

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

In the Matter of)	
)	
Annual Assessment of the Status of)	MB Docket No. 07-269
Competition in the Market for the)	
Delivery of Video Programming)	

COMMENTS OF COMCAST CORPORATION

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COMMENTS OF COMCAST CORPORATION

Comcast Corporation (“Comcast”) hereby responds to the above-captioned Notice of Inquiry (“*Notice*”).¹ Profound changes have occurred in the nearly three years since the Commission last surveyed the video marketplace. Video is now being delivered via a variety of platforms and devices -- cable, satellite, telco, broadcast, Internet, mobile devices, gaming consoles, and more -- all competing for revenues and for consumers’ attention. Many of these sources did not exist (or barely existed) three years ago. Consumers demand the video they want, when and where they want it, and the marketplace is delivering as never before.

I. INTRODUCTION AND SUMMARY

Comcast is pleased to assist the Commission in its video competition inquiry. These comments illustrate how the video options available to consumers have continued to expand. Year after year, in each of its video competition filings, Comcast consistently has reported to the Commission about the dynamic and fast-paced competition that it faces in the battle for subscribers in the video marketplace. That competition continues to intensify.

¹ *In re Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Notice of Inquiry, 24 FCC Rcd. 750 (2009) (“*Notice*”); see also *In re Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Supplemental Notice of Inquiry, 24 FCC Rcd. 4401 (2009).

As Comcast has previously noted, to serve its statutory purpose of informing Congressional deliberations, it is essential that the Commission's video competition report objectively survey the entire video landscape and fully and fairly detail the abundance and diversity of competition that characterize the video marketplace. This task is especially important this year, as the Commission resumes its congressionally-assigned annual survey of competition in the video marketplace by collecting data for 2007, 2008, and 2009 -- the three most dynamic years ever (so far) in the video marketplace.²

The statutorily-mandated annual video competition report has been stalled for nearly three years.³ During this pivotal period, as cable operators were continuing the ongoing battle for subscribers with robust MVPD competition presented by DirecTV and Dish Network, cable operators were also facing fierce new MVPD competitors with tremendous resources, as well-established telephone companies continued to introduce facilities-based video services. And competition among traditional cable operators, DBS providers, overbuilders, and telephone companies increasingly involves bundles of services -- packaging video, voice, Internet, and sometimes wireless services together -- all designed to deliver maximum value to customers who choose a particular provider. At the same time, video delivered over the Internet blossomed, with increasingly more consumers viewing programming online (from fixed or mobile locations) every day. As explained by one observer:

² Despite unprecedented competition and rapid marketplace change, the cable industry has faced three years of regulatory challenges, which have skewed competition, limited technology choices, and increased costs for consumers. In addition, over the past year, all marketplace participants have faced the challenges of an economic downturn. With the Nation and the Commission enjoying welcome new leadership, the time is ripe for a fresh review of video competition and video regulation.

³ See Barbara Esbin, *A Tale of Two Reports*, Progress on Point (Jan. 2009), available at <http://pff.org/issues-pubs/pops/2009/pop16.1taleoftworeports.pdf>; Barbara Esbin & Adam Thierer, *Where Is the FCC's Annual Video Competition Report?*, Progress Snapshot (May 2008), available at <http://www.pff.org/issues-pubs/ps/2008/ps4.11whereisFCCvidcompreport.html>.

[T]he market for the delivery of video programming continues to become more and more competitive, both from traditional MVPDs like DBS and telephone company video providers, and increasingly, through video programming available over the Internet This increase in competition has led to greater consumer choice among distributors, the number of video programming channels offered and the array of services offered by each type of provider.⁴

Meanwhile, the viewing of video reached record levels, with the average American watching 151 hours of television per month at the end of 2008.⁵ In addition to watching more television overall, many consumers have become accustomed to watching video in new ways, including on the device of their choosing, at the time of their choosing, and at the location of their choosing. Increasingly, consumers are dividing their attention between more than one screen at a time, with laptops on their laps and iPhones in their hands, while the television is on.

Informed commentators from across the legal, business, and financial spectrum recognize the frenzied pace of competition present in the video marketplace. For example, the U.S. Court of Appeals for the Second Circuit has characterized competition between cable operators and DBS providers as “extremely fierce.”⁶ Many industry watchers and journalists perceive seismic changes:

- [R]unning 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.⁷
- There’s no doubt the multiplatform business is getting bigger and much more competitive. Deals, company milestones and other strategic maneuvers . . . demonstrate that companies within this industry aren’t going to give up market share without a fight.⁸

⁴ Esbin, *A Tale of Two Reports*, *supra* note 3, at 4-5.

⁵ Todd Spangler, *TV Watching Hits Heights in Q4: Nielsen*, Multichannel News, Feb. 23, 2009 (noting that, “[a]mong the ‘three screens,’ TV remains vastly more popular for viewing video”), *available at* http://www.multichannel.com/article/179727-TV_Watching_Hits_Heights_In_Q4_Nielsen.php.

⁶ *Time Warner Cable, Inc. v. DIRECTV, Inc.*, 497 F.3d 144, 149 (2d. Cir. 2007).

⁷ Denise Caruso, *Media Innovations, Leaping from Lab to Screen*, N.Y. Times, June 10, 2007, *available at* <http://www.nytimes.com/2007/06/10/business/yourmoney/10frame.html>.

- It's a fresh dawn for television. . . . Cable and satellite systems are adding HD programming as quickly as they can to woo and keep subscribers. "There is the equivalent of an arms race to get HD programming out there. They are basically sitting out there like two gunslingers, staring each other down and saying 'I can outdo you.'"⁹
- The 3Q results indicate the rapid increase in competition faced by the cable MSOs, both from DBS providers aggressively marketing their high-definition capabilities and from RBOCs' ability to offer digital TV services and service bundles. . . .¹⁰
- Today's stable and profitable subscription TV services are facing new competition from online and mobile entertainment services, and from new, high-quality packaged goods, [such as Blu-ray discs]. The very nature of what consumers call "entertainment" is undergoing a profound change. . . .¹¹
- We find it surprising the FCC would propose to re-regulate cable given increasing competition (DBS, RBOCs and over time, web video). In fact, cable basic subs have been flat to down since '00. The FCC's action also comes in stark contrast to its support of RBOC mergers.¹²
- As consumers get more access to their favorite TV shows and movies through their internet connection, they're going to start asking themselves why they're paying their cable bills. It's time for cable companies and telco TV providers to go on fear watch.¹³
- Internet video as a replacement for traditional multichannel services remains a wildcard.¹⁴
- The TV industry is going through a huge shift. It's great to have a front-row seat.¹⁵
- [T]here are plenty of options available today and more are coming.¹⁶

(...footnote continued)

⁸ SkyFILES: *It's Getting Competitive Out There*, SkyREPORT.com, May 25, 2007, available at http://www.mediabiz.com/news/articles/?edit_id=929.

⁹ Mike Snyder, *Wide World of HDTV; Picture Clarity Gives Rise to New Channels*, USA Today, Nov. 26, 2007, at 1D (quoting Phil Swann, president and publisher of TVPredictions.com). This HD "arms race" is no longer limited to traditional cable operators and DBS providers, with several telephone companies also providing many HD options as described in more detail in section II.B below.

¹⁰ Pike & Fischer Broadband Advisory Services 12-2, *Cross-Industry Analysis: Cable vs. DBS Operators 5* (3d Quarter 2007).

¹¹ *Is Broadband the Future of TV?*, Retail BRIDGE, Nov. 19, 2007 (quoting Gerry Kaufhold, Analyst, In-Stat), available at http://www.mediabiz.com/news/articles/?publication_id=2&release_id=260.

¹² Spencer Wang et al., Bear Stearns, *Just When You Thought It Couldn't Get Worse . . . The FCC Prepares To Impose New Regulation 1* (Nov. 11, 2007).

¹³ Evie Haskill, *SkyBox: Sharpen Your Knives*, SkyREPORT.com, Nov. 5, 2007 (quoting James McQuivey, Analyst, Forrester Research), available at http://www.mediabiz.com/news/articles/?edit_id=5557.

¹⁴ Robert Serrano & Mark Rondeli, SNL Kagan, *Multichannel Trends: Telcos Continue To Increase Video Market Share*, Multichannel Market Trends, Mar. 9, 2009.

¹⁵ Arik Hesseldahl, *Boxee Battles Big Media*, Bus. Week, May 13, 2009 (quoting Boxee founder Avner Ronen), available at http://www.businessweek.com/print/technology/content/may2009/tc20090512_237515.htm.

- The struggle between cablecos and telcos continues to rage. It's a natural battle, really.¹⁷
- 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.¹⁸
- Hollywood is now blessed with a plethora of ways to reach the audience, from traditional distribution channels like cable to online video streams and downloads. . . . The barriers that have long inhibited Internet-based TV are beginning to crumble. . . . [U]nless they find ways to adapt very quickly, telecoms and cable companies will lose. Messy? Absolutely. The process will [] prove to be another example of long technological gestation followed by abrupt, even breathtaking, change. This is "creative destruction" at its best.¹⁹
- If the past six months have been a nightmare for most investors, it has been a massive wake-up call to big media companies. The recession is forcing them to rethink their approach to the Web.²⁰
- The battle for TV customers is getting personal. Instead of merely trumpeting their own services, companies including Time Warner Cable, DirecTV Group and Verizon Communications are taking public shots at their rivals' offerings. . . .²¹
- Life may soon get even harder for satellite and cable companies. Already under pressure from phone companies eager to enter the video market, operators like Comcast and DirecTV are facing accelerating competition from a host of upstarts eager to deliver movies and TV programming on demand.²²

(...footnote continued)

¹⁶ Marguerite Reardon, *Dreaming of Cutting the Subscription Cord*, Digital Media, Mar. 9, 2009, available at http://news.cnet.com/8301-1023_3-10189658-93.html?part=rss&subj=news&tag=2547-1_3-0-20.

¹⁷ Tim Young, *Access Technology Rumble: Cableco vs Telco*, Pipeline 1 (Vol. 5, Mar. 2009), available at http://www.pipelinepub.com/0309/EC1_1.html.

¹⁸ Peter Grant & Dionne Searcey, *Verizon's FiOS Challenges Cable's Clout*, Wall St. J., Oct. 24, 2007, at A12.

¹⁹ Gary Morgenthaler & Herve Utheza, *Winning the Broadband TV Game*, Bus. Week, Jan. 28, 2008, available at http://www.businessweek.com/technology/content/jan2008/tc20080125_511072.htm.

²⁰ Martin Peers, *Media Risk Walking the Plank*, Wall St. J., Mar. 6, 2009, at C10.

²¹ Vishesh Kumar, *Cable Ads Again Accentuate the Negative: Time, DirecTV, Verizon Raise Rhetoric, Barbs; Time to 'Blame-Storm,'* Wall St. J., Apr. 28, 2008, at B6.

²² Cliff Edwards, *Streaming Entertainment's Big Moment*, Bus. Week, Mar. 4, 2009 (citing ZillionTV (the newest rival intent on giving consumers an alternative way to get their entertainment fix: delivered à la carte, via home Internet connections), Roku (a video player that recently added Amazon.com's Video on Demand library of 40,000 titles), and Netflix (which is considering launching a streaming video-only service later this year or early in 2010)), available at http://www.businessweek.com/technology/content/mar2009/tc2009033_139376.htm?campaign_id=rss_topStories.

In such a marketplace, unquestionably characterized by a high level of competition and rapid technological change, policymakers *must* maintain a light regulatory touch. As noted by a group of media executives:

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 . . . the Internet has emerged as a new and rapidly growing source of video media services. . . . 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.²³

The years since comments were last filed in a video competition inquiry were blighted by a series of regulatory actions adverse to the cable industry.²⁴ These actions were wide-ranging and cable-specific, ultimately slowing cable's transition to digital, attempting to commandeer scarce channel capacity for use by leased access programmers, adding additional must-carry burdens, limiting cable system ownership, and abrogating contracts between cable operators and MDU owners (to name just a few of the actions). Now is the time to set the record straight and adopt more forward-looking regulatory policies.

²³ Letter from Peter Chernin, President and Chief Operating Officer, News Corporation; Robert Iger, President and Chief Executive Officer, The Walt Disney Company; Philippe Dauman, Chief Executive Officer, Viacom; and Jeff Zucker, President and Chief Executive Officer, NBC Universal, to FCC Chairman Martin, and FCC Commissioners Adelstein, Copps, McDowell, and Tate, filed in MB Dkt. Nos. 06-189 and 07-42 (Nov. 20, 2007); *see also* Commissioner Robert M. McDowell, FCC, Remarks at the Media Institute Luncheon 8 (Nov. 19, 2007) (“In 1975, cable was in its infancy and had yet to develop programming. Now we have DBS, telephone companies offering video, cable overbuilders, the Internet and its millions of websites, iPods, satellite radio, cell phones, Wi-Fi, video-on-demand, digital video recorders, pay-per-view, etc. There is no disputing that the marketplace has been transformed by technological advances and business innovations into the most competitive multimedia environment in human history. Consumers have more choices and more control over what they read, watch and listen to than ever.”).

²⁴ James Gattuso & Adam Thierer, *TV Train Wreck, Martin, Markets, and the Potential for Regulatory Disaster*, Nat'l Review Online, Nov. 29, 2007 (“For whatever reason, a disproportionate number of [the new or proposed regulations] have been aimed at cable television[.]”), *available at* <http://article.nationalreview.com/?q=MGJmNmIIMjcxNDBlZGNjMzhiNGQ0OTNmYzJhYjg1ZjU=>. Public interest groups also recognized a negative focus on the cable industry. *See, e.g.*, Robert Cohen, *FCC Chairman Turns Up Heat on Comcast, Cable*, Seattle Times, Jan. 22, 2008 (quoting Andrew Jay Schwartzman, Chairman of the Media Access Project, a nonprofit advocacy group: “It is fair to say that Kevin Martin has taken a very aggressive posture toward the cable industry[.]”), *available at* http://seattletimes.nwsourc.com/html/business/technology/2004137561_comcast22.html.

II. CONSUMERS HAVE A RAPIDLY INCREASING NUMBER OF SOURCES FOR VIDEO PROGRAMMING.

A. DBS Providers Continue To Provide Strong Competition in the MVPD Marketplace.

The primary DBS providers, DirecTV and Dish Network, offer a vast array of video programming options to consumers in every community across the country. After more than a decade of strong growth, DirecTV and Dish Network are the second- and third-largest MVPDs in the United States, respectively.²⁵ Together, they serve 31.66 million subscribers,²⁶ or approximately 32.3% of MVPD subscribers nationwide.²⁷ Since the Commission's last report, the number of DBS subscribers has grown by 13.2%.²⁸ For purposes of the Commission's reporting of 2007 and 2008 data, DirecTV reported 16.32 million customers as of June 30, 2007, and 17.16 million customers as June 30, 2008.²⁹ Dish Network reported 13.59 million and

²⁵ Compare Press Release, DirecTV Group, Inc., *The DIRECTV Group Announces First Quarter 2009 Results* (May 7, 2009), available at <http://investor.directv.com/releasedetail.cfm?ReleaseID=382409> and, Press Release, Dish Network, *Dish Network(R) Reports First Quarter 2009 Financial Results* (May 11, 2009) (reporting that, as of March 31, 2009, Dish Network had approximately 13.584 million subscribers), available at <http://dish.client.shareholder.com/releasedetail.cfm?ReleaseID=382970> with Nat'l Cable & Telecom. Ass'n ("NCTA"), *Statistics: Top 25 MSOs*, at <http://www.ncta.com/ContentView.aspx?contentId=73> (last visited May 18, 2009).

²⁶ Press Release, DirecTV Group, Inc., *The DIRECTV Group Announces First Quarter 2009 Results* (May 7, 2009) (announcing that DirecTV added 460,000 net subscribers in the first quarter of 2009, which is a 67% increase from the first quarter 2008 and brings total subscribers numbers to 18.08 million), available at <http://investor.directv.com/releasedetail.cfm?ReleaseID=382409>. Todd Spangler, *DirecTV Loads Up 301,000 Subs in 4Q*, Multichannel News, Feb. 10, 2009 (reporting that DirecTV "blew past analyst expectations" by adding 301,000 net subscribers in the last quarter of 2008, bringing total DirecTV subscribers to 17.621 million), available at http://www.multichannel.com/article/173863-DirecTV_Loads_Up_301_000_Subs_In_Q4.php; Press Release, Dish Network, *Dish Network(R) Reports First Quarter 2009 Financial Results* (May 11, 2009) (reporting that, as of March 31, 2009, Dish Network had approximately 13.584 million subscribers), available at <http://dish.client.shareholder.com/releasedetail.cfm?ReleaseID=382970>.

²⁷ As of December 31, 2008, there were 98.1 million MVPD subscribers. Robert Serrano & Maria Rondeli, SNL Kagan, *Telcos Continue to Increase Video Market Share*, *Broadband Technology*, Mar. 19, 2009, at 16. Thus, with 31.66 million subscribers, DBS providers serve approximately 32.3% of all multichannel video subscribers. *Id.*

²⁸ *In re Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Thirteenth Annual Report, 24 FCC Rcd. 542 ¶ 75 (2009) ("*13th Annual Report*") (reporting, as of June 2006, approximately 27.97 million DBS subscribers).

13.79 million subscribers on those dates, respectively.³⁰ As of March 31, 2009, DirecTV reported reaching the 18 million subscriber mark, reaching 18.08 million subscribers, having added 460,000 subscribers in the quarter.³¹ As of March 31, 2009, Dish Network reported that it had 13.854 million subscribers.³²

DBS providers will continue to battle with other MVPDs (and each other) in future years. DirecTV has added subscribers in every quarter for over a decade, and Dish Network has done the same except for the past three quarters.³³ Seemingly unaffected by the economic downturn, DirecTV had its best quarter in the past three years at the end of 2008, leading Sanford Bernstein senior analyst Craig Moffett to state that “one could make a case that DirecTV has, at least so far, been as little impacted by the recession as any company in America” and prompting The Wall Street Journal to report that “DirecTV continues to defy the recession and skeptics alike.”³⁴

(...footnote continued)

²⁹ See Press Release, DIRECTV Group, Inc., *The DIRECTV Group Announces Second Quarter 2007 Results* (Aug. 9, 2007), available at <http://dtv.client.shareholder.com/releasedetail.cfm?ReleaseID=286362>; Press Release, DIRECTV Group, Inc., *The DIRECTV Group Announces Second Quarter 2008 Results* (Aug. 7, 2008), available at <http://dtv.client.shareholder.com/releasedetail.cfm?ReleaseID=326924>.

³⁰ See Press Release, EchoStar Communications Corp., *EchoStar Reports Second Quarter 2007 Financial Results* (Aug. 10, 2007), available at <http://dish.client.shareholder.com/releasedetail.cfm?ReleaseID=259236>; Press Release, Dish Network, *Dish Network Reports Second Quarter 2008 Financial Results* (Aug. 4, 2008), available at <http://dish.client.shareholder.com/releasedetail.cfm?ReleaseID=325963>.

³¹ Press Release, DirecTV Group, Inc., *The DIRECTV Group Announces First Quarter 2009 Results* (May 7, 2009), available at <http://investor.directv.com/releasedetail.cfm?ReleaseID=382409>.

³² Press Release, Dish Network, *Dish Network(R) Reports First Quarter 2009 Financial Results* (May 11, 2009) (reporting that, as of March 31, 2009, Dish Network had approximately 13.584 million subscribers), available at <http://dish.client.shareholder.com/releasedetail.cfm?ReleaseID=382970>.

³³ See Maria Rondeli, SNL Kagan, *DirecTV Defies Industry Trends*, Cable TV Investor: Deals and Finance, Feb. 27, 2009, at 12; Maria Rondeli, SNL Kagan, *DirecTV Keeps Momentum, Dish Comeback Stumbles*, Cable TV Investor: Deals and Finance, Nov. 26, 2008, at 18.

³⁴ Spangler, *supra* note 26; Roger Cheng, *DirecTV Bucks Recession*, Wall St. J., Apr. 7, 2009, available at <http://online.wsj.com/article/SB123915352038899619.html#printMode>.

Although Dish Network reported subscriber losses, it also “boosted its bottom line, growing net income nearly 21%” in the first quarter of 2009.³⁵

To distinguish their service from MVPD competitors, DirecTV and Dish Network have greatly increased their high definition (“HD”) offerings. Dish Network claims that it has demonstrated “continued HD leadership, as no one has more HD channels or a higher quality picture than Dish Network.”³⁶ Meanwhile, DirecTV claims that “on average, DirecTV has 3 times more channels in HD than cable.”³⁷ The battle over who has the most HD is so heated that it has gone to court.³⁸ Currently, both DirecTV and Dish Network claim to offer over one hundred national HD channels, and each offers local HD broadcast channels in over one hundred markets.³⁹ DirecTV and Dish Network both also tout their HD regional sports programming

³⁵ Todd Spangler, *Dish Drops 94,000 Subs, Boosts Income*, Multichannel News, May 11, 2009, available at <http://www.multichannel.com/article/231940-Dish-Drops-94-000-Subs-Boosts-Income.php?nid=2226&source=title&rid=5304342>.

³⁶ Press Release, Dish Network, *Dish Network Introduces Seven New HD Channels from MTV Networks and BET Networks* (Apr. 10, 2009) (quoting Dave Shull, Senior Vice President of Programming for Dish), available at <http://dish.client.shareholder.com/releasedetail.cfm?ReleaseID=376612>; Press Release, Dish Network, *Dish Network Introduces New National HD Channels* (May 8, 2009) (reporting that Dish added HD networks FX, Speed, Fashion TV, Logo, and MavTV to its lineup, “fortifying its HD superiority and bringing its total national HD count to more than 140 channels”), available at <http://dish.client.shareholder.com/releasedetail.cfm?ReleaseID=382837>.

³⁷ Press Release, DirecTV, Inc., *DirecTV ScoreGuide(TM) Provides Sports Fans with the Ultimate Navigation Tool at the Push of a Button* (Apr. 27, 2009), available at <http://dtv.client.shareholder.com/releasedetail.cfm?ReleaseID=379900>; DirecTV, Inc., *Reasons Why DirecTV Crushes Cable and Dish Network*, at <http://www.directv.com/DTVAPP/global/contentPageNR.jsp?assetId=500008> (last visited May 18, 2009). DirecTV has also aired commercials making claims about having greater HD capacity than cable. See Todd Spangler, *Judge Rules for DirecTV in HD-Ad Spat*, Multichannel News, Apr. 18, 2007, available at <http://www.multichannel.com/article/128687-Judge-Rules-for-DirecTV-in-HD-Ad-Spat.php>.

³⁸ DirecTV and cable operators, including Comcast, have brought claims of deceptive advertising of HD quality and offerings to the courts. See Jonathan Hemingway, *Who’s Got the Best HD?, Cable, Satellite, Telcos Claim Top Picture, Channel Selection*, *Broad. & Cable*, Nov. 25, 2007 (“As the marketing war heated up earlier this year, DirecTV and Comcast sued each other over advertising that claimed superior picture quality. Comcast was eventually allowed to continue using its ads based on a Frank A. Magid Associates study, while DirecTV was forced to pull its survey-based spots.”), available at <http://www.broadcastingcable.com/article/111316-Who-s-Got-the-Best-HD.php>.

³⁹ Press Release, DirecTV, Inc., *DirecTV ScoreGuide(TM) Provides Sports Fans with the Ultimate Navigation Tool at the Push of a Button* (Apr. 27, 2009) (indicating that DirecTV offers more than 130 national HD channels), available at <http://dtv.client.shareholder.com/releasedetail.cfm?ReleaseID=379900>; Press Release, (footnote continued...)

options, with DirecTV currently carrying HD games from 21 RSNs, and Dish Network carrying HD games from 25 RSNs.⁴⁰

The DBS providers have obtained exclusive rights to programming to distinguish themselves from other MVPDs. Most notably, DirecTV carries the NFL Sunday Ticket on an exclusive basis.⁴¹ According to reports, with 2 million subscribers, each paying \$300 per season, Sunday Ticket nets approximately \$600 million in direct revenues for DirecTV each season.⁴² In March 2009, DirecTV and the NFL announced that they would continue DirecTV's exclusivity through 2014, for which DirecTV is paying a billion dollars per year.⁴³ It is indisputable that the Sunday Ticket gives DirecTV a strong competitive advantage; as Mediaweek has reported, DirecTV "has successfully leveraged Sunday Ticket as a means of differentiating itself from its

(...footnote continued)

DirecTV, Inc., *DirecTV Delivers Local HD Programming To Customers in Bangor, Maine* (Apr. 16, 2009) (indicating that DirecTV provides local HD broadcast channels in 122 cities), available at <http://dtv.client.shareholder.com/releasedetail.cfm?ReleaseID=377764>; Dish Network, *TurboHD, What and Why*, (indicating that Dish offers over 120 national HD channels), at <http://www.dishnetwork.com/turbohd/learnAbout/default.aspx> (last visited May 18, 2009); Press Release, Dish Network, *Dish Network Announces Expansion of Local HD Markets* (Apr. 6, 2009) (indicating that Dish offers local HD broadcast channels in 130 Markets), available at <http://dish.client.shareholder.com/releasedetail.cfm?ReleaseID=375781>.

⁴⁰ See DirecTV, Inc., *HD Sports*, at <http://www.DirecTV.com/DTVAPP/global/contentPage.jsp?assetId=2300004> (last visited May 18, 2009); Dish Network, *TurboHD Sports*, at <http://www.dishnetwork.com/sports/regional/default.aspx> (last visited May 18, 2009).

⁴¹ See Press Release, DirecTV, Inc., *NFL and DirecTV Extend NFL SUNDAY TICKET(TM) Agreement Through 2014 Season* (Mar. 23, 2009) (quoting Chase Carey, President and CEO, DirecTV Group: "The NFL SUNDAY TICKET service has been a part of DirecTV since our first year of operation and is one of the defining characteristics of our best-in-class positioning"), available at <http://dtv.client.shareholder.com/releasedetail.cfm?ReleaseID=372330>.

⁴² Mike Reynolds, *DirecTV's Sunday Ticket Renewal Sets NFL Network's Game Plan*, Multichannel News, Mar. 29, 2009, available at http://www.multichannel.com/article/190869-DirecTV_s_Sunday_Ticket_Renewal_Sets_NFL_Network_s_Game_Plan.php?q=DirecTV+and+NFL.

⁴³ Under the agreement, DirecTV also expands carriage of Sunday Ticket to broadband viewers. See Press Release, DirecTV, Inc., *NFL and DirecTV Extend NFL Sunday Ticket Agreement Through 2014 Season* (Mar. 23, 2009), available at <http://investor.directv.com/releasedetail.cfm?ReleaseID=372330>.

cable rivals, and the exclusivity of the offering seems to have had a positive impact on its subscriber numbers.”⁴⁴

DirecTV also carries other programming on an exclusive basis, including: NASCAR Hotpass, NCAA Mega March Madness, NFL Sunday Ticket SuperFan, and CricketTicket.⁴⁵

DirecTV also promotes an exclusive HD commercial-free network, “The 101 Network,” which includes news, original series, concerts (including exclusive coverage of the South by Southwest music festival), and other popular programs.⁴⁶ Moreover, DirecTV carries exclusive international programming for Russian, Indian, Vietnamese, and Spanish-speaking audiences.⁴⁷

Dish Network focuses on providing exclusive international programming, like broadcast of the Portuguese soccer league SuperLiga, a Spanish version of CBeebies (a Mexican-focused, Spanish-language channel developed by BBC that delivers educational and entertainment content

⁴⁴ Anthony Crupi, *NFL Extends DirecTV's NFL Sunday Ticket Pact*, MediaWeek, Mar. 23, 2009, available at http://www.mediaweek.com/mw/content_display/news/cable-tv/e3i122eef64e5ea3297aaf945e9f7abcb8d.

⁴⁵ DirecTV, Inc., *Reasons Why DirecTV Crushes Cable and Dish Network*, at <http://www.directv.com/DTVAPP/global/contentPageNR.jsp?assetId=500008> (last visited May 18, 2009); Press Release, DirecTV, Inc., *Baseball Slugger Manny Ramirez Turns Cricket Batsman in Support of DirecTV's CricketTicket Service; Hits Five of Eight Pitches in Cricket Debut* (Mar. 18, 2009), available at <http://investor.directv.com/releasedetail.cfm?ReleaseID=371671>.

⁴⁶ See, e.g., Press Release, DirecTV, Inc., *Second Season of DirecTV Hometown Heroes Gives Viewers Perfect Antidote for 'Bad News Fatigue' by Focusing on Inspiring Individuals Making a Difference* (Mar. 19, 2009), available at <http://dtv.client.shareholder.com/releasedetail.cfm?releaseid=371761>; Press Release, DirecTV, Inc., *Dan Patrick Signs Up for New TV Show on DirecTV* (Mar. 16, 2009), available at <http://investor.directv.com/releasedetail.cfm?ReleaseID=371007>; Press Release, DirecTV, Inc., *DirecTV Announces Lineup for SXSW Live, the Only Live Television Broadcast from the Trendsetting Music Festival, Airing March 20-21 on DirecTV's The 101 Network*, Mar. 5, 2009, available at <http://investor.directv.com/releasedetail.cfm?ReleaseID=369084>; Press Release, DirecTV, Inc., *NBC Universal and DirecTV Team Up Again To Renew 'Friday Night Lights' for 26 Episodes* (Mar. 31, 2009), available at <http://www.directv.com/DTVAPP/global/article.jsp?assetId=P5630018>.

