

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

In the Matter of

Annual Assessment of the Status of
Competition in the Market for the Delivery
of Video Programming

MB Docket No. 07-269

COMMENTS OF DIRECTV, INC.

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SUMMARY

When DIRECTV launched its service seventeen years ago, video competition in the United States was little more than a pipe dream. Today, it has never been more intense. Video content is being made available to more viewers in more ways, on more devices, and from more sources than ever before. Once the very first real competitor to cable in many places, DIRECTV maintains its competitive edge by continuing to seek out compelling content, implementing technological innovations, and providing superior customer service, offering viewers the best television experience available anywhere. To this end, DIRECTV remains the leader in HD programming, and has extended that leadership into 3D programming as well. It has introduced a whole-home DVR, devised an app that enables subscribers to schedule recordings using an iPhone, and launched a service that makes first-run movies available on television earlier than ever before. DIRECTV intends to continue expanding opportunities for viewers to enjoy video content in the manner they most desire, assuming that Commission rules (such as the “AllVid” proposal now under consideration) do not prevent it from doing so.

Yet for all of its innovative spirit and technical prowess, DIRECTV faces significant challenges from an increasing variety of sources. First and foremost, it is a one-way, video-only platform competing against providers that offer a bundle of broadband and telephone services with their video offerings. As very high-speed broadband increasingly becomes a differentiated must-have product, moreover, the few entities that can provide this product are able to leverage their broadband market power into the video arena by using high broadband margins to subsidize the video service. These differentiated services are difficult and expensive for video-only providers to replicate (if they can be replicated at all), and also facilitate the expansion of online video distributors (“OVDs”) as discussed below.

Second, DIRECTV faces competition from providers operating under new business models, particularly those that deliver video content “over-the-top” using the Internet. Every week seems to bring a new announcement of another such OVD, from well-established names with substantial resources (such as iTunes, Google TV, Hulu, and MLB.com) to repurposed “old economy” businesses (such as Netflix) to start-up enterprises looking to make a name for themselves (such as Bamboom and ivi). Unlike DIRECTV, these providers do not have to incur the expense of building and operating their own distribution facilities, as they ride on the public Internet. They also are not constrained by traditional MVPD carriage arrangements and regulatory burdens, and thus are free to explore potentially more cost-effective means of acquiring and packaging programming. The growth of OVDs not only adds a new competitor in the video marketplace, but also enhances the power of the broadband systems over which they are delivered – a double hit against a video-only provider such as DIRECTV.

Third, programming prices continue to escalate at a breakneck pace. Broadcasters have been particularly egregious in this regard, as networks and their affiliated stations have exercised their undeniable market power to extract ever more onerous fees for carriage to the viewers they are supposed to be serving over-the-air. Broadcasters enjoy government-sanctioned exclusivity in their designated markets, which enables them to pit ever more competitive distributors against one another. Viewers are held for ransom, with stations threatening to deny access to their signals if their demands are not met. Ultimately, the costs imposed by programmers are borne by consumers either directly (through price increases) or indirectly (through distributors less able to provide compelling content or differentiated services).

To date, DIRECTV has been able to provide compelling video service that has overcome these challenges, and it intends to continue meeting them with the spirit of innovation and

customer-first orientation that has been a DIRECTV hallmark. These challenges are only likely to grow more formidable over time, requiring that DIRECTV not only sustain its efforts but augment them. So long as such challenges result from vigorous and fair competition, regulatory intervention is likely unnecessary, and even counterproductive in such a dynamic and quickly-evolving market. Nonetheless, the Commission should remain vigilant against the improper exercise of market power and not hesitate to take steps as appropriate to prevent such anticompetitive behavior.

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COMMENTS OF DIRECTV, INC.

DIRECTV, Inc. (“DIRECTV”) submits these comments in response to the Commission’s *Further Notice of Inquiry* soliciting data and information for its annual report on the status of competition in the market for delivery of video programming.¹ DIRECTV has always prided itself on offering the best video service available. When it initiated direct broadcast satellite (“DBS”) service in 1994, DIRECTV faced a single dominant cable monopoly in each market. Today, however, it is confronted by a variety of rivals, new and old. Continuing the spirit that animated its launch, DIRECTV has met the competition by offering the most high-definition programming, state-of-the-art innovation, outstanding customer service, and the best programming selection anywhere.

Yet DIRECTV’s best-in-class video service, for all of its virtues, faces increasing challenges.

- One such challenge results from the ability of cable and telephone companies to bundle video services with very high-speed broadband. As such higher-speed

¹ *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Further Notice of Inquiry, MB Docket No. 07-269, FCC 11-65 (rel. Apr. 21, 2011) (“*NOI*”).

broadband increasingly becomes a distinct, must-have product, the few entities capable of offering higher-speed broadband can increasingly leverage their broadband service to enhance their competitive position with regard to their video services, placing DIRECTV at a distinct and unfair disadvantage.

- Another challenge arises from the fast-developing market for “over-the-top” video programming transmitted over the Internet, with new delivery mechanisms and business models appearing virtually every week that are not subject to regulatory burdens imposed on traditional multichannel video programming distributors (“MVPDs”).
- A third challenge relates to the ever increasing cost of acquiring programming. Broadcasters, in particular, have moved aggressively to capitalize on their market power (through retransmission consent), making it difficult for unaffiliated MVPDs like DIRECTV to obtain network programming at reasonable and nondiscriminatory rates.

As a video-only, one-way platform with very minimal programming interests, DIRECTV must continue to meet these challenges in the only way available to it: by providing viewers the most compelling and innovative video offering available anywhere.

The evidence discussed below demonstrates that DIRECTV has met this challenge to date. But its ability to continue to compete at this level is by no means assured. Regulatory intervention could stymie its ability to innovate, while consolidation of market power among a few ever-larger entities could skew the market against video-only entities. In order to promote the dynamic and competitive aspects of the video market, the Commission should be wary of

imposing additional regulatory burdens but vigilant to prevent improper exercises of market power.

I. DIRECTV CONTINUES TO PROVIDE FIRST-IN-CLASS VIDEO SERVICE

Because its satellite platform supports an inherently one-way service, DIRECTV has never gotten into the phone, Internet, or wireless business.² DIRECTV has instead focused its energy almost exclusively towards improving its delivery of video content in the most compelling and viewer-friendly manner possible. As a result, from high-definition (“HD”) programming to innovative offerings to customer service, DIRECTV’s reputation as a video service provider is unmatched.

A. DIRECTV Offers More High-Definition Service Than Any Other MVPD

Five years ago, DIRECTV became the first MVPD to employ MPEG-4, a highly efficient codec that has since become the industry standard. The resulting increase in capacity enabled DIRECTV to offer HD programming when others maintained there would never be a market for anything better than standard definition. Today, no MVPD offers as much HD video as DIRECTV.³ Even given the well-recognized difficulty and expense for satellite carriers to offer local television,⁴ DIRECTV will provide high-definition local channels in markets serving

² DIRECTV does, of course, offer many these services through commercial relationships with third parties, primarily telcos. See n. 48, below, and accompanying text.

³ See Press Release, “DIRECTV Continues To Deliver More Full Time HD Than Any Other Provider With The Addition Of Over 30 New HD Channels -Bringing DIRECTV's HD Lineup to More Than 160” (Apr 20, 2010), available at <http://investor.directv.com/releasedetail.cfm?ReleaseID=461441>; DIRECTV HD, <http://www.directv.com/DTVAPP/content/hd/overview>.

