchasing glass from a separate manufacturer; a newspaper company uses employees rather than contractors to distribute its newspapers to newsstands; a university operates its own electrical generation facility rather than purchasing electricity from a local utility; and a clothing store manufactures its own branded line of clothes rather than reselling other brands.

47 *See Nat'l Fuel Gas Supply Corp. v. FERC*, 468 F.3d 831, 840 (D.C. Cir. 2006) ("We began by emphasizing that vertical integration creates efficiencies for consumers."); DOJ, *Merger Guidelines*, 49 Fed. Reg. 26,823, § 4.23 (June 29, 1984) (noting efficiencies associated with vertical integration); Areeda & Hovenkamp, *supra* note 45, ¶ 755a ("In the majority of cases no anticompetitive consequences can be attached to [vertical integration], and injury to competition should never be inferred from the mere fact of vertical integration. Every firm -- from the largest monopolist to the tiniest competitor -- is vertically integrated to one degree or another.").

enforcers and practitioners that vertical integration is usually beneficial to competition and consumers.[48]

Vertical integration may also bring together complementary resources or expertise, thereby facilitating investment, innovation, and product development.[49] This helps explain why cable companies have played a leading (but far from dominant) role over the years in developing and launching new programming networks.

Exclusive contracts provide similar competitive benefits. Allowing the producer of a product or service to limit the channels through which it will be distributed, or allowing a distributor to distribute or refuse to distribute a given product or service, can foster investment and innovation and increased competition based on product differentiation -- so-called "interbrand" competition.[50] Exclusive arrangements often promote non-price competition and improved quality, and eliminate free-riding of one distributor on the marketing efforts of another

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48 *See, e.g.*, Christine A. Varney, Commissioner, FTC, *Vertical Merger Enforcement Challenges at the FTC*, PLI 36th Annual Antitrust institute, San Francisco, Cal. (July 17, 1995) ("Vertical integration can lower transaction costs, lead to synergistic improvements in design, production and distribution of the final output product and thus enhance competition. Consequently, most vertical arrangements raise few competitive concerns."), *available at* http://www.ftc.gov/speeches/varney/varta.htm.

49 Firms typically integrate vertically because they find it cheaper and more efficient to produce an input rather than to purchase it from the marketplace. As a general matter, this type of cost savings is beneficial to the economy and should be encouraged. *See* Areeda & Hovenkamp, *supra* note 45, ¶ 757c ("The extensive literature on vertical integration suggests that the majority of instances of vertical integration produce resource savings."). Vertical integration can also lower costs to consumers by eliminating "double mark ups" -- the ability of an upstream firm to charge a downstream firm a mark-up for an input, which is then passed on to consumers. Economists refer to this as the elimination of "double marginalization." *Id.* ¶ 758a2 ("*Consumers are better off for each instance of double marginalization eliminated.* By precisely the same token, the market price comes down each time a firm with market power is eliminated from the production and distribution chain.").

50 *See generally Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 54-55 (1977) ("Vertical restrictions promote interbrand competition by allowing the manufacturer to achieve certain efficiencies in the distribution of his products. These 'redeeming virtues' are implicit in every decision sustaining vertical restrictions under the rule of reason. Economists have identified a number of ways in which manufacturers can use such restrictions to compete more effectively against other manufacturers.").

distributor. A distributor with an exclusive arrangement has more incentive to market the supplier's product for which it has exclusive distribution rights.

There are myriad examples of exclusive contracts working this way in the communications industry. We see this when Yahoo! cuts exclusive deals with newspapers so that it can better compete against Google.[51] We see this when XM Radio builds exclusive shows around Bob Dylan, Oprah, and the sports leagues (including Major League Baseball, ACC, PAC-10 and Big Ten football, and the National Hockey League), and Sirius counters with Howard Stern, Martha Stewart, and other major sports leagues (including the National Football League, National Basketball Association, and NASCAR).[52] We see this when Verizon Wireless announces that it will offer ESPN SportsCenter clips, fantasy sports leagues, and "more live games than any other carrier"; when AT&T/Cingular announces content deals with HBO, *Saturday Night Live*, the NCAA, and World Wrestling Entertainment; when Sprint Nextel announces exclusive NASCAR content; and when T-Mobile cuts a deal with the NBA.[53] We see this when Microsoft announces a new music player that offers features that are not available on the iPod, while neither device can play music purchased from the other's affiliated music store.[54]

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51 *See* Press Release, Yahoo! Inc., *Yahoo! Forms Strategic Partnership with Consortium of More Than 150 Newspapers Across the U.S.* (Nov. 20, 2006), *available at* http://yhoo.client.shareholder.com/press/ReleaseDetail.cfm?ReleaseID=219204.

52 *See* Corey Deitz, *Radio: A Step by Step Comparison of XM and SIRIUS Satellite Radio Features*, About.com, *at* http://radio.about.com/od/satelliteradio/ss/blsatstepbystep.htm (last visited Mar. 15, 2007).

53 *See* Kenneth Hein, *Carriers Locked in Content Land Grab*, Brandweek.com, Mar. 12, 2007, *available at* http://www.brandweek.com/bw/news/recent_display.jsp?vnu_content_id=1003556832 ("Looking to help retain and attract customers, each of the major players is avidly inking exclusive content deals with sports and entertainment properties.")

54 *See* Ethan Smith, *Can Anybody Catch iTunes?*, Wall St. J., Nov. 27, 2006, at R1 ("Microsoft is currently mounting the most ambitious assault on iTunes with Zune -- a software and hardware 'ecosystem' that tries to mimic the successful synergy between iTunes software and iPod gadgets.").

We see this in the video marketplace when DIRECTV enters into exclusive agreements with the NFL, NASCAR, and the NCAA, while EchoStar licenses a substantial amount of international fare on an exclusive basis, in order to differentiate their services.[55] The DBS providers have used these exclusive arrangements as competitive tools to attract customers away from cable operators. In the words of DIRECTV's CEO Chase Carey: "[U]nique content is what will separate the company from its pay-TV brethren over the course of the next few years."[56]

C. If There Was a Justification for the Exclusivity Prohibition in 1992, That Justification Is Now Long Gone.

In light of the evidence detailed above, it is clear that the exclusivity prohibition does not "continue[] to be necessary to preserve and protect competition and diversity in the distribution of video programming."[57] As Chairman Martin instructed, "necessary" as used in Section 628(c)(5)

> means more than just "helpful" or "useful." I believe "necessary" should mean something closer to "indispensable" or "essential." . . . [T]he 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. . . .

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55 Variety reports that "DIRECTV is so gung ho about sports exclusivity it also ponies up a humongous $3.5 billion for exclusive rights to *NFL Sunday Ticket*" and, " [i]f the MLB/DIRECTV deal ends up de-facto exclusive, the satcaster will pay a cool $100 million a year for seven years for the rights to Extra Innings." John Dempsey, *MLB Pitches DIRECTV Deal*, Variety.com, Mar. 8, 2007, *available at* http://www.variety.com/article/VR1117960785.html?categoryid=14&cs=1. DIRECTV also has exclusive rights to NASCAR HOTPASS and NCAA MARCH MADNESS.

56 *Looking Forward with DIRECTV*, SKYREPORT.COM, Mar. 9, 2007, *available at* http://www.skyreport.com/archives/view/?publication_id=1&release_id=143#Story2.

57 47 U.S.C. § 548(c)(5).

> Thus, I believe that a finding that the exclusivity ban is "beneficial" to or "promotes" competition and diversity would not be sufficient.[58]

The exclusivity prohibition, in today's competitive environment, is clearly not "necessary" to preserve and protect competition and diversity in the distribution of video programming.[59] Cable faces fierce competition in the video marketplace and the number of programming networks vertically integrated with any cable operator has dropped precipitously since the rules were first adopted. Meanwhile, the number of programming networks has increased dramatically and there is an abundance of programming to fill every MVPD's channel lineup. In short, Congress's goals have been achieved.

The chart below is a graphical representation of the statistics reported herein, comparing 1992, 2002, and today. The chart demonstrates the profound increase in DBS subscribership numbers and the marked decrease in the percentage of programming networks that are vertically integrated with a cable operator.

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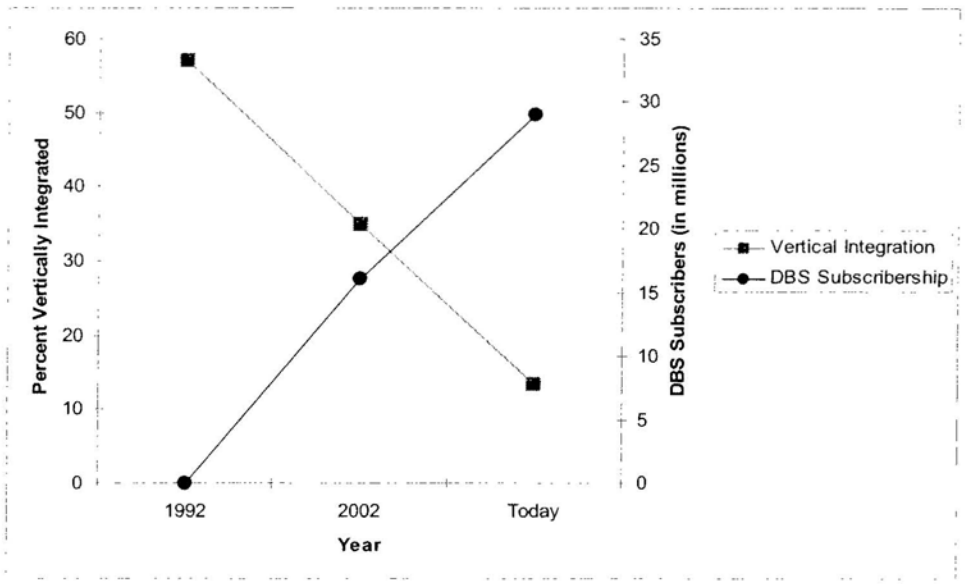
[58] *Sunset Order* at 12180 (Separate Statement of Commissioner Kevin J. Martin, Approving in Part, Concurring in Part) (emphasis in original).

[59] As discussed below, the exclusivity prohibition may actually be *harmful* to competition and diversity of programming because it allows competitors to free-ride on the investments of cable operators and provides no incentives for those competitors to invest in developing their own programming.



Cable competitors have advocated for extension of the prohibition because investing in programming is costly and risky, and it is easier for them to rely on government assistance rather than invest risk capital in new programming.[60] However, in enacting the exclusivity ban, Congress meant to ensure that *fledgling* competitors could not be denied access to popular programming vertically integrated with a cable operator; Congress did not intend to bolster established and powerful distributors and allow those providers to free-ride on the investments of cable operators.[61] And yet the parties that most commonly file program access complaints are not fledglings but DIRECTV, with nearly 16 million subscribers, and EchoStar, with more than

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[60] DIRECTV and EchoStar want to have it both ways. In their view, "exclusivity" is procompetitive when they practice it, but not when their competitors practice it. Exclusivity is either good for consumers and competition or it is bad -- it cannot be simultaneously good for Company A and bad for Company B.

[61] The *Notice* explains: "The focus of Congress in enacting the program access provisions . . . was to encourage entry into the [MVPD] market by existing or potential competitors to traditional cable systems by making available to those entities the programming necessary to enable them to become viable competitors." *Notice* ¶ 2.

13 million subscribers.[62] To DIRECTV's credit, it has invested in creating some new programming, although the majority of its affiliated networks (past, present, and future) were created well before they became affiliated with DIRECTV. EchoStar, on the other hand -- the most litigious of cable's competitors -- has made only nominal investments in programming and, instead, has built its business in large part on the investments, creativity, and hard work of cable programmers who are compelled to provide their programming to EchoStar. This is not what Congress intended. Moreover, there is no indication that new entrants to the video business, namely the powerful Bell companies, are having any trouble obtaining the programming they need to compete.[63]

The video distribution marketplace is more competitive and diverse than ever. The vast array of distribution platforms present significant profit-generating opportunities for programming networks in the form of subscription fees and advertising revenues. Except in very rare situations, a typical programming network, no matter its ownership structure, will not foreclose opportunities to be as widely distributed as possible on multiple distribution platforms. In fact, many programmers refer to themselves as "platform-agnostic":

> Programmers no longer consider themselves "cable" networks . . . . From well established to start-up, independent to consolidated, they consider themselves platform-agnostic "brands" or "media networks" -- anything but "cable networks." Each wants to be future-proofed and ready for convergence, or at least willing to experiment with new

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62 EchoStar or DIRECTV filed over half of the last fifteen program access complaints (eight out of fifteen).

63 *Comcast Video Competition Comments* at 27-29; *Comcast Video Competition Reply* at 13; *Supplement* at 2-3. One Bell Company filed a single program access complaint at the Commission, but that complaint was dismissed because the parties reached an agreement on their own. *In re Verizon Tel. Cos. and Verizon Servs. Corp. v. Cablevision Sys. Corp. and Rainbow Media Holdings, LLC*, Order, 21 FCC Rcd. 13387 (2006).

> platforms and technologies. They'll see what sticks with consumers and advertisers and what will drive their core business -- getting eyeballs to their programming.[64]

With respect to diversity, the inherent nature of the video marketplace ensures that consumers have a diverse array of programming available to them. No programming network, whether or not affiliated with a cable operator, wants to produce programming that replicates the content of other programming networks. Similarly, no distributor wants to offer consumers 200 channels of programming that is duplicative. Rather, the goal of each programming network is to create unique programming that attracts viewers to the network, while the goal of distributors is to make as diverse an array of programming from numerous sources available as possible in order to attract as many customers as possible.[65] Whether programming networks are affiliated with cable operators has no impact on how diverse the programming is that the networks produce. Thus, the exclusivity prohibition is not "necessary" to preserve and protect diversity in the distribution of video programming.[66]

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[64] Shirley Brady, *Why Call 'Em Cable Networks?*, Cable World, Apr. 4, 2005 ("Programmers once considered cable operators their first and most important partners. . . . These days, however, networks are just as likely to launch with cable's satellite competitors, EchoStar and DIRECTV. Programmers increasingly are looking to use cable's telco competitors, Verizon and SBC, as video launchpads."), *available at* http://www.cable360.net/cableworld/business/competition/dbs/15859.html.

[65] Comcast makes available over 200 channels of video programming on a typical Comcast system, but only carries at most 10 to 14 of its national networks (depending on how many PPV channels a system offers), an affiliated regional sports network (or two in a handful of markets), and possibly one or two regional or local news or entertainment networks. In Arlington, VA, for example, Comcast offers approximately 264 channels of video programming, and only 16 channels (or approximately 6%) are affiliated with Comcast. Thus, well over 90% of the programming Comcast carries is unaffiliated.

[66] Allowing the prohibition to sunset will not diminish diversity in programming, but could promote diversity by increasing incentives for non-cable video distributors to invest in their own quality programming. Much like the Commission's Financial Interest and Syndication Rules ("Fin-Syn Rules") -- which barred the broadcast networks from investing in more than a small percentage of the programs they aired, and provided the production studios with no incentive to launch new programming networks -- the exclusivity prohibition distorts the marketplace and inhibits investment in the development of new programming. The Fin-Syn Rules, in some form, were in effect from 1970 until 1995, but, after repeal of the rules, the broadcast networks took on the risk of investing in substantially more programming, and the production studios, no longer a "protected class" under the Rules, invested heavily in

(footnote continued...)

In short, there is simply no rational basis for finding that the exclusivity prohibition continues to be necessary to preserve and protect competition and diversity in the distribution of video programming. The competitors cable operators face in today's video marketplace are not only viable, but experienced, well-established, and successful as well. Any justification Congress had for adopting the exclusivity prohibition, or the Commission had for extending the prohibition, is no longer valid, and the marketplace should be allowed to work free of government interference.

D. Antitrust Laws Are Better Suited To Protect Consumers and Competition.

The intense competition that now pervades every aspect of the video marketplace makes the exclusivity ban an anachronism. It addresses problems that no longer exist. To the extent that there remain any bases for concern about anticompetitive conduct, the exclusivity prohibition represents an artificial and clumsy solution to problems that are better addressed through antitrust mechanisms.

Cable operators and other communications companies are fully subject to the antitrust laws,[67] and the antitrust laws provide the tools to evaluate whether a contract that enables a single MVPD to carry a given network is procompetitive or anticompetitive. The antitrust laws

(...footnote continued)

the creation of new broadcast and cable networks. *See* Mara Einstein, FCC Media Ownership Working Group, *Program Diversity and the Program Selection Process on Broadcast Network Television*, Sept. 2002, at 33 (concluding that diversity "increased sharply in the years following fin-syn's repeal . . . as networks began owning and producing more of the programs they distributed"), *available at* http://www.fcc.gov/ownership/materials/already-released/programdiversity090002.pdf.

[67] *See 1992 Cable Act* § 27 (codified at 47 U.S.C. § 521 note) ("Nothing in this Act or the amendments made by this Act shall be construed to alter or restrict in any manner the applicability of any Federal or State antitrust law."); *United States v. AT&T*, 552 F. Supp. 131, 157 (D.D.C. 1982) (explaining that the court repeatedly rejected the pre-divestiture Bell System's claim that it was immune from the antitrust laws because those laws had been preempted by "pervasive regulation" under the Communications Act); *United States v. AT&T*, 524 F. Supp. 1336, 1345 (D.D.C. 1981); *United States v. AT&T*, 461 F. Supp. 1314, 1320-30 (D.D.C. 1978).

are superior to sector-specific regulation in a number of respects. Antitrust is driven by *facts and analytical rigor*, not by speculation. Antitrust is informed by evolution in the science of economics, not preconceived theories that have long since been disproved by real-world experience in the marketplace. Antitrust generally leaves marketplace participants free to create, innovate, and alter business arrangements without pre-ordained and highly artificial boundaries, and it intrudes only to the extent needed to remedy market failures.

In contrast, laws and regulations applied specifically to cable companies under the Communications Act impose arbitrary restrictions on certain competitors' abilities to innovate and structure their businesses in the ways that make the most economic sense. In fact, those laws and regulations discriminate between competitors and create an uneven playing field. While cable operators are subject to regulation of their vertically integrated programming networks and prohibitions on entering into exclusive contracts, no such regulation and restrictions are imposed on cable operators' competitors. It makes no sense to deem News Corp.'s vertical integration and exclusive arrangements to be beneficial for consumers, but Comcast's and Time Warner's to be harmful. It is well past time for Congress and the Commission to transition communications regulation from sector-specific regulation to the antitrust laws.

E. Independent of the Foregoing, the Exclusivity Prohibition as Currently Applied Is Anomalous in the Extreme, and the Commission Must Not Perpetuate These Anomalies.

In addition to the problems with the exclusivity prohibition itself, the current application of the exclusivity prohibition is fraught with inconsistencies. For example, the exclusivity prohibition's focus on whether programming is affiliated with a cable operator misses an important point: to the extent that MVPDs cannot survive without access to certain programming, it is irrelevant whether that programming is "affiliated"; what matters is whether that programming is "must-have" in order to compete. In the current regime, cable-affiliated programming that is of no competitive consequence is covered by the exclusivity prohibition, but other programming that has powerful competitive implications is not. The best example of this is DIRECTV's exclusive and semi-exclusive arrangements for highly valued programming (including NFL SUNDAY TICKET, NASCAR HOT PASS, and the recent MLB EXTRA INNINGS deal) that are not covered by the rule, but that some MVPD subscribers likely view as "must have." Meanwhile, a cable operator cannot have an exclusive for any satellite-delivered programming with which it is vertically integrated, even if it the programming has little (or no) competitive significance.[68]

Furthermore, it is anomalous that Cable Company X cannot have an exclusive agreement for programming that is owned by completely unrelated Cable Company Y. This makes no sense. Absent evidence of collusion, which the D.C. Circuit directs cannot be presumed,[69] there is no reason for prohibiting an exclusive arrangement in that situation while permitting it in the case of programming that is not vertically integrated. And, it is exceptionally incongruous to allow non-cable MVPDs to have exclusives for their own vertically integrated programming.

Of course, the Commission cannot rewrite the statute; that is a job that only Congress can perform. A rational rewrite would involve massive reductions of Title VI regulations, not just adjustments to Section 628. But, in addressing the issue of whether it is "necessary" to further

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68 As noted above, Comcast has no ownership interests in *any* of the top 15 programming services as measured by prime-time ratings. In addition, of the top 20 programming services as measured by subscribership (distribution), Comcast has an ownership interest in only one: C-SPAN. *See 12th Annual Report*, App. C, Table C-5.

69 *See Time Warner Entm't Co. v. FCC*, 240 F.3d 1126, 1130 (D.C. Cir. 2001) ("[W]hile collusion is a form of anti-competitive behavior that implicates an important government interest, the FCC has not presented the 'substantial evidence' required by *Turner I* and *Turner II* that such collusion has in fact occurred or is likely to occur; so its assumptions are mere conjecture.").

extend the exclusivity prohibition, more than five years beyond the time that Congress originally planned for it to sunset, it would be arbitrary and capricious for the Commission to further prolong a rule that has become so illogical in light of the realities of today's video marketplace.

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The evidence overwhelmingly demonstrates that the Commission should take this opportunity to allow the exclusivity prohibition to sunset, the way Congress expected it would. Competition and consumers would benefit tremendously. If the Commission can somehow substantiate that the rule remains "necessary" -- which we believe the record will not show -- it must, at a minimum, scale back the exclusivity prohibition to make it more competitively neutral. For example, the rule should not be available to be invoked by any company that itself exploits exclusive contracts for competitive advantage. Nor should it be available to companies that have extensive resources to negotiate program carriage contracts for themselves (*e.g.*, companies with over 10 million customers, or companies that are part of an enterprise with a market capitalization of over $100 billion should not be permitted to complain about exclusive contracts). Finally, a company should not be permitted to invoke the rule after its first five years in the video distribution business. After that time, a competitor should be able to sink or swim on its own.

III. CHANGES TO THE COMMISSION'S PROGRAM ACCESS COMPLAINT PROCEDURES ARE UNNECESSARY.

The *Notice* also seeks comment on the program access complaint procedures that will have continuing relevance even after the exclusivity prohibition is permitted to sunset. These procedures were the product of careful thought, they have worked well, and accordingly, there is no basis to change them. Supplementing these procedures by allowing for binding arbitration is unnecessary and would be unlawful.

The Commission "carefully designed" the program access procedural rules "to provide effective relief by placing the least necessary evidentiary burdens on those seeking relief under [its] program access rules and ensuring a speedy resolution of their complaints."[70] Recognizing that not all program access complaints are made equal, the Commission "developed a streamlined complaint process [to] enable [the Commission] to settle uncomplicated complaints quickly while still resolving complex cases in a timely manner."[71] Commenters in the initial program access rulemaking proceeding "address[ed] the development of complaint procedures at length."[72] The Commission gave serious consideration to these comments, and devised a set of procedures that, as experience has borne out, are well suited to dealing with the "complexity of issues involved in each type of behavior address[ed] by" the program access rules.[73] In addition, the Commission conducted a later comprehensive review of its program access procedures and in 1998 modified them to further expedite the pleading cycle.[74]

When the Commission initially adopted the program access rules, it expected to receive hundreds of complaints. After nearly 15 years, however, fewer than 50 complaints have been

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70 *In re Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992; Development of Competition and Diversity in Video Programming Distribution and Carriage, First Report and Order*, 8 FCC Rcd. 3559 ¶ 9 (1993) ("*Program Access First Order*").

71 *Id.* ¶ 17.

72 *Id.* ¶ 71.

73 *Id.* ¶ 72; *see also id* ¶ 135 (explaining that "[g]iven the nature of the programming distribution marketplace, and the wide range of sales practices, we do not believe that it would be efficient or advisable to mandate uniform discovery processes").

74 *In re Implementation of the Cable Television Consumer Protection and Competition Act of 1992; Petition for Rulemaking of Ameritech New Media, Inc. Regarding Development of Competition and Diversity in Video Programming Distribution and Carriage*, 13 FCC Rcd. 15822 ¶¶ 34-62 (1998) (addressing timing and discovery issues, among other things).

submitted to the Commission; the majority of those have been settled by the parties, while 12 have been denied outright. The Commission has not found a single program access violation since July 1, 1998.[75] This track record strongly suggests two things. First, the relative lack of complaints means that the parties understand their obligations and that MVPDs are obtaining access to programming on fair and nondiscriminatory terms and conditions. Second, the Commission's procedures, as they stand, actively encourage parties to continue to negotiate and resolve their disagreements at the bargaining table instead of before a federal agency. Rather than hampering the ability of distributors to seek program access relief, these procedures are working just as Congress intended -- to spur the marketplace to ensure that distributors have access to the programming their subscribers demand on terms that are reasonable and fair to all parties.[76]

The *Notice*, however, inquires whether it should require arbitration of program access complaints, as it has done in two recent mergers.[77] The answer is "no." On its face, the statute specifically assigns the responsibility to adjudicate program access disputes to the Commission.[78] There is no provision of law that empowers the Commission to outsource this responsibility.[79]

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75 *See Turner Vision, Inc. v. Cable News Network, Inc.*, 13 FCC Rcd. 12610 (1998).

76 It also suggests that several parties may see the program access rules more as a negotiating tool than as a means of addressing real grievances. To that end, the Commission should consider whether it has been too lenient in not reprimanding parties who file frivolous complaints.

77 *See Notice* ¶¶ 13-15.

78 47 U.S.C. § 548(d) ("may commence an adjudicatory proceeding *at the Commission*") (emphasis added).

79 An agency may not subdelegate its statutory responsibilities to third parties without express authority from Congress. *See United States Telecom Ass'n v. FCC*, 359 F.3d 554, 566 (D.C. Cir. 2004) ("[W]hile federal agency officials may subdelegate their decision-making authority to subordinates absent evidence of contrary congressional intent, they may not subdelegate to outside entities - private or sovereign - absent affirmative evidence of authority to do so."). One provision of Title II allows the Commission to consider alternative dispute resolution to resolve

(footnote continued...)

Furthermore, there is no provision of law that authorizes the Commission to mandate binding arbitration of program access disputes. Indeed, in its Alternative Dispute Resolution ("ADR") Policy Statement, the Commission explained that it intended to "honor the results of ADR unless they are inconsistent with our statutory mandate" and emphasized that ADR "techniques are *purely voluntary* and that any parties choosing not to use ADR procedures will not be penalized in any manner."[80] The Alternative Dispute Resolution Act ("ADRA") also prohibits the Commission from requiring parties to engage in arbitration.[81]

It is also significant that ADRA prohibits an agency from requiring binding arbitration if, among other things, the matter involves significant government policy questions, requires consistent policies that should not be subject to individual decisions, may significantly affect third parties, or a full public record of the proceeding is important.[82] Taken in combination,

(...footnote continued)

technical disputes with telecom equipment. *See* 47 U.S.C. § 273(d)(5). However, even with such explicit legal authority, "the commenting parties overwhelmingly opposed" the Commission's proposal to use binding arbitration to resolve these disputes, and that proposal was abandoned. *See In re Implementation of Section 273(d)(5) of the Communications Act of 1934, as Amended by the Telecommunications Act of 1996 -- Dispute Resolution Regarding Equipment Standards*, Report & Order, 11 FCC Rcd. 12955 ¶ 9 (1996).

80 *See In re Use of Alternative Dispute Resolution Procedures in Commission Proceedings and Proceedings in which the Commission is a Party*, Initial Policy Statement & Order, 6 FCC Rcd. 5669 ¶ 12 (1991) (emphasis added). When the Commission revised its cable complaint procedures, it specifically incorporated voluntary alternative dispute resolution procedures into Section 76.7(g)(2) of its rules.

81 Under ADRA, "[a]n agency may not require any person to consent to arbitration as a condition of entering into a contract or obtaining a benefit." 5 U.S.C. § 575(a)(3) (2006); *see also Air Line Pilots Ass'n v. Miller*, 523 U.S. 866, 869, 876 (1998) ("a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit"); 5 U.S.C. § 575(a)(1) (2006) (explaining that arbitration can be used only "whenever all parties consent"). Further, if an arbitration requirement violates ADRA, the Commission cannot enforce it without violating the Administrative Procedure Act ("APA"). *See, e.g., S. Pac. Transp. Co. v. I.C.C.*, 69 F.3d 583, 599 (D.C. Cir. 1995) (Rogers, J., dissenting on other grounds) (supporting remand of a case in part because the agency failed to provide a satisfactory explanation as to why an arbitration mandate was not imposed as a condition for obtaining a benefit in violation of ADRA).

82 *See* 5 U.S.C. § 572(b) (2006).

these provisions thoroughly demonstrate that the Commission cannot properly require that program access complaints be addressed through compulsory arbitration.[83]

IV. CONCLUSION.

In light of the significant competition in the programming supply and distribution segments of the video marketplace, the Commission should allow the exclusivity ban to sunset on October 5, 2007. Allowing the rule to sunset comports with Congress's intentions. It is time to remove one of too many remnants of an antiquated statutory regime crafted for the video marketplace of 1992. The video marketplace is robustly competitive and rapidly evolving, and all players deserve equal footing.

Respectfully submitted,

/s/ James L. Casserly

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April 2, 2007

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83 Based on Comcast's recent experiences, it is clear that certain parties are inclined to use the threat of arbitration mainly to obtain additional leverage in negotiations -- artificially seeking to skew what should be private marketplace bargaining.

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

In the Matter of	)	
	)	
Implementation of the Cable Television	)	
Consumer Protection and Competition	)	
Act of 1992	)	
	)	MB Docket No. 07-29
Development of Competition and Diversity	)	
In Video Programming Distribution:	)	
Section 628(c)(5) of the Communications Act:	)	
	)	
Sunset of Exclusive Contract Prohibition	)	

COMMENTS OF
NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION

cable

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April 2, 2007

SUMMARY

In this proceeding, the Commission is considering whether the statutory prohibition on exclusive contracts between cable operators and satellite-delivered program networks in which a cable operator has an attributable interest should finally be allowed to sunset, as mandated by Section 628(c)(5) of the Communications Act. In addition, it has asked whether the rules and procedures for considering program access complaints under Section 628 need to be modified to expedite such consideration.

Five years ago, the Commission decided that the ban on exclusive contracts between cable operators and satellite-delivered program networks in which a cable operator has an attributable interest remained "necessary to preserve and protect competition and diversity in the distribution of video programming." It therefore extended the sunset of the prohibition, which was to occur that year, for five years. During that period, all the pro-competitive trends that had made the Commission's 2002 decision a "very close call" have continued, and it's now time to eliminate this artificial constraint on marketplace competition.

When the prohibition was enacted in 1992, Congress was concerned that cable operators, had the incentive and the ability to thwart the emergence of new competitors – especially direct broadcast satellite (DBS) providers – by refusing to make their vertically integrated program networks available to those competitors. By 2002, when the prohibition was due to sunset, two national DBS providers had grown, as Congress hoped, into vibrant competitors of cable operators, and one out of every four multichannel households were receiving their service from a competitor of their incumbent cable operator. Moreover, the percentage of cable program networks in which any cable operator had an attributable interest had sharply decreased.

The Commission expected that if these trends continued, a five year extension of the rules would be sufficient to address its concerns. In fact, cable's facilities-based competitors have steadily continued to increase their share of multichannel households – to more than one in *three.* Meanwhile, the percentage of satellite-delivered national programming services in which cable operators have an attributable interest declined from 53% in 1993, to 35% in 2002, to only 21.8% today. While seven of the 15 top-rated networks were vertically integrated with cable operators, in 2002, only three are cable-affiliated today.

In addition, there is now significant vertical integration between non-cable distributors (including a DBS provider that serves more customers than all but one cable operator) and programmers. Moreover, those non-cable distributors have themselves sought and acquired program exclusivity as a means of competing with their cable competitors. In these fully competitive circumstances, a ban that singles out cable operators and their affiliated program networks has surely become anachronism. Removing such a one-sided ban would not foreclose the irreversible development of competition in the multichannel video marketplace. It only serves to distort marketplace competition.

Furthermore, the Commission has already crafted and amended its rules to ensure expedited consideration of program access complaints. There is no evidence of any problem that warrants further changes. To the contrary, program access complaints have been few in number, and most have resulted in settlements. Providing for mandatory arbitration would improperly delegate the Commission's responsibilities to an outside party – or, assuming that the Commission would provide for de novo review of the arbitrator's decision, would add an extra, time-consuming layer to what is now an expeditious process.

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Section 628(c)(5) of the Communications Act:	)	
	)	
Sunset of Exclusive Contract Prohibition	)	

COMMENTS OF
NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION

The National Cable & Telecommunications Association ("NCTA") hereby submits its comments on the Notice of Proposed Rulemaking ("Notice") in the above-captioned proceeding.

NCTA is the principal trade association for the U.S. cable industry, representing cable operators serving more than 90 percent of the nation's cable television households and more than 200 cable program networks. The cable industry is the nation's largest broadband provider of high speed Internet access after investing more than $100 billion in the past ten years to build a two-way interactive network with fiber optic technology. Cable companies also provide state-of-the-art telephone service to millions of American consumers.

I. THE PROHIBITION ON EXCLUSIVE CONTRACTS BETWEEN CABLE-OWNED PROGRAM NETWORKS AND CABLE OPERATORS SHOULD SUNSET.

Fifteen years ago – before DBS launched commercially, before there was the World Wide Web, before there was digital television, and before anyone could imagine the convergence that now has cable operators and telephone companies competing in each other's core business –

Congress enacted the program access provisions of the Communications Act. The purpose of those provisions, including a specific prohibition on exclusive contracts between cable operators and any satellite-delivered program network in which any cable operator had an attributable interest, was to jump-start and incubate the development of a competitive multichannel video programming marketplace.

Congress did not intend for the bar on exclusive contracts to be permanent. Indeed, Congress recognized that in a competitive marketplace, exclusive contracts can often be harmless and even pro-competitive. The prohibition precludes such pro-competitive benefits. Moreover, it distorts the marketplace by precluding one group of competitors – vertically integrated networks and cable operators – from using a competitive approach available to others.

Congress provided that the prohibition would sunset after ten years unless the Commission found that it "continue[d] to be necessary to preserve and protect competition and diversity in the distribution of video programming."[1] When the sunset date arrived five years ago, the Commission found that the video marketplace had dramatically "changed for the better."[2] In particular, two national DBS services had, in just ten years, already "garner[ed] nearly one-fifth of MVPD subscribers."[3]

Despite the emergence of DBS as a strong and vibrant competitor, the Commission was not yet fully convinced that the ban on exclusive contracts was no longer necessary. It found that "[c]ontrolling 78 percent of all MVPD subscribers, cable operators continue to decisively dominate the market for the distribution of programming."[4] In addition, it noted that

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[1] 47 U.S.C. § 548(c)(5).

[2] Report and Order, CS Docket No. 01-290, 17 FCC Rcd 12124, 12153 (2002) ("*Sunset Report and Order*").

[3] *Id.*

[4] *Id.*

"[v]ertically integrated programming, although not as pervasive as it was in 1992, continues to play a significant part in the channel package of any viable MVPD."[5] For these reasons, it concluded that "were the prohibition on exclusive contracts permitted to sunset in the current market conditions, competition and diversity in the distribution of video programming would not be preserved and protected."[6]

As then-Commissioner Martin made clear, this was "a very close call."[7] He pointed out that there was a "high burden" to overcome if the prohibition was to remain in effect. In his view,

> 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 sufficient.[8]

If the question of whether the prohibition remained necessary was "a very close call" five years ago, it should be an easy call today. As documented by the Commission's own annual video competition reports, all the trends that the Commission identified in 2002 have continued, and it is undeniable that competition in the video marketplace has fully taken hold. Meanwhile, to the extent that vertical integration of cable operators and program networks ever posed a threat to competition in the video marketplace, it cannot credibly be argued that it does so now.

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5 *Id.*

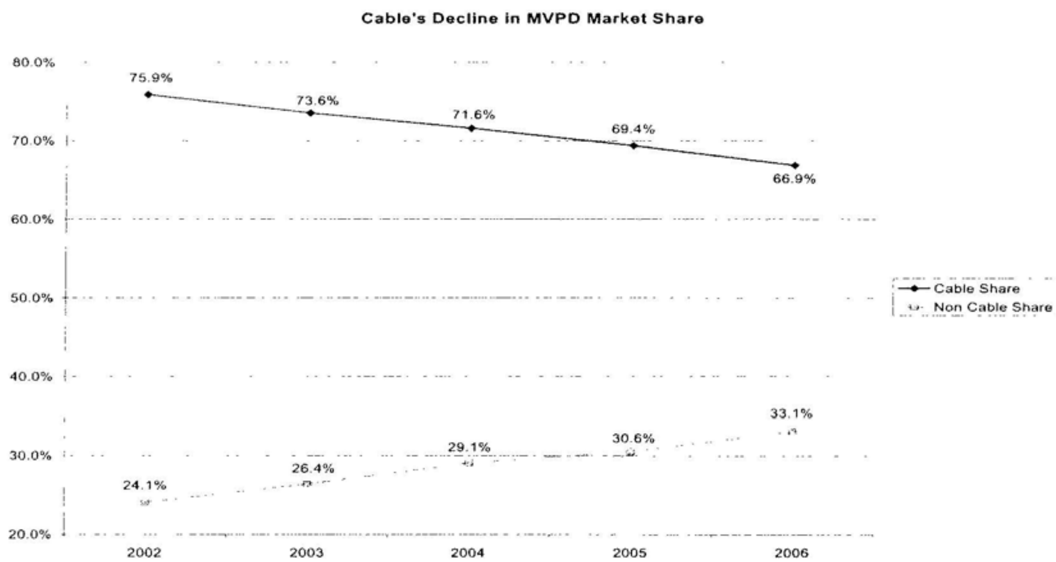
6 *Id.* at 12153-54.

7 Separate Statement of Commissioner Martin, approving in part, concurring in part, *id.* at 12181.

8 *Id.* at 12180 (emphasis in original). Commissioner Abernathy, dissenting, thought that the statutory standard for extending the prohibition had clearly *not* been met and that it was already the case, five years ago, that the ban was "overinclusive, inconsistent with today's marketplace, and no longer 'necessary' as defined by the statute." Dissenting Statement of Commissioner Abernathy, 17 FCC Rcd at 12175.

A. Competition Has Undeniably Taken Hold in the Video Marketplace.

The 78% share of MVPD customers that the Commission found still to be dominant in 2002 has, in just five years, diminished to less than 67%. *One out of three* customers now receives service from a competitor of their incumbent cable operator. And the other two have access and can switch to one of the DBS alternatives – or, increasingly, to a wireline alternative provided by the local telephone company or a competitive broadband provider.