⁴⁷ See Press Release, DirecTV, Inc., *DirecTV Launches Russia's First Children's Channel in the United States* (Apr. 3, 2008), available at <http://investor.directv.com/releasedetail.cfm?ReleaseID=303065>; Press Release, DirecTV, Inc., *Top-Rated Indian Channels NDTV Profit and NDTV Good Times Now Available Exclusively on DirecTV in the U.S.* (May 6, 2009), available at <http://investor.directv.com/releasedetail.cfm?ReleaseID=382171>; Press Release, DirecTV, Inc., *DirecTV Launches Premier Vietnamese Television Entertainment Channel* (May 8, 2008), available at <http://investor.directv.com/releasedetail.cfm?ReleaseID=309082>; Press Release, DirecTV, Inc., *DIRECTV Más Launches Telecentro, a New and Exclusive Spanish-Language Channel from Central America* (Oct. 23, 2008), available at <http://investor.directv.com/releasedetail.cfm?ReleaseID=342791>.

for preschoolers), the Spanish telenovela channel Pasioness, two Polish networks, and the Ecuadorian channel TeleAmazonas.⁴⁸ Dish Network also offers exclusive programming like the Dish Network Earth Channel, which offers a live feed of the Earth 24 hours a day.⁴⁹

Using broadband connections, DBS providers have expanded their video on demand (“VOD”)-like services.⁵⁰ DirecTV launched its DirecTV on Demand service to customers on June 30, 2008, offering more than 4,500 standard and HD titles.⁵¹ Dish Network’s VOD-like offerings include programming and movies from Sony Pictures Television and Disney’s Buena Vista.⁵² Dish Network declares it was the first to offer VOD-like programming in 1080p high

⁴⁸ See Dish Network, *Dish Network Portuguese Package*, at <http://www.afreedish.com/dish-network-portuguese.html> (last visited May 18, 2009); Press Release, Dish Network, *Dish Launches DishMEXICO Programming Package* (Nov. 19, 2008) (noting that in addition to CBeebies, Dish plans to launch additional exclusive content to DishMEXICO, “the first programming package in the United States designed specifically for Mexicans”), available at <http://dish.client.shareholder.com/releasedetail.cfm?ReleaseID=348660>; Linda Moss, *Dish Network Adds Telenovela Channel*, Multichannel News, Nov. 25, 2008, available at http://www.multichannel.com/article/159865-Dish_Network_Adds_Telenovela_Channel.php?rssid=20074&q=dish+Network+exclusive; Linda Moss, *Dish Becomes Exclusive U.S. Provider of Two Polish Nets*, Multichannel News, Dec. 8, 2008, available at http://www.multichannel.com/article/160500-Dish_Becomes_Exclusive_U_S_Provider_of_Two_Polish_Nets.php?q=dish+Network+exclusive; Press Release, Dish Network, *Dish Network Becomes Exclusive U.S. Provider of TeleAmazonas* (Oct. 1, 2008), available at <http://dish.client.shareholder.com/releasedetail.cfm?ReleaseID=338035>.

⁴⁹ See Press Release, Dish Network, *Dish Network Introduces Dish Earth Channel* (Apr. 22, 2009), available at <http://dish.client.shareholder.com/releasedetail.cfm?ReleaseID=379017>.

⁵⁰ See Vishesh Kumar, *DirecTV To Start On-Demand*, Wall St. J., Mar. 13, 2008, at B3 (noting that if DirecTV successfully offers VOD services, it could have a “weapon to lure customers who want on-demand offerings previously available only on cable or newer phone-company TV services”).

⁵¹ Press Release, DirecTV, Inc., *DirecTV On Demand Now Available Nationwide* (June 30, 2008), available at <http://dtv.client.shareholder.com/releasedetail.cfm?ReleaseID=318983>; see also DirecTV, Inc., *Introducing DirecTV on DEMAND*, at <http://www.DirecTV.com/DTVAPP/global/contentPageNR.jsp?assetId=P4750018> (last visited May 18, 2009) (providing an updated VOD title count of 4,500). DirecTV on Demand combines satellite with broadband to achieve two-way communication. Some programming is automatically transmitted to the set-top-box, while viewers actively order and download additional titles. See Kumar, *supra* note 50.

⁵² See Press Release, Dish Network, *Dish Network and Sony Pictures Television Reach Agreement to Offer Video on Demand* (Sept. 25, 2008), available at <http://dish.client.shareholder.com/releasedetail.cfm?ReleaseID=336691>; Press Release, Dish Network, *Dish Network and Disney’s Buena Vista Video-on-Demand Sign VOD Movie Deal* (Mar. 26, 2007), available at <http://dish.client.shareholder.com/releasedetail.cfm?ReleaseID=241079>.

definition, which analysts claim is almost identical in quality to Blu-ray Discs.⁵³ DirecTV also recently introduced VOD movies at 1080p quality, and announced that, “As the HD leader, we continue to push the envelope with unmatched HD quality and breadth of content. By offering the largest selection of 1080p titles, we further strengthen DirecTV’s position as the premier destination for the most compelling and complete lineup of HD content.”⁵⁴

DBS providers are also working to attract subscribers by offering interactive television offerings. For example,

- Dish Network launched History Interactive channel on its iTV Platform, offering Battles B.C., a graphic-style series of ancient historical conflicts that incorporates interactivity by offering viewers access to biographical information and games synchronized to the content, allowing viewers to play along.⁵⁵
- DirecTV introduced ScoreGuide, a feature that tracks the live scores and start times of professional and collegiate sporting events and provides links to the channel airing each event.⁵⁶
- DirecTV offers YES Interactive, with interactive content for Major League Baseball and the New York Yankees on YES Network.⁵⁷
- Dish Network’s interactive platform, Dish Network Interactive Television, offers several categories of interactivity, including customer support, news and weather, games and learning, entertainment, sports, and shopping.⁵⁸

⁵³ Dish Network, *Dish Network Video On Demand*, at <http://www.dishnetwork.com/vod/> (last visited May 18, 2009); David Katzmaier, *Dish Network VOD vs. Blu-ray: 1080p Shootout*, CNET News, Oct. 13, 2008, available at http://news.cnet.com/8301-17938_105-10064560-1.html.

⁵⁴ See Press Release, DirecTV, Inc., *DirecTV Now Offers the Largest Selection of 1080p Movies* (Apr. 15, 2009) (quoting Eric Shanks, executive vice president of DirecTV Entertainment), available at <http://dtv.client.shareholder.com/releasedetail.cfm?ReleaseID=377425>.

⁵⁵ See Press Release, Dish Network, *Dish Network Premieres Interactive Television Experience for New History Series BATTLES BC* (Mar. 9, 2009), available at <http://dish.client.shareholder.com/releasedetail.cfm?ReleaseID=369565>.

⁵⁶ See Todd Spangler, *DirecTV Gets Game on with Sports ScoreGuide*, Multichannel News, Apr. 27, 2009, available at http://www.multichannel.com/article/210095-DirecTV_Gets_Game_On_With_Sports_ScoreGuide.php?rssid=20059&q=DirecTV.

⁵⁷ See Press Release, DirecTV, Inc., “YES Interactive Only on DirecTV” Launches as First-Ever Interactive Content for Major League Baseball Telecasts (July 25, 2006), available at <http://dtv.client.shareholder.com/releasedetail.cfm?ReleaseID=286466>.

- DirecTV offered interactive coverage of U.S. Open Tennis, allowing subscribers to watch up to five matches at once, view early round matches, and obtain statistics on demand.⁵⁹
- DirecTV added interactive features to its NFL Sunday Ticket package that provide more team stats and allow viewers to track player performances while viewing regular season games.⁶⁰
- DirecTV announced NASCAR Hotpass, a three-year deal between DirecTV and NASCAR to produce five dedicated driver channels that follow races from the drivers' seats.⁶¹
- DirecTV introduced its Game Lounge channel in partnership with Mattel, Nickelodeon, Leap Frog, and PBS Kids that offers puzzles, word games, card games, educational games, and arcade style games.⁶²

DirecTV has pursued a sports programming strategy to distinguish its services from those of other MVPDs.⁶³ In addition to the offerings described above, DirecTV also provides GameSearch, a technology that automatically searches for a blacked-out game on other channels and displays a message to the viewer if it finds an alternative source of the game.⁶⁴

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⁵⁸ See Dish Network, *Welcome to Interactive Television*, at <http://www.dishnetwork.com/entertain/itv/default.aspx> (last visited May 18, 2009).

⁵⁹ See Press Release, DirecTV, Inc., *DirecTV, USA Network and USTA Serve Up the First-Ever Interactive TV Coverage of 2006 US Open* (Aug. 14, 2006), available at <http://dtv.client.shareholder.com/releasedetail.cfm?ReleaseID=286469>.

⁶⁰ See Press Release, DirecTV, Inc., *DirecTV Feeds Stat-Hungry NFL Fans and Fantasy Players with New Interactive Features for 2006 NFL Sunday Ticket™* (Aug. 24, 2006), available at <http://dtv.client.shareholder.com/releasedetail.cfm?ReleaseID=286474>. DirecTV also offers a SuperFan option, enabling package subscribers access to content over mobile phones and web-streams. See Press Release, DirecTV, Inc., *DirecTV Delivers Unprecedented Access to NFL Action Via Web-Stream and Mobile Phone* (Aug. 13, 2007), available at <http://dtv.client.shareholder.com/releasedetail.cfm?ReleaseID=286364>.

⁶¹ See Press Release, DirecTV, Inc., *DirecTV Produces a World's First; Ushers in New Era of NASCAR Viewing with Innovative HOTPASS Service To Debut at 2007 Daytona 500* (Dec. 6, 2006), available at <http://dtv.client.shareholder.com/releasedetail.cfm?ReleaseID=286496>.

⁶² See Press Release, DirecTV, Inc., *DirecTV Redefines Casual Gaming with Launch of Game Lounge and Exclusive Mattel Agreement* (Feb. 13, 2007), available at <http://investor.directv.com/releasedetail.cfm?ReleaseID=286318>.

⁶³ Spangler, *supra* note 56 (“With ScoreGuide, DirecTV wants to reinforce its sports programming lineup, which the operator has positioned as a competitive differentiator.”).

⁶⁴ Press Release, DirecTV, Inc., *Sports Blackouts No Longer Keep DirecTV Viewers in the Dark* (May 21, 2008), available at <http://investor.directv.com/releasedetail.cfm?ReleaseID=311684>.

At the end of 2008, analysts projected that 41.8% of DBS customers subscribed to digital video recorder (“DVR”) services.⁶⁵ To increase the percentage of DVR subscribers, both DBS providers are adding new technologies. For example, DirecTV and TiVo plan to launch a new HD DirecTV DVR in the second half of 2009 that will support all of DirecTV’s HD programming as well as provide TiVo features like Swivel Search.⁶⁶ DirecTV also developed a DVR scheduler application that can be used with the Apple iPhone.⁶⁷ EchoStar Technologies L.L.C. won the 2009 “Best of CES” award for its new DVR model, which incorporates Sling Media’s placeshifting technology that allows subscribers to watch and control television programs from any broadband connection through their computers or mobile phones.⁶⁸

DBS providers have continued to utilize partnerships to offer bundled video, voice, and Internet services. DirecTV is currently partnered with the three largest U.S. telcos -- AT&T (as of February 1, 2009), Qwest, and Verizon -- and they aggressively cross-promote each others’ products through bundled offerings.⁶⁹ Dish Network has partnerships with several rural and

⁶⁵ SNL Kagan, *DBS Growth Slows as Competition Intensifies*, Cable TV Investor: Deals and Finance, Nov. 26, 2008, at 7.

⁶⁶ See Press Release, DirecTV, Inc., *DirecTV and TiVo To Launch New HD DirecTV DVR with TiVo Service* (Sept. 3, 2008), available at <http://www.directv.com/DTVAPP/global/contentPage.jsp?assetId=P4900010>.

⁶⁷ See Press Release, DirecTV, Inc., *DirecTV DVR Scheduler Now Available in Apple App Store* (Mar. 30, 2009) (“The iPhone app will take the DirecTV’s DVR Scheduler experience to an entirely new level with its incredible ease of use, amazing search function and great looking graphics,” said Eric Shanks, executive vice president of Entertainment for DirecTV.”), available at <http://dtv.client.shareholder.com/releasedetail.cfm?ReleaseID=373850>.

⁶⁸ See Press Release, Dish Network, *EchoStar’s SlingLoaded 922 HD DVR Wins CNET’s ‘Best of CES’ Award for Hottest Home Video Product at 2009 International Consumer Electronics Show* (Jan. 13, 2009), available at <http://dish.client.shareholder.com/releasedetail.cfm?ReleaseID=358994>.

⁶⁹ Under the AT&T/DirecTV agreement, the companies together offer a “quadruple play” of video, landline telephone, Internet, and mobile phone. See Press Release, AT&T Inc., *AT&T Mobility and Consumer Markets and DirecTV Launch AT&T/DirecTV Service, with Quad-Play Bundle Offers Cable Can’t Match* (Feb. 2, 2009), available at <http://www.att.com/gen/press-room?pid=4800&cdvn=news&newsarticleid=26508>. Analysts have acknowledged growth potential in the AT&T/DirecTV agreement. See Serrano & Rondeli, *supra* note 27, at 18 (“[W]e believe the advantages of its AT&T reseller agreement for customer growth will far outweigh the impact of lesser promotional activity. As a result, we expect DirecTV to continue improving its market share in 2009.”). Qwest, which offers its subscribers video services through DirecTV, reported that as of March 30, 2008, it had

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smaller telcos, including Embarq, Frontier Communications, CenturyTel, Windstream, and TDS.⁷⁰ Dish Network previously had a bundling agreement with AT&T.⁷¹ Both DBS providers have agreements with WildBlue Communications, a satellite Internet provider, to offer bundled video and broadband services.⁷²

The DBS providers are also pursuing other ways to extend their reach. For example, they both offer portable receiver technologies that allow subscribers to receive signals when they are on the road.⁷³ Both DBS providers have also expanded efforts to deliver programming to

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signed up 699,000 video subscribers “almost exclusively through its partnership with DirecTV,” representing a 42% increase over the number of subscribers at the same time in 2007. Brian Santo, *Qwest Sweats Its Way to Narrower IQ Profit*, CED Magazine, May 6, 2008, available at <http://www.cedmagazine.com/Qwest-Q1-profit.aspx>; Press Release, Qwest, *Qwest Reports Steady First Quarter 2008 Results, Announces Partnership with Verizon Wireless* (May 6, 2008), available at http://media.corporate-ir.net/media_files/irol/11/119535/Q_1q08_er.pdf. Under the DirecTV-Qwest agreement, DirecTV handles customer service, equipment, and installation, and Qwest receives a monthly fee based on the number of subscribers it has obtained. See Marguerite Reardon, *Qwest Needs To Cut the Cord*, CNET News, Feb. 25, 2008, available at http://news.cnet.com/8301-10784_3-9877496-7.html. Verizon offers a DirecTV/DSL/phone bundle in the 60% of its national footprint where Verizon has not yet deployed its FiOS network. See Todd Spangler, *Verizon Sues Time Warner Cable over Ads*, Multichannel News, Apr. 9, 2008, available at http://www.multichannel.com/article/132802-Verizon_Sues_Time_Warner_Cable_Over_Ads.php; Press Release, Verizon Communications Inc., *Expansion Drives Growth for Verizon’s Telecom Unit in 2008* (Jan. 28, 2009), available at <http://newscenter.verizon.com/press-releases/verizon/2009/expansion-drives-growth-for.html>.

⁷⁰ See DirecTV, Inc., *2008 Annual Report (Form 10-K)* 10 (Feb. 13, 2009). Embarq, which has bundling agreements with both DirecTV and Dish, reported 297,000 customers signed up to receive DBS services. Embarq Corp., *2008 Annual Report (Form 10-K)* 4 (Feb. 13, 2009). As of the first quarter of 2008, Frontier Communications reported almost 120,000 Dish subscribers who had signed up through Frontier. Karen Brown, *Frontier Q4: Dish Sub Count Rises, but Data, Voice and Revenue Fall*, OneTrak.com, Feb. 25, 2009, available at <http://www.onetrak.com/ShowArticle.aspx?ID=3928>; Linda Moss, *Frontier, Dish Renew Strategic Alliance*, Multichannel News, Nov. 20, 2008, available at http://www.multichannel.com/article/85796-Frontier_Dish_Renew_Strategic_Alliance.php. Dish and Frontier have recently renewed their partnership.

⁷¹ See Natalie Weinstein, *AT&T Drops Dish for DirecTV*, CNET News, Sept. 27, 2008, available at http://news.cnet.com/8301-1035_3-10052944-94.html. In 2008, 504,000 AT&T customers subscribed to Dish. Dish Network, *2008 Annual Report (Form 10-K)* 38-39 (Mar. 2, 2009).

⁷² See Press Release, WildBlue Communications Inc., *WildBlue Signs Wholesale Distribution Agreements with DirecTV and EchoStar* (June 9, 2006), available at <http://www.wildblue.com/company/doPressReleaseDetailsAction.do?pressReleaseID=31>. DirecTV may also be developing a bundled package of satellite television and satellite radio services. See *DirecTV, Sirius XM Bundle in the Works?*, SkyREPORT.com, Feb. 25, 2009, available at http://www.mediabiz.com/news/articles/?edit_id=11156.

⁷³ See Press Release, DirecTV, Inc., *DirecTV Delivers Live Local Channels to Motorists on the Open Road for the First Time* (Aug. 23, 2006), available at

<http://dtv.client.shareholder.com/releasedetail.cfm?ReleaseID=286472>; Press Release, DirecTV, Inc., *DirecTV(R)*

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MDUs. For example, Dish Network launched fiber-to-the-home satellite TV service for MDUs, called the Dish Optical Network, which is capable of delivering 400 HD channels to up to 128 subscribers in a building over a single strand of fiber optic cable.⁷⁴ Meanwhile, DirecTV partnered with Perfect 10 Inc. to pursue new MDU business opportunities.⁷⁵

Of course, improving quality and enhancing services does not come without costs. For example, to offset the “significant investments [DirecTV] made to enhance [its] customers’ viewing experience,” DirecTV raised its prices by nearly 4% in early March 2009.⁷⁶ And, according to reports, Dish Network raised its prices between 4-7% in February.⁷⁷

B. Video Delivered by Telephone Companies Has Quickly Become a Significant Source of Competition.

After years of promises, telcos have finally established themselves as serious players in the video marketplace,⁷⁸ and now serve over 3.1 million subscribers on their own facilities-

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Sat-Go Is Ready for the Road (May 3, 2007), available at <http://dtv.client.shareholder.com/releasedetail.cfm?ReleaseID=286341>; Press Release, Dish Network, *Dish Network TM Launches MobileDish Programming Packages* (May 4, 2007), available at <http://dish.client.shareholder.com/releasedetail.cfm?ReleaseID=241273>.

⁷⁴ *Dish Launches Fiber Service for MDUs*, Evening BRIDGE, Apr. 28, 2008, available at http://www.mediabiz.com/news/articles/?publication_id=3&release_id=689.

⁷⁵ See Press Release, DirecTV, Inc., *DirecTV Adds Perfect 10 to Its Approved MDU Distributor List To Pursue New MDU Business* (Nov. 7, 2008), available at <http://dtv.client.shareholder.com/releasedetail.cfm?ReleaseID=346441>.

⁷⁶ See Todd Spangler, *DirecTV Hikes Rates: Satellite Television Operator Price Increases To Take Effect March 4*, Multichannel News, Feb. 9, 2009 (quoting a DirecTV spokesman), available at http://www.multichannel.com/article/173827-DirecTV_Hikes_Rates.php.

⁷⁷ See Dish Network, *Quarterly Report (Form 10-Q)* 34 (May 11, 2009) (“The \$2.10 or 3.1% increase in ARPU was primarily attributable to price increases in February 2009 and 2008 on some of our most popular programming packages and changes in the sales mix toward HD programming packages and advanced hardware offerings.”); *Dish Network Raising Rates*, Satellite TV, at <http://www.dish-television.com/2009/02/02/dish-network-raising-rates/> (last visited May 18, 2009).

⁷⁸ As explained by an AT&T spokeswoman, AT&T “compete[s] directly with cable competitors in every local market served by our AT&T U-verse services and other wireline services.” Tim Young, *Access Technology Rumble: Cableco vs Telco*, Pipeline 4 (vol. 5, Mar. 2009), available at

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based, cable networks.⁷⁹ AT&T and Verizon have spent several billions of dollars to build out high-capacity networks to provide video services, and both have dramatically increased their subscriber numbers. In a review of 2008 alone, one observer states that “AT&T and Verizon shook off their long-time video-loser mantles, wowing the biz as they added nearly 1.8 million video subscribers.”⁸⁰ Consumer Reports noted that “[i]ntense competition for cable and satellite customers between AT&T U-verse and Verizon FiOS high-speed fiber providers has driven down rates for Internet, phone and TV service.”⁸¹ Some analysts project that the telcos will amass over 9 million subscribers by 2011.⁸²

The telcos have experienced dramatic growth in video subscribers over the last three years. In the last video inquiry, Comcast reported that the telcos were presenting competition

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http://www.pipelinepub.com/0309/EC1_1.html. Similarly, Verizon spokesperson Robert Elak has stated that cable companies represent direct competition for Verizon. *See id.*

⁷⁹ Serrano & Rondeli, *supra* note 27, at 16.

⁸⁰ Evie Haskell, *The Inside-Out Year, Winners, Losers & Changing Tides*, The BRIDGE, Apr. 2009, at 1, available at http://www.mediabiz.com/media/archives/2008_Year_in_Review_BR0409.pdf.

⁸¹ *Consumer Reports Calls FiOS, U-verse Best Choices in Bundling*, Retail BRIDGE, Jan. 6, 2009, available at http://www.mediabiz.com/news/articles/?edit_id=10684.

⁸² Jessica Reif Cohen & David W. Barden, Banc of America-Merrill Lynch Research, *Battle for the Bundle: Telcos Take Broadband Net Add Lead 5* (Mar. 16, 2009). AT&T and Verizon have proven that there are few regulatory impediments for telcos to enter the video marketplace. In the Notice of Inquiry for the 13th Annual Report, the Commission asked if the telcos faced any regulatory impediments that slowed their entry into the video marketplace. *See In re Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Notice of Inquiry, 21 FCC Rcd. 12229 ¶¶ 10, 49 (2006). Comcast commented then that Verizon had been able to secure franchises in all of the markets where it had applied, and that AT&T would not have difficulty getting franchising agreements because it could take advantage of statewide franchising legislation. Comcast Corp. Comments, MB Dkt. No. 06-189, at 23, 25 (Nov. 29, 2006). These comments have borne themselves out. Verizon has negotiated at least 1,000 franchise agreements, including franchises that cover entire states. *See, e.g., FiOS Expands in Florida*, Morning BRIDGE, July 11, 2007, available at http://www.mediabiz.com/news/articles/?edit_id=2310; Linda Haugsted, *Verizon Gets Statewide Franchise in Calif.*, Multichannel News, Mar. 8, 2007, available at http://www.multichannel.com/article/128173-Verizon_Gets_Statewide_Franchise_in_Calif_.php; Todd Spangler, *State Commission Approves Verizon’s Video Franchise in NYC*, Multichannel News, July 16, 2008, available at http://www.multichannel.com/article/133978-State_Commission_Approves_Verizon_s_Video_Franchise_in_NYC.php; *see also* Comcast Corp. Comments, MB Dkt. No. 09-13, at 18 (Mar. 9, 2009) (noting that 20 states have enacted statewide franchising laws that permit franchising agreements to be made at the state level).

that primarily relied on their partnerships with DBS providers. Now, the telcos are rapidly gaining subscribers on their own cable networks. As of 2006, the Commission reported that Verizon was serving just 207,000 FiOS TV subscribers; today, Verizon is the 9th largest MVPD, serving 2.2 million FiOS TV customers.⁸³ In the first quarter of 2009 alone, despite increasing rates by 12% in January 2008,⁸⁴ Verizon continued to realize significant growth adding 299,000 FiOS TV customers -- an 83.8% increase compared with the first quarter of 2008.⁸⁵ As of March 31, 2009, Verizon reported that its FiOS TV service was available to more than 9.7 million homes in parts of 14 states, and that it had achieved a 22.9% penetration rate.⁸⁶

AT&T U-verse is also making considerable video subscribership gains. As of 2006, the Commission reported that AT&T offered its U-verse service to just 11 cities in Texas, California, Indiana, and Connecticut.⁸⁷ U-verse now serves over one million subscribers and has become the 12th largest MVPD.⁸⁸ In the first quarter of 2009, AT&T added 284,000 MVPD

⁸³ Compare 13th Annual Report ¶ 132, with Verizon Communications Inc., *Verizon FiOS - Fact Sheet*, at <http://newscenter.verizon.com/kit/fios-symmetrical-internet-service/all-about-fios.html> (last visited May 18, 2009); *Multiplatform's Top Tier - Video Programming*, The BRIDGE, Apr. 2009, at 3, available at http://www.mediabiz.com/thebridge/index.cfm?release_id=165.

⁸⁴ Todd Spangler, *Verizon To Boost FiOS TV Rates for New Subscribers*, Multichannel News, Nov. 20, 2007 (reporting that Verizon increased the price of its primary video package from \$42.99 to \$47.99), available at http://www.multichannel.com/article/131224-Verizon_to_Boost_FiOS_TV_Rates_for_New_Subscribers.php.

⁸⁵ Press Release, Verizon Communications Inc., *Verizon Communications Reports Revenue, Earnings and Cash Flow Growth in IQ 2009* (Apr. 27, 2009), available at <http://investor.verizon.com/news/view.aspx?NewsID=983>

⁸⁶ See Verizon Communications Inc., *Verizon FiOS - Fact Sheet* (indicating that FiOS TV is available in parts of California, Delaware, Florida, Indiana, Maryland, Massachusetts, New Jersey, New York, Oregon, Pennsylvania, Rhode Island, Texas, Virginia and Washington), at <http://newscenter.verizon.com/kit/fios-symmetrical-internet-service/all-about-fios.html> (last visited May 19, 2009).

⁸⁷ See 13th Annual Report ¶ 133.

⁸⁸ Press Release, AT&T Inc., *AT&T Reports Fourth-Quarter and Full-Year Results Highlighted by Robust Wireless Data Growth, Accelerated U-verse TV Ramp, Continued Double-Digit Growth in IP Data Services* (Jan. 28, 2009); Todd Spangler, *U-verse TV Counts to a Million*, Multichannel News, Dec. 16, 2008, available at http://www.multichannel.com/article/160917-U_verse_TV_Counts_To_A_Million.php; *Multiplatform's Top Tier - Video Rankings*, The BRIDGE, Apr. 2009, at 3, available at http://www.mediabiz.com/thebridge/index.cfm?release_id=165.

subscribers.⁸⁹ According to AT&T, “[c]ustomer demand is growing as AT&T expands availability and introduces service enhancements.”⁹⁰ AT&T’s U-verse video service is “now available in 93 markets across 19 states,” passing “nearly 18 million living units.”⁹¹ AT&T recently announced that it plans to continue to invest so the U-verse network will reach its previously announced target of 30 million living units in 2011.⁹² AT&T also announced it would add 3,000 jobs in 2009 to support its video, broadband, and wireless operations.⁹³

What is most striking about the telcos’ performance in the video marketplace is how quickly they have become national players. To assist the Commission in its effort to gather data for 2007 and 2008, we note the following:

⁸⁹ Press Release, AT&T Inc., *U-verse TV Starts 2009 with Record Quarter* (Apr. 23, 2009), available at <http://www.att.com/gen/press-room?pid=4800&cdvn=news&newsarticleid=26766>.

⁹⁰ *Id.*

⁹¹ *Id.* As of the end of the third quarter of 2008, “U-verse was available to approximately 9.4 million homes . . . yielding an overall penetration rate of about 8%.” Spangler, *supra* note 88.

⁹² See Todd Spangler, *AT&T To Cut Capital Spending in 2009*, Multichannel News, Mar. 10, 2009 (noting that approximately two-thirds of AT&T’s 2009 capital expenditures “will be invested in building out wireless and wired broadband networks to increase coverage, speed and capacity”), available at http://www.multichannel.com/article/189778-AT_T_To_Cut_Capital_Spending_In_2009.php.