⁴ *Carriage of Digital Television Broadcast Signals: Amendment to Part 76 of the Commission’s Rules; Implementation of the Satellite Home Viewer Improvement Act of 1999: Local Broadcast Signal Carriage Issues and Retransmission Consent Issues*, Second Report and Order, Memorandum Opinion and Order, and Second Further Notice of Proposed Rulemaking, 23 FCC Rcd. 5351, 5355-5359, ¶¶ 7, 8, 11 (2008) (confirming the “serious technical difficulties” faced by satellite carriers in retransmitting the signals of thousands of local broadcast stations throughout the country, finding that “the capacity used for local channels is separate from the capacity used for national channels and the

approximately 96 percent of Americans by the end of 2011, a record unsurpassed by any other MVPD.⁵ DIRECTV also offers more local HD public television channels than any other MVPD.⁶ And DIRECTV offers the most movies in 1080p HD format, the same high-resolution format used for Blu-Ray.⁷

B. DIRECTV's Innovations Are Second to None

DIRECTV continues to innovate in order to provide its subscribers with the best television experience in the market. Among the new products and services it has introduced in the last two years are the following:

- DIRECTV was the first MVPD to introduce 3D television.⁸ It now has four dedicated 3D channels, more than anybody else.⁹
- DIRECTV was among the first MVPDs, and was the first DBS provider, to offer a true “whole home” DVR. This enables viewers to share recorded programs on any TV in the home, begin a program in one room and finish it in another, and access DIRECTV’s DVR technology on non-DVR HD receivers—all without installing DVRs on every television.¹⁰

two are generally not interchangeable,” recognizing “that satellite carriers face unique capacity, uplink, and ground facility construction issues” in connection with offering local service, and noting that, if faced with onerous carriage requirements, satellite carriers might be “forced to drop other programming, including broadcast stations now carried in HD pursuant to retransmission consent, in order to free capacity,” or might be “inhibited from adding new local-into-local markets”).

⁵ Press Release, DIRECTV, “DIRECTV to Offer Local Channels in HD” (Apr. 11, 2011), *available at* <http://www.directv.com/DTVAPP/global/article.jsp?assetId=P7400028> (“*Local HD Channels 2011*”).

⁶ *See, e.g.*, Press Release, DIRECTV, “DIRECTV Launches 10 More Local PBS Stations in HD” (Dec. 10, 2008), *available at* <http://investor.directv.com/releasedetail.cfm?ReleaseID=353895>.

⁷ Press Release, DIRECTV, “DIRECTV Now Offers the Largest Selection of 1080p Movies” (Apr 15, 2009), *available at* <http://www.directv.com/DTVAPP/global/article.jsp?assetId=P5680002>.

⁸ Press Release, DIRECTV, “DIRECTV is the First TV Provider to Launch 3D” (Jan. 6, 2010) *available at* <http://www.directv.com/DTVAPP/global/article.jsp?assetId=P6600006>.

⁹ *See, e.g.*, Press Release, DIRECTV, “3net Debuts on DIRECTV” (Feb. 10, 2011), *available at* <http://www.directv.com/DTVAPP/global/article.jsp?assetId=P7310007>; Press Release, DIRECTV, “British Estates in 3D” (Mar. 23, 2011), *available at* <http://www.directv.com/DTVAPP/global/article.jsp?assetId=P7380025>.

¹⁰ Press Release, DIRECTV, “Record in One Room. Watch in Any Other. With a Single HD DVR.” (June 7, 2010), *available at* <http://www.directv.com/DTVAPP/global/article.jsp?assetId=P6820202>.

- DIRECTV was among the first MVPDs, and was the first DBS provider, to offer an iPhone scheduler. More than one million iPhone users have now downloaded the DIRECTV app.¹¹
- DIRECTV's "Home Premiere" offers certain motion pictures in the earliest non-theatrical release window available, even before DVD release.¹²
- DIRECTV was the first MVPD to offer Common Sense Media's age-based content reviews on its electronic programming guide.¹³

In addition, DIRECTV's advanced features for sports programming and innovative sports program packages are unmatched by any other MVPD.

- DIRECTV developed the "Red Zone" feature for its NFL Sunday Ticket offering, which ultimately became the model for some of its competitors' most popular offerings.¹⁴
- DIRECTV's Mega March Madness offering became the model for the latest NCAA television package by making all first- and second-round games available for the first time.¹⁵

¹¹ Press Release, DIRECTV, "DIRECTV DVR Scheduler iPhone(R) App Surpasses 1 Million Milestone Mark" (Feb. 2, 2010), *available at* <http://investor.directv.com/releasedetail.cfm?releaseid=442111>.

¹² *See, e.g.*, Press Release, DIRECTV, "DIRECTV Premieres 'Pirate Radio' More Than A Month Before DVD Release" (Mar. 11, 2010), *available at* <http://www.directv.com/DTVAPP/global/article.jsp?assetId=P6720023>. DIRECTV licensed and implemented watermarking technology to provide the additional security required by the studios to make Home Premiere content available.

¹³ Press Release, DIRECTV, "DIRECTV Is First to Deliver Easy-To-Understand On-Screen TV Ratings from Common Sense Media" (Feb. 24, 2011), *available at* <http://www.directv.com/DTVAPP/global/article.jsp?assetId=P6700131>.

¹⁴ *See* Press Release, DIRECTV, "DIRECTV'S New NFL SUNDAY TICKET(TM) SuperFan Offers 'Immaculate Reception' for Football Fans; New Premium Tier Features Eight Games on One Screen, Red Zone Channel, Single Games in 30 Minutes and More Than 100 HD Games" (Aug. 1, 2005), *available at* <http://dtv.client.shareholder.com/releasedetail.cfm?releaseid=286543>.

¹⁵ *See* Press Release, DIRECTV, "DIRECTV Delivers NCAA(R) March Madness(R) Slam Dunk with New Enhanced Features" (Feb. 14, 2006), *available at* <http://dtv.client.shareholder.com/releasedetail.cfm?ReleaseID=286419>; Press Release, NCAA, "Turner, CBS to air all of NCAA tourney" (Feb. 23, 2011) *available at* <http://www.ncaa.com/news/basketball-men/2011-02-10/turner-cbs-air-all-ncaa-tourney>.

- DIRECTV provides unique interactive features with respect to golf’s four majors¹⁶ and tennis’ four Grand Slam events.¹⁷ These include additional coverage, additional camera angles, and updated statistics. For example, DIRECTV provided the following coverage of the Masters golf tournament this year:
 - A bonus hour of coverage each day compared to that offered on the “main” ESPN/CBS feeds;
 - Two featured group channels, allowing viewers to follow particular groups of interest;
 - Separate channels dedicated to Amen Corner and holes 15 and 16;
 - “Masters in Depth,” which included a live broadcast featuring exclusive interviews with players, live updates of rounds in progress and press room cut-ins;
 - The Masters Mix Channel, which allowed viewers to scan all of these channels at once; and
 - A continuously running leader board featuring live tee times, scoring and leaders’ locations on the course.¹⁸
- DIRECTV introduced the ScoreGuide feature, which enables fans to easily track scores and start times of major sporting events, see a list of channels carrying each event, and tune directly to those channels.¹⁹

DIRECTV has also been among the leaders in developing ways through which subscribers can access licensed content using non-television devices, such as laptops and tablets.²⁰ In addition, it is a founding member of the RVU Alliance, which has developed an

¹⁶ DIRECTV Grand Slam Golf: Expanded Coverage Only on DIRECTV, <http://www.directv.com/DTVAPP/content/sports/golf>.

¹⁷ DIRECTV Grand Slam Tennis: Expanded Coverage Only on DIRECTV, <http://www.directv.com/DTVAPP/content/sports/tennis>.

