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 AT&T[1]

In the first half of this year, AT&T continued to expand its investment in state-of-the-art broadband facilities to deliver its U-verse TV Service in direct, head-to-head competition with formerly monopoly incumbent cable operators. By the end of the 1Q09, for example, AT&T had expanded the reach of its advanced U-verse fiber network to pass nearly 18 million living units – up from 17 million at the end of the prior quarter – and was offering U-verse TV service in 93 MSAs across the United States. And AT&T continues to expand to more markets on an on-going basis, bringing much needed consumer choice and competition to incumbent cable operators. Consumers have demonstrated their hunger for that choice. As a consequence, the total number of U-verse TV subscribers grew by more than half a million to reach 1.6 million by the end of 2Q2009. AT&T U-verse also continued to garner industry accolades for service excellence and innovation. For example, U-verse received two 2009 IPTV World Series Awards, including Most Innovative New Service for Total Home DVR and Best Subscriber Growth Achievement for U-verse TV service in 2008.

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

Not surprisingly, incumbent cable operators have fought back with every weapon in their arsenal to stifle nascent wireline video competition, which the Commission has recognized is the only form of competition that effectively constrains incumbent cable operators' prices,[2] and thus retain their dominant position in multichannel video programming distribution markets. For example, as AT&T and Verizon have repeatedly and exhaustively documented, cable incumbents have sought to use their control over regional sports programming to undermine their wireline competitors' ability to offer consumers a viable, competitive alternative. The Commission has rightly found that such programming is "non-substitutable programming" that is essential "for competition in the video distribution market to remain viable," and, without which, an "MVPD's ability to compete will be significantly harmed."[3] Recognizing this, cable incumbents have withheld such programming from competitive wireline video service providers with the specific purpose and predictable effect of significantly inhibiting their ability to compete. Cox, for example, has refused to license Padres programming to AT&T in San Diego,[4]

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

[3] *Implementation of the Cable Television Consumer Protection and Competition Act of 1992, et al.*, MB Docket Nos. 07-29, 07-198, Report and Order and Notice of Proposed Rulemaking, 22 FCC Rcd 17791, ¶ 39 (2007) (*Program Access Extension Order*).

[4] Cox maintains that AT&T has "misrepresent[ed] [Cox] Channel 4 SD," which has exclusive rights to carry live Padres programming, "as a regional sports network," in a vain attempt to play down the competitive significance of its unreasonable and unlawful refusal to deal. Letter of David J. Wittenstein, Counsel for Cox Communications, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 07-269 (Jun. 22, 2009). However, irrespective of the appellation applied to Channel 4 SD (*i.e.*, whether one calls it a "regional sports network"), there is no question that Channel 4 SD has exclusive access to live Padres

and Cablevision has refused to license the high-definition (HD) format of MSG and MSG Plus programming (which includes exclusive broadcasting of the New York Knicks, the New York Rangers, the New York Islanders, the New Jersey Devils, and other professional sports teams)[5] to AT&T in Connecticut and Verizon in New York, even as they have licensed that programming to other MVPDs that do not offer direct and/or effective competition to the incumbents' own cable services.

In these cases, the cable incumbents have offered no business justification for refusing to provide the regional sports programming at issue. Rather, they have refused to make that programming available under any terms solely on the grounds that such programming is delivered terrestrially, and that terrestrially-delivered programming is not subject to the program access rules.

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programming, and it is that regional sports programming that is – as the Commission found – "non-substitutable programming" that is essential "for competition in the video distribution market to remain viable," and, without which, an "MVPD's ability to compete will be significantly harmed." *Id.* In any event, even if Channel 4 SD carries other non-sports programming, Cox cannot deny that much, if not all, of Channel 4 SD's popularity derives from its carriage of Padres programming. Indeed, Channel 4 SD is known colloquially as the Padres Channel, and its website landing page prominently highlights that channel's carriage of Padres programming. Moreover, in its advertising, Cox emphasizes its exclusive carriage of Padres programming – specifically noting that such programming is not available on U-verse – not its carriage of other, non-sports programming (such as Sam the Cooking Guy) on Channel 4 SD.

[5] The HD format of regional sports programming is particularly essential to an MVPD's ability to compete. In 2008, the number of American households with HD television sets (HDTVs) increased to 45 percent, up from less than 20 percent in 2006. *See, e.g.*, Simon Flannery et al., Morgan Stanley, *Broadband Outlook: Recent Sell-Off an Opportunity in Recurring Revenue Models*, at 11, Exh. 25 (Oct. 17, 2008); Walter Mossberg, *Family Snapshots in the Splendor of HD*, Wall St. J. Online (Nov. 26, 2008), *available at* http://online.wsj.com/article/SB122766053302758377.html. Moreover, demand for sports programming is a primary driver behind the growth in HD televisions. *See* Consumer Electronics Association (CEA), *Second Annual Inside the Mind of the HD Sports Fan Study* (Jan. 2007) (concluding that approximately 60 percent of HDTV owners can be classified as sports fans); Consumer Electronics Association Press Release, *Sports Fans Drive HD Television Sales According to New Survey*, (Jan. 17, 2006) (summarizing study concluding that nearly 50 percent of HDTV owners cited HD sports programming as the primary force behind their HDTV purchase, and that 45 percent of HDTV sports fans would consider switching to another source of HD sports if superior to their current package) *available at* http://www.ce.org/shared_files/pr_attachments/20060110_SVG_survey.doc. Simply put, the many consumers who have invested in an HDTV in order to watch sports programming will not switch to a competitor that cannot show their favorite teams in HD.

Of course, as AT&T and Verizon have shown in complaints against Cox and Cablevision, irrespective of whether the Commission's existing program access rules cover terrestrially delivered programming, their refusal to deal violates section 628(b) of the Communications Act, which broadly prohibits any unfair method of competition the purpose or effect of which is to significantly hinder the ability of a competitive MVPD (like Verizon and AT&T) to offer a viable multichannel video programming service that includes satellite delivered programming. In any event, these cable incumbents' stubborn refusal to negotiate access arrangements for regional sports programming with their wireline competitors emphasizes the critical importance of Commission action to strengthen the existing program access rules by extending them to terrestrially delivered programming, and thus to fulfill Congress's mandate that the Commission promote video competition and further broadband deployment. As AT&T has explained in its prior filings in this docket, and in the open program access proceeding (MB Docket Nos. 07-29, 07-198), the Commission plainly has authority to close the so-called "terrestrial loophole," and should do so promptly.

Respectfully submitted,

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