⁹³ *See id.*

Telco Subscriber Growth⁹⁴

	2Q07 Subscribers	2Q08 Subscribers	1Q09 Subscribers
AT&T	51,000	549,000	1,329,000
Verizon	515,000	1,382,000	2,217,000
Combined	566,000	1,931,000	3,546,000

Like other, longer-established cable operators, Verizon and AT&T emphasize bundles of voice, Internet, and video services. Robert Elak, spokesperson for Verizon, has said that “bundling is king for customer retention.”⁹⁵ AT&T is capitalizing on its ability to bundle wireless phone service to provide a “quad play,” including wireless and wireline voice, video, and high-speed Internet, with integrated cross-platform features.⁹⁶ Verizon has indicated that it will soon offer VoIP phone service in a bundle with its FiOS TV and FiOS Internet double-play.⁹⁷ To further integrate the video and phone services in its bundle, Verizon has introduced

⁹⁴ *AT&T U-Verse Sub Count at 51,000*, Morning BRIDGE, July 24, 2007, available at http://www.mediabiz.com/news/articles/?edit_id=2319; Todd Spangler, *U-verse TV: More Than Half-Million Served*, Multichannel News, July 25, 2008, available at <http://www.multichannel.com/article/81421-U-Verse-TV-More-Than-Half-Million-Served.php>; Press Release, AT&T Inc., *U-verse TV Starts 2009 With Record Quarter* (Apr. 23, 2009), available at <http://www.att.com/gen/press-room?pid=4800&cdvn=news&newsarticleid=26766>; *Half a Million FiOS TV Subs*, Morning BRIDGE, July 30, 2007, available at http://www.mediabiz.com/news/articles/?edit_id=2323; Verizon Communications Inc., *2Q08 Quarterly Report (Form 10-Q)* 16 (July 28, 2008); Press Release, Verizon Communications Inc., *Verizon Communications Reports Revenue, Earnings and Cash Flow Growth in 1Q 2009* (Apr. 27, 2009), available at <http://investor.verizon.com/news/view.aspx?NewsID=983>.

⁹⁵ Young, *supra* note 17, at 1.

⁹⁶ See Press Release, AT&T Inc., *AT&T U-verse Arrives in Mid-Michigan* (Jan. 7, 2009), available at <http://www.att.com/gen/press-room?pid=4800&cdvn=news&newsarticleid=26449> (describing the features of quad-play as including a single, combined voice mailbox for U-verse Voice and wireless messages; U-verse Central, an online portal to manage call preferences and settings from any PC; an online voice mailbox; ability to view call logs from PC or TV screen; ability to make a call from PC or TV using Click to Call; and an online address book).

⁹⁷ See *Verizon Prepping VoIP for FiOS Bundle*, xchange, Dec. 15, 2008, available at <http://www.xchangemag.com/hotnews/verizon-prepping-voip-for-fios-bundle.html>.

“The Hub,” a customer device that serves, among other things, as a telephone, a web-video player, and a distribution center for V-Cast video.⁹⁸

U-verse and FiOS each claim to offer at least 100 HD channels in every one of their video markets, and both assert that they offer more HD than the local cable provider.⁹⁹ Verizon is attempting to gain subscribers by offering exclusive local content. It launched FiOS1, a programming network focused on local issues, including weather, traffic and community news, in the Washington, D.C. metropolitan area, and will soon launch a version of the network in New York City.¹⁰⁰ The telcos have added significant foreign-language and international programming, with AT&T offering Spanish, Mandarin, Polish, Russian, and French programming packages, as well as channels targeted to Indian, Vietnamese, and Korean

⁹⁸ “Phone calls, and other features like simultaneous ring (of other phone numbers, such as a mobile) and visual voice mail, are just the beginning. The Hub delivers news, information, V-Cast video and other interactive features such as driving directions and ordering movie tickets.” Todd Spangler, *Product Review: Verizon’s Over-the-Top Phone*, Multichannel News, Mar. 2, 2009, available at http://www.multichannel.com/article/189284-Product_Review_Verizon_s_Over_the_Top_Phone.php.

⁹⁹ See Press Release, AT&T Inc., *AT&T U-verse TV Lineup Expands to 100 or More High Definition Channels in Every U-verse TV Market* (Mar. 2, 2009) (asserting that U-verse “now offers 100 HD channels — exceeding the HD channel lineups offered by the local cable providers in every U-verse TV market”), available at <http://www.att.com/gen/press-room?pid=4800&cdvn=news&newsarticleid=26580>; Press Release, Verizon Communications, Inc., *Verizon FiOS TV Delivers 100 High-Definition Channels to New Yorkers - on the Network Built for HD* (July 28, 2008) (“America’s biggest city now has the biggest high-definition (HD) TV lineup as Verizon today begins selling FiOS TV service to customers in New York City. As FiOS TV is launched here, the service will offer 100 HD channels, giving customers more HD than Time Warner or Cablevision.”), available at <http://newscenter.verizon.com/press-releases/verizon/2008/verizon-fios-tv-delivers-100.html>. AT&T and Verizon continue to ramp up their HD menus. See Mike Reynolds, *AT&T Rings Up MTVN, BETN Pacts*, Multichannel News, Jan. 16, 2009 (announcing an agreement with MTV Networks and BET Networks to carry seven additional HD channels), available at http://www.multichannel.com/article/162254-AT_T_Rings_Up_MTVN_BETN_Pacts.php; Todd Spangler, *FiOS TV Debuts Six HD Channels from Entertainment Studios*, Multichannel News, May 11, 2009, available at http://www.multichannel.com/article/231976-FiOS_TV_Debuts_Six_HD_Channels_From_Entertainment_Studios.php?nid=2226&source=link&rid=5304342.

¹⁰⁰ See Vishesh Kumar & Amol Sharma, *Local TV Is New Weapon*, Wall St. J., Mar. 25, 2009, at B8 (noting that “a version of the Verizon local channel available in Maryland and Northern Virginia ranks in the top 20% by viewers of the 350 channels the company offers, despite Verizon’s ample menu of high-definition programming”). Verizon also provides localized content on its FiOS1 Local Zone VOD channel in Massachusetts and Rhode Island. See Press Release, Verizon Communications Inc., *‘Community Auditions’ Stars on Verizon’s FiOS TV* (Mar. 3, 2009), available at <http://newscenter.verizon.com/press-releases/verizon/2009/community-auditions-stars.html>.

audiences.¹⁰¹ Verizon is currently introducing three Chinese-language networks on FiOS TV, and has recently rolled out 14 World TV international networks.¹⁰² In addition, both telcos have grown their sports content offerings. For example, AT&T has added ESPNNews HD, ESPNU HD, NHL Network, and NHL Network HD,¹⁰³ while Verizon added MLB Network HD, MLB Extra Innings, and Big Ten Network in both standard-definition and HD to its FiOS channel lineup.¹⁰⁴ Verizon and AT&T also provide ESPN 360 sports programming to their broadband subscribers for no additional charge.¹⁰⁵

Like other cable operators, AT&T and Verizon offer a variety of other enhanced video services. After first rolling out its VOD service in December 2007, Verizon's FiOS TV VOD

¹⁰¹ See Laura Martinez, *AT&T Adds Hispanic Fare to U-verse TV*, Multichannel News, Nov. 3, 2008, available at http://www.multichannel.com/article/83973-AT_T_Adds_Hispanic_Fare_to_U_verse_TV.php; Linda Moss, *AT&T Revs Up HD Lineup with 30 New Nets*, Multichannel News, Oct. 27, 2008, available at http://www.multichannel.com/article/135275-AT_T_Revs_Up_HD_Lineup_With_30_New_Nets.php?rssid=20077; *AT&T Expands U-verse Ethnic Programming*, SkyREPORT.com, Mar. 24, 2009, available at http://www.mediabiz.com/news/articles/?edit_id=11338.

¹⁰² See Mike Reynolds, *Verizon Reaches Out with Sino Television Pact*, Multichannel News, Apr. 29, 2009, available at http://www.multichannel.com/article/210300-Verizon_Reaches_Out_With_Sino_Television_Pact.php; Linda Moss, *Verizon Rolls Out World TV International Channels*, Multichannel News, Aug. 20, 2008, available at http://www.multichannel.com/article/134407-Verizon_Rolls_Out_World_TV_International_Channels.php.

¹⁰³ See Press Release, AT&T Inc., *AT&T U-verse TV Channel Lineup Scores NHL Network and NHL Network HD* (Jan. 12, 2009), available at <http://www.att.com/gen/press-room?pid=4800&cdvn=news&newsarticleid=26458>; Press Release, AT&T Inc., *AT&T U-verse TV Lineup Expands to 100 or More High Definition Channels in Every U-verse TV Market* (Mar. 2, 2009) (noting that U-verse offers a Sports Package with more than 25 channels of college sports, regional sports, international soccer, outdoor recreation, and horse racing), available at <http://www.att.com/gen/press-room?pid=4800&cdvn=news&newsarticleid=26580>.

¹⁰⁴ See Press Release, Verizon Communications Inc., *Batter Up, FiOS TV Customers - MLB Network HD and 'MLB Extra Innings' Package Available in Time for Baseball Season* (Mar. 10, 2009), available at <http://newscenter.verizon.com/press-releases/verizon/2009/batter-up-fios-tv-customers.html>; Danny King, *Verizon's FiOS To Carry Big Ten Network*, TVWeek.com, July 9, 2008, available at http://www.tvweek.com/news/2008/07/verizons_fios_to_carry_big_ten.php.

¹⁰⁵ See Todd Spangler, *ESPN To Retool ESPN360.com, Adding More Live Sports*, Multichannel News, Aug. 8, 2007, available at http://www.multichannel.com/article/81666-ESPN_to_Retool_ESPN360.com_Adding_More_Live_Sports.php; Press Release, Verizon Communications Inc., *Verizon Broadband Customers Get Online Ticket to ESPN360.com's Boston College-UMass Football Game, High-Speed Internet Connection Only Way To Watch* (Sept. 26, 2007), available at <http://newscenter.verizon.com/press-releases/verizon/2007/verizon-broadband-customers-1.html>.

library now includes more than 14,000 titles per month, of which 8,500 are free.¹⁰⁶ Verizon also touts the 1,000 HD movies that it offers on demand.¹⁰⁷ AT&T launched U-verse TV VOD, and has assembled an HD library with new release movies that is accessible to all U-verse customers.¹⁰⁸ AT&T also offers Total Home DVR, which lets U-verse customers play back recorded programs from a central DVR to any set-top box in the home.¹⁰⁹ Further, the telcos are experimenting with interactive TV offerings:

- AT&T, in partnership with Yahoo, launched an interactive fantasy football application that lets U-verse customers receive updates and stats on NFL players on their televisions.¹¹⁰
- AT&T's partnership with Yahoo also enables U-verse customers to access photographs they have uploaded to Flickr.com from their TV sets.¹¹¹
- During the 2008 Olympics, AT&T had an interactive, on-screen application that offered Olympic headlines, a medal tracker, and bios of U.S. athletes.¹¹²

¹⁰⁶ See Jon Hemingway, *Verizon FiOS TV Rolls Out HD VOD*, Multichannel News, Dec. 5, 2007, available at http://www.broadcastingcable.com/article/94342-Verizon_FiOS_TV_Rolls_Out_HD_VOD.php; Press Release, Verizon Communications Inc., *FiOS TV Adds More Free Movies and Other On-Demand Programming Through New Deals with Turner Networks and Sony* (Mar. 9, 2009) (indicating that Verizon added VOD programming from Turner Networks, Starz, Showtime, Sundance Channel, and Sony), available at <http://newscenter.verizon.com/press-releases/verizon/2009/fios-tv-adds-more-free-movies.html>. Verizon also carries ON Networks, an online video studio that puts online productions on TV. See Daisy Whitney, *FiOS Puts ON Networks' Web Shows on TV*, TVWeek.com, May 19, 2008, available at http://www.tvweek.com/news/2008/05/fios_puts_on_networks_web_show.php.

¹⁰⁷ See Press Release, Verizon Communications Inc., *Verizon FiOS TV Customers Now Enjoy 1,000 High-Definition Video-on-Demand Titles* (Nov. 11, 2008), available at <http://newscenter.verizon.com/press-releases/verizon/2008/verizon-fios-tv-customers-now.html>.

¹⁰⁸ See Press Release, AT&T Inc., *AT&T U-verse Expands Video On Demand Library with HD VOD Titles* (Sept. 5, 2008), available at <http://www.att.com/gen/press-room?pid=4800&cdvn=news&newsarticleid=26059>.

¹⁰⁹ It supports up to four simultaneous SD streams, and up to three simultaneous HD streams. See *AT&T Completes U-verse Multiroom DVR Rollout*, Multichannel News, Nov. 11, 2008, available at http://www.multichannel.com/article/135491-AT_T_Completes_U_verse_Multiroom_DVR_Rollout.php.

¹¹⁰ See Todd Spangler, *AT&T Fuels Football Fantasies on TV*, Multichannel News, Aug. 7, 2008, available at http://www.multichannel.com/article/134257-AT_T_Fuels_Football_Fantasies_On_TV.php.

¹¹¹ See *AT&T Flicks Photos to the TV*, Multichannel News, Apr. 2, 2008, available at http://www.multichannel.com/article/132682-AT_T_Flicks_Photos_to_the_TV.php?rssid=20077&q=AT%26T+Flicks+Photos+to+the+TV.

¹¹² See Spangler, *supra* note 110.

- Verizon offers an interactive media guide that provides on-demand access to personalized information, including local traffic and weather reports, daily local and national news headlines, fantasy sports, daily national sports headlines, and daily horoscopes.¹¹³ The guide also provides access to personalized ESPN Fantasy Football points, stats, and player information.¹¹⁴

The telcos are aggressively marketing their services. In April 2009, Verizon launched a promotion offering a FiOS triple-play package for \$99 per month for new customers.¹¹⁵ Verizon has also offered new FiOS TV subscribers free HD DVR service for six months, with claimed savings of up to \$119 over that period.¹¹⁶ In 2007, Verizon offered new subscribers in several states a free flat-screen television for switching to FiOS.¹¹⁷ AT&T has also used promotions that offer cash in return for subscribing to U-verse TV. After launching a \$200 cash-back promotion, AT&T “sweetened the deal with added TV and music channels, newer CPE and included its fledgling Total Home DVR feature.”¹¹⁸ In an effort to link popular video games to U-verse,

¹¹³ See Press Release, Verizon Communications Inc., *Verizon Offers Ultimate Home Upgrade with Easy, Affordable Switch from Cable to Advanced, All-Fiber-Optic FiOS Services* (Apr. 21, 2009), available at <http://newscenter.verizon.com/press-releases/verizon/2009/verizon-offers-ultimate-home.html>; see also Tara Seals, *Verizon Throws Open FiOS TV to Developers*, xchange magazine, Mar. 13, 2009 (noting that Verizon is opening up its FiOS TV service to third-party developers to write applications, which “has the potential to bring thousands of Apple iPhone-style software bits to subscribers, opening up a whole world of customizable viewing and untold business models”), available at <http://www.xchangemag.com/hotnews/verizon-throws-open-fios-tv-to-developers.html>. Verizon is also developing Facebook and Twitter widgets for FiOS TV subscribers. See *id.*

¹¹⁴ Press Release, Verizon Communications Inc., *Verizon and ESPN Kick Off Fantasy Football on FiOS TV* (Nov. 12, 2008), available at <http://www.webwire.com/ViewPressRel.asp?aId=79670>.

¹¹⁵ The deal included \$150 cash back and requires a two-year commitment. See Todd Spangler, *FiOS TV Available to More Than 1 Million California Homes*, Multichannel News, Apr. 30, 2009, available at http://www.multichannel.com/article/230871-FiOS_TV_Available_To_More_Than_1_Million_California_Homes.php.

¹¹⁶ *Verizon FiOS Promo Covers HD DVR Options*, xchange magazine, Jan. 7, 2009, available at <http://www.xchangemag.com/hotnews/verizon-fios-promo-covers-hd-dvr-options.html>.

¹¹⁷ *Verizon Offers Free Sharp LCD TV to New FiOS Subscribers*, Telecomm. Indus. News, Nov. 21, 2007, available at <http://www.teleclick.ca/2007/11/verizon-offers-free-sharp-lcd-tv-to-new-fios-subscribers/>.

¹¹⁸ Bob Wallace, *AT&T Sweetens U-verse TV Promo*, xchange magazine, Oct. 9, 2008, available at <http://www.xchangemag.com/hotnews/att-sweetens-uverse-tv-promo.html>

AT&T launched a promotion providing new subscribers a copy of Guitar Hero World Tour.¹¹⁹

To reach potential subscribers in retail locations, AT&T signed marketing agreements with Wal-Mart under which the retailer will sell U-verse TV and high-speed Internet services.¹²⁰

Other telcos are also participating in the video marketplace. The National Telecommunications Cooperative Association reported that 68% of its members have a video offering as of October 2008, and that 10% more of its members expect to have a video offering by the end of 2009.¹²¹ In 2007, Qwest announced it would not pursue a broad video play, and is instead concentrating on its partnership with DirecTV for now.¹²² However, Qwest's strategy is to provide increased broadband Internet capacities -- eventually allowing customers to access an HD VOD online system -- where it believes television's future lies.¹²³

¹¹⁹ Darren Murph, *Sign Up for AT&T's U-verse, Get Guitar Hero World Tour*, engadget HD, Nov. 13, 2008, available at <http://www.engadgethd.com/2008/11/13/sign-up-for-atandts-u-verse-get-guitar-hero-world-tour/>.

¹²⁰ See Todd Spangler, *AT&T Takes U-verse to Wal-Mart, Circuit City*, Multichannel News, Oct. 13, 2008, available at http://www.multichannel.com/article/135082-AT_T_Takes_U_verse_To_Wal_Mart_Circuit_City.php?rssid=20077.

¹²¹ See Nat'l Telecomm. Coop. Ass'n, *NTCA 2008 Broadband/Internet Availability Survey Report 13* (Oct. 2008), available at <http://www.ntca.org/images/stories/Documents/Advocacy/SurveyReports/2008ntcabroadbandsurveyreport.pdf>.

¹²² See Carol Wilson, *Qwest Charts Different Video Course*, Telephony Online, Jan. 11, 2008 (quoting Qwest's chief executive Ed Mueller as saying "We have a great relationship with DirecTV, and they have a core competency in content."), available at <http://telephonyonline.com/access/news/qwest-vod-video-011108/>. As of March 30, 2008, Qwest had signed up 699,000 video subscribers through that partnership. Press Release, Qwest, *Qwest Reports Steady First Quarter 2008 Results, Announces Partnership with Verizon Wireless* (May 6, 2008), available at http://media.corporate-ir.net/media_files/irol/11/119535/Q_1q08_er.pdf.

¹²³ See Wilson, *supra* note 122 (explaining that "While AT&T and Verizon aggressively deploy video services via their U-Verse and FiOS TV offerings, respectively, Qwest Communications is pursuing a very different video strategy. It may appear to be no strategy at all -- but that's a misconception. Qwest is, in fact, expecting the fat broadband pipes that it is developing to become the conduit for a wide range of video-on-demand offerings, including high-definition video.").

C. Viewing Video over the Internet Has Become Mainstream and Provides a Broad Diversity of Programming Options to Consumers.

As early as July 2006, online video was declared “mainstream” when YouTube.com broke into the list of top 50 online properties.¹²⁴ The diversity and amount of video on the Internet, and the number of people accessing it, has dramatically changed the video marketplace since then.¹²⁵ When compared with what the Commission last reported, the changes described below are nothing short of revolutionary.¹²⁶

Looking at just YouTube reveals the dramatic change. In June 2007, Commissioner McDowell noted that “YouTube itself uses as much bandwidth today as the entire Internet did in 2000. In the past year alone, we have witnessed a 1000 percent increase in videos being uploaded or downloaded on the Internet.”¹²⁷ This trend continues; as of April 2009, YouTube “account[ed] for 58 percent of all video streamed on the Web in the U.S.” with “its total volume of streams climbing by 36 percent in April to nearly 5.5 billion videos compared to the same period last year.”¹²⁸

¹²⁴ See Press Release, comScore, Inc., *Online Video Officially Goes Mainstream as YouTube.com Breaks into the comScore Media Metrix Top 50* (Aug. 15, 2006), available at <http://www.comscore.com/press/release.asp?press=982>.

¹²⁵ See *13th Annual Report* ¶ 150 (noting “[t]he amount of web-based video provided over the Internet continues to increase significantly each year”).

¹²⁶ Compare *id.* ¶ 17 (“In July 2006, 107 million Americans, three out of every five Internet users, viewed video online. In July 2006, about 60 percent of U.S. Internet users downloaded videos. More than 7 billion videos were downloaded that month.”), with Press Release, comScore, *Hulu Continues Ascent in US Online Video Market* (Apr. 28, 2009) (noting that as of March 2009, 149 million Americans viewed 14.5 billion videos online), available at http://www.comscore.com/Press_Events/Press_Releases/2009/4/Hulu_Breaks_Into_Top_3_Video_Properties.

¹²⁷ Robert M. McDowell, Commissioner, FCC, Luncheon Address at the Broadband Policy Summit III 13 (June 7, 2007), available at <http://www.fcc.gov/commissioners/mcdowell/speeches2007.html>.

¹²⁸ Mike Shields, *Nielsen: Hulu’s Traffic Soars While FIM’s Plummet*, MediaWeek, May 14, 2009 (noting that in April 2009, Hulu also experienced explosive growth: “Hulu streamed over 373 million videos, a whopping increase of 490 percent versus the same month last year”), available at http://www.mediaweek.com/mw/content_display/news/local-broadcast/e3id8b91cde574aee6561378e0eb5ff80bb.

Earlier this year, CNN reported that online viewership is skyrocketing, and that “[a]s more Americans get used to watching video on their computers, more Web sites are popping up to offer free movies and TV shows. Consumers are taking advantage of this to eliminate cable or satellite TV and integrate their home entertainment with the Web.”¹²⁹ However, the story is still unfolding, with MVPDs seeing video available on the Internet as presenting a growth opportunity. For example, Comcast Chairman and CEO Brian Roberts said in April 2009 that he believes that making cable programming online could be a boon for distributors, and declared that he thinks “it’s a friend, not a foe.”¹³⁰

Without a doubt, the growth of online video viewing is on a sharp vertical trajectory. A January 2008 report by consumer technology researcher The Diffusion Group found that 83% of adult consumers, or more than 110 million people, watch online video at least once a week.¹³¹ In addition, the report forecast that long-form videos, such as TV shows and movies, will total 22.8 billion streams annually, or 4.1% of total video streams by 2013.¹³² By October 2008, a study by Nielsen Media Research found that one in four Internet users had streamed full-length

¹²⁹ Zach Pontz, *More Turning to Web To Watch TV, Movies*, CNN.com, Feb. 6, 2009, available at <http://www.cnn.com/2009/TECH/02/06/internet.tv/index.html>.

¹³⁰ Mike Farrell, *2009 Cable Show: Comcast’s Roberts Embraces Online Video as ‘Friend, Not Foe,’* Broad. & Cable, Apr. 1, 2009, available at http://www.broadcastingcable.com/article/191141-2009_Cable_Show_Comcast_s_Roberts_Embraces_Online_Video_As_Friend_Not_Foe_.php; see also Marguerite Reardon, *Channeling TV Shows to the Web*, CNET News, Apr. 27, 2009 (noting that Time Warner Cable is testing its online video-on-demand service in Milwaukee), available at http://news.cnet.com/8301-1023_3-10227487-93.html; Deborah Yao, *Cable TV Companies Nervously Embrace Web*, E-Commerce News: Media Convergence, Feb. 25, 2009 (quoting Keith Coccozza of Time Warner Cable: putting video online “could give consumers more for their money while also helping to preserve the current business model that is generating and delivering popular branded shows viewers want”), available at <http://www.ecommercetimes.com/story/66298.html>.

¹³¹ The report found that successful business models will embrace an ad-supported video syndication model and that the majority of Internet television programmers will rely on advertising rather than subscriptions for most of their revenue. See Gina Keating, *Disney, Hulu Restart Talks over ABC Shows*, Reuters, Mar. 27, 2009, available at <http://www.reuters.com/article/marketsNews/idUSN2727588120090328>.

¹³² See *id.*

TV episodes online in the previous three months.¹³³ By November 2008, online video viewing accounted for 12.5% of the total time U.S. users spent on the Internet, up from 8.5% in November 2007.¹³⁴ The potential of Internet video was exemplified during the Presidential Inauguration in January 2009. Online video viewership surged between 12:00 and 1:00 p.m. EST on Inauguration Day, with online viewership at MSNBC.com, CNN.com, and FoxNews.com “surg[ing] fourteen-fold between 12-1 PM EST.”¹³⁵

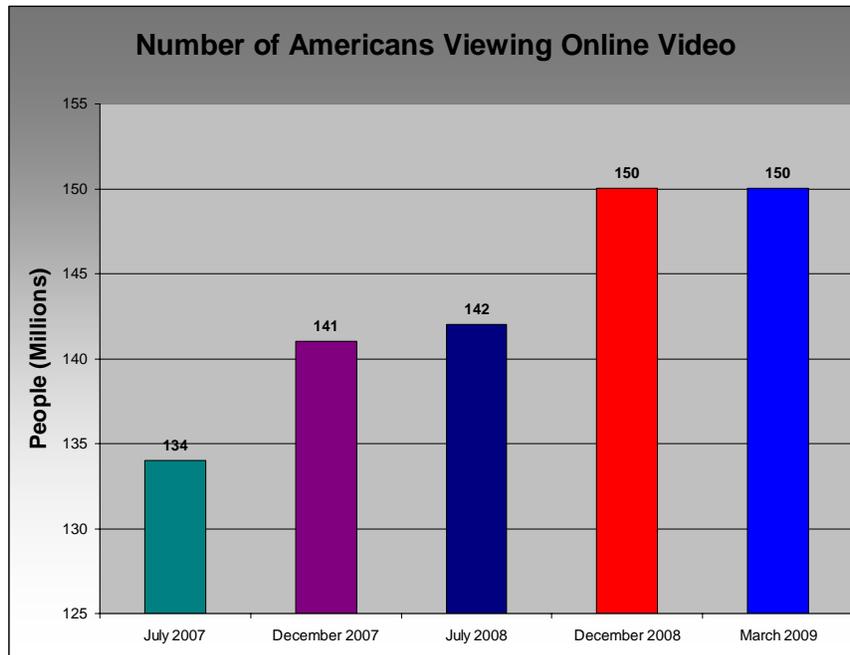
The charts below show the rapid increase in online video watching. The first chart shows the average number of Americans who viewed online videos for selected months between July 2007 and March 2009.¹³⁶

¹³³ See Brian Stelter, *Serving Up Television Without the TV Set*, N.Y. Times, Mar. 10, 2008, available at <http://www.nytimes.com/2008/03/10/technology/10online.html>.

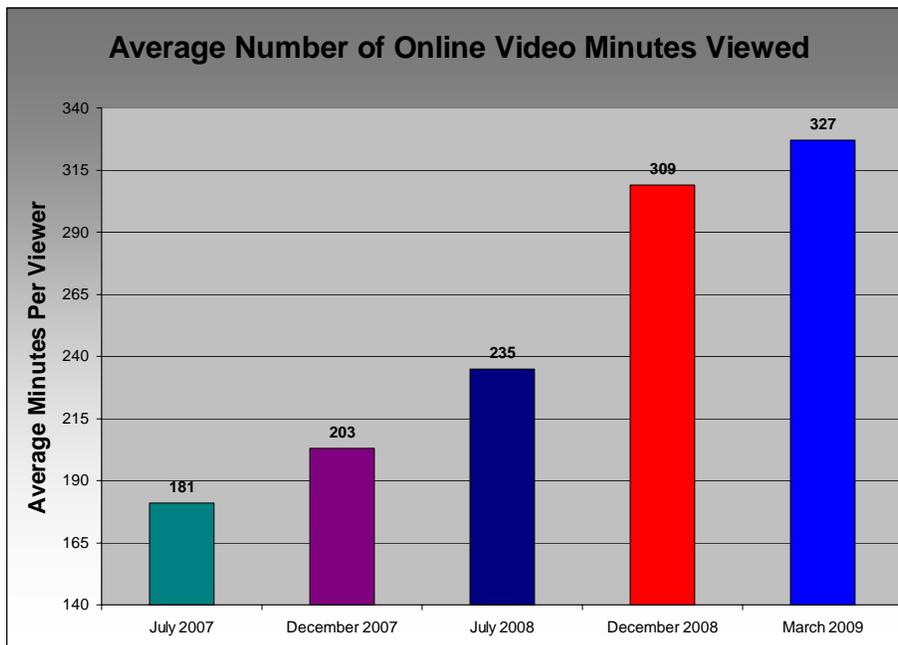
¹³⁴ See Sarah Radwanick, comScore, *The 2008 Digital Year in Review* 11 (Jan. 2009), available at <http://www.comscore.com/2008-digital-review/>.

¹³⁵ See Press Release, comScore, *Live Coverage of Presidential Inauguration Drives Significant Incremental Viewership at MSNBC, CNN and FoxNews Web Sites* (Jan. 27, 2009), available at <http://www.comscore.com/press/release.asp?press=2705>. As of 3:30 p.m. on Inauguration Day, CNN.com said it “served more than 21.3 million live streams globally since 6 a.m. That was nearly four times the amount of live streams on the site on Election Day when there were 5.3 million live streams.” Jake Coyle, *Like Never Before, Inauguration Experienced Online*, Seattle Times, Jan. 21, 2009, available at http://seattletimes.nwsourc.com/html/entertainment/2008650794_apinaugurationonline.html.

