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	)	

REPLY COMMENTS OF
<u>THE NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION</u>

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The National Cable & Telecommunications Association ('NCTA") hereby submits its reply comments in the above-captioned proceeding.

INTRODUCTION

The initial comments in this proceeding confirm beyond dispute that the marketplace for the delivery of video programming is diverse, dynamic and fiercely competitive. Indeed, no party has or can credibly make the case that further government intervention is necessary to jumpstart or accelerate competitive new video offerings. Competition is evident at every turn: from the number of competitors, the number and variety of service and product offerings, the ever-changing host of new digital and IP video sources, the growth in high definition and diverse programming, and the drive to innovate and develop new business models to challenge existing services and attract customers.

Complacency has no place in today's highly competitive video marketplace. As NCTA and other parties demonstrated, the cable industry is meeting competition with an unprecedented array of video service offerings, as analog services are being gradually migrated to digital format (and more recently including switched video), freeing more bandwidth for high-definition, on demand, digital video recording and other new video services, and increasing capacity for broadband Internet and telephone services. Meanwhile, the convergence of digital video, voice and Internet service over cable and telephone facilities has led to the ubiquitous availability of bundled offerings – with discounts that result in bundled prices that are lower than what consumers paid for all three services a decade ago.

Yet at a time when multichannel video programming distributors (MVPDs) are competing head-to-head for every customer, and facing growing competition from Internet video services available on demand, not to mention digital broadcasters, home video sales and rentals and mobile video, it is remarkable that cable's major competitors continue to seek regulatory favors to boost their standing in the video marketplace at the expense of cable. But their arguments for more regulation do not have a leg to stand on. This is a time for *less* regulation, not more.

The record shows that cable providers have gone from 69 percent to 63 percent of multichannel video customers in the last three-and-a-half years. And today more than 1 out of 3 multichannel video customers receive service from an MVPD other than cable. DBS customers have grown by 15 percent over the last 3 years, and DirecTV saw remarkable growth in the first quarter of 2009. The Bell Companies are growing at a rapid rate. Verizon has more than doubled the number of customers to its FiOS TV service in the past 18 months. And AT&T's subscriber base for its U-Verse TV service increased more than five times over the last five quarters. Alternative broadband providers, such as RCN and WideOpenWest, are strong in certain markets. And Internet video is flourishing nationwide. Vertical integration between cable operators and programmers has dropped to just 9 percent. Video service providers and programming networks are investing tens of billions of dollars in diverse video content, and interactive and advanced technology.

As AT&T pointed out in its comments, the Commission has already established a highly favorable regulatory regime for new competitors to cable, ranging from assistance in their dealings with local franchise authorities and multi-dwelling unit building owners to increasing leverage with programmers. But, as in the past, AT&T, Verizon and DirecTV – ironically three of the largest and most successful of cable's competitors – use the annual video competition inquiry to put forth their wish list for new cable regulations, while the justification to differentiate cable from other MVPDs makes less and less sense.

The proposals for new cable regulations from these leading competitors and other parties are as unlawful as they are unwarranted by the facts. As NCTA has repeatedly shown, there is no statutory basis, as Verizon, AT&T and DirecTV claim, for the Commission to expand the coverage of program access regulation beyond vertically-integrated, satellite-delivered programming and, as a policy matter, such increased intrusion in the marketplace is unjustified.[1] The D.C. Circuit's recent decision upholding the Commission's MDU Order, which prohibits exclusive service contracts in MDUs, does not change the scope and breadth of the program access provision, Section 628 of the Communications Act. Nothing in the MDU Order or the court's decision overturned long-standing FCC and judicial precedent that terrestrially-delivered programming is not covered by the Act.

As discussed at length in other proceedings, the Commission similarly lacks statutory authority to expand must-carry rights for Class A and other LPTV stations or adopt draconian

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[1] *See e.g., In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, MB Docket No. 05-255, NCTA Reply Comments filed April 25, 2006; NCTA Reply Comments filed April 3, 2006; NCTA Comments filed Sept. 19, 2005; Reply Comments filed October 11, 2005; MB Docket No. 04-227, NCTA Comments filed July 23, 2004; NCTA Reply Comments filed August 25, 2004; *In the Matter of Implementation of Cable Television Consumer Protection & Competition Act of 1992, Development of Competition and Diversity in Video Programming Distribution: Section 628(c)(5) of the Communications Act: Sunset of Exclusive Contract Prohibition*, MB Docket No. 07-29, NCTA Reply Comments filed April 16, 2007, NCTA Comments filed April 2, 2007.

leased access rules. And there is no basis for adopting new rules to govern termination of service of video customers, where there are sound reasons for treating voice and video customers differently.