In the five years since the Commission decided to extend the prohibition on exclusivity, the Commission's annual video competition reports have documented not only the increasing shares of DBS and other alternative MVPDs but also the evidence that competition has, indeed, taken hold in the video marketplace. By 2003, the Commission had already concluded that "the vast majority of Americans enjoy more choice, more programming and more services than any time in history."[9] A year later, it further confirmed that "almost all consumers have the choice

9 *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 19 FCC Rcd 1606, 1608 (2003)("10th Annual Report").

between over-the-air broadcast television, a cable service, and at least two direct broadcast satellite (DBS) providers" and found that "in some areas, consumers may also choose" to receive service via one or more emerging technologies, including digital broadcast spectrum, fiber, and video over the Internet.[10] Last year, in its Twelfth Annual Report, the Commission echoed its previous findings, highlighting that "[c]ompetition in the delivery of video programming has provided consumers with increased choice, better picture quality, and greater technological innovation."[11]

B. Vertical Integration Between Cable Operators and Program Networks Has Diminished and Poses No Threat to Competition in the Video Marketplace.

Meanwhile, the decline in the amount and importance of cable-owned, vertically integrated programming on MVPD programming lineups has continued. In its 2002 Report and Order extending the exclusivity prohibition, the Commission noted that the percentage of satellite-delivered national programming services owned by cable operators had declined from 53% in 1993 to only 35%. By 2005, the Commission reported that the percentage had dramatically declined to 21.8%.[12]

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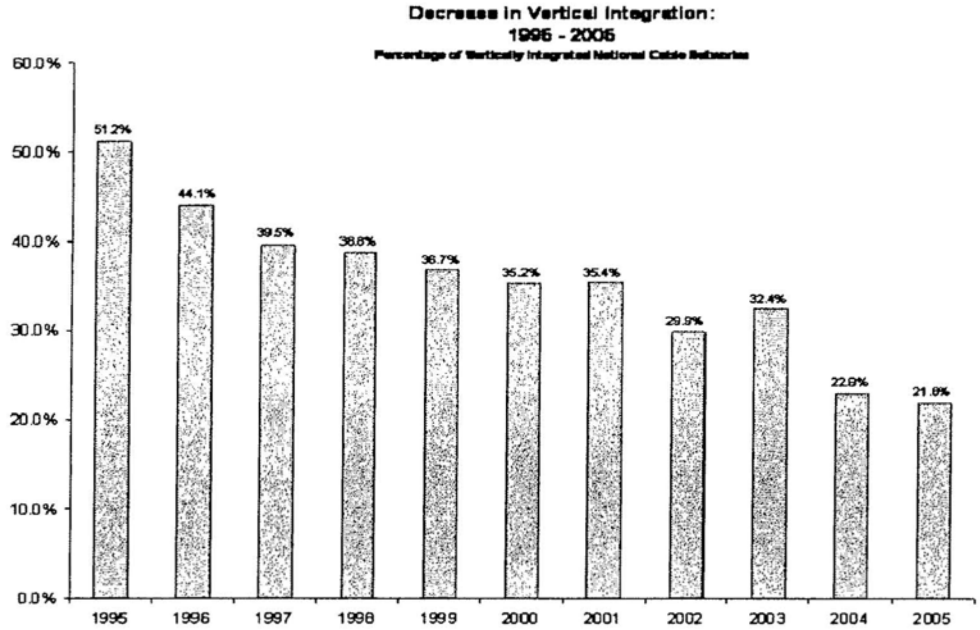
[10] *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 20 FCC Rcd 2755, 2757 (2005)("11th Annual Report").

[11] *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 21 FCC Rcd 2503, 2506 (2006)("12th Annual Report").

[12] This number actually overstates the extent of vertical integration, since it counts the inDemand pay-per-view service as if it were *60* separate programming services. *See* Ex parte letter of Michael S. Berman, Senior VP, inDemand Networks, MB Docket No. 06-189, Feb. 2, 2007.



Source: FCC, Annual Reports on the Status of Video Competition

Most importantly, there is no evidence to suggest that, as vertical integration has sharply declined and competition from DBS and other MVPDs has sharply increased, there is any significant likelihood that program networks that are vertically integrated with cable operators would or could seek to use exclusivity as a means of foreclosing competition. Among other things, the very success of DBS means that any decision to deal exclusively with cable operators would require a network to forgo viewership and revenues from more than 30% of MVPD households.

In any event, program networks that are vertically integrated with cable operators no longer constitute the essential core of MVPD programming lineups, as Congress thought they did in 1992 and as the Commission suggested they might still be in 2002. In its Report and Order extending the prohibition in 2002, the Commission noted that "seven out of the top 20 satellite-delivered video programming networks (ranked by prime time ratings) are vertically integrated with cable MSOs."[13] But in its most recent annual report on video competition, the Commission found that only *three* of the 15 top-rated prime time non-broadcast programming networks – TNT, TBS, and The Discovery Channel – were vertically integrated with a cable operator.

Many of the remaining 12 top-rated networks are vertically integrated with *non-cable* media entities. Those entities, as well as other independent programmers, have already created viable alternatives in virtually all the genres and niches of programming provided by cable-owned networks. As a result, it is unlikely, *first*, that highly rated operator-owned networks would refuse to deal with alternative MVPDs and thereby cede viewership and revenues to a competitive network. And it is unlikely, *second*, that any such exclusive dealing would have the effect of squelching competition from new or existing competitors were it to occur.

C. The Program Access Rules Are Not Meant To Address All Public Policy Issues Related To Exclusive Programming Contracts.

There may, of course, be other public policy issues – wholly apart from the concerns underlying the program access rules – regarding exclusive contracts for certain types of programming. For example, DirecTV for several years had exclusive rights to provide to its customers a "Sunday Ticket" package of all out-of-market National Football League games and has announced a similar potentially exclusive deal to carry Major League Baseball's "Extra Innings" package of all out-of-market baseball games.

Some policymakers have expressed concern over such exclusive arrangements, but not because of any vertical integration between the NFL or Major League Baseball, and not because of a fear that such exclusivity will foreclose competition among MVPDs. Their concern, as expressed by Senator John Kerry, is that certain programming – specifically, in this case, out-of-

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[13] *Sunset Report & Order* at 12132.

market major league sports packages – should be available for purchase by *all* MVPD *customers*, regardless of where they obtain their subscription service.[14] Congress barred exclusive retransmission consent deals because it similarly was concerned that over-the-air broadcast stations should be accessible by all MVPD households.[15]

These issues may warrant further consideration by policymakers. But the program access provisions of Section 628, which focus solely on satellite-delivered programming vertically integrated with a *cable operator*, are not meant to address them.[16] And retaining the statutory bar on exclusive contracts would do nothing to solve them.

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Proponents of further extending the sunset of the exclusivity prohibition have a heavy burden of proof, which simply cannot be met. The Commission expected that, in light of the trends that were already evident in 2002, a five-year extension would "provide[] a sufficient time period in which the video distribution marketplace may have the opportunity to achieve the level of competition and diversity envisioned by Congress."[17] Those trends have continued on course, and have been enhanced and accelerated by the entry of a sturdy new competitor – the local telephone companies.

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14 "[I]f this exclusive deal is approved, only 15 million DirectTV subscribers will be able to purchase Extra Innings, leaving 50 million Americans without access to out-of-market games that they currently enjoy and a viable alternative to view them." "Kerry Wants Martin To Investigate Sports Exclusivity," *Broadcasting & Cable*, Feb. 2, 2007, http://www.broadcastingcable.com/article/CA6413042.html.

15 *See* 47 U.S.C. § 325(b)(3)(C)(ii).

16 The Commission recognized as much when it declined, five years ago, to link the sunset of the bar on exclusive contracts under the program access rules with the statutory sunset of the prohibition on exclusive retransmission consent agreements: "Although both provisions involve prohibition of exclusive contracts, they are not so intertwined that consolidating the termination dates is appropriate." *Sunset Report and Order*, 17 FCC Rcd at 12161.

17 *Id.* at 12160.

In an abundance of caution, the Commission kept the constraints of regulation in place for half a decade longer than Congress expected to be necessary. Competition in the video marketplace is here to stay, and it's time for the prohibition to go.

II. MODIFIED PROCEDURES FOR RESOLVING PROGRAM ACCESS COMPLAINTS ARE UNNECESSARY.

The FCC also asks whether to modify the rules and procedures regarding its program access complaint process.[18] Section 628(f)(1) requires the FCC to adopt regulations that "provide for an expedited review of any complaints made pursuant to this section." There is every reason to believe that the Commission's existing procedures satisfy this dictate. Program access complaints have been few and far between over the last 15 years. Those that have been filed have been disposed of relatively quickly or settled by the parties. The Notice provides no reason to believe that regulations governing the complaint process are in need of an overhaul.

A. The Commission Already Has Procedures in Place Designed to Expedite Consideration of Program Access Complaints.

Existing complaint procedures work, and the Notice states nothing to the contrary. These procedures were established after a comprehensive review in which the FCC in 1998 modified its program access complaint process to further expedite the pleading cycle.[19] As a result, program access complaints already are put on a fast track: cable operators have only 20 days to answer a program access complaint, and replies are due 15 days thereafter – among the shortest

[18] Notice at ¶13.

[19] Implementation of the Cable Television Consumer Protection and Competition Act of 1992; Petition for Rulemaking of Ameritech New Media, Inc. Regarding Development of Competition and Diversity on Video Programming Distribution and Carriage, 13 FCC Rcd 15822 (1998) ("Ameritech Order"). The *Ameritech Order* also addressed issues relating to discovery, strengthening its procedures to require additional documents from respondents. *Id.* at 15849-50.

timeframes anywhere in FCC regulation. Given this short pleading cycle, it is hard to see how reducing it further would materially affect the timing for resolving these disputes. Any shortening of the time period for a cable operator's response to a complaint would merely impose additional hardships on the respondents with no guarantee of a more expeditious agency resolution.

In that regard, the Notice asks whether "specific time limits on the Commission, the parties, or others would promote a speedy and just resolution of these disputes."[20] The FCC already pledged to resolve program access complaints for denial of programming within 5 months of a complaint being filed, and within 9 months for all other program access disputes.[21] When it adopted these goals, the Commission acknowledged that "these dates reflect not what the Commission would select if afforded unlimited resources, but rather what we believe to be realistic goals that are achievable given the Commission's limited resources and overall statutory duties."[22] The Notice provides no evidence that the FCC has ignored these self-imposed deadlines. But neither does it show that the legitimate considerations on which these timelines were based have changed.

In any event, since the last program access review, only a handful of complaints have even been filed. So far as we are aware, in the nearly nine years since the FCC adopted its August 1998 decision expediting its program access procedures, only 14 program access complaints have been lodged. This amounts to, on average, a little more than one program

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[20] Notice at 14.

[21] *Ameritech Order*, 13 FCC Rcd at 15842-43.

[22] *Id.* at 15843.

access complaint annually. And of those complaints filed, *the FCC has found not a single program access violation.*

The FCC resolved many of these complaints in a matter of months.[23] In other cases which may have taken longer to deny or dismiss, as far as can be determined from a review of the FCC decisions, it appears that negotiations between the parties may have prolonged the time between complaint filing and complaint dismissal.[24] The FCC has encouraged voluntary resolution of these disputes,[25] an outcome that would be less feasible if the Commission were to impose an unrealistically aggressive timeframe.

B. The Commission Should Not Require Arbitration.

The Notice also asks whether to impose alternative procedures or remedies in the form of "mandatory standstill agreements and/or arbitration."[26] Establishing a mandatory commercial arbitration provision similar to those imposed in the News Corp./DirecTV[27] and the Comcast/Time Warner/Adelphia[28] transactions, would be neither lawful nor advisable here.

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[23] *See, e.g., EchoStar Communications Corp.*, CSR-5364-P (Public Notice Jan. 1999; denied June 1999); *Dakota Telecom Inc.*, CSR-5381-P (Public Notice April 1999; denied July 1999); *RCN Telecom Services of NY Inc.*, CSR – 5404-P (Public Notice May 1999; denied October 1999); *Microwave Satellite Technologies*, CSR-5415-P (Public Notice July 1999; denied October 1999); *EchoStar Satellite Corp.*, CSR-5412-P (Public Notice July 1999; dismissed December 1999).

[24] *See, e.g., City of Ashland*, CSR-5597-P (Public Notice September 2000; dismissed after settlement June 2001); *DirecTV Inc.*, CSR-6901-P (Public Notice June 2005; dismissed after complaint withdrawn, April 2006).

[25] *Ameritech Order*, 13 FCC Rcd. at 15843 (encouraging resolution of program access complaints through negotiated settlements).

[26] Notice at ¶ 15.

[27] *General Motors Corp. and Hughes Electronics Corp., Transferors and The News Corp Ltd., Transferee, for Authority to Transfer Control*, 19 FCC Rcd 473 at ¶ 177 (2004).

[28] *Applications for Consent to the Assignment and/or Transfer of Control of Licenses Adelphia Communications Corp., Assignors to Time Warner Cable Inc. and Comcast Corporation, Assignees and Transferees*, 21 FCC Rcd. 8203 (2006) at ¶ 156 ("Adelphia Order") (applying commercial arbitration remedy similar to that adopted in News Corp. – DirecTV Order).

Whatever the merits of the FCC's merger-specific arbitration conditions, the Act provides no rationale for the Commission to import this concept into the program access regulations. Section 628 instructs the Commission to establish remedies and procedures and provides the FCC no authority to outsource its responsibilities for program access complaint resolution or fact gathering to a third party arbitrator.[29] Absent express authority, the Commission has no power to delegate its statutory responsibilities to third parties. As the United States Court of Appeals for the D.C. Circuit has noted, "the case law strongly suggests that subdelegations to outside parties are assumed to be improper absent an affirmative showing of Congressional authorization."[30] This is, according to the Court, because: "[W]hen an agency delegates power to outside parties, lines of accountability may blur, undermining an important democratic check on government decision-making . . . . Also, delegation to outside entities increases the risk that these parties will not share the agency's national vision and perspective . . . and thus may pursue goals inconsistent with those of the agency and the underlying statutory scheme."[31]

Even if the Act were ambiguous as to the FCC's duty to itself decide these cases, compulsory arbitration would be ill-advised. Virtually all the program access complaints that have been filed since 1998 revolve around legal interpretations of the scope of the program

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[29] This contrasts with other provisions of the Act, where Congress expressly prescribed arbitration to resolve disputes. *See, e.g.*, 47 U.S.C. Sec. 252(b) (compulsory arbitration before State PUC).

[30] *USTA v. FCC*, 359 F.3d 554, 565 (D.C. Cir. 2004); *see also Michigan Bell v. Lark*, 373 F. Supp. 2d 694 (E. D. Mich. 2005).

[31] *Id.* (citations omitted).

access provision.[32] The Commission is uniquely qualified to make determinations that involve such questions.

Where a program access complaint were to contain issues that required a weighing of the facts in a particular case, FCC rules and procedures already in place will help speed resolution of these types of disputes. The general cable complaint rules provide for referral to an administrative law judge for an adjudicatory hearing if warranted.[33] The rules also contemplate alternative dispute resolution ("ADR") under certain circumstances; Section 76.7(g)(2) allows parties to choose *voluntarily* to resolve certain factual disputes in that manner.[34]

The more specific program access rules also already provide for this type of alternative procedure, permitting issues regarding the amount of damages for a program access violation, upon *agreement* of the parties, to be "submitted for mediation…."[35] Thus, the Commission already has procedures in place that will enable both parties to agree to resolution by ADR. Under these circumstances, imposing *mandatory* commercial arbitration as a remedy would simply represent an abdication of FCC responsibility to resolve a dispute that arises under the

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[32] *See, e.g., World Satellite Network, Inc. v. TCI,* 14 FCC Rcd. 13242 (1999) (denying complaint due to lack of standing); *Dakota Telecom, Inc. v. CBS Broadcasting, Inc.*, 14 FCC Rcd. 10500 (1999) (denying program access complaint brought against exclusive contract between cable operator and non-vertically-integrated program network); *RCN Telecom Services of NY v. Cablevision Systems Corp.*, 14 FCC Rcd 17093 (1999) (denying program access complaint brought against non-satellite delivered service); *Everest Midwest Licensee v. Kansas City Cable Partners*, 18 FCC Rcd. 26679 (2003) (denying complaint filed against terrestrially delivered and unaffiliated program network).

[33] 47 C.F.R. Sec. 76.7(g).

[34] *See generally TCR Sports Broadcasting Holding v. Comcast Corp.*, 21 FCC Rcd 8989 (2006) (directing Administrative Law Judge to resolve factual dispute within 45 days or allowing parties to voluntarily resolve the dispute through alternative dispute resolution.)

[35] 47 C.F.R. Sec. 76.1003(h)(iii)(C)(2). *See also First Report and Order*, 8 FCC Rcd. 3359, 3416 (1993) ("If… the staff determines that a case is particularly complex and will require extensive discovery, the parties will be so advised, and will be given the opportunity to resolve the dispute through ADR. If ADR is not selected or is unsuccessful, the case will be designated for an evidentiary hearing before an administrative law judge (ALJ).")

Commission's rules. And it would deny parties the right to elect mediation as a permitted, not mandated, solution.

Moreover, including an additional layer of dispute resolution through mandatory commercial arbitration will only serve to delay, not expedite, resolution of any program access complaint. Using the model of recent merger conditions shows why this is the case. Under the merger conditions, any party aggrieved by an arbitrator's decision can seek a *de novo* review by the Commission.[36] This can take up to an additional four months from the date of the petition, which itself can be filed up to a month after the arbitrator's award. Thus, the time for resolution of a program access complaint could be doubled – from the existing FCC goal of five months to up to ten months – to accommodate this additional layer of review.

In sum, the program access process is working as the Commission intended. If the FCC wants to adopt a more expedited timeframe for its *own* resolution of complaints, we have no objection, so long as cable operators and programmers are provided with sufficient time to respond to complaints. But a further shortening of the already expedited pleading cycle is unwarranted. And forcing cable operators and programmers to submit to mandatory arbitration is a wholly inappropriate approach to implementing the Commission's responsibilities.

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[36] Adelphia Order, 21 FCC Rcd. 8203 at App. B.

CONCLUSION

In an abundance of caution, the Commission extended the ban on exclusive contracts for five more years than were probably necessary at the time. Today, it's no longer even arguably a "very close call" whether to allow the prohibition finally to sunset. Vibrant competition is the hallmark of today's video marketplace, and the prohibition is in no way essential to preserving this irreversible development. There is also no reason to adjust the procedures for dealing with program access complaints. There is no evidence that the current rules are in any way deficient, and adopting unduly stringent timetables or providing for mandatory binding arbitration would likely only serve to impair the process for resolving the few disputes that arise.

Respectfully submitted,

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March 30, 2007

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Re: Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, MB Docket No. 06-189

Dear Ms. Dortch:

On behalf of Comcast Corporation ("Comcast"), we submit for the record the attached summary of recent developments in the video marketplace. Recognizing that the value of the Commission's annual video competition report depends in large measure on the completeness and accuracy of the information reported therein, we thought it would be useful to provide information concerning developments since reply comments were filed on December 29, 2006.

All of the developments described in the summary were publicly reported in the past 90 days. The summary is by no means exhaustive; in fact, creating a comprehensive summary would be impossible considering that important developments occur nearly every day. Nonetheless, this list of recent developments provides further confirmation of the intense competition, relentless innovation, and abundant choice in the video marketplace.

We hope this information will be useful to Commissioners and agency staff. We would welcome any questions.

Respectfully submitted,

/s/ James L. Casserly
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cc: Monica Desai
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RECENT VIDEO COMPETITION DEVELOPMENTS
(since December 29, 2006)

DBS PROVIDERS

- **Subscriber Growth:** During the fourth quarter of 2006, DIRECTV added 275,000 net subscribers and ended the year with a total of 15.95 million subscribers. Meanwhile, EchoStar added 350,000 net subscribers and ended the year with 13.105 million subscribers. DBS provider growth exceeded expectations.

- **Telco Bundle Partnerships:** As of the end of 2006, Verizon reported 540,000 Verizon/DIRECTV bundle subscribers; AT&T reported 1,450,000 total AT&T/DBS bundle subscribers, including 818,000 newly-acquired BellSouth/DIRECTV bundle subscribers and 632,000 AT&T/EchoStar bundle subscribers; and Qwest reported 366,000 Qwest/DIRECTV bundle subscribers. Verizon announced that, in Florida and Texas, its bundle of wireless, DSL, landline, and DIRECTV services has been selected by 5% of customers. EchoStar announced an extension of its multi-year deal with telco Windstream to provide a discounted bundle of voice, broadband, and EchoStar video services in 16 states.

- **Local Broadcast Channels:** By the end of April, DIRECTV will offer local channels in 143 DMAs, representing about 94% of U.S. television households.

- **HD Programming:** DIRECTV announced that it is on track to carry 100 national HD channels and has agreements with more than 70 major networks for HD content including A&E, Bravo, CNN, MTV, The History Channel, and the Weather Channel. DIRECTV is advertising aggressively that it will have "three times as many HD channels as cable," including through TV commercials featuring Christopher Lloyd as his *Back to the Future* character, where the announcer states "For a future of 150 HD channels, get DIRECTV." This week, DIRECTV announced that it now offers local HD broadcasts in 56 cities, or 67%, of U.S. households. Meanwhile, EchoStar announced that it has expanded its HD programming lineup to 31 channels, including A&E.

- **Advanced Services:** EchoStar announced that, beginning in February 2007, it would provide new customers with its HD DVR receiver at no cost. EchoStar also entered into a partnership with Showtime, to create a free service that pulls video from the set-top box's DVR and incorporates the content into an interactive TV environment. DIRECTV expects that by year-end 2008, it will have 9 million subscribers for its advanced set-top box HD and DVR platforms. Also, as part of its planned two-year in-orbit expansion program, DIRECTV announced that it will launch Spaceway 3 by the end of 2007, which will enable bandwidth-on-demand services and switch and route broadband traffic on board, eliminating the need for routing through a central hub earth station.

- **Sports Programming:** DIRECTV expanded the exclusive sports programming it offers by partnering with MLB for de facto exclusivity on Extra Innings, a package of out-of-market baseball games. In addition, DIRECTV and MLB agreed to launch in 2009 a 24-hour baseball channel in which DIRECTV will have an equity interest. DIRECTV also renewed its exclusive agreement to provide the NCAA Mega March Madness package of games.

- **Mobility:** DIRECTV introduced a compact and portable TV system, DIRECTV Satellite-To-Go, which includes an LCD monitor with an integrated DIRECTV receiver, flat antenna, and replaceable or rechargeable battery. EchoStar introduced TV On The Go, a MobileDISH in-car satellite service that allows customers to watch live satellite TV from vehicles, even while in motion. Sirius Satellite Radio announced that it will launch Sirius BackseatTV, a video service for the rear seats in select DaimlerChrysler vehicles.

Sirius said it will partner with Nickelodeon, Disney Channel, and Cartoon Network to offer the service.

BROADCASTERS

- **Internet Distribution:** Broadcasters continued to expand their website video libraries with current hit shows, helping them to attract millions of unique visitors. During February 2007 alone, ABC.com attracted 9 million, NBC.com attracted 8 million, CBS.com attracted 5.6 million, and Fox.com attracted 2.9 million. Fox announced it will soon offer select prime time programming on its affiliate station websites for $1.99 per episode. Even the CW streamed a never-before-seen episode of *Everybody Hates Chris* without commercials on Yahoo! TV for one week prior to its broadcast debut.

- **Internet Video Revenues:** Broadcasters have generated significant revenues through the Internet. Local broadcasters' online revenues reportedly increased 41% in 2006 to $399 million, compared with local TV ad revenue, which increased 11% in 2006. 72% of broadcast stations sold video ads on their sites; Disney, for example, announced that it has secured commitments from 80% of its affiliates to incorporate local ads into online programming. News Corp. President Peter Chernin said that he expects the company to exceed its goal of $500 million in digital revenue in 2007 and said that online video advertising may be a significant part of that business.

- **New Online Services:** News Corp. and NBC Universal announced an agreement to create an online video site with TV shows and movies, including hits like *Heroes*, *The Office*, *Family Guy*, and *24*, and downloads of Universal Pictures and 20th Century Fox movies. Launch is planned for summer 2007. Distribution deals have reportedly been made with Yahoo, Microsoft, AOL, and MySpace.

- **Wireless:** CBS announced a new division, CBS Mobile, to expand its wireless offerings. It is seeking to start a dedicated network feed by 2008. CBS announced new arrangements with Sprint to deliver mobile content including live streams of CBS Evening News with Katie Couric and with Verizon's V Cast Mobile TV to offer live and on-demand episodes of prime-time hits such as *CSI: Miami*, *Jericho* and *Survivor*, as well as the *Late Show with David Letterman*, and *The Late Late Show with Craig Ferguson*. NBC Universal announced a partnership with MobiTV to offer VOD full-length episodes of prime-time shows from its top networks and to launch several new mobile video channels. In addition, NBC Universal announced the formation of NBCU Digital2Go on Qualcom's MediaFlo mobile video technology platform. The service offers channels such as NBC News2Go, which will feature episodes of *Today*, *Meet the Press*, and *Nightly News with Brian Williams*, and NBC2Go, which will feature episodes of *Heroes*, *The Office*, and Bravo's *Top Chef.*

RBOCs

- **Subscriber Growth:** During the fourth quarter of 2006, Verizon added 89,000 net cable subscribers and served a total of 207,000 cable subscribers at the end of the year. Verizon expects its cable service to pass 9 million homes by YE08 and 18 million homes by YE10. As of YE06, AT&T had 7,000 cable customers. AT&T plans to reach 15 to 20 markets and 8 million homes by YE07 and 19 million homes by YE08.

- **Programming:** Verizon expanded its program offerings to include Spanish, Chinese, and Hindi films on VOD, and will soon offer user-generated video content from Revver. Verizon announced that, later this year, it will launch local video channels that will include traffic and weather, local news, and community sports content. These channels reportedly will include original programming shot and produced by citizen journalists using HD camcorders and provide a platform for local user-generated content. AT&T expanded its cable program offerings to include 3 Lifetime channels, the 2007 Masters Tournament, and Scripps Networks' linear, HDTV, and on-demand programming, which includes HGTV, Food Network, DIY Network, Fine Living, and Great American Country. AT&T also said it signed retransmission agreements with Hearst-Argyle Television for local television stations in six markets and with ION Media Networks for its bilingual children's programming.

- **HD Programming:** Verizon's cable service reportedly offers 24-34 HD channels, and AT&T reportedly offers 25 HDTV channels and is looking for programming improvements such as better content search technology and more local content.
- **Franchising and Service Areas:** So far this year, Verizon has obtained new cable franchises covering areas of California, Florida, Maryland, Massachusetts, New York, Pennsylvania, and Virginia. Verizon's cable service is now available in more than 200 communities in 10 states. AT&T expanded its U-verse cable network into parts of California, Kansas, Wisconsin, and Texas, increasing the number of DMAs it serves from 11 at YE06 to 15 now. Qwest is reportedly upgrading its network to a fiber-optic infrastructure that will allow the company to provide video service on a broader scale.
- **Mobility:** MobiTV announced an OnTheGo version of AT&T's U-verse that allows U-verse subscribers, for an extra $10 per month, to access live content on a PC through an Internet connection. The service offers 30 channels, including some with live programming like The Weather Channel and Bloomberg Television. OnTheGo will eventually offer VOD, movie trailers, and other channels and content. In addition, OnTheGo will eventually be available using an AT&T wireless device, such as a mobile phone.

INTERNET-DELIVERED VIDEO

- **Viewership Growth:** Recent surveys found that 27% more people reported watching streaming video once a week in 12/06 than in 3/06; more than 40% of Americans aged 12-64 watch online videos at least once a week; and one-quarter of online Americans over 12, or about 45 million people, have streamed full TV shows. CBS SportsLine announced that more than 800,000 people registered for its March Madness on Demand Internet coverage of the 2007 NCAA Division I Men's Basketball Tournament. During the tournament, there were more than 189,000 users waiting in line to get into the video player before the tipoff of the first game.
- **Revenue Projections:** Web sales of TV shows and movies are expected to hit $1.5 billion in 2007 and $6.3 billion by 2012.
- **Internet Video Services:** YouTube announced partnerships with the NBA to create a basketball channel, with Wind-up Records to stream music and allow users to incorporate music into their videos, and with the BBC to create an entertainment and news channel. YouTube launched You Choose '08, which hosts official web videos from candidates. YouTube officials say the company is adding more than 200 media partners each quarter.
- Skype introduced its Internet TV venture, Joost, which will launch later this year and provide VOD content (including content from National Geographic and the IndyCar Series) distributed using a peer-to-peer networking architecture with interactive features. Rival

venture Babelgum, which will also launch later this year, announced that it is expanding its peer-to-peer video program offerings.

- Google has been working with large content companies to syndicate Internet TV. Videos will stream inside Google ad boxes on sites that are relevant to the content of the videos.
- Limelight Networks, a content distributor that provides Internet video-delivery services to MSNBC, Viacom, and 700 other customers, filed for an initial public offering that it said could be worth up to $201 million. Its revenue more than tripled from $21.3 million YE05 to $64.3 million YE06.
- **Video Download Services:** Wal-Mart opened the beta version of its video download service and said it secured distribution deals with Fox, the CW, and Viacom, in addition to its agreements with major studios including 20th Century Fox, Disney, Lionsgate, Paramount, Sony, and Universal.
- Movie Gallery, the second largest U.S. movie rental chain, said it plans to open an online DVD rental service later this year to compete with Netflix and Blockbuster.
- For no extra charge, Netflix customers will soon be able to access more than 1000 movies and TV shows streamed directly to their computers using real-time playback. Neflix said that content will be supplied by major studios and TV networks including NBC Universal, Sony Pictures, 20th Century Fox, Paramount, Warner Bros., Lionsgate, A&E, BBC Worldwide, IFC, and Starz Digital.
- **Consumer Electronics-Based Services:** TiVo announced that it will sell content from Amazon Unbox directly to its subscribers, allowing them to simultaneously navigate downloadable broadband video and recorded TV programming. The service will include content from CBS, Fox, Lionsgate, Paramount, Universal, and Warner Bros.
- Sling Media announced a service that allows viewers to clip streamed TV programming and upload it to the Internet or send it via e-mail. CBS was the first channel to submit content for clipping. Sling also announced a set-top box that sends content from the Web to a TV.
- Apple announced Apple TV, a wireless set-top box that transmits video from the iTunes Store to a TV. The device connects to a TV like a DVD player, storing and playing up to 50 hours of video. Analysts predict that between 25% and 70% of the 22 million Mac users, and many more PC users, will buy the device in the next five years, eclipsing the consumer bases of both TiVo and Netflix.

MOBILE PHONES

- **Programming:** MTV has created 3 TV series, comprised of 9-12 episodes at 3-5 minutes each, that will premiere exclusively on wireless video services including Verizon Wireless, Cingular (now AT&T) and other mobile carriers. Sprint introduced its Sprint Power View mobile sports network, which provided 300 shows (10 hours) of basketball programming during March Madness, up-to-the minute scores and updates, and a tournament bracket tracker. MTV and Sprint also announced plans to launch 3 ad supported 24 hour per day linear network versions of MTV, Nickelodeon and Comedy Central, on Sprint.
- **Services:** Verizon Wireless launched its mobile video service, V-CAST, in 20 markets including parts of Illinois, Colorado, Louisiana, Texas, Florida, Virginia, and California. The service uses Qualcomm's MediaFLO and offers made-for-mobile channels from CBS, NBC, Fox, MTV, Comedy Central, Nickelodeon, Lime Healthy Living, and TV Guide.

- The FCC approved a waiver request allowing Crown Castle to transmit video to mobile phones using its Modeo service at up to 20 times previously authorized power levels, thereby reducing the number of necessary base stations and costs. Modeo announced that its mobile TV service is being tested in New York City.
- **User-Generated Video:** See Me TV allowed users to shoot videos on their cell phones and post them to a gallery where others can watch them from their phones. Uploaders received a percentage of the revenues. MySpace also announced a deal with AT&T to provide user-generated content to cell phones for $2.99 per month.
- **Equipment:** Apple introduced its iPhone, which synthesizes communications, video, music, and computing. Apple estimates that it will sell 10 million phones by 2008.

OVERBUILDERS

- RCN reported that its revenue in 4Q06 rose 13% to $158 million. Total customers increased to 425,000 from 424,000 in 3Q06.
- Knology announced it will acquire PrairieWave Communications in a $255 million deal. Knology also reported 12.2% increase in revenues, a 97% increase in HD deployment, and a 76% increase in DVR deployment at YE06.
- Optical Entertainment Network (OEN) announced that it will offer its FISION Triple Play Plus Services (including cable, VoIP, and broadband) in Houston, TX.

COMCAST

- **Upgrades:** Comcast announced an $80 million upgrade for some San Francisco Bay Area systems and that it will lay more than 2,200 additional miles of fiber to boost broadband speeds.
- **VOD:** Comcast announced a partnership with Clear Channel Radio and Music Choice to offer a jointly produced telecast called *Video 6 Pack* on VOD. The programming will showcase local radio personalities hosting a half-hour music-video countdown. The service will launch in Chicago with other markets to follow.
- **DVR:** Comcast announced that it is testing a new service that will offer customers a single digital cable set-top box that includes TiVo DVR features.
- **HD Technology:** Comcast is conducting trials of switched-digital-video systems that can deliver channels more efficiently than conventional cable transmission by sending video streams to a subscriber only when a channel is requested. The technology will allow Comcast to carry more HD channels.
- **Wireless:** The joint venture of Sprint Nextel, Comcast, and three other cable operators announced Pivot, a new mobile telephone service that allows customers to watch live TV, access TV listings, check home e-mail, and make unlimited calls between their cable VoIP home service and mobile phones.

ORIGINAL

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

DOCKET FILE COPY ORIGINAL

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

FILED/ACCEPTED
DEC 29 2006
Federal Communications Commission
Office of the Secretary

REPLY COMMENTS OF COX COMMUNICATIONS, INC.

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

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

REPLY COMMENTS OF COX COMMUNICATIONS, INC.

Cox Communications, Inc. ("Cox"), by its attorneys, submits the following reply comments in response to the above-referenced Notice of Inquiry seeking information, comments and analyses of the myriad factors shaping competition in the video marketplace. Cox presents its unique perspective, as an industry leader in the provision of a bundle of high-quality video, high-speed internet and telephone services, as well as a host of advanced services for consumers (both residential and commercial) that are constantly evolving as a result of its innovation and its deployment of a robust broadband network.

I. Cox Leads the Industry in Providing a High-Quality, High-Value Bundle of Services, Increasing Choices for its Customers

Since 1996 when Congress enacted the Telecommunications Act, Cox has invested $16 billion in private investment capital to build a state-of-the-art broadband communications network. This infrastructure provides customers not only basic and advanced video offerings, but also high-speed Internet and digital telephone services. The simplicity, convenience and exceptional value proposition provided by Cox's full-service bundle of communications services has proven appeal for our customers. In fact, more than half of Cox customers buy two or more services today. And, nearly one-fourth of Cox's total customer base buys a three-product bundle.

Cox is beginning to further extend the reach of its bundle through a wireless joint venture with Sprint and other cable operators, formed in 2006, to provide wireless mobility for all its services. Given the dramatic evolution of the cable business in recent years, the FCC would be well-served to examine video competition in the context of the three-product bundle, including broadband internet and competitive telephone service. Such a perspective would better reflect the marketplace experiences of today's video customer and recognize the tremendous value this service combination provides to American consumers across the country today.

II. Consumers Have Judged Cox Favorably in the Marketplace

Cox competes aggressively with multiple providers in each of its product categories, distinguishing itself on the following fundamentals: (1) the desirability and quality of the product offering, (2) the value consumers place on these services and (3) the service level consumers receive. Cox has demonstrated its ability to provide best-in-class customer service and value for its video service with the variety of programming it offers, the technologies it employs for new and enhanced viewing options, and the attractive pricing and options available for a wide range of programming packages. Customers increasingly pair these packages with Cox's other broadband service offerings for a total communications service value. Cox's success with delivering consumers an outstanding value proposition has been consistently recognized by third parties. In 2006 alone, Cox earned five J.D. Power and Associates honors, receiving the Highest Honor in the West in the 2006 Residential Cable/Satellite TV Customer Satisfaction Study. Cox also has earned the distinction of being the only company to receive highest honors for all three residential services (video, telephone and high-speed Internet) from J.D. Power and Associates.

Video. Cox has 5.4 million residential video customer relationships across the 18 states in which it operates 22 cable systems. With a highly diverse customer base, Cox's success in each market depends on its ability to tailor its service offerings to customers' interests at reasonable prices. Cox systems do this very well with programming tiers and options tailored to various segments of their customer bases. For example, 17 Cox systems representing over 5.2 million customers have launched the very popular Paquette Latino service that includes over 40 channels of Spanish language and themed programming in addition to local broadcast channels. Cox offers a Faith and Values tier in four markets – San Diego; Hampton Roads, Va.; Middle Georgia and Roanoke, Va. – for approximately 1.1 million customers. This tier typically offers three to eight channels of religious-oriented and family programming. Cox also has launched a robust Family Service tier -- averaging 40 channels -- including G-rated only networks, serving 1.2 million customers in Oklahoma, Northern Virginia and San Diego. And where certain customer segments may not be considered large, but have unique programming needs, Cox is often able to serve those needs through premium offerings, including the Filipino channel, Korean TV and Southeast Asia TV in Northern Virginia. These examples illustrate Cox's ongoing commitment to providing its customers diverse, high-quality video offerings in a competitive video marketplace. They also highlight the fact that the marketplace, rather than an artificial regulatory framework, such as government mandated *a la carte*, is best suited to dictate the appropriate mix of service offerings at affordable prices for consumers.

Digital technology has enabled Cox to further craft multiple programming packages that increase customer choice and enhance value. Cox cable systems typically include a Sports and Information Tier, a Movie Tier, and a Variety Tier in their digital service. Some systems also offer smaller mini-tiers, such as the Digital International tier in Northern Virginia. Cox customers typically can choose one, some or all of these digital tiers, or a level of digital service that includes no tiers, but includes the valuable digital programming guide as well as access to over 45 channels of commercial free CD quality music, over 1,000 hours of movies and events through On Demand or Pay-Per-View and free High Definition programming.

Cox and other cable operators have also accelerated the rollout of High Definition programming content by cable networks and have played an important role in the introduction of local HD broadcast channels for consumers. Cox carries a wide range of cable network HD programming in all of its markets, as well as the HD and other digital multicast content of local public broadcasting in each of its markets. And in most of its markets where retransmission consent has been granted, Cox is carrying the HD signals (and in many cases other digital multicast content) of the local broadcast network affiliates at no additional charge to customers.

In addition to expanding the vast array of video programming packages available, digital technology also has enabled Cox to provide a growing number of options for customers to personalize their own viewing experience. Cox's OnDemand and DVR services have made time-shifted viewing a reality, a convenience that has been hugely popular with customers. Cox's OnDemand service provides Cox customers over 1,000 hours of a combination of free, pay-per-view and subscription programming, including 100-200 hours of children's programming. In fact, approximately 20% of Cox's free OnDemand content is children's programming. Cox's OnDemand, DVR and High Definition services have proven compelling for customers as they make the transition to digital services. Cox's OnDemand service is available to almost 60% of Cox households. And combined, over 1 million of Cox's digital customers are enjoying either the High Definition or DVR services Cox provides.

