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. 07-207

COMMENTS OF AT&T[1]

I. Introduction and Summary.

In 1984, Congress enacted the Cable Communications Policy Act of 1984[2] with the express objectives of, *inter alia,* "promot[ing] competition in cable communications" and "assur[ing] . . . the widest possible diversity of information and services to the public."[3] Eight years later, Congress amended that act in order to further "promote increased competition in the cable television and related markets" and thereby "increase[] consumer protection."[4] To that end, it specifically mandated that the Commission adopt policies and rules "to promote the public interest, convenience and necessity by increasing competition and diversity in the multichannel video programming market" and to spur "continuing development of communications technologies."[5] Only now, a quarter-century after Congress first directed the Commission to promote competition in the market for multichannel video programming, have

[1] AT&T Inc. submits these comments on behalf of itself and its wholly owned subsidiaries.

[2] Cable Communications Policy Act of Act of 1984, Pub. L. No. 98-549, 98 Stat. 2780 (1984) (Cable Act).

[3] 47 U.S.C. § 521(4), (6).

[4] Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992) (1992 Cable Act).

[5] 47 U.S.C. § 528(a), (c).

nascent wireline competitors to incumbent cable operators begun to emerge to provide the sort of real, head-to-head competition envisioned by Congress.

AT&T, for example, has launched Project Lightspeed, investing billions of dollars to deploy new fiber-optic and state-of-the-art broadband facilities across its service territory, to deliver its U-verse TV Service (U-verse) to customers. By the end of 4Q08, more than 17 million living unites were passed by AT&T's advanced fiber network.[6] U-verse is an IP-based platform capable of providing a robust triple-play offering of voice, high-speed Internet access, and video services, bringing much needed consumer choice and competition to incumbent cable operators. As of the end of 4Q08, U-verse was available in 82 MSAs across the United States, and AT&T continues to expand on an on-going basis. Consumers have plainly demonstrated their desire for a real choice of wireline video providers, with 1.045 million subscribers signing up for U-verse video by the end of 4Q 2008, more than 90 percent of which bundle AT&T U-verse High Speed Internet. In 2008, AT&T U-verse TV ranked highest in customer satisfaction in the North Central, South and West regions in J.D. Power and Associates's Residential Television Service Provider Satisfaction Study. Also in 2008, U-verse Total Home DVR was honored with a TelcoTV Vision Award for service provider innovation. And Frost & Sullivan named AT&T U-verse its 2009 Consumer Product of the Year.

While these gains may be impressive, wireline competition to incumbent cable operators, which the Commission has recognized is the only form of competition that effectively constrains

[6] The Commission's NOI seek data regarding the status of competition in the market for video programming as of the end of 2Q08. *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, MB Docket No. 07-269, Supplemental Notice of Inquiry, FCC 09-32 (rel. Apr. 9, 2009) ("Supplemental *Notice*"). At the end of that quarter, AT&T U-verse had 549,000 subscribers in 53 MSAs, 85 percent of which bundled with Internet services. In addition, more than 11 million living units were passed by AT&T's advanced fiber network at that time.

incumbent cable operators' prices,[7] is still only in the early stages of development, as confirmed by the continued escalation of average cable rates nationwide. In January, for example, the Commission reported in its *2009 Cable Industry Price Report* that cable rates have continued to increase at rates significantly above the rate of inflation, except where cable operators confront competition from wireline video service providers. Specifically, it found that the average monthly price of expanded basic service had increased by 3.9 percent in the 12 months ending January 1, 2006, by 4.6 percent in the 12 months ending January 1, 2007, and by 5 percent over the 12 months ending January 1, 2008; and that, between 1995 and 2008, the price for such service had increased 122.1 percent – more than three times the rate of inflation.[8] Those trends are continuing. Moreover, despite the efforts of AT&T and other new wireline video service providers (such as Verizon FiOS), incumbent cable operators continue to retain the vast majority of MVPD subscribers.[9]