With regard to technical standards for the delivery of video programming and related services, such standards should encourage competition and innovation and that the Commission should not mandate any particular standard. As has been the case throughout the “plug and play” process, the cable industry continues to support an “all-MVPD” solution for the delivery of interactive video services via retail consumer electronics equipment. NCTA urges the Commission to apply its navigation device rules in a fair, even-handed manner to spur innovation.

In sum, NCTA again urges the Commission, as it evaluates the state of video competition in its Fourteenth Annual Report, to confirm more forcefully than ever that the goal of a highly competitive video marketplace has been achieved. The Commission should tell Congress that it will be guided by policies that promote the ability of all providers to fully utilize new technological advancements and resist placing new demands and constraints on bandwidth use that are at odds with what consumers want: faster broadband, more high-definition content, and the deployment of new innovative and interactive services. And in implementing and applying the provisions of the Act, it should itself be guided by these principles.

I. THE COMMISSION SHOULD REJECT PROPOSALS TO EXPAND PROGRAM ACCESS REGULATION THAT WILL ONLY BENEFIT CERTAIN MVPDS AT THE EXPENSE OF CABLE

As in past years, Verizon, AT&T and DirecTV seek more program access regulation by urging the Commission to adopt rules mandating access to so-called "must have" regional programming, particularly sports programming. They allege that their lack of access to such programming is somehow impeding their ability to compete as multichannel video distributors.[2] Verizon asserts, for example, that cable operators are exploiting perceived "loopholes" in the program access rules by routing high definition regional sports programming over fiber rather than via satellite in order to circumvent the rules. It alleges that without such programming, it is prevented from providing a "meaningful competitive alternative" to consumers.[3] AT&T similarly asserts that it lacks "critical video programming assets (such as regional sports)" and needs government action in order to become "a viable competitive alternative."[4] DirecTV, the second largest MVPD, also argues that the ability of all video providers to have access to non-satellite-delivered vertically-integrated programming is essential to compete in the video marketplace.[5]

Paradoxically, these major cable competitors continue to profess their dire need for government intervention to obtain regional programming when they are among the largest and fastest growing MVPDs in the marketplace today. But with each passing year, their assertions ring more and more hollow as the facts dispel any notion that the lack of particular programming

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2 NCTA has repeatedly addressed the program access issue in the annual video competition proceeding and most recently in the Commission's 2007 program access proceeding. *See e.g.*, NCTA Comments, Review of the Commission's Program Access Rules and Examination of Programming Tying Arrangements, MB Docket No. 07-198, January 4, 2008.

3 Verizon Comments at 4.

4 AT&T Comments at 4.

5 DirecTV Comments at 25.

is impeding their ability to grow and thrive in the video marketplace. As the record shows, in just over three years, Verizon has garnered 2.2 million FiOS TV customers (as of March 31, 2009). As the nation's seventh largest multichannel video provider, Verizon reported in April "continued strong growth" of its FiOS TV service.[6] AT&T has shown "impressive" gains too, reporting 1.045 million U-Verse subscribers by 4Q 2008, and showing continued gains in first quarter 2009.[7] DirecTV saw tremendous growth in subs even in a down economy, adding 460,000 net new subscribers in the first quarter of 2009. DirecTV and DISH, the two national DBS providers, together serve more than 30 million customers, or 37% of the MVPD marketplace. They continue to rank second and third, respectively, in customers among all MVPDs.

Moreover, these companies offer consumers a full array of video programming and other services, while seeking to differentiate themselves in a highly competitive video marketplace. Verizon touts its FiOS service for its ability "to carry substantially more video programming than a cable provider using HFC facilities or other providers relying on FTTN architecture."[8] Verizon claims that FiOS offers "access to up to 348 digital channels, including more than 100 HD channels in all of its TV markets," along with "more than 14,000 VOD titles per month, 70 percent of which are free, and more than 1200 HD VOD titles."[9] Verizon states that it "uses its innovative and robust FTTP network in order to provide consumers with an extremely attractive

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6 *See* Verizon Q1 Investor Quarterly (Apr. 27, 2009) at 5, available at http://investor.verizon.com/financial/quarterly/vz/1Q2009/1Q09Bulletin.pdf?t=633766172256617061; *see also* Verizon Communications Reports Revenue, Earnings and Cash Flow Growth in 1Q 2009, April 27, 2009, http://investor.verizon.com/news/view.aspx?NewsID=983.

7 AT&T Comments at 2. *See also* AT&T's First-Quarter Results Highlighted by Wireless Gains, U-verse TV Growth, Double-Digit Increase; April 22, 2009, http://www.att.com/gen/press-room?pid=4800&cdvn=news&newsarticleid=26752.