Digital cable also has allowed customers to further individualize their viewing experience with interactive television functionalities, including extensive tailored parental control features. And the customer education tools about Cox's parental control features, for both cable and high-speed internet, are unparalleled. Through its "Take Charge!" campaign with spokesperson and children's advocate, John Walsh, Cox has aired nationwide more than 1.2 million public service announcements, distributed more than 500,000 parent guides in its communities, and 18,000 electronic guides have been downloaded through the Take Charge web site.

With cable market share at around 67%, the ability of Cox and other distributors to move customers to digital platforms is critical as the nation prepares for the upcoming digital transition. Cox has played a large role in spurring this transition with the smart, innovative products described above which customers are fully embracing, propelling Cox's digital-to-basic penetration to more than 50%.

Voice. In 2007, Cox will mark a decade in the telephone business. Cox now provides high quality, reliable telephone service to more than 2 million households and 150,000 businesses across the country. This service, called Cox Digital Telephone, is available in all of the company's systems and employs traditional circuit-switched as well as packet-switched (Voice over Internet Protocol) technology to transport phone calls over a private, managed IP-based data network. Regardless of the technology used, Cox Digital Telephone is a full life-line service and the network architecture does not require an Internet connection. Cox continues to improve its digital telephone service with new features and service enhancements, such as Phone Tools and caller ID to the TV, that make customers' lives easier, more convenient and more enjoyable. Phone Tools, a service that converges telephone and internet technology to provide customers with PC based voicemail management, is currently available in Cox's Roanoke, Va.; Central Florida; Gulf Coast; Macon, Ga; and Greater Louisiana markets.

Customer satisfaction with Cox Digital Telephone is reflected in the numerous awards Cox has received. Cox received the highest honors in JD Power and Associates' 2006

Residential All-Distance Telephony Customer Satisfaction Survey in the Northeast, Southwest and Western Regions. Cox has topped the Western Region polling four years straight – in direct competition with century-old incumbent telco providers Verizon and AT&T. In the Western region, Cox ranked highest in all six categories measured by JD Power, including performance and reliability, customer service, company image, offerings and promotions, billing and cost of service. And *Telephony Magazine*, a trade publication serving the telephone utilities industry, recently hailed Cox for its telephone service, saying Cox is "trouncing the competition" and "building a new breed of telecom player."

Data. Broadband Internet rounds out Cox's triple-play bundle of advanced communications services. More than 3.2 million customers subscribe to Cox High Speed Internet, which provides speeds up to 15 Mbps. Among the many features and benefits of Cox High Speed Internet service is the Cox Security Suite, which helps customers protect their personal computers from viruses, spyware, spam, phishing scams and pop-up ads. The Security Suite also includes a wide array of parental control features to help block kids from inappropriate websites and allows parents to keep track of their children's online activities with daily web history reports. Cox's PowerBoost™, one of the latest exciting innovations introduced by Cox, gives Cox's high-speed Internet customers a speed burst above and beyond their normal speed when downloading large files and is available to Preferred and Premiere customers free of charge. Once again, the high quality of Cox's broadband service has been recognized by third parties. In 2006, Cox was honored by JD Power and Associates with its highest honors in Satisfying Small/Midsize Business Customers in its Business Data Study. And PC Magazine has three times ranked Cox as the number one broadband internet service provider.

III. *Competition is Thriving in Cox Markets*

Where cable succeeds, competitors follow. And competition has mounted on many fronts. DBS providers historically have competed with Cox in residential video. But through partnerships with other competing providers, the two national DBS providers now market a bundle of video, high-speed internet, telephone and even wireless services. There are also several wired competitors that compete directly with Cox in its markets, such as Wide Open West in Cleveland, Ohio; Full Channel in Rhode Island; Brighthouse in Gainesville, Florida; and recently Verizon in Northern Virginia. In the San Diego area alone, there are three wireline competitors: Time Warner, Ultronics and National City. Qwest also continues to compete with its video service in Cox's Phoenix, Arizona, and Omaha, Nebraska, service areas. Verizon is expected to launch video service soon in Cox's Orange County/Palos Verdes, Ca.; Hampton Roads, Va.; and Rhode Island markets. Similarly, AT&T just announced the launch of video service in Cox's Connecticut markets and has secured permission to launch its video service in Cox's Cleveland, Ohio and Tulsa, Oklahoma markets. With their foray into video, the telcos are attempting to replicate the successful full-service communications bundle that Cox provides.

There are simply no Cox markets where customers are beholden to any one provider for <u>any</u> communications service – with all markets providing at least three choices for multi-channel video service alone, and a number providing four video choices or more. Competition, therefore, is flourishing in the marketplace – where it should -- without government intervention.

IV. Regulatory Parity is Key to Allowing the Marketplace to Dictate Results

Cox has consistently been guided by the philosophy that the marketplace, rather than government regulation, should be the driving force for competition. Cox has rolled out its three-product bundle of advanced communications services without the special franchising favors sought by late-to-market competitors such as the mammoth phone companies. With a thoughtful balance of choice and value, Cox is a convincing illustration that innovation can flourish in a competitive marketplace solely in response to consumer demands.

Increasingly, however, the regulatory arena is being skewed by overly simplistic views that selective government-facilitated competition is necessary to lower prices for video service. While Cox agrees that much of the local franchising process is outdated and should be streamlined and modernized, doing so for only one set of well-heeled providers is unfair and bad policy. And it is consumers that will bear the ultimate consequences of government unleashing unbalanced regulations into the competitive video market, stifling certain competitors and therefore denying customers the innovation that an open market fosters.

There is no consumer benefit of this unbalanced approach, as the policies flowing from the flawed assumptions about video pricing miss the single most critical distinction between video services and other communications services – video services are <u>content-based</u>. Every operator (cable, satellite and telco) purchases content from the same programming providers and *all* face the serious pressures of dramatically rising programming costs, which have soared 10% each year for Cox over the past three years. As a result of programming cost pressures, satellite companies have increased their prices every year for the past five years, despite the fact that as national providers they have at least triple the customer base of companies like Cox on which to negotiate volume discounts for programming. Telephone company video pricing will similarly be directly impacted by programming costs. In fact, just one year into its launch of FiOS, Verizon has already increased video prices by three dollars or 7.6%. Until content cost increases abate, it is simply unrealistic to expect video pricing trends to change significantly.

Cox's operational expertise has allowed it to maintain prices that are comparable to Verizon, AT&T and satellite, substantially larger providers. Cox's expertise comes from knowing our markets, and being nimble enough to respond to customers who are focused on lowering their overall telecommunications bill, rather than rate card video prices. In fact, cable's bundle of video, high-speed Internet and voice service costs *23 percent less* than the inflation adjusted price ten years ago, according to data compiled from MSOs and the Bureau of Labor Statistic's Inflation calculator. In order for innovation to continue to flourish and for consumers to realize even greater benefits from the full-service communications bundles offered by multiple providers, a level regulatory playing field must exist for all providers and across all services in the competitive marketplace.

V. Conclusion

Cox fully embraced Congress' vision of telecommunications competition outlined in the 1996 Telecommunications Act by becoming the first U.S. cable company to deliver digital video, high-speed internet and telephone service via a single network, dramatically improving the value proposition for consumers as a result. It is undeniable that Cox's competitive advantage is its knowledge of its local markets and emphasis on customer service, which has resulted from extensive innovation and operational excellence. Cox's successes have sparked an unprecedented number of competitive responses from many sources, which we welcome and expect to continue unabated. Cox's experience proves that consumers, in a free marketplace with a level regulatory playing field, are best equipped to pick the winners for their entertainment and communications service needs.

Respectfully submitted,

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December 29, 2006

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

cable

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REPLY COMMENTS OF THE
NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION

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

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

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

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

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

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

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

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

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

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

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

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

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

4 BSPs Comments at 12.

program networks has decreased from 53% in 1994 to only 21.8% as of 2005.[5] Retail competition is driving innovation, experimentation, and challenges to established business models, which in turn is maximizing the value of video services for consumers and having a beneficial competitive spillover effect in the provision of non-video services.

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

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

6 Verizon Comments at 4-5.

7 *Id.* at 5-6.

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

Meanwhile, Verizon has been awarded 245 franchises since last year and has conceded that the franchising process is not an obstacle to its ability to compete. It reported that its network build-out is "on target" to pass a total of six million premises by year's end.[9] AT&T is rolling out its U-verse service in major cities in Texas and has announced service launches in another 13 regions by the end of 2006.[10] In addition, U-verse is now available in three Connecticut metro areas: New Haven, Hartford and Stamford.[11] In an effort to surpass cable HDTV offerings, AT&T recently announced that it is adding 27 high definition channels.[12] Broadband Service Providers reported that they "have made significant inroads in the multichannel video programming distribution market" by distinguishing themselves with "the most technically advanced services, bundled in packages."[13]

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

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

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9 Verizon Comments at 7.

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

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

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

13 BSPs Comments at 2.

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

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

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[14] *See* NCTA's Comments and Reply Comments filed February 13, 2006 and March 28, 2006 in MB Docket No. 05-311, *In the Matter of Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984*, http://www.ncta.com/ContentView.aspx?hidenavlink+true&type+1pubtp5&contentId+2890; http://www.ncta.com/ContentView.aspx?hidenavlink+true&type+lpubtp5&contentId+2891.

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

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

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

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

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

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[17] *In the Matter of Development of Competition and Diversity in Video Programming Distribution: Section 628(c)(5) of the Communications Act, Sunset of Exclusive Contract Prohibition, 17 FCC Rcd. 12124, 12127 (2002).*

[18] *See* Comments of AT&T at 15.

[19] "AT&T U-verse TV to Include Comcast Networks' Content," AT&T Press Release, September 14, 2006.

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

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

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

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

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

[24] Comments of EchoStar at 6. *See In the Matter of À La Carte & Themed Programming and Pricing Options for Programming Distribution on Cable Television and Direct Broadcast Satellite Systems*, MB Docket No. 04-207, NCTA Comments filed July 15, 2004, http://www.ncta.com/ContentView.aspx?hidenavlink=true&type=lpubtp5&contentId=2690; NCTA Reply Comments filed August 13, 2004, http://www.ncta.com/ContentView.aspx?hidenavlink=true&type=lpubtp5&contentId=2689; NCTA Response to Staff Further Report on À La Carte March 15, 2006, http://www.ncta.com/ContentView.aspx?hidenavlink=true&type=lpubtp5&contentId=2826.

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

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

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

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

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

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

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

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

Second, we have previously submitted a comprehensive study of all 433 wireline overbuild communities that existed in 2003.[29] That study showed that in virtually every case, lower prices – to the extent that they existed – were attributable to anomalous circumstances that had nothing to do with wireline overbuilders being more "competitive" than DBS or other competitors. In many of those communities, the overbuilder erroneously underestimated the effects of DBS on cable prices and services and initially set prices at unsustainable prices – leading either to rapid price increases or rapid bankruptcy. In others, overbuilders had purchased their systems from bankrupt owners at pennies on the dollar, allowing them to avoid the full costs of building a system. Other overbuild systems were operated on a not-for-profit basis by municipalities or co-ops. None of these circumstances would, of course, apply to new telco overbuilders, who are constructing their own massively expensive facilities and who presumably do not intend to operate their systems on a not-for-profit basis.

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

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

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

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

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

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

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

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

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

CONCLUSION

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

Respectfully submitted,

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December 29, 2006

Statement of Dr. Debra J. Aron
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I. Qualifications and introduction

1. My name is Debra J. Aron. I am an Adjunct Associate Professor in the School of Communication at Northwestern University and a Director at LECG, LLC in Evanston Illinois. My business address is 1603 Orrington Avenue, Suite 1500, Evanston, IL, 60201.

2. LECG, LLC is an economics and finance consulting firm, providing economic expertise for litigation, regulatory proceedings, and business strategy. Our firm comprises more than 350 economists and professional staff from academe and business, and has offices in North America, South America, Europe, Australia and New Zealand. LECG's practice areas include antitrust analysis, intellectual property, and securities litigation, in addition to specialties in the telecommunications, gas, electric, and health care industries.

3. I received a Ph.D. in economics from the University of Chicago in 1985, where my honors included a Milton Friedman Fund fellowship, a Pew Foundation teaching fellowship, and a Center for the Study of the Economy and the State dissertation fellowship. I was an Assistant Professor of Managerial Economics and Decision Sciences from 1985 to 1992, at the J. L. Kellogg Graduate School of Management, Northwestern University, and a Visiting Assistant Professor of Managerial Economics and Decision Sciences at the Kellogg School from 1993-1995. I was named a National Fellow of the Hoover Institution, a think tank at Stanford University, for the academic year 1992-1993, where I studied innovation and product proliferation in multiproduct firms. Concurrent with my position at Northwestern University, I also held the position of Faculty Research Fellow with the National Bureau of Economic Research from 1987-1990. At the Kellogg School, I have taught M.B.A. and Ph.D. courses in managerial economics, information economics, and the economics and strategy of pricing. I currently teach a Master's course on competition and strategy in communications

markets at Northwestern University. I am a member of the American Economic Association and the Econometric Society, and an Associate member of the American Bar Association.

4. My research focuses on multiproduct firms, innovation, incentives, and pricing, and I have published articles on these subjects in several leading academic journals, including the American Economic Review, the RAND Journal of Economics, and the Journal of Law, Economics, and Organization. My academic publications include research on penalty mechanisms and incentive devices.

5. I have consulted on numerous occasions to the telecommunications and media industries on issues pertaining to the development of competition, the effects of regulatory rules on competition, and strategic and efficient pricing. I have submitted affidavits to the FCC on various issues pertaining to competition analysis, including an analysis of market power in support of an incumbent local exchange carrier's petition for Section 10 forbearance from regulation of high-capacity services in the Chicago LATA, CC Docket No. 95-65. I have conducted analyses of mergers in many other industries under the U.S. Department of Justice and Federal Trade Commission 1992 Horizontal Merger Guidelines, and in other countries, including cable industry mergers. In addition, I have consulted in other industries regarding potential anticompetitive effects of bundled pricing and monopoly leveraging, market definition, and entry conditions, among other antitrust issues, as well as matters related to employee compensation and contracts, and demand estimation. In 1979 and 1980, I worked as a Staff Economist at the Civil Aeronautics Board studying price deregulation of the airline industry. In July 1995, I assumed my current position at LECG. My professional qualifications are detailed in my curriculum vitae, which is attached as Appendix A.

6. I have been asked by the National Cable & Telecommunications Association to respond to comments and inferences made by various industry observers regarding the market power of cable service providers. My discussion will not focus on the market power of specific carriers themselves, which I have not analyzed, but rather will focus on the economic principles that are critical in any market power analysis. In particular, my purpose is to correct two oft-repeated but erroneous inferences regarding market power.

These are (1) the claim that sustained increases in real prices (that is, sustained price growth faster than the rate of inflation) indicates market power; and (2) that market share is a reliable indicator of market power. Neither of these is an economically valid statement and subscription to either one is likely to lead to erroneous conclusions.

II. Sustained growth in a firm's real prices does not imply market power

7. Industry observers have noted in the press with much indignation that prices in the cable television industry have risen faster than the rate of inflation in recent years. These observers argue (or simply claim) that this observation is evidence of market power by the cable companies. High growth rates of prices, however, do not in general create an economic inference of market power.

8. As a basic economic principle, firms with greater market power would be expected to charge higher prices than those with less market power, all else equal. This means that if one were to imagine two markets, A and B, in which cost conditions, demand conditions, and other economic conditions were identical, one would expect prices to be higher in market A than in market B if firms in market A had a greater degree of market power than those in market B. This familiar proposition, that prices are expected to be correlated with market power at a point in time, is virtually tautological.

9. It is not true, however, nor does it follow from the preceding discussion, that firms with higher market power would be expected to demonstrate a higher *growth rate* of prices over time than would firms with lesser market power, all else equal. The latter proposition, though often asserted or implied in the popular press and similar venues, is not supported by economic logic.

10. Similarly, one would not expect firms with high market power necessarily to demonstrate higher growth rate of prices over time than the rate of inflation, nor, conversely, can one expect that a firm with price growth faster than the rate of inflation has an above-average level of market power.

11. Prices change over time for various reasons.[1] At a microeconomic level, firms raise prices because something in their profit calculation changes. This could be a change in demand, a change in the costs of inputs, a change in technology, a change in the competitive characteristics of the market, or other factors. Changes in demand can include increases or decreases due to overall population growth or demographic changes, changes in the prices of related products, or more subjective factors such as changes in fashion or tastes. Changes in the costs of inputs could include interest rate changes, changes in labor costs due to renegotiation of union contracts or increased demands for certain skills in the economy, or changes in the supply of certain types of skills. Cost changes can also result from changes in the costs of material inputs into production, or equipment necessary for production. Changes in technology can include process improvements that lower the cost of production, or that offer new product features or functionalities. Changes in the competitive characteristics of the market may include entry of new providers, mergers, technological changes that lower entry barriers, and regulatory changes. In all cases, one would generally expect that sustained—as opposed to one-time—price changes are the response to sustained changes in one or more of the above-listed factors. For example, if the demand for a product were suddenly to rise significantly, one would expect a relatively rapid adjustment in price, followed by a new plateau at the new price. Over time, the higher price might attract entry into the market or expansion of existing capacity, ultimately driving price back down. But a one-shot demand increase would not be expected to generate sustained growth in price over time. In contrast, continued growth of demand due to population growth could cause price to rise continuously if the rate of entry or expansion in the market did not keep up with the rate of population growth.

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1 I focus here on changes in the level of prices, rather than the structure of prices. By price structure, (as opposed to pricing levels) I refer to the particular combination of price elements charged. Per-unit charges, flat rates, fixed fees, tiered prices, menus of prices, bundles of units, volume discounts term commitments, volume commitments, and combinations of the above are all different kinds of pricing structures. Pricing levels refer to the dollar value of the rate elements.

A firm might change its pricing structure without necessarily changing its pricing level, and may do so for a variety of strategic, economic, or marketing reasons. I do not consider the specific reason for such changes in this affidavit.

12. The effect that each of the factors I have listed would have on the price would depend on the unique characteristics of the market. For example, the effect on price of a given cost increase would depend on whether the increased costs are fixed or variable costs, the degree of substitutability with other inputs whose prices did not rise, the elasticity of demand, the nature of competition, and other factors.

13. At a macroeconomic level, changes in the overall level of prices (i.e., inflation or deflation) may be triggered by a number of policy variables (such as fiscal, monetary, or trade policy), but these policy changes find their way into prices changes through the individual microeconomic mechanisms I discussed above. For example, macroeconomic policy efforts might increase interest rates, but this ultimately affects the price of various goods and services because interest rate changes affect the costs of production and demand for various goods. The effect on each individual market will be unique to that market.

14. The rate of inflation in the economy is, very roughly, a weighted average of the increase in prices overall in the economy. When there is inflation, some prices will necessarily have increased more than inflation, some less, and some may have decreased. How the prices of each individual product will have changed in a given year will depend on how the various changes I discussed earlier—costs, demand, technology, and competition—have changed in that particular industry, how those unique changes affected the price, and the interaction of the changes with the other characteristics of the market.

15. One reason, then, that one cannot infer the level of market power from observations of price growth is simply that there are many causes of price growth, and all may play a role in any observed price path. Moreover, the price path of any particular industry is not likely to exactly equal the rate of inflation, simply by virtue of the fact inflation is an average of all the disparate price paths in the economy.

16. In particular, the observation that an industry's prices are growing at a rate faster than the rate of inflation establishes no inference about market power. A monopolist who is fully exploiting its market power, as it normally has every incentive to do, would have no

reason to increase its price unless its costs, demand, or technology changed. If it is fully exploiting its market power, it does not benefit from increasing its price because *it is presumably already charging the profit maximizing price*, any deviation from which would simply lower profits.

17. One might ask, though, whether a monopolized industry, or one with firms holding a high degree of market power, would be expected to show higher price growth holding all these other factors constant. The answer in general is no. As I indicated earlier, market power would be expected to lead to higher prices, but not higher price growth. Price growth would typically be associated with market power only to the extent that market power itself is growing over time. Hence, regardless of the existing market power of the ostensible monopolist, if the evidence is that the competitive power of rivals is growing, rather than declining, one would not generally expect the growth in prices to be attributable to market power factors.

18. One might nevertheless seek to justify the claim that sustained, above-average price growth signals market power, on the basis of a theory that market power magnifies the effect of other changes in the market. For example, if the fundamental source of price growth in a market is that costs are growing, one might ask whether cost increases would be passed through more readily by a firm with market power than by a firm in a competitive market.

19. The answer, surprisingly, is no, not as a general rule. The determinants of how much of a cost increase is passed through are somewhat complex, but the general principles are these. In a market that resembles the textbook construct of "perfect competition," all cost increases (and no more) will be passed through in the long run. In the short run, an increase in variable costs will be partially passed through, with full adjustment in price coming as unprofitable firms drop out of the industry. An increase in fixed costs will be fully passed through in the long run also, as firms drop out of the industry due to the higher cost structure.

20. The other extreme market structure is perfect monopoly. In that textbook setting, how much of a cost increase is passed through to consumers depends on the elasticity of demand for the product. Two simple cases illustrate the fact that there can be many possible outcomes and that, unlike the case of a perfectly competitive market, it is quite possible that substantially less than the full cost increase will be passed through to consumers, even in the long run. First, when demand is linear, half of any increase in variable cost will be passed through to consumers, and half will be absorbed as a decrease in profit. If demand is of the constant elasticity form, more than 100% of the cost increase will be passed through (with less elastic demand resulting in greater passthroughs). Other demand functions will generate other results, the implication being that a monopolized market may pass through less than the total increase in variable costs, all of it, or more, depending on factors that are unique to the market demand. When a monopoly experiences a cost increase, moreover, there is no long run adjustment period comparable to that in a competitive market. The effect of cost increases in a competitive market—that marginal firms exit—is not a factor in a monopolized market. The short run response is the full response.[2]

21. Moreover, in a monopolized market, any increase in fixed (as opposed to variable) costs is fully absorbed by the monopolist. Unlike a competitive market, which fully passes along an increase in fixed costs in the form of higher prices in the long run, a rational monopolist cannot improve its profits by increasing price in response to an increase in fixed costs if it was charging the profit maximizing price to begin with. Hence, considering increases strictly in fixed costs, one would expect the result to be higher prices over time in the competitive market, but no price increases from a monopolist.

22. When the market is characterized by oligopoly, the theoretical predictions about the degree to which price increases would be passed on to consumers is still more complex and is less well established. In my experience teaching pricing theory and strategy, and

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2 There may be "longer" run effects reflecting adjustments to costs that can only be accomplished over time. For example, if demand increases, the firm might not be able to expand its capacity immediately to satisfy the demand efficiently. Hence, there may be a longer run adjustment by which costs decline as the firm efficiency expands output. These cost adjustments typically, if anything, would cause prices to decline after an initial price increase, but not to continue to increase.

consulting on various pricing issues, I have not seen any general theoretical result in the professional economics literature that describes the degree to which cost increases are passed through as a function of different degrees of market power in oligopoly market structures, nor have I seen any cross-industry statistical analyses of this issue.

23. Hence, to my knowledge, there is no theoretical or empirical basis upon which to conclude that continuous, sustained increases in cost would result in higher growth rates of prices in a monopoly market or an oligopoly market than in a perfectly competitive market.

24. The foregoing discussion pertains to the effect of sustained increases in costs, but one could analyze the effects of other sources of price changes as well, such as technological change. The qualitative conclusion would be the same: there is no theoretical reason to predict as a general matter that greater market power would be expected to lead to higher growth rates of prices, nor is there any reason to predict that a market exhibiting higher growth rates of prices is characterized by firms with greater market power. A specific theory as to how the price behavior in the market in question would deviate from the predictions of standard economic principles, coupled with specific factual evidence, would be necessary to overcome this robust economic principle. For any given industry, if one observes prices rising faster than the rate of inflation, one could test empirically whether the growth rate could be explained in that case by market power. Doing so would require controlling for other factors, such as cost increases, demand increases, and technological changes. But absent some sort of empirical demonstration, there is no basis on general principles for attributing sustained real price growth to market power.

III. Market share in not a reliable measure of market power

25. I understand that industry observers have also argued that the high degree of concentration (i.e., the high market share of the incumbent cable providers) in the market for delivery of video programming demonstrates that the incumbent cable providers have a high degree of market or monopoly power. Market share is not, however,

determinative of market power; indeed, it is not even the primary determinant. This is true as a general matter, but, in particular, in a market in which an incumbent is moving from a protected or de facto monopoly to a competitive environment, market share can be a very misleading measure of market power, and other measures are more informative and useful.

26. A market share analysis focuses on past competitive losses, rather than forward-looking competitive alternatives. In economics, market power can be defined as "the ability ... to raise price above the competitive level without losing so many sales so rapidly that the price increase is unprofitable and must be rescinded."[3] The true determinant of the market power of a given firm, then, is the extent to which competitive alternatives are available or poised to be available, to which customers could turn if the firm attempted to raise price. If competitors could expand their output or enter the market with sufficient capacity in a timely fashion to satisfy the demand for alternatives created by the firm's price increase, those competitors would impose a competitive constraint on the firm's ability and desire to raise its price. That is, they would decrease or eliminate its market power.

27. Most fundamentally, it is the availability of competitive alternatives, not a competitor's current market share, that is relevant to assessing competition. In particular, the ability of actual competitors to expand output to meet consumer demand and/or the ability of potential competitors to enter and provide reasonably substitutable services are the key determinant of market power. The ability of suppliers to respond to potential price increases in a timely fashion can be summarized as the "supply elasticity," which generally measures the extent to which rivals will increase output through expansion and/or entry in response to a given increase in price. Market share can sometimes be a useful, simple proxy for the viability of competitive alternatives, but because it is not

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3 W.M. Landes, and R.A. Posner, "Market Power in Antitrust Cases," *Harvard Law Review*, vol. 94 (1981), p. 937. The Department of Justice/Federal Trade Commission *1992 Horizontal Merger Guidelines* similarly defines market power as "the ability profitably to maintain prices above competitive levels for a significant period of time," but also note that "sellers with market power also may lessen competition on dimensions other than price, such as product quality, service, or innovation." See the introductory section of the *Merger Guidelines*.

always or necessarily a good proxy for the supply elasticity, it can be misleading and induce erroneous conclusions.

28. Market share data can mask the true competitive situation for several reasons, all of which appear to be relevant to the market for delivery of video programming.

29. The first and most fundamental reason that market shares can be a misleading measure of competition is, as I indicated, that they are a static picture of the market that do not reflect the presence or absence of barriers to expansion and entry into the market. Economists, the courts, and the federal antitrust agencies recognize that the ability of rivals to expand output is critical to determining the ability of any firm in a market to exercise market power. If there are no significant barriers to expansion and/or entry, then market share is essentially irrelevant; no firm, no matter how large its market share, could exert significant market power for any length of time. Ease of expansion of existing competitors or entry of new competitors, therefore, trump market share.

30. Second, market share is a particularly inappropriate measure of competition in a market that is emerging from regulated monopoly environment, because an incumbent's market share tends to understate the degree of competition during a transition to competition, and tends to underestimate a competitor's future competitive significance.[4] A market that was, in recent history, a protected monopoly, may well be much more concentrated than an equally competitive market without a regulated history. Market shares are "path-dependent;" i.e., they depend upon past market shares, even if the market is now highly competitive. An incumbent that prices competitively need not lose customers to competitors; if the incumbent prices so as to reflect the competitive threat, there is no incentive for its existing customers to move. Customers nonetheless receive the benefits of competition even if the incumbent's market share does not change.

31. The shortcomings of market share as a measure of market power are well recognized by U.S. competition policy. The US Department of Justice's Merger Guidelines, for example, memorialize into competitive policy the economic principle that "a merger is

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4 The *Merger Guidelines* state that "recent or ongoing changes in the market may indicate that the current market share of a particular firm either understates or overstates the firm's future competitive significance." (§ 1.521)

not likely to create or enhance market power or to facilitate its exercise, if entry into the market is so easy that market participants, after the merger, either collectively, or unilaterally, could not profitably maintain a price increase above premerger levels."[5] The statement is equally applicable to supply responses via the expansion of output from providers who are already in the market. The antitrust courts have also reflected these economic principles.[6]

32. Indeed, the FCC itself has repeatedly recognized the significant shortcomings of market share as a measure of competition. In its 1996 order declaring AT&T non-dominant, the FCC wrote:

> It is well established that market share, by itself, is not the sole determining factor of whether a firm possesses market power. Other factors, such as demand and supply elasticities, conditions of entry and other market conditions, must be examined to

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[5] *Merger Guidelines*, §3.0.

[6] See also ABA Section of Antitrust Law, *Antitrust Law Developments* (4th ed. 1997), pp. 328-332, a standard source for practicing antitrust attorneys and economists, citing: United States v. Baker Hughes Inc., 908 F.2d 981, 987 (D.C. Cir. 1990) ("In the absence of significant entry barriers, a company probably cannot maintain supracompetitive pricing for any length of time"); California v. American Stores Co., 872 F.2d 837, 842-43 (9th Cir. 1989) (recognizing that "[a]n absence of entry barriers into a market constrains anticompetitive conduct, irrespective of the market's degree of concentration," but finding that district court could properly have concluded, based on conflicting evidence, that defendant's proof of ease of entry was not sufficient to overcome plaintiff's prima facie case), *rev'd on other grounds*, 495 U.S. 271 (1990); Oahu Gas Serv. v. Pacific Resources, Inc., 838 F.2d 360, 366 (9th Cir.) ("A high market share, though it may ordinarily raise an inference of monopoly power, ... will not do so in a market with low entry barriers or other evidence of a defendant's inability to control prices or exclude competitors."), *cert. denied*, 488 U.S. 870 (1988); United States v. Waste Mgmt., Inc., 743 F.2d 976, 981-83 (2d. Cir. 1984) (prima facie illegality of 48.8% postmerger market share rebutted by ease of entry into Dallas County commercial trash collection market); United States v. Gillette Co., 828 F. Supp. 78m 84 (D.D.C. 1993) ("there is ample evidence that the mechanics of fountain pen design are readily available, thus leaving no technological barriers to [new] entry [and there] ... are also no legal or regulatory barriers"); Pennsylvania v. Russell Stover Candies, Inc., 1993-1 Trade Cas. (CCH) ¶ 70,224, at 70,093-94 (E.D. Pa. 1993) ("defendant can rebut the evidence [of a prima facie violation] by showing that barriers to entry are not significant"); United States v. Syufy Enters., 712 F. Supp. 1386, 1401 (N.D. Cal. 1989) (showing of absence of entry barriers "undermines any claim of monopoly power"), *aff'd*, 903 F.2d 659 (9th Cir. 1990); United States v. Calmar Inc., 612 F. Supp. 1298, 1306-07 (D.N.J. 1985) (ease of entry ensured that merger would not injure competition, despite the fact that it resulted in leading firm with 50% of market and HHI of 3000); Echlin Mfg. Co., 105 F.T.C. 410, 485-92 (1985) (Lack of entry barriers into the assembly and sale of carburetor kits eliminates any possibility of a substantial anticompetitive effect); Frank Saltz & Sons v. Hart Schaffner & Marx, 1985-2 Trade Cas. (CCH) ¶ 66,768 at 63,724 (S.D.N.Y. 1985) (dictum) (noting that even if concentration had been high, relative ease of adapting a factory from lower quality clothing to better quality men's suits would have precluded finding an antitrust violation); United States v. Tracinda Inv. Corp., 477 F. Supp. 1093, 1108 (C.D. Cal. 1979) (no barriers to entry into motion picture market); United States v. M.P.M., Inc., 397 F. Supp. 78, 92, 94 (D. Colo. 1975) (entry barriers relatively low in ready-mix cement business).

> determine whether a particular firm exercises market power in the relevant market [footnote omitted]. As we noted in the First Interexchange Competition Order, "[m]arket share alone is not necessarily a reliable measure of competition, particularly in markets with high supply and demand elasticities.[footnote omitted]" [7]

33. In its decision in AT&T v. FCC, Case No. 99-1535, released January 23, 2001, the DC Circuit court pointed out that in the FCC's COMSAT Non-dominance Order (1998) it "went so far as to view market share as irrelevant where there was other evidence that a carrier lacked market power." In that Order, the FCC also rejected evidence of increased profitability as relevant to a determination of market power, as well as finding that COMSAT's competitive advantages due to size and superior access to certain resources did not preclude the FCC from concluding that COMSAT did not have market power in certain markets.[8] Consistent with the principles I have described, the FCC focused, instead, substantially on supply considerations and noted the importance of intermodal competition (meaning, in that case, competition between cable and satellite carriers) for proper competitive analysis.[9]

34. A firm's future competitive significance can, of course, in many cases be reasonably reflected in its market share, which is one reason why market shares are considered useful despite (and if one fully recognizes) their limitations. For example, consider the market for a conventional consumer good that requires factory capacity, labor, machinery, and raw materials with which to produce each unit. If there are, say, two firms in the market, each of which is running without substantial excess capacity, and if the production process requires significant intellectual property, expertise, or other unique resources that are possessed by these firms but not easily attainable in a

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7 Federal Communications Commission, *In the Matter of Motion of AT&T Corp. to be Reclassified as a Non-Dominant Carrier,* Order, FCC 95-427, October 12, 1995 (*"AT&T Reclassification Order"*), ¶ 68.

8 Federal Communications Commission, *COMSAT Corporation, Petition Pursuant to Section 10(c) of the Communications Act of 1934 , as amended, for Forbearance from Dominant Carrier Regulation and for Reclassification as a Non-Dominant Carrier,* Order and Notice of Proposed Rulemaking, FCC 98-78, April 24, 1998 (*"COMSAT Reclassification Order"*), ¶ 93.

9 *COMSAT Reclassification Order*, ¶ 76.

reasonable period of time by any third party, then each firm's market share is likely to be a good proxy for its competitive significance in the near term. If one firm attempted to raise price, the other's ability to increase its output substantially in a short period of time would be constrained by its capacity, and its relative capacity in the market would be roughly summarized by its market share. A firm with, for example, a 20% market share might have limited ability realistically to absorb sufficient quantities of demand that it would be able to defeat the profitability of the rival's price increase.

35. In contrast, in a market in which each firm's costs are characterized by relatively high fixed costs but relatively low incremental costs of providing more units or serving more customers over a large range of output, the firm's existing market share provides very little insight into its ability to expand rapidly to meet the demand created by a competitor's price increase. A firm with a 20% market share in such a market might easily and realistically be able to absorb all of the demand quickly without substantially increasing its costs. The latter cost characteristics are thought to apply to many information goods, such as software, newspapers, and music recordings, as well as, in principle, to delivery of video services over satellite.

36. Hence, the market power of a firm cannot as a general rule be summarized by its market share or, indeed, by any other single statistic or number. Rather, an economically compelling analysis of market power requires an analysis of the ability of existing firms to expand output, to provide a product or service that is viewed as a reasonable substitute for the product or service of the firm at issue by a sufficient subset of customers, and/or the ability of potential entrants to enter the market and provide a reasonable substitute in a timely fashion. Short of such a full analysis, however, some statistics can be useful, if incomplete, tools for examining market power. One such statistic is the firm's share of the *growth* in the market, or what I will call the "growth share." If, for example, a market grew by 100,000 customers (or dollars, or units of output) in a given month, and the firm captured 20,000 of those, its growth share for that month would be 20%. Growth share can be useful because it indicates the degree to which customers view the services of competitors as attractive and substitutable for the services of the firm at issue. It also

provides evidence of the extent to which the prices of the firms are considered to be competitive with one another.

37. Growth shares can be very informative in communications markets such as local telecommunications and video delivery, because these are markets recently emerging from regulation and facing competition. As I explained, in markets recently emerging from regulation, current market share may well reflect historical market shares more than future competitive significance of rivals. In such a case, growth share overcomes the backward looking characteristic of static market shares and provides a valuable measure of the vigor of competitive alternatives.

38. Another measure that can be useful in assessing competition in some markets is the "addressability" of customers by existing competitors. Addressability measures the extent to which the existing facilities of firms can serve new customers without substantial incremental cost. Addressability is a way of reflecting ease of expansion by capturing the degree to which existing facilities of competitors can be expanded or exploited more fully at low cost in order to serve more customers. In the context of a cable provider, all households passed by cable facilities would be considered addressable by the cable provider, assuming other capacity constraints or technical limitations on the cable were not binding on the provider's technical capability to serve the households. Hence, the addressability of a cable provider in a given geographic area would be measured by the percentage of households passed by its cable. For a satellite provider, all households with necessary line of sight would be addressable, assuming any incremental costs (such as antennas) specific to the customer do not outweigh the benefits of a small but significant price reduction or small but significant increase in quality.

Assessing Quality-Adjusted Changes in the Real Price of Basic Cable Service

Steven S. Wildman
Michigan State University

September 10, 2003

I. Introduction and Summary

Historically, the nominal price for basic cable television service has increased more rapidly than the consumer price index (CPI).[1] This trend, which continues today, has been cited as evidence that cable system operators enjoy market power and that cable subscribers have been hurt by rising subscription fees. While superficially appealing, both claims are analytically incomplete at best. The first ignores the role of costs in the determination of prices and the second ignores the need to consider changes in quality as well as price in determining whether an industry's customers are helped or hurt by changes in its products and prices over time. In addition, the claim that rising prices are evidence of market power embeds a logical fallacy based on a confusion of levels of prices with trends in prices over time.

Recognizing that both prices and changes in service quality must be considered in assessing an industry's performance, the Federal Communications Commission asked in its July 30, 2003 Notice of Inquiry for comments and evidence that would help it better assess the relationship between price and quality for MVPD services. This report responds to that request, focusing on changes in prices and quality for basic cable services from 1997 through 2003. It provides evidence that the quality of services

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[1] As used in this report, the term basic cable service, or basic service, refers to two sets of services commonly included under the label of basic. One is the combination of local broadcast stations and public, educational, and government channels that cable operators are required by law to offer as a stand-alone package. The other is the set of commercial networks, most of which sell advertising, that is sold by cable operators in what is called the expanded basic programming tier. Because most cable subscribers take both tiers of basic service, the term basic is commonly used to refer the combination of the two sets of services.

offered cable subscribers has been persistently increasing over time, and suggests price per viewing hour as a measure of quality-adjusted basic cable prices that has significant advantages over unadjusted prices and the price per channel approach to adjusting for changes in quality that some have advocated in the past. For a representative basic cable subscriber, the real (inflation-adjusted) price paid per hour spent viewing ad-supported basic cable networks in 2003 was just over 15 percent lower than it was in 1997. By this measure, cable viewers appear to be substantially better off now than they were six years ago. Moreover, observed increases in time spent watching basic cable services during this period and evidence that cable subscribers value cable programming more now than in the past suggest that the estimated 15 percent reduction in the real price per hour of cable viewing may substantially understate the true reduction in the quality-adjusted price of basic service that occurred during this period.