¹³⁶ Press Release, comScore, *US Viewers Watched an Average of 3 Hours of Online Video in July* (Sept. 12, 2007), available at <http://www.comscore.com/press/release.asp?press=1678>; Press Release, comScore, *US Internet Users Viewed 10 Billion Videos Online in Record-Breaking Month of December* (Feb. 8, 2008), available at http://www.comscore.com/Press_Events/Press_Releases/2008/02/US_Online_Video_Usage; Press Release, comScore, *YouTube Draws 5 Billion US Online Video Views in July 2008* (Sept. 10, 2008), available at <http://www.comscore.com/press/release.asp?press=2444>; Press Release, comScore, *US Online Video Viewing Surges 13 Percent in Record-Setting December* (Feb. 4, 2009), available at <http://www.comscore.com/press/release.asp?press=2714>; Press Release, comScore, *Hulu Continues Ascent in US Online Video Market* (Apr. 28, 2009), available at http://www.comscore.com/Press_Events/Press_Releases/2009/4/Hulu_Breaks_Into_Top_3_Video_Properties.



The second chart shows the increase in the average number of minutes viewed by each online video viewer for those same months.¹³⁷



¹³⁷

Id.

These charts demonstrate the dramatic -- and continuing -- escalation in both the number of people watching online video and the amount of time dedicated to it.¹³⁸ Growth is likely to continue as increasingly more Americans obtain broadband access, and as even more quality video content is made available online.¹³⁹ Moreover, services such as Veoh Networks and Boxee help users locate online video content, and (the latter) routes that content directly to the TV set for viewing.¹⁴⁰

Established media companies, including broadcast and cable networks, are reaching new audiences by expanding the availability, formats, and purposes of online video. Many are providing consumers with repurposed full-length content, as well as with interactive features and bonus content available exclusively online. For example:

- In March 2008, Fox and NBC launched Hulu, an online video joint venture that allows users to access advertiser-supported video content for free. Hulu generated a 57% increase in online videos viewed in the last 6 months of 2008.¹⁴¹ At the end of 2008, Hulu started offering full-length HD episodes of ten NBC shows including *30 Rock* and

¹³⁸ *Id.*

¹³⁹ The President's goal to increase broadband Internet deployment is being implemented with a 2009 stimulus package, which includes substantial funding for high-speed Internet networks in parts of the country that rely on dial-up connections or have only one broadband option. See Joelle Tessler, *Broadband Funding in Stimulus Plan Sparks Debate*, Associated Press, Feb. 6, 2009, available at http://www.usatoday.com/tech/news/2009-02-06-broadband-funding_N.htm.

¹⁴⁰ See Mark Seavy, *Cable Companies Seeking Stakes in Internet Video*, Communications Daily, Mar. 23, 2009, at 6-7. "[O]n a laptop or connected to an HDTV, Boxee gives you a true entertainment experience to enjoy your movies, TV shows, music and photos, as well as streaming content from services like Netflix, MTV, Pandora and flickr." BOXEE.com, *You Are Now Free To Be Entertained*, at <http://www.boxee.tv/> (last visited May 19, 2009).

¹⁴¹ See Radwanick, *supra* note 134, at 11. In December 2008, the duration of the average online video on Hulu was 10.1 minutes. See Press Release, comScore, *U.S. Online Video Viewing Surges 13 Percent in Record-Setting December* (Feb. 4, 2009), available at <http://www.comscore.com/press/release.asp?press=2714>. The number of videos viewed on Hulu grew 6% from November 2008 to December 2008, to 241 million videos viewed. See *id.* During March 2009, 380 million videos were viewed on Hulu, representing a 58% increase compared to December 2008. See Press Release, comScore, *Hulu Continues Ascent in US Online Video Market* (Apr. 28, 2009), available at http://www.comscore.com/Press_Events/Press_Releases/2009/4/Hulu_Breaks_Into_Top_3_Video_Properties.

The Office, and announced plans to increase its HD gallery.¹⁴² In April 2009, Disney became an investor in Hulu and agreed to add content to the site.¹⁴³

- TV.com, CBS's answer to Hulu, reported about 16 million unique viewers in December 2008.¹⁴⁴ CBS finalized distribution deals with Sony, Starz Media, and MGM.¹⁴⁵
- CBS Sports's live online presentation of the 2009 NCAA men's basketball tournament reached more online viewers in its first four days of coverage than were reached during the entire tournament in 2008.¹⁴⁶ By the end of the tournament, CBSSports.com reported that its site supported 7.52 million unique visitors in 2009, up 58% from 4.76 million in 2008.¹⁴⁷
- Disney announced in March 2009 that it will provide short-form videos from ABC and ESPN to run on YouTube under an ad-revenue sharing arrangement.¹⁴⁸
- In April 2009, press reports indicated that YouTube signed video distribution deals with several movie studios, Starz, Discovery Communications, and National Geographic.¹⁴⁹
- In 2008, MTV Networks made every episode of *The Daily Show* and *South Park* available in an online, searchable archive.¹⁵⁰

¹⁴² See Alex Weprin, *Hulu Begins HD Programming Push*, *Broad. & Cable*, Nov. 24, 2008, available at http://www.broadcastingcable.com/article/159856-Hulu_Begins_HD_Programming_Push.php.

¹⁴³ See Nat Worden, *Disney CEO Says Hulu Deal Won't Hurt Other Businesses*, *Wall St. J.*, May 5, 2009, available at <http://online.wsj.com/article/BT-CO-20090505-719986.html>.

¹⁴⁴ See Brian Stelter, *CBS Pumps Up TV.com To Create a Destination*, *N.Y. Times*, Jan. 11, 2009, available at <http://www.nytimes.com/2009/01/12/business/media/12cbs.html>.

¹⁴⁵ See Erik Gruenwedel, *TV.com Cites Traffic Surge*, *Home Media Magazine*, Mar. 24, 2009 (reporting that on March 24, 2009, TV.com reported a 162% increase in unique viewers, a 551% increase in video streams, and a 4,316% increase in minutes viewed in February compared to the same period last year), available at <http://www.homemediamagazine.com/streaming/tvcom-cites-traffic-surge-15119>; see also Alex Woodson, *CBS Upgrades TV.com To Stream Shows*, *United Press Int'l*, Jan. 12, 2009, available at http://www.upi.com/Entertainment_News/2009/01/12/CBS_upgrades_TVcom_to_stream_shows/UPI-15891231784520/; Daisy Whitney, *TV.com Prepares To Do Hulu Dance*, *TVWeek*, Jan. 11, 2009 (explaining that TV.com and Hulu have similar "content strategies . . . setting up a clash of old-media titans on the new-media frontier"), available at http://www.tvweek.com/news/2009/01/tvcom_prepares_to_do_hulu_danc.php.

¹⁴⁶ According to reports, the March Madness on Demand video player -- which streamed 48 live games from March 19 through March 22 -- reached 5.6 million unique viewers, a surge of 60% compared to the same time period last year. See Michael Shields, *First Four Days of CBS's Live NCAA Online Tops '08*, *MediaWeek*, Mar. 23, 2009, available at http://www.mediaweek.com/mw/content_display/news/digital-downloads/broadband/e3ib501b76c37004ff7552e1fbc35120e55.

¹⁴⁷ Visitors watched and listened to 8.6 million hours of video and audio, a 75% increase. *NCAAs Get 58 Percent Jump in Online Video Visits*, *ESPN.com*, Apr. 10, 2009, available at <http://sports.espn.go.com/espn/wire?section=ncb&id=4059555>.

¹⁴⁸ See *Disney/ABC ESPN Sign YouTube Video Deal*, *ABC News*, Mar. 30, 2009, available at <http://abcnews.go.com/Technology/wireStory?id=7213604>.

¹⁴⁹ See Reardon, *supra* note 130.

- In January 2009, Tribune launched The Syndicate, an “online multimedia content marketplace” shared by Tribune’s television station and newspaper websites, and the station websites owned by Local TV.¹⁵¹
- NBC offered first time live streaming video of the 2008 Beijing Olympics, making approximately 2,200 hours of coverage available online.¹⁵²
- In 2007, Fox expanded the distribution of Fox On Demand, its online video platform for streaming the network’s prime-time shows, to more than 200 of its network affiliate websites. This allows local Fox stations to stream full-length episodes of shows such as *24*, *Bones*, and *Prison Break*.¹⁵³

As the Washington Post recently reported, “full-length episodes of more than 90 percent of the shows carried by the major broadcast networks are legally accessible within a day of being broadcast.”¹⁵⁴ This is a stark change from a few short years ago when full-length programming available on the Internet was much less commonplace.

Content providers also have developed stand-alone series and content for viewing online.

For example, in late 2007, Lifetime announced plans to launch original supplementary digital

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¹⁵⁰ See Kenneth Li, *MTV To Offer all South Park Clips Online*, Reuters, Nov. 29, 2007 (noting that the archive includes features that allow viewers to grab online videos to install on a viewer’s own website and communicate with content creators), available at <http://www.reuters.com/article/internetNews/idUSN2864695720071129>. According to Erik Flannigan, Executive VP of Digital Media: “In three years’ time, you’ll count an online rating the same way you’d count a live-plus-three-day rating. . . . South Park’s online audience adds another 13 percent to the TV base of viewers 18-49 . . . So the scale is now approaching real TV ratings-level numbers.” See Anthony Crupi, *Comedy Central Stays Agnostic on Delivery of Shows*, AdweekMedia, Mar. 25, 2009, available at http://www.adweekmedia.com/aw/content_display/mediaupfront/news/cable/e3ie60616bd56e87859e66e32b3fbb2b1b?ref=mediaweek.

¹⁵¹ See Michael Malone, *Tribune Launches “Content Marketplace,”* Broad. & Cable, Jan. 22, 2009 (noting that the website will pull content from Tribune’s 23 television stations, 17 stations owned by Local TV, Tribune’s newspaper sites, and outside vendors), available at http://www.broadcastingcable.com/article/162557-Tribune_Launches_Content_Marketplace_.php.

¹⁵² See *NBC To Air 3,600 Hours of Coverage from Beijing*, Associated Press, Aug. 7, 2007, available at <http://sports.espn.go.com/espn/wire?section=oly&id=2964544>.

¹⁵³ See Mike Shields, *Fox On Demand Expands Digital Distribution to Local Affiliates*, MediaWeek, Mar. 1, 2007, available at <http://www.onlinevideowatch.com/fox-expands-digital-distribution-to-local-affiliates/>.

¹⁵⁴ Paul Farhi, *Click, Change: The Traditional Tube Is Getting Squeezed Out of the Picture*, Wash. Post, May 17, 2009, at E1, available at <http://www.washingtonpost.com/wp-dyn/content/article/2009/05/14/AR2009051404522.html>.

content offerings on myLifetime.com to complement three of its reality series.¹⁵⁵ In April 2008, Warner Bros. re-launched the WB Network exclusively online via TheWB.com and KidsWB.com, which both provide ad-supported VOD content.¹⁵⁶ In May 2008, CBS announced a partnership with the producers of online series *lonelygirl115* to create original programming for new-media platforms that would compliment CBS's broadcast programming.¹⁵⁷ CBS's latest original online programming endeavor, *Heckle-U*, about an underachiever who excels at heckling during college basketball games, was streamed during March Madness 2009.¹⁵⁸

New and independent online video entrants are providing both original and re-purposed content to online video viewers. For example:

- Funny or Die is a comedy video website created by Gary Sanchez Productions (Will Ferrell, Adam McKay, and Chris Henchy) that combines user generated content with original, exclusive content.¹⁵⁹
- Metacafe is an online video website that teams with content creators to develop short-form video.¹⁶⁰

¹⁵⁵ See Mike Shields, *Lifetime To Roll Out Original Web Content*, MediaWeek, Dec. 20, 2007, available at http://www.mediaweek.com/mw/eseach/article_display.jsp?vnu_content_id=1003687815.

¹⁵⁶ See Press Release, Warner Bros., *Warner Bros. Television Group Unveils New Digital Initiatives, Including the Launch of TheWB.com and KidsWB.com* (Apr. 28, 2008), available at <http://www.timewarner.com/corp/newsroom/pr/0,20812,1735660,00.html>. In June 2008, Warner Bros. announced that it signed distribution agreements with Dailymotion, Joost, Sling Media, TiVo, and Veoh Networks to launch channels that will include TheWB.com and KidsWB.com. See Press Release, Warner Bros., *Warner Bros. Television Group Announces Distribution Agreements with Dailymotion, Joost, Sling Media, TiVo and Veoh Networks To Launch New Branded Channels* (June 12, 2008), available at <http://www.timewarner.com/corp/newsroom/pr/0,20812,1814072,00.html>.

¹⁵⁷ See Alex Weprin, *CBS Strikes Deal with lonelygirl115 Creators*, Broad. & Cable, May 14, 2008 (noting that the programming would include extended narratives and stand-alone plot lines), available at http://www.broadcastingcable.com/article/113725-CBS_Strikes_Deal_with_lonelygirl115_Creators.php.

¹⁵⁸ See Andrew Wallenstein, *CBS Sets "Heckle" Web Series*, Hollywood Rep., Dec. 30, 2008, available at http://www.hollywoodreporter.com/hr/content_display/television/news/e3i935003166745e37d982de1cd198abf50.

¹⁵⁹ The site encourages celebrities, established and up-and-coming comedians, and regular users to upload videos, then selects the best videos to keep on the site through audience voting. See Funny or Die, *What is Funny or Die?*, at <http://www.funnyordie.com/about> (last visited May 19, 2009).

¹⁶⁰ Metacafe features include: an NBA channel featuring game highlights; a music channel; more than 30 channels from content partners; the "MetaFest" online-offline film festival; and a feature that allows Metacafe
(footnote continued...)

- Plus1TV is an independent online video site that features channels, series, and “prime-time” viewing hours on four channels (music, film, food, and humor).¹⁶¹

Non-profit and community organizations are also providing video content on the Internet.

For example, One Economy has developed the online Public Interest Channel, which “combines compelling programming with a launching point into relevant information that provides the opportunity for people to take action.”¹⁶² Several non-profit organizations utilize YouTube to post videos online, recognizing that “[a]llowing YouTube to host video” saves bandwidth and exposes messages to “an entirely new audience.”¹⁶³ Other websites, like DoGooderTV, are devoted entirely to enabling nonprofit organizations “to present new videos and existing media assets to new audiences.”¹⁶⁴

What is most astounding about the foregoing discussion is that it is only the “tip of the iceberg.” New online programming developments are reported virtually every day. In addition, several companies are creating avenues to deliver video from the Internet to television sets. For example:

- TV manufacturers are moving towards making Internet access a standard feature of future sets. Sharp currently features a model with a built-in Ethernet port for plugging into a

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visitors to add and edit descriptions for any of the millions of videos on the site. In December 2008 alone, Metacafe attracted more than 11 million unique U.S. viewers. See Press Release, Metacafe, *Metacafe Strengthens Its Position as the Leading Independent Online Video Site in the U.S.* (Jan. 15, 2009), available at <http://press.metacafe.com/?p=137>.

¹⁶¹ Episodes on Plus1TV are “snack size” for the online viewing audience and average three to five minutes. See Plus1TV, *Who We Are*, at <http://plus1tv.com/about/> (last visited May 19, 2009).

¹⁶² One Economy Corp., *About the Public Interest Channel*, at <http://www.pic.tv/about> (last visited May 18, 2009).

¹⁶³ Brian Satterfield, *Share Your Nonprofit’s Videos with the World*, Tech Soup, Sept. 28, 2006, available at <http://www.techsoup.org/learningcenter/internet/page5876.cfm>. YouTube encourages nonprofits to post videos to its site, and even provides an instructional video titled *Broadcast Your Cause - YouTube Nonprofit Program*. See YouTube, *Broadcast Your Cause - YouTube Nonprofit Program*, at <http://www.youtube.com/watch?v=TIIdEnSkhA9A> (last visited May 18, 2009).

¹⁶⁴ DoGooderTV, *About DoGooderTV*, at <http://www.dogooder.tv/aboutus.aspx> (last visited May 18, 2009).

home broadband router.¹⁶⁵ In 2009, LG and Samsung are offering Netflix-friendly home theater systems and HDTVs that can stream movies from the Netflix website.¹⁶⁶

- Sony developed a Bravia Internet Link box that attaches to a variety of flat-panel TVs and connects to the Internet via Wi-Fi or Ethernet wire. It allows users to view a group of pre-selected Internet services, including YouTube and Amazon.com's Video On Demand service.¹⁶⁷ Panasonic's 2009 VieraCast-compatible plasmas will also support Amazon's VOD.¹⁶⁸
- Yahoo! is working with TV manufacturers to develop TV sets that can provide an integrated Internet and TV content experience. The system, known as Connected TV, Yahoo!, will feature a variety of widget programs that will display Internet content in on-screen sidebars that will not interrupt TV viewing.¹⁶⁹
- ZillionTV, which launched on March 4, 2009, is providing consumers another way to view on-demand movies and TV programs using Internet connections. The company created the "Z-bar" hardware, which connects the TV and the Internet via an Ethernet cable or Wi-Fi. ZillionTV has deals with Hollywood movie studios and TV networks, including Disney, 20th Century Fox Television, NBC Universal, Sony Pictures, and Warner Bros.¹⁷⁰
- Seattle-based online video company GridNetworks created Gridcast TV, a service that links Web video to televisions via Microsoft Xbox 360s. Gridcast connects a user's computer to his Xbox, telling it that a web video is available for streaming.¹⁷¹
- Cable companies are also actively exploring ways to deliver Internet video to television sets. For example, at a recent CableLabs forum, cable tech executives were enthusiastic about a set-top box that can play Internet video on a television. Comcast Chief

¹⁶⁵ See Hiawatha Bray, *What's on TV? Connections to the Internet*, Boston Globe, Feb. 5, 2009, available at http://www.boston.com/business/technology/articles/2009/02/05/whats_on_tv_connections_to_internet/.

¹⁶⁶ See Marguerite Reardon, *Dreaming of Cutting the Subscription TV Cord*, CNET.com, Mar. 9, 2009, available at http://news.cnet.com/8301-1023_3-10189658-93.html?part=rss&subj=news&tag=2547-1_3-0-20.

¹⁶⁷ See Press Release, Sony, *Sony Brings Internet Video to the Living Room* (Jan. 7, 2009), available at http://news.sel.sony.com/en/press_room/consumer/television/flat_panel_displays/lcd/release/27475.html; see also Bray, *supra* note 165; John Falcone, *Bravia Internet Video Brings Online Video to Sony TVs*, CNET News, Jan. 7, 2007, available at http://news.cnet.com/8301-17938_105-9672957-1.html.

¹⁶⁸ See Reardon, *supra* note 166.

¹⁶⁹ TV sets with this built-in system are expected to be released in 2009. See Press Release, Yahoo, *Yahoo!(R) Brings the Cinematic Internet™ to Life and Revolutionizes Internet-Connected Television* (Jan. 7, 2009), available at <http://yhoo.client.shareholder.com/press/releasedetail.cfm?ReleaseID=358066>; see also Bray, *supra* note 165.

¹⁷⁰ See Marguerite Reardon, *Start-Up Offers Alternatives to Subscription TV*, CNET.com, Mar. 4, 2009, at http://news.cnet.com/8301-1023_3-10187655-93.html.

¹⁷¹ See Dan Frommer, *More Progress on Web-Video-To-TV Front, Via Xbox 360*, Bus. Insider, Nov. 17, 2008, available at <http://www.businessinsider.com/2008/11/web-video-tv-xbox-360>.

Technology Officer Tony Werner said that the product was picked because the startup has developed “a very compelling software platform.” Charter Communications CTO Marwan Fawaz stated that, at some point, cable operators could consider integrating the Internet set-top box features into their digital cable set-tops.¹⁷²

For now, it appears that online viewing does not cannibalize MVPD subscribers.¹⁷³ While at this point no one can predict the full impact video delivered over the Internet will have on the video marketplace, there is no question it has already provided consumers with a vast and increasing number of video options.

D. Broadcasters Are Making the Transition to Digital and Continue To Provide Consumers with an Important Source of Video Programming.

Millions of households rely on free over-the-air broadcast television, and tens of millions more consume broadcast content distributed over other platforms. After years of planning and technological development, the broadcast industry is finally on the verge of going full bore into the digital age -- a development that provides broadcasters with new avenues for supplying video programming. One industry observer has summarized broadcast television’s position in the media marketplace as being “one of the strongest local media franchises,” one that will dynamically respond to marketplace changes by developing new revenue streams for, among

¹⁷² See Todd Spangler, *Cable Tech Execs Bullish on Internet Video Set-Top*, Multichannel News, Feb. 9, 2009, available at http://www.multichannel.com/article/173850-Cable_Tech_Execs_Bullish_On_Internet_Video_Set_Top.php.

¹⁷³ “It makes for a salacious headline, but the reality is actually different” and pay TV customers are increasing. Andy Fixmer & Adam Santariano, *Hulu Doesn’t Cannibalize Cable TV Subscribers, CEO Kilar Says*, Bloomberg.com, Apr. 22, 2009 (quoting Jason Kilar, chief executive of Hulu), available at <http://www.bloomberg.com/apps/news?pid=20601204&sid=aULJwPCFWsgE&refer=technology>; see also *Cable, Add Another Voice to the Chorus of Those Saying Online Video’s Growth Won’t Hurt Pay-TV*, Communications Daily, Apr. 15, 2009, at 11 (“Initially the thought was that ZillionTV’s business model would lead to cord cutting as consumers wouldn’t have a need for their current cable/satellite service or the monthly bill that came with it. To us, it sounds like disintermediation of subscription TV is not a near-term event, but still something to watch for.”) (quoting Wachovia analyst Marci Ryvicker).

other things, “digital multicasting and the Internet, as well as mobile TV revenues that will arise in the near future.”¹⁷⁴

As of December 31, 2008, there were 1,759 broadcast television stations nationwide that collectively provided video programming to nearly all of the nation’s 114 million TV households.¹⁷⁵ Although the vast majority of households receive their broadcast television through a cable operator, DBS provider, or other MVPD, free broadcast services delivered over-the-air continue to be an important option. Recent reports indicate that 17.62 million TV households, or 15.4% of the 114.2 million total TV households, rely on over-the-air-TV for video programming.¹⁷⁶ In addition, even MVPD customers may have some secondary televisions that rely solely on over-the-air signals.

Currently, 1,655 broadcast stations (94% of all broadcast stations) are broadcasting in digital.¹⁷⁷ By June 12, 2009, all full-power broadcasters are required to complete the transition to digital television. Recent reports indicate that over 600 stations already transitioned successfully.¹⁷⁸ The transition to digital affords broadcasters opportunities to “re-brand and

¹⁷⁴ SNL Kagan, *Market-by-Market Revenue Projections, 2009 Radio/TV Station Annual Outlook* 33. Such new revenue streams could help broadcast stations make up for losses due to increased video competition and the decline in advertising spending. See S. Schechner & R. Dana, *Local TV Stations Face a Fuzzy Future*, Wall St. J., Feb. 12, 2009, at A1 (“Stations are scrambling to find new revenue streams. Some are testing out technology that will send their signals to cell phones and mobile devices, and beefing up their Web sites to boost online advertising.”).

¹⁷⁵ News Release, FCC, *Broadcast Station Totals as of Dec. 31, 2008* (Feb. 27, 2009), available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-288910A1.doc; Robin Flynn, SNL Kagan, *Logic of FCC’s 30% Cap Fading Along With Cable’s Video Share in a Multiplatform World*, Cable TV Investor: Deals & Finance, Apr. 30, 2009, at 1.

¹⁷⁶ See Flynn, *supra* note 175, at 1.

¹⁷⁷ Nat’l Ass’n of Broadcasters (“NAB”), *DTV Stations in Operation*, at <http://www.nab.org/AM/ASPCode/DTVStations/DTVStations.asp> (last visited May 19, 2009).

¹⁷⁸ Chris Georg, *Digital TV Switch Happening for over 600 TV Stations*, eFluxMedia, Feb. 17, 2009, available at http://www.efluxmedia.com/news_Digital_TV_Switch_Happening_For_Over_600_TV_Stations_35094.html.

reinvent” their services.¹⁷⁹ For instance, “over the past year, there has been a 57 percent increase in the number of stations offering their newscasts in high-definition.”¹⁸⁰ According to the Commission, “digital is a more efficient transmission technology that allows broadcast stations to offer improved picture and sound quality, as well as offer more programming options for consumers through multiple broadcast streams (multicasting).”¹⁸¹

Multicasting allows broadcasters to provide an expanded array of news, entertainment, and foreign language programming of interest to the local communities they serve.¹⁸² For example, MGM and Weigel Broadcasting launched “This TV,” a multicast channel that carries programming from MGM’s library of 4,100 films and 10,000 hours of TV shows.¹⁸³ LATV, a bilingual music and entertainment channel, has successfully pursued multicast carriage deals to reach audiences in new markets.¹⁸⁴ In the Washington, D.C. metropolitan area, public

¹⁷⁹ David Rehr, President, NAB, State of the Industry Keynote Address at the 2009 NAB Show (Apr. 20, 2009).

¹⁸⁰ *Id.*

¹⁸¹ FCC, *Consumer Facts: “DTV” Is Coming (And Sooner Than You Think)*, at <http://www.fcc.gov/cgb/consumerfacts/digitaltv.html> (last visited May 19, 2009).

¹⁸² See FCC, *What Is DTV?*, at <http://www.dtv.gov/whatisdtv.html> (last visited May 19, 2009) (explaining that “[m]ulticasting allows broadcast stations to offer several channels of digital programming at the same time . . . [which] means more programming choices for viewers”); Becky Krystal, *A Wider Spectrum of Free Television; Multicasting Allows Broadcasters To Offer More Options Than Ever*, Wash. Post, Aug. 17, 2008, at Y5 (noting that “[o]ptions are as varied as 24-hour weather radar, children’s shows and health and wellness programming”).

¹⁸³ “This TV” will offer stations programming “all day every day, but stations signing on have the right to a certain number of preemptions so they can localize the channel with sports, news and weather.” Ben Grossman, *MGM Jumps into the Multicast Game*, Multichannel News, July 27, 2008, available at http://www.multichannel.com/article/134106-MGM_Jumps_Into_the_Multicast_Game.php. With additional launches on stations owned by Tribune, Raycom, and Sunbeam, This TV has cleared 60% of the country. See M. Malone & P. Albinak, *This TV Clears 60%*, Broad. & Cable, Jan. 26, 2009, available at http://www.broadcastingcable.com/article/162773-This_TV_Clears_60_.php.

¹⁸⁴ See Glen Dickson, *LATV Nets Multicast Carriage with KTVU*, Broad. & Cable, Feb. 6, 2008 (noting that LATV has 27 national affiliate agreements for carriage as a digital multicast), available at http://www.broadcastingcable.com/article/112336-LATV_Nets_Multicast_Carriage_with_KTVU.php?q=multicast; see also David Goetzl, *Gray’s Multicast Strategy: Use That Real Estate*, Broad. & Cable, Sept. 28, 2008 (noting that broadcasters are striving to maximize “the possibilities of multicast” by providing additional local content that viewers cannot find elsewhere, as well as utilizing national networks offered for multicast like CW, MyNetworkTV, and Universal Sports in markets where those networks are not available), available at

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broadcaster MHz Networks announced that it will broadcast (and that local cable systems have agreed to carry) ten international networks as part of its multicasting strategy.¹⁸⁵

Multicast channels cost relatively little to operate, and offer broadcasters the ability to attract new advertisers with lower cost advertising spots.¹⁸⁶ According to MGM's John Bryan, multicast channels can help a broadcaster attract more advertising, ultimately realizing "an 8% to 10% bump in their bottom line."¹⁸⁷ Moreover, several broadcasters offering compelling programming have successfully gained cable carriage of their multicast channels.¹⁸⁸ For example, Comcast carries the multicast signals of multiple broadcasters in virtually every market Comcast serves.¹⁸⁹

Broadcasters are also aggressively pursuing distribution of their video content on other platforms. In addition to the Internet outlets described above in section II.C, broadcasters offer significant amounts of programming on their own websites,¹⁹⁰ as well as via websites offering

(...footnote continued)

http://www.broadcastingcable.com/article/93111-Gray_s_Multicast_Strategy_Use_That_Real_Estate.php?q=multicast.

¹⁸⁵ The addition of euronews to the full-time MHz Networks local channel line-up is part of MHz Network's multicasting actions for the Washington D.C. metro area. "These innovative plans for the digital transition include the broadcasting of 10 full-time international channels in the metro area." Press Release, MHz Networks, *MHz Networks Launches 24/7 euronews in Washington, D.C.* (May 1, 2009), available at <http://www.mhznetworks.org/news/112/>; see also Paul Farhi, *Al Jazeera Channel Cracks the U.S. Dial*, Wash. Post, Apr. 29, 2009 (noting that MHz Network's 10 international channels are carried on the digital tiers offered by Comcast, and other local cable operators, throughout the D.C. region), available at <http://www.washingtonpost.com/wp-dyn/content/article/2009/04/28/AR2009042803918.html>.