8 Verizon Comments at 7.

9 *Id.* at 9.

competitive alternative to traditional cable or satellite services."[10] With its enhanced carrying capacity, Verizon also promotes its "unique programming packages tailored to subscribers' interests, and to carry a wide range of programming, including diverse, independent, multicultural and international channels."[11]

AT&T similarly offers a broad mix of national, regional and local programming options for its customers. It proclaims its U-Verse service offers an "advanced entertainment experience" powered by Internet Protocol (IP) technology, including upgraded digital video recording capabilities "you can't find from any cable providers," on demand applications and other "new enhancements."[12]

DirecTV trumpets its offering of more than 1800 digital video and audio channels, including 190 basic entertainment channels, 33 premium movie channels, over 36 regional and specialty sports networks, over 1400 local channels in the aggregate, as well as Spanish and other foreign language special interest channels, pay per view options, and high definition channels – including, of course, its *exclusive* offering of the NFL's Sunday Ticket football package.[13]

Whether touting a diverse array of programming, more HD channels, or unique programming not available on cable, new and established competitors are claiming that their programming line-ups and options are *better* than cable's. It is totally incongruous for them to now claim that they need further program access regulation to compete effectively with cable. Verizon, AT&T and DirecTV have negotiated carriage deals with a wide range of programmers,

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[10] *Id.*

[11] *Id.*

[12] *See e.g.*, "AT&T Rolls Out More U-verse Enhancements at No Additional Cost to Customers", Press Release, June 16, 2009.

[13] DirecTV Comments at 4.

including every cable-affiliated programming network with rare exceptions. And virtually all of the most popular and widely viewed cable program networks are available from DBS and telco providers. To argue that these services are not fully competitive alternatives to cable or any other MVPD is ludicrous. With annual revenues of $220 billion in 2008 (as compared to cable's $86 billion) and buoyed by an existing customer base of 90 million voice customers and nearly 150 million wireless customers, Verizon and AT&T surely do not need to have the government put a further thumb on scale of programming negotiations in order to compete. As for DirecTV, it is the *second* largest multichannel video programming distributor in the U.S. and hardly needs the government to step in to enhance its standing.

What is really in play is the desire of cable's competitors to unfairly benefit their businesses at the expense of competing cable operators by having the government interfere in what is and should continue to be the subject of marketplace negotiations. Even if there were any policy basis for such regulatory intervention, the statutory language of Section 628, as construed and implemented by the Commission, would not allow it. Cable's competitors simply cannot ignore the law and years of Commission precedent.

The Commission has repeatedly made clear that the language of Section 628(c), which specifically prohibits certain exclusive programming contracts,

> expressly applies to "satellite cable programming and satellite broadcast programming," and that terrestrially delivered programming is "outside of the direct coverage of Section 628(c)." We have been presented with no basis to alter that conclusion in this proceeding. To the contrary, the legislative history to Section 628 reinforces our conclusion.[14]

[14] *Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Development of Competition and Diversity in Video Programming Distribution: § 628(c)(5) of the Communications Act, Sunset of the Exclusive Contract Prohibition*, CS Docket No. 01-290, 17 FCC Rcd 12124, 12158 (2002)(*2002 Extension of Program Exclusivity Order*). Based upon its evaluation of the statutory language and Congressional intent, the Commission found that "[g]iven this express decision by Congress to limit the scope of the program access provisions to satellite delivered programming, we continue to believe that the statute is specific in that it applies only to satellite delivered cable and broadcast programming." *Id.*

AT&T and Verizon contend, however, that the more general provisions of Section 628(*b*) – which prohibit cable operators and vertically integrated programmers from engaging in "unfair methods of competition or unfair or deceptive acts or practices, the purpose or effect of which is to hinder significantly or to prevent any multichannel video programming distributor from providing *satellite* cable programming or *satellite* broadcast programming to subscribers or consumers" – authorize the Commission to prohibit exclusive contracts with vertically integrated *terrestrial* program networks.

It is true that, as AT&T and Verizon point out, the Commission has held that the scope of Section 628(b) authorizes regulation of unfair practices that go beyond restrictions on access to programming. Specifically, the Commission has held that the language of Section 628 can be construed to prohibit exclusive contracts between cable operators and multiple dwelling unit ("MDU") building owners insofar as such contracts prevent MVPDs from distributing satellite programming to an MDU's residents. And the United States Court of Appeals for the District of Columbia Circuit has upheld the Commission's construction.