The need for continued growth in wireline competition for the delivery of video services could not be more obvious. While the Commission has taken vital steps to promote such competition (*inter alia*, by extending its program access rules, adopting rules to prevent

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[7] *Implementation of the Cable Television Consumer Protection and Competition Act of 1992; Statistical Report on Average Rates for Basic Service, Cable Programming Service, and Equipment,* MM Docket No. 92-266, Report on Cable Industry Prices, DA 09-53, ¶ 3 (rel. Jan. 16, 2009) (*2009 Cable Industry Price Report*) ("Cable prices decrease substantially when a second wireline cable operator enters the market. It does not appear from these results that DBS effectively constrains cable prices. Thus, in the large number of communities in which there has been a finding that the statutory test for effective competition has been met due to the presence of DBS service, competition does not appear to be restraining price as it does in the small number of communities with a second cable operator."). *Id.* at ¶ 14 ("In markets with two competing cable operators, the results show that the incumbent operator charges 14.1 percent less, on average, all other things held constant, than operators charge in markets where a second cable operator is not present.").

[8] *Id.* at ¶ 2 (noting that the price of expanded basic service had grown from $22.35 to $49.65, an increase of 122.1 percent, compared with an increase in the Consumer Price Index of 38.4 percent).

[9] In its recently released *Thirteenth Annual Report on Cable Competition*, for example, the Commission found that, as of June 2006, over 68 percent of MVPD subscribers obtained video programming services from cable operators. *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, MB Docket No. 06-189, Thirteenth Annual Report, FCC 07-206, at ¶ 8 (rel. Jan. 16, 2009) (*Thirteenth Annual Report on Cable Competition*).

franchising authorities from imposing unreasonable requirements that create barriers to entry, and prohibiting incumbent cable operators and others from enforcing arrangements granting them exclusive access to MDUs), further action is necessary. Most importantly, in the area of program access, further action by the Commission is necessary to ensure that incumbent cable operators cannot abuse their control over critical video programming assets (such as regional sports programming) to prevent or significantly impede competitors from being able to offer a viable competitive alternative. Specifically, the Commission should complete action in its open program access docket and, as AT&T and others proposed, adopt a rule pursuant to section 628(c) extending the prohibition against exclusive access arrangements to terrestrially delivered programming.

In March, the Media Bureau rejected AT&T's program access complaint against Cox for unlawfully withholding must-have Padres programming in San Diego.[10] As AT&T showed in its complaint and its application for review of the Bureau's decision, Cox's refusal to license that programming to AT&T and other competitive video providers constitutes an unfair method of competition the purpose and effect of which is to hinder significantly AT&T's ability to offer a competitive video service (one that includes satellite delivered programming) to consumers in San Diego, and thus, under existing Commission precedent, violates section 628(b). The Bureau's refusal to apply that precedent regarding the scope of section 628(b) and redress Cox's unlawful refusal to deal emphasizes the need for prompt Commission action pursuant to section 628(c) to adopt a rule closing the purported "terrestrial loophole" and thus prevent incumbent cable operators from using their control over must-have programming to strangle nascent

[10] *AT&T Services Inc. and Pacific Bell Telephone Company d/b/a SBC California d/b/a AT&T California v. CoxCom, Inc.*, CSR-8066-P, Memorandum Opinion and Order, DA 09-530 (rel. Mar. 9, 2009) (*AT&T Program Access Complaint Order*), *application for review pending*. .

wireline video competition in the crib. Failure to do so could thwart Congress's twin goals of promoting video competition and further deployment of broadband to all Americans.

II. The Commission Should Close the So-Called Terrestrial Loophole to Prevent Cable Operators from Inhibiting Video Competition by Denying New Entrants Access to Must-Have Programming.