¹⁸ Press Release, DIRECTV, “Unmatched Masters Coverage” (Mar. 30, 2011), *available at* <http://www.directv.com/DTVAPP/global/article.jsp?assetId=P7380087>.

¹⁹ Press Release, DIRECTV, “DIRECTV ScoreGuide Provides Sports Fans with the Ultimate Navigation Tool at the Push of a Button” (Apr. 27, 2009), *available at* <http://www.directv.com/DTVAPP/global/article.jsp?assetId=P5680058>.

²⁰ *See* Press Release, DIRECTV, “DIRECTV to Launch HBO GO® and MAX GO®, April 12th” (Apr. 12, 2011), *available at* <http://investor.directv.com/releasedetail.cfm?releaseid=568022>.

open-standard technology that will permit distribution of video programming to televisions and other client devices throughout the home, without the need for multiple set-top boxes.²¹

Because innovation is so critical to DIRECTV's continued growth and viability, it is naturally concerned about policy developments that would constrain its ability to provide its subscribers with the most technologically advanced consumer equipment and compelling video content.²² Of particular concern at present are proposals in the "AllVid" proceeding that would mandate a **one-size-fits all** approach to navigation devices.²³ DIRECTV has already expressed its concern that the "one size" under consideration does not "fit" satellite service.²⁴ Even setting satellite-specific concerns aside, the depth and breadth of video innovation has never been greater, with new business models and new devices coming on the market at a breakneck pace.²⁵

²¹ See, e.g., Press Release, DIRECTV, "DIRECTV Launches Field Trial of Its Home Media Center with Industry's First RVU-Enabled DIRECTV Server" (May 18, 2011), available at <http://investor.directv.com/releasedetail.cfm?ReleaseID=578966>; Press Release, DIRECTV, "RVU Alliance Forming to Accelerate Development Of Remote User Interface Technology" (Aug. 3, 2009), available at <http://www.directv.com/DTVAPP/global/article.jsp?assetId=P6300036>.

²² NOI at ¶¶ 66-67.

²³ See *Video Device Competition; Implementation of Section 304 of the Telecommunications Act of 1996: Commercial Availability of Navigation Devices; Compatibility Between Cable Systems and Consumer Electronics Equipment*, Notice of Inquiry, 25 FCC Rcd. 4275 (2010) (requesting data and comment on potential AllVid "smart device" regime).

²⁴ See, e.g., Comments of DIRECTV, Inc., MB Docket No. 10-91, CS Docket No. 97-80, PP Docket No. 00-67 (filed July 13, 2010).

²⁵ For example, Xbox LIVE, the Microsoft service that features HD movies and TV shows from Netflix, has more than 30 million subscribers—more than any DBS provider. Press Release, XBOX, "2010: The Biggest Year in Xbox History" (Jan. 11, 2011), available at <http://www.xbox.com/en-US/Press/archive/2011/0112-BiggestYear>. Netflix has acquired exclusive online streaming rights to first-run films distributed by Relativity Media and Epix (including Paramount, Lions Gate, and MGM productions), and also has rights to stream NBCU cable programming. Press Release, EPIX, "EPIX and Netflix Announce Exclusive Internet-Only Deal to Instantly Stream EPIX Movies to Netflix Members" (Aug. 10, 2010), available at <http://epixnews.tumblr.com/post/931723470/epix-and-netflix-announce-exclusive-internet-only-deal>; Press Release, Netflix, "Netflix and Relativity Media Announce Groundbreaking Deal to Stream First Run, Studio Quality Theatrical Movies to Netflix Subscribers" (July 6, 2010), available at <http://netflix.mediaroom.com/index.php?s=43&item=361>. Amazon also recently acquired the rights to stream Fox and ABC network programming online for \$0.99 per show. Nilay Patel, *Amazon Streaming 99-Cent ABC And Fox Shows...Right Now (Update:*

The RVU technology that DIRECTV helped pioneer is but one example of an industry standard developed to support cross-platform interoperability. In the midst of such a dynamic and emerging market, regulatory intervention would not only be inappropriate but also dysfunctional, as it would stymie initiatives currently under way. DIRECTV urges the Commission not to take any steps that could limit technological and service innovations.

C. DIRECTV Continues to Provide Outstanding Customer Service

DIRECTV knows that excellent programming and innovative products alone are not sufficient to compete in the MVPD market. Superior customer service is also critical and DIRECTV has dedicated itself to making its customer service among the best in the industry. These efforts have paid off, as DIRECTV was listed at the top of customer satisfaction ratings in 2010 by J.D. Power and Associates for the East, South, and West for the third year in a row, bypassing all other cable and satellite providers in those regions.²⁶ Likewise, in 2009 and 2010, DIRECTV received higher scores for customer satisfaction than all cable TV providers on the American Customer Satisfaction Index.²⁷ Because DIRECTV views customer satisfaction as an integral part of its video service, it will endeavor to improve upon this level of excellence to ensure that the entire DIRECTV experience is as enjoyable for subscribers as possible.

Purchases, Not Rentals!), Engadget, Sept. 1, 2010, <http://www.engadget.com/2010/09/01/amazon-streaming-99-cent-abc-and-fox-shows-right-now/>. Similarly, AppleTV is rolling out a new player and renting Fox and ABC network shows for \$0.99. Brian Barrett, *You Can Rent iTunes TV Shows for \$1 and Movies for \$5*, Gizmodo, Sept. 1, 2010, <http://gizmodo.com/5627674/you-can-rent-itunes-tv-shows-for-1-and-movies-for-5>.

²⁶ Press Release, J.D. Power and Associates, “Satisfaction with Cost of Service Declines Considerably among Television Service Customers” (Oct. 6, 2010), *available at* <http://businesscenter.jdpower.com/news/pressrelease.aspx?ID=2010166>.

²⁷ The American Consumer Satisfaction Index, “Scores by Company: DIRECTV,” http://www.theacsi.org/index.php?option=com_content&view=article&id=149&catid=&Itemid=214&c=DIRECTV+.

D. Performance Metrics Reflect the Excellence of DIRECTV's Video Service

1. Subscribership

As of the first quarter of 2011, DIRECTV served approximately 19.41 million U.S. subscribers.²⁸ This figure represents an increase of four percent over the approximately 18.66 million subscribers served as of the same period last year,²⁹ which itself was an increase of three percent over the approximately 18.09 million subscribers served a year earlier.³⁰ Although the percentage of U.S. households that cannot receive DBS service due to line-of-sight problems remains difficult to quantify, line-of-sight continues to affect the availability of DBS service to potential subscribers, particularly persons living in multiple dwelling units (“MDUs”).³¹ The GAO found in 2005 that as many as half of all MDU residents are unable to receive DBS signals due to line-of-sight problems.³² DIRECTV has expanded its efforts to service the MDU market by increasing the number of consumers served by a centrally-wired DBS signal distribution systems fed by a roof-top antenna, and the Commission’s orders eliminating exclusive access arrangements for incumbent cable operators have made that option a more practical and attractive solution to property owners.³³ DIRECTV would note, however, that it has seen an increase in cable contracts granting exclusive access to the coaxial wiring in MDU properties,

²⁸ The DIRECTV Group, Inc., Quarterly Report (Form 8-K) (May 5, 2011). *See* NOI at ¶11.

²⁹ The DIRECTV Group, Inc., Quarterly Report (Form 8-K) (May 6, 2010).

³⁰ The DIRECTV Group, Inc., Quarterly Report (Form 8-K) (May 7, 2009).

³¹ *See* NOI at ¶ 13.

³² *See* United States Government Accountability Office, *Telecommunications: Direct Broadcast Satellite Subscribership Has Grown Rapidly, But Varies Across Different Types of Markets*, GAO-05-257 (Apr. 2005), available at <http://www.gao.gov/new.items/d05257.pdf>.