But the Commission has also made clear that the language of Section 628(b) cannot reasonably be construed broadly to prohibit exclusive contracts with terrestrial program networks. It has construed that section to prohibit such contracts only in circumstances involving "moving satellite delivered programming to terrestrial distribution in order to evade application of the program access rules and having to deal with competing MVPDs."[15]

The Commission has repeatedly rejected the notion that, in the absence of any such evasive conduct, terrestrial programming is somehow subject to Section 628(b)'s prohibition

[15] *Implementation of Section 302 of the Telecommunications Act of 1996, Open Video Systems*, 11 FCC Rcd 18223, 18325 n.451 (1996). *See, e.g., RCN Telecom Services of New York, Inc. v. Cablevision Systems Corporation et al.*, 16 FCC Rcd 12048, 12053 (2001).

when, as the Commission observed in the 2007 Program Access Order and NPRM, "the plain language of Section 628(b), like Section 628(c)(2)(B) specifies 'satellite cable programming' and 'satellite broadcast programming.'"[16] The Commission's MDU Order did not purport to reverse this longstanding and wholly reasonable construction of the plain meaning of the statute, nor does anything in the court's decision have any such effect.

Nor is there any policy reason or evidence in the record for altering the law to expand the range of programming to which cable's competitors are entitled. Verizon, AT&T and DirecTV persist in alleging that cable operators have moved programming from satellite to terrestrial delivery for the express purpose of evading the program access requirement. The Commission has repeatedly and consistently rejected such claims, and the D.C. Circuit has affirmed those decisions.[17]

The Commission found no evidence then of migration from satellite to terrestrial delivery to evade program access rules, and there is no evidence that vertically-integrated programming networks have done so or will do so. As the Commission recognized, there are wholly legitimate reasons to distribute programming terrestrially rather than by satellite,[18] including lower costs, greater efficiency and existing terrestrial distribution systems.[19]

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[16] *See Implementation of the Cable Television Consumer Protection and Competition Act of 1992; Development of Competition and Diversity in Video Programming Distribution; Review of the Commission's Program Access Rules and Examination of Program Tying Arrangements*, MB Docket Nos. 07-29, 07-198, Report and Order and Notice of Proposed Rulemaking, 22 FCC Rcd 17791, 17861 (2007).

[17] *See DIRECTV, Inc. v. Comcast Corporation*, 15 FCC Rcd 22802, 22807 (2000), *aff'g*. *EchoStar Communications Corporation v. Comcast Corporation*, 14 FCC Rcd 2089 (1999), *DIRECTV, Inc. v. Comcast Corporation*, 13 FCC Rcd 21822 (1998), *aff'd sub nom*. *EchoStar Communications Corporation v. FCC*, 292 F. 3d 749 (D.C. Cir. 2002); *RCN Telecom Services of New York, Inc. v. Cablevision Systems Corp.*, 16 FCC Rcd 12048 (2001).

[18] *DIRECTV, Inc. v. Comcast Corporation, Memorandum Opinion and Order*, 13 FCC Rcd 21822, 21837 (1998). *See also EchoStar Communications Corp. v. Comcast Corporation*, 14 FCC Rcd 2089 (1999).

[19] *DIRECTV, Inc. v. Comcast Corporation* and *EchoStar v. Comcast Corporation*, Application for Review of Orders of the Cable Services Bureau Denying Program Access Complaints, Memorandum Opinion and Order, 15 FCC Rcd 22802 (2002). Regional sports programming, for example, is designed to serve a restricted

As NCTA told the Commission in its comments in response to the Report and Order and NPRM in the program access proceeding, now more than ever there should be *less* regulation of the video marketplace not more given the degree of competition that exists today. Indeed, as discussed in our comments, the multichannel video competition that Congress envisioned by enacting Section 628 seventeen years ago took hold long ago with the growth of DBS as a full-fledged competitor and now well-heeled telephone companies have entered the marketplace armed with everything that they need to compete effectively with cable nationwide. As the record shows, competition is now flourishing, vertical integration has dropped to single digits, and cable's competitors themselves are using exclusivity as a means to compete with cable operators and with each other.

The Commission's decision 18 months ago to retain the program exclusivity prohibition for another five years was a step in the wrong direction.[20] The video marketplace bears no resemblance to that which existed 17 years ago when Section 628 of the Communications Act was enacted and the policy underpinnings of the entire program access regime should be called into question. Nevertheless, while the prohibition remains in place, there is no *legal* basis to *extend* the program access provision to non-satellite-delivered vertically-integrated programming.

In sum, given the judgment of Congress that the program access rules should be limited to satellite-delivered programming (and even then that these rules should be applied for a limited

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geographic area instead of the entire continental United States. But national programming services reach national audiences and, for the foreseeable future, satellite delivery is the preferred mechanism for distributing such services.