In its 2007 order extending its program access rules, the Commission correctly recognized that incumbent cable operators retain the incentive and ability to inhibit video competition by denying new entrants access to must-have, affiliated programming that subscribers value most highly.[11] In particular, it found that certain programming, including regional sports programming, is "non-substitutable programming . . . necessary for competition in the video distribution market to remain viable," and, without which, an "MVPD's ability to compete will be significantly harmed."[12] That is all the more true now that new wireline entrants, like AT&T, are establishing a foothold in markets dominated by former monopoly cable incumbents, as then-Commissioner Copps rightly observed.[13] Those findings, and the Commission's concomitant conclusion that it should extend the prohibition against exclusive program access arrangements to promote both viable competition for video services and further investment in broadband, apply with equal – if not greater – force to terrestrially delivered programming.

AT&T's own experience confirms as much. In June 2007, AT&T launched U-verse in San Diego, in competition with incumbent cable operators Cox and Time Warner, which, in their largely non-overlapping service territories, serve a combined 87.8 percent of all MVPD

[11] *Implementation of the Cable Television Consumer Protection and Competition Act of 1992, et al.*, MB Docket Nos. 07-29, 07-198, Report and Order and Notice of Proposed Rulemaking, 22 FCC Rcd 17791, ¶ 29 (2007)(*Program Access Extension Order*).

[12] *Program Access Extension Order* at ¶ 39.

[13] *Id.*, Statement of Commissioner Michael J. Copps, Approving in Part and Concurring in Part.

subscribers in the DMA.[14] In order to compete with these incumbents, AT&T U-verse must include the popular "programming networks that are demanded by MVPD subscribers and for which there are no adequate substitutes,"[15] which, in San Diego, includes live coverage of Padres baseball games, which is available exclusively on Cox-4 – a regional sports network owned by Cox.[16] Accordingly, in October 2005, AT&T began its efforts to license Cox-4 in San Diego.[17] Despite repeated requests, Cox steadfastly refused to license Cox-4 to AT&T, stating that it was satisfied its level of distribution of Cox-4 and that Cox was not interested in licensing Cox-4 to "non-wireline or telco cable providers."[18] Cox acknowledged that it made Cox-4 available to "traditional wireline cable" providers in San Diego, but asserted it had no obligation to make that programming available to AT&T and other non-cable competitors because it was not satellite-delivered.[19]

In October 2008, AT&T brought a program access complaint against Cox to redress its repeated refusal to license its must-have Padres sports programming to AT&T in San Diego.[20] In its complaint, AT&T established that Cox's conduct was an unfair method of competition the purpose and effect of which was to significantly hinder AT&T's ability to offer a viable multichannel video programming service (which includes satellite-delivered programming) in

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[14] http://www.tvb.org/nav/build_frameset.asp?url=/rcentral/index.asp.

[15] *Program Access Extension Order* at ¶ 39.

[16] *See* AT&T Complaint at ¶¶ 2, 30-38.

[17] *Id.* at ¶¶ 19-29.

[18] *Id.* at ¶27.

[19] *Id.* at ¶ 29.

[20] AT&T Complaint.

competition with Cox, in clear violation of the express terms of section 628(b) of the Act.[21]

Specifically, AT&T showed that:

- Cox has repeatedly refused to license its exclusive live Padres sports programming to AT&T.[22]

- In so doing, Cox deliberately sought to limit competition to its cable operations in San Diego – as demonstrated by its extensive advertising touting its exclusive access to Padres programming,[23] and its refusal to license that programming to AT&T and other head-to-head competitors to Cox, even as it licenses Cox-4 to Time Warner (which provides incumbent cable services in areas adjacent to, but not overlapping, Cox's San Diego footprint).[24]

- Cox's refusal to license Cox-4 to AT&T has, in fact, significantly hindered AT&T's ability to offer a competitive video programming service in San Diego, as Cox intended. For example, AT&T provided studies and consumer polling data establishing that Cox's refusal to license Padres programming has significantly interfered with AT&T's ability to attract and retain subscribers in San Diego and thus to provide satellite-delivered programming to consumers.[25] These data thus confirmed the Commission's prior conclusion that Cox's withholding of Padres programming has adversely affected video competition in San Diego.[26]

In its answer, Cox argued that "a denial of terrestrially-delivered programming is lawful under Section 628(b) and cannot be the basis for an unfair act or practice."[27] Cox thus maintained that it could withhold Padres programming with impunity, irrespective of whether its refusal to deal was intended to or had the effect of significantly hindering competition in San Diego.