³³ *See Exclusive Service Contracts for Provision of Video Services in Multiple Dwelling Units and Other Real Estate Developments*, 22 FCC Rcd. 20235 (2007), *aff'd sub nom. NCTA v. FCC*, 567 F.3d 659 (D.C. Cir. 2009); *Exclusive Service Contracts for Provision of Video Services in Multiple Dwelling Units and Other Real Estate Developments*, 25 FCC Rcd. 2460 (2010).

which could frustrate the Commission's efforts to introduce the benefits of competition for consumers who live in MDUs.

2. *Available Programming*

DIRECTV continually strives to provide subscribers with a compelling slate of video programming. As noted above, it offers more full-time HD and 3D channels than any other MVPD, and has also continued its rollout of local-into-local service.³⁴ As of the end of 2010, DIRECTV offered local television service in 172 markets, and local HD channels in 155 markets.³⁵ DIRECTV will extend local signal availability to 190 markets, including local HD channels in 174 markets, by the end of 2011.³⁶ In all, at the end of 2010, DIRECTV offered more than 2,000 digital video and audio channels to its subscribers, including:

- Approximately 200 basic entertainment channels,
- 40 premium movie channels,
- Over 50 regional and specialty sports networks,
- Over 1,500 local channels in the aggregate,
- Over 120 Spanish-language and other foreign language special interest channels,
- Over 31 pay-per-view movie and event choices,
- Over 160 national HD channels,
- Four dedicated 3D channels,

³⁴ See *NOI* at ¶ 25.

³⁵ Press Release, DIRECTV, "DIRECTV to Offer Local Channels in 172 Markets Including 16 New Markets in HD" (May 17, 2010), available at <http://investor.directv.com/releasedetail.cfm?ReleaseID=470358>.

³⁶ *Local HD Channels 2011*, *supra* note 5.

- Video-on-demand service offering over 6,000 movies and television programs to consumers.³⁷

3. Packages

DIRECTV offers multiple programming packages at competitive rates.³⁸ These offers included the following rates and packages as of May 2011:

- The DIRECTV Choice™ package, priced at \$60.99 per month, with over 150 digital channels including 40 HD channels and local channels where available;³⁹
- The DIRECTV Choice Xtra™ package, priced at \$65.99 per month, with over 210 digital channels, including all the channels available in the Choice™ package and 60 additional cable network channels, and DIRECTV Cinema™;⁴⁰
- The DIRECTV Choice Ultimate™ package, priced at \$70.99 per month, with over 225 digital channels, including all the channels available in the Choice™ package and 75 additional cable network channels, DIRECTV Cinema™, and NFL Sunday Ticket™;⁴¹ and
- The DIRECTV Premier™ package, priced at \$114.99 per month, with over 285 channels (including 55 premium movie channels), DIRECTV Cinema™, NFL Sunday Ticket™, and over 35 specialty sports networks.⁴²

In addition, DIRECTV offers the DIRECTV MÁS™ package for Spanish-speaking households, which included the following rates and packages as of June 2007:

- The MÁS MEXICO™ package, priced at \$29.99 per month, with more than 85 digital channels, including 35 Spanish-language channels;⁴³

³⁷ DIRECTV, Annual Report (Form 10-K) (Feb. 28, 2011); The DIRECTV Group, Inc., Annual Report (Form 10-K) (Feb. 26, 2010). Although DIRECTV distributes over 1,500 local channels, a subscriber generally receives only the local channels in that subscriber's home market.

³⁸ *NOI* at ¶ 23 (requesting data on the availability and pricing of DBS programming packages).

³⁹ See Exhibit 1, 2011 DIRECTV Packages; Exhibit 2, 2011 DIRECTV Choice™ Channel Lineup.

⁴⁰ See Exhibit 1, 2011 DIRECTV Packages; Exhibit 3, 2011 DIRECTV Choice Xtra™ Channel Lineup.

⁴¹ See Exhibit 1, 2011 DIRECTV Packages; Exhibit 4, 2011 DIRECTV Choice Ultimate™ Channel Lineup.

⁴² See Exhibit 1, 2011 DIRECTV Packages; Exhibit 5, 2011 DIRECTV Premier™ Channel Lineup.

⁴³ See Exhibit 6, 2011 DIRECTV Spanish-Language Packages; Exhibit 7, 2011 DIRECTV MÁS MEXICO™ Channel Lineup.

- The OPTIMO MÁS package, priced at \$44.99 per month, with over 165 digital channels, including 55 Spanish-language channels;⁴⁴
- The MÁS ÚLTRA™ package, priced at \$59.99 per month, with over 205 channels, including more than 60 Spanish-language channels and DIRECTV CINEMA™;⁴⁵ and
- The LO MÁXIMO™ package, priced at \$114.99 per month, with over 295 channels, including 53 premium movie channels, over 35 specialty sports networks, DIRECTV CINEMA™, and NFL Sunday Ticket™.⁴⁶

A selection of DIRECTV's current promotional offers, which include even more programming and typically feature pricing below the rates described above for the first twelve months of a new customer's subscription, are set forth in Exhibits 1 and 6.⁴⁷ In some markets, DIRECTV has commercial relationships with certain local exchange carriers ("LECs") to provide joint service (video programming from DIRECTV and voice/DSL broadband from those LECs).⁴⁸

DIRECTV also offers a wide variety of foreign language programming packages, with programming from multiple foreign countries, including Brazil, China, the Philippines, Korea, Russia, India, and Vietnam.⁴⁹ International channels are available (for the additional charge discussed below) to customers who subscribe to DIRECTV's \$12.99 per month Basic service or \$39.99 Preferred Choice package, both of which include local channels at no additional cost.⁵⁰

⁴⁴ See Exhibit 6, 2011 DIRECTV Spanish-Language Packages; Exhibit 8, 2011 DIRECTV OPTIMO MÁS™ Channel Lineup.

⁴⁵ See Exhibit 6, 2011 DIRECTV Spanish-Language Packages; Exhibit 9, 2011 DIRECTV MÁS ÚLTRA™ Channel Lineup.

⁴⁶ See Exhibit 6, 2011 DIRECTV Spanish-Language Packages; Exhibit 10, 2011 DIRECTV LO MÁXIMO™ Channel Lineup.

⁴⁷ See Exhibit 1, 2011 DIRECTV Packages, Exhibit 6, 2011 DIRECTV Spanish-Language Packages.

⁴⁸ See DIRECTV Best Bundles, <http://www.directv.com/DTVAPP/content/directv/internet>. ("*Best Bundles*").

⁴⁹ See Exhibit 11, 2011 DIRECTV International Packages.

⁵⁰ *Id.*

DIRECTV's foreign language programming packages are priced at \$19.99 to \$39.99 per month, depending on origin,⁵¹ and certain foreign language channels are also available on an a la carte basis starting at \$14.99 per month.⁵²

DIRECTV continues to offer a variety of noncommercial, educational, and other public interest programming to subscribers, in compliance with the Commission's four percent channel capacity set-aside requirement.⁵³ Among others, DIRECTV carries the following qualifying noncommercial channels: World Harvest Television, C-SPAN 1 and 2, Daystar, Trinity Broadcasting Network, the WORD Network, BYU TV, LINK TV, NASA TV, TCT, Once Mexico, EWTN, HITN, NRB, MHz, V-Me, CTN, Gem Net, Hope Channel, JLTV, Enlace, Golden Eagle Broadcasting, Free Speech TV, GOD TV, and numerous local PBS channels.