[20] *See Implementation of the Cable Television Consumer Protection and Competition Act of 1992; Development of Competition and Diversity in Video Programming Distribution; Review of the Commission's Program Access Rules and Examination of Program Tying Arrangements*, MB Docket Nos. 07-29, 07-198, Report and Order and Notice of Proposed Rulemaking. *See* Comments of NCTA, Review of the Commission's Program Access Rules and Examination of Programming Tying Arrangements, MB Docket No. 07-198, January 4, 2008, at 7-9.

period, and may be extended by the Commission only upon a specific finding that they are necessary to preserve competition and diversity), the Commission should reject proposals to expand the program access regime. The Commission should encourage these companies to negotiate for programming in the marketplace and to use their substantial resources to invest in and develop new programming of interest to their subscribers. Over the past 17 years, the current law has preserved incentives to engage in the significant financial risk-taking necessary to launch and promote local and regional program services. And no party has shown that limited exclusivity for these few channels among the hundreds otherwise available has had the effect of thwarting competition.

II. OTHER REGULATORY PROPOSALS THAT HAVE BEEN ADDRESSED IN OTHER PROCEEDINGS SHOULD BE REJECTED

Consumers Union attempts to use the so-called 70/70 provision of Section 612(g) of the Communications Act as the avenue to more regulation of cable services. Section 612(g), which governs commercial leased access, provides that "at such time as cable systems with 36 or more activated channels are available to 70 percent of households within the United States and are subscribed to by 70 percent of those households, the Commission may promulgate any additional rules necessary to provide diversity of information sources." The Commission found in the Thirteenth Annual Report that the first prong of the test – the "cable availability" prong – has been met. However, it did not determine whether the second prong of the test was met, *i.e.*, whether cable subscribership exceeded 70 percent of households (with 36 or more activated channels available) because cable penetration was not calculated from a complete census of cable systems. The Commission decided to propose a new survey form that would require cable operators to provide data on their systems.[21]

[21] Thirteenth Annual Report, 24 FCC Rcd 542, 560 (2009).

Consumers Union alleges that "voluntary disclosures [on cable subscribership] from the industry are inadequate, since they can lead to misleading, inaccurate, and conflicting data."[22] It urges the Commission to compel cable operators to submit certified subscriber information under penalty of law. There is no basis to mandate such a requirement. As NCTA discussed in the survey form proceeding, the Commission annually collects the necessary data in Form 325, the "Annual Cable Operator Report," which includes information on cable subscribers, homes passed and channel capacity, from every cable system serving 20,000 or more subscribers and a statistical sampling of systems serving fewer than 20,000. Those forms are signed and attested to for their veracity by cable operators, and provide that "willful false statements made on this form are punishable by fine and/or imprisonment (U.S. Code, Title 18, Section 1001)." Thus, CU's suggestion that there is some need for certification to prevent operators from somehow under-reporting subscribers is wholly without merit.

In any event, as NCTA also showed, based on every reasonable measure and market indicator, it is hard to imagine how the 70/70 test *ever* would be met.[23] NCTA's comments in the 70/70 survey form proceeding explained that the systems serving 20,000 or more customers represent the vast majority of cable customers. Based on the data collected by the Commission, NCTA has already showed that "it is mathematically impossible for those small systems that do not report From 325 data materially to change the outcome. Even if every household passed by cable systems with fewer than 20,000 subscribers subscribed to those systems, cable penetration would still be well below the 70 percent threshold."[24] The Thirteenth Annual Report

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22 Consumers Union Comments at 1.

23 *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, MB Docket No. 05-255, NCTA Comments and Reply Comments, November 29, 2006 and December 29, 2006.

24 *Cable Subscribership Survey for the Collection of Information Pursuant to Section 612 of the Communications Act*, MB Docket No. 07-269, Comments of NCTA at 4, filed February 17, 2009.

documented that cable subscribership has hovered below 60 percent of homes passed for the last several years, estimating that "subscribers to systems with 36 or more channels as a percent of the homes passed by such systems is 56.3 percent [based on the 2005 Price Survey data], compared to 58.8 percent using data from the 2004 Price Survey sample."[25] Data derived from Form 325 "shows that this figure [for 2006] is 54 percent, the same percent as reported last year."[26]

That downward trend has continued into 2009. According to SNL Kagan first quarter 2009 data, incumbent cable systems passed 125.1 housing units with video service and only 62.5 million – or 49.96 percent – of those households subscribe to cable video service (if one were to include the 4.5 million customers that subscribe to cable service provided by telephone companies and other overbuilders, the penetration rate rises to 53.6%). Nielsen data showed that for roughly 5,500 systems reporting complete information, cable subscribership to systems with at least 36 channels is 60.2 percent.[27]

Consumers Union discredits the data sources and accuses cable operators of systematically underreporting cable penetration to prevent the Commission from exercising its supposed "broad authority" under Section 612(g), while publicly-owned cable operators

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[25] Thirteenth Annual Report, 24 FCC Rcd at 684.

[26] *Id.* at 560.