Given the persistence of claims that rising nominal prices are evidence of market power, this report also touches briefly on the logical fallacy underlying this claim and the need to consider movements in input costs as factors influencing price trends in consumer goods and services.

II. The Logical Fallacy

The logical fallacy at the heart of the claim that rising prices are evidence of market power is based on a confusion of levels of prices with trends in prices. The nature of this fallacy was fully explained in a paper by Debra Aron that was attached to comments filed with the FCC by NCTA in MB Docket 02-145.[2] Here I simply restate the fairly straightforward intuition underlying her analysis.

At the heart of the fallacy is a confusion of levels of prices with trends in prices. At any point in time, prices will be higher if the firms serving a market have market power than if they don't. In fact, the ability to set and maintain prices at supra-competitive levels is what we mean by market power. We expect profit-maximizing firms to fully exploit such market power as they have. If they didn't, they wouldn't be maximizing profits. A direct implication of profit-maximization, however, is that by themselves trends in prices over time can tell us nothing about whether the firms serving a market have market power. While prices are influenced by the competitiveness of the markets in which firms sell their products, the effect of a market's competitiveness should always be reflected in its prices. That is, if a firm's market power remains constant over time, the effect of that market power on price should also be constant over time. Market power is simply not predictive of movements in prices.

If the intensity of competition was the only factor influencing prices, changes in a market's prices over time might be interpreted as a reflection of changes in the intensity of competition in that market over time, but this is simply not the case. Price levels are

[2] Statement of Professor Debra J. Aron, attached to NCTA Comments in MB Docket 02-145.

influenced by a number of other factors, including input costs, the level of demand for the market's products, and the quality of its products. Changes in one or more of these factors, all of which may vary independently of the intensity of competition, will influence price levels and changes in price levels over time. The simple observation that prices have changed by itself cannot tell us which of the many factors influencing firms' prices may have changed as well. If firms set prices to maximize their profits on an ongoing basis and prices change from one period to the next, it can only mean that one or more of the many elements in their profit calculus changed between the two periods, nothing more. Additional information would be required to narrow the list of candidates. To infer more from the simple fact that prices change over time, one would have to assume that firms' pricing strategies were driven by objectives other than maximizing profits.

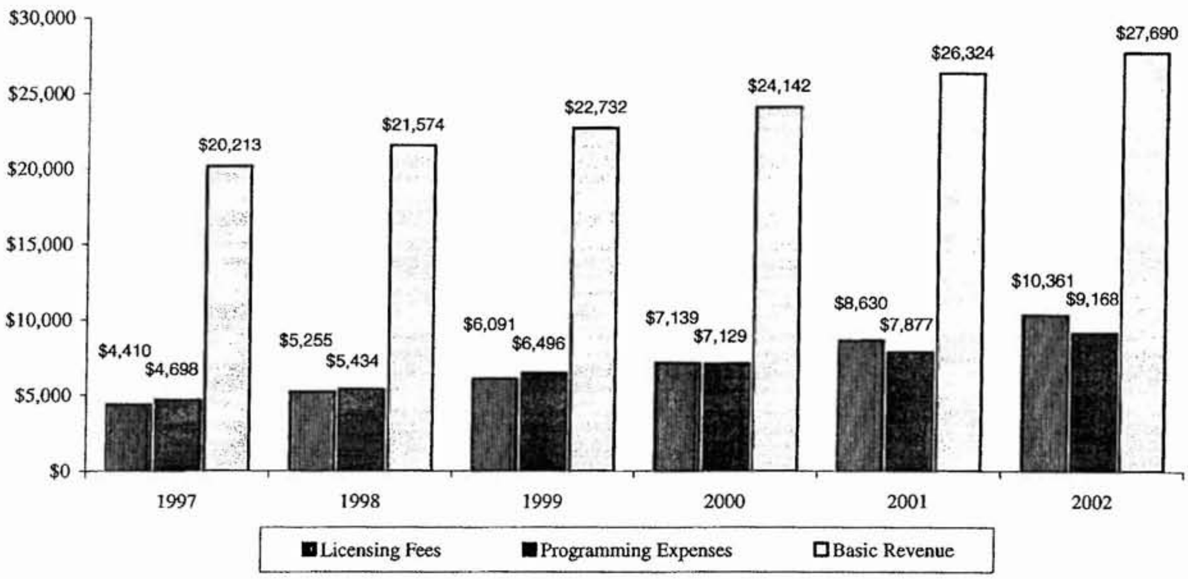
III. How well an industry performs in delivering value to its customers cannot be judged by comparing changes in its prices to the CPI.

For similar reasons, an industry's performance cannot be judged by comparing changes in its prices to changes in the consumer price index (CPI) over time. Roughly speaking, the CPI is an average of the prices for a large number of goods and services included in a hypothetical market basket constructed by the U.S. Bureau of Labor Statistics to reflect representative consumer purchasing habits. The weights of the individual prices in the basket reflect the relative importance of the associated goods and services in household budgets. Because the many factors that influence prices may and do vary among industries, price trends for the various components of the CPI will naturally diverge from the CPI over time. It would be wrong to conclude, however, that industries whose prices rise less rapidly than the CPI are, in some way meaningful for policymaking, performing better than industries whose prices rise more rapidly than the CPI. The following example illustrates this point.

Consider two industries for which input prices are the only price-influencing factors that changes over time. The firms in the first industry are economically efficient in the sense that they deliver the maximum possible value to their customers given the costs of the inputs they utilize to produce their products. Firms in the second industry are not nearly so efficient and they deliver only half the value to their customers that would be possible if they operated as efficiently as firms in the first industry. The prices of the inputs used to produce the first industry's products are increasing considerably more rapidly than the CPI. As a consequence, its prices must also increase more rapidly than the CPI for revenues to keep up with rising costs of production. For reasons totally exogenous to the industry, prices for the second industry's inputs are falling and as a result the prices charged by firms in this industry are observed to fall relative to the CPI. For policy purposes, how well an industry performs should be judged by how effectively it converts the inputs it employs into value for its customers. By this standard, it is clear that the industry whose prices are increasing relative to the CPI is performing better than the one whose prices are falling because performance in the second industry could be improved. Yet, if judged by changes in their prices relative to the CPI, a naïve policy analysis would come to just the opposite conclusion.

As noted earlier, the price of basic cable service has been rising relative to the CPI. Basic cable prices have not risen more rapidly than have cable systems' payments for the networks that typically account for over one-third of their costs,[3] however, as is evident from Figures 1 and 2.

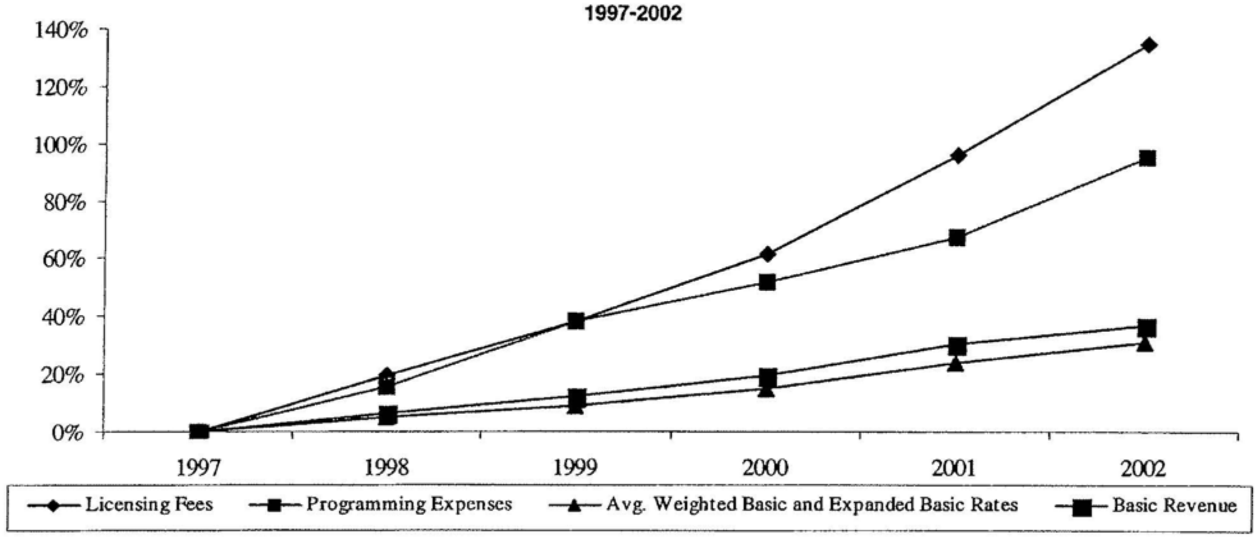
Figure 1
Programming Expenses, Licensing Fees, and Basic Revenue ($ mil), 1997 - 2002



Source: Source: Kagan World Media, Economics of Basic Cable Networks 2003, pp 18-19 and Broadband Cable Financial Databook, p.8.

[3] Morgan Stanley, *Pricing Power II: Subscriber Mix is Key to Valuation*, December 9, 2003, p. 16.

Figure 2
Growth Trends For Licensing Fees, Programming Expenses, Basic Revenues and Basic Rates, 1997-2002



Source: Source: Kagan World Media, Economics of Basic Cable Networks 2003, pp 18-19 and Broadband Cable Financial Databook, p.8.

Figure 1 reports estimates of cable operators' annual license fee payments to network suppliers from 1997 through 2002, the networks' content production and acquisition costs, and the basic service subscription fees received by cable systems for the same years. Year-to-year increases in all three series appear substantial in absolute terms. The annual percentage increases for the three series are shown in Figure 2, which also reports for purposes of comparison the corresponding year-to-year percentage increases in the U.S. average price of basic service. Operators' subscription revenues rose much less rapidly than did their total license fee payments to networks. The networks' programming expenses also increased considerably faster than subscription revenues, although not as fast as network license fees. The average price of basic service rose at a slightly slower rate than did aggregate basic subscription fees, with the difference reflecting the fact that the growth in subscription fees reflects growth in the number of basic subscribers during this period, as well as growth in per subscriber payments.

The critical point illustrated by Figure 2 is that while the price of basic service may have been growing at a substantially more rapid rate than the CPI, a critical component of the cost of basic service was growing much more rapidly than were the revenues from the sale of basic service. Given the unavoidable influence of costs on prices, it should not be surprising that the prices for cable services have been rising more rapidly than the CPI, regardless of the competitive situation of cable system operators. But whether cable operators have been doing a good job of creating value for their subscribers from the programming inputs they purchase simply cannot be determined from CPI comparisons.

We also cannot tell by comparing movements in cable prices to the CPI whether cable subscribers were better or worse off when prices were lower because, as was mentioned earlier, price changes may reflect changes in the quality of the service delivered consumers, as well as changes in costs. Further complicating an assessment of industry performance is the possibility that costs may have risen because service providers and/or input suppliers increased their spending for inputs that could add value to the products and services offered consumers. If, over a period of time, an industry's price increases exceed what its customers would have been willing to pay for any improvements in the quality of its products realized during that period, the industry's customers were better off when its prices were lower. On the other hand, if an industry's prices increase, but by less than the value of improvements in its products to consumers, its customers are better off after the price increase than before. Attempts to restrict price increases could work counter to the interests of consumers in this second situation if the industry's investments in quality enhancement were undertaken in expectation that prices could be raised as the value delivered increased.

In principle, comparisons of changes in an industry's prices with the CPI could reveal whether the value net of price delivered to consumers by the industry's products was increasing or decreasing relative to other products and services in the BLS market basket if the industry's prices were appropriately adjusted to reflect changes in the quality of its products and if the prices for the other goods in the basket were also adjusted to reflect changes in their qualities. Unfortunately, this is often not possible in practice. Changes in quality are difficult to measure and the BLS makes no adjustments for changes in quality for the prices of many of the goods and services in the CPI. For other products such adjustments as are made are partial at best. This is the case for the BLS cable index, where unspecified adjustments are made to reflect the addition of new networks to cable system lineups, but no attempt is apparently made to reflect changes in the quality of the established networks already available, which account for the bulk of cable viewing. As can be seen in Figure 4 in Section IV, the BLS cable index closely tracks a basic cable index constructed from unadjusted basic rates.

While a portion of the increase in programming expenditures by cable networks discussed above may reflect spending by new networks, network-specific data make clear that established networks increased their spending on programming substantially during this period, even as new networks were trying to find places in cable systems' network lineups. This is evident in Table 1, which reports the average for estimated programming expenditures for the top 10 cable networks (ranked by the average number of TV households in their audiences during the second quarter of 2003) for 1997 and 2002. Nine of the top ten networks increased their programming budgets during this period, most substantially and three by over 100 percent. For the top 10 networks as a whole, expenditures on programming increased by 54.9 percent. The total number of cable networks also increased considerably during this period. Due to the added expenditures of new networks, the total of cable networks' spending on programming increased even more rapidly than did expenditures by the top 10 networks.

If the value of established cable networks to cable subscribers increased as a result of their increased expenditures on programming, such adjustments as are made in the BLS cable index to reflect new services may dramatically underestimate true changes in service quality. As the Commission recognized in its Notice of Inquiry, we need better information on changes in the quality of cable services to determine whether the situation for cable subscribers has improved or worsened over time.

Table 1
Growth In Programming Expenses

Networks	Programming Expenses ($ mil.) 1997	2002
1 Nick	224.0	300.3
2 Fox News	54.0	127.0
3 TNT	396.4	690.1
4 TOON	31.1	81.1
5 Lifetime	147.4	304.5
6 Disney	102.2	140.5
7 TBS	207.1	383.0
8 USA	348.0	339.4
9 CNN	140.8	222.1
10 TLC	74.3	83.7
Top 10 Total	1725.3	2671.7
% Change	0.0%	54.9%
Total Expenses All Networks*	4698.4	9168.0
% Change	0.0%	95.1%
Top 10 As % Of All Networks	36.7%	29.1%

Sources: Cable Network Economics, Kagan World Media p6-7 and Cable Program Investor, August 21,2003, Kagan World Media, p13
**Source: Kagan World Media, "Economics of Basic Cable Networks 2003"*

IV. Assessing changes in the benefit-price relationship for cable television

Because the number of networks included in basic service packages has been increasing over time and one would expect the new channels to have some value to viewers, dividing the number of channels offered by the price of service has been suggested as one way of adjusting nominal prices for cable services for changes in service quality over time. However, as the FCC observed in paragraph seven of the Notice of Inquiry, "not all consumers watch all channels." As this observation applies to new channels as well as to existing channels, it is possible that the ratio of all new channels to all previously existing channels may be either larger or smaller than the ratio of new channels watched to previously existing channels watched. Viewers also may not value new channels the same as those they were already receiving, which is a second potential problem with a per channel price. A third potential source of bias in this measure is that it cannot reflect changes in the value of previously existing networks to cable subscribers, the same problem identified above with the BLS cable index. If the increased programming expenditures by established networks made them more valuable to viewers, then price adjustments that only reflect increases in the number of channels over time would fail to capture all of the increased value delivered to cable customers.

Subsection A below looks at behavioral evidence which suggests that the consumption value subscribers realize from basic cable services has been increasing over time. Subsection B suggests that price per viewing hour (PPVH), which is the price cable subscribers pay for service divided by the number of hours spent watching programs on basic cable networks, may be a superior, though still imperfect, alternative to other quality-adjusted measures of the price of basic cable service. PPVH has the advantage of reflecting in a single measure changes in the nominal price of basic cable service and cable viewers' responses to changes in the quality of cable services over time.

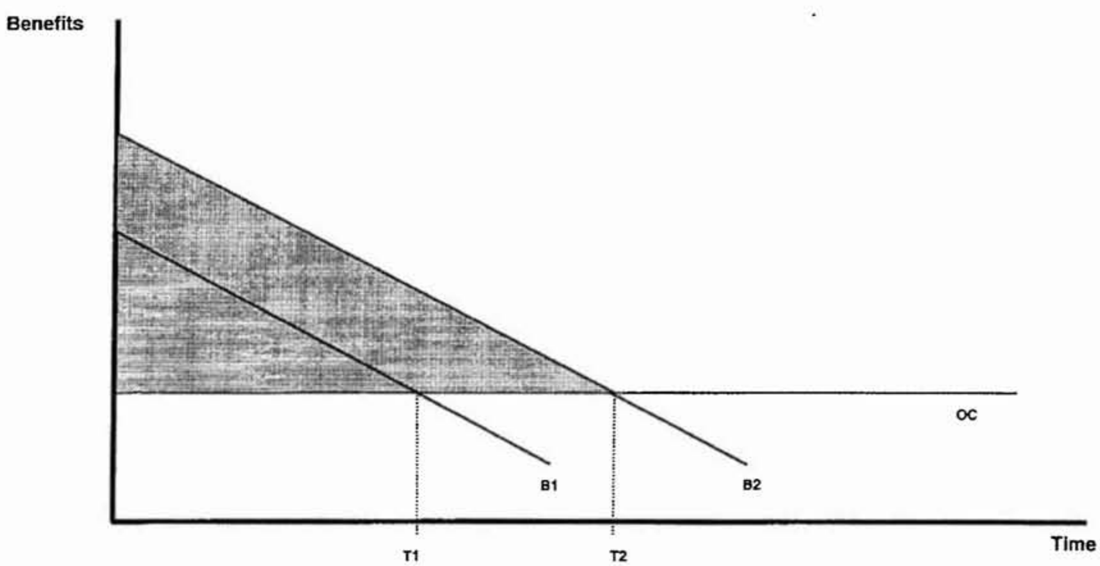
By this measure, it appears that the value proposition offered cable subscribers has been improving steadily over time. If calculated using nominal prices (prices that are not adjusted for inflation), the nominal PPVH (NPPVH) was about three percent lower in 2003 than it was in 1997. Of course, a better measure of the true cost of cable service to cable subscribers would adjust the nominal price of cable service to reflect the effect of inflation on the purchasing power of the dollar. Using the more appropriate inflation-adjusted real price of cable service to calculate a real price per viewing hour (RPPVH), I estimate that the RPPVH has declined by slightly over 15 percent over the last six years. Furthermore, when combined with evidence that the value of cable networks to cable subscribers has been increasing over time, a comparison of the increased time cable subscribers spend watching basic networks reported in Subsection A with the change in the inflation-adjusted average price of basic service during the same period suggests that the 15 percent reduction in RPPVH probably understates the reduction in the true quality-adjusted price of basic cable service during this period, possibly by a very substantial amount. This analysis is presented in Subsection C.

A. Increased viewing of basic networks reflects increased value of basic cable programming to subscribers

Slowly, but seemingly inexorably, cable services have been increasing their audience shares at the expense of their broadcast competitors. This trend, which has been evident since the ratings services first started reporting measures of cable audiences, has been interpreted by many as evidence that the appeal of cable programming has been increasing relative to the programs offered by the major broadcast networks and individual television stations in local markets. While increasing cable audience shares reflect viewers' decisions to spend more time watching cable networks, the actual shift in time involved is less frequently reported and is almost certainly larger than is generally realized. From the 1996-1997 television viewing season to the present, which is the period of time covered by the data examined below, the amount of time the average cable household spent watching the ad-supported cable networks that predominate in cable systems' expanded basic packages increased by 43 percent—from 24 hours and 22 minutes per week to 34 hours and 44 minutes per week.[4] Even more so than the increases in cable viewing shares that are more commonly cited, this increase in time spent watching basic cable programming is direct evidence of an increase in the value of basic cable programming to cable subscribers.

The economics behind this observation is straightforward. Subscribers pay a fixed monthly fee for basic service that does not vary with the amount of time they spend watching basic cable programs. Because cable subscription fees are fixed independently of the amount of cable programming watched, a subscriber's decision to spend more or less time watching cable television must reflect a change in the relative benefits anticipated from spending that time watching cable programs or engaged in other time-consuming activities. This relationship is illustrated diagrammatically in Figure 3.

Figure 3
Benefits of Improved Programming to a Representative Subscriber



[4] 1996/97-2001/02: CAB, CableTV Facts 2003, p. 7; 2002/03 estimate: CAB.

B1 and *B2* in Figure 3 are marginal benefit of viewing schedules for a representative cable subscriber. The schedules give the marginal value to the viewer of different amounts of time spent watching ad-supported, basic cable channels, starting with the program valued most highly and proceeding through the remaining programs in order of descending value. *B1* is the benefit schedule before an increase in programming quality. *B2* is the benefit schedule after quality has increased. Benefits are measured vertically and time spent viewing or doing other things is measured on the horizontal axis. The horizontal line, *OC*, is the opportunity cost of time spent doing something other than watching cable TV, which would include watching local over-the-air TV channels carried by the cable system along with other things the subscriber might do with her time.[5]

The increase from *T1* to *T2* in time spent watching programs on basic channels is the representative subscriber's response to the increase in the quality of programs available on basic channels. As such it is a direct reflection of the fact that programming quality has increased. (It could also reflect an increase in the quality of the viewing experience due to technical improvements in the distribution system.) While the increase in time spent watching cable programs is evidence that the quality of cable service has increased, by itself, it cannot tell us how much overall benefits have increased because it only reflects the shift in that portion of the benefit schedule near its intersection with *OC*.

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[5] If cable programs were homogeneous goods, a benefit schedule could be converted to a representative viewer demand curve by subtracting OC from the height of the benefit schedule, because the maximum a consumer will pay for a unit of a product is the difference between the consumption value anticipated and the opportunity cost of the next best option.

The total increase in the value of basic service to the representative cable subscriber can also be represented with Figure 3. In what follows I will use the term "added value" to refer to the benefits a cable subscriber realizes from watching basic cable programs over and above the benefits she would have been realized from the next best use of the viewing time. The added value of programming watched before the increase in quality is the horizontally shaded triangle under *B1* and above *OC*. The overall increase in value due to the increase in quality is the additional vertically shaded region between *B1* and *B2* and above *OC*. As drawn, *B2* is parallel to *B1* and it is apparent on inspection that the percentage increase in value delivered to the representative subscriber is considerably greater than the percentage increase in viewing time. (The horizontal distance between *B2* and *B1* is constant, while the distance from *B1* to the vertical axis diminishes as we move up *B1* from its intersection with *OC*.)

For the 1997 and 2003 benefits schedules for basic cable programs, we know only the magnitude of the distance between them where they intersect OC, which is the 10 hours and 22 minutes of extra time spent watching basic cable networks. However, a general and broadly distributed increase in cable networks' ratings during the period examined here strongly suggests that the substantial increase in cable networks' programming budgets during this period combined with the introduction of new networks has shifted the entire benefits schedule outward—not just the lower portion near the opportunity cost line, as might be the case if the audiences attracted by new networks accounted for most of the increase in time spent watching cable programs.

Because it takes time for new networks to build coverage and, more significantly, to develop a following among the subscribers they do reach, the most popular cable networks tend to be the ones that have been around for a while. Thus, among the 10 most popular cable networks in the Second Quarter of 2003, the youngest (Fox News) was launched in 1996 and the second youngest (Cartoon Network) launched in 1992. All the rest commenced operations in the 1970s (2) or the 1980s (6), and all but one of these started up prior to 1985. Among the second 10 most popular networks, only four were launched in 1994 or later, and just one, Lifetime Movie Network, which started up in 1998, was launched after 1996. 24 hour ratings for the five least watched of the top 20 network varied from a third to just under half of the 24 hour ratings for the most popular networks. Many of the newer networks are not listed in this table because their audiences are not large enough to be reported by Nielsen.[6]

The Nielsen estimates of cable network audiences over the last six years reported in Table 2 show that within-coverage area 24-hour ratings have grown for the more popular established networks even as an increasing number of new networks have also managed to attract viewers. With the exception of the top five networks, for which there was a slight decline in the average rating from 1997 to 2003 due to a substantial drop in prime time ratings for one of the networks, the same pattern is evident in the networks' prime-time ratings during this period reported in Table 3. The largely across the board increase in cable networks' ratings suggests that the quality of cable networks' programming has also increased across the board. Just as the viewers attracted by new networks are evidence of added value for viewers, so are the audience gains of established networks.

[6] Nielsen does not report audience estimates for programs with very small audiences because the numbers of viewers watching these programs in their measured sample audience is too small to report estimates with acceptable degrees of statistical significance.

Table 2
Average Full Day Rating By Coverage Area

Average Full Day Rating	1997*	2003
Top 5 Networks	1.06	1.24
Top 6-10 Networks	0.49	0.84
Top 11-15 Networks	0.26	0.56
Top 16-20 Networks	0.20	0.50
Top 21-25 Networks		0.40
Top 26-30 Networks		0.40
Top 31-35 Networks		0.30
Top 36-40 Networks		0.22
Top 41-45 Networks		0.20
Top 46-50 Networks		0.12
Top 51-52 Networks		0.05

**) For 1997, there are only 17 stations listed*
Sources: Cable TV Programming, Aug 31, 1997, Kagan World Media,pp 6-7 and Cable Program Investor, Aug 21, 2003, Kagan World Media, p 13

Table 3
Average Prime Time Rating By Coverage Area

Prime Time Day Rating	1997*	2003
Top 5 Networks	1.89	1.78
Top 6-10 Networks	1.23	1.36
Top 11-15 Networks	0.81	0.98
Top 16-20 Networks	0.49	0.86
Top 21-25 Networks	0.34	0.68
Top 26-30 Networks	0.30	0.60
Top 31-35 Networks		0.46
Top 36-40 Networks		0.40
Top 41-45 Networks		0.24
Top 46-50 Networks		0.20
Top 51-52 Networks		0.05

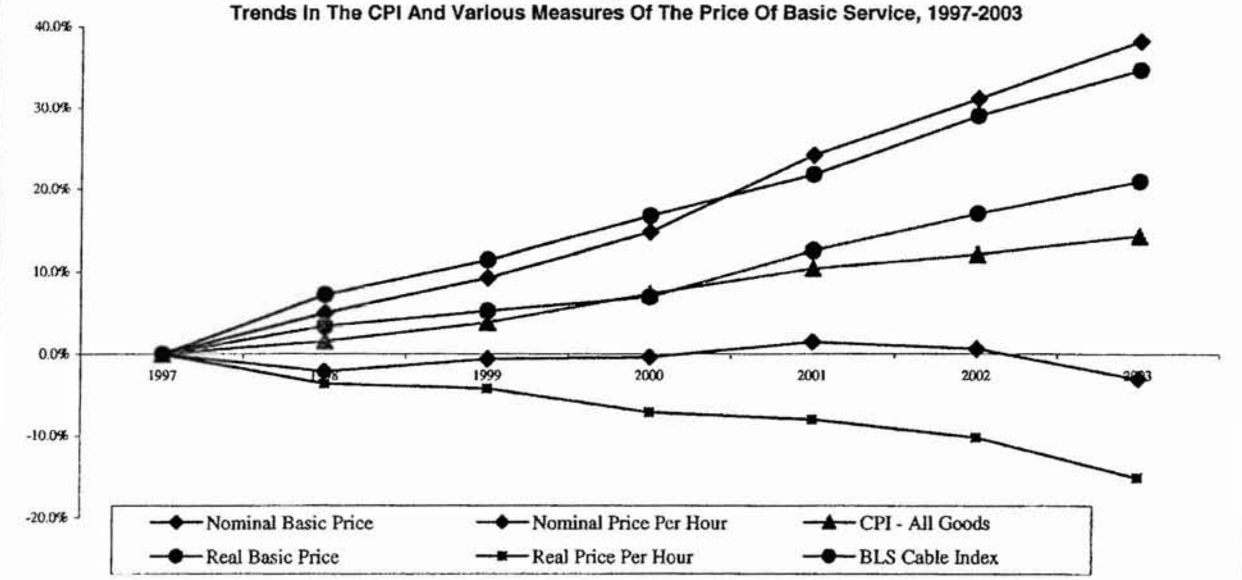
**) For 1997, there are only 27 stations listed*
Sources: Cable TV Programming, Aug 31, 1997, pp 6-7 and Cable Program Investor, Aug 21, 2003, p 13

B. Measured per unit of viewing time, the price of cable basic cable service has been falling

The data on viewing hours and basic cable prices presented above showed that both have increased substantially over the past six years. Calculated in percentage terms, the two increases were nearly identical, with a slightly larger percentage increase in time spent viewing producing about a three percent decline in subscriber payments per viewing hour. This, of course, ignores changes in the value of the dollar over this time. Due to low but persistent inflation, approximately $1.14 was required in June of 2003 to purchase what a dollar would have bought in 1997. Seven-year trends in the nominal and real prices per hour of cable viewing (NPPVH and RPPVH) are shown in Figure 4. When the price of basic cable service is adjusted for the reduction in the purchasing power of the dollar over time, the real price paid for an hour of cable viewing is shown to have fallen by about 15.2%, which is a fairly substantial reduction.

Figure 4

Trends In The CPI And Various Measures Of The Price Of Basic Service, 1997-2003



Source: BLS CPI Data, NHI NTAR; 3rd Quarter various years, and 2003 Kagan World Media, Broadband Cable Financial Databook, 2003.

Price per viewing hour is an intuitively appealing index of value delivered because it is a ratio of payments made to a measure of services actually consumed. It also has the advantage of reflecting in a single measure changes in nominal prices and viewer responses to changes in the quality of services provided, as was mentioned earlier. Its principle shortcoming is that it assumes that the added value delivered to viewers is not concentrated in the new programs and networks watched, but is also comprised in substantial part from increased value delivered by the networks and programs that viewers were already watching, when this might not be the case. While the general increase in cable networks' viewing shares documented above is evidence that both old and new networks have contributed to an increase in the value of basic cable service to subscribers, the question of the size of their relative contributions still remains. However, utilizing the data reported above on changes in the inflation-adjusted average price for basic service and household average changes in time spent watching basic cable networks and plausible assumptions regarding changes in the benefits cable viewers derive from watching basic cable programs, it is possible to estimate changes in the benefits of subscribing to a basic cable service for a representative cable household for a number of plausible scenarios. The calculations reported below suggest that changes in RPPVH may substantially understate the extent to which the real quality-adjusted price of basic cable service has declined.

C. Representative household estimates of changes in quality-adjusted prices

To construct estimates of changes in quality-adjusted prices, it is convenient to represent the added value of basic service in terms of the mean added value of the individual programs watched. Total added value is the mean added value times the total number of programs watched. Similarly, the price paid for basic service can be expressed as the price per viewing hour times the number of hours watched. The net benefit of basic cable service to a subscribing household's welfare is the difference between the total added value of basic service and the price of the service. Estimates of average viewing hours and the real price per viewing hour were presented in Subsections A and B above. If we had comparable estimates of mean added values, we could calculate directly the effects of changes in programming quality for a representative basic cable household.

Let *M1* be the mean of the added value of basic cable programs watched by a representative household in 1997 and let *M2* be the mean added value for cable programs watched in 2003. In terms of Figure 3, *M1* would be the area of the horizontally shaded triangle divided by *T1* and *M2* would be the sum of the areas of the horizontally shaded triangle and the vertically shaded region divided by *T2*. For the representative cable subscriber, the change in the net benefits (*CNB*) of cable viewing from 1997 to 2003 is given by equation (1).

$$CNB \equiv (M2 - P2)T2 - (M1 - P1)T1, \tag{1}$$

where *P1* and *P2* are the real prices per viewing hour for 1997 and 2003 respectively.

For the average cable household, *P2*=0.85P1, as reported in the previous subsection, and from the 43 percent increase in time spent watching basic cable networks from 1997 to 2003 we know that *T2*=1.43T1. If we express *M2* as a multiple *m* of *M1*, so that *M2=mM1*, we can use the following simplified expression for *CNB*.

$$CNB = [(1.43m - 1)M1 - 0.2155P1]T1. \quad (2)$$

We can use equation (2) to solve for $\hat{m}$, the value of m for which CNB equals zero. The importance of $\hat{m}$ is that if m is less than $\hat{m}$, the representative subscriber derives less value from basic cable in 2003 than she did in 1997. If m is greater than $\hat{m}$, she is better off in 2003. Letting r stand for the ratio of $P1$ to $M1$, we have

$$\hat{m} = \frac{(1 - 0.2155r)}{1.43}. \quad (3)$$

$P1$ can be no greater than $M1$. If it were, the cost of service would exceed its benefits and the household would not subscribe. For $P1=M1$, r=1 and $\hat{m}$=0.549. This is the smallest possible value for m. $\hat{m}$ achieves its maximum value of just under 0.7 if r is equal to zero, in which case the ratio of benefits delivered to the price paid is so great that price is trivial in comparison, as would be the case if the price was zero. More plausible ratios of $P1$ to $M1$ produce values of $\hat{m}$ between these extremes. For example, $\hat{m}$ would be approximately 0.624 if $P1$ were half of $M1$. These calculations are of particular relevance to an attempt to determine whether cable subscribers are better or worse off following the increases in subscription prices and viewing time noted above because they tell us that for the representative subscriber to be worse off after the price and quality changes than before, the average net benefits realized from an hour spent watching basic cable programs would have to fall to less than seventy percent of its initial value. This flies in the face of the evidence presented earlier that viewers value cable programming more highly today than they did in 1997.

Dividing *CNB* by *(M1-P1)T1* allows us to calculate percentage changes in the total net benefits realized by the representative viewer for different values of *m* and *r*. Thus for *m*=1, in which case the average hour of cable viewing would deliver the same net benefits to a cable subscriber in 2003 as in 1997, and *r*=0.9, benefits net of price for the representative cable subscriber would have increased by 236 percent. But even for *r* at its lowest possible value of zero, the representative subscriber's net benefits would still increase by a minimum of 43 percent, nearly three times the 15 percent reduction in RPPVH, as long the average value of an hour of cable viewing did not decline from 1997 to 2003. If it rose, the increase is potentially much larger.

Of course we don't know the actual values of *m* and *r*. But these calculations based on hypothetical values for these ratios illustrate an important point. Given the large increase in time spent watching cable networks over the last six years and the decline in the real price per hour of cable viewing, it seems highly likely that cable subscribers have benefited substantially from changes in the services provided, even though they are paying more for cable service now than they did in 1997.

V. Conclusions

While the nominal price of basic cable service has been increasing over time, the dramatic increase in the amount of time cable subscribers spend watching basic cable networks is compelling evidence that the quality of basic services has been increasing as prices have been going up. A dramatic increase in spending on programming by the basic networks has undoubtedly contributed substantially to the increase in quality. The real (inflation-adjusted) price of cable service divided by the number of hours spent watching basic cable programming is an appealing measure of changes in the quality-adjusted real price of basic service because it reflects both changes in the price of service and viewer responses to changes in service quality over time. Calculations based on a hypothetical representative basic subscriber suggest, however, that for the 1997-2003 period, the estimated 15 percent reduction in the real price per viewing hour for basic service may substantially understate the reduction in the true (but unobserved) quality-adjusted price of basic service.

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

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

REPLY COMMENTS OF VIACOM INC., MTV NETWORKS AND BLACK ENTERTAINMENT TELEVISION LLC

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SUMMARY

Viacom Inc., MTV Networks ("MTVN") and Black Entertainment Television LLC ("BET Networks") (collectively, "Viacom") submit these reply comments to urge the Commission to report to Congress that competition in the video programming market is flourishing, and that consumers would benefit most from continued government restraint when it comes to oversight of the distribution of programming networks. Consumers today have access to an unprecedented number of video programming choices, and the competitive free market has fostered the creation of an enormous array of diverse program networks. Thus, the Commission should reaffirm that diversity is "best achieved by reliance on competition among delivery systems rather than by government regulation."

Indeed, as opening comments in this proceeding demonstrate, competition is now the hallmark of the marketplace for the delivery of video programming. Despite this intense competition, however, some commenters continue to suggest that the government should force programmers and multichannel video program distributors ("MVPDs") to offer networks on an a la carte or themed tier basis. As Viacom and others have convincingly demonstrated over the past three years, government-mandated a la carte would only serve to limit consumer choice while increasing consumers' costs. Moreover, programming networks devoted to serving niche or minority audiences would suffer the most, undermining one of the FCC's touchstone goals – the promotion of program diversity.

In particular, Viacom previously commissioned Economists Incorporated ("EI") to provide economic analysis of the market for the delivery of video programming.

EI has explained in detail that most MVPD networks (including those owned by Viacom) rely upon two interconnected sources of revenue to produce the high-quality programming necessary to attract a discerning audience – advertising revenues and subscriber fees. Any type of a la carte regime would destroy this economic model and result in consumers having to pay more for lower-quality programming. For that very reason, EI also explained, programmers and MVPDs have chosen to offer most networks to consumers via packages, or "bundles," of channels. Bundling is a ubiquitous practice throughout the U.S. economy, enabling consumers to obtain products or services at lower prices while allowing sellers to efficiently package and distribute a wide array of components designed to appeal to the demands of various consumers.

Mandatory a la carte or themed tiering would have a particularly detrimental impact on programming networks that seek to attract minority or niche audiences, such as Viacom's BET (the preeminent programming service for African Americans) and Noggin (which provides 12 hours each day of award-winning, commercial-free educational programming that appeals to families with young children). By participating in programming bundles and obtaining carriage on widely-available programming tiers, minority-targeted and niche networks gain access to a guaranteed base of subscribers and to a revenue stream that enables them to develop high-quality program offerings that appeal to specific audiences. If networks such as BET and Noggin are precluded from inclusion in programming bundles, they would have difficulty attracting a sufficient number of subscribers to survive. Similarly, new minority and niche networks would find it nearly impossible to launch.

In addition, Viacom's experience reveals that very few other countries mandate that programming be offered to consumers on an a la carte or themed tier basis. But even this limited experience confirms that when governments do attempt to impose a la carte schemes, consumers fare worse than their American counterparts, particularly with respect to diversity of programming choices.

Thus, the Commission should disregard requests made in this proceeding for further exploration of government-mandated la carte or themed tier programming regimes. Instead, the FCC should confirm to Congress that the video programming market is working well to provide consumers with a tremendous array of diverse programming choices.

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REPLY COMMENTS OF VIACOM INC., MTV NETWORKS AND BLACK ENTERTAINMENT TELEVISION LLC

Viacom Inc., MTV Networks ("MTVN") and Black Entertainment Television LLC ("BET Networks") (collectively, "Viacom") hereby submit these reply comments in response to the Commission's *Notice of Inquiry*, released October 20, 2006, seeking information about the status of competition in the market for the delivery of video programming.[1] The video programming market today is extraordinarily competitive and vibrant, and consumers have access to an assortment of video programming choices unimaginable a generation ago. As the Commission has made clear, program diversity – the availability of a wide variety of programming formats and contents – has long been one of its central policy goals.[2] Given that the dynamic free market is working well to create diverse choices for consumers, Viacom urges the Commission to use this proceeding to confirm to Congress that "program diversity is best

[1] *See In re Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Notice of Inquiry, FCC 06-154, released October 20, 2006 (the "*Notice of Inquiry*").