[21] *See generally id.* and Reply.

[22] AT&T Complaint at ¶¶ 19-29.

[23] *Id.* at ¶ 40.

[24] *Id.* at ¶ 27.

[25] *Id.* at ¶¶ 30-38; Reply at 30-32.

[26] *Program Access Order* at ¶ 39 (noting that lack of access to Cox's RSN programming in San Diego had resulted in a 33 percent reduction in the number of households subscribing to DBS services).

[27] Cox Answer at 4.

In March, the Media Bureau released a decision rejecting AT&T's complaint.[28] The Bureau acknowledged that the Commission has expressed "significant concern" that the withholding of terrestrially delivered cable affiliated programming could adversely impact video competition, and found empirical evidence that Cox's withholding of Cox-4, in particular, has had a material adverse impact on video competition in San Diego.[29] The Bureau nevertheless rejected AT&T's claim that Cox's actions violated section 628(b) without even considering AT&T's legal argument that section 628(b), as authoritatively construed by the Commission in the *MDU Order*, broadly prohibits any unfair or anticompetitive conduct that significantly hinders video competition regardless of whether such conduct involves withholding of satellite-delivered programming.[30] It did so based on decisions that predated the *MDU Order* and did not address the legal theory on which AT&T's complaint was based.[31] The Bureau further asserted that it was appropriate to dismiss AT&T's complaint because the Commission already is considering in the program access rulemaking whether it should extend the program access rules to all terrestrially delivered cable-affiliated programming pursuant to section 628(c).[32]

The Bureau's dismissal of AT&T's complaint without considering whether the facts alleged by AT&T constitute a violation of section 628(b), as interpreted by the Commission in the *MDU Order*, was plain error, and AT&T therefore has sought Commission review of the

[28] *AT&T Program Access Complaint Order*.

[29] *Id.* at ¶ 14.

[30] *Exclusive Service Contracts for the Provision of Video Services in Multiple Dwelling Units and Other Real Estate Developments*, MB Docket No. 07-51, 22 FCC Rcd 20235 (2007) (*MDU Order*).

[31] *AT&T Program Access Complaint Order* at ¶¶ 13-16.

[32] *Id.* at ¶ 16.

Bureau's decision.[33] While AT&T is confident the Commission will grant AT&T's application for review, the Bureau's decision confirms the need for prompt Commission action to adopt a rule closing the supposed "terrestrial loophole" in its program access rules. AT&T elsewhere has demonstrated that the Commission has ample authority under the Act – including section 628, Title I and other provisions – to extend the program access rules to terrestrially delivered programming,[34] and will not repeat itself here. Failure to do so would permit incumbent cable operators to use their control over must-have programming to prevent wireline new entrants, like AT&T, and others from offering a viable competitive alternative to cable. Accordingly, the Commission should take action in its open program access docket to extend the prohibition against exclusive access arrangements to terrestrially delivered programming, and thus fulfill its congressionally-mandated obligations to promote video competition and, concomitantly, further deployment of broadband.

Respectfully submitted,

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[33] *AT&T Services, Inc. and Pacific Bell Telephone Company d/b/a SBC California d/b/a AT&T California v. CoxCom, Inc.*, File No. CSR-8066-P, Application for Review (filed April 3, 2009).

[34] *See* Comments of AT&T Inc., *Review of the Commission's Program Access Rules and Examination of Programming Tying Arrangements,* MB Docket No. 07-198 (filed Jan. 4, 2008).