[27] Nielsen, FOCUS database, data as of May 31, 2009. SNL Kagan and Nielsen are reliable, publicly-available research services, but as the Commission pointed out in the Thirteenth Annual Report, their data is not based on a complete record of every cable system. Warren Communications Factbook, another service, does not provide a complete data set as it contains partial data for cable systems. Consumers Union seizes upon apparent discrepancies between the Warren Communications and SNL Kagan data that were identified and addressed in the Thirteenth Annual Report proceeding – *i.e.*, the SNL Kagan data put cable penetration well below the benchmark while the Warren data appeared to place cable penetration above 70 percent. But Warren Communications conceded in 2007 that its database is not suitable for the 70/70 determination because it contains incomplete responses from cable systems, *i.e.*, not all systems have data reported for both basic subscribers and homes passed. Communications Daily, November 14, 2007. Consumers Union ignores this fact and seems not to want to accept that, when properly analyzed, the Warren data is consistent with all the other available data sources, SNL Kagan and Nielsen, which showed cable penetration remains significantly below the 70% threshold. *See* NCTA *Ex parte* letter, MB Docket No. 06-189, November 20, 2007.

routinely disclose their aggregate subscriber numbers *and* homes passed to the Securities and Exchange Commission in their certified 10-K filings where they are subject to civil and criminal penalties for failing to report accurately. Those certified SEC filings also are consistent with the numbers. According to the public filings of the seven largest publicly-traded cable operators – Comcast, Time Warner Cable, Charter, Cablevision, Mediacom, CableOne (through its ownership by The Washington Post Company,) and GCI – together with Insight Communications, which also is subject to SEC reporting, these eight cable operators passed a total of 96.7 million homes as of December 31, 2008. When the three largest private cable operators are added to the analysis, the total homes passed figure rises to 112.9 million for these 11 companies, as of December 31, 2008.[28] The basic video subscribers of this group totaled 58.7 million as of December 31, 2008, resulting in a penetration rate of 52%.[29] All in all, Consumers Union has no basis whatsoever for its assertion that the low penetration rate reported by publicly-held companies was the result of underreporting – rather than the result of vigorous competition on all fronts.

In any event, even if the cable industry's steady decline in subscribership were somehow reversed to enable it to reach the 70 percent benchmark, the Commission would have no broad authority to regulate under Section 612. As NCTA has repeatedly explained, its authority to promote diversity of information sources under Section 612(g) would be limited to modifying the rates for *leased access* channels – for "commercial use" by programmers unaffiliated with the

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[28] NCTA Analysis of Company Reports.

[29] NCTA Analysis of Company Reports and SNL Kagan Estimates.

operator.[30] This statutory provision does not confer broad authority on the Commission to regulate cable in other areas.

Apart from CU's efforts to exploit the 70/70 provision, various other parties seek to revisit regulatory proposals that have been addressed, and in some cases rejected, in other proceedings. Some of these proposals far exceed anything that was proposed at the time of the 1992 Cable Act, when DBS had few customers (in contrast to the over 31 million DirecTV and DISH Network have today), the Bell Companies were statutorily prohibited from providing video programming services (both are now spending billions to lure customers away from cable, DBS and other MVPDs), and neither Internet nor wireless providers were capable of delivering video content to consumers.

Rather than reiterate the lengthy policy and legal infirmities of these proposals in this proceeding, NCTA will address them briefly and refer the Commission to the appropriate proceedings:

<u>Retention Marketing</u>. Verizon reiterates claims from its retention marketing petition filed last year in the local number portability docket that "there are different rules in place today with respect to the [video] service cancellation process and the marketing that is permitted while a request to cancel is pending, which distorts competition" in favor of cable.[31] It again urges the Commission to ensure "parity between video and voice providers" by adopting rules to govern termination of service by video customers.[32] As fully discussed in NCTA's response to the petition, the notion that cable operators enjoy certain advantages under the existing rules has no

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30 *See e.g. Annual Assessment of the Status of Competition in the Market for Delivery of Video Programming,* MB Docket No. 05-255, NCTA Comments, filed April 3, 2006.

31 Verizon Comments at 26.

32 *Id*.

merit.[33] With respect to marketing and porting, cable operators and telephone companies are subject to the same regulatory regimes in connection with each of the triple play services, *i.e.*, all voice providers must comply with the same marketing rules, including the retention marketing prohibition, just as all video providers must comply with the same marketing rules.