[2] *See, e.g., In re 2002 Biennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, 18 FCC Rcd 13620, 13631-32 (2003).

achieved by reliance on competition among delivery systems rather than by government regulation," and that governmental interference would in fact produce a net loss in terms of diversity of program offerings available to consumers.[3]

I. THE PRO-COMPETITIVE VIDEO PROGRAMMING MARKETPLACE IS THRIVING, DELIVERING UNPRECEDENTED CHOICE AND VARIETY TO AMERICAN TELEVISION VIEWERS

MTVN programs channels that appeal to the entire range of consumers' tastes and interests. From the award-winning children's educational programming of Nickelodeon and Noggin to the music-lovers' networks MTV, MTV2, VH1, VH1 Classic, VH1 Soul, CMT (County Music Television) and CMT Pure Country to the classic programming offered by TV Land and Nick at Night to the comic relief provided by Comedy Central and to Spike, the first network created especially for men, MTVN offers something for everyone. MTVN also programs a number of channels specifically targeting minority and underserved audiences, such as MTV Tr3s (for Hispanic Americans) and MTV Chi (for Chinese Americans). BET Networks offers a variety of programming services to its viewers including BET, BET J, BET Gospel, and BET Hip Hop. BET was the nation's first, and it remains the preeminent, programming service specifically targeted to African Americans. Viacom strongly believes that this diverse range of channels is the product of a competitive free market that encourages content-producers to take financial and artistic risks to create innovative and compelling programming, including the risks necessary to provide programming for under-served (often minority) audiences.

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[3] *Id.*

Indeed, as several parties pointed out in their opening comments, robust competition is now the hallmark of the marketplace for the delivery of video programming.[4] Not only do consumers have an increasing number of options when it comes to the source of their video programming (be it cable, satellite or now telephone companies), they also have an ever-burgeoning number of video programming networks from which to choose. By 2005, there were more than 530 national programming networks available via multichannel video programming distributors ("MVPDs") (an increase of more than 30 percent from the year before), plus an additional 96 regional or local channels.[5] And that does not even include the video content available from broadcast networks (both analog and digital multicast), DVDs and the Internet and mobile devices, which are flourishing as never before. With so many choices competing for viewers' attention, Viacom is well aware that its future as an independent video programming company is directly tied to its ability to continue to provide consumers with unique, high-quality content.

II. GOVERNMENT-IMPOSED 'CHOICE,' WHETHER IN THE FORM OF MANDATORY A LA CARTE OR THEMED TIERING, WOULD LIKELY REDUCE CONSUMERS' VIDEO PROGRAMMING OPTIONS

Despite the intense competition that characterizes the video programming market, two parties nonetheless have suggested again in this proceeding that MVPDs and

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4 *See, e.g.*, Comments of the National & Telecommunications Association, at 8-27; Comments of Comcast Corp., at 2-7; Comments of the Consumer Electronics Association, at 5-6.

5 *See In re Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Twelfth Annual Report, FCC 06-11 (released March 3, 2006), at ¶¶ 21-22.

programmers should be forced to offer networks on an a la carte or themed tier basis.[6] As Viacom and others have convincingly demonstrated over the past three years, any type of government-mandated a la carte regime would only serve to *limit* consumer choice while increasing consumers' costs.[7] Moreover, the record is replete with evidence that programming networks dedicated to serving niche or minority audiences, such as BET, Noggin, CMT, MTV Tr3s or MTV Chi, would suffer the most under an a la carte regime.[8] In fact, many minority-targeted networks would not likely survive the imposition of an a la carte scheme.

Unlike a number of its competitors, Viacom is an independent producer of video programming and does not own a multichannel video distribution platform. Thus, as noted above, Viacom's success is predicated on producing high quality programming that warrants carriage on MVPDs because of its attractiveness to consumers. Viacom is therefore especially attuned to the potentially devastating impact that government-imposed a la carte would have on the market for the delivery of video programming.

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6 *See* Comments of Broadband Service Providers, at 20-22; Comments of EchoStar Satellite L.L.C., at 6-7, 12 ("EchoStar Comments").

7 *See, e.g., In re A La Carte and Themed Tier Programming and Pricing Options for Programming Distribution on Cable Television and Direct Broadcast Satellite*, MB Docket No. 04-207, Comments of Viacom (filed July 15, 2004) (the "Viacom A La Carte Comments"); Reply Comments of Viacom (filed August 13, 2004) (the "Viacom A La Carte Reply Comments"); *see also* Comments of the National Cable & Telecommunications Association (filed July 15, 2004); Comments of Discovery Communications, Inc. (filed July 15, 2004).

8 *See id.*, at 25-28. *See also In re A La Carte and Themed Tier Programming and Pricing Options for Programming Distribution on Cable Television and Direct Broadcast Satellite*, MB Docket No. 04-207, Comments of MBC Gospel Network, LLC (filed July 15, 2004); Comments of GoodLife TV Network (filed July 15, 2004); Comments of Oxygen Media Corp. (filed July 15, 2004); *Ex Parte Letter* from the NAACP to the FCC, August 13, 2004 (noting that a la carte proposals would be a "wrecking ball for media diversity").

Because any regulation of a la carte intrudes on multifaceted business dealings involving, among other things, pricing, promotion, channel positioning, quality and other technical considerations, any government mandate for a la carte necessarily would create a vast and complex regulatory intrusion into the market – a market that, by all accounts, is competitive and working. Together with the incredible complexities that a government-mandated a la carte regulation would introduce, any effort to foster so-called "choice" by government fiat would in fact result in consumers paying more money for fewer choices.[9] And program diversity, long one of the touchstone FCC policy goals, would likely suffer most.

A. Economic Analysis Demonstrates That Government Regulation of the Program Delivery Market Would Harm Consumers

Viacom has previously commissioned Economists Incorporated ("EI") to provide economic analysis of the market for the delivery of video programming, and to explain the ways that the bundling of video programming networks has benefited consumers.[10] Viacom hereby incorporates the EI Studies by reference into this proceeding. As EI has explained, most MVPD networks (including MTVN and BET

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9 To the degree that the FCC is concerned about allegedly indecent programming on broadcast and MVPD networks, it should focus not on the imposition of an a la carte regime but rather on empowering parents to take control over their children's television viewing experience through technologies such as the V-Chip.

10 *See Cable Networks: Bundling, Unbundling, and the Costs of Intervention*, by Bruce M. Owen and John M. Gale, Economists Inc., submitted with the Viacom A La Carte Comments (July 15, 2004); *Why a Box of Crayons Has Many Colors, and the 'Cable Tax' is Not a Tax*, by Bruce M. Owen and John M. Gale, Economists, Inc., submitted with the Viacom Reply Comments (August 13, 2004); *Ex Parte Letter* from DeDe Lea, Executive Vice President, Viacom, to Marlene H. Dortch, April 13, 2006, transmitting *The FCC 'Further Report' on the Retail Marketing of Video Programming Services: An Economic Review*, by Bruce M. Owen (collectively, the "EI Studies").

Networks) rely upon two interconnected sources of revenue in order to produce the high-quality programming necessary to attract a discerning audience – advertising revenues and subscriber fees.[11] Any type of a la carte regime would be reasonably likely to result in reduced subscribership for the vast majority of networks.[12] And since channels that reach at least 50 million viewers are eligible to participate in the national ad market, a reduction in subscribership below that threshold would cause a dramatic decrease in advertising revenues.[13] Assuming that consumers today channel surf and at least occasionally view networks that they would not subscribe to in an a la carte environment, then advertising revenue stemming from that viewership would drop for all networks (even those that manage not to drop below that threshold) if a la carte is imposed by the government. At the same time, programmers would incur increased transactional and marketing costs, as each network would have to persuade viewers to select it on a stand-alone basis.[14]

Facing a dramatic reduction in revenue plus increased costs, programming networks would confront a devastating cycle: any attempt to increase subscriber fees to maintain the revenue necessary to produce high-quality programming would almost certainly drive away subscribers. A loss of subscribers, in turn, would reduce available resources (both subscriber fees and advertising revenue) and force the network to spend

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11 *See Cable Networks: Bundling, Unbundling, and the Costs of Intervention*, at 7.

12 *See id.*

13 *See id.*

14 *See id.* Based on the estimated expenses currently incurred by premium networks (such as HBO and Showtime), EI calculated that existing widely-distributed networks would face approximately $300 million in annual marketing and related transaction costs under an a la carte regime. *See id.* at 39-40.

less on the production of programming, which would only make the network less attractive to consumers. Whereas the current free market model works to consumers' benefit by encouraging and enabling networks to rely upon advertising revenue in order to charge lower subscriber fees, a la carte – by impairing both sources of revenue – would result in consumers having to pay *more* for lower-quality programming. Inevitably, numerous programming networks would be forced out of business under an a la carte system, while launching new networks would become extraordinarily difficult.

For all of these reasons and many more, programmers and MVPDs have chosen to offer most networks to consumers via packages, or "bundles," of channels. As EI also has explained, "[a]lmost every product and service purchased by consumers is 'bundled,' by sellers, from various components that could each, at least in principle, be sold or priced separately."[15] Bundling enables consumers to obtain products or services at lower prices, while sellers obtain competitive advantages from efficiently packaging and distributing bundles of components designed to appeal to the demands of various consumers.[16] Thus, not only is "bundling . . . a pervasive practice throughout the economy," it is also especially well-suited to the video programming marketplace.[17]

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15 *The FCC 'Further Report' on the Retail Marketing of Video Programming Services: An Economic Review*, at 6.

16 *See id.* at 7.

17 *Id.* Bundling, for example, permits newspaper and magazine publishers to efficiently produce and distribute a variety of content that is packaged together for sale to consumers. Thus, *The Washington Post* and *Newsweek* sell publications containing international news, sports news, local news and feature material all in a single package, while consumers benefit from the ability to receive a diverse array of content for a modest price. Like in the video competition market, a government mandate that consumers be permitted to purchase the sports section or a specific political cartoon on a stand-alone basis would only increase costs while likely reducing the availability of diverse content. As EI explained,

Moreover, the U.S. Supreme Court recently confirmed that product bundling is often pro-competitive.[18] Adopting a modern analysis rooted in rigorous economic theory, the Court also found that many bundling arrangements are "fully consistent with a free, competitive market."[19] Accordingly, the Commission should disregard requests made in this proceeding for further government exploration of a la carte or themed tier programming regimes.

EchoStar states in its opening comments that some programmers' decision to bundle networks requires EchoStar to "carry unwanted programming as a condition of access to must-have programming."[20] EchoStar, however, has more than 13 million subscribers to its DISH Network satellite platform, which has been growing at a rate of more than a million subscribers a year for the past six years.[21] As one of the largest MVPDs nationwide, EchoStar has significant market power when it negotiates with

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"[c]ustomers get a bundled product for a lower price, which they prefer to a self-assembled product, even though the self-assembled or tailor-made product might more closely match their own special tastes. Sellers obtain competitive advantage from offering bundles of components that are cheaper and/or better suited to the demands of various consumers, and the competitive market process tends to ensure that the driving force behind the assembly of bundles is consumer satisfaction." *Cable Networks: Bundling, Unbundling, and the Costs of Intervention*, at 12-13.

18 *See Illinois Tool Works, Inc., et al. v. Independent Ink, Inc.*, 126 S. Ct. 1281, 1292 (2006).

19 *Id.*

20 EchoStar Comments, at 10-11.

21 *See EchoStar Tops 13 Million Subs*, Broadcasting & Cable TV Fax, December 26, 2006.

programmers regarding the channels that EchoStar is willing to carry and the prices it is willing to pay for those channels.[22]

B. A La Carte Schemes Would Have a Detrimental Effect on Program Diversity

Mandatory a la carte or themed tiering would have a particularly damaging impact on programming networks that seek to attract minority or niche audiences. Indeed, as EI also has pointed out, a loss of programming diversity is likely to be one of the most harmful consequences, even if unintended, wrought by mandated a la carte.[23] If minority-targeted networks are precluded from participating in programming bundles, they likely would have an especially difficult time attracting a sufficient number of subscribers to survive. Many existing diverse networks would struggle to generate enough revenue to continue to offer high-quality programming, while new networks with no brand recognition would find it nearly impossible to launch.

That bleak prospect stands in stark contrast to the way that the free market fostered the creation of BET and enabled it to make an enormous contribution to the American programming landscape. BET Networks today comprises BET, BET J, BET

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22 Moreover, the Commission has noted that when MVPDs negotiate with broadcasters for carriage of over-the-air television stations, a "balance of terror" – the threat to both sides that failure to reach a carriage deal would be devastating to their businesses – ensures that the parties have relatively equal bargaining power. *See In re General Motors Corp. and Hughes Electronics Corp., et al.*, 19 FCC Rcd 473, 556-57 (2003). Since Viacom does not own any broadcast stations, there is no comparable balance of terror tempering EchoStar's demands in negotiations for carriage of Viacom's programming networks. Instead, those networks achieve carriage through complex business negotiations that succeed only when the result provides value to both Viacom and EchoStar, generally on the basis of the networks' ability to convince EchoStar that they offer high-quality programming that is attractive to a discerning audience.

23 *See The FCC 'Further Report' on the Retail Marketing of Video Programming Services: An Economic Review*, at 14-15.

Gospel and BET Hip Hop – all of which seek to reflect the authentic and diverse experiences of the African American community. But when BET first launched in 1980, it was a trailblazer, helping to introduce diverse content to MVPD audiences. It is unlikely that BET ever could have gotten off the ground in an a la carte environment. With the benefit of carriage on widely-available programming tiers, BET used the revenue provided by subscriber fees to invest in programming capable of attracting more viewers. As its viewership increased (today BET is in more than 80 million homes), BET also was able to take advantage of increased advertising revenues to further improve and expand the breadth of its programming. BET Networks followed a similar model to launch BET J, BET Gospel and BET Hip Hop. Indeed, it is the growth engendered by carriage on widely-available tiers that has enabled BET Networks to increase its programming from a single channel providing two hours of African American-targeted content per day to four distinct channels offering diverse programming on a daily basis.

Minority audiences likely would suffer the most collateral damage under an a la carte regime, since it is uncertain what type of programming services and quality of programming BET Networks could offer its audiences under a government-mandated a la carte regime. Without the economic base provided by wide carriage, it is unlikely that even established programmers could continue to develop and expand the quality and diversity of their program offerings. Viewers of niche programming services also would be left behind. Noggin, for instance, offers 12 hours daily of commercial-free educational programming designed to appeal to families with young children. Noggin never could have become a programming staple for many pre-school children if it had not been able to obtain MVPD carriage on widely-available programming tiers (which provided a guaranteed base of subscribers) at the time of its launch.

C. The Limited Experience With A La Carte in Foreign Countries Only Confirms That A Free Market Approach is Better-Suited to Delivering Consumer Benefits

In the *Notice of Inquiry*, the Commission also asks for comment on the degree to which a la carte programming options are available and successful in other countries.[24] Since Viacom distributes a great deal of programming to foreign markets, it believes that it is especially well qualified to report to the Commission on the limited availability of la carte offerings in other countries. First and foremost, Viacom's research has revealed that very few countries actually mandate that programming be offered to consumers on an a la carte or themed tier basis. Even in those few countries that have experimented with a la carte, Viacom has found that consumers fare worse since they have far fewer content choices than their American counterparts.

In Canada, for example, government-mandated a la carte offerings do not include the most popular programming networks. And in order to get the channels that are available on a stand-alone basis, consumers first must subscribe to a basic tier of cable networks. So even in Canada, consumers cannot simply select any programming service they want at any time. More importantly, according to the then-President of the Canadian Cable Television Association, most Canadians would gladly give up the highly-regulated Canadian system in exchange for the incredible array of content choices that have developed under the pro-competitive American model.[25] "[I]t's somewhat ironic

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24 *See Notice of Inquiry*, at ¶ 90.

25 *See* Remarks by Michael Hennessy, then-President and CEO, Canadian Cable Television Association, Washington Metropolitan Cable Club, June 29, 2004.

that America has become engaged in a spirited debate about regulated choice – or mandated a la carte – when our industry looks enviously to your country because of the choice you have in terms of diversity."[26]

In Hong Kong, meanwhile, a la carte offerings are available only from one MVPD – the incumbent telephone company – which has chosen to offer the service as a loss leader to attract customers as it tries to break into the video programming business. In other words, the new entrant is willing to sell video programming at an artificially depressed price (and to lose money doing so) in the hope that it can lure customers away from the entrenched cable provider.[27] This is not a model designed for any long-term viability. Other nations, such as India and the United Kingdom, operate essentially the same way that the United States does – certain channels, usually premium or movie channels, are available on an a la carte basis, and then only after consumers buy a certain minimum level of bundled service (*i.e.*, a basic programming tier).

In short, the few foreign markets where limited a la carte offerings are available do not provide any basis for concluding that an a la carte mandate would benefit American consumers. To the contrary, the experiences in markets such as Canada and Hong Kong confirm what Viacom and others have argued to the Commission: that mandated a la carte would eradicate the pro-competitive business model that has

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26 *Id.*

27 *Cf. In re Implementation of Section 3 of the Cable Television Consumer Protection and Competition Act of 1992, Statistical Report on Average Rates for Basic Service, Cable Programming Service, and Equipment*, FCC 06-179 (released December 27, 2006), at ¶ 15 & n.14 (attributing moderation in the increase in costs for Hong Kong cable to "aggressive pricing" from the competitive entrant).

delivered enormous programming choices to American viewers, harming diversity and driving up costs.

III. CONCLUSION

In conclusion, the market for the delivery of video programming is incredibly competitive – offering consumers access to an extraordinary array of video programming options. Viacom urges the Commission to use this proceeding to report to Congress that the marketplace is working well, and that consumers would benefit most from continued government restraint when it comes to oversight of the distribution of video programming networks.

Respectfully submitted,

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COMMENTS OF

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November 29, 2006

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COMMENTS OF THE
NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION

The National Cable & Telecommunications Association ("NCTA"), by its attorneys, submits the following comments on the status of competition in the market for the delivery of video programming. NCTA is the principal trade association of the cable television industry. Its members provide video programming, broadband Internet, wireline phone, and other services throughout the United States. NCTA also represents programmers and suppliers of equipment to the cable television industry.

INTRODUCTION & SUMMARY

Today's marketplace for the delivery of video programming to consumers could hardly have been foreseen when Congress first directed the Commission to provide annual reports on the status of competition. Even the viability of direct broadcast satellite (DBS) service, which was just being launched, was still an open question. The notion that two national DBS competitors would, in 14 years, have captured 30% of all multichannel video programming customers would have been viewed as wildly optimistic.

But today the vigorous head-to-head competition between cable operators and the two DBS companies is just the tip of the iceberg, and the idea of an annual report focused solely on the state of video competition seems anachronistic, a bit like asking the Federal Aviation Administration in 1912 to report on whether there is airline competition in 2006. Digital technology – along with the investment by cable operators of more than $100 billion to use that technology – have completely transformed the marketplace in which video programming services are delivered to consumers. Cable operators deployed that technology in order to offer their customers a much greater number of channels of programming, along with the enhanced video and audio quality associated with digital transmission. But it has also enabled them to provide high-speed Internet service (unheard of in 1992), and to offer robust and fully competitive telephone service throughout the nation.

In *each* of the three services that cable operators now provide – video, Internet, and telephone – they face, and they provide, vigorous competition. And, as the result of this competition, customers of each of these services are able to choose from a variety of options that maximize value at competitive prices.

With respect to multichannel video services, the Commission's previous annual reports have documented the steady growth of DBS services into a full-fledged competitor of cable. Throughout the nation, virtually every consumer can now choose from among at least three fully competitive alternatives, including a cable operator and the two national DBS services. And this year, the report should document the steadily growing availability of cable service from a fourth provider – the local telephone company. At long last, after abandoning their video efforts of a decade ago, the Bell Companies are beginning to offer a competitive multichannel service.

The telcos initially sought to portray the cable franchising process as an insuperable barrier to their ability to deploy their services and compete effectively with existing cable operators. But this rhetoric has been overtaken by the facts. As Verizon now admits, cities are "eager to bring competition to market,"[1] "franchising is not an issue for us,"[2] and "franchising is not holding us back."[3] Yesterday Verizon announced its 231st franchise.[4]

Video competition is producing a cornucopia of viewing options, in a manner that maximizes consumer value. Beyond the basic broadcast tier, which all cable customers are required by law to purchase, cable operators typically provide an additional analog tier of services, digital tiers and mini-tiers (including, in many cases, a "family viewing" tier), premium movie and sports channels, pay-per-view and video-on-demand services – all available as optional choices to customers. As the testimony and evidence in the Commission's à la carte inquiry demonstrated, the offering of many services in tiers instead of on a per-channel basis enables operators to offer customers a larger and more diverse array of program services. And it enables customers to view more of the channels that they value at a lower cost.

Moreover, while video competition is expanding the service offerings and options provided by cable operators and DBS services, these Multichannel Video Programming Distributors ("MVPDs") continue to face additional competition from other sources old and new. Broadcasters are in the midst of a digital transition which is giving them additional flexibility in deciding how to use their spectrum to maximize value to consumers. They are already using

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1 http://investor.verizon.com/news/20060927/20060927.pdf.

2 http://investor.verizon.com/news/20060927/20060927_transcript.pdf.

3 *Id.*

4 "Verizon Gets Franchise," Communications Daily, November 29, 2006 at 2.

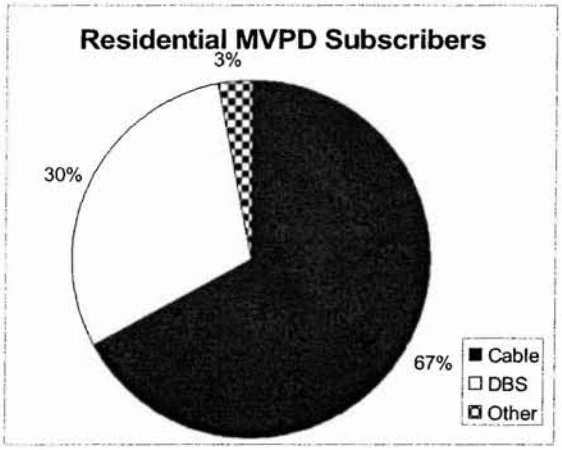
their digital spectrum to offer high definition programming and multiple channels of multicast programming over-the-air to viewers. In addition, home video and, increasingly, mobile video rentals compete with cable operators not only for the attention of television viewers but, specifically, in the sale of movies and other services typically offered by cable on a per-program basis.

Finally, with Internet access speeds increasing exponentially, video competition from the Internet is offering yet another viewing option for consumers. Streaming video on the Internet is offering a multitude of options, ranging from short-form video clips on innumerable sites to full-length movies offered at a fee on a per-program basis. And Internet viewing is no longer tethered to the desktop computer. Streaming video can be viewed on television sets in the living room – or, at the opposite extreme, on tiny wireless telephones.

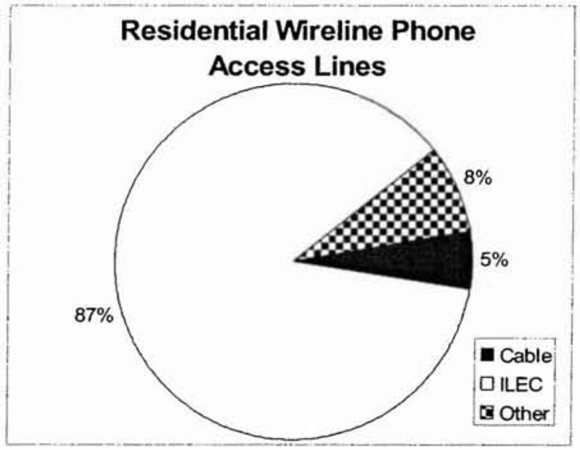
All of these Internet viewing options exist because of the provision of high-speed Internet access, which the cable industry was the first to provide to American consumers. While telephone companies are only now beginning to deploy competitive video services, they are already vigorous competitors in the provision of high-speed Internet service throughout the nation. They were late starters, holding back on the provision of DSL service (which competed with their higher-priced T1 and ISDN lines) until cable operators demonstrated that there was a consumer market for their high speed cable modem service. But today 38.3% of the nation's high-speed Internet households purchase DSL service. Meanwhile, new technologies, including Wi-Fi, Wi-MAX, and Broadband over Power Lines (BPL) are poised to provide additional competition to both cable modem service and DSL service.

Here, again, competition is enhancing choice and value for consumers. Technological developments are not only making it possible to offer customers higher and higher speed access to the Internet. They are also enabling customers to choose the speed and bandwidth that they need, so that those who use the Internet to upload and download large amounts of data can do so at a higher price, while those who rely on the Internet solely for e-mail and browsing of information can satisfy their needs at a lower price. As new bandwidth-intensive uses of the Internet continue to develop, cable operators will need to continue to find innovative ways to ensure that those uses are available to those who value them, while also keeping high speed service available and affordable to as many households as possible.

But when it comes to the state of wireline phone competition…



Source: Kagan Research LLC, as of September 2006



Source: FCC Local Telephone Competition Report, as of December 2005

As of Year End 2005, more than 87% of all households still purchased telephone service from the incumbent local exchange carriers in their communities. Indeed, this has been the toughest communications marketplace in which to introduce real and sustained choice and competition. Cable's core video marketplace is more vigorously and fully competitive; the ILECs still dominate their core telephone marketplace.

Congress sought to encourage local exchange competition with the Telecommunications Act of 1996, and, in fact, there was a brief flowering of competitive local exchange carriers in the aftermath of the Act.

But, as Congress recognized, because of the unique circumstances of the local exchange marketplace, telco competition required cooperation from the incumbents. First of all, incumbents would have to make available certain "unbundled network elements" that would enable CLECs to compete without having to replicate the entire facilities of the ILECs. Second, telco competition requires that non-incumbent customers be able to call the incumbent's customers, and vice versa. And this, in turn, means that even facilities-based CLECs need to be able to interconnect with ILECs if they are to attract any customers at all.

The ILECs litigated and frustrated every effort by the Commission to implement the Act in a manner that facilitated CLEC competition. Many competitors were crushed. And after ten years, competition largely failed to take hold – with one important exception. The cable industry, unlike most of the failed CLECs, has deployed its own broadband facilities, which are capable of providing competitive telephone service to 93% of the nation's homes. Cable phone service is now available to more than 78% of those homes, and more than 8.5 million households have already chosen this alternative to their incumbent telephone company's service.

But now that telephone companies and cable operators are competing head-to-head with bundled video, Internet and telephone service offerings, it is more important than ever that the ILECs not be permitted to use their market power to stifle new telephone competition. Cable provides the best prospect for long-term wireline telephone competition. And because cable service is increasingly being welcomed by consumers delivered as part of a bundle that *includes* telephone service means, telephone companies can, by hindering cable's ability to provide telephone service, gain an unfair advantage and distort if not ultimately destroy competition in the provision of video and Internet services as well. The danger is clear, and the need for Commission action to remove barriers to facilities-based phone competition is compelling.

In the past dozen reports, the Commission has observed the rapid, steady and irreversible growth of investment and competition in the video marketplace. And, with a wise policy of "vigilant restraint," it has nurtured innovation and competition in the provision of high-speed Internet services. By constraining, through targeted and efficient policies, the unique ability of the ILECs to thwart competition in their core telephone business, the Commission can ensure that these competitive developments continue – and that competition finally and firmly takes hold in the telephone marketplace, as well.

I. COMPETITION IS THE HALLMARK OF TODAY'S VIDEO MARKETPLACE, WHICH IS MARKED BY AN UNPRECEDENTED ARRAY OF VIDEO PROGRAMMING DISTRIBUTORS OFFERING A DIVERSE MIX OF VIDEO PRODUCTS AND SERVICES

Almost three years ago, the Commission concluded in its 10th Annual Report on the status of competition in the video marketplace that "the vast majority of Americans enjoy more choice, more programming and more services than any time in history."[5] A year later, it further confirmed that "almost all consumers have the choice between over-the-air broadcast television, a cable service, and at least two direct broadcast satellite (DBS) providers" and found that "in some areas, consumers may also choose" to receive service via one or more emerging technologies, including digital broadcast spectrum, fiber, and video over the Internet.[6] Earlier this year, in its 12th Annual Report, the Commission echoed its previous findings, highlighting that "[c]ompetition in the delivery of video programming has provided consumers with increased choice, better picture quality, and greater technological innovation."[7]

In 2006, three years after the Commission first recognized that video competition had irreversibly taken hold, competition among providers is even more deeply rooted in the communications landscape. Cable, satellite, broadband and increasingly telephone providers are competing head-to-head for every customer. And as this past year shows, jockeying for customers between multichannel video distributors competing against one another and against a barrage of newer video players keeps ratcheting up as the forces of technological change make

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5 *See e.g., Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 19 FCC Rcd 1606, 1608 (2003)("10th Annual Report").

6 *See e.g., Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 20 FCC Rcd 2755, 2757 (2005)("11th Annual Report").

7 *See e.g., Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 21 FCC Rcd 2503, 2506 (2006)("12th Annual Report").

new and different video delivery mechanisms possible. The growth in broadband combined with the versatility of the Internet has opened up all manner of new fronts in the ongoing video competition battle.

Looking solely at traditional multichannel video programming distribution, there is no starker proof of a competitive video marketplace than the fact that *nearly 32 million* consumers now subscribe to cable's competitors – DBS, alternative broadband providers, and local telephone companies that are just beginning to enter the marketplace. That's almost one of every three video subscribers. Fifteen years ago, cable operators had 95 percent of the multichannel video marketplace but today because of fierce competition from DBS and other broadband service providers, cable's share has dropped to less than 67 percent.

MVPD SUBSCRIBERS
As of September 2006

MVPD	Customers (in Millions)	Percent of Total
Cable	64.5	66.9%
DBS	28.9	30.0%
C-Band	0.1	0.1%
SMATV	1.0	1.0%
Wireless Cable	0.1	0.1%
Overbuilds	1.1	0.7%
Others	0.7	1.2%
Non-Cable MVPDs	31.9	33.1%
Total MVPD	96.4	100.0%

As multichannel video competitors duke it out for customers, Internet video has flooded the marketplace with competitive offerings that are attracting more and more consumer attention. Meanwhile, the broadcast and home video industries are not being left behind as they, too have introduced ways to leverage their strengths in the competitive video fray.

So, in light of this dynamic and ever-changing video marketplace, isn't it well past time for the Commission to recommend to Congress that an annual inquiry into the status of competition in the delivery of video programming is no longer necessary? The Commission has all but proclaimed it in the last three reports and the evidence this year is again abundantly and dramatically clear – as demonstrated in the brief overview of competitors below.

Direct Broadcast Satellite and Broadband Service Providers. The two nationwide DBS providers, DirecTV and EchoStar, are well-established proven competitors, having captured over 28 million customers. DirecTV ranks second and EchoStar ranks fourth among MVPDs with 15.678 million and 12.755 million customers respectively.[8] Acquired by News Corporation in 2003, DirecTV is a giant vertically-integrated video provider offering 825 channels, including the Fox broadcast network, 10 of its own national cable networks, and 12 regional Fox cable networks. Through aggressive marketing and joint ventures with the telephone companies, little or no upfront consumer equipment costs, and channel line-ups including local broadcast signals, DBS has consistently added two to four million customers over the past five years.[9]

Although DBS did not experience the double digit growth this past year that marked its remarkable ten-year climb, subscribership still increased by 6.7% between the third quarter of 2005 and the third quarter of 2006 (from 26.6 million to 28.4 million). By comparison, cable grew 0.3 percent in new basic customers during the same period, although it continues to significantly increase the number of customers migrating to its digital platform. DBS's state-by-

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8 *See* http://phx.corporate-ir.net/phoenix.zhtml?c=68854&p=irol-newsArticle&ID=927674&highlight and http://media.corporate-ir.net/media_files/irol/12/127160/pdf/Q306EarningsRelease.pdf.

9 Kagan Media Money, January 31, 2006 at 5, January 29, 2003 at 7.

state penetration continues to increase and total dish subscribership (C-Band and DBS) now exceeds 15 percent in 46 states. It exceeds 30 percent in 9 states and 20 percent in 36 states.[10]

As DBS grew by leaps and bounds, cable responded to this intense competition by expanding channel capacity and deploying premium tiers, video on-demand, high definition programming, and digital video recorder services. DBS in turn deployed its own advanced products and services, such as Dish Network's on-demand library with stop and start features and DirecTV's advanced DVR service. EchoStar also teamed with AT&T to provide IP-based video-on-demand service through AT&T's Homezone product. Cable is now wooing customers back and drawing in new subscribers by bundling advanced video, voice and data services.

This bundled "triple play" offers customers the convenience of one-stop shopping – a single provider to deal with and a single bill to pay. But the efficiencies of bundling also result in lower prices for consumers. The lower prices that cable customers pay when they purchase Internet and/or telephone service along with their cable service (as well as various promotional price offers) have not generally been taken into account when the Commission and others have analyzed and reported on cable prices.

Even in a vigorously competitive marketplace, there are factors other than competition that affect prices. Prices are, of course, a function of costs; if the costs incurred by cable operators and DBS operators go up, their retail prices will go up as well. And, in fact, costs *are* continuing to increase faster than inflation.[11] In particular, programming costs have increased markedly in the last year for cable operators – and presumably for *all* MVPDs. Competitive

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[10] Data as of November 2005, www.mbc-thebridge.com, Nielson Media Research.

[11] *See* Chart, "Cable Operators' Programming Expenditures," at 35, *infra*.

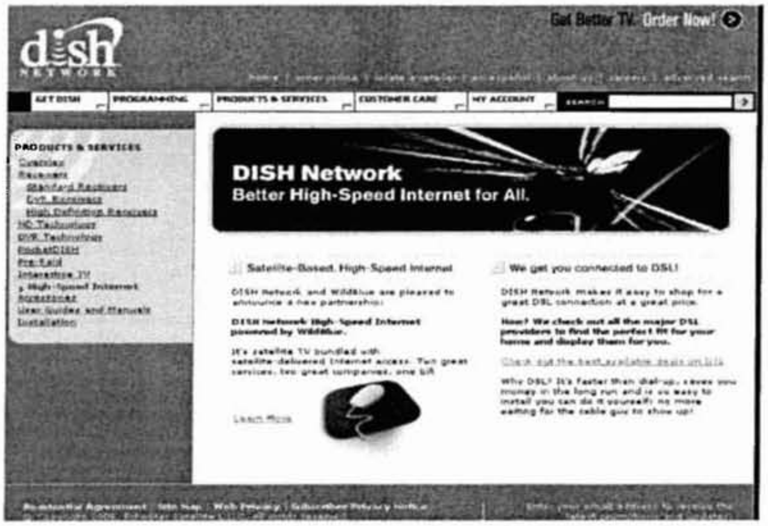
providers have no choice but to carry services that are attractive to consumers lest they lose customers to their competitors. And they have no choice but to pass through the additional costs.

DirecTV and EchoStar's counter-move to the "triple play" bundle is to market broadband Internet access offered by WildBlue Communications in rural communities and join forces with the telephone companies to bundle their video services with telephone broadband service.[12] DirecTV CEO Chase Carey views his company's alliances with Verizon, BellSouth, and Qwest (and EarthLink in AT&T territory) as "an increasingly strong competitive response" to cable's triple play.[13] DirecTV has begun directly selling broadband with its video service, rather than relying solely on telco sales and marketing.

[12] "WildBlue Signs Wholesale Distribution Agreements with DirecTV and EchoStar," PR Newswire US, June 9, 2006; "EchoStar Signs Agreement to Distribute WildBlue High-Speed Internet Service," EchoStar Press Release, June 9, 2006. The companies also jointly bid on advanced wireless spectrum in August 2006 but later withdrew.

[13] Satellite Week, August 14, 2006.

Similarly, Dish Network is marketing its own high-speed satellite-based service along with marketing telco DSL service on its website.



In densely populated, metropolitan areas of the country, cable and DBS also contend with major broadband service providers, such as RCN Communications, which are offering bundles of video, voice and data services. RCN serves 19 communities in top markets in the Northeast and Midwest, including Massachusetts, New York, Pennsylvania, Washington, D.C., Chicago and Los Angeles. As cable operators ramp up their video-on-demand services, RCN has made improving its VOD product "a very strong initiative this year."[14] RCN also recently began marketing wireless phone services to customers in the Boston area, along with its television, Internet and wireline phone service, in its bid to compete in the "quadruple play" arena. RCN hopes its wireless product will evolve from purely a phone service to a broadband wireless service offering video content and the ability to control customer equipment remotely.[15] Four

[14] "MSOs Revamp VOD Strategies; Operators Roll Out More Local Fare, Interactive Services to Bolster Business," Multichannel News, May 1, 2006.

[15] "RCN to market wireless service," Boston Globe, August 29, 2006; http://www.rcn.com/.

major cable companies, Comcast, Time Warner Cable, Cox Communications, and Advance/Newhouse Communications, have committed to a wireless phone venture that too is expected to evolve into a broadband wireless product.[16]

Wide Open West, Knology, Grande Communications and Wave Broadband are also competing against cable and DBS in various cities throughout the west. Their broadband operations are providing the latest technology, including high speed Internet, digital programming, digital video recorders, HDTV and free on demand services, to compete with MVPDs in their regions.

In addition, municipally-owned utilities compete with cable and other MVPDs in providing cable television and broadband services. According to the American Public Power Association, the number has slightly increased since last year, from 102 to 105 utilities providing cable service, and from 81 to 82 providing cable modem or DSL service.[17]

Bell Operating Companies. Looming over all of this competitive activity are the telephone companies, who are moving into the video marketplace on a massive, unprecedented scale. With 130 million access lines and $150 billion in annual revenues, the Bell Operating Companies' (BOCs) immense size is a force to be reckoned with by all video providers even at this early stage in their deployment of video services. The Bell companies control roughly 90% of the revenue in residential and small business telephone markets, which gives them a massive perch in the communications marketplace to launch their video services and the kind of market power that can tip the balance unfavorably against cable and other competitors in the still

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[16] *See e.g.*, "Sprint Nextel, Comcast, Time Warner Cable, Cox Communications and Advance/Newhouse Communications to Form Landmark Cable and Wireless Joint Venture," Time Warner Press Release, November 2, 2005.

[17] "Communities Provide More Services Every Year," American Public Power Association, www.appanet.org.

nascent competitive voice, data *and* video bundled services.[18] While the Bells are, strictly speaking a "new entrant" in the video marketplace, they are certainly not start-ups.

Nevertheless, the BOCs began arguing last year, in Congress and at the Commission, that they needed to be free of many of the statutory and regulatory requirements that apply to cable operators. In particular, they maintained that they could not expeditiously deploy competitive video service if they were required to obtain cable franchises and comply with the obligations imposed by franchising authorities pursuant to Title VI of the Communications Act. In response to those requests for a regulatory boost vis-à-vis their cable competitors, the Commission initiated a proceeding to determine the extent to which any such relief was warranted and within its statutory authority.