¹⁸⁶ See Goetzl, *supra* note 184.

¹⁸⁷ David Lieberman, *Classic Shows Could Find New Life in Digital TV*, USA Today, Aug. 14, 2008, available at http://www.usatoday.com/money/media/2008-08-13-digital-tv-extra-local-channels_N.htm.

¹⁸⁸ See, e.g., John Eggerton, *ACA, APTS Strike Digital-Multicast Deal*, Broad. & Cable, Sept. 17, 2008, available at http://www.broadcastingcable.com/article/115455-ACA_APTS_Strike_Digital_Multicast_Deal.php?q=multicast.

¹⁸⁹ See, e.g., Farhi, *supra* note 185 (noting that MHz Network's 10 international multicast channels are carried on the digital tiers offered by Comcast throughout the D.C. region).

¹⁹⁰ The major broadcast networks offer full episodes of popular shows and other video content online. See David Chartier, *Web Video Cage Match: Four Networks Enter, One Leaves*, Ars Technica, May 23, 2008

(footnote continued...)

aggregated video content.¹⁹¹ Nielsen Online reported late last year that all four major networks experienced month-over-month growth in the number of streams of their online shows.¹⁹² As Jon Gibs, vice president of media analytics at Nielsen Online, explained, “Consumers are increasingly relying on the Web to catch up on content they missed when it aired on television and the networks are beginning to capitalize on this trend.”¹⁹³ For the month of December 2008, the top ten network shows viewed on network websites (excluding Hulu.com) garnered nearly 7.5 million unique streams.¹⁹⁴ Some broadcasters feared that Internet video would cannibalize television, but “viewership is increasing. . . . And though we’re providing more platforms for consumers to enjoy our content, 99 percent of video viewing was done on television in the past year.”¹⁹⁵

(...footnote continued)

(describing online video players for ABC, CBS, FOX, and Hulu), *available at* <http://arstechnica.com/old/content/2008/05/hands-on-with-the-major-web-video-services.ars>; Brad Linder, *NBC Direct Relaunches: Free Video Downloads of NBC TV Shows*, Download Squad, Feb. 16, 2009, <http://www.downloadsquad.com/2009/02/16/nbc-direct-relaunches-free-video-downloads-of-nbc-tv-shows/>. Both CW and MyNetworkTV also offer full episodes online. *See* MyNetworkTV Inc, *Now Playing*, at <http://www.mynetworktv.com/player/> (last visited May 19, 2009); The CW Television Network, *CW Video: Full Episodes, Previews and More*, at <http://www.cwtv.com/cw-video> (last visited May 19, 2009). PBS recently launched an online video player, providing access to thousands of full-length episodes. *See* Mike Shields, *PBS Launches New Online Video Channel*, MediaWeek, Apr. 22, 2009, *available at* http://www.mediaweek.com/mw/content_display/news/digital-downloads/broadband/e3icbbfbd34476c89901157a042a3525657.

¹⁹¹ *See* Paul Thomasch, *Disney Joins Hulu Video Site, Takes Ownership Stake*, Wash. Post, Apr. 30, 2009, *available at* <http://www.washingtonpost.com/wp-dyn/content/article/2009/04/30/AR2009043002830.html>.

¹⁹² *See* Press Release, Nielsen Online, *Online Viewers at TV Network Web Sites Increase an Average of 155 Percent in September, According to Nielsen Online* (Nov. 6, 2008), *available at* http://www.nielsen-online.com/pr/pr_081106.pdf.

¹⁹³ *Id.* at 1.

¹⁹⁴ *See* Nielsen Wire, *“Lost” Is Found by Online Viewers*, Feb. 12, 2009, at http://blog.nielsen.com/nielsenwire/online_mobile/lost-is-found-by-online-viewers/.

¹⁹⁵ David Rehr, President, NAB, *State of the Industry, Keynote Address at the 2009 NAB Show* (Apr. 20, 2009).

Aside from the major networks, individual broadcast stations are also taking advantage of the Internet to distribute their content in a variety of ways.¹⁹⁶ Some have developed platforms that upload Internet clips only seconds after being broadcast,¹⁹⁷ while others have partnered with large online players like YouTube to deliver broadcast content online.¹⁹⁸ Local broadcasters are buying the rights to show popular syndicated programs on their Web sites, “and they sell advertisements with those programs to local businesses.”¹⁹⁹ Online advertising revenue continues to grow for local broadcasters. Despite the economic downturn, Borrell Associates recently reported that websites of local broadcasters raised \$1 billion in revenue in 2008, and are on course to reach \$1.3 billion in 2009.²⁰⁰

Broadcast industry leaders have said they are hopeful that television stations will earn an additional \$2 billion annually within four years by sending programming directly to handheld devices.²⁰¹ In addition to the mobile outlets discussed in section III.A below, local broadcasters

¹⁹⁶ According to then-NAB President David Rehr, broadcasters are in a “unique position” to use television to “drive consumers online.” *Id.* (“[O]nce [broadcast viewers are online], we can provide them with greater access to our advertising partners, further monetizing our platforms and theirs. Consumers will follow us online because they’ve followed us and our great content for years.”).

¹⁹⁷ LIN TV has rolled out a real-time broadcast-to-online video platform that enables LIN TV to create clips of broadcasts and distribute them to all LIN TV websites within seconds of airing on television. *See* Press Release, LIN TV Corp., *LIN TV Selects Critical Media’s Syndicator for Real-Time Broadcast-to-Online Video Distribution* (Oct. 28, 2008), available at http://www.lintv.com/news/images/PDFs/news_releases/LIN%20TV%20Selects%20Critical%20Media's%20Syndicator%20for%20Video%20Distribution%20-%202010-28-08.pdf.

¹⁹⁸ Hearst-Argyle Television partnered with YouTube to distribute local content online in five markets, in what was YouTube’s first revenue-sharing agreement with a local broadcaster. *See* Jacqui Cheng, *Local TV in Five Cities Goes Online Through YouTube*, *Ars Technica*, June 5, 2007, available at <http://arstechnica.com/old/content/2007/06/local-tv-in-five-cities-goes-online-through-youtube.ars>.

¹⁹⁹ *See* Brian Stelter, *TV Stations Seek Shows To Put Online*, *N.Y. Times*, Feb. 1, 2008, available at <http://www.nytimes.com/2008/02/01/business/media/01adco.html>.

²⁰⁰ Michael Malone, *Stations Websites To Make \$1.3 Billion in 2009: Local TV Seeing Big Growth, But Must Adapt To Gain Share*, *Broad. & Cable*, Apr. 2, 2009, available at http://www.broadcastingcable.com/article/191155-Station_Websites_to_Make_1_3_Billion_in_2009.php.

²⁰¹ *See* Ted Hearn, *Rehr: Mobile Video Booty Awaits Free TV*, *Multichannel News*, Apr. 14, 2008 (citing then-NAB President David Rehr), available at http://www.multichannel.com/article/132858-Rehr_Mobile_Video_Booty_Awaits_Free_TV.php.

are developing technology that will enable mobile devices to receive digital broadcast television signals. Open Mobile Video Competition (“OMVC”), a group of more than 800 commercial and public broadcasters, has been working to create a mobile digital television standard to allow broadcasters to transmit live video broadcasts to cell phones.²⁰² Another local broadcaster, LIN TV, has partnered with News Over Wireless (“NOW”) “for mobile distribution of LIN station content as well as the development of iPhone applications for each of LIN’s 27 stations.”²⁰³

Moreover, broadcasters continue to capitalize on other new media platforms to reach audiences. For example, broadcasters continue to use VOD services to further extend their popular network programming by getting carriage of their programming on cable operators’ VOD systems.²⁰⁴ Contrary to the initial fear of some broadcasters, DVR technology is beneficial

²⁰² Leslie Ellis, *Translation Please: Cable and the Mobile Future*, Multichannel News, Feb. 16, 2009, available at http://www.multichannel.com/article/174225-Translation_Please_Cable_And_The_Mobile_Future.php; Todd Spangler, *Broadcasters Wrap Up Mobile-Tech Trials*, Multichannel News, Apr. 21, 2008 (noting that, in April 2008, OMVC announced that it completed successful trials of technologies in San Francisco and Las Vegas), available at http://www.multichannel.com/article/132941-Broadcters_Wrap_Up_Mobile_Tech_Trials.php. OMVC recently announced that it chose the Washington, D.C. market for broadcasters to test programming, services, and features. NAB: *Broadcasters Target D.C. for Mobile TV Consumer Trials*, TV Technology, Apr. 20, 2009, <http://www.tvtechnology.com/article/79146>. Several groups demonstrated equipment capable of mobile broadcast reception at the 2009 NAB Show. *See Firms Set To Demo Mobile DTV in Vegas*, TV Newsday, Apr. 15, 2009, available at <http://www.tvnewsday.com/articles/2009/04/15/daily.16/> (“Our demonstration offers a practical example of how sophisticated mobile DTV capabilities can be realized without requiring significant and costly changes to existing broadcast plants and workflows.” (quoting Ralph Bachofen of Triveni Digital)). NBC, Rohde & Schwarz, and other firms together demonstrated a mobile DTV broadcast system based on the Advanced Television System Committee’s mobile handheld standard (ASTC-M/H) that would allow broadcasters to immediately launch mobile DTV services. *See Glen Dickson, NAB 2009: Rohde & Schwarz Unveils Mobile DTV System*, Broad. & Cable, Apr. 24, 2009, available at http://www.broadcastingcable.com/article/209863-NAB_2009_Rohde_Schwarz_Unveils_Mobile_DTV_System.php. Prototypes of handsets that functioned as both phones and personal DTV sets were demonstrated at the 2008 Consumer Electronics Show. *See Glen Dickson, CES 2008: LG Electronics Touts Mobile DTV*, Broad. & Cable, Jan. 6, 2008, available at http://www.broadcastingcable.com/article/111855-CES_2008_LG_Electronics_Touts_Mobile_DTV.php.

²⁰³ *See* Dave Hendrick, SNL Kagan, *Broadcaster Eyes Brand Extension, Greater Mobile Revenues*, May 1, 2009. Rob Richter, LIN TV’s Senior Vice President of new media, said that, “[f]rom my standpoint, I want [consumers] to get our content, and I want them to be wedded to our brand no matter where they are. . . . My goal in life is to distribute our content.” *Id.*

²⁰⁴ *See, e.g., Cox Gets ABC VOD*, Cable Digital News, Feb. 27, 2008, http://www.lightreading.com/blog.asp?blog_sectionid=398&doc_id=147075&site=cdn; *Charter Puts NBC Shows on VOD*, Cable Digital News, Apr. 7, 2009, http://www.lightreading.com/document.asp?doc_id=174962&site=cdn.

to broadcasters, primarily because people with DVRs watch more television. One analyst said that DVRs have made television more stable, and have actually boosted broadcast television.²⁰⁵

E. Broadband Service Providers/Overbuilders Present a Competitive Force for Video, Voice, and Data in a Number of Markets.

Broadband Service Providers (“BSPs”) (commonly referred to as “overbuilders”) present consumers with an additional MVPD competitor in some markets. Despite the economic downturn, press reports indicate that overbuilders are performing well, having rebounded from earlier financial hardships. They continue to expand their service offerings and attract new customers throughout their service areas.²⁰⁶

Overbuilders serve a significant number of subscribers in the markets they serve. For example, RCN, the largest overbuilder, now serves 366,000 basic video subscribers, and continues to roll out enhanced digital services, including adding more than 100 HD channels.²⁰⁷

²⁰⁵ *The Economist* reports that “[f]amilies with DVRs seem to spend 15-20% of their viewing time watching pre-recorded shows, and skip only about half of all advertisements. This means only about 5% of television is time-shifted and less than 3% of all advertisements are skipped. Mitigating that loss, people with DVRs watch more television.” *The Revolution That Wasn’t: DVRs Were Supposed To Undermine Television. They Have Done the Opposite*, *The Economist*, Apr. 23, 2009, available at http://www.economist.com/business/displayStory.cfm?story_id=13528310; Greg Sandoval, *NAB: Will DVRs Thwart Rise of Online TV Shows?*, *CNET News*, Apr. 14, 2008, http://news.cnet.com/8301-10784_3-9917839-7.html.

²⁰⁶ See Mike Farrell, *RCN Reports Strong Q1*, *Multichannel News*, May 6, 2009 (noting that RCN was “beating analysts’ estimates in a rough economy”) available at http://www.multichannel.com/article/231565-RCN_Reports_Strong_Q1.php?nid=2226&source=link&rid=5304342; Mike Farrell, *Overbuilders Report Q3 Sub, Financial Gains*, *Multichannel News*, Nov. 9, 2008 (noting that the two largest publicly traded overbuilders, RCN and Knology, “have proven that they too are performing well despite the prospects of a deep recession”) available at http://www.multichannel.com/article/135450-Overbuilders_Report_Q3_Sub_Financial_Gains.php.

²⁰⁷ NCTA, *supra* note 25; see also Mike Farrell, *RCN Reports Strong Q1*, *Multichannel News*, May 6, 2009, available at http://www.multichannel.com/article/231565-RCN_Reports_Strong_Q1.php?nid=2226&source=link&rid=5304342. RCN has recently completed its “Analog Crush” project in its major markets, achieving 100% digital penetration in Boston, New York, Philadelphia, and Washington. This project has resulted in increased capacity, which RCN is using to increase the number of channels to 200 digital channels on its expanded basic tier, accelerating HD channel rollout, and adding an international “Global Passport” tier with 150 channels and VOD offerings. See Press Release, RCN Corp., *RCN’s Major Market Analog Crush To Be Completed January 31st* (Jan. 20, 2009), available at http://rcnc.client.shareholder.com/common/download/download.cfm?CompanyID=RCNC&FileID=264955&FileKey=b1b42e5d-3489-40d0-83f7-7f5608f8e0a0&FileName=RCNI_News_2009_1_20_General.pdf.

Another large overbuilder, Knology, reported 235,332 video subscribers as of the end of the first quarter of 2009.²⁰⁸

Valuation of overbuild systems is also high, attracting significant per-subscriber prices from purchasers. For instance, SureWest completed the buyout of Everest Broadband in December 2007 at a purchase price of \$4,600 per subscriber, which was described as “an almost unheard of price for an overbuilder,” and “one of the richest valuations for a cable company in years.”²⁰⁹

Overbuilders, like other cable operators, are using bundling of popular services to drive up revenues per subscriber. For example, during 2008, overbuilder Grande Communications experienced a \$13.4 million increase in revenues from its bundled services (for a total of \$168.4 million in revenues) as compared to the same period in 2007.²¹⁰ Overbuilders have also found that bundling increases customer retention, which helps sustain revenue over time.²¹¹ Given the competitive benefits of bundling, overbuilders are aggressively marketing packages of their service offerings,²¹² and are offering bundled services to a growing number of communities.²¹³

²⁰⁸ “We are off to a solid start in 2009 with the business performing well during the first quarter.” Press Release, Knology, Inc., *Knology Reports Continued Growth in First Quarter 2009* (May 7, 2009) (quoting Rodger L. Johnson, Chairman and Chief Executive Officer, Knology, Inc.), available at [http://phx.corporate-ir.net/phoenix.zhtml?c=130221&p=irol-newsArticle&ID=1285694&highlight=.](http://phx.corporate-ir.net/phoenix.zhtml?c=130221&p=irol-newsArticle&ID=1285694&highlight=)

²⁰⁹ Mike Farrell, *Grande’s on the Block*, Multichannel News, Jan. 17, 2008, available at http://www.multichannel.com/article/131777-Grande_s_On_The_Block.php; Mike Farrell, *How Subs Sell for \$4,600 Per*, Multichannel News, Dec. 16, 2007, available at http://www.multichannel.com/article/87308-How_Subs_Sell_For_4_600_Per.php.

²¹⁰ See Grande Communications Holdings, Inc., *2008 Annual Report (Form 10-K)* 2 (Mar. 20, 2009).

²¹¹ See, e.g., Sarah Reedy, *Knology Studies Triple Play Customer Loyalty*, Telephony Online, Feb. 20, 2008 (noting that as of the end of 2008, of Knology’s subscriber base, “49% use a triple play of phone, TV and Internet services and 31% subscribe to a double play of two out of three services”), available at <http://telephonyonline.com/independent/news/knology-customer-loyalty-0220/index.html>.

²¹² For example, WideOpenWest, a BSP with nearly 364,000 subscribers, offers a bundle of cable, Internet, and phone services for as little as \$79.99 per month, a price that is guaranteed until 2011. See NCTA, *supra* note (footnote continued...)

Municipally-owned overbuilders also continue to expand their services in various ways. For example, Lafayette Utilities System in Lafayette, LA, is launching a \$110 million fiber-to-the-home video service.²¹⁴ Braintree Electric Light Department (“BELD”) has introduced DVR-capable set-top boxes and a lower-priced high-definition service tier.²¹⁵ And Tacoma, Washington’s Click! Network has also increased its service options, adding 17 new HD channels in April 2009, bringing a total of 31 new HD channels to its customers in less than a year.

F. Home Video Sales, Rentals, and Downloads Are a Popular, and Increasingly Convenient, Way To Access Video Programming.

As the Commission has recognized, home video sales and rentals are important to consider in this inquiry as another distribution outlet for video content because they offer “services similar to premium and pay-per-view offered by MVPDs.”²¹⁶ Industry players have shown the ability to evolve business models in light of changing technology to meet changing consumer demands.

(...footnote continued)

25; WideOpenWest Networks, LLC, *Pricing and Packaging*, at http://content.wowway.com/apps/wowwaycontent/p_n_p.aspx (last visited May 19, 2009).

²¹³ See, e.g., Steve Donohue, *RCN Expands in Massachusetts*, Multichannel News, May 21, 2007 (reporting that RCN expanded its “triple play” bundle to the town of Milton, MA), available at http://www.multichannel.com/article/84886-RCN_Expands_in_Massachusetts.php; Anil Sharma, *SureWest Communications Completes Everest Broadband Acquisition*, TMCnet, Feb. 15, 2008 (noting that SureWest’s acquisition of Everest Broadband more than doubles its triple-play residential base), available at <http://internetcommunications.tmcnet.com/topics/broadband-mobile/articles/20923-surewest-communications-completes-everest-broadband-acquisition.htm>.

²¹⁴ See Linda Moss, *Lafayette, Broadcasters Settle Retrans Squabble*, Multichannel News, Dec. 8, 2008, available at http://www.multichannel.com/article/160507-Lafayette_Broadcasters_Settle_Retrans_Squabble.php.

²¹⁵ See Braintree Electric Light Department, *New Services*, at <http://www.beld.com/Cable/NewServices.asp> (last visited May 19, 2009).

²¹⁶ *13th Annual Report* ¶ 164.

Recent reports indicated that, at the end of 2008, the penetration rate of DVD players in TV households was 87.5%, and is predicted to grow.²¹⁷ As the industry evolves to high definition, penetration of HD DVD players is predicted to reach near ubiquity in the next ten years.²¹⁸ In 2008, total video resale industry revenue, including rentals and sales, totaled \$22.4 billion.²¹⁹ This industry will continue to have a significant impact on the ways in which TV households consume media.²²⁰

Consumers continue to be able to purchase home video and DVDs at large retail chains, both online and in brick-and-mortar stores, as well as at outlets such as pharmacies and grocery stores. Online retailers like Amazon.com offer even more titles.²²¹ Rental options also continue to expand. Redbox, which installs rental kiosks inside McDonalds, Walgreens, Walmart, and other grocery and convenience stores, has expanded its service from 1400 locations in 2006 to 12,000 locations today.²²² Netflix, another service that rents via mail, recently reported that its

²¹⁷ SNL Kagan, *U.S. Home Video Retail Industry, 1999-2008*, Kagan Media Money, Apr. 28, 2009, at 3; SNL Kagan, *U.S. Home Video Retail Industry, 2009-2018*, Kagan Media Money, Apr. 28, 2009, at 5. Even though DVD technology has far surpassed VHS use, revenue for rental and purchase of VHS was almost \$50 million in 2008. See *U.S. Home Video Retail Industry, 1999-2008*, at 5.

²¹⁸ *U.S. Home Video Retail Industry, 2009-2018*, *supra* note 217, at 5. Another research service reported that about 9 million Blu-ray discs were sold in the United States between January and March, “doubling the year-to-date sales over 2008.” Tom LeBlanc, *Study: Blu-ray Sales Increase 105%, DVD Sales Fall 14% in Q1*, CE Pro, Apr. 28, 2009, available at http://www.cepro.com/article/study_blu_ray_sales_increase_105_dvd_sales_fall_14_in_q1/K318.

²¹⁹ *U.S. Home Video Retail Industry, 1999-2008*, *supra* note 217, at 5.

²²⁰ *U.S. Home Video Retail Industry, 2009-2018*, *supra* note 217, at 5 (while the data does not predict an increase in revenues, it predicts that home video sales and rentals will maintain a large slice of the video content marketplace).

²²¹ Amazon.com recently obtained the rights to sell Nickelodeon DVDs, some of which are available on DVD for the first time, in the “first-ever on-demand duplication deal by [a] Viacom-owned basic cable network.” Robert Marich, *Nickelodeon Pacts for On-Demand DVDs*, Broad. & Cable, Aug. 25, 2008, available at http://www.broadcastingcable.com/article/115142-Nickelodeon_Pacts_For_On_Demand_DVDs.php.

²²² Redbox, *Easy \$1 DVD rentals*, at <http://www.redbox.com/home.aspx> (last visited May 19, 2009); Press Release, Redbox Automated Retail, LLC, *Redbox Launches Online Movie Rentals* (Sept. 9, 2006).

subscribers now total 10.3 million, up from 5.7 million in 2006.²²³ Netflix also reported a 21% increase of its first quarter 2009 revenue over its first quarter 2008 revenue, totaling \$394.1 million.²²⁴

Online purchase and rental of video that is then downloaded to the customer's computer or set-top box is experiencing growth as broadband Internet penetration increases. Netflix, which calls itself the "world's largest online movie rental service," has developed an online streaming service that gives most subscribers unlimited access to movies and TV shows.²²⁵ Netflix has also "taken steps to bridge the gap" between a consumer's computer and TV with several devices that are "capable of linking the two seamlessly."²²⁶ Blockbuster recently announced an agreement with TiVo to deliver Blockbuster's library of digital movie titles to TiVo DVRs for customers to either purchase or rent, and then watch on their TV.²²⁷

²²³ Press Release, Netflix, Inc., *Netflix Announces Q1 2009 Financial Results* (Apr. 23, 2009), available at http://ir.netflix.com/common/download/download.cfm?companyid=NFLX&fileid=289482&filekey=370a0bcc-d014-4a5a-8402-b6268cd7d805&filename=NFLX_1Q09_Earnings_Release_04232009.pdf.

²²⁴ *Id.*

²²⁵ Netflix, Inc., *Media Center*, at <http://www.netflix.com/MediaCenterHome> (last visited May 19, 2009); see also Glen Dickson, *Netflix Player To Deliver Video via Online Streaming*, *Broad. & Cable*, May 21, 2008, available at http://www.broadcastingcable.com/article/113821-Netflix_Player_to_Deliver_Video_via_Online_Streaming.php. Netflix offers more than 12,000 titles and delivers to multiple platforms, including computers or a television that uses a Netflix-enabled device, like TiVo, Microsoft Xbox 360, Roku, and LG Electronics. See Todd Spangler, *MTVN Deal Lets Netflix Stream 300-Plus Shows Online*, *Multichannel News*, Apr. 6, 2009, available at http://www.multichannel.com/article/195684-MTVN_Deal_Lets_Netflix_Stream_300_Plus_Shows_Online.php. In April 2009, MTV Networks struck a deal with Netflix to provide over 300 episodes of past seasons of MTV Networks properties. Content covered under the agreement includes the first nine seasons of *South Park*, along with popular series from Nickelodeon. See *id.*

²²⁶ Michael Patrick Brady, *Streaming Internet Movies at Home*, *Forbes*, Apr. 13, 2009, available at <http://www.forbes.com/2009/04/13/hdtv-internet-entertainment-technology-personal-tech-hdtv.html>.

²²⁷ Press Release, Blockbuster Inc., *Blockbuster and TiVo Announce Agreement To Make Blockbuster OnDemand Available Through the TiVo Service and To Promote TiVo DVRs Throughout Retail Stores Nationwide* (Mar. 25, 2009), available at <http://www.b2i.us/profiles/investor/ResLibraryView.asp?ResLibraryID=29160&GoTopage=1&BzID=553&Category=1647&a=>.

Through its iTunes model, Apple provides AppleTV, which facilitates the purchase and rental of movies and video that are delivered to consumers' TVs and works as a storage device for those programs.²²⁸ As of October 2008, more than 200 million television shows were downloaded via iTunes.²²⁹ Apple offers movie rentals on iTunes for \$2.99, and the Apple TV software allows users to rent and watch movies on their widescreen TV, with no computer required.²³⁰ In March 2009, Apple began offering HD movie rentals on iTunes.²³¹ Some analysts have suggested that Apple's entry into the online video rental scene could "redefine the way movies are rented online" in the same way that it "upended online distribution of music."²³²

Embarq also has started offering an online video store in a deal with CinemaNow, which allows their high-speed Internet customers to rent and purchase TV and movie content online.²³³ Several other online retailers have developed online systems to offer video for purchase or rental.

²²⁸ See Apple Inc., *Now Playing: HD TV Shows and More*, at <http://www.apple.com/appletv/> (last visited May 19, 2009); Dickson, *supra* note 225.

²²⁹ Tameka Kee, *iTunes TV Show Downloads Top 200 Million; Apple Store Now Includes HD from All Four Major Nets*, Paid Content, Oct. 16, 2008, available at <http://www.paidcontent.org/entry/419-itunes-tv-show-downloads-top-200-million-apple-store-now-includes-hd-fr/>. This popularity has lead optics maker Carl Zeiss to make watching video on iPods easier by creating special eyewear that allows users to watch content from their iPod on a headset, providing a more "cinematic" experience. See Azadeh Ensha, *Eyewear Gives Big Screen Quality to iPhone Videos*, N.Y. Times, Apr. 1, 2009 (noting that the eyewear, called Cinemizer Plus, will be available in May 2009 for \$449), available at <http://www.nytimes.com/2009/04/02/technology/personaltech/02zeiss.html?ref=personaltech>.

²³⁰ Users can also view photos from their computers, Flickr, and Mac Web Galleries on their widescreen TV as slideshows or screen savers, and anytime photos are updated on Flickr or Mac Web they are automatically updated on Apple TV. See Press Release, Apple Inc., *Apple Premieres iTunes Movie Rentals with All Major Film Studios* (Jan. 15, 2008), available at <http://www.apple.com/pr/library/2008/01/15itunes.html>.

²³¹ Greg Sandoval, *iTunes Rolls Out High-Def Movie Downloads*, CNet, Mar. 19, 2009, available at http://news.cnet.com/8301-1023_3-10200439-93.html. So far, HD quality is only available on computers, since rentals displayed on iPods are still in standard definition. *Id.* Apple has noted that more than 50% of television programming is purchased in HD when available. *Id.*

²³² Arik Hesseldahl, *Will Apple Upset the Rental Cart*, Bus. Week, Dec. 28, 2007, available at http://www.businessweek.com/technology/content/dec2007/tc20071227_058544.htm?chan=top+news_top+news+index_businessweek+exclusives.

²³³ Matt Stump, *Embarq Launches Online Video Store for HSI Subs*, OneTRAK, Feb. 7, 2008, available at <http://onetrak.com/ShowArticle.aspx?ID=3117>.

These include Amazon.com's Unbox Video Downloads, websites like CinemaNow and Movielink, and online content sellers like AOL Video, Direct2Drive, and Movie Gallery.²³⁴

III. NEWER PLAYERS IN THE VIDEO MARKETPLACE PROVIDE MORE CHOICES FOR PROGRAMMERS AND CONSUMERS.

A. Audiences Accessing Video over Mobile Devices Are Steadily Growing, While Wireless Technologies Continue To Improve.

In the *13th Annual Report*, the Commission recognized that wireless operators have increasingly provided a wide range of video content.²³⁵ According to some, “[t]he cell phone increasingly is moving center stage as the most important entertainment device.”²³⁶ As of December 31, 2008, 11.2 million U.S. consumers used wireless handsets to watch video programming, which represents a 9% growth in users over the previous quarter.²³⁷ According to a May 2008 report, the number of mobile TV/video subscribers and customers is predicted to grow to 27.7 million by 2012.²³⁸

²³⁴ Adrian McCoy, *Netflix, Blockbuster Launch New Services*, Pitt. Post-Gazette, Jan. 30, 2007, available at <http://www.scrippsnews.com/node/19117>.

²³⁵ See *13th Annual Report* ¶¶ 4, 142.