4. *Alaska and Hawaii*

The NOI requests information regarding the availability of DBS service in Alaska and Hawaii and asks whether such service differs from that offered in the contiguous states.⁵⁴ DIRECTV continues to provide the same programming packages, at the same rates, in Alaska and Hawaii as it provides to the rest of the nation, in compliance with the Commission's geographic service requirements.⁵⁵

However, subscribers in Hawaii are still unable to enjoy the same benefits as subscribers in the rest of the country because the Commission's rules on over-the-air reception devices

⁵¹ See, e.g., Exhibit 12, 2011 DIRECTV Mandarin Packages.

⁵² See, e.g., Exhibit 13, 2011 DIRECTV Russian Packages.

⁵³ See 47 C.F.R. § 25.701(f)(1). See also NOI at ¶ 21, n.63.

⁵⁴ NOI at ¶ 59.

⁵⁵ See 47 C.F.R. § 25.148(c).

(“OTARD”) do not protect the use of the larger dishes required in Hawaii.⁵⁶ Due to location and technical constraints, subscribers in Alaska and Hawaii must use nominally larger 1.2 meter receive antennas than subscribers in the lower 48 states. Although receive antennas of any size are protected in Alaska by the Commission’s OTARD rules, only smaller dishes enjoy such protection in Hawaii. Without the larger dish, subscribers in Hawaii cannot receive service at acceptable reliability levels. The Commission should adjust its OTARD rules so that subscribers in Hawaii can enjoy the same benefits and effective protections as subscribers in the rest of the country.

II. WITH TIME, RECENT DEVELOPMENTS COULD THREATEN DIRECTV’S ABILITY TO COMPETE

DIRECTV believes that no video provider offers the depth and breadth of features and innovations that it does. But even as DIRECTV solidifies its position as the premier multichannel video service in the country, there are developments that should concern policy makers:

- Market concentration in the provision of higher-speed broadband service and among programmers could increasingly threaten competition in the market for multichannel video services in which DIRECTV competes.
- OVDs and other over-the-top video providers, which are regulated substantially less than are traditional MVPDs, are increasingly likely to be viewed as a substitute for traditional MVPD service.

⁵⁶ 47 C.F.R. § 1.4000.

- It is becoming increasingly difficult for unaffiliated MVPDs such as DIRECTV to obtain key programming – particularly broadcast programming – at reasonable and non-discriminatory rates.

Although these developments concern DIRECTV as a business matter, they also raise important policy issues for the Commission. To the extent these challenges represent nothing more than increased competition, the American consumer is the beneficiary. To the extent these challenges result from the abuse of market power or unfair regulatory advantages, however, regulatory monitoring and intervention would be appropriate and may be necessary.

A. Video Programming Competition May be Skewed by the Exercise of Market Power in the High-Speed Broadband Market

1. Cable Operators and (Where Available) Telco Fiber Systems Increasingly Possess Market Power in a Differentiated Product Market for Very High Speed Broadband

Broadband access has experienced staggering development, emerging from a curiosity in the 1990s to an integral part of American life today. As the Commission found in its National Broadband Plan,

Today, high-speed Internet is transforming the landscape of America more rapidly and more pervasively than earlier infrastructure networks. Like railroads and highways, broadband accelerates the velocity of commerce, reducing the costs of distance. Like electricity, it creates a platform for America’s creativity to lead in developing better ways to solve old problems. Like telephony and broadcasting, it expands our ability to communicate, inform and entertain.⁵⁷

Broadband systems have evolved to support myriad applications, including business transactions, telemedicine, the distribution of news and information, and access to

⁵⁷ Federal Communications Commission, *Connecting America: The National Broadband Plan* at 3, available at <http://download.broadband.gov/plan/national-broadband-plan.pdf>.

interactive games and audio-visual entertainment. For many consumers, life without broadband is no longer an option.

For years, the broadband market in the United States was essentially divided into two camps. As they upgraded to digital technology, cable operators were able to offer cable modem service over their existing facilities in their respective franchise areas. These services were typically offered in a bundle with video and telephone service provided by the cable operator for a single price. Telephone companies offered the alternative of digital subscriber line (“DSL”) service over existing copper wire facilities in their respective service areas. They did not, however, typically have their own video service to offer as well. This presented an opportunity for cooperation. By combining DBS video and DSL broadband/telephony to create a “synthetic bundle,” telephone companies and satellite providers could both round out their service offerings to consumers. DIRECTV has for several years had such agreements with telcos such as AT&T, Verizon, and CenturyLink/Qwest.⁵⁸

More recently, however, some telcos (including Verizon and AT&T) have extended fiber optic networks much farther toward or even into consumers’ homes, and have used these same facilities to offer digital video services, creating a full suite of services comparable to the cable bundle. Cable operators have responded by upgrading their networks in order to support the newer versions of DOCSIS, which can provide download speeds of 100 Mbps or more. Where these higher-speed broadband services have been deployed, consumers have come to view them as superior to, and qualitatively different from, DSL. As a result, first-generation broadband systems are no longer

⁵⁸ *Best Bundles*, *supra* note 48.

viewed as interchangeable with fiber and cable modem service, which must therefore be deemed to be their own product market.⁵⁹ Indeed, the evidence suggests that these “higher speed” broadband services are increasingly priced higher than DSL service,⁶⁰ yet they continue to attract subscribers at a far greater pace than does DSL service.⁶¹

The evidence also suggests that cable operators and telephone companies increasingly possess market power in this newly differentiated market. In many areas, only the cable operator offers higher speed broadband, and cable broadband is thus growing more quickly than other broadband services.⁶² Indeed, Liberty Media Chairman John Malone recently stated that “cable

⁵⁹ US Department of Justice and the Federal Trade Commission, HORIZONTAL MERGER GUIDELINES, § 4.1.1 (Aug 19, 2010) (describing the definition of a product market to include the “hypothetical monopolist test,” which “requires that a hypothetical profit-maximizing firm, not subject to price regulation, that was the only present and future seller of those products (“hypothetical monopolist”) likely would impose at least a small but significant and non-transitory increase in price (“SSNIP”) on at least one product in the market, including at least one product sold by one of the merging firm”), available at <http://www.justice.gov/atr/public/guidelines/hmg-2010.html#4a>.

⁶⁰ See Rob Frieden, *Lies, Damn Lies and Statistics: Developing a Clearer Assessment of Market Penetration and Broadband Competition in the United States*, 14 VA. J.L. & TECH. 100 (2009) (undertaking a case study of broadband options and finding that DSL service, with speeds of up to 786 kilobits per second (kbps) downstream and up to 128 kbps upstream, costs approximately \$22 per month, while cable modem service with speeds of up to 6 Megabits per second (Mbps) downstream and up to 1.5 Mbps upstream costs approximately \$43 per month), available at http://works.bepress.com/cgi/viewcontent.cgi?article=1010&context=robert_frieden; George S. Ford, Ph.D. et. al., *Competition After Unbundling: Entry, Industry Structure, and Convergence*, 59 FED. COMM. L.J. 331, 351 (2007) (“The effect of differentiation on prices can be significant. At the extreme, two products can become so different that they no longer are substitutes for one another—while both made by General Motors, a Hummer is not really a viable substitute product for a Chevette.”).

⁶¹ See, e.g., David B. Wilkerson, *Broadband, cost control key for cable stocks*, MARKETWATCH, May 25, 2011, <http://www.marketwatch.com/story/broadband-cost-control-key-for-cable-stocks-2011-05-25> (in the first quarter of 2011, cable operators added approximately 727,000 broadband customers, while “DSL technology, now obsolete, lost 333,000 subscribers”).