In comments and ex parte filings in that proceeding – as well as comments in last year's video competition inquiry – NCTA showed that giving the phone companies such a regulatory advantage was neither warranted *nor* authorized by Title VI. We incorporate those filings by reference here.[19] Jurisdictional issues aside, we pointed out that there was no reason to believe that franchise requirements were a barrier to the telcos' ability to deploy expeditiously their competitive service. We showed that Ameritech had no trouble a decade ago obtaining franchises at a rapid pace – until SBC acquired the company and terminated its video plans. And

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[18] As reported in the press, industry observers estimate that as many as 175 telcos and cable overbuilders have launched IPTV services over fiber-rich networks in smaller suburban and rural markets across North America. The installations range in size from several hundred to several thousand video subscribers by such emerging providers as SureWest Communications, Consolidated Communications, Pioneer Telephone Cooperative, CT Communications, South Slope Cooperative Communications Co., Bixby Telephone Co., Oxford Communications and Dakota Central Telecommunications, among others. "Smaller U.S. Telcos Roll Out IPTV While AT&T Struggles," Cable Digital News, June 1, 2006.

[19] *See In the Matter of Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended by the Cable Television Consumer Protection and Competition Act of 1992*, MB Docket No. 05-311, NCTA Comments, filed February 13, 2006, and NCTA Reply Comments, filed March 28, 2006.

we showed that Verizon was, in fact, already obtaining franchises to deploy its video service at a rapid rate that exceeded its planned rate of deployment.

Now, even Verizon has conceded that the franchising process is not an obstacle to its ability to compete. As it readily admits, cities are "eager to bring competition to market,"[20] "franchising is not an issue for us,"[21] and "franchising is not holding us back."[22]

In these circumstances, it would be wrong and at odds with the public interest for the Commission to relieve telephone companies of regulatory obligations that constrain and impose costs on incumbent cable operators. As Chairman Martin recently stated, "it is the Commission's responsibility to help ensure technological and competitive neutrality in communications markets. Accordingly, I believe that all providers of the same service must be treated in the same manner regardless of the technology that they employ."[23]

Verizon has, in fact, successfully launched its television service, FiOS, in Keller, Texas and the service is now available to 1.2 million households[24] in parts of California, Florida, Maryland, Massachusetts, New York, Texas, and Virginia.[25] Verizon is laying fiber in large parts of 16 states across the country and expects to spend about $23 billion by 2010 to reach 18 million homes by the end of the decade.[26]

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[20] http://investor.verizon.com/news/20060927/20060927.pdf.

[21] http://investor.verizon.com/news/20060927/20060927_transcript.pdf.

[22] *Id.*

[23] *In the Matter of United Power Line Council's Petition for Declaratory Ruling Regarding the Classification of Broadband over Power Line Internet Access Service as an Information Service*, Memorandum Opinion and Order, WC Docket No. 06-10, FCC 06-165 (Statement of Chairman Martin).

[24] http://investor.verizon.com/news/view.aspx?NewsID=784.

[25] http://newscenter.verizon.com/press-releases/verizon/2006/seven-more-communities-in-1.html.

[26] Verizon FiOS Briefing Session; 9/27/06; pg.40, pg.10; http://investor.verizon.com/news/20060927/20060927.pdf.

AT&T's U-verse television service has launched in San Antonio, Texas and soon will be available in Houston and another 13 metropolitan markets in its 13-state region by the end of 2006. It expects to pass 2.4 million households by December and plans to ramp up marketing of the service in 2007.[27] AT&T's initial build out plans call for expenditures of approximately $4.4 billion to reach 18 million households by 2008.[28] If the FCC approves its acquisition of BellSouth, AT&T, already the nation's largest telecommunications company, would gain another 20 million access lines in the U.S.

The fact that AT&T and Verizon have not launched more broadly in Texas, for example, has nothing to do with the ability to obtain franchises. After successfully obtaining legislation to vitiate the franchising process state-wide well over a year ago, the Bell companies could have initiated video service in many more communities than the 27 that they currently serve.[29] This only shows that any delays in their deployment are not due to difficulties with getting a cable franchise.

Nevertheless, analysts expect a battle royale between cable and telephone companies in the years ahead, a factor which is already evidenced in the major advertising campaigns that the rival industries conducted this year targeting American consumers.[30] In an effort to lure customers away from cable, the telcos are spending millions upon millions to market themselves

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[27] AT&T 3rdQ '06 Earnings Conference Call, pg.16; http://library.corporate-ir.net/library/11/113/113088/items/217052/T3Q06EarningsConfCall_Color.pdf.

[28] AT&T 01/31/06 Analyst Conference; http://library.corporate-ir.net/library/11/113/113088/items/217052/T3Q06EarningsConfCall_Color.pdf.

[29] By year-end 2006, Verizon hopes to offer video service to nearly 400,000 homes in Texas, or fewer than 5 percent of the 8.3 million total homes in the state. AT&T, which has a greater wireline footprint in the state than Verizon, is marketing its video service to fewer than ½ percent of homes in Texas.

[30] UBS Investment Research, "Telecommunications Services," February 14, 2006; Stifel Nicolaus, "Telecom Services: Verizon Communications Inc.," August 7, 2006; Morgan Stanley Equity Research, "Cable/Satellite: Looking into 3Q2006 and 2007," October 25, 2006; Bank of America Equity Research, "Cable & Satellite TV: Battle for the Bundle: 3Q06 Wrap Up," November 15, 2006.

as the "next big thing" in the delivery of video, data and voice services. In an effort to differentiate itself from cable, for example, Verizon has launched a multi-room digital video recorder that enables customers to watch recorded shows on any television set in the house. AT&T launched Homezone TV and Internet service, which combines high speed Internet and satellite television in one set top box. Homezone offers digital video recording, movies on demand, photo and music sharing and web-based remote access. AT&T introduced the service in San Antonio, Texas and Ohio and plans to roll it out in other cities in the next several months.

Broadcast Television. Although the majority of U.S. households subscribe to a multichannel video programming service, 15 to 20 million American homes continue to rely solely on over-the-air broadcast television for their entertainment and information needs, representing at least 14 percent of all U.S. television households.[31] Broadcasting is a robust medium that still garners substantial viewership on the national networks and local stations and healthy growth in ad revenues.[32] With more than 1,584 stations nationwide on the air with digital signals, including virtually all network stations in the top 30 markets, broadcasters are well on their way to making the transition to digital.[33]

Broadcasters are also entering the on-line video realm to promote their shows and profit from the Internet. This fall, NBC Universal, for example, began offering ad-supported episodes of some of its new prime time shows for free on-line viewing on personal computers. NBC

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[31] 12th Annual Report at ¶ 96-97.

[32] According to Television Advertising Bureau (TVB), in the most recent week, broadcast television delivered 98 of the top 100 rated programs. *See* Viewer Track Weekly Broadcast vs. Subscription TV Primetime Ratings: Week ending November 19, 2006 at www.tvb.org. Total advertising spending on broadcast television is expected to rise 8.7 percent to $46.64 billion in 2006, according to an analysis by Veronis Schuler Stevenson, September 12, 2006, www.vss.com.

[33] *See* http://www.nab.org/AM/ASPCode/DTVStations/DTVStations.asp.

Broadband provides video clips for free to web sites in exchange for a piece of the advertising revenues. The Disney Company also offered episodes of seven of its hit ABC network shows on an ad-supported broadband outlet, and the Fox Network is offering its programming on-line as well. CBS too has leveraged the Internet platform to offer its primetime shows on-line, including free downloads in a video-on-demand joint venture with Comcast. And local stations are streaming popular local programming content and looking at new business models for distributing original programming and even multiple channels through the Web.

All the major broadcast networks are also releasing their programming through Apple's iTunes, which in just over a year has become the leading destination site for purchasing video downloads. In February, for example, NBC debuted its new drama series, "Conviction," on iTunes weeks prior to its network premiere in hopes of generating buzz for the program.[34] As of October 2006, 45 million television shows have been sold on iTunes,[35] selling at a rate of over one million videos per week at $1.99 per episode. iTunes touts a library of over 220 television shows from more than 40 broadcast and non-broadcast networks.[36] Some series are available on a monthly subscription basis for $9.99. New episodes are available the day after telecast.

As video over the Internet grows, local broadcast stations in several markets have joined together to create a multichannel over-the-air service to compete with cable and satellite multichannel offerings. U.S. Digital Television, LLC launched USDTV in four cities, Albuquerque, Dallas, Salt Lake City, and Las Vegas, with up to 18 channels of local broadcast stations (and their high definition or multicast signals) and popular cable programming networks.

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[34] "Brave new TV land," Time, March 13, 2006.

[35] "The Gadget that Transformed TV," Television Week, October 9, 2006.

[36] "PBS programs now available on the iTunes Store," PR Newswire US, October 10, 2006.

This service is available for $19.95 per month. Recently, NexGen Telecom purchased U.S. Digital Television's assets, and announced plans to expand the service.[37]

Home Video Rentals and Sales. Just as some consumers rely on over-the-air broadcast television as the primary source for video delivery, others meet their video programming needs with the purchase or rental of digital video discs (DVDs). Although movie downloads appear to be the wave of the future in home entertainment, DVDs are currently the primary means of viewing movies and TV shows at home. With a market penetration of about 85% of U.S. households,[38] DVD sales and rentals of DVDs continue to thrive.[39] According to the Digital Entertainment Group, a DVD trade association, sales brought in $16.3 billion last year and an additional $6.5 billion in rental fees.[40]

Netflix, the largest provider of movie rentals via mail, recently reported an unexpectedly strong third quarter, with its revenue for the period totaling $246 million, a 48% increase over the same period last year.[41] Netflix subscriber totals rose 58% to more than 5.6 million, and the company expects to have 6.3 million by the end of this year. Netflix anticipates continued strong growth through 2007.

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[37] *See* http://www.usdtv.com/about/release-11-9-2006.html.

[38] "DVD duel: High-definition showdown," Orlando Sentential, June 24, 2006.

[39] According to one analyst, DVDs will remain the primary distribution medium for movies for the next 5-plus years. "DVD or download?" www.cnnmoney.com (quoting recent report by Cowen & Co.). In an effort to capture the growing demand for high-definition technology, two different formats of high-definition DVDs have been introduced to the market: Toshiba's HD DVD and Samsung's Blue-ray Disc.

[40] The number of DVD titles, both television shows and movies, has continued to increase. In 2005, 925 TV series were released on DVD; in the first nine months of 2006, 645 TV titles were released. A total of 12,264 DVD titles (including movies) were released in 2005, 532 more than in 2004. *See e.g.*, "No shortage of new DVDs," The Hollywood Reporter, January 12, 2006; DVD News, October 12, 2006.

[41] "Good News for Netflix," Business Week Online, October 24, 2006.

Web-based rent-by-mail services have grown at the expense of traditional video-rental shops. Netflix CEO Reed Hastings predicted that between 500 to 1,000 video stores nationwide will close next year as a result of the influx of customers turning to the Internet for DVD rentals.[42] In a recent report, PricewaterhouseCoopers projected that though the overall home video industry will continue to modestly grow in the coming years, the rapidly emerging market of online video sales and rentals will experience a significant boom.[43]

Blockbuster, the country's largest video retail chain, introduced its own online video rental service in August of 2004. In one of its most significant competitive moves since the creation of its online services, Blockbuster announced in early November the immediate launch of a plan to allow its online customers to return movies both through the mail and at one of its 5,000 participating stores. The new plan, called "Blockbuster Total Access," is aimed at accomplishing a faster shipping cycle, since videos returned in-store will automatically be registered as returned, signaling the next movie on the subscriber's queue to be delivered. Furthermore, Blockbuster is giving customers a free in-store rental if they return a movie ordered online in stores. Total Access is being heralded as a much needed trump card to compete with Netflix's pure online business model.[44]

In addition, both Blockbuster and Netflix are taking steps to develop services that will deliver movies through high-speed Internet connections. Wal-Mart, which currently accounts

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[42] "Netflix 3Q profit tops analyst estimates as customer base grows," Associated Press Financial Wire, October 23, 2006.

[43] The firm estimates that by 2010 the market for online video sales and rentals will hit $3.6 million, whereas in-store rentals will fall to around $6.2 billion. *Id.* at 3.

[44] "New rental idea seen as big building block," Dallas Morning News, November 2, 2006; "Stressed over Netflix," Daily Variety, November 2, 2006.

for about 40% of all DVDs sold in the U.S., is also reportedly preparing an online movie downloading service of its own.[45]

Internet Video and Mobile Video. As wireline and satellite distributors compete for customers tooth and nail, and the home video industry expands its universe of potential video buyers, all video programming distributors face growing competition for eyeballs and ad dollars from on-line video offerings. Indeed, video has permeated the Internet over the past year as broadband access further penetrates American households and consumers increasingly look to the Web, through their PCs, TVs, and handheld mobile devices, as another medium for the delivery of video content. New outlets for original and repurposed video content emerge everyday and media companies are racing to enter this burgeoning marketplace with web-based services.

The Internet is proving to be a viable, competitive video alternative capable of shaking up the entire marketplace. The recent rise of YouTube illustrates the growing appetite for personalized, non-traditional video entertainment, especially among younger consumers. Internet search titan, Google, Inc., purchased YouTube for $1.65 billion after only 20 months in business. And YouTube just inked a deal with Verizon Wireless to provide a "television-like" channel featuring its most popular videos to V-Cast cell phone customers.[46]

As do-it-yourself Internet video continues to find an audience, the downloading of high quality, high demand Hollywood movies and TV shows has been steadily growing in popularity over the past several years. Backed by major computer industry players, Microsoft Corporation and Cisco Systems, Inc., CinemaNow offers digitally compressed movies on a pay-per-rental or

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45 "Target Seeks Equity on DVDs," Los Angeles Times, October 10, 2006.

46 "Hello, CellPhone? YouTube Calling," The Washington Post, November 28, 2006.

download-to-own basis. Movielink LLC, another film and TV download service, is owned by five major movie studio owners (Metro-Goldwyn-Mayer Inc., Viacom Inc., Sony Corporation, GE's NBC Universal, and Time Warner Inc.). The service currently offers over 2,000 films, with rentals starting at 99 cents up to $4 and purchase prices are comparable to DVDs.[47] Movielink announced in July 2006 that customers will be able to copy their downloaded movies onto DVDs and play them on DVD players starting in the first quarter of 2007 – a service already offered by CinemaNow. Meanwhile, CinemaNow is working with EchoStar to develop a Dish Network receiver that will be able to access its movies.[48] And last April Movielink and CinemaNow began making movies available for download on the same day that the DVD hits the shelves.

The recent entry of multiple household-name companies, Apple Computer, Amazon and AOL, into the video marketplace promises to boost Internet-based home delivery of movies and other entertainment as a competitive alternative to other video services. Apple launched its on-line movie service in September 2006 and its arrival is particularly noteworthy given the company's track record in revolutionizing the music industry with online downloads to its now ubiquitous portable entertainment device, the iPOD. With only 75 Disney movies in its library, Apple generated $1 million in less than a week through the sale of 125,000 movie downloads.[49] Under its deal with Disney, Apple will be able to put new movies up for sale at the same time

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[47] "Films at your fingertips," Pittsburgh Post-Gazette, July 11, 2006.

[48] "The lowdown on movie downloads," Los Angeles Times, October 1, 2006.

[49] *Id.*

they arrive on DVD.[50] Downloaded films can be played on a Mac or PC-based computer, and can also be transferred to a video iPod for repeated playback.[51]

Starz Entertainment Group, in partnership with Microsoft and Sony, launched its own online movie service, Vongo, in June of this year. Vongo hopes to become a "one-stop shop for broadband movie and entertainment enjoyment," according to Bob Greene, senior VP of advanced services for Starz.[52] For $9.99 a month, subscribers gain unlimited access to Vongo's more than 1,600 movies and video (available for playback on Windows-based PCs, select portable devices, and television sets), in addition to a live, online streaming version of the Starz TV channel.[53] Individual movies can be downloaded on a pay-per-view basis for $3.99 each, and users can download content to a maximum of three devices per account. Through its alliance with Microsoft, Vongo is compatible with multiple portable video players.[54] Vongo has also joined hands with big-name player AT&T, which will offer Vongo to its high-speed Internet customers and market the service on the AT&T Worldnet portal and a co-branded website.[55]

This fall, the "Fox Reality" program network and Apple partnered in an arrangement that allows viewers to watch the premier episodes of all of its upcoming original series on iTunes at no charge one week before they air on television.[56]

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[50] "First music, then TV, now Apple to sell movies," Boston Globe, September 13, 2006. Films are priced at $12.99 during their first week of release, and are subsequently raised to $14.99; older movies will cost $9.99.

[51] Apple plans to unveil a new product next year (which it is currently calling iTV) that will wirelessly broadcast online-purchased movies from a user's computer to a standard television set. *Id.*

[52] "Starz' Vongo net-based movie service goes live," Online Reporter, June 10, 2006.

[53] *Id.*

[54] "Microsoft, Sony see Starz," Online Reporter, January 7, 2006.

[55] "Starz' Vongo net-based movie service goes live," Online Reporter, June 10, 2006.

[56] "Fox Reality bows on iTunes," Daily Variety, November 27, 2006.

Meanwhile, broadcast and nonbroadcast programmers are providing more and more streaming and downloadable video content on their Internet web pages. And exploiters of Internet technology continue to push the envelope in video distribution with the launch of services, such as LX.TV Lifestyle Television, a broadband channel featuring professionally produced, independent content.[57] Brightcove, an Internet TV company backed by veteran TV executive and entrepreneur, Barry Diller's IAC/Inter-Active Corp and AOL, plans to launch an online video marketplace that will facilitate deals between owners of movies, television programs and other videos and website owners.[58]

The pursuit of the on-the-go consumer has become more aggressive in the past year as a wide range of companies explore ways to distribute pre-recorded, live and original video programming over mobile devices. In September, Sprint launched "Sprint Movies", which offers full length pay per view movies on mobile phones, including recent box office hits. A movie can be seen in its entirety all at once, or it can be broken up into chapters and watched over time; customers can also pause and skip forward or backward, similar to a DVD player. Mobile-movie watching has grown in popularity, with subscriber growth averaging more than 30 percent a month since Sprint's mSpot movie subscription service was introduced in December 2005.[59] Consumers can also get video clips on Verizon Wireless' V Cast phones and, as noted earlier, the company recently announced a joint venture with YouTube. Cingular is launching a new service that will allow consumers to use their cell phones to access video channels and

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[57] "Site Bets Slick, Made-for-Web Shows are the Next Big Thing," Wall Street Journal, October 31, 2006.

[58] "Brightcove to Launch Online Video Marketplace," Wall Street Journal, October 31, 2006.

[59] "Sprint is First to Offer Full-Length "Pay Per View" Movies on Mobile Phones in U.S.," Business Wire, September 5, 2006.

download music, video content and browse the Internet at speeds comparable to cable modems or DSL lines.[60]

Other recent examples of mobile video include a new generation of portable media players being promoted by EchoStar's Dish Network that enable customers to record and transfer movies and television programs to its portable "PocketDish" player.[61] Discovery Communications also announced that it will launch Discovery Mobile at the end of 2006, a service that will include short video clips on travel and health, animal footage, fun facts, and clips from popular shows.[62]

Analysts predict the number of people using mobile video could increase from roughly 7 million now to up to 12 to 24 million customers by 2010.[63]

The foregoing demonstrates that the still-evolving Internet video distribution platform in all of its many variations is establishing a place in the competitive video arena. And in an era of younger, more technology savvy consumers open to video entertainment and information over multiple outlets, no industry player has a lock on this nor any other form of program delivery. Everyone is experimenting with new ideas, through capital investments in existing entities, start-ups and joint ventures, all with the knowledge that the only sure thing is that nothing is settled. This goes for companies within the same industry *and* those competing against companies in other industry sectors. And this is as it should be in a fully competitive video marketplace.

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60 *Id.*

61 "Portable Media Players Aim for the Masses," The New York Times, October 19, 2006.

62 "Shooting for a Bigger Audience on the Smaller Screen; Discovery Aims for Escape the Confines of the Television with Video Tailored for Cellphones," The Washington Post, July 17, 2006.

63 "Video to go," St. Louis Post-Dispatch, September 8, 2006 (quoting Jupiter Research and IDC of Framingham, Mass., respectively).

II. TO MEET THE COMPETITION, THE CABLE INDUSTRY CONTINUES TO PACKAGE AND PROVIDE PROGRAMMING AND NEW CUTTING EDGE SERVICES THAT MAXIMIZE CONSUMER CHOICE AND VALUE

In a ferociously competitive video marketplace, "where rapid technological change confounds business assumptions every day,"[64] cable companies are driven to innovate and create newer and better service offerings for their customers. By investing over $100 billion to construct an advanced two-way fiber optic network, cable operators increased their channel capacity *nearly two-fold* to deliver more than 200 video channels in nearly every community nationwide. It is estimated that the industry will expend over $11 billion during the twelve months of 2006 in capital improvements.[65] The wisdom of this continuing infrastructure upgrade has been borne out by consumer zeal for digital cable programming options, including increased subscriptions for packages of sports, foreign language, international, family-oriented and niche programming.

At the end of June 2006, over 45 percent of cable subscribers, or 32.9 million, had chosen a digital cable package from their cable company. This marked a 22 percent increase from June 2005.

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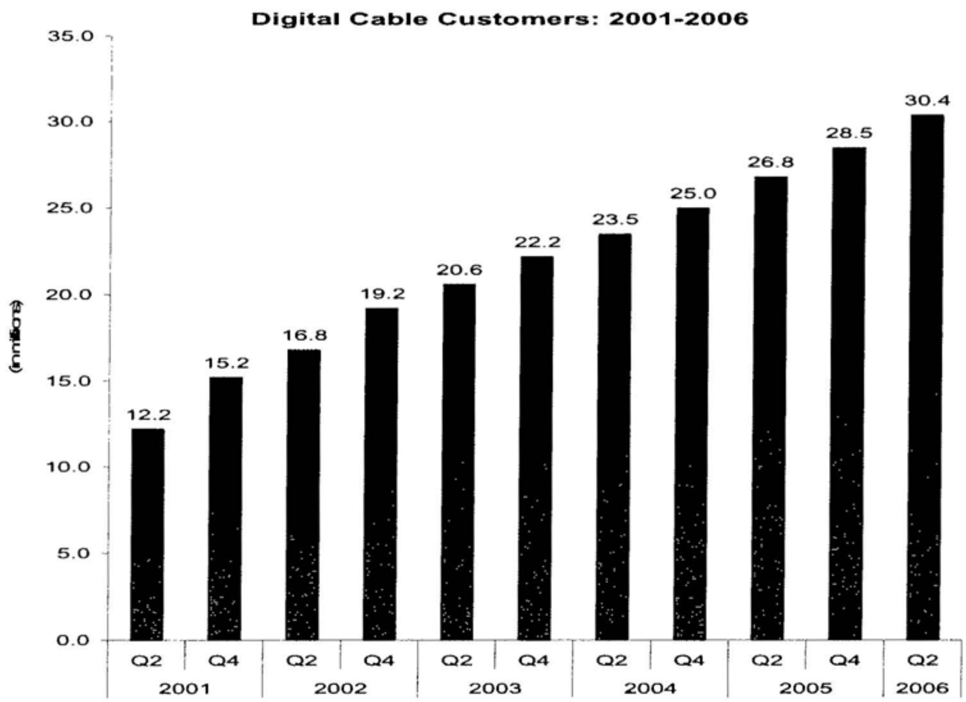
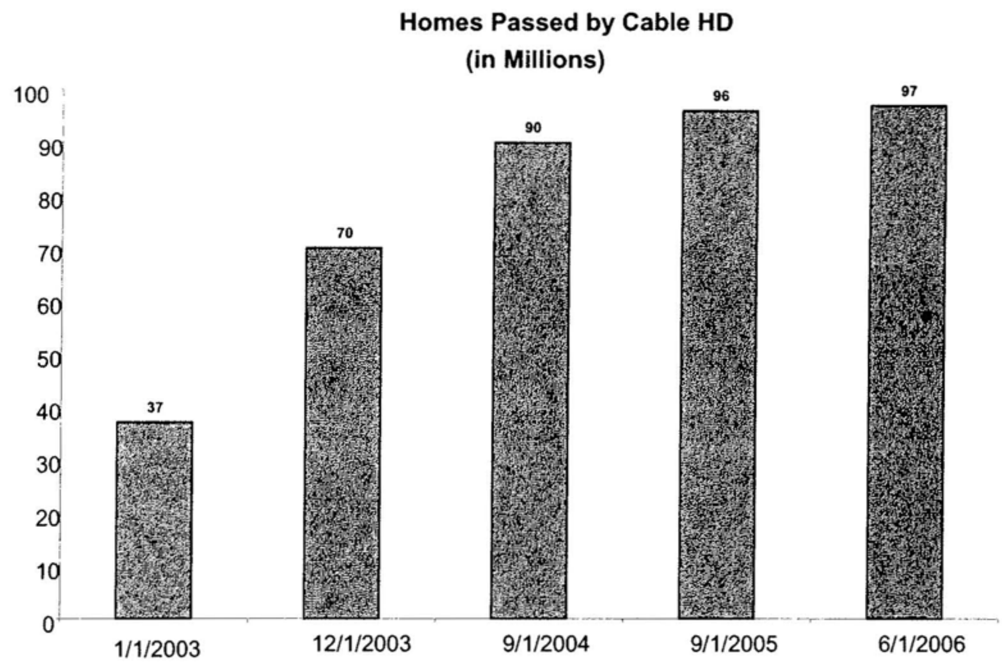
64 Remarks by Brian L. Roberts, Chairman and Chief Executive Officer, Comcast Corporation before the Progress and Freedom Foundation, Washington, D.C., September 21, 2006.

65 Kagan Research, LLC, Broadband Technology, April 18, 2006 at 2.



Source: NCTA estimate based on company data.

Consistent with its long-standing efforts to advance the transition to digital television, cable operators also continue to aggressively market HDTV services. High definition channels are now widely available to cable customers, with systems offering upwards of 25 HD channels and additional HD programming on demand. By June 2006, 97 million U.S. television households were passed by at least one cable system offering HDTV service, which represents all of the top 100 designated market areas (DMAs). Of all DMAs, a total of 203 markets (out of 210) were served by at least one cable system that offers high-definition programming.



Source: NCTA research based on company data.

Cable networks too have embraced HD technology and have steadily increased the amount of content being produced in this format. As of November 2006, 27 cable networks offer high definition programming on a full-time or part-time basis – in a variety of genres including news, sports, movies, and general interest.[66] And as of June 2006, local cable systems also were carrying the digital signal of 788 unique broadcast stations, a seven-fold increase from January 2003, when 92 such stations were carried. And the agreement entered into between cable operators and public television stations in 2005 ensures that local public television digital programming is being carried on cable systems throughout the country.

[66] The networks include A&E HD, Cinemax HD, Comcast SportsNet HD, Discovery HD Theater, ESPN HD, ESPN2 HD, Food Network HD, FSN HD, HBO HD, HDNet, HDNet Movies, HGTV HD, INHD, MHD (MTV HD), MSG Network HD, National Geographic Channel HD, NBA TV, NFL Network HD, Outdoor Channel 2 HD, Playboy HD, Showtime HD, Spice HD, Starz HD, TMC HD, TNT HD, Universal HD, and YES-HD.

Digital video recorders (DVRs) have become standard products offered by a range of video players: DVR product makers, cable, satellite and telephone companies. Every major cable operator offers DVR technology to its customers. Comcast, for example, has deployed 4.1 million advanced DVR set top boxes, many with HD capability. One out of three, or 34 percent, of Comcast digital customers have purchased this service, up from 21.8 percent of digital customers in September 2005. Cablevision has doubled the number of customers to its HDTV service since last year, increasing to 525,000 at the end of September 2006.[67] The technology is moving into uncharted territory with recently announced plans to offer an on-demand ad service to enable customers to research products or services similar to the way they search the Web for information.[68]

The past year has also seen a growing demand for and proliferation of "video-on-demand" ("VOD") services – from entertainment fare to consumer products. According to Forrester Research, "an estimated 29 million households in the U.S. now have video-on-demand capabilities – more than double the number of households three years ago and almost reaching the same penetration as digital cable."[69]

Cable is the leading provider of video-on-demand services, as free VOD has been one strategy employed by cable operators battling satellite and other competitors. For example, Comcast provides more than 7,500 video on demand programs each month available for viewing 24 hours a day in such categories as movies, TV shows, children's programming, sports and

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[67] "Cablevision HDTV Subs Double in 2006," www.tvpredictions.com/cablevisionhd110806.htm, November 8, 2006.

[68] "TiVo's Latest Viewing Option: Commercials," Wall Street Journal, May 8, 2006. ReplayTV, a DVR pioneer, has introduced a new service with software that turns PCs into DVRs. "DVR providers getting competition with a PC twist," USA Today, June 28, 2006.

[69] "Marketers Press the Play Button for Video on Demand Programs," Wall Street Journal, August 28, 2006.

fitness, music, lifestyle and home themes.[70] Nearly 95% of these ON DEMAND programs are available at no additional charge. Comcast's 100-plus hours of HD ON DEMAND will double in 2007, and again in 2008.

Charter offers over 1200 hours of VOD, and added over 20 content providers in the last two years, as its service has seen significant growth. Similarly, Cox has added a wide range of content providers to expand its VOD offerings, along with increased local content. Smaller operators, such as Bresnan Communications, are rolling out expanded VOD products as well.

As VOD grows, cable operators are experimenting with advanced ad insertion technology in the video-on-demand space in an effort to compete with the much higher advertising yields in the Internet video space.[71] And they are strengthening their competitive position by offering more local-oriented programming. Time Warner Cable, for example, is offering local programming in about two-thirds of its systems, along with interactive features.[72] Time Warner's "Start Over" service, launched in November 2005, uses VOD technology to allow digital video customers to instantly restart from the beginning select programs as they are being aired. Time Warner also offers PhotoShowTV[tm], which allows digital video and HSD subscribers to upload photo slideshows and videos for other system subscribers to view on their televisions via the VOD feature. Here are a few other examples of other advanced services offered by cable:

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70 "Comcast On Demand Tops Three Billion Views: Nation's Premier Video-On-Demand Service Features 7500 Programs," News Release, September 6, 2006.

71 "Cable Operators Test New Ad Models for VOD," ADWEEK, September 25, 2006.

72 "MSOs Revamp VOD Strategies; Operators Roll Out More Local Fare, Interactive Services to Bolster Business," Multichannel News, May 1, 2006.

Charter

- **Charter iTV** – Provides interactive access to content including weather, entertainment (including movie descriptions and listings), games and puzzles, sports (including scores, stats and standings), news, and business news.

Cox

- **interACTIVE** – allows digital video subscribers to interact with select commercials and programs at the touch of a button on the remote control enabling viewers to do things like vote on community issues, request more information, or take advantage of special offers.

Insight

- **Localsource** – Interactive information and entertainment guide that delivers local news and weather, sports news, movie listings, dining guides, games and community directories and calendars.

Cable is also easing the transition to digital TV by working with the consumer electronics companies on universal standards for "Digital Cable Ready" equipment that allows subscribers to receive digital cable services without the need for a set-top box.[73]

Packaged vs. A La Carte Programming

In today's video marketplace, where households can readily switch from cable to DBS (or, increasingly, to another cable provider), it's a competitive imperative that providers package

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[73] The NOI (at ¶ 84) asks a number of questions with respect to CableCARDs – the separate security modules that cable operators provide to cable customers for use in accessing cable services in "Digital Cable Ready" devices. The questions asked in the NOI relating to number of cards placed in service, pricing, methods of installation and the like, are the same questions the Commission has asked cable operators to answer in quarterly reports to the Commission, the last of which was filed on September 29, 2006, which we incorporate by reference herein. *See* Letter from Neal M. Goldberg, NCTA, to Marlene H. Dortch, Secretary, FCC, CS Docket No. 97-80, September 29, 2006 (transmitting CableCARD reports from five largest MSOs). The next report will be filed December 22, 2006. Since the last report, CableLabs has announced further progress in developing multi-stream CableCARDs and testing procedures for compatible "Digital Cable Ready" devices so that consumers who use these devices may, for example, record one scrambled channel while viewing another. Specifically, CableLabs has qualified M-Cards from Motorola and Cisco/Scientific-Atlanta and has reached an agreement with a number of consumer electronics companies (including representatives from TiVo, Motorola and Digeo Interactive) on new testing procedures to verify Digital Cable Ready devices that have an M-Card interface which permits the use of an M-Card in multi-stream mode. *See* Letter from Neal M. Goldberg, NCTA, to Catherine Bohigian, Chief, Office of Strategic Planning & Policy Analysis, FCC, CS Docket No. 97-80, November 14, 2006.

their services in the way that maximizes value for consumers. To achieve this objective, cable systems offer their customers a broad array of service options.

Beyond the basic tier that includes broadcast and access channels, which Congress requires all customers to buy, cable systems offer additional program networks and services in analog and digital tiers and mini-tiers. In addition, some services are offered on a "per-channel" basis, while others are offered on a per-program (pay-per-view) basis. Customers with high-definition television sets can purchase additional non-broadcast high-definition programming. They can purchase video-on-demand services. And they can lease a digital video recorder.

Sometimes, consumers – and policymakers – question why cable systems do not offer *every* program network and service on a per-channel "à la carte" basis. The FCC's Media Bureau conducted an extensive inquiry into this question and initially concluded – as had the Government Accountability Office – that a requirement that all channels be available to customers on an à la carte basis, even if they are also available in tiers, would make most consumers *worse* off. The Bureau found that consumers would have to pay more than they pay today to receive far fewer channels – fewer even than the number of channels that they regularly watch, much less the channels that they occasionally watch.

The Bureau also concluded that à la carte and themed tier requirements would significantly diminish the quantity, quality, and diversity of programming available to viewers. À la carte would cause many program networks to fail – especially networks aimed at minority and niche interests.

These findings were supported not only by economic studies and analyses supplied by affected parties and industries. They were also confirmed by a panel of four independent economists who were invited by the Bureau to testify at a symposium on the subject. The economists explained why offering many basic cable services only on a tiered basis enabled more viewers to watch more program networks for a lower price than if the services could also be purchased à la carte.

Nevertheless, as the Notice of Inquiry in this proceeding points out, in February 2006, the Media Bureau released a *Further* Report "finding that greater choice *could* benefit consumers."[74] NCTA submitted a comprehensive response to that Further Report, along with an economic analysis by Professor Steven Wildman of Michigan State University, which showed that the Bureau had failed to substantiate its revised conclusion, that the Bureau's critique of the First Report was itself plagued by methodological errors, and that the Bureau, in fact, had it right the first time.[75] We incorporate by reference that response in these comments.

For purposes of this proceeding, the point is that competition is driving video competitors to offer customers a range of options in order to maximize value – and that the range of options that maximizes value includes the packaging of many services in tiers. DBS services generally offer their customers a similar array of tier, per-channel and pay-per-view options – except that they are not required to provide a basic broadcast tier to all their customers, and they are not yet technologically capable of providing on-demand services.

As technology changes and as the economics of the video marketplace evolve to take such change into account, the array of service offerings – and the way in which they are packaged – may change as well. But competition among providers will continue to ensure that consumers will have the options that provide the best value. So far, competition has already produced more

[74] Notice, ¶ 17 (emphasis added).

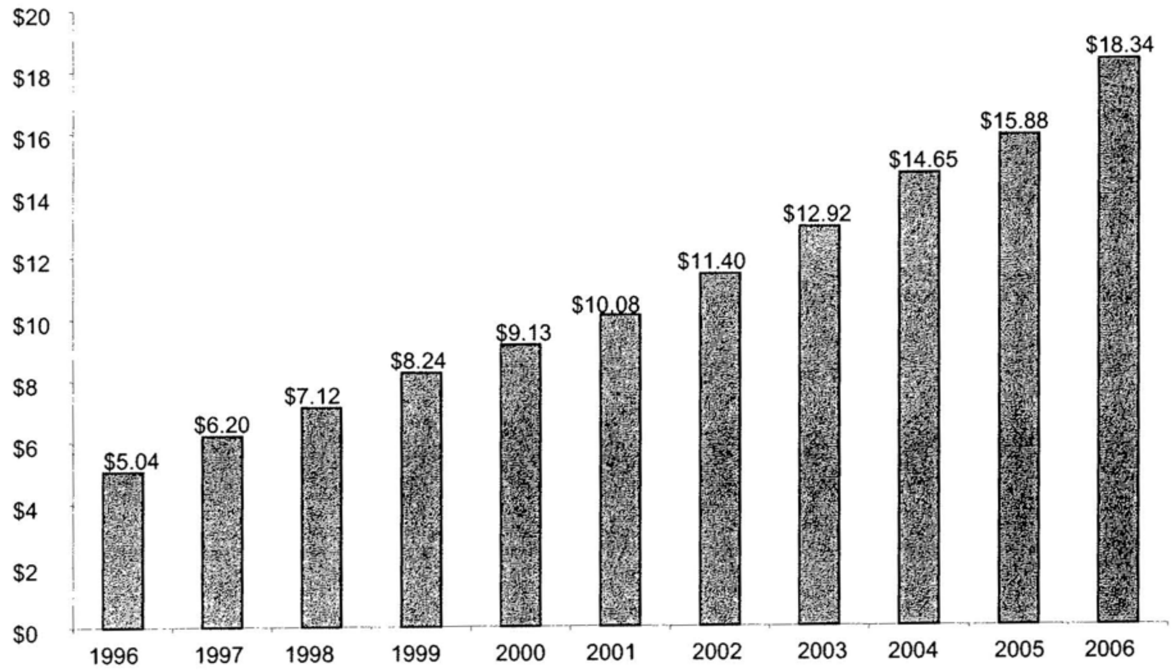
[75] "A Case of À la Carte and "Increased Choice"?" An Economic Assessment of the FCC's Further Report, Steven S. Wildman, Michigan State University, March 9, 2006.

choices of what to watch *and* more choices of what to purchase than ever before. That trend is likely to continue.