²³⁶ Monica Allevan, *Survey: Phones Take Center Stage*, WirelessWeek, Jan. 11, 2008 (quoting Phil Asmundson, Vice Chairman and National Managing Partner for Deloitte's Technology, Media & Telecommunications group, and highlighting a January 2008 Deloitte survey in which 36% of respondents said they use their cell phone as an entertainment device, up from 24% the prior year), available at <http://wirelessweek.com/cell-phone-entertainment-device.aspx>; see also *CNN and Ericsson Reveal Finding from Joint Mobile TV Study*, Cellular News, Feb. 12, 2008 (noting that in a joint CNN and Ericsson study, mobile video rated as the number one application users want on their phone), available at <http://www.cellular-news.com/story/29250.php>; Daisy Whitney, *TV Networks Targeting Growing Smartphone Market: Success of iPhones Indicates Hunger for Mobile Video*, TV Week, Feb. 8, 2009 (reporting that more than one third of iPhone users watch video on their phones, and that in the third quarter of 2008, more than 10.3 million mobile customers watched video on their cell phone -- a 14% jump from the previous quarter), available at http://www.tvweek.com/news/2009/02/tv_networks_targeting_growing.php.

²³⁷ See Nielsen Co., *A2/M2 Three Screen Report: 4th Quarter 2008 2, 4*, available at http://www.nielsen-online.com/downloads/3_Screens_4Q08_final.pdf. Nielsen cites mobile video consumption as a “Trend to Watch.” *Id.*

²³⁸ See Mark Hyland, *Mobile Video To Break Out in 2009, Enhanced Content and New Business Models Will Drive Growth*, Telecom. Online, Jan. 12, 2009 (citing an IDC report titled *U.S. Mobile Television and Commercial Video 2008-2012 Forecast*), available at http://www.telecoms-mag.com/article.asp?HH_ID=AR_4700.

The two most prevalent mobile TV platforms are MobiTV and MediaFLO. As of February 2009, MobiTV, which provides more than forty mobile video channels on multiple wireless telephone networks, including Sprint, reached six million subscribers.²³⁹ MediaFLO, which provides Verizon's V-CAST and AT&T's Mobile TV customers with more than ten mobile channels, reportedly has more than 100,000 subscribers.²⁴⁰

Mobile video delivery continues to improve both in terms of technology and the variety of programming offered. The capabilities of mobile TV technology have grown as the industry has developed numerous means of mobile video delivery. For example, the "FLO" (Forward Link Only) technology used by Qualcomm's MediaFLO enables multicasting of multimedia services.²⁴¹ In early 2009, MediaFLO announced plans to expand coverage from 63 metro areas serving 140 million subscribers to more than 100 markets serving 200 million subscribers.²⁴²

²³⁹ Todd Spangler, *MobiTV Reaches 6 Million Subs*, Multichannel News, Feb. 17, 2009, available at http://www.multichannel.com/article/print/174297-MobiTV_Reaches_6_million_Subs.php; see also *MobiTV Crosses 4 Million Subscriber Mark (USA)*, Wireless Fed'n, Aug. 5, 2008 (noting that as of August 2008, MobiTV surpassed four million subscribers, and was offering programming on more than fifteen carrier networks, including AT&T, Sprint, and Alltel), <http://wirelessfederation.com/news/mobitv-crosses-4million-subscribers-mark-usa/>.

²⁴⁰ Wayne Friedman, *MobiTV Surpasses 6 Million Subscribers*, Media Daily News, Feb. 17, 2009, available at http://www.mediapost.com/publications/?fa=Articles.showArticle&art_aid=100479. Verizon and AT&T have partnered with MediaFLO to provide mobile video channels to their customers. See Glen Dickson, *MediaFLO To Ramp Up Programming with New Spectrum*, Broad. & Cable, Apr. 4, 2008 (noting that Verizon launched a MediaFLO service in 2007), available at www.broadcastingcable.com/index.asp?layout=articlePrint&articleID=CA6548100; Press Release, AT&T Inc., *AT&T Mobile TV Premieres Sunday, May 4* (May 1, 2008) (noting that AT&T launched a MediaFLO service in May 2008), available at <http://www.att.com/gen/press-room?pid=4800&cdvn=news&newsarticleid=25610>.

²⁴¹ See John Fletcher, SNL Kagan, *Wireless Investor: The Future of Mobile Television*, Sept. 29, 2008 (noting that technologies like MediaFLO are preferable to unicasting); Murali R. Chari et al., *FLO Physical Layer: An Overview*, 53 IEEE Transactions on Broadcasting 145-60 (2007) (explaining the advantages of FLO technology), available at http://www.mediaflo.com/news/pdf/FLO_physical_layer_IEEE.pdf.

²⁴² See Press Release, FLO TV, *MediaFLO USA Set To Expand FLO TV in More Than 100 Markets in 2009* (Jan. 8, 2009), available at <http://www.flotv.com/corp/newsroom/article43.php>. MediaFLO customers must live in one of the broadcast areas and have mobile broadcast enabled phones to receive the service. See Luke Simpson, *Lassoing Mobile TV*, Wireless Week, Apr. 1, 2009 (noting that AT&T offers four TV phones and Verizon offers two), available at <http://www.wirelessweek.com/Article-Lassoing-Mobile-TV-040109.aspx>.

In contrast, MobiTV uses a blended multicast and unicast technology.²⁴³ Its Optimized Delivery Server creates a single delivery platform that improves quality and decreases the channel lineup limitations of other unicast technologies.²⁴⁴ Unlike Qualcomm's MediaFLO, which needs its own spectrum to deliver video, MobiTV "rides" on a variety of networks.²⁴⁵ Sprint, Alltel, AT&T, and U.S. Cellular use MobiTV to provide mobile television to customers,²⁴⁶ and MobiTV is available wherever these wireless providers have network coverage.²⁴⁷

²⁴³ See *MobiTV, Our Technology, Improving Network Efficiency While Enhancing Video Quality* (promoting MobiTV's Optimized Delivery Server as a "blended solution that utilizes that best of both worlds," combining unicast and multicast distribution methods), at <http://www.mobitv.com/technology/optimized.php> (last visited May 19, 2009); see also Mickey Alam Khan, *MobiTV Upgrades TV Delivery Technology*, *Mobile Marketer*, Apr. 15, 2008 (discussing MobiTV's upgrade to the Optimized Delivery Server and noting that the Server is said to combine unicast and multicast distribution methods on a delivery platform that improves video quality and decreases backhaul), available at <http://www.mobilemarketer.com/cms/news/television/839.print>.

²⁴⁴ One of the downsides to unicasting is that channel changing can take up to fifteen seconds, whereas MobiTV says its upgraded server makes changing channels possible in less than one second. See *id.*

²⁴⁵ Olga Kharif, *The Mobile TV Wars*, *Bus. Week*, July 26, 2007 (explaining that "MobiTV streams video channels over a carrier's cellular network instead of a separate, dedicated network of wireless towers like those . . . being built by MediaFlo"), available at http://www.businessweek.com/technology/content/jul2007/tc20070725_294703.htm.

²⁴⁶ *MobiTV, Our Technology, Partners*, <http://www.mobitv.com/technology/partners.php> (last visited May 19, 2009); Khan, *supra* note 243. Sprint and MobiTV paired up in 2007, and Sprint currently brands its MobiTV-powered product as "Sprint TV." Press Release, *MobiTV, MobiTV Enters Long-Term Agreement To Deliver Industry Leading TV Service on Sprint* (Oct. 22, 2007), available at http://www.mobitv.com/press/press.php?i=press/release_102207a. Alltel, AT&T, and U.S. Cellular offer MobiTV but do not brand it as their own product. See U.S. Cellular, *Easy Edge Games & Entertainment: MobiTV*, at <http://easyedge.uscc.com/easyedge/GameDetail.do?2160> (last visited May 19, 2009); Alltel Wireless, *MobiTV*, at http://www.alltelsolutions.com/solutions/mobi_tv.html (last visited May 19, 2009). AT&T offers customers both MobiTV and its own branded "AT&T Mobile TV," which is powered by MediaFLO. See Press Release, AT&T Inc., *AT&T Mobile TV Premieres Sunday, May 4* (May 1, 2008) (describing "AT&T Mobile TV" as using the "FLO" service of MediaFLO), available at <http://www.att.com/gen/press-room?pid=4800&cdvn=news&newsarticleid=25610>; AT&T Inc., *Answer Center: MobiTV Overview* (describing AT&T's MobiTV Service), at <http://www.wireless.att.com/answer-center/main.jsp?solutionId=kb63829&t=solutionTab> (last visited May 19, 2009).

²⁴⁷ See Simpson, *supra* note 242 ("MediaFLO is popular in cities where it is available. But streaming services have an advantage because there is better coverage."); see also Kharif, *supra* note 245 (explaining that "MobiTV streams video channels over a carrier's cellular network instead of a separate, dedicated network of wireless towers like those...being built by MediaFLO").

Mobile users are also consuming video through various applications on their mobile devices. Blackberry has introduced a subscription VOD service from QuickPlay Media called “PrimeTime2Go” that will allow users to download and watch TV shows from the four major networks, Discovery Channel, ESPN, and USA, among others.²⁴⁸ Apple offers several iPhone “Apps” that deliver video content from various networks, including ABC, CBS, ESPN, and Food Network.²⁴⁹

Other technological changes in the mobile wireless space have increased the quantity and quality of mobile video. For example, the widespread use of 3G networks and the development of handsets with larger screens and better processors provide a much improved platform for delivering and receiving video.²⁵⁰ Advancements in compression technology have made it possible to deliver more content.²⁵¹ In 2008 MobiTV partnered with Media Excel, a company that provides real-time video encoding and transcoding applications, to enhance compression capabilities and ensure efficient and reliable video over 3G and 4G networks.²⁵² Media Excel’s

²⁴⁸ See Glen Dickson, *Blackberries Get Video-On-Demand*, Multichannel News, May 6, 2009, available at http://www.broadcastingcable.com/article/231500-Blackberries_Get_Video_On_Demand.php?nid=2228&source=link&rid=9813543.

²⁴⁹ See Apple Inc., *CBS News.com for iPhone*, at <http://www.apple.com/webapps/news/cbsnewscomforiphone.html> (last visited May 19, 2009); Apple Inc., *ESPN Mobile Web - iPhone Edition*, at <http://www.apple.com/webapps/sports/espnmobilewebiphonedition.html> (last visited May 19, 2009); Jonathan Dube, *ABC News Launches iPhone Application*, ABC News, at <http://abcnews.go.com/Site/story?id=6567350> (last visited May 19, 2009); Apple Inc., *Food Network*, at <http://www.apple.com/webapps/entertainment/foodnetwork.html> (last visited May 19, 2009).

²⁵⁰ See Simpson, *supra* note 242 (reporting that MobiTV’s CEO Charles Nooney said that these advances in mobile phone and network technology have better facilitated the data-intensive streaming process).

²⁵¹ For example, MobiTV has developed a compression platform that enables it to adjust encoding depending on a variety of factors, such as the type of content, the provider, network conditions and end-user device. See MobiTV, *Our Technology, Content Management Care*, at <http://mobitv.com/technology/content.php> (last visited May 19, 2009).

²⁵² See *MobiTV and Media Excel Partner To Offer Integrated Transcoding & Video Streaming Solution for Wireless Service Providers*, Compact PCI Systems, Sept. 15, 2008, available at <http://www.compactpci-systems.com/news/Technology+Partnerships/13200>; *MobiTV, Media Excel Join To Enable 3G, 4G Video Delivery to Service Providers*, Broad. Eng’g, Oct. 7, 2008, available at <http://broadcastengineering.com/RF/mobitv-media-excel-enable-video-deliver-providers-1007/>.

HERA 4000 transcoder, also released in 2008, enables encoding and transcoding of video over any network.²⁵³

The next generation of mobile wireless networks, using WiMAX and Long Term Evolution (“LTE”) technology, will enable further advances in mobile video delivery. For example, various technology companies, including Samsung²⁵⁴ and Nextwave Wireless,²⁵⁵ have announced new devices or services that incorporate WiMAX technology. At the 2009 Cable Show, Clearwire demonstrated a WiMAX-equipped car that played video from Hulu.com on an in-dash screen and also played video through a Sony PSP.²⁵⁶ LTE is not far behind; during the CTIA show in March 2009, Motorola displayed video data at speeds of more than 10 Mbps to television monitors inside a moving van using LTE technology.²⁵⁷ The senior vice president for cellular and WiMAX technology at Motorola said that “LTE will be all about video.”²⁵⁸ LTE’s

²⁵³ See Press Release, Media Excel Inc., *Media Excel Releases HERA 4000 at IBC 2008* (Sept. 12, 2008), available at <http://www.streamingmedia.com/press/view.asp?id=10035>.

²⁵⁴ Samsung announced the release of the first mobile Internet device that incorporates WiMAX technology in its Samsung Mondii, boasting of “instant access to . . . video content.” Press Release, Samsung Telecom. Am., *Samsung Mobile Launches First WiMAX-Enabled Mobile Internet Device* (Mar. 31, 2008), available at <http://www.samsungusanews.com/2009/03/samsung-mobile-launches-first-wimax-enabled-mobile-internet-device/>.

²⁵⁵ See Amitabh Kumar, *Nextwave Announces WiMAX based Mobile TV Platform*, Mobile TV Book, Mar. 10, 2008, <http://mobiletvbook.com/mwimax.aspx>. Nextwave’s service, branded as “MXtv,” is a multicast and broadcast technology that allows WiMAX operators to deliver mobile television and other multimedia services. See Press Release, NextWave Wireless Inc., *MXtv: The Innovative New Mobile Multimedia and Advertising Platform for WiMAX Operators* (Mar. 10, 2008), available at <http://www.fiercewireless.com/press-releases/innovative-new-mobile-multimedia-and-advertising-platform-wimax-operators>.

²⁵⁶ See Nate D’Amico, *Photos: Clearwire’s WiMAX In-Car Video*, NewTeeVee, Apr. 7, 2009, available at <http://newteevee.com/2009/04/07/photos-clearwires-wimax-in-car-video/#more-22029>.

²⁵⁷ See Matt Hamblen, *LTE Test Drive: Watching Wireless Video While Cruising Through Vegas*, Computer World, Apr. 6, 2009, available at <http://www.computerworld.com/action/article.do?command=viewArticleBasic&articleId=9131179>.

²⁵⁸ *Id.*

ability to handle video with efficiency and high quality will likely attract wireless video subscribers once LTE is deployed, which could be as soon as 2010.²⁵⁹

The content available for mobile platforms is growing by leaps and bounds. Wireless operators continue to increase the amount and quality of mobile video programming accessible over their networks. Since 2006, wireless operators have added a variety of news, full-length television shows, and sports coverage, making content that was once available only on television accessible over mobile devices. For example:

- Verizon's V-CAST offers more than 135 full-length programs from broadcast and cable programming sources. It offers news, sports, and entertainment from Disney/ABC and ESPN, including full-length episodes of *Grey's Anatomy*, *Lost*, and *Hannah Montana*. In 2008, V-CAST began offering full-length NBC television shows, including *The Office* and *30 Rock*. V-CAST also teamed up with FOX and Warner Bros. Television Group to promote the television series *Terminator: The Sarah Connor Chronicles*, offering sneak peaks, episode recaps, and other exclusive mobile content. Other V-CAST mobile channels include MTV, VH1, and Comedy Central.²⁶⁰
- AT&T's mobile offerings include programming from CBS, ESPN, FOX, NBC, Comedy Central, MTV, and Nickelodeon, as well as PIX (a movie service from Sony Pictures) and CNN Mobile Live.²⁶¹

²⁵⁹ Verizon Wireless recently announced its plan for deployment of its LTE network, hoping to be the first operator to offer LTE service in 2010. See Press Release, Verizon Wireless, *Verizon Wireless Fosters Global LTE Ecosystem as Verizon CTO Dick Lynch Announces Deployment Plans* (Feb. 18, 2009), available at <http://investor.verizon.com/news/view.aspx?NewsID=969>.

²⁶⁰ See Press Release, Verizon Wireless, *Mobile Content Is a Star at Verizon Wireless* (Apr. 2, 2009), available at <http://news.vzw.com/news/2009/04/pr2009-04-01c.html>; Press Release, Verizon Wireless, *Disney/ABC Television Group and ESPN Extend Agreement with Verizon To Offer Entertainment, Kids, Sports and News Programming* (Jan. 26, 2009), available at <http://news.vzw.com/news/2009/01/pr2009-01-26a.html>; Press Release, Verizon Wireless, *Hit NBC Universal Shows in Your Pocket: Full Length Episodes on V Cast from Verizon Wireless* (Sept. 10, 2008), available at <http://news.vzw.com/news/2008/09/pr2008-09-09j.html>; Jon Lafayette, TV Week, *Verizon Gets Content in Fox Marketing Deal*, Jan. 16, 2008, available at http://www.tvweek.com/news/2008/01/verizon_gets_content_in_fox_ma.php; Press Release, Verizon Wireless, *Verizon Wireless and MTV Networks Launch MTV, VH1, COMEDY CENTRAL, Nickelodeon, And CMT on Mobile Web 2.0* (Mar. 28, 2008), available at <http://news.vzw.com/news/2008/03/pr2008-03-28b.html>. A complete program guide is available on Verizon's website. See Verizon Wireless, *V CAST Mobile TV, Program Guide*, at <http://products.vzw.com/index.aspx?id=mobileTV&lid=//global/features+and+downloads//mobileTV//program+guide#grid> (last visited May 19, 2009).

²⁶¹ See Press Release, AT&T Inc., *AT&T To Deliver MediaFLO USA's FLO TV Service in 58 Markets on New AT&T-Exclusive Handsets Designed for Mobile TV Viewing* (May 1, 2008) (noting that CNN Mobile Live provides live streaming coverage as well as programs such as *Lou Dobbs Tonight*, *Larry King Live*, and *Anderson Cooper 360°*), available at <http://www.att.com/gen/press-room?pid=4800&cdvn=news&newsarticleid=25610>; Dickson,

(footnote continued...)

- MobiTV offers prime-time shows from CBS, NBC, and ABC, and more than 40 channels of content from networks like ESPN, Disney, and MSNBC. In January 2009, adding CBS to its service, MobiTV began providing subscribers with full-length episodes of shows like *CSI: NY*, and access to news, sports, and comedy clips from CBS Mobile. In 2007, MobiTV began offering A&E Mobile and History Channel Mobile, offering shows such as *Modern Marvels* and *Dog the Bounty Hunter*.²⁶²
- Sprint TV began carrying live NFL Network game telecasts in November 2008.²⁶³ Sprint is the only wireless carrier to offer the NFL Network via its exclusive NFL Mobile Live application.²⁶⁴ In addition to game telecasts, NFL Mobile Live offers live radio broadcasts of every NFL regular-season game, a “Game Center” with real-time scores and statistics, breaking news, and video on-demand such as previews and game highlights.²⁶⁵

Other content producers continue to enter the mobile video marketplace. YouTube launched its mobile site in January 2008, and access is not tied to any single operator or device: all the site requires is a streaming-capable phone and a 3G wireless network provider.²⁶⁶ E! Entertainment aired a live simulcast of its Emmy Award coverage in 2007 for wireless users.²⁶⁷ CinemaNow allows customers to access movie trailers on their cell phones, but recently joined

(...footnote continued)

supra note 240 (noting that PIX, from Sony Pictures Television, offers a variety of movies from the studio’s library). A complete program guide is available on AT&T’s website. See AT&T, *AT&T Mobile TV, Program Guide*, at <http://www.wireless.att.com/learn/messaging-internet/mobile-tv/#top> (last visited May 19, 2009).

²⁶² See Friedman, *supra* note 240; Marguerite Reardon, *MobiTV Adds CBS to Lineup*, CNET.com, Jan. 6, 2008, available at http://news.cnet.com/8301-1035_3-10132161-94.html; Daisy Whitney, *A&E Mobile Channels Go to MobiTV*, RCR Wireless News, July 23, 2007, available at <http://www.rcrwireless.com/article/20070723/SUB/70723002/A&E-Mobile-channels-go-to-MobiTV>.

²⁶³ Press Release, Sprint, *Sprint To Carry Live NFL Network Games Telecasts Via Wireless on Sprint’s Now Network* (Oct. 30, 2008) available at http://newsreleases.sprint.com/phoenix.zhtml?c=127149&p=irol-newsArticle_newsroom&ID=1219874.

²⁶⁴ See *id.*

²⁶⁵ See *id.*

²⁶⁶ Monica Allevan, *YouTube Expands in Mobile*, WirelessWeek, Jan. 24, 2008 (noting that customers can order full-length movies to watch on their television or computer), available at www.wirelessweek.com/YouTube-Expands-Mobile.aspx.

²⁶⁷ Linda Moss, *E! Goes Mobile for Emmy Red Carpet Coverage*, Multichannel News, Sept. 13, 2007, available at http://www.multichannel.com/article/130388-E_Goes_Mobile_for_Emyy_Red_Carpet_Coverage.php; see also Laura M. Holson, *All the Celebrities You Want, on Your Cellphone*, N.Y. Times, Oct. 20, 2008 (noting that TMZ.com and People.com offer mobile videos and photos of celebrities-in-action), available at http://www.nytimes.com/2008/10/20/business/media/20celeb.html?_r=1.

forces with Blockbuster and plans to offer full-length movies to download directly to mobile phones sometime in 2009.²⁶⁸

Development of additional mobile television content has been driven by the increased popularity of the iPhone.²⁶⁹ More than one third of iPhone users watch video on their phones. Such frequent use has prompted networks like MTV and NBC to make their websites iPhone-compatible.²⁷⁰ Sling Media is releasing a demo of a SlingPlayer Mobile application for iPhone users, which would allow Slingbox users to access their set-top boxes, including full channel lineups and DVR recordings, on their phone.²⁷¹ CBS sold a VOD application for the iPhone with live streaming of the 2009 NCAA Men's Basketball tournament.²⁷² The iPhone has also given children's programming content providers new ways to reach audiences. For example, PBS KIDS Sprout created the Sprout Player application, which streams videos of three- to four-minute Sprout shows.²⁷³

²⁶⁸ See CinemaNow, *CinemaNow Mobile*, at <http://www.cinemanow.com/devicesmobile.aspx> (last visited May 19, 2009); *CinemaNow to Offer Movie Orders Via Cell Phone*, Reuters, Apr. 29, 2008, available at <http://www.reuters.com/articlePrint?articleID=USN2917006820080429>; DealBook Blog, *Blockbuster Links with CinemaNow for Video Delivery*, N.Y. Times, Jan. 14, 2009, available at <http://dealbook.blogs.nytimes.com/2009/01/14/blockbuster-downloads-cinemanow-for-video-delivery/?partner=rss&emc=rss>.

²⁶⁹ AT&T reported that 1.9 million iPhones were activated in the fourth quarter of 2008. See Press Release, AT&T, Inc., *AT&T Reports Fourth Quarter and Full-Year Results Highlighted by Robust Wireless Data Growth, Accelerated U-Verse TV Ramp, Continued Double-Digit Growth in IP Data Services* (Jan. 28, 2009), available at <http://www.att.com/gen/press-room?pid=4800&cdvn=news&newsarticleid=26502>.

²⁷⁰ Daisy Whitney, *TV Networks Targeting Growing Smartphone Market*, TV Week, Feb. 8, 2009, available at http://www.tvweek.com/news/2009/02/tv_networks_targeting_growing.php.

²⁷¹ Todd Spangler, *Slinging TV to iPhones*, Multichannel News, Jan. 5, 2009, available at http://www.multichannel.com/blog/BIT_RATE/10676-Slinging_TV_to_iPhones.php.

²⁷² See Todd Spangler, *CBS Swings March Madness Pass to iPhones*, Multichannel News, Mar. 12, 2009, available at http://www.multichannel.com/article/189836-CBS_Swings_March_Madness_Pass_To_iPhones.php?rssid=20059&q=%22mobile+video%22

²⁷³ See Dong Ngo, *PBS Sprout Makes iPhone Apps for Preschoolers*, CNet, Mar. 5, 2009, available at http://news.cnet.com/8301-17938_105-10189527-1.html.

Other mobile device providers are also introducing services to take advantage of video capabilities. Blackberry has introduced a subscription VOD service from QuickPlay Media called “PrimeTime2Go” that will allow users to download and watch TV shows from the four major broadcast networks, Discovery Channel, ESPN, USA, and others.²⁷⁴

B. Broadband over Power Line Continues To Be a Potential Video Delivery Vehicle.

In the NOI, the Commission seeks comment on the deployment of video services by utility service providers.²⁷⁵ Broadband over Power Line (“BPL”) has not garnered widespread adoption, and it is not clear what role BPL will ultimately play in the video marketplace. Nonetheless, various players continue to invest in the technology to develop a reliable and profitable business model. Examples include the following:

- IBM and International Broadband Electric Communications, Inc. (“IBEC”) signed a \$9.6 million agreement to install BPL networks at electric cooperatives throughout the East Coast. They will focus on providing broadband to underserved, rural communities.²⁷⁶
- IBEC is working to make BPL a reality for electricity firms. It recently received \$50 million in loans from the U.S. Department of Agriculture to develop BPL for rural electricity cooperatives. IBEC also has an agreement with a leading surge protector manufacturer, Cooper Power, that makes installing BPL cheaper and easier.²⁷⁷
- Ambient Corporation’s BPL communications nodes were approved as a device for connecting into Verizon’s 3G network. The result will be a two-way network that uses

²⁷⁴ See Dickson, *supra* note 248.

²⁷⁵ Notice ¶ 55.

²⁷⁶ See Press Release, IBM, *IBM and International Broadband Electric Communications, Inc. Work Together To Connect Rural America* (Nov. 12, 2008), available at <http://www-03.ibm.com/press/us/en/pressrelease/25979.wss>; Paul McDougall, *IBM Plans Broadband Over Power Lines For Rural America*, Info. Week, Nov. 12, 2008, available at <http://www.informationweek.com/news/industry/technology-telecom/showArticle.jhtml?articleID=212002016>.

²⁷⁷ *What IBM Knows About IBEC Puts BPL Back into Headlines*, BPL Today, Nov. 18, 2008, available at http://www.ibec.net/pdf/20081118_Wat_IBM_Knows_About_IBEC.pdf.

power lines within a grid's geographic area and Verizon's wireless network for long-haul communications.²⁷⁸

- MSTI Holdings and Telkonet installed a power line communications system, called Telkonet Series 5, to a high-rise commercial office building in Midtown Manhattan.²⁷⁹

Some technology firms are using BPL technology to develop networking solutions for within a particular consumer's home. These solutions use a "plug and play" system over the home's electrical wiring to create a home network, sending data over power lines. Equipment builders are touting the system as "good enough to transmit HD video around the home" between the various plugs.²⁸⁰

C. The Video Marketplace Is Generating a Multitude of New Ways To Access Video, with "To-Be-Determined" Competitive Impact.

In addition to video programming described above, consumers are also watching video in many other ways, including on devices such as video-enabled iPods and game systems. For example, as noted above, Apple offers video content on iTunes that can be downloaded to iPods,

²⁷⁸ Efrain Viscarolasaga, *Local Firms Prep for Smart Networked Power Grids*, Mass High Tech, Jan. 16, 2009, available at <http://www.masshightech.com/stories/2009/01/12/weekly14-Local-firms-prep-for-smart-networked-power-grids.html>.

²⁷⁹ The partnership plans to bring Telkonet Series 5 to buildings throughout the Tri-State area. Telkonet Series 5 combines power line technology with an advanced 200Mbps chipset to turn an existing electrical infrastructure into an IP network backbone, making it ideal for buildings with wireless problems. See Press Release, *MSTI and Telkonet Target Commercial Tri-State HSIA Market with First Deployment of Telkonet Series 5 200Mbps PLC Broadband Networking Solution* (Mar. 26, 2008), available at http://www.mst-online.com/corporate/press_short.asp?id=34.

²⁸⁰ Netgear began selling two power line adapter kits for plug-and-play broadband access. One is based on the HomePlug standard, and the other an HD version. Both provide high-speed connections for audio, video, VoIP, and Internet. See Rachel Cericola, *Netgear Puts More out for Powerline Fans*, Elec. House, Nov. 17, 2008, available at http://www.electronichouse.com/article/netgear_puts_more_out_for_powerline_fans/C157. Power line networking using home adapters is advantageous because there are no new cables to install, no range concerns, and less security concerns than with wireless. See Dean Evans, *Powerline: The Reliable Alternative to Wi-Fi*, Tech Radar, Dec. 1, 2008, available at <http://www.techradar.com/news/digital-home/home-networking/explained-powerline-networking-137203>.

iPhones, or other devices.²⁸¹ In addition, the Apple TV software allows users to view the video content from a widescreen TV, with no computer required.²⁸²

Video game system manufacturers like Sony and Microsoft now offer on-demand services that allow users to access movies and TV shows.²⁸³ Microsoft has even announced that “Xbox Live members will be able to access ‘twice as much on demand content’ as is provided by any cable or satellite TV operator.”²⁸⁴ To enhance its service, Sony has produced video content specifically for the Sony PlayStation -- it began “Qore,” an original series, that is available for purchase and viewing through PlayStation consoles.²⁸⁵

Software developers are experimenting with ways to move Internet content to televisions. Adobe has recently introduced a Flash video-viewing program for TVs, set-top boxes, and Blu-ray disc players that enables Internet-connected televisions to display video downloaded online without the need for a browser.²⁸⁶ Microsoft developed Mediaroom software that now serves

²⁸¹ See Press Release, Apple Inc., *Apple Premieres iTunes Movie Rentals with All Major Film Studios* (Jan. 15, 2008), available at <http://www.apple.com/pr/library/2008/01/15itunes.html>; see also *Fox DVDs Get iTunes Digital Copy*, Digital Trends, Jan. 16, 2008 (noting that FOX and Apple agreed to enable purchase of Fox DVDs through iTunes), available at <http://news.digitaltrends.com/news-article/15445/fox-dvds-get-itunes-digital-copy>.