⁶² Press Release, Leitman Research Group, “3.4 Million Added Broadband from Top Cable and Telephone Companies in 2010” (March 2, 2011) available at <http://www.leitmanresearch.com/press/030211release.pdf> (noting that top cable companies added 68% of broadband additions in 2010; numbers for telcos do not differentiate between fiber-based broadband and DSL service). Though fiber-based broadband has expanded in recent years – in mostly urban areas – that expansion has slowed. See Susan P. Crawford, *The Looming Cable Monopoly*, 29 YALE L.& POL’Y REV. INTER ALIA 34, 34-35 (2010), available at http://yalelawandpolicy.org/sites/default/files/YLPRIA29_

is pretty much a monopoly in broadband now.”⁶³ Even where they do not enjoy a “monopoly” because of telco fiber deployment, cable operators participate in what is at best a duopoly.⁶⁴ Because only cable operators and some telephone companies can offer higher speed broadband, each possesses substantial market power.⁶⁵ As a result, consumers have fewer truly competitive broadband options from which to choose.

2. *Broadband Market Power Can Be Leveraged Into the Video Programming Market Through Bundling of Services*

In a world of bundled services offerings, the market power that cable operators and telco fiber systems enjoy in the provision of broadband services can adversely affect the video market, placing MVPDs without their own higher speed broadband capability at a significant and unfair disadvantage.⁶⁶ As the Commission recognized in the *Comcast-NBCU* proceeding several

Crawford.pdf (citing the National Broadband Plan as recognizing that only 15% of the population will have access to non-cable higher-speed broadband). See NOI at ¶ 12.

⁶³ David Lieberman, *Liberty Media's John Malone Says Cable Is 'Pretty Much A Monopoly' In Broadband*, DEADLINE NEW YORK, May 6, 2011, <http://www.deadline.com/2011/05/liberty-medias-john-malone-says-cable-is-pretty-much-a-monopoly-in-broadband/>. See also Jerry A. Hausman et al., *Residential Demand for Broadband Telecommunications and Consumer Access to Unaffiliated Internet Content Providers*, 18 YALE J. ON REG. 129, 163 (2001) (noting that cable’s early lead in broadband penetration may mean that “any promise of DSL or satellite competitiveness in the new millennium may be futile”).

⁶⁴ See Industry Analysis and Technology Division, Wireline Competition Bureau, Federal Communications Commission, *Internet Access Services: Status as of December 31, 2009*, at 7, Figure 3(a) (Dec. 8, 2010), available at http://www.fcc.gov/Daily_Releases/Daily_Business/2010/db1208/DOC-303405A1.pdf.

⁶⁵ See, e.g., Bill D. Herman, *Opening Bottlenecks: On Behalf of Mandated Network Neutrality*, 59 FED. COMM. L.J. 103, 104 n.2 (2006) (“While no one company provides broadband nationally, most customers are effectively forced to choose among two broadband providers—a telephone company... and a cable company.... This concentration grants these broadband service providers (‘BSPs’) economic power characteristic of noncompetitive markets.”).

⁶⁶ The use of multiple platforms to deliver some combination of digital video, voice, and data services has led some to consider whether video providers compete in a larger, converged market. See, e.g., Andrea Stazi, *Technological Convergence and Competition on the Edge – “Emerging Markets” and Their Regulation*, IIC-INTERNATIONAL REVIEW OF INTELLECTUAL PROPERTY AND COMPETITION LAW (August 2007), available at http://works.bepress.com/andrea_stazi/7.

months ago, entities with market power over higher-speed broadband could simply require subscribers to take their video service in order to secure access to their broadband offerings.⁶⁷ This effectively puts some consumers out of reach of a video-only competitor such as DIRECTV. Moreover, a cable operator could use the supra-competitive profits available in a non-competitive broadband service market to cross-subsidize its video operations.⁶⁸ Taken to its extreme, such a strategy could relegate video service to a loss leader. As a result, video providers such as DIRECTV are placed at a tremendous disadvantage—one that has nothing to do with the quality of their service and that is totally outside of their power to respond. In this environment, perhaps it should come as no surprise that at least one major cable operator has concluded that broadband has replaced video as the cable industry’s anchor product.⁶⁹

Market power in the provision of high-speed broadband services also permits cable operators and telephone companies to more easily absorb programming costs, in particular skyrocketing retransmission consent fees.⁷⁰ Because they face minimal competition in the provision of broadband services, they can apply the large revenue margins enjoyed in that part of

⁶⁷ See *Applications of Comcast Corp., General Electric Co. and NBC Universal, Inc.*, Memorandum Opinion and Order, 26 FCC Rcd. 4238, ¶ 102 (2011) (“*Comcast/NBCU Order*”) (“Given the limited choice of broadband providers that many Americans have, particularly for higher speed connections, Comcast could, for example, hinder competition from DBS and OVD providers, both of which provide video over a third-party’s broadband network, by requiring a cable subscription in order to receive broadband services or by charging an excessive price for standalone broadband services.” (internal references omitted)).

⁶⁸ See *id.*

⁶⁹ See Nat Worden, *Time Warner Cable CEO Sees Opportunity for Broadband-Only Customers*, SMARTMONEY, June 1, 2011, <http://www.smartmoney.com/news/ON/?story=ON-20110601-000428>.

⁷⁰ In this regard, DIRECTV notes that NBC affiliates have recently acquiesced in Comcast/NBC Universal’s plans to negotiate retransmission consent fees on their behalf, which will almost certainly increase upward pricing pressure on non-Comcast MVPDs. See Michael Malone, *NBC, Affiliates Iron Out Blanket Retrans Deal*, BROADCASTING & CABLE, May 16, 2011, http://www.broadcastingcable.com/article/468357-NBC_Affiliates_Iron_Out_Blanket_Retrans_Deal.php.

the business to offset programming price increases, knowing that subscribers will be unlikely to switch in response to higher broadband prices. Non-bundling video providers such as DIRECTV, by contrast, have no revenue source other than video services with which to offset input cost increases. Thus, even if programmers increase prices by a uniform amount, such increases will place non-uniform pressure on MVPDs that lack broadband capability.

B. The Commission Can No Longer Ignore the Effect of OVDs and Over-the-Top Video Providers on the Video Programming Market

The proliferation and upgrading of broadband systems has had another effect on the video market by providing a platform for a new class of competitor: OVDs and other over-the-top video programming providers. A recent white paper found that Internet video now accounts for 40 percent of consumer Internet traffic, while such video viewed on a television tripled in 2010 and video-on-demand traffic is projected to triple by 2015 (to the equivalent of 3 billion DVDs per month).⁷¹ The Commission has previously noted the number and popularity of over-the-top video services, and their potential to provide competition to traditional MVPDs.⁷² Yet in this proceeding, it has suggested that OVDs are not part of the MVPD market.⁷³ DIRECTV believes that even if this conclusion is accurate today, it certainly will not be in the very near future. OVDs no longer provide just an additional method of viewing programming; they have

⁷¹ See Cisco, *Cisco Visual Networking Index: Forecast and Methodology, 2010-2015*, at 2 (June 1, 2011), available at http://www.cisco.com/en/US/solutions/collateral/ns341/ns525/ns537/ns705/ns827/white_paper_c11-481360.pdf.

⁷² See, e.g., *Comcast/NBCU Order* at ¶ 41 (“We recognize that the amount of video content available on the Internet continues to increase significantly each year, and consumers are increasingly turning to the Internet to view video programming.”), ¶ 81 (“even today OVDs may provide some competition for Comcast and affect the prices it charges consumers”), ¶ 86 (“we find that OVDs pose a potential competitive threat to Comcast’s MVPD service”).