Meanwhile, the programming marketplace remains as *competitive* as ever as investment in original programming continues to flourish, as delivery options explode, and as program packaging responds to marketplace incentives. The growth in cable digital capacity has spurred growth in national video programming services, up from 390 in 2004 to 531 in 2005. And program networks and cable operators have continued to expend more and more money to produce and deliver compelling, high quality programming for cable customers. In 2006, cable networks will invest more than $18 billion in new programming, while cable operators will spend nearly $21 billion on programming services.[76]

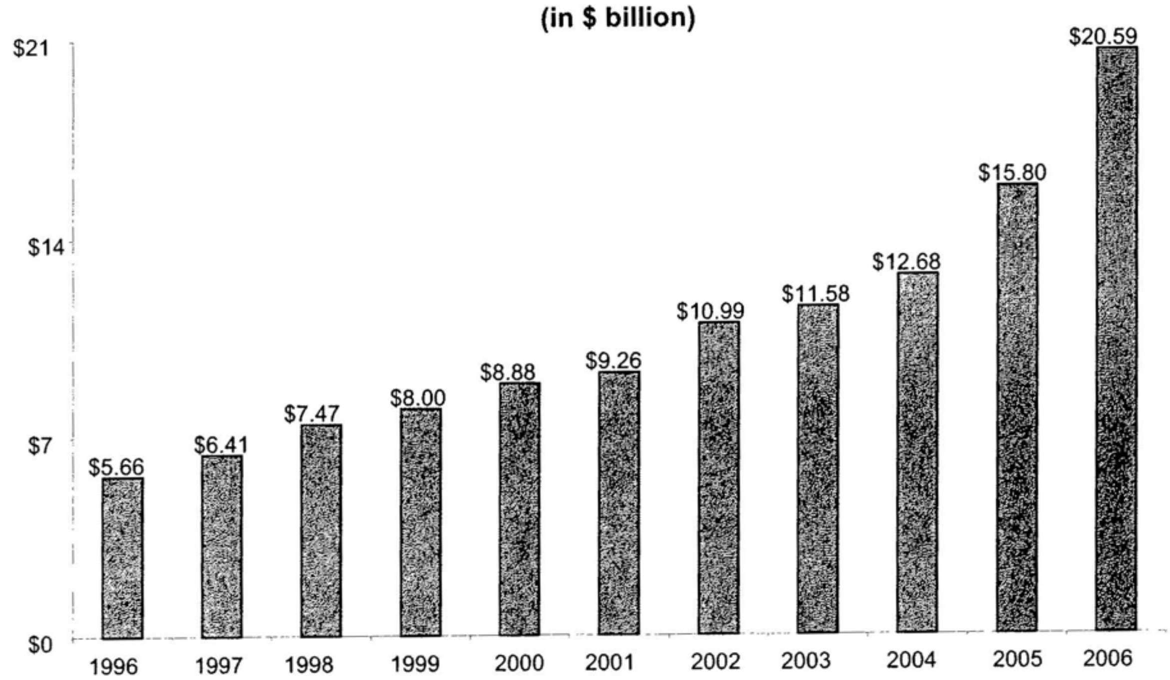
[76] Cable companies are also responding to "ballooning competition from startups, entertainment companies and large Internet sites" offering video on the Web by acquiring broadband rights and linking Internet content to TV sets. "Cable Takes on Web Video," Associated Press Financial Wire, June 29, 2006. Comcast, for example, is planning to make a wide variety of movies, TV shows and other video material available on its Web site. And it is introducing new technology that will enable its high speed Internet customers to route its Web-based video content to TV sets.

Cable Networks' Programming Expenditures
(in $ billion)



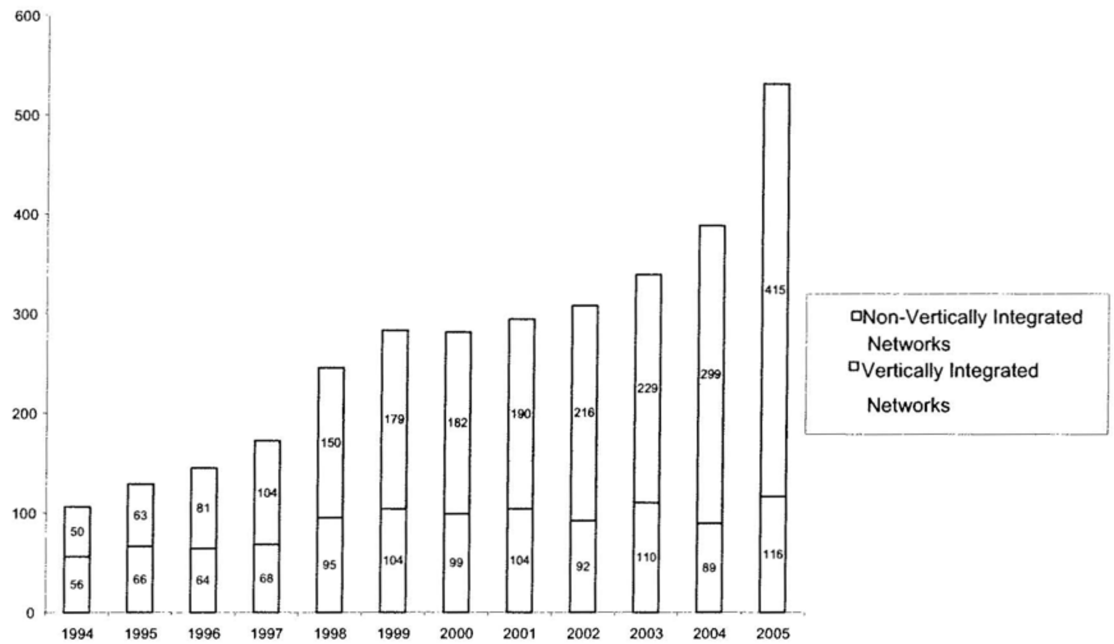
Cable Operators' Programming Expenditures

(in $ billion)



The small amount of vertical integration of cable operators and program networks is not a threat to marketplace competition. In 1992, 48% of all national cable programming services were owned by cable operators. By January 2002, that number had fallen to only 26%. According to the Commission's 12th Annual Report, only 21.8% of cable programming networks were vertically integrated as of 2005.[77]

Vertically Integrated and Non-Vertically Integrated Networks



But the notion that vertical integration alone automatically constitutes a threat to competition is not sustainable. And, in any event, with DBS a fully established competitor in the video marketplace, cable operators cannot refuse to carry a popular program network – whether vertically integrated or not – without risking losses in subscribership that outweigh any benefits.

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[77] Twelfth Annual Report ("In 2005, we identified 531 satellite-delivered national programming networks, an increase of 143 networks over the 2004 total of 388 networks. Of the 531, 116 networks (21.8 percent) were vertically integrated with at least one cable operator in 2005. Last year we identified 388 satellite-delivered national networks, 89 of which (22.9 percent) were vertically integrated with a cable operator.")

Moreover, DBS is now significantly vertically-integrated, and the level of programming exclusivity that DirecTV, the nation's second largest MVPD, holds now surpasses any held by cable operators, most of whom it dwarfs in size.

Meanwhile, as the percentage of vertically integrated networks continues to decline, the number of channels available on cable networks has expanded dramatically since 1992. Taken together, the decline in vertical integration, the increase in channel capacity, and the growth of retail competition from alternative providers have essentially mooted Congress's core concern that large cable operators could constrict the flow of diverse programming to consumers by favoring their vertically integrated networks.

Every indication is that the product offerings, levels of service, options, and bundling of services reflects a fully competitive marketplace; the choices are multiplying and the marketplace is working to provide the right mix of programming options for consumers. Regulating here would be counterproductive to consumer interests. Consumers today have real choices in the video marketplace and they are exercising those choices as Congress intended.

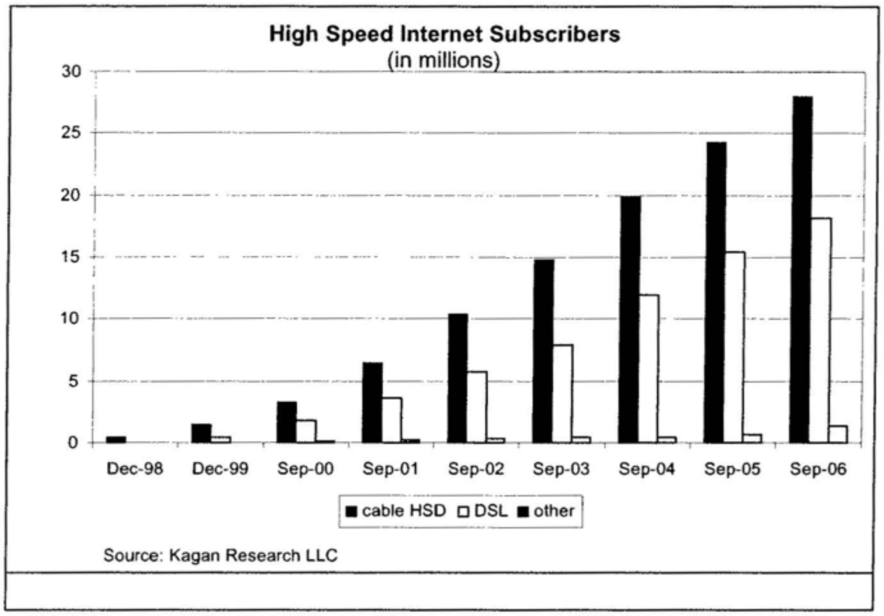
III. COMPETITION IS FLOURISHING IN THE PROVISION OF HIGH-SPEED INTERNET SERVICE

When cable operators decided to rebuild their facilities in order to provide a more robust multichannel video programming service they also set in motion a revolution in the provision of advanced broadband services. The digital plant that was built to transport bits of video information is also capable of transporting digitized data and voice information. And since the deployment of new facilities took place not long after the emergence of the Internet and the World Wide Web, cable operators were able to offer their customers a brand new residential service – high-speed Internet access.

High-speed Internet access was already available to *business* users via T1 lines offered by telephone companies. And it *could* have already been available from the telephone companies as a residential service over existing telephone lines. The technology for providing DSL service was already in place, but telephone companies underestimated demand for the service and chose not to deploy it lest it undercut their sales of the more lucrative (*i.e.*, expensive) T1 service, and ISDN plans.

Cable modem service not only responded to significant consumer demand for faster access to the World Wide Web. It also stimulated and created new and more intense demand by creating a platform for the delivery of new Internet services that were unimaginable in the era of dial-up service. High-speed cable Internet access has literally transformed the way we listen to, share and purchase music, the way we get our news and information, the way we shop, and the way we communicate. We send pictures and videos by e-mail, we communicate by "instant messaging," and we use webcams for online video chats. Cable modem service even provides the platform for Internet-based telephone services.

Once consumer demand for cable modem service became evident, the telephone companies entered the marketplace with their own DSL service. Having conceded a head start to cable operators, the telcos quickly captured a significant share of high-speed Internet customers. Today, 58.9% of all high-speed Internet households are cable modem customers, while 38.3% purchase DSL service.



Cable operators and telcos compete aggressively for new and existing Internet customers. Both providers already have facilities in place to offer high speed access to customers, and both vigorously seek additional customers to defray the sunk costs of their facilities investments. Moreover, because cable operators and telephone companies offer bundled service offerings that include telephone and video services in addition to high-speed Internet access, they have additional competitive incentives to ensure that their Internet offerings provide the best service and the best value to consumers.

While competition between DSL and cable modem service is already intense, several other technologies provide additional choices for consumers. These include satellite broadband, fixed wireless, mobile wireless, and WiFi networks. Satellite broadband service is available throughout the nation but its customer base today (1.3% of all high-speed Internet households) is largely located in those limited areas that cannot economically be served by cable modem or DSL service.

Fixed wireless broadband was once viewed with enormous potential, but technical shortcomings and the prominent business failures of Winstar and Teligent, among others, have stunted the growth of this alternative. Its subscribership has reached a plateau of approximately 1.5% of high-speed households.

Although WiFi networks are being explored or implemented in many areas, they still primarily serve public outdoor spaces and do not reach inside dwellings to provide household service. But Wi-MAX and broadband over powerlines (BPL) technologies, which are both in their infancy, have the potential to offer significant competition to cable HSD and DSL services. Just this month, the Commission took a step to facilitate the development of this new service by ruling that BPL, like DSL and cable modem service, should be classified as an "information service." The Commission noted that this step not only "establishes a minimal regulatory environment for BPL-enabled Internet access service that promotes our goal of ubiquitous availability of broadband to all Americans," but also furthers the Commission's goal of developing a consistent regulatory framework across broadband platforms by regulating like services in a similar manner."[78]

High-speed Internet service is now ubiquitously *available* throughout the nation. According to FCC data, cable modem service is available to 93% of the nation's households, and DSL is available to 78%.[79] But only 46% of the nation's households choose to *purchase* high-speed Internet service.

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[78] *In the Matter of United Power Line Council's Petition for Declaratory Ruling Regarding the Classification of Broadband over Power Line Internet Access Service as an Information Service, supra*, ¶ 2.

[79] FCC, *High Speed Service fore Internet Access: Status as of December 31, 2005*; July 2006, at 3 and Table 14.

This shortfall in penetration increases the rewards and opportunities for providers who are able to offer greater value to consumers. By offering a better price-quality ratio, a provider can capture customers not only from its competitors but also from the large number of households that have not yet been persuaded to purchase the service. Given the large sunk costs of capital-intensive broadband facilities and the effect that a superior Internet service can have on the provider's video and telephone revenues, it's not surprising that cable operators and telephone companies are continually upgrading the speed and quality of their Internet offerings. And they are also continually searching for ways to offer service more efficiently at price points that maximize value to consumers.

In terms of quality, cable operators are upgrading the speed at which service is available. The standard speed on Cablevision Systems' Optimum Online service, for example, is now 15 Mbps, with 30 Mbps available for an additional $9.95 per month. The standard speed for most cable HSD providers is now 6 Mbps, while the DSL offerings of the telephone companies carry standard speeds of 1.5 Mbps to 3 Mbps. These speeds have doubled or tripled within the last several years.[80]

This is an enhancement that may not be noticeable to those who use the Internet mainly for sending e-mail and reading online newspapers and blogs, but that matters enormously for those who rely on the most bandwidth-intensive Internet sites and services, such as peer-to-peer file sharing, and the uploading and downloading of streaming video and music.

[80] Insight recently announced ramping up its broadband speeds for business customers to 15 Mbps. Insight Press Release, "Insight Business Ramps Up Broadband Speeds," November 20, 2006.

These upgrades are costly, so operators are also seeking ways to enhance the speed and quality of service without excessively increasing the price of such upgrades – especially for those customers who are least likely to benefit from them. Technology is making it possible to offer "tiered" service to customers, providing the option to purchase higher speeds and greater bandwidth or to purchase a "basic" service at a lower price.[81]

In addition, if the marketplace supports it, broadband providers may be able to develop innovative business models that would shift some of the costs from consumers to large commercial web-based providers (who, in turn, could recover costs from the particular consumers who use them – and from other sources, such as advertisers). Such business models could be a win-win-win proposition for consumers, web-based providers, and broadband providers, as consumers would pay less and use more, commercial web-based providers could develop and market innovative new products and services, and broadband providers could sell more services since their retail pricing would be lower than it otherwise would be.

It is important that cable operators (and content providers) not be prevented, under the rubric of "net neutrality," from seeking innovative ways to maximize value to the maximum number of consumers. The Commission has, in this regard, consistently struck the right balance, adhering from the outset to its policy of "vigilant restraint." It has recognized the possibility that facilities-based providers of Internet access could conceivably act in ways that adversely affect marketplace competition. But it has refrained, in the absence of any indication that this is more than a hypothetical concern, from adopting prophylactic regulations that could do more harm than good.

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[81] Comcast recently rolled out its PowerBoost feature, a network technology that temporarily doubles Internet speeds at no additional cost for consumers subscribing to the company's 6 Mbps and 8 Mbps services, raising download speeds to 12 Mbps and 16 Mbps, respectively. Cablevision Buckeye offers a similar service.

Billions of Internet transmissions have occurred since the start of the network neutrality debate, and in only one instance has there been a complaint filed. Responding to a complaint filed by Vonage, the FCC moved swiftly in reaching a deal with Madison River Communications in which the company agreed to "refrain from blocking" VoIP traffic.[82] This ratio speaks volumes about the absence of a market failure justifying regulation.

Fierce competition between cable operators, telephone companies and other providers of Internet access will drive them to continue to seek ways to attract and retain not only the heavy users of Internet service but also those households that have not chosen to purchase the service. The Commission should continue to promote this pro-competitive result with its policy of vigilant restraint.

IV. CABLE IS BRINGING COMPETITION TO THE TELEPHONE MARKETPLACE

Ten years ago, when Congress enacted the Telecommunications Act of 1996, cable operators and telephone companies promised to bring new competition to each other's core businesses. Telcos, which previously had been barred from providing cable service in their telephone service areas, promised to do so if the prohibition was repealed. Cable operators, which had been subject to stringent rate regulation, promised to rebuild their systems and bring new competition to the telephone marketplace if Congress eliminated regulation of rates for the expanded basic ("cable programming service") tier.

One of these parties immediately set about to keep its promise. The cable industry, since 1996, invested more than $100 billion to upgrade facilities in order to compete in the new digital broadband marketplace. Meanwhile, cable operators began exploring ways to use their facilities to provide local telephone service – just as they said they would. Even before the development

[82] http://news.com.com/Telco+agrees+to+stop+blocking+VoIP+calls/2100-7352_3-5598633.html.

and deployment of Voice-over-Internet-Protocol ("VoIP") telephone service, some operators offered robust circuit-switched telephone service that was fully competitive with the incumbent local exchange carriers.

With the development and deployment of VoIP technology, the cable industry is offering consumers across the nation a competitive choice of facilities-based local wireline telephone providers. Cable telephone service is now available to more than 73% of the nation's households, and it is already being purchased by 8.5 million customers. And it is now clear that not only cable's circuit-switched offerings but also its VoIP service is being marketed and purchased as a *substitute* for the primary local telephone service of the ILECs.[83]

It's still the case, of course, that the ILECs have the lion's share of residential households. Unlike the other two components of the bundled "triple play" offerings of broadband providers, the telephone marketplace is still characterized by the dominance of one major provider. This imbalance is not simply because of consumers' reluctance to switch to new providers, or a superior incumbent's offering. Where cable operators and Internet-based VoIP providers have begun offering competitively priced phone service, consumers have shown that they are more than willing to switch.

But the ILECs have a unique ability to slow down and raise the costs of their local exchange competitors. And they have a history of using the anticompetitive tools at their disposal. Unlike the video marketplace, new competitors in the telephone marketplace cannot succeed merely by offering a superior product or by offering better prices. Because of the

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[83] *See e.g.*, J.D. Power and Associates Press Release, "Cable Companies Dominate Customer Satisfaction Rankings for Local and Long Distance Telephone Service," July 12, 2006. http://www.jdpower.com/corporate/news/releases/pressrelease.asp?ID=2006108. (While telephone service offered by cable companies is relatively new to the market, large numbers of customers are being lured to switch with enticing cost savings and highly attractive bundles of video, voice and data service.")

unique "network effects" associated with the offering of telephone service, a newcomer cannot enter the marketplace without the active cooperation and assistance of the incumbent provider.

Who, for example, would switch to a new provider if, after switching, they could not call or receive calls from the incumbent's customers? But, as Congress and the Commission have recognized, a new provider's customers will not be able to reach the incumbent's customers unless the incumbent cooperates by providing, for example, interconnection and other necessary services and facilities. And because the ILECs have obvious incentives *not* to cooperate – and a history of anticompetitive conduct to preserve their local exchange monopoly – Congress and the FCC have imposed rules *requiring* interconnection and other necessary cooperation.

One reason why the telcos are only now beginning to implement their 1996 promise to provide *video* competition is that they spent most of the last ten years resisting and challenging those rules and requirements in order to thwart competition in their core telephone business.[84] A multitude of competitive local exchange carriers (CLECs) blossomed in the aftermath of the 1996 Act. As documented in previous video competition reports, some began offering the "triple play" of bundled video, voice and Internet service, even before many cable operators and ILECs were doing so. It's unlikely that all of them would have survived in a competitive marketplace. But it's not at all unlikely that those that were most efficient and effective at providing value to consumers would have become long-term competitors.

But the telcos' 10-year battle against effective implementation of the 1996 Act has precluded this outcome. Today, the CLECs, after engaging in endless proceedings and struggles

[84] One Bell Company – Ameritech – did, in fact, begin deploying cable television facilities shortly after enactment of the 1996 Act. Indeed, Ameritech had no difficulty obtaining more than 100 cable franchises and was well on its way to providing competitive cable service. But when SBC acquired Ameritech in 1999, it pulled the plug on Ameritech's cable plans, and, like its ILEC brethren, turned its attention to preserving its local telephone monopoly.

to gain interconnection, access to unbundled elements, prompt porting of telephone numbers, and other essential cooperation from the ILECs, have all but vanished. Their primary competitors, AT&T and MCI, were acquired by the incumbent themselves. And now, the ILECs appear to be turning their attention to their cable competitors, who offer the best remaining prospect for long-term competition in residential phone service.

Consumers will be the beneficiaries of a vigorously competitive marketplace in which providers expand beyond their core businesses to offer telephone, voice, video and Internet – and, in some cases, *wireless* telephone – services. While wireless service is already an important supplement to many consumers' communications services, it is increasingly, for younger generations, treated as a substitute for wireline phone service. In addition to their current dominance in the provision of local telephone service, the ILECs already have a head start in transforming their bundled "triple play" offerings into a "quadruple play." Through mergers and acquisitions, they already own two of the largest providers of wireless phone service – Cingular and Verizon Wireless. And they have acquired additional spectrum for wireless use in the Commission's recent auction.

But the benefits of competition in *all* of these services depend on preserving fair competition in *each* of them. If consumers are expected increasingly to purchase all these services from a single provider, then the effects of anticompetitive conduct in the provision of one of these services have a spillover effect on the provision of the other services.

More specifically, if the LECs were able to thwart or unfairly raise the costs of competition from cable companies in the provision of local telephone service by, for example, impeding interconnection or by failing to facilitate number portability in a timely manner, the effect would not only be to impair competition in the telephone marketplace. They have already started down this path, resisting requests by cable operators to allow operators to choose technically feasible points of interconnection, including a single point of interconnection in a LATA.[85] And while LECs have virtually no competition in the provision of essential transiting services, they have refused to recognize any obligation to include transiting services in their interconnection agreements with cable operators.[86]

By making it harder or costlier for cable operators to offer competitive local telephone service, the ILECs would make the cable operators' bundled "triple play" offerings less attractive and more expensive for consumers – which would, in turn, make their own packages relatively *more* attractive. As a result, the ILECs could not only retain their dominance in the telephone marketplace but could also unfairly leverage that dominance into the video and high-speed data marketplace, capturing cable and Internet customers for reasons that have nothing to do with superior efficiency or a superior product.

For this reason, the belated entry of the Bell Companies into the already competitive video marketplace offers the prospect of still more choice for consumers – but it also raises a threat to the vibrant competition that currently exists. To preserve the best prospect of local telephone competition *and* to preserve fair and vigorous competition in the provision of video, Internet, and wireless services, the ILECs' propensity to delay and deny necessary cooperation with competitors in the provision of telephone services must be held in check. Vigilance in ensuring such cooperation and in preventing anticompetitive conduct will reap enormous rewards for consumers. It will ensure that the competition that has characterized the video

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85 *See, e.g.*, Comments of Advance/Newhouse Communications, et al. on AT&T's Proposed Conditions on AT&T, Inc. and BellSouth Corporation Applications for Approval of Transfer of Control, WC Docket No. 06-74, Oct. 24, 2006, at 5-8.

86 *Id.* at 16-19.

marketplace in the Commission's annual reports will continue to flourish and will extend into the Internet and telephone marketplace.

CONCLUSION

It's hardly news anymore that the video marketplace is vibrantly competitive. Head-to-head competition between cable operators and two national DBS providers – and, now, the large incumbent telephone companies – continues to drive innovation and maximize value for consumers. The interesting news is that competition in the video marketplace – and the rebuilding of cable facilities to meet that competition – has had a competitive spillover effect in the provision of *non-video* services.

Competition is now flourishing in the provision of high-speed Internet services. And cable operators are vigorously competing to provide local telephone service across the country. Unlike the video and high-speed data markets, the local telephone marketplace is still dominated by the ILECs. But at long last, there is a real prospect of fully effective competition in that marketplace, so long as the Commission is vigilant in preventing the ILECs from foreclosing such a development.

Competition in the video marketplace and in the high-speed Internet marketplace is here to stay, and, with a watchful eye, the Commission can ensure that competition becomes the hallmark of the telephone marketplace as well.

Respectfully submitted,

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November 29, 2006

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of	)	
	)	
Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming	)	MB Docket No. 05-255
	)	
	)	

REPLY COMMENTS OF COMCAST CORPORATION

Comcast Corporation ("Comcast") hereby replies to the comments submitted in response to the Commission's inquiry regarding the 70/70 provisions set forth in Section 612(g) of the Communications Act of 1934, 47 U.S.C. § 532(g).[1]

I. THERE IS MORE DIVERSITY IN INFORMATION SOURCES AT THE PRESENT TIME THAN AT ANY POINT IN HISTORY AND THE NUMBER OF SOURCES GROWS EACH DAY.

In its *Twelfth Annual Report*, the Commission sought comment on a number of issues regarding the so-called 70/70 test, including what "additional action" is "necessary to provide diversity of information sources" if the test is satisfied.[2] As the National Cable & Telecommunications Association ("NCTA") noted in its comments, "This is an odd time for the Commission to address this issue."[3] In today's dynamic marketplace, the need for "additional action" has never been weaker.

The battle for consumers' time and attention has always been fierce, but it is even more so now, with unprecedented numbers of video programming networks, intense and still-growing competition among multichannel video programming distributors, and

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1 *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 ¶¶ 31-36 (2006) ("*Twelfth Annual Report*").

2 *Id.* ¶ 36; 47 U.S.C. § 532(g).

3 NCTA Comments at 2.

enormous new quantities of information and programming being offered by broadband and mobile content, service, and application providers. In the video marketplace alone, less than two months ago, the Commission acknowledged that "[c]ompetition in the delivery of video programming services has provided consumers with increased choice, better picture quality, and greater technological innovation."[4] If anything, this was a significant understatement. In previous reports, when consumers enjoyed far fewer information and entertainment choices than they have today, the Commission recognized that "consumers today have viable choices in the delivery of video programming"[5] and that "*the vast majority of Americans enjoy more choice, more programming and more services than any time in history.*"[6]

In contrast to 1984 (when consumers' primary information sources were newspapers, radio stations, and the big three broadcast television networks) and 1992 (when cable was emerging but its two most successful satellite competitors had yet to sign up the first of their now 28 million customers), consumers today have more sources than ever before from where they can obtain a voluminous array of video programming and other print and electronic information. In addition to being able to choose from hundreds of diverse video programmers available from at least three multichannel video providers in almost every market, consumers in the United States can access video from

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4 *Twelfth Annual Report* ¶ 5.

5 *In re Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Eleventh Annual Report, 20 FCC Rcd. 2755 ¶ 6 (2005).

6 *In re Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Tenth Annual Report, 19 FCC Rcd. 1606 ¶ 4 (2004) (emphasis added).

over-the-air broadcasters, Internet sites such as Google Video and iTunes,[7] and numerous providers of content for mobile devices. Moreover, consumers can now easily create their own content, which can be mass distributed on websites such as YouTube.com.[8] This content, in turn, can be viewed on any number of consumer electronics, including televisions, wireless phones, PCs, or portable media devices such as video iPods.[9]

And, while cable programming networks comprise only a small fraction of the universe of information sources, they too are *already* infused with diversity, not only in the content they show but in the entities that own them. The number of video programming networks has exploded from a mere 106 in 1994 to an astounding 531 in

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[7] iTunes now carries episodes of popular primetime programming for a small fee. For instance, ABC recently announced that a number of its television shows, including the award-winning programs "Lost" and "Desperate Housewives," will be available for purchase on iTunes and for free on abc.com. *See* Allison Romano, *ABC Deal Stuns Affils*, Broad. & Cable, Apr. 17, 2006, *available at* http://www.broadcastingcable.com/article/CA6325082.html. Google video has hundreds of thousands of video clips. For example, among others, its "Sports" video category lists 48,741 video clips; its "Comedy" video category lists 68,718 video clips; its "Educational" video category lists 20,817 video clips; and its "News" video category lists 14,322 video clips. *See generally* Google, *Google Video, at* http://video.google.com/ (last visited Apr. 25, 2006).

[8] *See* Michael Liedtke, *YouTube.com Offerings Range from TV Clips to Amateur Videos*, Marshfield News-Herald, Apr. 10, 2006 (describing the explosive growth of YouTube.com), *available at* http://www.marshfieldnewsherald.com/apps/pbcs.dll/article?AID=/20060410/MNH03/604100438/1768/MNHbusiness. At the beginning of April 2006, "people were posting about 35,000 new videos daily at YouTube.com, luring even more viewers to an audience that's already watching more than 35 million videos per day, most lasting 30 seconds to 2 1/2 minutes. Just four months ago, YouTube's visitors were posting about 8,000 videos a day while viewers were seeing 3 million videos daily." *Id.*

[9] *See Twelfth Annual Report* ¶ 5 ("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. In addition, through the use of advanced set-top boxes and digital video recorders, and the introduction of new mobile video services, consumers are now able to maintain more control over what, when, and how they receive information.").

2005.[10] Meanwhile, the number of these networks affiliated with a cable operator has dropped dramatically from 53% in 1994 to 21.8% in 2005.[11]

Cable operators have no choice but to embrace content from unaffiliated programmers. The vast majority of *all* of the programming that Comcast carries is unaffiliated. Comcast owns or has attributable interests in only 10 national networks,[12] owns and manages only 6 regional sports networks,[13] and is affiliated with only a small number of regional and local news and entertainment networks.[14] In a typical market, Comcast makes available more than 200 channels of video programming that are tailored to the market, but its affiliated content is limited -- at most -- to its 10 national networks, one regional sports network, and possibly a regional or local news or entertainment network. Thus, well over 90% of the programming carried by Comcast is not affiliated with Comcast.

In light of these facts, it is more than a little strange that the Commission would consider invoking 22-year-old statutory authority -- generations ago in the history of the

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10 *Compare In re Implementation of Section 19 of the Cable Television Consumer Protection and Competition Act of 1992 Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming,* First Report, 9 FCC Rcd. 7442 ¶ 224 (1994) ("*First Annual Report*"), *with Twelfth Annual Report* ¶ 157.

11 *Compare First Annual Report* ¶ 161, *with Twelfth Annual Report* ¶ 157. In fact, the decline in vertical integration is even more dramatic than those statistics reflect. The *Twelfth Annual Report* erroneously counts iN DEMAND's single pay-per-view service as 60 separate networks. When this error is corrected, the number of national networks is approximately 472 and the percentage of networks that are vertically integrated with a cable operator plummets to approximately 12.1%.

12 These networks are OLN, E!, Style, Golf Channel, G4, TV One, AZN, PBS Kids Sprout, INHD, and INHD2.

13 These networks include Comcast SportsNet ("CSN") -Philadelphia, CSN-Mid Atlantic, CSN-Chicago, CSN-West, CSS, and SportsNet New York. *See* Reply of Adelphia Communications Corp., Comcast Corp., & Time Warner, Inc., filed in MB Dkt. No. 05-192, at 53 (Aug. 5, 2005).

14 These networks include CN8, New England Cable News, Comcast Local (Detroit), and Comcast Entertainment TV (Denver).

video media -- to justify any new regulations. It is equally peculiar that any additional government intervention in an incredibly dynamic marketplace would be thought "necessary to provide diversity of information sources." The past two decades have seen the number of information sources grow enormously. That growth continues at an exponential pace. The free marketplace has proven to be exceedingly successful in facilitating the creation and widespread availability of innumerable diverse sources of information, with the greatest rate of innovation occurring in the marketplace sectors in which the government is *least* involved (broadband services, mobile services, and the Internet). It is inconceivable that greater governmental regulation of the marketplace could possibly make it perform better.

II. THE COMMISSION SHOULD REJECT CALLS TO APPLY SELECTIVE DATA OR A UNIQUE METHODOLOGY TO SATISFY THE 70/70 TEST.

Certain commenters who want to leverage the 70/70 provisions to impose new and utterly unwarranted regulation on the cable industry urge the Commission to pick-and-choose data, adopt methodologies, and torture reality in order to satisfy a claim that the 70/70 test has been met. AT&T blatantly calls for skewed counting, urging the Commission to "establish metrics for the 70/70 thresholds consistent with the goal of promoting diversity of information sources."[15] In other words, AT&T urges the Commission to bend the facts to satisfy AT&T's agenda. Similarly, Media Access Project (filing comments on behalf of the Association of Independent Video and

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[15] AT&T Comments at 2. AT&T claims that in its reply comments in the video competition inquiry it "used simple arithmetic and the cable industry's own data" to demonstrate the 70/70 test has been met. *Id.* at 3. But, as the Commission's own report noted, AT&T's calculation was based on selective data from the Commission and NCTA, and even AT&T "acknowledge[d] that its data for households passed by cable systems and cable subscribers differ from the data used by the Commission to determine whether the statutory trigger has been met." *Twelfth Annual Report* ¶ 33.

Filmmakers and others) urges the Commission to rely on the "most favorable" data to determine that the 70/70 test has been met.[16]

More specifically, in clear violation of the statutory language, these and other parties urge the Commission to skew both parts of the test: (1) only counting certain households (e.g., households with televisions) as households that "have access" to cable systems with 36 or more channels;[17] and (2) counting DBS subscribers as households that subscribe to a cable system with 36 or more activated channels.[18] In other words, proponents of new and unjustified regulations urge the Commission to selectively choose whatever data will justify the pre-ordained result, in hopes that the Commission will seize the opportunity to adopt regulations that have not been authorized by Congress.

The Commission must reject these arguments and evaluate whether the 70/70 test has been satisfied based on the language in the statute and the facts. Section 612(g) states the applicable test clearly, and under this test only two data sets are relevant to the Commission's inquiry: (1) the number of *households that are passed by a cable system*

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16 Ass'n of Indep. Video & Filmmakers et al. ("AIVF") Comments at 6. Although Media Access Project consistently refers to its client, AIVF, as the "Association of Independent and Video Filmmakers," this construction appears to be erroneous. Media Access Project's client actually appears to be the Association of Independent Video and Filmmakers, see http://www.aivf.org/ and http://www.mediaaccess.org/web/.

17 *See* AT&T Comments at 4; Verizon Comments at 11.

18 *See* AIVF Comments at 12 (claiming that "a strong argument can also be made that the Commission should include DBS subscribers in determinating [sic] 'cable subscribers' for purposes of Section 612(g)"). Media Access Project also argues that the Commission should count cable Internet customers that do not also subscribe to a cable service "because the Commission has frequently considered cable broadband a potential competitor to video programming, and because some broadband providers are now offering traditional video programming services via broadband." *Id.* at 12-13. Although the Commission has made clear that cable Internet customers are not subscribers to a cable service and therefore should not be counted in determining whether the 70/70 test has been met, the Commission should take into account the impact of broadband services on the diversity of information sources. The nearly infinite (at least from the perspective of one person's ability to view all video available online in her lifetime) supply of video online from more sources than can be counted undermines any claim that the Commission needs to adopt regulations under Section 612(g).

that offers 36 or more channels; and (2) the number of those households that *subscribe to cable service*. For purposes of the second prong, the statutory language directs the Commission to determine whether cable systems offering 36 or more channels are subscribed to "by 70 percent of the households to which such systems are available,"[19] *not* "70 percent of the *television-set-owning* households to which [cable] systems are available." Nor, despite the claims of some commenters, does it instruct the Commission to include households that subscribe to *DBS* service or some other non-cable service in the count of households that subscribe to *cable* service.[20]

Moreover, in evaluating whether the statutory test has been satisfied, the Commission is not free to pick and choose data from different sources on the basis of a pre-determined objective of wanting to adopt new regulations, rather than on the basis of the data's reliability. Such a methodology would be arbitrary and capricious, especially were the Commission to choose one source for its data on the number of households that subscribe to cable systems and another source for the number of households passed by such cable systems.[21]

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19 47 U.S.C. § 532(g). AT&T also urges the FCC to require cable operators to submit detailed subscriber data "broken out by appropriate demographic and geographic criteria." AT&T Comments at 5. There is no rational basis for requiring such detailed data. As even Media Access Project acknowledges, "the number of homes passed" and "the number of subscribers" are "precisely the information needed." AIVF Comments at 10. Imposing data filing requirements such as AT&T urges would be overly burdensome and unnecessary.

20 *See* Verizon Comments at 11-12 (agreeing that the Commission should not count customers that do not subscribe to a cable service). In the cable ownership context, Media Access Project advocated that DBS subscribers should not be counted in the denominator, i.e., the total number of multichannel video subscribers, when determining what a "reasonable limit on the number of cable subscribers a person is authorized to reach." 47 U.S.C. § 533(f)(1)(A). Thus, it is clear that in both this inquiry and the cable ownership context, Media Access Project favors a construction of the statute that is most inconsistent with the statutory purposes.

21 As NCTA explained in its comments, this is the approach that AT&T took in concluding that the 70/70 test is met. *See* NCTA Comments at 7-8. "This mixing and matching of data from different sources, compiled at different times and using different methodologies, is of no evidentiary value." *Id.* at 8. In

III. THE COMMISSION'S AUTHORITY IN SECTION 612(g) IS NARROWLY PRESCRIBED TO THE LEASED ACCESS CONTEXT.

Certain commenters assert that the authority conferred to the Commission under Section 612(g) provides it with broad authority to write any new regulations that purportedly will promote "diversity of information sources."[22] This is plainly not the case. As NCTA explained in its comments:

> [T]he legislative history and the placement of Section 612 unambiguously make clear that any contemplated regulation would apply *only to leased access channels*. But even if the language were ambiguous, if Congress had intended the language of Section 612 to confer a broad grant of authority that went beyond the regulation of leased access channels, it would have expressly said so and would not have put such a provision in the *leased access section* of the Act.[23]

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contrast, in its comments, NCTA showed that four different sets of data -- from three independent sources -- prove that the 70/70 Test has not been met. *See id.* at 4-5 ("Based on our analysis of each data source, . . . the penetration rate for those systems *under all three sources is below the 70 percent threshold.*" (emphasis in original)). Cable operators' own publicly available information confirms that they provide cable service to significantly fewer than 70% of the households that have access to their cable systems, which is consistent with NCTA's results. *See* Press Release, Comcast Corp., *Comcast Reports Fourth Quarter and Year End 2005 Results* 11 (Feb. 2, 2006) (providing cable service to 51.5% of the households its cable systems pass); Press Release, Charter Communications, Inc., *Charter Reports Fourth-Quarter and Full-Year 2005 Financial and Operating Results* (Feb. 28, 2006) (providing cable service to 47% of the households its cable systems pass); Press Release, Insight Communications Co., *Insight Communications Announces Fourth Quarter and Year-End 2005 Results* 13 (Mar. 7, 2006) (providing cable service to 52.9% of the households its cable systems pass); Press Release, Cox Communications, Inc., *COX Communications Announces Fourth Quarter and Full-Year Financial Results for 2005* (Mar. 28, 2006) (providing cable service to 58.4% of the households its cable systems pass). Even Cablevision and Time Warner, which both have substantial customer bases in the highly-concentrated NY market, only provide cable service to 67.5% and 59%, respectively, of the households that have access to their cable systems. *See* Press Release, Cablevision Sys. Corp., *Cablevision Systems Corporation Reports Fourth Quarter and Full Year 2005 Results* (Feb. 27, 2006); Time Warner, Inc., *2005 Trending Schedules*, Schedule 5 (2006), available at http://ir.timewarner.com/downloads/2005trending_020106.pdf.