Verizon nonetheless asserts that government intervention is needed because the process to switch video providers "is far more cumbersome" in that customers must call their video provider and cancel service. This is patently ridiculous. As NCTA discussed last year, "ordering service from a new provider and separately cancelling service from the old provider, without regulatory oversight, is the norm for almost all consumer services, *e.g.*, newspaper, magazines, lawn service, alarm service – even broadband service." Moreover, as explained by NCTA in response to Verizon's objections to changes in number porting rules, there are sound reasons for treating video and voice differently (although we note that in important respects voice and video providers are subject to the same marketing rules).[34] We will not reargue those points here but refer the Commission to our filings in the local number portability proceeding.

<u>Low Power TV</u>. The Community Broadcasters Association resurrects the issue of mandatory carriage for low power television stations. Here, too, NCTA has addressed this issue in a separate proceeding.[35] NCTA showed that Congress has already spoken to the breadth of cable's mandatory carriage obligation in Section 614 of the Communications Act. The Commission is precluded by both this provision and the First Amendment from affording must-

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[33] *See* Letter from Kyle McSlarrow, National Cable & Telecommunications Association, to Kevin Martin, Chairman, Federal Communications Commission, WC Docket No. 07-244 (filed April 24, 2008); *see also* Letter from Neal Goldberg, National Cable & Telecommunications Association to Marlene Dortch, Secretary, Federal Communications Commission, WC Docket No. 07-244; MB Docket No. 07-29, MB Docket No. 07-198 (filed April 30, 2009) ("NCTA April 30, 2009 Letter").

[34] NCTA April 30, 2009 Letter at 2, 3.

[35] Report and Order and Third Further Notice of Proposed Rulemaking, MB Docket No. 07-294 (rel. Mar. 5, 2008), Comments of NCTA.

carry status to Class A low power stations that do not otherwise qualify for such status under Section 614(h)(2). We also pointed out that requiring cable operators to carry multiple low power stations at a time when they are already required to carry the analog and high definition digital signals of television broadcasters would result in the displacement of cable program networks that appeal to minority and niche interests throughout cable communities. And it would do so without any evidence that such mandatory carriage of low power stations will have any effect on diversity of broadcast ownership.

Cable operators carry a variety of Class A low power stations voluntarily throughout the country, where those stations provide programming that customers value. And they carry those stations that meet the standards that Congress deemed sufficient to warrant mandatory carriage. But the Commission has no reason – or authority – to force cable operators to carry every Class A low power station.

Leased Access. Heritage Media Services, a leased access programmer, seeks modifications to the Commission's commercial leased access rate scheme. The Commission has addressed leased access issues in a separate proceeding, where it adopted new rules governing the rates and procedures for the provision of leased access channels pursuant to Section 612 of the Communications Act.[36] Many of the leased access practices about which Heritage complains have been evaluated separately and approved by the Commission.[37] And Heritage fails to show that their proposal calling for flat rates based on system size would "assure that such use will not

[36] The new rules that came out of that proceeding have not yet gone into effect, and are under review by the court. *United Church of Christ Office of Communications, Inc. v. FCC*, No. 08-3245 (6th Cir.) (staying the new rules pending judicial review and holding the case in abeyance). *In the Matter of Leased Commercial Access*, 23 FCC Rcd 2909, rel. November 27, 2007.

[37] For example, Heritage's complaints about geographic levels of service and technical costs were addressed in that proceeding. 23 FCC Rcd at ¶¶ 16, 20.

adversely affect the operation, financial condition, or market development of the cable system" as the statute requires.[38]

III. THE CABLE INDUSTRY SUPPORTS AN "ALL-PROVIDER" "PLUG AND PLAY" SOLUTION AND URGES THE COMMISSION TO APPLY ITS NAVIGATION DEVICE RULES IN AN EVENHANDED MANNER THAT WILL SPUR INNOVATION

Verizon's comments on technical standards begin with principles with which we are in full agreement: that technical standards should encourage competition and innovation, and that the Commission should not mandate any particular standard or approach.[39] The Two-Way MOU among the six largest cable companies and some of the largest digital television manufacturers is an excellent example of a voluntary inter-industry agreement that promotes such competition and innovation: it enables "two-way" digital cable ready retail products to come to market and receive interactive cable services, including video on demand and interactive programming guides, while allowing further innovation in consumer electronics ("CE") equipment, cable networks, cable programming and interactive applications.

We disagree with Verizon's suggestion that the MOU might "entrench" cable operators. In the first place, Verizon acknowledges that CableCARD-enabled DTVs *will* work with other platforms.[40] Second, Verizon claims that if the CableCARD and "tru2way" technology make it easier for CE equipment to work with cable, then those MVPDs that continue to rely upon set-top boxes (like Verizon, AT&T, DirecTV and DISH) might face consumer reluctance to move from cable to another provider. We think the concern is exaggerated. After all, all evidence reflects a vibrant competitive market, in which Verizon continues to report growth to Wall Street

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[38] *See Valuevision Int'l v. FCC*, 149 F. 3d 1204, 1212 (D.C. Cir. 1998) (upholding FCC rejection of various flat fee rate proposals).