²⁸² See Press Release, Apple Inc., *Apple Premieres iTunes Movie Rentals With All Major Film Studios* (Jan. 15, 2008), available at <http://www.apple.com/pr/library/2008/01/15itunes.html>.

²⁸³ See, e.g., Todd Spangler, *Sony's PlayStation Tunes to Video*, Multichannel News, July 16, 2008 (noting that Sony's PlayStore offers for sale and rent television content from various cable programming networks and movie studios), available at http://www.multichannel.com/article/133976-Sony_s_PlayStation_Tunes_to_Video.php; Tom Steinert-Threlkeld, *Microsoft Xbox To Pull in ABC, Disney Shows On Demand*, Multichannel News, Jan. 6, 2008 (noting that Microsoft Xbox 360 owners can use Xbox Live to deliver ABC, Disney, and MGM shows and movies to their console), available at http://www.multichannel.com/article/131639-Microsoft_Xbox_To_Pull_In_ABC_Disney_Shows_On_Demand.php.

²⁸⁴ See Steinert-Threlkeld, *supra* note 283 (quoting the president of Microsoft's Entertainment & Devices Division, Robbie Bach).

²⁸⁵ Qore is described as “Entertainment Tonight for gamers,” and features behind-the-scenes looks at new games, trends in gaming, and other exclusive content. See Mike Shields, *Sony Creates Original Series for PlayStation Net*, MediaWeek, Jun. 3, 2008, available at http://www.mediaweek.com/mw/content_display/esearch/e3ice3f83ada9e7b559c42d24e521b2d748.

²⁸⁶ See Rochelle Garner, *Adobe To Unveil Flash Video-Viewing Software for Televisions*, Bloomberg, Apr. 20, 2009, available at http://www.bloomberg.com/apps/news?pid=conewsstory&tkr=DIS:US&sid=asp_8AbFfP.w.

one million set-top boxes, and uses IPTV to enable new, more interactive, television capabilities.²⁸⁷ Boxee provides a free application that allows “users to view video from networks such as ABC, CBS and Comedy Central, as well as movie services such as Netflix.”²⁸⁸

Hardware developers are also trying to make the transition between Internet and TV seamless. Panasonic has developed and is selling three Viera Plasma HDTV sets with the Viera Cast feature that connects to Amazon’s Video On Demand service “that touts a library with more than 500 hi-def titles, and about 40,000 shows and movies.”²⁸⁹ Sony has entered into an agreement with the six largest cable companies to market products that are compatible with tru2way, an initiative across the cable industry to develop a common two-way TV platform.²⁹⁰ Sling Media’s Slingbox incorporates “place-shifting” technology that allows TV content to be transmitted from a consumer’s TV set to any location with an Internet connection. Along with EchoStar, Sling Media has developed a new SlingModem that can be used both as a high-speed data modem and a Slingbox.²⁹¹ TiVO and YouTube struck a deal that allows TiVo customers to

²⁸⁷ Microsoft is working with TNT, Showtime, TBS, and CNN to develop new TV applications. It has also developed “MyPad,” which as an application that allows users to access social-networking sites from their TVs. Microsoft also offers “DVR Anywhere,” which enables viewers to watch recorded programs from multiples TVs in their home, while also recording other shows. See Todd Spangler, *Microsoft: 1 Million IPTV Set-Tops Served*, Multichannel News, Jan. 6, 2008, available at http://www.multichannel.com/article/131637-Microsoft_1_Million_IPTV_Set_Tops_Served.php; *Microsoft Enters the Interactive TV Market with DVR Anywhere*, DMNews, Jan. 9, 2009, available at <http://www.dmnews.com/Microsoft-enters-the-interactive-TV-market-with-DVR-Anywhere/article/100588/>.

²⁸⁸ Mark Robichaux, *Box[e]d In*, Multichannel News, Feb. 23, 2009, available at http://www.multichannel.com/article/174593-Box_e_ed_In.php?q=boxee.

²⁸⁹ Jeff Baumgartner, *Panasonic Plugs in HD Web TV*, Light Reading, Apr. 23, 2009, available at http://www.lightreading.com/document.asp?doc_id=175711&site=cdn&f_src=lightreading_FinancialContent.

²⁹⁰ Sony said that “[t]he agreement will encourage the development and distribution of interactive and high-value digital content.” See Robert Marich, *Sony Embraces tru2way*, Broad. & Cable, May 27, 2008, available at http://www.broadcastingcable.com/article/113885-Sony_Embraces_tru2way.php.

²⁹¹ Glen Dickson, *SlingModem Comes to Market*, Broad. & Cable, May 14, 2008, available at http://www.broadcastingcable.com/article/113716-SlingModem_Comes_to_Market.php.

directly access YouTube videos via broadband-connected units.²⁹² And many Blu-ray manufacturers are now including *BD-Live* technology in their Disc players, which enables consumers to connect to the Internet and download content from sites such as YouTube, CinemaNow, Amazon, Netflix, and Pandora, depending on the manufacturer.²⁹³

IV. COMCAST TAKES GREAT PRIDE IN ITS RESPONSES TO CONSUMER DEMAND FOR THE HIGHEST QUALITY, AND MOST DIVERSE AND ATTRACTIVE, OPTIONS FOR VIDEO, BROADBAND, AND VOICE.

Competition forces Comcast to work diligently to retain and attract customers by enhancing existing services and developing a diverse and innovative array of programming, products, and services. Comcast is committed to delivering consumers the value and choice they demand. Long-standing products, like Comcast's video services, are expanded and adapted to meet changing consumer preferences, technologies, and opportunities, while new advanced services continue to be developed, designed, and deployed. Despite the economic downturn, Comcast is investing \$5 billion in capital expenditures in 2009 to ensure that it offers its customers cutting-edge technologies and services.²⁹⁴ The following chart provides subscriber data to assist the Commission in its fact-gathering effort, with data as of June 30 for 2007 and 2008 and the latest available data for 2009 (to be supplemented with June 30 data when available).

²⁹² TiVo said that such a deal with YouTube was important given that Apple's AppleTV already has a deal with YouTube. See Glen Dickson, *TiVo To Deliver YouTube to TV Sets*, *Broad. & Cable*, Mar. 12, 2008, available at http://www.broadcastingcable.com/article/91873-TiVo_to_Deliver_YouTube_to_TV_Sets.php.

²⁹³ See John Falcone, *CES 2009: Home Audio Wrap-up*, *CNet*, Jan. 13, 2009, available at http://ces.cnet.com/8301-19167_1-10141344-100.html?tag=mncol:title.

²⁹⁴ *Comcast Puts Focus on Phone and Internet*, *The Tennessean*, Apr. 5, 2009 (quoting Steve Burke), available at <http://www.tennessean.com/article/20090405/BUSINESS05/904050373/1003/BUSINESS>.

Selected Comcast Subscriber Data

Segment	1Q09	2Q08	2Q07
VIDEO			
Homes Passed	50,740	50,096	47,900
Basic Subscribers (000's)	24,104	24,553	24,141
Basic Penetration	47.5%	49.0%	50.4%
Digital Subscribers (000's)	17,293	16,335	14,133
Digital Penetration	71.7%	66.5%	58.5%
HIGH-SPEED INTERNET			
Homes Passed (000's)	50,456	49,548	47,445
Subscribers (000's)	15,258	14,357	12,380
Penetration of Homes Passed	30.2%	28.9%	26.1%
PHONE (CDV)			
Homes Passed (000's)	47,393	45,143	37,638
Subscribers (000's)	6,769	5,643	3,097
Penetration of Homes Passed	14.3%	12.5%	8.2%

A. Comcast Provides Its Video Subscribers Unparalleled Programming Choices, Enhanced Services, and Value.

As of March 31, 2009, Comcast provided video programming services to approximately 24.1 million customers.²⁹⁵ To enhance its customers' experience and attract new ones, Comcast

²⁹⁵ See Press Release, Comcast Corp., *Comcast Reports First Quarter 2009 Results* (Apr. 30, 2009), available at <http://www.cmcsk.com/phoenix.zhtml?c=118591&p=irol-newsArticle&ID=1282445&highlight=>.

is constantly improving its service offerings: increasing the variety and quality of its video programming; launching new HD channels; adding thousands of VOD titles; deploying advanced DVR capabilities; and developing innovative interactive video options. Comcast subscribers are receiving these unparalleled programming choices at a real value. As explained in a recent analyst report, “[t]aking into account the increased amount of time U.S. households spend watching television, and the fact that cable’s share of total television viewing has increased, the real price of an hour of cable TV has actually *declined* by an inflation-adjusted 26% over the past 10 years.”²⁹⁶

Video Content. To provide consumers with diverse, appealing, and innovative content, Comcast scours the programming marketplace, regularly adding channels and features to satisfy as diverse an array of consumer interests as possible. Over the past few years, Comcast has entered into carriage agreements (both new and renewal agreements) with the owners of well over 100 channels unaffiliated with Comcast.²⁹⁷ For example,

- Comcast agreed to carry VeneMovies, the first full-featured Spanish-language film channel ever offered in the United States, as part of its CableLatino Hispanic programming package, giving customers access to a 24-hour, commercial-free channel and 20 hours of VOD programming.²⁹⁸
- Comcast reached a carriage agreement with MGM HD, a new movie channel, making hundreds of movies available to subscribers both on the linear channel and VOD.²⁹⁹

²⁹⁶ Craig Moffett et al., Bernstein Research, *U.S. Cable & Satellite: How Economically Sensitive Is Pay TV?* 1, 11 (Jan. 14, 2009). The cost of an hour of cable has also declined on a relative basis versus competing forms of entertainment, including movies, DVD purchases, and DVD rentals. *See id.*

²⁹⁷ The vast majority of programming networks that Comcast carries are not owned by Comcast.

²⁹⁸ *See* Press Release, Comcast Corp., *Cisneros Group’s Venevision International Launches on Comcast “VeneMovies”*: America’s First Full-Featured U.S.-Hispanic Cable Movie Channel (Sept. 6, 2006), available at <http://www.comcast.com/About/PressRelease/PressReleaseDetail.aspx?PRID=47>.

²⁹⁹ *See* Glen Dickson, *MGM HD Gets Comcast Carriage*, *Broad. & Cable*, May 16, 2008, available at http://www.broadcastingcable.com/article/113785-MGM_HD_Gets_Comcast_Carriage.php.

- Comcast launched The Africa Channel, which features cultural, entertainment, and destination programming pertaining to the continent, on Comcast Digital Cable in Chicago.³⁰⁰
- Comcast and Black Television News Channel, “the nation’s only African-American news network,” announced a multi-year carriage agreement.³⁰¹
- Comcast entered into a long-term, comprehensive distribution agreement with Disney for the 10 ABC-owned broadcast TV stations and a broad array of Disney’s networks, including Disney Channel, ABC Family, Toon Disney, and the ESPN family of networks, and agreed to expand Disney’s VOD offerings and content available at Comcast.net.³⁰²
- Comcast and the Big Ten Network (“BTN”) reached a long-term multimedia agreement for Comcast to carry BTN programming across TV, broadband, and VOD, starting with the 2008 college football season.³⁰³
- Comcast reached an agreement with Alterna TV to carry three more Spanish-language channels as part of its Spanish-language tier offering in Chicago, which is comprised of nearly 60 linear networks, as well as 125 Hispanic ON DEMAND choices.³⁰⁴
- Comcast added WAPA America, a Puerto Rican channel, to its lineup around the Denver metro area and in Colorado Springs.³⁰⁵
- Comcast agreed to add HDNet and HDNet Movies to its HD lineup.³⁰⁶

³⁰⁰ See Mike Reynolds, *Africa Channel Launches on Comcast in Chicago*, Multichannel News, Apr. 6, 2009, available at http://www.multichannel.com/article/195743-Africa_Channel_Launches_On_Comcast_In_Chicago.php. Comcast originally reached a long-term affiliation agreement with The Africa Channel in 2006 for carriage in the Atlanta area. See R. Thomas Umstead, *Comcast Signs Africa Channel*, Multichannel News, Feb. 23, 2006, available at http://www.multichannel.com/article/81892-Comcast_Signs_Africa_Channel.php.

³⁰¹ See Press Release, Black Television News Channel, *Black Television News Channel Announces Carriage Agreement with Comcast* (Apr. 14, 2008), available at <http://www.btnc.tv/node/2>.

³⁰² See Press Release, Comcast Corp., *Comcast and the Walt Disney Company Announce Long-Term Comprehensive Distribution Agreements Securing Carriage for Disney Media Networks’ Products and Services* (Nov. 21, 2006), available at <http://www.comcast.com/About/PressRelease/PressReleaseDetail.ashx?PRID=24>.

³⁰³ See Press Release, Comcast Corp., *Comcast, Big Ten Network Reach Broad Multimedia Agreement for Big Ten Network Content* (June 19, 2008), available at <http://www.comcast.com/About/PressRelease/PressReleaseDetail.ashx?PRID=767>.

³⁰⁴ See Mike Reynolds, *Alterna TV Offers Three More Spanish-Language Alternatives for Comcast*, Multichannel News, Apr. 8, 2009, available at http://www.multichannel.com/article/195853-Alterna_TV_Offers_Three_More_Spanish_Language_Alternatives_For_Comcast.php.

³⁰⁵ See *Comcast Adds WAPA to Channel Lineup*, Denv. Bus. J., May 6, 2009, available at <http://www.bizjournals.com/denver/stories/2009/05/04/daily47.html>.

³⁰⁶ See Press Release, HDNet, *HDNet and HDNet Movies Announce Affiliation Agreement with Comcast* (Sept. 4, 2008), available at <http://www.hd.net/pressrelease.html?2008-09-04-01.html>.

- Comcast and Retirement Living TV, a network targeting audiences age 50 and over, announced an initial launch of Retirement Living TV to 12 million Comcast subscribers.³⁰⁷
- Comcast reached an agreement to carry MavTV, a network targeting men aged 18 to 54, with programming focused on topics including “sports, sports analysis, gaming, comedy, women and relationships, health and fitness, finance, gadgets, and movies.”³⁰⁸
- Comcast signed a multi-year distribution agreement for linear and VOD services with BlueHighwaysTV, which features programming on “roots music, including bluegrass, blues, folk western, gospel and traditional country, outdoor adventure and agriculture, lifestyle, cooking, equestrian and a variety of other subjects.”³⁰⁹
- Comcast and RFD TV announced that Comcast agreed to carry both the HD and standard-definition versions of RFD TV, a programming service centered on rural programming.³¹⁰

Comcast offers its customers a rich variety of video programming options. As the Commission has recognized, Comcast’s broad selection of program and price combinations enable all consumers to find the right mix of services to meet their interests and finances.³¹¹ For example, on a typical cable system, Comcast offers:

- An inexpensive basic tier that provides local broadcast stations, public, educational, and governmental channels, and several basic cable networks.
- An expanded basic tier that supplements the basic tier channels with the most popular cable programming networks, such as ESPN, CNN, BET, Discovery, Nickelodeon, The Weather Channel, and the Disney Channel.
- Digital service tiers that include up to 250 digital cable networks, broadcast multicast programming, digital music channels, and access to an interactive programming guide, thousands of hours of VOD content, and advanced parental controls. In 2008

³⁰⁷ See S. Schechner & V. Kumar, *Retirement Living TV Gets Boost*, Wall St. J., Jan. 16, 2009, at B9.

³⁰⁸ See Mike Reynolds, *MavTV Inks Comcast Affiliation Pact*, Multichannel News, Feb. 17, 2009, available at http://www.multichannel.com/article/174307-MavTV_Inks_Comcast_Affiliation_Pact.php.

³⁰⁹ See Travis Tackett, *BlueHighwaysTV Announces Affiliation Agreement with Comcast*, BluegrassJournal.com, June 3, 2008, available at <http://www.bluegrassjournal.com/2008/06/03/bluehighways-tv-announces-affiliation-agreement-with-comcast/>.

³¹⁰ See Phillip Swann, *Comcast To Add RFD HD with Don Imus*, TVPredictions.com, Jan. 30, 2008, available at <http://www.tvpredictions.com/comcast013008.htm>.

³¹¹ See FCC, Media Bureau, *Report on the Packaging and Sale of Video Programming Services to the Public* 65 & n.319 (Nov. 18, 2004), available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-254432A1.pdf.

alone, Comcast experienced a 10% growth rate in digital video subscribers.³¹² By March 31, 2009, 17.3 million of Comcast's 24.1 million video subscribers were receiving digital video service.³¹³

- Themed tier options that cater to the programming interests of particular consumers or that contain programming with unique cost structures (e.g., high-cost programming with limited appeal). Examples of such tier options include the Sports Entertainment Package, which gives consumers access to specialized sports channels like the Fox Soccer Channel, Tennis Channel, CBS College Sports Network, and Fox College Sports.³¹⁴
- On average, 15-20 multicultural cable networks (selections vary widely by system), including Spanish-language networks like Discovery en Español, CNN en Español, and Toon Disney en Español. As of October 2008, Comcast had programming deals with 80 Hispanic networks.³¹⁵ Comcast offers a CableLatino programming package, which consists of about 25 Spanish-language linear channels, music channels, and Spanish VOD content.³¹⁶ David Jensen, Comcast's vice president of content acquisition, is "determined to increase cable's share of the so-called ethnic market, especially the fast-growing Hispanic one."³¹⁷ In a recent interview, Jensen noted that Comcast's goal is to deliver "90 channels of ethnic television to all of our systems nationwide: 60 in Spanish and 30 non-Spanish."³¹⁸
- A variety of premium cable channels, including HBO, Showtime, Starz, The Movie Channel, and Cinemax.³¹⁹ Comcast subscribers are also able to access VOD content from the premium channels they purchase.

³¹² See Press Release, Comcast Corp., *Comcast Reports Fourth Quarter and Year End Results* (Feb. 18, 2009), available at http://media.corporate-ir.net/media_files/irol/11/118591/Earnings_4Q08/4Q08PR.pdf.

³¹³ See Press Release, *supra* note 295.

³¹⁴ See Comcast Corp., *Sports Entertainment Package, Channel Lineup*, at <http://www.comcast.com/Corporate/Programming/sports/SEPackage.html> (last visited May 19, 2009).

³¹⁵ See George Winslow, *More Choices for Hispanic Viewers*, *Broad. & Cable*, Oct. 19, 2008, available at http://www.broadcastingcable.com/article/115953-More_Choice_for_Hispanic_Viewers.php?.

³¹⁶ See *Operators en Español*, *Broad. & Cable*, Oct. 20, 2008, available at http://www.broadcastingcable.com/article/115952-Operators_en_Espanol.php.

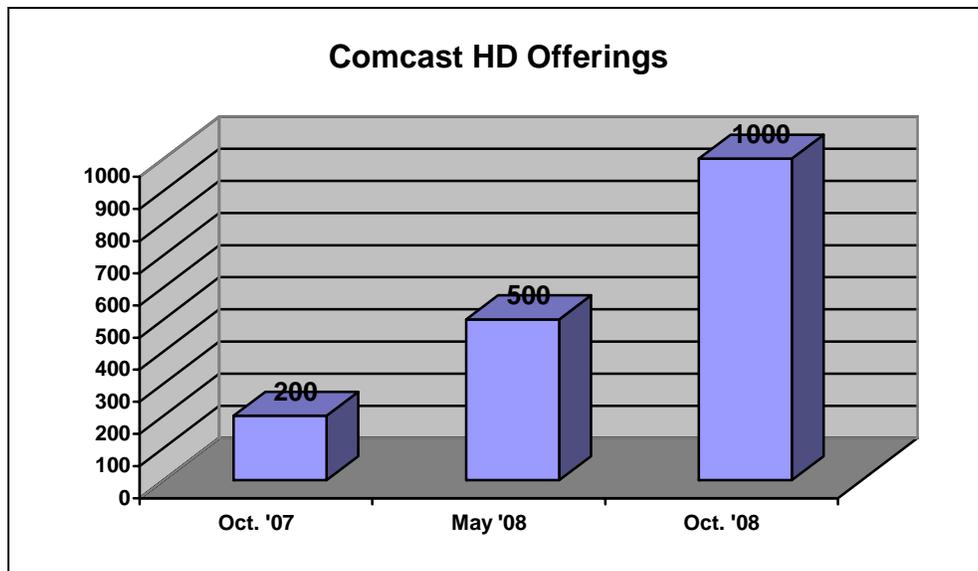
³¹⁷ Laura Martinez, *Q&A with Comcast's David Jensen, Winning More Hispanic Subs Is This Exec's Mission*, *Multichannel News*, May 13, 2009 (reporting that "Comcast has aggressively beefed up its Spanish-language programming tier CableLatino, adding new channels, offering a limited triple-play package for less than \$80 a month and a growing library of VOD hours targeted to Hispanic audiences"), available at http://www.multichannel.com/article/232436-Q_A_With_Comcast_s_David_Jensen.php.

³¹⁸ *Id.* (noting that Comcast aims to have the 90 channels "in front of a third of our customers in 2009, and all of them by 2010").

³¹⁹ See Comcast Corp., *What Premium Channels Does Comcast Offer?*, at <http://www.comcast.com/customers/faq/FaqDetails.ashx?ID=3386> (last visited May 19, 2009).

HD. Over the past three years, consumers' desire for HD programming has escalated, as more and more households purchase HD television sets and increasingly more HD content is available. Comcast has responded to this demand by steadily increasing the number of HD channels and amount of HD VOD content it carries.

In October 2007, Comcast provided approximately 200 different HD viewing choices. As of May 2008, Comcast offered more than 500 HD choices at any given time, including premium content, such as HD VOD movie and TV series programming from Showtime, Encore, MoviePlex, and Starz.³²⁰ Just five months later, in October 2008, Comcast was providing more than 1,000 HD viewing choices -- the most in the industry and five times more than just one year earlier -- including the highest-quality content that consumers really want.³²¹



³²⁰ See Press Release, Comcast Corp., *Comcast Hits 500 HD Choices Providing Consumers with the Most HD Content Available Anywhere, Anytime* (May 19, 2008), available at <http://www.comcast.com/About/PressRelease/PressReleaseDetail.ashx?PRID=758>.

³²¹ See Press Release, Comcast Corp., *Comcast Announces More Than 1,000 HD Choices Available – The Most HD Content Anytime, Anywhere* (Oct. 15, 2008), available at <http://www.comcast.com/About/PressRelease/PressReleaseDetail.ashx?PRID=811>.

In response to the HD “arms race” among MVPDs, Comcast is rapidly expanding its HD channel lineup. In addition to offering the broadcast networks in HD, and all the HD VOD choices discussed above, and below, on a typical cable system, Comcast provides approximately 40 linear channels in HD, including ESPN, ESPN2, The Discovery Channel, MTV, the Food Network, The History Channel, and premium networks (including HBO, Starz, Showtime, and Cinemax). In some markets, Comcast offers far more linear HD channels, including in areas of the Boston and Chicago markets, where it offers more than 70 linear HD channels.³²² Comcast continues to add more HD channels in particular markets, for example, it recently announced plans to add 27 linear HD channels to its Houston cable system.³²³ As additional bandwidth is freed up through analog-to-digital conversions of expanded basic channels, Comcast expects to add dozens more linear HD channels.

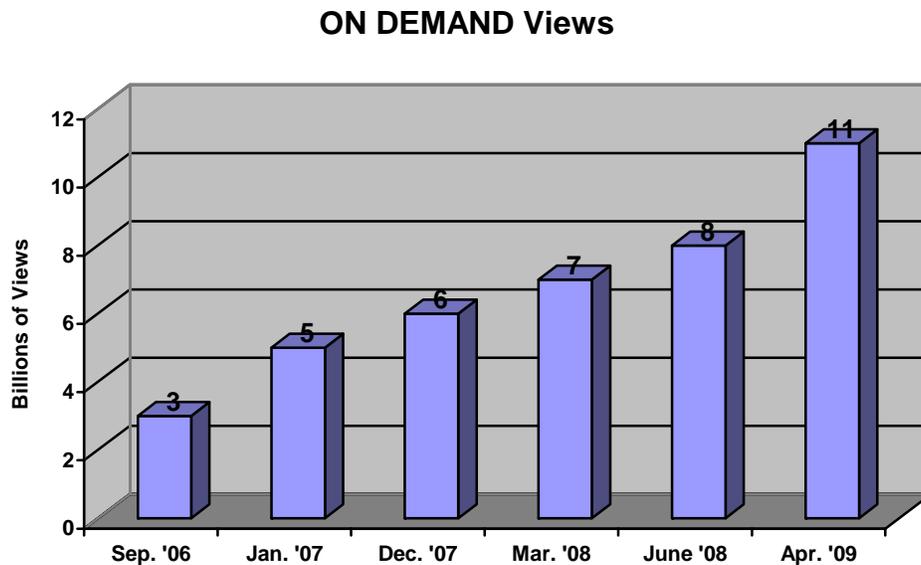
VOD. Comcast’s ON DEMAND service, which currently features over 10,000 choices available each month, has been overwhelmingly popular, as viewers opt for the convenience and value of having instantaneous access to full length movies, hit TV shows, music videos, and specialty programming.³²⁴ Since its introduction in 2003, Comcast subscribers have watched more than 11 billion ON DEMAND programs, and consumers are now accessing an ON

³²² See Swanni, *Comcast: 80 HD Channels In Chicago*, TVPredictions.com, Dec. 21, 2008 (noting that Comcast offers 80 HD channels in areas of the Chicago market, and 70 HD channels in areas of the Boston market), available at <http://www.tvpredictions.com/comcast122108.htm>.

³²³ See David Barron, *Comcast Adds HD Channels*, Hous. Chronicle, Apr. 18, 2009, available at http://www.chron.com/CDA/archives/archive.mpl?id=2009_4727182.

³²⁴ See Press Release, Comcast Corp., *April Showers Bring More On Demand Program Hours* (Apr. 3, 2009), available at <http://www.comcast.com/About/PressRelease/PressReleaseDetail.ashx?PRID=857>.

DEMAND program 120 times each second.³²⁵ By April 1, 2009, Comcast customers were viewing more than 149 million hours of VOD content every month.³²⁶



The striking increase in ON DEMAND usage is undoubtedly linked to the high quality of content that Comcast conveniently makes available to its subscribers.

- In 2006, Comcast offered more than 100 hours of HD VOD programs, including feature films available through Starz HD and Encore HD.³²⁷

³²⁵ See Press Release, Comcast Corp., *Comcast ON DEMAND Tops 3 Billion Views* (Sept. 6, 2009), available at <http://www.comcast.com/About/PressRelease/PressReleaseDetail.ashx?PRID=46>; see also Press Release, Comcast Corp., *Consumers Demand Comcast's Signature Video-On-Demand Service — And Have Demanded It More Than Six Billion Times* (Dec. 5, 2007), available at <http://www.comcast.com/About/PressRelease/PressReleaseDetail.ashx?PRID=709>; Press Release, Comcast Corp., *Comcast Hits 7 Billion Views On Demand* (Mar. 19, 2008), available at <http://www.comcast.com/About/PressRelease/PressReleaseDetail.ashx?PRID=737>; Press Release, Comcast Corp., *Comcast's HD VOD Library Heats Up This Month with TV Favorites and Summer Sci-Fi Sizzlers* (June 9, 2008), available at <http://www.comcast.com/About/PressRelease/PressReleaseDetail.ashx?PRID=764>; Press Release, Comcast Corp., *Comcast Launches PBS HD ON DEMAND* (Apr. 1, 2009), available at <http://www.comcast.com/About/PressRelease/PressReleaseDetail.ashx?PRID=853>.

³²⁶ See *Comcast Launches PBS HD ON DEMAND*, *supra* note 325.

³²⁷ See Press Release, Comcast Corp., *Comcast Launches Unprecedented HD Programming Initiative To Offer 100 Hours of High-Definition Video-On-Demand Programming* (Sept. 13, 2006), available at <http://www.comcast.com/About/PressRelease/PressReleaseDetail.ashx?PRID=42>.