⁷³ *NOI* at ¶ 5, n.16 (“[W]e have concluded that for most consumers [OVDs] are not a substitute for MVPD service today, but rather an additional method for viewing video programming.”).

become, for many, a substitute for cable, fiber, and satellite video service.⁷⁴ Consumers also now have a range of set-top devices available to access over-the-top video and OVDs, including Apple TV, Roku boxes, and TiVo, and gaming console makers are increasingly integrating access to online video programming into their devices.⁷⁵ The Commission should recognize this emerging trend for what it is – the rise of a new class of competitor in the video services market – and should begin to consider whether it is necessary to modify its regulatory structure accordingly. To the extent that this trend exacerbates the already-formidable market power possessed by cable and telephone companies, as DIRECTV believes it does, the Commission should be especially vigilant.

1. Traditional MVPD Subscriptions Are Stagnating

Consumers increasingly view video programming content online, and some are “cutting the cord”—dispensing with MVPD service altogether.⁷⁶ This trend is expected to continue.⁷⁷ And this trend is occurring even as traditional MVPD subscribership stagnates. An SNL Kagan report in the third quarter of 2010 showed that consumers are abandoning cable service in record

⁷⁴ See, e.g., *Comcast/NBCU Order*, ¶ 80 (finding that the “growing popularity of online video, combined with the burgeoning technological options for viewing online video on television sets, is likely to heighten consumer interest in cord-cutting”); Nick Bilton, *Cable Freedom Is a Click Away*, N.Y. TIMES, Dec. 9, 2009, <http://www.nytimes.com/2009/12/10/technology/personaltech/10basics.html> (noting that the author and his wife view all of their video programming online, from sources such as Hulu, iTunes, and Netflix).

⁷⁵ See SNL Kagan, *The State of Online Video Delivery: An Analysis of Over-the-Top and TV Everywhere Trends*, at 9 (2011) (“SNL Kagan OTT Report”).

⁷⁶ David Goldman, *One in eight to cut cable and satellite TV in 2010*, CNNMONEY, Apr. 30, 2010, http://money.cnn.com/2010/04/30/technology/dropping_cable_tv/.

⁷⁷ Dawn C. Chmielewski & David Sarno, *More TV viewers may be cutting the cord this year*, L.A. TIMES, Jan. 3, 2011, <http://articles.latimes.com/2011/jan/03/business/la-fi-electronics-show-20110104>.

numbers.⁷⁸ Although earlier reports cited factors other than OVD offerings as responsible for these losses, later reports suggested that “it is becoming increasingly difficult to dismiss the impact of over-the-top substitution on video subscriber performance, particularly after seeing declines during the period of the year that tends to produce the largest subscriber gains due to seasonal shifts back to television viewing and subscription packages.”⁷⁹ Traditional MVPDs are confronted by OVD substitutes that, unburdened by legacy business models or the need to deploy and operate their own infrastructure, often can provide narrowly-tailored programming packages at attractive price points. OVDs and over-the-top video are therefore viewed by many as a cost-effective alternative: one report found that “72% of adults who go online at least once a week say the Internet is a better value for the dollar than cable TV.”⁸⁰

Two primary implications can be drawn from these facts. First, as the universe of MVPD subscribers stagnates, subscriber gains by one MVPD can generally be achieved only by attracting subscribers away from another MVPD. Second, as OVDs and other over-the-top providers attract ever larger numbers of viewers, MVPDs will likely have a shrinking pool of potential subscribers for which to compete, further intensifying competition in the video market.

2. *OVDs and Over-the-Top Providers Are Becoming True Substitutes for Traditional MVPD Service*

As consumers have begun to explore and accept alternatives to traditional MVPD service, content providers (broadcast and cable networks, major league sports) have begun to offer more

⁷⁸ Deborah D. McAdams, *SNL Kagan: Pay TV Subscribers Dwindle*, TVB: TELEVISION BROADCAST, Aug. 23, 2010, <http://www.televisionbroadcast.com/article/105264>.

⁷⁹ Robert Seidman, *The Cord Cutting Myth: Now A Little Less Mythical?*, TV BY THE NUMBERS, Nov. 17, 2010, <http://tvbythenumbers.zap2it.com/2010/11/17/the-cord-cutting-myth-now-a-little-less-mythical/72438/> (quoting *SNL Kagan Analysis Shows U.S. Multichannel Video Subscribers Drop for Second Straight Quarter* (Nov. 17, 2010)).

⁸⁰ ActionTec, Electronics, Inc., Whitepaper, *Meeting the Growing Demand for Broadband*, (2011), available at http://www.actiontec.com/crosstalk/AEI_whtppr_growingBBdemand_final.pdf.

and more of their programming online.⁸¹ At the same time, content and software services (Netflix, Hulu, Vudu, iTunes, Amazon Video) are licensing more and more of that content, including motion pictures and television series. These developments all but ensure that over-the-top video and OVDs will continue to build market share.

Some suggest that over-the-top services require further technological advancements to provide service more comparable to traditional MVPD service.⁸² None, however, can dispute that over-the-top services are thriving. For instance, Netflix now has more subscribers than any single MVPD.⁸³ And Netflix users report that they are more likely to “cut the cord” than consumers who do not subscribe to Netflix.⁸⁴ In addition, “[s]ome 15-20 percent of Roku owners are cancelling their cable or satellite services agreement and are relying solely on a broadband connection to get their television programming.”⁸⁵ As OVDs and over-the-top

⁸¹ Patrick Seitz, *Web TV Services, Content Swell*, INVESTOR’S BUSINESS DAILY, Aug. 4, 2010 (“We’re seeing content providers increasingly willing to offer their content over the top,” Wood said in an interview. “There are lots of (content) companies that maybe a year ago would say, ‘Nah, we’re not going to do anything. We don’t want to upset our cable customers.’ And now they’re telling us about plans to launch (over-the-top) services equivalent to cable services over the next year or so.”).

⁸² See, e.g., *New Over the Top (OTT) Video Study: Trender Research Predicts 7 Percent of Households Will “Cut the Cord” on Pay TV Subscriptions by 2012*, TRENDER RESEARCH, June 1, 2010, <http://www.trenderresearch.com/page/ott-video-report> (“Among the OTT obstacles highlighted in the report are limited live TV, sports, and high definition content, and the relative complexity of setting up and using OTT devices and networks. ‘However, the OTT market is moving fast,’ continued [Brian] Mahony. ‘Judging by the rapid growth of online video consumption on sites like Hulu, and the plethora of enabling devices such as Roku, Xbox, and a range of new HDTV models, our projection may be conservative.’”).

⁸³ Brian Stelter, *For Netflix, Higher Earnings and a Milestone*, N.Y. TIMES, Apr. 25, 2011, <http://mediadecoder.blogs.nytimes.com/2011/04/25/for-netflix-higher-earnings-and-a-milestone/>.

⁸⁴ Terrence O’Brien, *Netflix Users More Likely to Cut the Cord*, Jan. 5, 2011, <http://www.switched.com/2011/01/05/netflix-users-more-likely-to-cut-the-cable-cord/>.