[39] Verizon Comments at 29.

[40] NCTA made this point in its August 13, 2008 response to an earlier Verizon *ex parte* submission of July 31, 2008 in CS Docket No. 97-80.

despite its use of set-top boxes. And DBS took subscribers from cable even though it required boxes while analog cable subscribers generally did not because they had “cable ready” sets.

We agree with Verizon that there may still be benefits to an “all-provider” solution under which retail devices could be manufactured to work with all MVPDs without a set-top box and that allows networks to use creative and differentiated distribution technologies. But we are disappointed that it has taken so long for Verizon to come to this conclusion. NCTA and traditional cable operators spent more than a year advocating an “all-provider” solution. In the summer of 2007, the cable industry asked the FCC to encourage an all-provider solution, and actively sought support for the concept from AT&T, Verizon, and satellite providers during the summer and fall of 2007, including numerous high-level contacts among the parties. Unfortunately, AT&T, Verizon, and the satellite providers all declined cable’s invitation, and cable proceeded to negotiate and conclude the Two-Way MOU with major consumer electronics and information technology companies. When the MOU was announced in June, 2008, the cable industry specifically renewed the invitation to collaborate on a voluntary all-provider solution.

If Verizon or other MVPDs using alternative distribution technologies now wish CE manufacturers to incorporate specific technology elements for those MVPDs within DTVs, that can be achieved in direct negotiation with CE. If Verizon or other MVPDs are ready now to discuss an all-MVPD solution, the cable industry remains willing. The cable industry did not enter the Two-Way MOU to gain competitive advantage. The industry has repeatedly contested the market imbalance caused by subjecting only cable operators to separated security requirements, while excusing other large competitors like the satellite providers and telephone companies. As NCTA noted in its comments,[41] there may be solutions that accommodate all platforms without frustrating innovation, and we are willing to discuss them.[42]

On a related technical issue, Verimatrix's Comments appear to take issue with any separated security solution other than downloadable software. The cable industry supports innovative conditional access solutions, including downloadable security. But Verimatrix is wrong in suggesting that CableCARDs have reduced choice with "closed" solutions and kept companies like TiVo out of the market.[43] In fact, CableCARDs have opened up markets for TiVo[44] and other retail manufacturers, and are called for by the very "existing rules" that Verimatrix asks the Commission to enforce.[45]

Going forward, now that CableCARDs have been widely deployed,[46] the Commission can best promote innovative CE options by allowing a wider range of experimentation and deployment of downloadable and other solutions that do not necessarily rely on CableCARDs. The Commission has repeatedly taken such steps, promoting innovation with navigation device waivers to advance cable's digital transition.[47]

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41 NCTA Comments at 41.

42 An appropriate forum may need to be developed. ATIS is primarily focused on Verizon's architecture, and may not be the appropriate forum. CableLabs participated in ATIS to ensure that ATIS's adaptation of the CableCARD specifications was not inconsistent with implementations of CableLabs's specifications that were already deployed and in use by cable operators. CableLabs has not participated in further ATIS activities, some of which are not conducted under ANSI procedures and are not open to the public at large.

43 Verimatrix Comments at 3-6.

44 Jeff Baumgartner, TiVo Covers Its Cable Bases, Light Reading's Digital Cable News, May 28, 2009, http://www.lightreading.com/document.asp?doc_id=177254&site=cdn&f_src=lightreading_sitedefault.

45 Verimatrix Comments at 6.

46 *See* Letter from Neal M. Goldberg, NCTA, to Marlene H. Dortch, Secretary, FCC, CS Dkt. No. 97-80, at 1 (March 23, 2009) (transmitting cable operator CableCARD reports and noting that the 10 largest incumbent cable operators had deployed more than 12,350,000 operator-supplied set-top boxes with CableCARDs).

47 *E.g.*, Evolution Broadband, LLC, FCC 09-46 (June 1, 2009); Cable One, Inc., FCC 09-45 (May 28, 2009).

CONCLUSION

Over the 17 years since Congress required annual reporting, the Commission has documented the dynamic, unrelenting and irreversible growth of video competition. The data gathered in this catch-up inquiry will make clear that anticompetitive concerns reflected in provisions of the 1992 Cable Act are relics of the past. Every American consumer has a choice of MVPD providers, with more programming channels, more services and more choices than ever before. Consumers may also access video content offered by a variety of other competitors who have capitalized on digital and IP technology. In a highly competitive marketplace, there is absolutely no need to provide telephone or DBS companies, among the largest and most successful competitors to cable, with any more unfair regulatory advantages over cable companies.

Respectfully submitted,

/s/ Neal M. Goldberg

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