- Comcast partnered with Lifetime Television to offer Lifetime’s first-ever VOD programming, making full-length programs and special features available to Comcast customers.³²⁸
- Since 2006, Comcast and CBS teamed up to make eight leading CBS primetime series available to viewers at no additional cost through ON DEMAND.³²⁹
- In February 2008, Comcast announced the addition of ON DEMAND blockbuster movies available the same day they are released on DVD, popular TV series premiering ON DEMAND at least one week before they air on linear channels.³³⁰
- Comcast partnered with Warner Bros. Pictures to bring Comcast customers exclusive VOD content associated with the blockbuster hit *The Dark Knight*, including behind-the-scenes footage, exclusive original content mini-movies, and trailers.³³¹
- Comcast and MGM Studios launched Impact, the first VOD channel dedicated exclusively to action programming, making available to customers popular action films and television shows, many of them in HD.³³²
- Comcast, in partnership with other cable operators, anticipates launching a politics VOD channel (“My Government ON DEMAND”) in the 3rd quarter of 2009, giving viewers access to national and local political information and programming.³³³
- In March 2009, Comcast partnered with the rock band U2 to offer Comcast customers a free, HD ON DEMAND look at the band’s new video, more than a week before it was publicly available, as well as 50 additional U2 music videos.³³⁴

³²⁸ See Press Release, Comcast Corp., *Lifetime Television Launches Its First-Ever VOD Service Featuring Full length Episodes of the Network’s Popular Programming Along with Special Featurettes* (Aug. 21, 2006), available at <http://www.comcast.com/About/PressRelease/PressReleaseDetail.ashx?PRID=49>.

³²⁹ See Press Release, Comcast Corp., *Comcast and CBS Introduce Free ON DEMAND Episodes of Primetime CBS Shows for Comcast Digital Cable Customers* (Sept. 14, 2006), available at <http://www.comcast.com/About/PressRelease/PressReleaseDetail.ashx?PRID=41>.

³³⁰ See Press Release, Comcast Corp., *Movie Debuts, Television Series Premieres, Action Trilogies and Oscar-Winning Films Pack Comcast’s On Demand Service* (Feb. 4, 2008), available at <http://www.comcast.com/About/PressRelease/PressReleaseDetail.ashx?PRID=730>.

³³¹ See Press Release, Comcast Corp., *Comcast Partners with Warner Bros. Pictures’ The Dark Knight to Bring Exclusive Content to Batman Fans* (July 14, 2008), available at <http://www.comcast.com/About/PressRelease/PressReleaseDetail.ashx?PRID=776>.

³³² See Press Release, Comcast Corp., *Comcast and MGM Announce Partnership To Launch Impact...The First All-Action Video-On-Demand Network* (Aug. 13, 2008), available at <http://www.comcast.com/About/PressRelease/PressReleaseDetail.ashx?PRID=791>.

³³³ See Claire Atkinson, *Cable’s New VOD Politics Channel*, *Broad. & Cable*, Dec. 7, 2008, available at http://www.broadcastingcable.com/article/160391-Cable_s_New_VOD_Politics_Channel.php.

³³⁴ See Press Release, Comcast Corp., *Comcast Partners with Rock Band U2 To Offer An Exclusive and Unprecedented HD Collection of Music Performances On Demand* (Feb. 24, 2009), available at <http://www.comcast.com/About/PressRelease/PressReleaseDetail.ashx?PRID=839>.

- In March 2009, Comcast debuted *Twilight* ON DEMAND, both in SD and HD, on the same day as the DVD release.³³⁵
- In April 2009, Comcast announced that for the first time ever PBS' HD programming would be available ON DEMAND to Comcast subscribers.³³⁶
- In May 2009, Comcast announced that it partnered with Green Day to provide exclusive advance access ON DEMAND to live performances from Green Day's new album.³³⁷

Comcast is constantly updating its ON DEMAND content, giving subscribers instant access to movies, primetime TV shows, music videos, and specialty content. Hit movies, music videos, and children's programming are Comcast's most popular ON DEMAND selections.³³⁸

In 2009, Comcast plans to offer more than 6,000 movie titles ON DEMAND, with more than half of those movies available in HD.³³⁹

Comcast continues to use ON DEMAND to bring important local news and other local content to viewers. For example, in many Comcast markets, Comcast's local ON DEMAND offerings include a variety of local newscasts, messages from overseas troops, high school sports, community events, and profiles on pets available for adoption.³⁴⁰ In several communities,

³³⁵ See Press Release, Comcast Corp., *Comcast Debuts Twilight On Demand In HD at 12:01 A.M. on March 21 – The Same Night of the DVD Release* (Mar. 16, 2009), available at <http://www.comcast.com/About/PressRelease/PressReleaseDetail.ashx?PRID=850>.

³³⁶ See *Comcast Launches PBS HD On Demand*, *supra* note 325.

³³⁷ See Press Release, Comcast Corp., *Comcast Partners with Green Day To Provide Exclusive First Look at Live Performances from New Album* (May 6, 2009) (noting that more the Green Day videos, concerts, and behind-the-scenes footage are available together for the first time in HD), available at <http://www.comcast.com/About/PressRelease/PressReleaseDetail.ashx?PRID=862>.

³³⁸ See George Winslow, *Younger Viewers, New Media*, Multichannel News, Jan. 4, 2009, available at http://www.multichannel.com/article/161511-Younger_Viewers_New_Media.php.

³³⁹ Glen Dickson, *CES 2008: Comcast Embarks on Project Infinity*, Broad. & Cable, Jan. 8, 2008, available at http://www.broadcastingcable.com/article/97951-CES_2008_Comcast_Embarks_on_Project_Infinity.php.

³⁴⁰ See, e.g., Christian Toto, *Is On Demand in Demand?*, Wash. Times, Feb. 2, 2006 ("For local news junkies, the service lets people catch . . . rebroadcasts of several local news affiliates."); *Comcast Marches In Troop Greetings On Demand*, Multichannel News, Dec. 22, 2008 (noting that, in many areas, Comcast provides "Troop Greetings On Demand" each holiday season, allowing family and friends of overseas military personnel to view special holiday greetings from their loved ones), available at http://www.multichannel.com/article/161212-Comcast_Marches_In_Troop_Greetings_On_Demand.php; Whitney Blake, *Comcast To Grow Service of Local On* (footnote continued...)

Comcast partners with local police to produce crime programs, such as *Fugitive Files ON DEMAND* and *Police Blotter ON DEMAND*, which have led to successful arrests of criminals.³⁴¹ Comcast also offers similar programming airing profiles of missing children ON DEMAND, urging viewers to call police if they have seen a featured missing child.³⁴² Other ON DEMAND programming includes coverage of political candidates,³⁴³ language lessons,³⁴⁴ and public health announcements.³⁴⁵

(...footnote continued)

Demand, Wash. Examiner, July 18, 2007 (“Community events . . . are the main attraction of On Demand. Local sporting events, such as Montgomery County high school football games, are covered, as are major events such as the National Cherry Blossom Festival.”); James A. McCray III, *MPSSAA Signs On to Air State Finals on TV*, S. Md. Newspapers, Dec. 7, 2007 (noting that Comcast offered high school football games ON DEMAND), available at http://www.somdnews.com/stories/120707/rectop171211_32084.shtml; Press Release, Comcast Corp., *Comcast Cable Eastern Division and the Pentagon Channel Deliver 2009 Service Academy Graduations ON DEMAND* (May 19, 2009) (reporting that Comcast and the Pentagon Channel partnered to bring coverage of this year’s U.S. Service Academy graduations featuring noted commencement speakers such as President Obama, Vice President Biden, and Secretary of Defense Gates to Comcast ON DEMAND subscribers throughout Delaware, Maryland, New Jersey, Ohio, Pennsylvania, Virginia, Washington, D.C. and West Virginia), available at <http://sev.prnewswire.com/television/20090519/PH1902719052009-1.html>; *Love at First Sight*, Frederick News-Post, Apr. 6, 2009 (reporting that, in more than 25 markets across the country, Comcast works with local shelters and Humane Societies to offer pet adoptions ON DEMAND), available at http://www.fredericknewspost.com/sections/archives/display_detail.htm?StoryID=95333

³⁴¹ See Moriah Balingit, *Cable TV Show Helping Sheriff Smoke Out Fugitives; Comcast Crime Series a Big Hit with Viewers*, Pitt. Post-Gazette, May 1, 2008, at B1 (noting that tips from viewers of *Fugitive Files ON DEMAND* “have helped the sheriff’s office nab four fugitives featured on the program”), available at <http://www.post-gazette.com/pg/08122/878161-85.stm>; see also Press Release, Comcast Corp., *Sacramento Police Department To Harness Power of ON DEMAND from Comcast To Track Criminals, Find Missing Persons, Make Communities Safer* (Mar. 5, 2009), available at <http://www.reuters.com/article/pressRelease/idUS245841+05-Mar-2009+PRN20090305>.

³⁴² Ari Natter, *Comcast Debuts ‘Missing in Maryland’ Show*, Carroll County Times, Apr. 7, 2007, available at http://www.carrollcountytimes.com/articles/2007/04/07/news/local_news/newsstory4.txt.

³⁴³ See C. Benjamin Ford, *Cable Offers Voters Candidates On Demand*, S. Md. Newspapers, Oct. 27, 2006, available at http://www.somdnews.com/stories/102706/indymor200532_32106.shtml.

³⁴⁴ See *Lessons in Basic English Offered to Hispanics*, El Comercio, Oct. 26, 2007.

³⁴⁵ See, e.g., Ass’n of Cable Communicators, *Comcast, A&E to Host Virginia Town Hall Forum to Address Prescription and Over-the-Counter Drug Abuse*, CPR Facts, Feb. 8, 2008, available at http://www.cablecommunicators.org/cpr/cpr_facts_2008_02_08.html#comcast; Ass’n of Cable Communicators, *Comcast and the American Heart Association Team Up to Raise Stroke Awareness*, CPR Facts, May 16, 2008, available at http://www.cablecommunicators.org/cpr/cpr_facts_2008_05_16.html#comcast; *Comcast to Launch ‘Breast Cancer Hope Initiative’*, Multichannel News, Sept. 23, 2007, available at http://www.multichannel.com/article/89898-Comcast_to_Launch_Breast_Cancer_Hope_Initiative_.php.

DVRs. Comcast offers state-of-the-art DVR options, including both standard-definition and HD DVR service. Comcast's standard DVR allows subscribers to store up to 45 hours of standard-definition programming.³⁴⁶ Meanwhile, Comcast's HD-DVR allows storage of up to 90 hours of standard-definition programming or 20 hours of HD programming.³⁴⁷ Comcast was the first provider to offer consumers the ease and convenience of using a single digital cable set-top box to enjoy popular TiVo DVR features along with Comcast's VOD and HD choices.³⁴⁸ In 2009, Comcast and Panasonic plan to offer the AnyPlay Portable DVR, the industry's first Portable DVR/DVD player, powered by tru2way technology, that will allow Comcast subscribers to record programming at home and view it on portable devices.³⁴⁹

Interactive Television. Comcast is an industry leader in the development of interactive television ("ITV"). In May 2008, Comcast Media Center ("CMC") announced the creation of HITS Advanced Interactive Services ("HITS AxIS"), a centralized hosting platform for developing ITV applications.³⁵⁰ In October 2008, CMC partnered with itaas, a firm that sells ITV software tools and services, to provide development and testing support for HITS AxIS.³⁵¹ On April 1, 2009, Comcast and itaas announced further plans to develop and deploy a standard ITV platform that will give consumers new and different ways to interact with television

³⁴⁶ See Comcast Corp., *Comcast Digital Video Recorder (DVR) Service*, at <http://www.comcast.com/Corporate/Learn/DigitalCable/DVR.html> (last visited May 19, 2009).

³⁴⁷ See *id.*

³⁴⁸ See Press Release, Comcast Corp., *Comcast and TiVo Demonstrate Integrated DVR Services at CES* (Jan. 8, 2007), available at <http://www.comcast.com/About/PressRelease/PressReleaseDetail.aspx?PRID=17>.

³⁴⁹ See Press Release, Comcast Corp., *Panasonic and Comcast Debut AnyPlay™ Portable DVR* (Jan. 7, 2008), available at <http://www.comcast.com/About/PressRelease/PressReleaseDetail.aspx?PRID=720>.

³⁵⁰ Todd Spangler, *Comcast Media Center Launches ITV Services*, Multichannel News, May 14, 2008, available at http://www.multichannel.com/article/133238-Comcast_Media_Center_Launches_ITV_Services.php.

³⁵¹ Todd Spangler, *Comcast Media Center Inks Deal with ITV Services Firm*, Multichannel News, Oct. 19, 2008, available at http://www.multichannel.com/article/135168-Comcast_Media_Center_Inks_Deal_With_ITV_Services_Firm.php.

programs.³⁵² Comcast has also recently announced a partnership with enableTV, a leading provider of interactive TV solutions and services, to support the development and delivery of ITV.³⁵³ In addition, Comcast is working with Intel Corporation to bring IP-based applications to the TV experience using the Widget Channel framework, a new open software development framework that provides the ability to combine Internet-based applications with a TV experience through a widget-based user interface that is easily accessed while watching TV programs.³⁵⁴ Comcast has also partnered with Adobe to develop a Flash player that will eventually be incorporated into set-top boxes.³⁵⁵

In addition to these ITV efforts, by the start of 2009, Comcast had deployed more than 10 million Motorola set-top boxes outfitted with Enhanced Binary Interchange Format (“EBIF”) technology, and approximately 20 million boxes will be EBIF-equipped by mid-2009.³⁵⁶ In one useful innovation based on EBIF technology, Comcast offers its Comcast Digital Voice customers the ability to receive Caller ID information via their TV.³⁵⁷

³⁵² See Todd Spangler, *Cable Show 2009: Itas Licenses Comcast's TVWorks Platform*, Multichannel News, Mar. 31, 2009, available at http://www.multichannel.com/article/191053-Cable_Show_2009_Itas_Licenses_Comcast_s_TVWorks_Platform.php.

³⁵³ Todd Spangler, *Comcast Media Center Signs EnableTV for ITV Services*, Multichannel News, Mar. 9, 2009, available at http://www.multichannel.com/article/189670-Comcast_Media_Center_Signs_EnableTV_For_ITV_Services.php

³⁵⁴ See Press Release, Comcast Corp., *Comcast To Work with Intel To Bring Interactive Applications to the TV* (Aug. 20, 2008), available at <http://www.comcast.com/About/PressRelease/PressReleaseDetail.ashx?PRID=793>.

³⁵⁵ See Jeff Baumgartner, *Comcast Offers Glimpse of Flash Strategy*, Cable Digital News, Apr. 21, 2009 (noting that initially the Flash player can be used to power interactive features such as email readers and weather widgets through the interactive program guide), available at http://www.lightreading.com/document.asp?doc_id=175545&site=cdn&.

³⁵⁶ See Todd Spangler, *Interactive TV Begins To Bloom*, Multichannel News, Mar. 2, 2009, available at http://www.multichannel.com/article/189294-Interactive_TV_Begins_To_Bloom.php. EBIF technology improves the viewing experience and enables consumers to interact with applications and features, for example by participating in live polling or requesting additional information about a particular product. See *id.*

³⁵⁷ See Spangler, *supra* note 352.

B. Comcast Continues To Deliver High-Quality Broadband Internet and Voice Services to a Growing Number of Subscribers.

Facing intense and growing competition, Comcast has continued to develop and deploy advanced broadband services to consumers. Most consumers choose to purchase these services as part of a discounted bundle of services that include multichannel video, Comcast High-Speed Internet (“HSI”) service, and Comcast Digital Voice (“CDV”) service.

HSI Service. As of March 31, 2009, Comcast offers its HSI service to more than 99% of the homes its cable systems pass, and it provided high-speed Internet access service to over 15 million of those homes -- an increase of 8% from one year earlier.³⁵⁸ To meet consumer demand, Comcast continues to actively upgrade its existing network and deploy new technology to ensure that Comcast high-speed Internet subscribers enjoy fast and reliable downloads and uploads. In an ever-growing number of markets, Comcast has deployed Internet broadband service based on DOCSIS 3.0, or wideband technology, providing customers purchasing the top tier of service with download speeds reaching up to 50 Megabits per second.³⁵⁹ Even those customers purchasing Comcast’s most popular tier of service, the Performance Tier, will see their speeds double from 6 Mbps downstream/1Mbps upstream to 12 Mbps downstream/2 Mbps upstream at no additional charge.³⁶⁰ In addition to the initial Twin Cities launch, Comcast now offers 50 Mbps download speeds to customers in parts of New England; Philadelphia; New Jersey; Seattle; Portland, Oregon; Baltimore; the Chicago area; Atlanta; Fort Wayne, Indiana;

³⁵⁸ See Press Release, *supra* note 295.

³⁵⁹ See Press Release, Comcast Corp., *Comcast Unleashes New 50/5 Mbps Extreme High-Speed Internet Service Using DOCSIS 3.0 Technology in the Twin Cities* (Apr. 3, 2008), available at <http://www.comcast.com/About/PressRelease/PressReleaseDetail.ashx?PRID=741>.

³⁶⁰ See Press Release, Comcast Corp., *Comcast Puts the Pedal to the Metal: Announces New 65% Benchmark To Roll Out Wideband High-Speed Internet Services in 2009* (Feb. 19, 2009), available at <http://www.comcast.com/About/PressRelease/PressReleaseDetail.ashx?PRID=838>.

and the Bay Area.³⁶¹ Comcast expects its DOCSIS 3.0 ultra-high-speed services to pass about 10 million homes and businesses in the next several months.³⁶² By the end of 2009, Comcast expects to bring DOCSIS 3.0 to more than 65% of its footprint.³⁶³

While DOCSIS 3.0 promises ultra-high-speed service as it is rolled out across the country, Comcast continues to enhance existing Internet services in all areas. For example, in June 2008, Comcast increased upstream broadband speeds for its residential high-speed Internet customers at no additional cost, offering customers upstream speeds of up to 2 Mbps.³⁶⁴

Comcast also has partnered with Intel, Google, Time Warner Cable, and Bright House Networks to invest in Clearwire, a new mobile broadband company formed by Clearwire Corporation and Sprint Nextel, focused on expediting the deployment of the first nationwide mobile WiMAX network.³⁶⁵ When completed, this network will offer mobile downloads at speeds up to 6 Mbps.³⁶⁶ Later this year, Comcast will begin offering WiMAX service in

³⁶¹ See *id.*; Press Release, Comcast Corp., *Comcast To Roll Out Extreme 50 Mbps High-Speed Internet Service in Bay Area* (Mar. 3, 2009), available at <http://www.comcast.com/About/PressRelease/PressReleaseDetail.ashx?PRID=841>.

³⁶² See Press Release, Comcast Corp., *Comcast Begins Rollout of Extreme 50 Mbps High-Speed Internet Service* (Oct. 22, 2008), available at <http://www.comcast.com/About/PressRelease/PressReleaseDetail.ashx?PRID=814>.

³⁶³ Todd Spangler, *Comcast To Expand Wideband, 'All-Digital' Rollouts*, *Broad. & Cable*, Feb. 18, 2009, available at http://www.broadcastingcable.com/article/174426-Comcast_To_Expand_Wideband_All_Digital_Rollouts.php.

³⁶⁴ See Press Release, Comcast Corp., *Comcast Increases Upstream Speeds for Its High-Speed Internet Customers for No Additional Charge* (June 12, 2008), available at <http://www.comcast.com/About/PressRelease/PressReleaseDetail.ashx?PRID=765>.

³⁶⁵ See Press Release, Comcast Corp., *Sprint and Clearwire To Combine WiMAX Businesses, Creating a New Mobile Broadband Company* (May 7, 2008), available at <http://www.comcast.com/About/PressRelease/PressReleaseDetail.ashx?PRID=789>. Comcast is committed to offering customers a variety of broadband options, allowing consumers to stay connected to the Internet wherever they go. To this end, Comcast invested over \$1 billion in Clearwire. See *Comcast Moves into Retail Market*, SkyREPORT.com, Mar. 17, 2009, available at http://skychat.mediabiz.com/news/articles/?edit_id=11289.

³⁶⁶ See *In re Sprint Nextel Corp. & Clearwire Corp. Application for Consent To Transfer Control of Licenses, Leases, and Authorizations*, Memorandum Opinion & Order, 23 FCC Rcd. 17570 ¶ 27 (2008).

Portland, Oregon under its own brand name.³⁶⁷ Comcast is also testing a free Wi-Fi service for its broadband customers, giving subscribers access to mobile Internet service from laptops and portable devices when they are away from their Comcast cable modem service.³⁶⁸

Comcast Digital Voice. Through the popularity of its triple-play service offering, Comcast has added millions of new CDV customers over the past few years. By October 2006, less than two years from introduction of the service, Comcast had added more than one million CDV customers.³⁶⁹ Just six months later, in March 2007, Comcast reached the two million CDV customer mark.³⁷⁰ In October 2008, Comcast served 5.7 million CDV subscribers.³⁷¹ As of March 2009, Comcast was the nation's third largest residential phone provider, serving approximately 6.8 million customers.³⁷² Comcast CDV growth as of mid-2007, mid-2008, and the first quarter of 2009 is reflected in the chart below.

³⁶⁷ See *id.*; see also Todd Spangler, *Clearwire Tests WiMAX-Based Mobile Phones*, Multichannel News, Mar. 20, 2009, available at http://www.multichannel.com/article/190370-Clearwire_Tests_WiMax_Based_Mobile_Phones.php.

³⁶⁸ See Todd Spangler, *Comcast Tags Along with Cablevision in Free Wi-Fi Test*, Multichannel News, Jan. 31, 2009, available at http://www.multichannel.com/article/173432-Comcast_Tags_Alone_With_Cablevision_In_Free_Wi-Fi_Test.php.

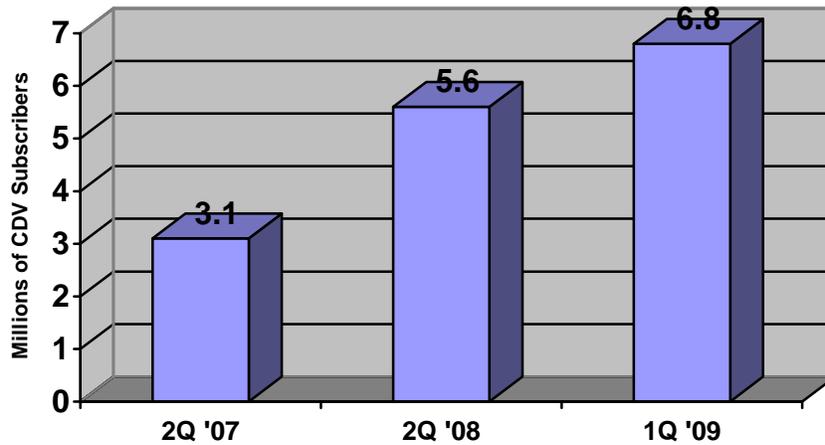
³⁶⁹ See Press Release, Comcast Corp., *Comcast Reaches One Million Comcast Digital Voice Customers* (Sept. 20, 2006), available at <http://www.comcast.com/About/PressRelease/PressReleaseDetail.ashx?PRID=39>.

³⁷⁰ See Press Release, Comcast Corp., *Comcast Reaches 2 Millionth Digital Voice(R) Customer Milestone in Michigan* (Mar. 1, 2007), available at <http://www.comcast.com/About/PressRelease/PressReleaseDetail.ashx?PRID=639>.

³⁷¹ See *Operators en Español*, Broad. & Cable, Oct. 20, 2008, available at http://www.broadcastingcable.com/article/115952-Operators_en_Espanol.php.

³⁷² See Press Release, Comcast Corp., *Comcast Now the Third Largest Residential Phone Services Provider in the U.S.* (Mar. 11, 2009), available at <http://www.comcast.com/About/PressRelease/PressReleaseDetail.ashx?PRID=844>; see also Comcast Corp., *supra* note 295.

Comcast Digital Voice Subscribers



This remarkable subscriber growth is a reflection of the quality and value of the CDV service, and Comcast continues to enhance its voice service to ensure that subscribers have access to the industry’s premiere voice service. On July 1, 2008, Comcast launched four international calling plans for CDV customers, offering users flat rates for calls made to more than 30 countries around the world.³⁷³

Online Content. Comcast has developed one of the Internet’s most heavily trafficked websites, Comcast.net, which offers visitors access to high-quality content and information.³⁷⁴ According to CEO Brian Roberts, “Being the place people go to for [video] content is what we have always done, and it makes sense to provide content online as well.”³⁷⁵

In January 2008, Comcast Interactive Media launched Fancast.com, the first online destination that enables users to watch, manage, and find entertainment content wherever it is

³⁷³ See Press Release, Comcast Corp., *Comcast Brings the World to Your Fingertips by Offering New International Calling Plans* (July 1, 2008), available at <http://www.comcast.com/About/PressRelease/PressReleaseDetail.aspx?PRID=769>.

³⁷⁴ See Peter Grant, *Cable Giant Comcast Tries To Channel Web TV*, Wall St. J., Apr. 26, 2007, at B1.

³⁷⁵ *Id.*

available -- on Fancast, on television, online, on DVD, or even in theaters -- including access to more than 3,000 hours of streaming free, full-length content from networks, movie trailers, short videos, and interviews.³⁷⁶ By March 2008, Fancast.com featured video content from more than 100 content providers, solidifying its position as a one-stop online personal entertainment guide that provides the widest selection of content and allows fans to manage their own entertainment experience.³⁷⁷

Over the past year, Comcast's Fancast service continued to expand its content offerings, adding more than 50 hours of full-length programming from MTV, BET, Comedy Central, and offering advance looks at the series premier of VH1's *Brooke Hogan Knows Best* and Nickelodeon's new TV movie *Polar Bears*.³⁷⁸ Fancast also streamed exclusively the third-season premiere of *Lincoln Heights*, a critically acclaimed ABC Family drama series, and debuted exclusively the 2009 season premiere of ABC Family's *Kyle XY*.³⁷⁹ More than 90,000 videos are available to Fancast users.³⁸⁰ Indeed, Fancast.com "dramatically increased its video offerings in 2008" and boosted unique users by over 200% and the number of video views by

³⁷⁶ See Press Release, Comcast Corp., *Comcast Interactive Media Launches Fancast.com* (Jan. 8, 2008), available at <http://www.comcast.com/About/PressRelease/PressReleaseDetail.ashx?PRID=722>.

³⁷⁷ See Press Release, Comcast Corp., *Fancast Tops 100 Video Content Providers Offering Content from Top Networks* (Mar. 10, 2008), available at <http://www.comcast.com/About/PressRelease/PressReleaseDetail.ashx?PRID=733>.

³⁷⁸ See Press Release, Comcast Corp., *Fancast.com To Stream Additional Programming from MTV Networks and BET Networks, Including Comedy Central's "South Park," "The Daily Show with Jon Stewart" & "The Colbert Report"* (May 19, 2008), available at <http://www.comcast.com/About/PressRelease/PressReleaseDetail.ashx?PRID=756>.

³⁷⁹ See Press Release, Comcast Corp., *Fancast To Air ABC Family's "Lincoln Heights" Season Premiere Exclusively Before Airing on TV* (Sept. 10, 2008), available at <http://www.comcast.com/About/PressRelease/PressReleaseDetail.ashx?PRID=797>; see also Linda Moss, *Updated: Fancast To Debut New Season of ABC Family's 'Kyle XY' Online*, Multichannel News, Dec. 29, 2008, available at <http://www.multichannel.com/article/161334-Updated-Fancast-To-Debut-New-Season-of-ABC-Family-s-Kyle-XY-Online.php>.

³⁸⁰ See Dickson, *supra* note 339.

550% between January and November 2008.³⁸¹ Fancast now draws nearly 3 million unique visitors each month.³⁸²

Beyond unparalleled content through Comcast.net and Fancast.com, Comcast also offers the SmartZone communications center, the industry's first fully integrated, Web-based communications center, which gives customers free access to email, online voicemail, instant messaging, and an online address book.³⁸³

³⁸¹ See George Winslow, *Web Strategies -- and Users -- Grow Up*, Multichannel News, Jan. 4, 2009, available at http://www.multichannel.com/article/161486-Web_Strategies_and_Users_Grow_Up.php.

³⁸² Daisy Whitney, *Fanning the Flame: Fancast Leverages Parent Comcast in Growth Campaign*, TV Week, Mar. 1, 2009, available at http://www.tvweek.com/news/2009/03/fanning_the_flame.php.

³⁸³ See Press Release, Comcast Corp., *Comcast Announces Plans To Launch Interactive SmartZone(TM) Communications Center* (May 7, 2007), available at <http://www.comcast.com/About/PressRelease/PressReleaseDetail.ashx?PRID=661>.

V. CONCLUSION

The marketplace for video programming is teeming with options for consumers, who demand video when and where they want it. As these comments demonstrate, MVPDs and other video programming platforms are responding to constantly evolving consumer demand and competitive pressure. As noted above,

Hollywood is now blessed with a plethora of ways to reach the audience, from traditional distribution channels like cable to online video streams and downloads. . . . The barriers that have long inhibited Internet-based TV are beginning to crumble. . . . Messy? Absolutely. The process will [] prove to be another example of long technological gestation followed by abrupt, even breathtaking, change. This is “creative destruction” at its best.³⁸⁴

The Commission’s report to Congress should reflect the proliferation of options for consumers, thus providing an initial step toward correcting the unnecessary regulatory actions directed at the cable industry in recent years.

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³⁸⁴ Morgenthaler & Utheza, *supra* note 19.