⁸⁵ Andy Plessner, *Roku Owners are “Cutting the Cord” in Substantial Numbers*, BEET.TV, May 10, 2011, <http://www.beet.tv/2011/05/roku-owners-are-cutting-cord-in-substantial-numbers-.html> (citing interview with Roku VP Jim Funk).

providers address some of their weaknesses, they will become increasingly viable substitutes for cable, fiber, and DBS video service.⁸⁶

The Commission has not yet decided what, if any, regulatory regime should be applied to this new breed of video provider. The issue of whether and under what circumstances an OVD qualifies as an MVPD for purposes of the Communications Act and the Commission's rules has been raised in two proceedings currently pending before the Commission.⁸⁷ Such developments prompt an important question: what MVPD obligations should apply to OVDs? At present, they have not been deemed subject to the Commission's requirements for closed captioning, children's television protection, political advertising, emergency broadcasting, public interest programming, must carry, and equal employment opportunities, among other things. Thus, online video providers are able to operate with distinct regulatory advantages over the MVPDs with whom they compete. Notably, Congress has begun to recognize that obligations imposed on traditional MVPDs should be extended to programming delivered via the Internet.⁸⁸ The Commission should move quickly to provide clarity in this area in order to ensure a level playing field for all participants in the video programming distribution market.

⁸⁶ *Over-the-Top Seen By Levin as Gaining Popularity*, COMMUNICATIONS DAILY, Apr. 21, 2010 (noting also that unifying set-top technology could displace DBS and that “[s]omeone will develop the device and/or software that will provide an ‘integrated experience and the kinds of applications that we did not know we needed and now cannot live without’ after they're commercialized, Levin said.”).

⁸⁷ *See VDC Corp. v. Turner Network Sales, Inc.*, Program Access Complaint (Jan. 18, 2007); *Sky Angel U.S., LLC v. Discovery Communications LLC*, Program Access Complaint (Mar. 24, 2010).

⁸⁸ *See, e.g.*, Twenty-First Century Communications and Video Accessibility Act of 2010, Pub. L. No. 111-260, 124 Stat. 2751 (2010) (directing the Commission to apply certain requirements to video programming distributed via the Internet) (to be codified at scattered sections of 44 U.S.C.).

3. *OVDs and Over-the-Top Video May Exacerbate the Cable/Telco Advantage*

Cable and telcos are less likely than video providers without broadband offerings to be threatened by OTT, because consumers require their higher-speed broadband service in order to view content over-the-top and from OVDs.⁸⁹ They have thus already hedged themselves against the risks presented by video programming available online.⁹⁰ As noted by one observer,

Whatever revenue they lose from Internet video viewing, cable companies hope to make up by selling faster Internet services to carry that video. That trend may already be showing up. At Charter, for instance, revenue from consumer video cable services was flat in the fourth quarter of last year, compared to a year earlier. But high-speed Internet service was up 7 percent and phone service up 8 percent.⁹¹

Moreover, to the extent such providers are able to subsidize their video service with profits from their broadband service (as discussed above), subscribers will be less inclined to “cut the cord” with respect to video service. In an analysis of over-the-top programming, SNL Kagan noted that “we expect cable modems to remain the dominant broadband provider, [so] the video/HSD bundle will likely continue to be a formidable price/value package and help cable operators maintain a significant portion of their video subscribers.”⁹²

C. DIRECTV Faces Increasing Challenges in Obtaining Programming at Reasonable Prices

Intense competition among distributors of video programming has given content providers greater leverage in negotiating carriage fees, resulting in dramatic increases in the cost of the most basic input to an MVPD service. Some MVPDs, such as Comcast, have apparently

⁸⁹ See *supra* Part II.A.2; SNL Kagan OTT Report at 10.

⁹⁰ Thomas W. Hazlett, *If a TV Station Broadcasts In The Forest...* (May 19, 2011), 51, available at http://www.heartland.org/custom/semod_policybot/pdf/30021.pdf.

⁹¹ Jim Gallagher, *Cutting the Cable TV Cord*, STLtoday.com, Mar. 30, 2011, http://www.stltoday.com/business/local/article_f588c958-d382-580e-a142-df273a5d3cfb.html.

⁹² SNL Kagan OTT Report at 10.

determined that the best response to this trend is to increase their own content holdings significantly. For those not able or inclined to pursue such a vertical integration strategy, rising programming prices present an ongoing challenge to their ability to provide consumers with the programming they want at a price they can afford.

Broadcasters have been particularly adept at using the competitive dynamic among video service providers to impose ever more onerous price increases.⁹³ Numerous provisions of copyright law, not to mention the Commission's own rules governing retransmission consent and exclusivity, give each network-affiliated station a monopoly over network programming within its own local market.⁹⁴ As the Commission has recognized, this regime allows broadcasters to exercise market power in negotiating retransmission consent fees.⁹⁵

Not surprisingly, such fees are escalating at a pace far surpassing the rate of inflation. SNL Kagan estimates that total retransmission consent fees will approach \$1.5 billion this year, and despite an expected decline in MVPD subscribers, will soar to over \$3.6 billion by 2017.⁹⁶ But it does not appear that this increased revenue is or will be used to provide more, or better, local programming. In fact, the opposite appears to be true. Many broadcasters are producing less local news, and others have replaced local programming with national infomercials.

⁹³ See Michael L. Katz et al, *An Economic Analysis of Consumer Harm From the Current Retransmission Consent Regime*, ¶¶ 45-51 (Nov. 12, 2009) (explaining connection between the rise of MVPD competition and the ability of broadcasters to extract higher fees) (attached to Letter from Neal M. Goldberg to Blair Levin, GN Docket Nos. 09-47, 09-51, and 09-137, and MB Docket No. 07-269 (Dec. 16, 2009)).

⁹⁴ See, e.g., 17 U.S.C. § 122, 47 U.S.C. §338, 47 C.F.R. §§ 77.658, 76.92-76.97, 76.151-76.163.

⁹⁵ See, e.g., *General Motors Corp. and Hughes Electronics Corp., Transferors and The News Corp. Ltd., Transferee*, Memorandum Opinion and Order, 19 FCC Rcd. 473, ¶ 201 (2004) (“We find that News Corp. currently possesses significant market power in the DMAs in which it has the ability to negotiate retransmission consent agreements on behalf of local broadcast stations.”).

⁹⁶ See Georg Szalai, *Broadcasters to Boost Retrans Fees to \$3.6 Billion by 2017*, THE HOLLYWOOD REPORTER, May 25, 2011, <http://www.hollywoodreporter.com/news/broadcasters-boost-retrans-fees-36-192349> (discussing SNL Kagan report).

Retransmission consent has become so contentious, with broadcasters demanding patently unreasonable terms and conditions as well as pulling their programming when their demands are not met, that the Commission recently issued a Notice of Proposed Rulemaking to consider steps it could take to prevent service disruptions for consumers.⁹⁷ DIRECTV urges the Commission to enhance its requirements for broadcasters to negotiate in good faith and ameliorate broadcasters' government-backed exclusive rights in order to restore some measure of sanity to the retransmission consent negotiation process.⁹⁸

DIRECTV willingly pays for high-quality content that its subscribers value. All programming entities deserve fair and reasonable compensation for the product they produce. This includes value-added content we receive from broadcasters. But it does not serve the American public if broadcasters and other content providers are allowed the unfettered ability to raise rates without any correlating benefit to consumers. The Commission should therefore consider measures to ensure that programming is available at a reasonable price and without interruption.

CONCLUSION

DIRECTV continually strives to provide the best video programming experience possible to its subscribers. It continues to expand the footprint of its local-into-local service and to maintain its lead in providing more national and local channels in HD (and now 3D) than any other MVPD. But it faces increasing competition from cable operators and telcos, which leverage their advantages in higher-speed broadband via "triple play" bundles, and from OVDs, which are increasingly seen as providing a viable substitute to MVPD video programming

⁹⁷ *Amendment of the Commission's Rules Related to Retransmission Consent*, Notice of Proposed Rulemaking, 26 FCC Rcd. 2718 (2011).

⁹⁸ *See* Comments of DIRECTV, Inc., MB Docket No. 10-71 (filed May 27, 2011).