22 *See* AT&T Comments at 6; AIVF Comments at 14-17; Verizon Comments at 4-11. Among other things, these commenters point to Section 612(g) as granting the Commission authority to take a bevy of actions, including revision of the franchising process, modification of the program access regime, prohibition of exclusive multiple dwelling unit access arrangements, and resolution of the pending cable horizontal ownership proceeding. *See, e.g.*, Verizon Comments at 4, 5, 7-11; AIVF Comments at 17-19, 27-28.

23 NCTA Comments at 11 (emphasis added); *see also* H.R. Rep. No. 98-934, at 54 (1984), *as reprinted in* 1984 U.S.C.C.A.N. 4655, 4691 ("[S]ubsection 612(g) provides a mechanism to assure there is adequate flexibility to develop new rules and procedures *with respect to the use of leased access channels* as the cable industry develops and serves more citizens in the future.") (emphasis added).

Comcast agrees: the authority granted in Section 612(g) only applies to rules for leased access.

AT&T, too, has supported NCTA's analysis. As the Commission reported in its *Seventh Annual Video Competition Report*:

> AT&T supports NCTA's conclusions with respect to the 70/70 benchmark asserting that the statute applies solely to modifications to the leased access requirements and cannot be the basis for promulgating rules unrelated to leased access.[24]

Yet now AT&T argues the opposite position -- without even acknowledging, much less explaining away, its previous advocacy.

Although the Commission cannot ignore the fact (as some would have it do) that the authority granted it in Section 612(g) is in the leased access section of Title VI and cannot ignore the legislative history of that section, it is also noteworthy that all of the regulations that proponents of new and unnecessary regulation urge the Commission to adopt under Section 612(g) address issues that are already addressed by other provisions of the Act.[25] There is no evidence whatsoever that Congress intended to empower the Commission to use Section 612(g) as authority to rewrite these separate statutory provisions or the rules the Commission has adopted thereunder. As the Supreme Court has explained, "Congress . . . does not . . . hide elephants in mouseholes."[26]

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[24] *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 ¶ 194 (2001) (citing AT&T Reply Comments filed in CS Dkt. 00-132, at 2).

[25] *See, e.g.*, 47 U.S.C. § 533 (ownership); *id.* § 541 (franchising); *id.* § 544 (inside wiring); *id.* § 548 (program access).

[26] *Whitman v. Am. Trucking Ass'n*, 531 U.S. 457, 468 (2001).

IV. COMMENTERS' LITANY OF GRIEVANCES AND ALLEGATIONS IS WHOLLY IRRELEVANT TO THIS INQUIRY.

A number of commenters have decided to reiterate allegations and grievances they have made repeatedly in other proceedings and that are completely unrelated to the issues in this inquiry. The Commission's task in this inquiry is clear. It must: (1) determine whether the 70/70 test has been met; and (2) if the test has been met, determine what, if any, fact-justified modifications to the leased access rules are "*necessary* to provide diversity of information sources." It is unreasonable, wasteful, and reckless to let this become a proceeding driven by a cacophony of regurgitated and inapposite arguments.

From the outset, commenters admit that they have raised the self-same issues in other Commission proceedings: The America Channel and Media Access Project repurpose claims raised *ad nauseum* in the review of the Adelphia transactions; Media Access Project reiterates its tired arguments about cable ownership rules; and Verizon recites entreaties made in the franchising rulemaking. Not surprisingly, none of these commenters explain why their repetitious arguments are in any way relevant to the Commission's inquiry in this proceeding. Exhaustive records have been developed on these issues in other proceedings, and the Commission should reject commenters' efforts to import them into this inquiry. For similar reasons the Commission should refuse to consider the misplaced, vague, and unsubstantiated program access and program carriage grievances raised by The America Channel, Media Access Project, and Verizon. The Commission has established complaint procedures to address conduct that violates the program access and carriage rules, and if these commenters believe their grievances have any merit, they should file complaints under the Commission's existing procedures.

V. CONCLUSION

Americans have access to more diverse sources of information than ever before. It is extremely puzzling for the Commission to be looking for new ways to intervene in the free marketplace that has produced that diversity. What is clear is that Section 612(g) sets forth an unambiguous test for the Commission to follow and, if that test is satisfied, provides the Commission authority to adopt only those regulations that are "*necessary* to provide diverse sources of information" in the leased access context. The Commission should reject certain commenters' attempts to rewrite the test Congress set forth and to have the Commission adopt broad regulations wholly unrelated to leased access. Even if the test were satisfied, marketplace evidence leaves little doubt that no new regulations are "necessary to provide diverse sources of information."

Respectfully submitted,

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Press Accounts

The New York Times
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RE:FRAMING

Media Innovations, Leaping From Lab to Screen

By DENISE CARUSO

ONCE upon a time, before "the convergence" — of computer power with telecommunications and media — companies generally knew where their market stopped and someone else's began.

But the flood of technology has effectively washed away those boundaries.

Today, I watch "Lost" on my laptop and "Veronica Mars" on my iPod, not on the TV for which they were first intended. I can browse the Web on TV or on a game console, instead of on my computer. I can Skype my friend in Sweden from my computer, and never touch my phone. Instead, I use it to listen to music, take pictures and read e-mail during meetings. And almost every day, there is new stuff vying for what is left of my attention — new media, new devices, new functions on old devices — that might inspire me to abandon whatever I was watching or using, yesterday.

As a result, running a media or entertainment company in the 21st century is not for the faint of heart. The change is relentless, the learning curve sharp, and the competition both fierce and seemingly infinite.

"Every day, there's another set of revelations about who is doing what to keep up — how they're handling games or broadband video, what's their mobile strategy," said Nick DeMartino, the senior vice president for media and technology at the American Film Institute in Los Angeles.

Mr. DeMartino opened the institute's first computer lab in 1991 and has had a bird's-eye view of the industry changes ever since.

"It's fascinating as a spectator sport," he says. But for the players, the question is this: "When it comes to innovation and new technologies, how do companies inform the decision-making process, so they can feel like they have some solid ground under their feet?"

While some go it alone, many of the best-known media brands turn to the institute's Digital Content Lab for help. For nearly 10 years, the lab (once called the Enhanced Television

Workshop) has provided companies with an opportunity to participate in a powerful research and development process that uses their own creative assets.

To date, participants include Animal Planet, America Online, Bravo, the Cartoon Network, the Disney Channel, MTV, NBC, National Geographic, Nickelodeon, PBS, Showtime and Turner Broadcasting System, as well as several small interactive and independent media production companies.

To begin, a company picks one of its media properties and applies to the lab, describing a problem it would like to solve. If selected, that property becomes the focus of a six-month, intensive collaboration. The institute chooses a group of consultants from the most innovative design, technology and production firms in the digital media industry, and teams them with professionals from television, films and games.

At the end of the six months, each team delivers a working prototype to the media company, which owns it outright and can use it in any way it chooses.

In the most recent round of prototypes, completed in late 2006, Cartoon Network New Media walked away with a prototype based on "Ben 10," one of its top three series.

The Cartoon Network was aiming to expand its library of more than 150 games — which correspond to its TV cartoons — beyond computers and into game consoles, without spending a fortune rewriting all its software, said Suzanne Stefanac, a journalist, and longtime A.F.I. mentor who was recently named director of the Digital Content Lab. (Ms. Stefanac and I once worked together at ZDTV.)

In response, its team delivered a technical feat: a "build once, broadcast everywhere" game engine that allows the same application to run on a PC or on a PlayStation 3 and that players can navigate with a mouse, a keyboard or a game controller.

The Ben 10 prototype, the first game to use the PlayStation 3's built-in browser, was such a hit that the network expects to commercialize the technology, which it calls a "megaseries," for some yet-unnamed assets by year-end. "We look at this as an amazing new content window for distribution," said Ross Cox, senior director for entertainment products at Cartoon Network New Media.

A New York documentary company, kontent real, presented its A.F.I. team with a very different problem. PBS had picked up its series on sustainable design, called "design: e2." "But because we don't have national distribution on PBS, the series airs at different times, on different dates and in different markets," said Midori Willoughby, strategic entertainment producer at kontent real. As word spread, a following began to evolve around the series that included "a lot of people who became aware of 'e2' via different vehicles."

Its video podcasts were quickly tagged as "new and notable" by iTunes, for example, and people began to find them on the Web as well. So kontent real asked its team to develop an interface and tools that would help these users manage and gain access to information across multiple devices.

The team took its suggestions even further, resulting in a sophisticated application that lets users upload and exchange information about "green" buildings and services, as well as events, by using the Web, TiVo, the G.P.S. functions and cameras of mobile phones and Blu-ray optical discs.

Ms. Stefanac said new teams are now working on the next cycle of projects. For example, Bravo has come to the table with its "Top Chef" series, looking for a technical solution to a problem that is plaguing the television and advertising industries: the fact that people with DVRs can speed past advertising. So far, viewers have strongly opposed any attempts by broadcasters to block this capability. "They know they can't stop people from doing it, but they would like to figure out what the right solution is," Ms. Stefanac said.

One of the most promising projects under way does not involve working with an existing property but with a new media genre called "machinima," a mash-up of "machine cinema." Today, machinima is allowing people to cobble together crude movies using 3-D games and creating their own soundtracks. Making a machinima environment from scratch "could save producers a lot of money, since you could repurpose them" for different projects, Ms. Stefanac said.

Digital Content Lab's process to stimulate such creative problem solving has several noteworthy features. For one, the media owners do not pay to bring their properties into a project. A.F.I. is a nonprofit group, and all the work of the lab is sponsored by corporate donations.

And all consultants who work on the project, who are called "mentors," donate their time. Sometimes the mentors and content owners are competitors in the outside world, but work together on project teams at the lab, an unusual détente in an industry where ideas are the coin of the realm and intellectual property is jealously guarded.

"The lab is a unique entity," Ms. Stefanac said. "It's allowed to be a kind of Switzerland, where even competitors will come together on the same team to work toward a goal and really share their expertise."

MS. STEFANAC says the system works because her team selects problems for which the solutions do not benefit one company alone. "These projects are sponsored and the mentors donate their time because they are contributing to the greater good of the industry," she said. "Our mentors come back year after year, project after project, because they get to address these larger issues."

One such mentor is Dale Herigstad, chief creative officer at Schematic, a digital design firm based in Los Angeles. He has been steadily mentoring content owners at A.F.I. for several years.

"It's a small industry but the collaborative spirit at A.F.I. has given a certain spirit to the business over all," he said. "I've always liked the phrase, 'Leave your guns at the door.' That's been the value, and one of the underlying directives of the lab. It's still a new business, and a new industry that's out there. And what A.F.I. has done has really affected that, and created a common sensibility for moving forward."

Denise Caruso is executive director of the Hybrid Vigor Institute, which studies collaborative problem-solving. E-mail: dcaruso@nytimes.com.

SkyFILES: It's Getting Competitive Out There

by Michael Hopkins mhopkins@mediabiz.com

There's no doubt the multiplatform business is getting bigger and much more competitive. Deals, company milestones and other strategic maneuvers during the past month and a half demonstrate that companies within this industry aren't going to give up market share without a fight.

The following is a list of efforts those in the satellite TV business should pay attention to in the coming months:

Comcast getting bigger: In April the nation's biggest cable operator made two strategic moves that will add a significant number of customers to its enrollment lists. With the first, Comcast and Insight split up their Midwest partnership in April, and that gave the cable giant 684,000 customers in Illinois and Indiana. A day later, Comcast announced plans to acquire New Jersey MSO Patriot Media and its 81,000 customers.

No stopping Verizon video: Verizon said that in the first quarter it was serving nearly one million video customers. The telco had about 348,000 homes with FiOS TV and about 620,000 customers with its DIRECTV offering. Those are significant numbers for a relatively new entrant in the video marketplace. Expect Verizon to keep a focus on FiOS TV, given the video product's rollout to consumers at break-neck speed and the billions being spent on the fiber-supported service.

Multicast Not Going Away: Los Angeles-based LATV has deals in place with a number of TV stations to deliver its bilingual programming, which is being positioned as a multicast channel placed within a broadcaster's DTV spectrum. ION Media Networks has two "diginets" called qubo and ION Life that look a lot like a multicast effort. A number of broadcasters are spending big on the multicast potential, and it's a sure bet their interests in D.C. will continue lobbying for a multicast must-carry mandate. Cable absolutely must pay attention to the multicast issue and satellite TV should watch the developments very, very closely.

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Multiplatform B.S.

News Briefs: DISH Launches Remote Shopping

MULTIPLATFORM -- EchoStar and the Home Shopping Network (HNS) have teamed up to launch HSN Shop by Remote - a new interactive TV service on DISH Network. The interactive application allows subscribers to buy products straight from the living room via DishHOME channel 100, and soon through HSN directly on DISH channels 84 and 222. Shop by Remote was developed with Tandberg Television and is part of HSN's multiplatform advanced services including podcasts, VOD and streaming video.

CONFERENCES -- Registration for 2007 CEDIA EXPO begins next Friday, June 1. This year's annual CEDIA EXPO will be held Sept. 5-9 at the Colorado Convention Center in Denver, Colo. More information on the event can be seen at http://www.cedia.org/expo.

USA TODAY

HDTV's clarity gives rise to new channels

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By Mike Snider, USA TODAY

It's a fresh dawn for television.

In fact, it's *Sunrise Earth*, the daylight-breaking series that simply sets up cameras in some stunningly remote locale — bison grazing in the prairies of Yellowstone, a canoe skimming the glossy surface of the Mother of God River in Peru, a butterfly emerging from its pupa in the Costa Rican rain forest — as the sun comes up.

Though the series has been around since 2004, it is being joined by a flood of other picturesque series on channels both familiar and obscure, whose existence would make much less sense if it weren't for another new dawn: the era of high-definition television.

Sunrise, which airs every morning on Discovery's HD Theater channel, was one of the first designed to shine in high-definition. *Sunrise* "doesn't even have dialogue," says Scott Wilkinson of *The Perfect Vision* magazine. "It's just a camera stuck in a beautiful place at sunrise, and they show beautiful pictures. You can put that on a loop, and your flat panel would be a high-tech art gallery."

MORE: Sampler of smaller channels

These days, new HD networks are coming online at a rapid clip. Some channels are sharper clones of familiar names such as TBS, CNN and Bravo. Others carry unfamiliar names and exist to serve in high-definition. Both are building up libraries of pretty-picture programming — nature, adventure, art, travel — designed specifically to appeal to people who have just hung that huge plasma in the home theater.

"You have this high-performance device on your wall, and you want to exercise it," says Comcast's Derek Harrar. "You want to watch something cool and exciting — and clearly, the three main categories would be movies and then sports and, I think, this pretty-picture content is right behind that."

A glance at the growing HDTV gallery:

•The Smithsonian Channel, which rolled out two months ago on DirecTV, covers the artful lines of classic cars (think pre-World War II vehicles and '50s Ferraris) in *World's Finest Cars*. Another program, *Nature Tech: The Magic of Motion*, zooms in on how the science of birds, insects, fish and sharks is improving airplanes, cars and even swimsuits.

The series *Stories From the Vault*, hosted by actor Tom Cavanagh (*Ed*), delves into the holdings of the Smithsonian museums. In HD, Cavanagh says, viewers are virtually transported to the museum. "The more clear and concise the image, the more people can see," he says.

"And when you are looking at artifacts with the weight of history to them, it helps to see them better."

•*Artland: USA*, a new series on the Voom HD network found on Echostar's Dish Network, takes viewers across the country to art galleries (such as The Art Institute of Chicago), national monuments (such as the Gateway Arch in St. Louis) and notable architectural feats.

•On Mojo — a cable channel just rechristened from its original name, INHD — is *Pressure Cook*, starring *Hell's Kitchen* finalist Ralph Pagano, who travels to destinations such as Mexico, Italy and Brazil to explore local kitchens and sites. "With the cooking craze on television, we took it to an exotic location where you can appreciate the beauty that comes across in HD," says Robert Jacobson, president and CEO of iN Demand Networks, which owns Mojo.

•*Expedition Safari*, a series on the Versus HD network, takes viewers from Alaska to South Africa to track bear, antelope and caribou and to fish for salmon. "This is a genre made for high-definition," says network president Gavin Harvey, "when you think of the (widescreen) aspect ratio that HD brings to the landscape and the great outdoors, as well as the color and vibrancy."

•CNN, which launched its HD channel last month, plans high-definition broadcasts of news events such as Wednesday's debate of Republican presidential candidates at 8 p.m. ET from St. Petersburg, Fla. (The network also televised the Nov. 15 Democratic debate from Las Vegas.)

But it began its programming in October with the two-part *Planet in Peril*, which sent hosts Anderson Cooper, Sanjay Gupta and Animal Planet's Jeff Corwin to exotic locales in Africa, China and Greenland. Other HD news specials in the works for 2008 include *Black in America* (expected to air in April) and *Transgender*.

•Discovery Channel is re-airing *Planet Earth* on Sundays at 8 ET/PT on its standard-definition channel as well as its HD counterpart, with two episodes a week until Dec. 16. The series, which was broadcast this spring, has sold more than 170,000 copies on high-definition video discs, at $100 a set, making it the top revenue-generating HD title so far.

"The pristine quality of the footage shows high-def at its best," says Judith McCourt of entertainment research firm Redhill Group. "It brings television viewing to a new level, letting you see and experience things you have never seen before."

•The History Channel's *Lost Book of Nostradamus*, which drew the network's highest ratings ever when it premiered late last month, "was shot all over the world," says Nancy Dubuc of The History Channel, which began producing its programs in high-def in early 2004. "Everything we do tends to take a global, visual view of things or has an action element. (With high-definition), the program just gets a fuller cinematic experience. It's much richer, clearer and brilliant."

The masses catch on

HDTV broadcasts began soon after the first sets were sold in 1998; since 2004, most prime-time scripted network programming has been available in high-definition. Early adopters watched special events such as the Super Bowl, college basketball's Final Four and the Olympics.

But it has taken until now for the HD audience to reach critical mass. Prices for the sexy flat-panel screens have dropped from $5,000 and up in 2002 to below $1,000 for some this year. As a result, about 32% of U.S. homes — or nearly 37 million households — now have high-definition sets, the Consumer Electronics Association says.

And this is prime TV-buying season. Last year, TV sales during the week of Thanksgiving and the post-holiday shopping weekend accounted for more than 19% of all TV sales for the year, according to market research firm DisplaySearch.

Also driving sales: the government-ordered deadline on Feb. 17, 2009, for broadcasters to finish the transition to digital television. As more shoppers see the value in springing for HD sets — rather than less expensive and lower-resolution "standard-definition" digital sets — they are more likely also to be in the market for premium programming subscriptions.

So cable and satellite systems are adding HD programming as quickly as they can to woo and keep subscribers.

"There's the equivalent of an arms race to get HD programming out there," says Phil Swann, president and publisher of TVPredictions.com. "They are basically sitting there like two gunslingers, staring each other down and saying, 'I can outdo you.' "

The arrival of mainstream outlets such as History and Weather Channel, he says, also "is crucial to making (HDTV) a mainstream technology. The channels people watch most often need to be in HD so most people wouldn't hesitate to buy."

DirecTV, which has 16.3 million subscribers, has ramped up offerings with a goal of 100 by the end of the year. Additions include A&E, Bravo, Food Network, HGTV, National Geographic, Nickelodeon and USA. Satellite competitor Dish Network, which has 13.6 million subscribers, offers many of the channels that DirecTV does plus exclusive programming such as *Artland: USA* on the 15 channels that make up its Voom HD network.

"DirecTV has obviously raised the stakes, but you're going to see the cable guys respond the best they can under the technological limitations," Swann says.

In general, major cable systems — and newer fiber-optic networks such as Verizon's FIOS and AT&T's U-Verse — have added channels at a slower pace; for now, their offerings average about two dozen channels.

While satellite networks have launched additional satellites to beam down more channels to subscribers, cable systems are depending on on-demand programming.

Cox cable systems typically have local networks in HD, along with a total of 20 popular channels such as Discovery, Mojo, Starz, Showtime, HBO, ESPN, History Channel and Universal.

By year's end, many systems could have up to 50 channels, including newer ones such as CNN.

In addition to offering the HD channels for A&E, CNN, Food, HGTV, History and National Geographic in many markets, Comcast offers about 200 HD on-demand program selections including *Sunrise Earth*.

"Linear channels are not the future of television," Comcast's Harrar says. With on-demand, "you look through a menu, pick what you want and hit play. You can pause and rewind and come back later."

Stories and pictures

The drive for more programming led to the creation of the Smithsonian Channel. Cable and satellite operators, after being pitched the channel as an on-demand network, asked, "Couldn't you be a full-blown 24-hour channel?" says David Royle, former executive producer of *National Geographic Explorer* and now the Smithsonian Channel's head of programming and production. "That was all tied into the explosion of HD."

An added benefit to networks such as the Smithsonian Channel is that high-def production adds minimally to the price of non-fiction programming, which already is much less expensive than traditional Hollywood scripted productions, says Stuart Zakim of Showtime Networks, which helped create the channel with the Smithsonian Institution.

Providers and consumers alike have "a growing, insatiable appetite" for HD programming, Royle says. As the channel began producing high-definition material, he saw "lots of people buying expensive plasma screens and realizing there's very little content. It's a bit like splurging on a Ferrari and then finding out that there is no petrol. It was an extraordinary situation."

In the works for summer 2008 is *Aerial America*, which will give viewers a bird's-eye view of the USA. "We have just had a helicopter fly under the Golden Gate bridge and swoop around Alcatraz. We've just been flying up in Alaska. We are very high up in the sky, yet you can see the bears there fishing for salmon in the rivers, and you can actually catch the detail of it," Royle says. "We feel we are beginning to be able to present America in a totally new visual experience for the audience."

Eventually, HD viewers will want more than just pretty pictures, he says. "That will only go so far. You've got to be a great storyteller, too. We intend to be America's storyteller."

There's more to *Sunrise Earth* than meets the eye, says producer David Conover, who has a new crop of sunrises coming to Discovery's HD Theater in January. Earlier this year, Conover and his Camden, Maine-based production team traveled to Ireland, Australia, Hawaii, New Zealand and the South Pacific to capture new episodes that will air in January.

"We really want to give the illusion that there is a camera there, untended," he says. "But if you look at it over an hour show there may be 100 edits. If they think it is just one camera looking at the natural world, then we have succeeded."

Beyond *Sunrise Earth*, Conover says he has some new HD projects in the works that fit into this new growing genre of "experiential television."

"It has just been wonderful to work with something that is really very much unlike the rest of television," he says.

Find this article at:
http://www.usatoday.com/tech/products/2007-11-25-HDTV-main_N.htm

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December 14, 2007

THE BRIDGE
Connecting Information, Entertainment and Communications

Publication Archive - The Retail BRIDGE - November 19, 2007

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Headlines for Monday, November 19, 2007:

Is Broadband The Future Of TV?

According to a report released last week by market research firm In-Stat, more than 16 million U.S. TV households may be using their broadband service more than their TV sets within the next three years.

"Today's stable and profitable subscription TV services are facing new competition from online and mobile entertainment services, and from new, high-quality packaged good, such as HD-DVD and Blu-ray discs," said Gerry Kaufhold, In-Stat analyst. "The very nature of what consumers call 'entertainment' is undergoing a profound change in which the ability to instantly share content with friends, family members, and those connected on social networks or buddy lists is creating micro user communities that replace traditional entertainment sources such as TV programs. As more high-quality content becomes available online, savvy consumers are considering ways to reduce their monthly bills by getting everything from the internet."

The In-Stat survey found that as many as 30 percent of respondents would consider dropping their pay TV subscription and use the internet for their entertainment needs if they knew how to do it. Why? Because, even with hundreds of available channels, 42 percent of respondents said they are not getting enough of the content they want (especially international news and information) from their TV service.

Most telling of all, nearly 40 percent of the viewers that In-Stat spoke with said that the call was the first they had heard of the upcoming analog TV cutoff mandate in February 2009.

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AMD Announces HDTV Device For Macintosh

Computer hardware developer AMD last week introduced the Mac-compatible ATI TV Wonder 650 Combo USB, a plug-and-play device that allows the user to receive off-the-air ATSC/HDTV broadcasts on their computer.

"AMD is enhancing the Mac experience with HDTV support from ATI TV Wonder 650 Combo USB for Mac," said Matt Skynner, vice president, AMD Graphics Products Group. alongside cutting-edge 3D game and HD acceleration performance of ATI Radeon HD 2600 PRO and ATI Radeon HD 2400 XT."

December 14, 2007

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SkyBOX

by Evie Haskell evie@Mediabiz.com

Monday, November 5, 2007

Sharpen Your Knives

It's heeeere!!! Well, here in beta. And the wolves, nay-sayers and (dare we say?) fear-mongers are already out in force.

The occasion is the beta launch of the joint NBCU/News Corp. online venture known as Hulu (Dumb name, we agree. But we've already been over that.) While the (for now) invitation-only service has drawn raves from some significant players in the online world, it's also dra more than its fair share of sharpened edges.

"Corporate self-serving at its worst," one blogger harrumphed. "Oh goody. An utterly backward and almost totally useless offering from NBC," wrote another. Meanwhile, hacked videos from the Hulu cache are popping up across the internet. (We found 1,801 ... sans advertising ... on one site.) But worst of all, some analysts have positioned it straight in the cross-hairs of some of NBCU's and News Corp's biggest customers.

In the words of Forrester Research analyst James McQuivey, "As consumers get more acces to their favorite TV shows and movies through their internet connection, they're going to st asking themselves why they're paying their cable bills. It's time for cable companies and tel TV providers to go on fear watch."

That's an argument we've made ourselves about internet video. And, from the vantage of o four-year-old Mac, we've got to tell you that the programming from Hulu is remarkably goo Quick downloads, smooth streaming, crisp picture and clear audio. But to our way of thinkir the service has one fatal flaw ... and it's one that bad blogs, cautious analysts and the like have yet to touch on:

The big thinkers at Hulu have built their snazzy new web service on the back of an old, and increasingly discredited, business model. At least so far Hulu says it will make money based advertising. Not new, integrated, targeted etc. advertising, but ye olde 30- to 60-second sp forced on viewers by way of programming breaks. If we've learned anything in the past few years, it's that viewers don't much like these ads ... and increasingly they're escaping by w of DVRs, iPod videos and the like. We don't think they're going to be anxious to return to th ad-littered days of yesteryear via their computers. Which suggests that, at least in this iteration, Hulu sits on one very shaky foundation.

Make a Commer

SkyBOX Archives

THE WALL STREET JOURNAL. ONLINE

November 8, 2007

Cable's Picture Gets Fuzzier

Market Leader Comcast's Stock Is Hit as Phone Companies Make Gains

By DIONNE SEARCEY
November 8, 2007; Page B3

In the ever-intensifying wars between the cable and phone companies, someone is always up, or always down. Right now it is cable that is perceived as being on the defensive.

And when that happens, **Comcast** Corp. takes a hit. The largest cable operator by number of subscribers, it often bears the highest expectations of the industry. Investors hammered Comcast's stock to what had been a 52-week low after the Philadelphia-based company's third-quarter results showed slowdowns in its ability to add customers, and shares have since gone lower.

The company blamed stiffer competition and softness in the economy for its disappointing growth in most subscriber categories. One analyst called the results "death by a thousand cuts."

"None of the numbers represented a material miss but every one had just a whiff of softness and left investors nervous about Comcast's longer-term growth story," said the analyst, Craig Moffett at Sanford C. Bernstein.

Comcast fell 2.9%, or 60 cents, to $20.09 in Nasdaq Stock Market 4 p.m. composite trading.

Phone companies are starting to pose a serious threat to cable companies and Comcast is vulnerable. **Verizon Communications** Inc. and **AT&T** Inc. are offering new TV services and fast Internet connections with big plans to expand into markets that Comcast serves. Comcast has publicly acknowledged that Verizon already is stealing video customers.

Worries are mounting that as competition heats up, Comcast has been too passive. A report issued by Pali Research last week cites remarks from Comcast Chief Executive Brian Roberts in May 2005 as evidence of "how cable got into the position it is today." Mr. Roberts told a Pali interviewer back then Comcast was "not out to hurt other people's businesses." The report says the cable industry "is now looking at an all-out war."

Comcast executives say they aren't nervous. They point out that 18 months ago they predicted they would start feeling the impact of competition with phone companies right about now.

"Our job is to keep our heads down and continue to put good operating results on the board," said Steve Burke, chief operating officer of Comcast, in an interview. "If we continue to do that the stock will take care of itself."

As for detractors who think the company hasn't been aggressive enough in the past, he said: "Different times call for different strategies and we will be plenty aggressive where we need to be."

Comcast plans to fight back against satellite companies that were offering deep discounts earlier in the year as well as phone companies that enter cable turf and offer lower prices for bundled TV, phone and Internet services. But executives haven't detailed specific plans other than to say they would sharpen their marketing for their video and high definition offerings.

"We are going to start shouting that from the rooftops to the consumer perhaps more strongly than we have," Mr. Roberts said on a third quarter earnings call with analysts.

While investors laud efforts to market more aggressively, they also say they fear Comcast could make too bold of a move with an expensive acquisition.

For starters, they're nervous Comcast could try to buy a wireless company, such as **Sprint Nextel** Corp. which would help the company enter a growth market. Comcast bought wireless spectrum last year as part of a consortium of cable companies, but the company says a wireless move isn't imminent.

"Wireless may be a great business but it's not probably a great business for the fifth player into the market," says Mr. Moffett. "It makes people nervous just knowing that it (the spectrum) is there."

And investors are perpetually worried Comcast could try to buy a content company. Comcast made an ill-fated effort to acquire Walt Disney Co. in 2004, largely to acquire Disney's content for its video-on-demand service. The move spooked investors.

"The market has already seen them go after a major entertainment-content company and interpreted that as a repudiation of their base business," said Oppenheimer & Co. analyst Thomas Eagan. "The market wants them to stick to fundamentals."

Mr. Eagan said the company needs to roll out new services while taking care not to alienate their basic video customers. Comcast reported a 12% drop in new digital-video subscribers in the third quarter from the prior year. Total basic-video subscribers fell by 65,000 to 24.2 million. Over the same period a year ago those subscribers rose by 11,000.

Comcast says that while basic video sales may be experiencing a slowdown, its other businesses have huge growth potential.

The cable company wants to lure customers with its phone service, which it began to roll out broadly at the start of last year. Comcast says that for every video subscriber it has lost, it has gained 10 phone subscribers. As of the end of the third quarter, 9.4% of the 40.3 million homes offered phone service have subscribed, leaving considerable room for growth. Phone service is profitable because it uses the company's existing network. By contrast, phone companies are spending billions to update their networks with fiber optics for their new TV and other services. If cable can sit back and enjoy the revenue, the industry will be in good shape. Cable companies insist they won't have to build more infrastructure to play catch up with the telecoms, but if that scenario changes the picture looks darker.

Comcast has hired roughly 750 sales people and trained about 1,200 technicians for its nascent plan to offer services to small and midsize businesses. It has the potential to serve five million businesses in its footprint and estimates that next year commercial revenue will show positive signs.

Comcast also expects growth from its broadband offering and says it is beating Verizon particularly in areas where Verizon has yet to deploy FiOS, a network that uses fiber optics to deliver television, faster Internet services and phone. Mr. Burke says high-speed Internet is a growth business despite signs that new subscriptions for all the companies are slowing. Mr. Burke predicts that eventually 80% of homes in the U.S. will have broadband, up from the roughly half of homes that do now.

"That could power our business for years to come," he said.

Write to Dionne Searcey at dionne.searcey@wsj.com[1]

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THE WALL STREET JOURNAL. ONLINE

October 24, 2007

Verizon's FiOS Challenges Cable's Clout

High-Speed TV Service Starts Meeting Promise; Cablevision Vote Impact

By PETER GRANT and DIONNE SEARCEY

October 24, 2007; Page A12

After years of promises, **Verizon Communications** Inc. is making significant headway with its $18 billion effort to roll out television and faster Internet service, posing a difficult new competitive threat for the cable industry.

Two years after launching its FiOS service, Verizon has signed up half a million TV subscribers and, as of the second quarter, was adding 2,600 customers per business day, the company says. In the parts of the Dallas area where FiOS service is offered, a quarter of households are taking it, Verizon estimates.

PLUGGED IN

- **Emerging Service:** Verizon's FiOS, which pipes TV, Internet and phone service to customers' homes over fiber-optic lines, is gaining traction.
- **New Threat:** FiOS is threatening to ratchet up competition with cable companies.
- **Assessing Impact:** FiOS could be a factor in today's Cablevision buyout vote.

David Barden, an analyst with Banc of America, predicts that Verizon will have two million FiOS TV customers by the end of 2008, ranking it as the ninth-biggest provider of television service in the country, after the top six cable operators and the two main satellite TV firms.

Cable industry executives, who two years ago scoffed at Verizon's plans, have changed their tune. "Verizon is real," Steve Burke, **Comcast** Corp's chief operating officer, said last month at an investor conference. "Verizon is taking video customers from us."

Verizon's growing market clout is a complicating factor in today's vote by shareholders in **Cablevision Systems** Corp. on whether to accept the Dolan family's $10.6 billion offer to take the company private. While some prominent institutional shareholders have warned they may vote against the deal, believing the price isn't high enough, others are worried by the long-term impact of tougher competition.

Proponents of the offer note that Cablevision has far more exposure than any other cable operator to Verizon's FiOS network. The outcome of the vote appears to be too close to call. Cablevision declined to comment.

FiOS uses fiber optics to deliver television, faster Internet services and phone. Like similar cable packages it typically costs a little under $100 a month for all three services. Cable systems use fiber-optics in their networks as well but depend on coaxial cables to get the service into homes.

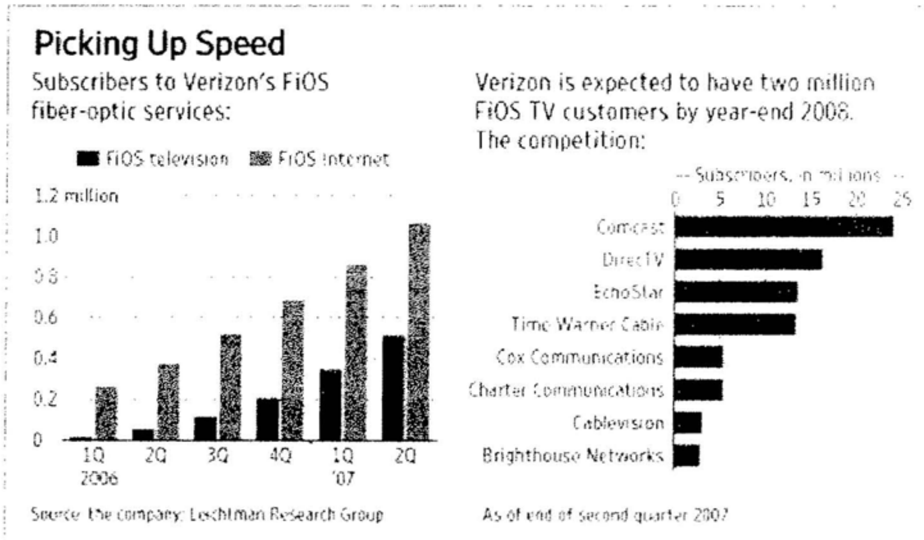
The FiOS network has far more capacity for high definition TV channels, online games and downloading and uploading files. It also offers a few premium features that cable companies don't offer, like digital video recorders that can pipe recordings to different TVs in the house.

On a national level, FiOS promises to change the balance of power among cable, telephone and satellite TV companies over which one can offer consumers the most attractive combinations of the latest TV, phone and high-speed Internet services. Until recently, cable companies were winning. They have about a 54% share of the high-speed Internet market and were much faster in breaking into phone service than phone companies were in offering TV. About 12 million of the roughly 90 million households that can get phone service from their cable operators subscribe to that service.

Phone company **AT&T** Inc. has launched TV service and has been upgrading its high-speed Internet network. But AT&T has been hoping to get by with a less expensive Internet technology. That service, known as U-verse, has been plagued with delays and software problems, although many analysts appear to have been mollified. AT&T announced yesterday that it has 126,000 U-verse customers. The company is contemplating buying a satellite-TV firm. (Please see related article[1].)

Already Wall Street has gone negative on cable stocks because of concern over FiOS as well as the slowing growth of the high speed Internet business and the rollout of more high definition TV stations by satellite companies. Comcast is now trading in the $23 range, down from its 52-week high of over $30 a share in January. Verizon's stock, on the other hand, is trading in the $45 range, its highest level since early 2002, with some on Wall Street partially crediting FiOS. Shares of Verizon rose 48 cents, or 1.1%, to $44.81 in 4 p.m. in New York Stock Exchange composite trading yesterday.

Verizon is spending heavily to roll out the new service. The company says it costs $842 to connect a home with FiOS, and that doesn't include Verizon's huge marketing budget for the program. In contrast, Cox Communications Inc., the third biggest cable operator, spends about $200 to $300 to connect a customer. Verizon also has to pay more to buy programming from TV networks than cable operators.



Cable operators contend that, with network upgrades, they can deliver the same quality, content and new features as Verizon. For example, CableLabs, the industry's research and development arm, is developing a next generation of broadband technology that backers say can deliver faster broadband speeds than Verizon is offering.

To be sure, the damage FiOS does to cable's business could be limited. Verizon at this point plans to offer the service to nearly three quarters of the households in its territory, but not all.

Still, Cablevision clearly is in the front lines of the FiOS battle. Already 25% of the homes it serves are exposed to FiOS service compared with about 4% for Comcast and **Time Warner Cable** Inc., according to a Citigroup Research estimate. While company executives have played down the impact of FiOS, the company in the summer revised its guidance on subscriber growth downward, predicting it to be flat instead of growing 1% to 2%.

Typical of those who have defected from Cablevision is Richard Recco, of Franklin Square, N.Y., one of thousands of residents of the New York City area who have dropped Cablevision for FiOS. Frustrated with Cablevision's service, Mr. Recco says he was quick to switch. Now he says he loves Verizon's clear picture and its ability to play different recorded material in multiple rooms.

However, Mr. Recco complains that the new service has had some glitches. Technicians have been to his home nearly a dozen times since FiOS was installed in December.

Cablevision investors who are opposed to the Dolan's plan say they aren't too concerned about FiOS. They predict that the company will more than make up for the loss of TV subscribers by taking telephone business away from Verizon. Also, cable companies in the past have successfully battled back against so-called overbuilders -- companies that have built competing wired TV systems.

"FiOS is just another overbuilder and cable has trashed them," says Mario Gabelli, whose Gamco Investors Inc. owns an 8.3% stake in Cablevision and who is planning to vote "no" today to taking the company private.

But a recent analysis by Jason Bazinet, analyst with Citi Investment Research, found that cable customers are signing up for FiOS TV at four times the rate that cable customers are signing up for cable phone.

Mr. Bazinet's advice for Cablevision investors: "Take the money and run."

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